CIVIL LIABILITY FOR MEDICAL ERRORS IN THE FIELD OF FACIAL SURGERY IN GREECE.

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ABSTRACT: *As health is the primary and fundamental human right, the importance of moral damages in cases of insults of human health is reflected on the wording of article 932 of the Civil Code: "in case of tort, irrespective of any compensation for financial damage, the court may award at its discretion reasonable monetary compensation for moral damage. This applies especially to anyone who has suffered health damage".*
In the particular field of facial surgery, article 931 of the Civil Code is of particular importance, according to which "the disability or the deformity caused to the victim is taken into account when awarding the compensation, if it affects his future", that is his professional, financial and social development.
Someone could reasonably assume that the economic crisis would not leave unaffected the monetary amounts awarded by court decisions against the State (or legal entities of public law) and in favor of individuals[1]*. Therefore, it would be expected that this effect would extend also to the field of civil liability of public hospitals due to medical errors, thus reducing the amount of monetary compensation due to moral damage or mental suffering*

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1. CIVIL LIABILITY FOR MEDICAL ERRORS IN THE FIELD OF FACIAL SURGERY; IN PARTICULAR THE INDEPENDENT CLAIM FOR COMPENSATION IN CASE OF DISABILITY OR DEFORMITY

Civil liability in the field of facial surgery follows the general rules of civil liability for medical errors. First of all, a medical error must exist, namely a violation of the rules of

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[1] See e.g. Symvoulio tis Epikratias 4467/2012: In the framework of calculation of the just satisfaction for exceeding the reasonable time of proceedings (articles 6 par. 1 of ECHR and 53 et seq. of law 4055/2012) it is also taken into account, inter alia, the "*decline in living standards in Greece over the recent years, as a result of the most severe unsettlement of the fiscal balance of the Greek State, due to the takeoff of the public deficit and public debt at levels unseen before in the history of the Country's public finances*".

medical science and ethics and/or lack of diligence, which the doctor was obliged and also capable to exercise under the circumstances. Regarding the damage to be restored, according to article 298 of the Greek Civil Code, it includes the actual damage (e.g. whatever was spent on hospital care, medical treatment and recuperation) as well as loss of profits, that is whatever was lost as a result of the medical error (e.g. loss of income due to temporary or permanent inability to work). In relation to loss of profits, it is precisely because they refer to the future that it is not possible to formulate a complete judicial belief and that's why probability in the normal course of events is sufficient. The restoration of non-material damages is of particular importance concerning medical errors. As health is the primary and fundamental human right, the importance of moral damages in cases of insults of human health is reflected on the wording of article 932 of the Civil Code: "*in case of tort, irrespective of any compensation for financial damage, the court may award at its discretion reasonable monetary compensation for moral damage. This applies especially to anyone who has suffered health damage"*. The criteria for the determination of monetary compensation for moral damage are primarily the severity of health damage, by taking into consideration also other data, such as the type of medical error and the potential joint liability of the patient (e.g. by providing to the doctor incorrect or incomplete information on his health history and condition). In case the medical error leads to death, then monetary compensation for mental suffering is awarded similarly to the family of the deceased according to article 932 of the Civil Code. Finally, here applies also the condition of the existence of a causal link between the medical error and the damage caused[2].

In the particular field of facial surgery, article 931 of the Civil Code is of particular importance, according to which "*the disability or the deformity caused to the victim is taken into account when awarding the compensation, if it affects his future"*, that is his professional, financial and social development. This provision applies to surgical interventions on the human face, which are likely to result in disability (e.g. blindness) or facial disfigurement[3].

According to case-law, it is accepted that article 931 of the Civil Code provides for an independent claim and thus a "reasonable" amount of money is awarded to the injured party without the need to prove certain financial damages. Moreover, this is the reason why "*this particular financial benefit does not constitute any compensation, as the latter is conceptually linked to the invocation and proof of financial damage"*[4]. The amount of

[2] As cases of medical errors are also taken to audiences of penal courts, it has to be noted that according to article 5 par. 2 of the Greek Code of Administrative Procedural law (law 2717/1999), the administrative courts are bound "*by the irrevocable convictions as imposed by the criminal courts regarding the perpetrator's guilt"* (on the contrary, the administrative courts are not bound by the acquittals in criminal courts; however, they should consider and take them into account). See also Administrative Court of Appeal of Athens 1585/2009: "*As, according to article 5 par. 2 of the Code of Administrative Procedural law, the … conviction imposed by the five-member Military Court of Athens, having … become irrevocable, binds this Court in relation to the illegality of his acts and omissions … during the medical intervention. As a result, it has to be acknowledged that in this case the conditions of the liability of the appellant Hospital for compensation are met …"*.

[3] «*As 'disability' is regarded any lack of physical, mental or psychological integrity of the person, while 'deformity' means any substantial alteration of the external appearance of the person, which is not necessarily determined by the views of medicine, rather than the concepts of life*» (Areios Pagos [the highest Court of Greece in civil and criminal cases] 150/2015).

[4] Areios Pagos 150/2015.

money awarded according to article 931 of the Civil Code is defined on the basis of a number of criteria, such as e.g. the nature and consequences of the deformity or the disability, the age of the victim and his potential joint liability.

The reasoning, on which the independence of the provision of article 931 of the Civil Code and its dissociation from the proof of certain financial damage is founded by case-law, is quite interesting: «*It cannot be foreseen whether the disability or the deformity will cause to the injured party any given financial damage. Nevertheless, it is certain that the disability or the deformity … will definitely have an adverse impact on his social and financial development, though in a way which cannot be precisely determined. This adverse impact is given as a fact, therefore there is no excuse for any persistence on the need to define the specific mode of this impact and its consequences on the social and economic future of the injured party. As prominent and crucial remains the fact of the disability or the deformity as injury to the physical body or health of the person, i.e. infringement of an autonomous legal right, which enjoys also constitutional protection under paragraphs 3 and 6 of article 21 of the Constitution*»[5].

Most certainly it cannot be denied that human health constitutes an independent legal asset, emerging also from the Constitution whereby the right to health is established (articles 5 par. 5 and 21 par. 3 of the Greek Constitution). However, this constitutional foundation applies to any health damage and not only to disability or deformity (despite the undeniable importance of the two latter). Nevertheless, the main question which arises de lege ferenda, is why to establish an independent claim on the basis of the specific regulation of article 931 of the Civil Code, since the negative impact from these severe health injuries could easily be taken additionally into account within the frame of the monetary compensation for moral damage under article 932 of the Civil Code. Moreover,

[5] Areios Pagos 150/2015. In fact, in the same decision it is further argued that the constitutionally protected right of health applies «*not only in the relationship between the citizen and the State, but also in the relationships between citizens*». In this excerpt an explicit implementation of the principle of direct «third-party effect» of constitutional rights is also manifested, according to article 25 par. 1 of the Greek Constitution stipulating that the fundamental rights apply also in relationships between private individuals, where appropriate (the said decision of Areios Pagos concerns private litigation arising from a car accident).
Regarding the issue of the independent claim under article 931 of the Civil Code, see also Areios Pagos 1631/2010, 329/2013, 1009/2013. More restrictive is Administrative Court of Heraklion 398/2009: «*The wording of article 931 of the Civil Code contains the basis for such a claim, if and only, according to its true meaning, the disability or the deformity affects the financial future of the injured party, in a manner which cannot be covered completely by the benefits provided under articles 929 and 932 of the Civil Code*». Regarding application of article 931 of the Civil Code in the field of civil liability of the State and of legal entities regulated under public law (however not due to medical error), see Administrative Court of Athens 4580/2014. The decision refers to an explosion while performing an experiment at a university, where a postgraduate student was injured, without the imposed supervision by the teaching personnel and without any appropriate means having been given to the student for the conduction of the experiment and the student's protection. The Court accepted the existence of disability (one-eyed vision) and awarded, on the basis of article 931 of the Civil Code, the benefit amount of 80.000 Euro. In particular, the decision took into account that, on one hand, this disability did not preclude the exercise of the profession of Agriculturist & Food Technologist, but on the other hand it constituted a negative element to his career development, in addition due to the labor market tightness. The decision also took into account that there will be an effect on «*the social evolution* [of the injured party] *and possibly on his contacts with people of the opposite sex*» and that the accident was also attributed to the injured party's liability at a percentage of 30%. See also Administrative Court of Appeal of Athens 1578/2009 (in a case of a sports fan injury resulting from inadequate police enforcement): adjudication of the amount of 60.000 Euro on the basis of article 931 of the Civil Code due to amputation of two fingers of the right hand of a person, who was employed as a non-qualified worker.

and apart from the lack of necessity, the regulation of article 931 of the Civil Code, as interpreted by case-law, raises a number of interpretative issues which mitigate its legal and political feasibility: What is the lack of «physical, mental or psychological integrity» that brings disability? In which cases is there a simple health damage and when is integrity lost? What is the «substantial» alteration of the person's external appearance, which creates deformity? What exactly does case-law mean, when it accepts that deformity is not necessarily determined by the views of the medical science, but also according to life concepts? The questions could be multiplied. The abovementioned observations just raise the issue, but perhaps it would be preferable to simplify the legislative framework and integrate into the general provisions any kind of separate monetary claims which are difficult to interpret.

