

STATE LIABILITY FOR MEDICAL FAULTS IN GREECE

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ABSTRACT: *The state liability in the Greek legal order is objective. That means that it does not depend on the fault of the state organ. Nevertheless, in the field of medical fault, in order to seek compensation, you have to prove that the doctor has acted improperly, that he has violated the standards of medical science and deontology. In other words you have to prove the medical fault. That means that the state liability in the specific field of medical law is not objective.*

KEY WORDS: *State liability, Greek Civil Code, Greek Public Servants' Codes, medical faults*

JEL CLASSIFICATION: *K 13*

1. According to the Art. 105-106 of the Introductory Law to the Greek Civil Code (which dates from 1941), when a state organ or an organ of a public law legal entity, acting in its public authority, behaves unlawfully causing damage to a citizen, then the Greek State is obliged to compensate the citizen and repair his damage. This state responsibility is 'objective' and not 'subjective', meaning that it does not depend on the fault of the state organ. It is called "civil liability" of the State and it is very well founded in the Greek legal tradition¹.

The idea of the state liability for unlawful state actions in the Greek legal order has three main reasons:

First of all, the belief that the State is more reliable, more trustworthy than the public servant, in the sense that the State has always money to repair the damage while the public servant perhaps may not have the necessary money. This belief was undoubted and unquestionable until recently. However, the economic situation since 2009 and the threat of bankruptcy of the Greek State make this justification very weak.

Secondly, the state liability refers to the fact that in many cases it is not easy, or it is even impossible, to find out the certain civil servant who behaved unlawfully and damaged the citizen. Because of the complexity of the legal provisions about state

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¹ For the 'civil liability' in the Greek legal order, see e.g. Prokopis Pavlopoulos, The 'civil liability' of the State according to the rules of Public Law, in: Ap. Gerontas/S. Litras/P. Pavlopoulos/Gl. Sioutis/S. Flogaitis, Administrative Law (in Greek), 2nd edition, 2010.

competences and because of the fact that in many cases many public servants act together (with the consequence that it is extremely difficult or almost impossible to distinguish who exactly causes the damage), it is better for the citizen to seek compensation from the State as a whole than from a certain public servant.

The third justification of the state liability comes from the administrative science's point of view. When the public servant feels that he is liable with his personal property without any restrictions, then he is indecisive and unwilling to take immediate and necessary decisions against the interests of some citizens.

However, the civil liability, according to the Art.105 of the Introductory Law to the Greek Civil Code, does not mean that the public servant is free from any responsibility. The same provision determines that, together with the State, also the public servant who acted with *dolus* or negligence is responsible against the damaged citizen. This provision is successful and in favor of the citizen, because it combines the advantages of both possible systems, the objective state liability and the subjective liability of the public servant.

2. The provisions of Art. 105 of the Introductory Law to the Greek Civil Code, as far as the liability of the public servants is concerned, are not in force. In a country where the public servants constitute a respectable percentage of the population, perhaps because of this fact, all the Greek Public Servants' Codes determine that the public servants are not responsible against the damaged citizen, who can seek compensation only from the State². The public servant remains responsible only against the State and only in the cases of *dolus* and gross (heavy) negligence. If this is the case, the State can seek the compensation which was given to the citizen through a procedure before the Court of Auditors.

According to my personal point of view, this traditional provision of the Greek legal order is unsuccessful for several reasons, especially in the current situation.

As already mentioned, the belief of the greater reliability of the Greek State has recently become questionable. For this reason and from the point of view of the damaged citizen, it is not sure that it is better to seek compensation from the State than from the public servant. We also have to keep in mind that the Greek legal order gives the State a lot of privileges when a citizen asks money from it. Shorter time limit and smaller interest are some of these privileges. The situation has become worse for the Greek citizen after the economic crisis of 2009. The state privileges became more and some of them are constitutionally dubious. E.g. according to a recent law³, when the State owes money to the citizen and the remedies are not exhausted, then the State will give the money only if the citizen gives the State a correlate guarantee.

The second thought against the provision of the Greek Public Servants' Codes has to do with the efficiency and the lawfulness of the public administration. As already mentioned, the public servant remains responsible only against the State and only in the cases of *dolus* and gross (heavy) negligence. However, the relevant procedures last for many years, sometimes decades, and only in very few cases the State asked the money given to the damaged citizen from the responsible civil servant. The latter knows that he has practically no economic consequences for his unlawful behavior. This is not only a matter which has to do with the non implication of the principles of administrative

² See Art. 38 of the Greek Public Servants' Code in force (Law 3528/2007).

³ Law 407/2012, Art. 326 par. 5.

legality. It raises also a more general question of justice. Why does the State, that means all of us, have to pay for the unlawful action of a public servant, taking into account that he was appointed to act lawfully and not unlawfully?

SPECIFIC STATE LIABILITY FOR MEDICAL FAULTS IN GREECE.

1. As far as the state liability for medical faults in Greece is concerned, the Greek courts give compensation to the patients who were damaged by medical faults in public hospitals. In order to get the compensation from the hospital, the citizen has to recourse to the administrative court at first instance, then the case can be trialed by the court of appeal and finally by the administrative cassation court (called Council of State). An average period of time for all court stages is 7-10 years.

If the remedy is accepted by the court, then the citizen takes compensation for his health damage (e.g. expenses for medical treatment, loss of money in case of work inability). Moreover, he can ask money for emotional distress (moral damage). The Greek courts are quite generous in this field. The compensation for moral distress depends on the circumstances of each case, but for serious health damages the courts give a respectable amount of money, ranging between 50.000 and 250.000 euros. According to the jurisprudence, the amount of compensation has to do with various criteria, such as the health damage seriousness, the medical fault gravity, the economic situation of the applicant and his family status (especially if he has children or not). On the contrary, the bad economic situation of the hospital and the fact that the hospital serves the common interest do not play a role for the amount of compensation⁴.

2. In order to accept the relative remedy, the applicant has to convince the court that the doctor has acted improperly, which means that he has not shown the attention, care, and diligence according to the standards of medical science and deontology. This condition causes three basic problems, one practical and two theoretical.

First of all, the practical problem: in most cases before the courts, both parties use medical experts, who give the most controversial opinions for and against the doctor. Which opinion and on which basis is the court going to follow?

About the theoretical problems, as already mentioned, the state liability in the Greek legal order is objective. That means that it does not depend on the fault of the state organ. Nevertheless, in the field of medical fault, in order to seek compensation, you have to prove that the doctor has acted improperly, that he has violated the standards of medical science and deontology. In other words you have to prove the medical fault. That means that the state liability in the specific field of medical law is not objective.

The second problem has to do with the fact that the standards of medical science and deontology are professional rules and not acts of parliament, they were not voted by the legislative organ. That's why some hospitals argued before the courts that violation of medical rules is not a violation of law. The Council of State⁵ rejected this argument, proving that at least in some cases professional rules are something more than soft law. They are 'hard' law.

⁴ For all these aspects, see, among others, Council of State, Decisions 727/2009, 1818/2009, 3783/2009, 1243/2010, 1244/2010, 1246/2010, 2544/2010, 5/2011, 868/2011.

⁵ Decision 5/2011.

3. To sum up, we could say that the Greek courts are quite generous when giving compensation for medical faults. This is not bad, keeping however two things in mind. Firstly, the judges are very generous against medical faults but not against faults committed by lawyers (judges, solicitors, barristers). At the same time, if the courts are too strict against the doctors, then the doctors are going to look first for their safety and then for the patients' good. And this is something which no legal order wants.

