

Litigation from Cosmetic and Plastic Surgery Czech, Polish and Turkish perspectives



David Kuboň
KLB Legal
Czech Republic

Gabriela Lenarczyk
BFP
Poland

Cemre Yilmaz Akyay
Yilmaz Akyay Law Firm
Turkey

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Case law the Facts

This case was dealt with by the District Court Pilsen-City (the Court of First Instance) and the Regional Court in Pilsen (the Court of Appeal)



- 23 January 2018 - The plaintiff purchased 2 vouchers for upper and lower eyelid surgery on an unnamed portal.
- 31 January 2018 - Blepharoplasty was performed by defendant.
- An unsatisfactory result of the cosmetic surgery (especially visible scars)
- The plaintiff filed a lawsuit against the defendant seeking compensation for non-pecuniary damage to his health.

What constitutes medical malpractice in cosmetic surgery cases?

Zoom in on the issue of Clients' expectations of a certain result v the law in Poland



- Patient dissatisfaction does not equal physician liability
- The doctor is not responsible for the **result** (Polish Supreme Court judgement of 10/01/2000: “The procedure is qualified as a **duty of care** and the doctor's liability is not triggered by the fact that the results promised by the doctor have not been achieved, despite the diligence exercised”)



Was the plaintiff successful with his lawsuit before the Czech courts?

The plaintiff's arguments

- No medical consultation before the surgery
- Insufficient information about the possible risks of the surgery
- Painful surgery
- No discharge summary, no written medical documentation of the operation

The defendant's arguments

- Proper informed consent according to the law
- Information about the risks of the procedure and what it is possible to achieve
- The surgery was performed *lege artis*
- The plaintiff only asked the defendant to improve his current appearance by removing the skin overhangs from his eyelids, he did not in any way ask for his appearance to be restored to that of previous years (limited by the costs of the surgery).

Conditions of liability for damages in the discussed legal systems



Comment on Poland:

- **Legal presumption in medical negligence cases** re: causal relationship between the negligence and the damage – “high degree of probability”

Czech Republic:

1. unlawful conduct
2. damage
3. causation between 1. and 2.
4. fault

Poland:

1. Unlawful act/omission
2. Damage
3. Causal relationship
4. Fault

Turkey:

1. Unlawful act,
2. damage,
3. causal link,
4. and fault.

Who to sue?

Zoom in on *actio directa* in Poland and the issue of cosmetologists performing procedures reserved for doctors



- ***Actio directa*** - a right to raise a claim directly against the insurance company. The insurer is an independent debtor, who can be joined as co-defendant at all stages of proceedings.
- Healthcare professionals are **obliged to have mandatory third-party civil liability insurance**, but...
 - *It does not cover cosmetic procedures (unless it is performed to correct a birth defect, damage resulting from injury or an illness, or from the treatment thereof)*
 - *More and more aesthetic medicine treatments are being carried out by beauticians, who are under no legal requirement to have **any** insurance*

Who to sue?

**Zoom in on the issue of
obligatory/voluntary insurance in
Turkey**



Turkey

Who to sue?

- State Hospital
- Private Hospital
- Malpractice liability insurance
- Doctor

According to the additional article 12 of the Law No. 1219: doctors have compulsory malpractice liability insurance.

Policy coverage in general:

- Minimum 250,000 Turkish Lira (€8700)
- Maximum 750,000 Turkish Lira (€26.000).
- There are policies above this amount, but insurance companies require approval from the general directorate for amounts like 1,000,000 Turkish Lira (€34700,-).



Liability for *non lege artis* procedure

Liability for *non lege artis stricto sensu* procedure



- Basis: An expert assessment
- **Practical problems** in the Czech Republic: few experts, long waiting periods, doctor v doctor
- Our case study - an expert said:
 - The cosmetic surgery was performed *lege artis*.
 - Serious shortcomings in the medical documentation (in the form of handwritten documents, which were allegedly not available to the plaintiff, insufficient informed consent).

Zoom in on the issue of access to medical documentation in Turkey

Comment on Poland:

- *Access to medical documentation is a patient right; issues arise with procedures conducted by non-doctors*
- *Some evidentiary issues where there is cash payment/WhatsApp appointments*

- Access to medical documentation is hard.
- Request the medical documentation through the prosecutor's office.
- We ask for an expert report, when the report is positive, we have more chances of success in civil proceedings.
- Start civil proceedings and get an expert report for calculation on material damages.



Liability for *non lege artis largo sensu* procedure



Comment on Poland: the requirement of the patient's consent is **stricter** in cosmetic surgery procedures. The **scope of information** provided to the patient goes furthest in the case of procedures carried out solely for aesthetic purposes.

- Various failures in the organisational field and in the communication and transfer of information both toward the patient and among healthcare professionals
- Our case study - the expert said:
 - The lack of sufficiently detailed informed consent, where the patient was not accurately informed about the outcome of the surgery and its course

Zoom in on the issue of informed consent in the Czech legal system



Law: emphasis on the doctor-patient dialogue, written informed consent should only be evidence of the dialogue

Case law: Reversed burden of proof - the healthcare provider must prove that the information was properly provided to the patient

- Surgery performed with insufficient informed consent
- Guidance for the courts' decision-making - judgment of the Supreme Court of the Czech Republic, Case No. 25 Cdo 1381/2013
- "The instruction must be such that even a layman can weigh the risks of the surgery and decide whether or not to undergo it."
- Liability of the healthcare facility only if the patient proves that, knowing the relevant facts, he would not have undergone the surgery.

How did the courts finally decide the case?

Comment on Turkey:

- If the surgery was performed *lege artis*, but the consent was insufficient, the patient can seek compensation for the infringement of his **patient's rights**
- Compensation would be about **1500 - 3500 EUR**

Comment on Poland:

- *If the surgery was performed *lege artis*, but the consent was insufficient, the patient can seek compensation for the infringement of his **patient's rights***
- *Compensation would be about **10k EUR***

- The surgery was performed *lege artis*.
- The informed consent was insufficient.
- => **Liability of the defendant for unjustified interference with the personal integrity of the plaintiff, but not liability for personal damage**
- => The costs of the surgery were awarded, but not the pain and suffering.
- => **The plaintiff was only partially successful.**



Comparison with foreign legal orders



- Lack of proper instruction - liability of the healthcare facility even for consequences that are otherwise part of the normal risk and which were not caused by any medical malpractice [Poland, Turkey]
- Germany
 - 1) *Grundaufklärung* = basic instruction on the most serious risks associated with the surgery
 - => In the event of misconduct, the liability is almost automatic
 - 2) instruction on the other risks
 - => In the event of misconduct, the patient usually does not bear the burden of proof
- Conclusion of comparison
 - Czech court practice is relatively different - not liability for personal injury, but liability for interference with personality rights

Last but not least... zoom in on the limitation periods



Czech Republic:

- **3 years subjective limitation; assessed ad hoc, taking into account:**
 - when the victim's state of health stabilized; and
 - the victim's knowledge about the damage caused.
- *The objective limitation period shall not apply*
- *Exceptions:*
 - Recognition (10 years from the date of recognition)
 - Absence of good faith.

Poland:

- **3 years from the day on which the victim learned of the damage and of the identity of the person obliged to remedy it** (or should have learned by exercising due care)
- *Exceptions: crimes / damages caused to a minor*

Turkey:

- **1 year: claims against public hospitals**
- **2 years: if the principles of tort law apply.**
- **5 years: claims against private hospitals or if the doctor-patient relationship is based on a contract**
- **10 years: In cases where the consent was insufficient** (such cases will be considered within the scope of unauthorized practice)



Thank you for your attention!