2. THE PERSON LIABLE FOR COMPENSATION

When a private doctor commits a medical error, then he himself is obliged to pay due compensation. On the contrary, in case of a medical error in a public hospital, the doctor himself is not personally liable for compensation, rather than the legal entity (public hospital) in which the doctor serves, as a result of the combined application of articles 105-106 of the Introductory Law to Greek Civil Code and article 38 of the current Civil Servants' Code (law 3528/2007)[6],[7]. Furthermore, and according to case-law of Symvoulio tis Epikratias[8], public hospitals are liable for compensation also for medical errors of university doctors, who serve at university clinics inside hospital facilities of the National Health System[9]. In the case of a hospital of the Armed Forces, the Greek State is liable for compensation, as follows from article 1 of Decree 2998/1954, which extends the application of the favorable regulations of the Civil Servants' Code also to those serving in the Armed Forces.

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[6] The civil servant is liable under conditions to the State, on the basis of the State's right of recourse for the compensation paid to the injured party by the State, according to article 38 of the Civil Servants' Code: «*1… The civil servant is also liable for the compensation which the State paid to third parties for illegal acts or omissions during the performance of his duties, if these are caused by willful misconduct or gross negligence. The civil servant shall not be liable to third parties for the abovementioned acts or omissions. 2. In case of willful misconduct, the civil servant shall be brought mandatorily before the Court of Audit. In case of gross negligence, if the civil servant is brought to trial, the Court of Audit, taking into consideration the specific circumstances, may attribute to him only partially the damage which was caused to the State or the compensation which the latter was ordered to pay*».

[7] Regarding the issue of this regulation de lege ferenda, see *Fotios Katsigianni*, The joint liability of the State bodies according to the provisions of article 105 of the Introductory Law to Civil Code and the need to abolish provisions of the Civil Servants' Code, which lift or narrow its foundation, as a factor of improvement of the administrative action, Dioikitiki Diki 2009, page 819 et seq.

[8] The highest Administrative Court of Greece.

[9] See Symvoulio tis Epikratias 735/2010: "*Furthermore, the medical staff of these university clinics, which constitutes the medical service of the hospital in these clinics, is considered, in respect of its service in the hospital, as a hospital's body in the sense and for the purposes of articles 105 and 106 of the Introductory Law to Civil Code. As a result, the hospital, where they work, can be held liable for compensation due to their illegal acts or omissions or material activities or omissions of material activities of this staff while providing their medical services, provided that the other conditions under the abovementioned articles are also met"*. Similarly also Symvoulio tis Epikratias 1219/2012. See further *George Pinakidi*, Constitutional parameters of civil liability of the university doctors. On the occasion of decisions No 2689/2004 and 2690/2004 of the Court of Appeal of Thessaloniki, Epitheorisi Dimosiou kai Dioikitikou Dikaiou 2006, page 50 et seq.

The civil liability of the State and legal entities of public law is objective in accordance with articles 105 and 106 of the Introductory Law of Civil Code. In other words, the detection of illegality is sufficient to establish (in combination with the other conditions) the liability for compensation, without any further need of existing fault on the side of the person who acted or illegally omitted an act. Such an assumption is generally correct, though it cannot apply specifically on the civil liability of the State due to medical errors. And this occurs because illegality in this specific field lies whether in the violation of the commonly acknowledged rules of medical science or the lack of diligence, which the doctor was able to exercise because of his capacity, his position and the prevailing circumstances. In this way, the civil liability from medical errors cannot be considered as objective, as it requires a fault on the side of the doctor[10].

3. IN LIEU OF EPILOGUE: DOES THE ECONOMIC CRISIS AFFECT THE CIVIL LIABILITY FOR MEDICAL ERRORS?

The severe economic crisis had a catalyst effect on public law, particularly in relation to the financial claims of individuals against the State and legal entities of public law. There are many examples and sometimes they signify a shift of case-law, such as in the case of the more favorable (reaching 6%) default interest rate on debts of the State, which –in contrast with previous case-law- is now considered as consistent with the Constitution[11] . In general, what previously the case-law described as «simple cash interest» of the State and could not justify any variations in its favor, today is defined as «overriding public interest» which aims to prevent any fiscal derailment and provides sufficient legal grounds for a privileged treatment of the State[12].

Someone could reasonably assume that the economic crisis would not leave unaffected the monetary amounts awarded by court decisions against the State (or legal entities of public law) and in favor of individuals[13]. Therefore, it would be expected that this effect would extend also to the field of civil liability of public hospitals due to medical errors, thus reducing the amount of monetary compensation due to moral damage or mental

[10] Regarding civil liability from doctors' errors in public hospitals and more generally all that was presented above in relation to civil liability from medical errors, see quite indicatively, *Dimitrios Emmanouilidis/John Papagiannis*, Civil liability for illegal medical acts or omissions by public hospitals (Commentary on decision Symvoulio tis Epikratias 2463/98), Epitheorisi Dimosiou kai Dioikitikou Dikaiou 2000, page 502 et seq., *Charalambos Crysanthakis*, The civil liability of the public hospital due to a medical error as a field of interaction between the medical and legal science. Answers to potential questions, Theoria kai Praxi Dioikitikou Dikaiou 2010, page 1 et seq., *Christos Detsaridis*, The medical error and the civil liability of the public hospital, Epitheorisi Dimosiou kai Dioikitikou Dikaiou 2014, page 663 et seq. (with further case-law and bibliographic references) and Symvoylio tis Epikratias 727/2009, 3421/2009, 1244/2010, 1246/2010, 1219/2012, 5001/2012, 1405/2013, Administrative Court of Appeal of Athens 1314/2011, Administrative Court of Heraklion 398/2009, Administrative Court of Livadia 259/2013.

[11] See Anotato Eidiko Dikastirio [the highest Court of Greece with certain competences according to article 100 of the Greek Constitution] 25/2012, Symvoulio tis Epikratias 1620/2011, Symvoulio tis Epikratias (Plenary) 2115/2014.

[12] See analysis in (Vlahopoulos, 2014), with further case-law and bibliographic references.

[13] See e.g. Symvoulio tis Epikratias 4467/2012: In the framework of calculation of the just satisfaction for exceeding the reasonable time of proceedings (articles 6 par. 1 of ECHR and 53 et seq. of law 4055/2012) it is also taken into account, inter alia, the "*decline in living standards in Greece over the recent years, as a result of the most severe unsettlement of the fiscal balance of the Greek State, due to the takeoff of the public deficit and public debt at levels unseen before in the history of the Country's public finances*".

suffering. The case-law, however, of Symvoulio tis Epikratias continues to accept, even on the peak of the crisis, that «*the amount of the financial compensation is not linked, in principal, with the particular each time property and fiscal status of the State or the public law legal entity, neither does the financial and property size of the above legal entities affect the definition of the amount of benefit (Symvoulio tis Epikratias 3839/2012 , 4988/2012, 1243/2010, 2579/2006). Moreover, charitable work performed by a public law legal entity, such as e.g. a hospital, does not constitute a legal element to reduce any financial compensation due to moral damage (see also Symvoulio tis Epikratias 1243/2010 , 2579/2006)*»[14].

The attitude which does not take into account, in the framework of the civil liability concept, the economic crisis and the financial status of public hospitals, may not be immune to objections. Not only in terms of lack of consistency (in some cases the economic crisis is taken into consideration and in others not), but also in terms of the charitable work, which public hospitals perform, and the reduction of their resources for the achievement of their purpose. However, these doubts have their positive side too: they demonstrate the significance and the sensitivity of the Greek legal order and its judicial bodies regarding infringements of the most fundamental legal right: The right of human health.

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[14] Symvoulio tis Epikratias 1405/2013. See also Symvoulio tis Epikratias 1219/2012: "*... the charitable work and the financial status of the appellant* [hospital] *do not constitute, in principle, legal factors to reduce the amount of financial compensation (CoS 2579/2006, 1243/2010, 868/2011)"*. Moreover, the economic crisis could lead even to the increase of the awarded monetary amounts, if the case-law for the monetary provision under article 931 of the Civil Code (causing disability or deformity) was also followed in cases of medical errors, where it is considered that the "*adverse effects are more intense in periods of economic distress and tight labor market"* (Areios Pagos 150/2015) and that «*the disability ... is a negative element for the career development of the claimant, in view also of the conditions of constantly growing competition and tightness prevailing in the labor market*» (Administrative Court of Athens 4580/2014).

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