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Fair Satisfaction due to Violations of Patients' Rights in Healthcare

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This article explores and presents the meaning of the award of just satisfaction for breaches of patients' rights that interfere with fundamental human rights and the personal integrity of the individual in the field of healthcare. The research is based on well-established methods of legal science, using historical, normative-dogmatic, comparative, axiological and sociological methods. This article reveals and presents a view on the normative regulation of the field of scientific study and points out the shortcomings of the regulation of the judicial protection of rights in health care in the Republic of Slovenia. The study concludes that the interference with a patient's right protected by law results in an interference with the patient's private life, which is why the court should mitigate the ongoing violation and its consequences without undue delay. The patient should be able to seek judicial protection of his or her rights in the healthcare system within the national system through the establishment of an institute of just satisfaction under Article 41 The European Convention on Human Rights (ECHR). The instrument of just satisfaction, as provided for by the ECHR and developed by The European Court of Human Rights (ECtHR), should be used as an important remedy in cases of violation of a patient's rights where no other immediate judicial remedy is available. It remains open to debate for which violations of patients' rights just satisfaction should be granted and in what procedure in order to ensure its swift effect.

Keywords: *Just satisfaction; non-pecuniary damage; criteria for non-business liability; exceptional circumstances; mitigation of the harmful consequences*

Introduction

The extreme importance of patients' rights issues in modern society is demonstrated by the numerous cases of ECtHR[1] judgments whose interference with fundamental human rights violates the protection and interests of patients' rights. Although the "right to health" - as such - is not enshrined among the rights guaranteed by the ECHR and its protocols[2], the ECtHR has repeatedly emphasised in its decisions that States have a duty to protect the lives of those within their

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[1]ECtHR *Vavřička and Others v. The Czech Republic*, no. 47621/13, 8.. 2021, para. 27; ECtHR *Polat v. Austria* no. 12886/16, 20. 7. 2021, para. 51; ECtHR *Salakhov and Islyamova v. Ukraine*, no. 28005/08, 14. 6. 2013, para. 180.

[2]See also ECtHR *Vasiliyeva v. Bulgaria*, no. 23796/10, 17.3.2016, para. 63.

jurisdiction and to refrain not only from "unintentional" deprivation of life, but also to take appropriate measures to protect the lives of those within their jurisdiction[3].

Health and its protection are a right defined in Article 35 of the Charter of Fundamental Rights of the European Union. EU Member States which are signatories to the Charter of Fundamental Rights of the European Union are required to implement and guarantee this right through national legislation. The principles derived from this Article are based on Article 168 TFEU[4] and Articles 11 and 13 of the European Social Charter. The protection of human rights in the field of health care is an important element of state action. In democratic countries, human life and health are recognised as the highest social values, with particular emphasis on health care. However, it is often health professionals who violate patients' rights[5].

Under Article 47 of the Charter and Article 19(1) TEU, anyone who has suffered a violation of any of his or her rights and freedoms under EU law has the right to an effective remedy and to an impartial tribunal, in addition to general rules of Article 6 of the ECHR.

The Charter establishes the principle of respect for fundamental rights guaranteed by the general principles of EU law, which both the EU and the Member States must respect. The requirement for judicial protection set out in the Charter reflects a general legal principle based on a constitutional tradition common to EU Member States. ECtHR in Strasbourg and other regional human rights tribunals represent a historically important breakthrough in the enforcement of human rights as an international jurisdiction. They allow individuals to bring their own state before an international, impartial tribunal for violations of their fundamental human rights[6]. At a principled level, upholding respect for human rights and fundamental freedoms is a foreign policy priority for many countries[7].

In the Health care sector in the Republic of Slovenia, human rights are limited by national legislation on patients' rights, which sets out the rights and responsibilities of patients, healthcare professionals and healthcare providers. Professional responsibility of health professionals is the ability to make binding decisions, accepting responsibility for breaches of professional rules and professional standards. They are committed to the realisation of patients' rights and legally protected interests guaranteed by the ECHR, subject to rules of professional conduct[8] (positive accountability) and liability for legal misconduct (negative accountability).

The ECtHR is empowered under Article 41 ECHR to award just satisfaction to those whose Convention rights have been violated. The determination of the amounts awarded to the complainants as just satisfaction is not one of the main tasks of the Court, but is a secondary task under Article 19 ECHR. If the ECtHR

[3]See *Calvelli and Ciglio v. Italy*, [GC], no. 32967/96, para. 51, ECHR 2002-I, and *Vo v. France* [GC], no. 53924/00, para. 90, ECHR 2004-VIII.
[4]Ibid., para. 1.
[5]Yanovska, Horodovenko & Bitsai (2019) at 72.
[6]Petrič (2010) at 407.
[7]Petrič (2010) at 243.
[8]Law on health care (ZZDej), Article 55.

considers that the amount to be awarded is necessary, the court will make an assessment on the basis of fairness, which involves flexibility and an objective assessment of what is just, fair and reasonable in all the circumstances of the case. Not only on the basis of the applicant's position and his/her possible contribution to the situation complained of, but also in the light of the circumstances in which the breach occurred. In doing so, the ECtHR draws on the case-law of similar infringements and considers them as a starting point for determining the appropriate amount to be awarded in the circumstances of the individual case. The criteria taken into account by the ECtHR in determining the amount to be awarded are: (I) the nature and gravity of the violation established, (II) its duration and effects, (III) other circumstances to be taken into account in the particular case (such as whether there have been several violations of protected rights, whether the State has awarded the applicant a sum of money for the damage caused, whether it has adopted any measure which could be considered the most appropriate remedy for the damage, etc.).

In the Republic of Slovenia, there are no specific legal provisions in place that would allow an individual who has suffered a violation of his or her rights to assert the right to just satisfaction within the meaning of the ECHR. According to the Constitutional Court of the Republic of Slovenia (CCRS), such a right can only be decided upon by a court in a civil proceeding under the general rules of the law of damages, which are regulated by the Code of Obligations[9] (CC). The recognised right to compensation ensures that everyone has the right, in accordance with the law, to claim compensation for the damage caused to him by the unlawful and impermissible conduct of the State and its institutions[10]. Effective judicial protection of the right to a trial within a reasonable time is guaranteed under the case-law of the ECtHR only if it also includes protection that provides just satisfaction. The ECtHR grants just satisfaction to an individual who has suffered a violation of his or her rights in proceedings that have already been concluded. It is a financial compensation awarded by the ECtHR to the injured party for the State's failure to comply with its positive obligation to ensure that the system or organisation of procedures is such as to enable the individual to obtain a decision from a court within a reasonable time. Given the nature of the right itself (a right of a procedural nature), this means that the State must guarantee it in a substantive sense. It does not necessarily mean that, in the event of a breach, the individual has acquired a right to a monetary claim against the State based on the rules of tort law. The latter does not directly provide for such a legal consequence by law. It could only be established by analogy, that there is a legal vacuum, in the area of the payment of pecuniary compensation for non-pecuniary damage[11].

Slovenian case law recognises that compensation can only be obtained for legally recognised damage. The Act on the Protection of the Right to a Trial without Undue Delay (ZVPSBNO)[12] regulates the payment of monetary compensation for damage caused solely as a result of a violation of the right to a

[9]Law on health care (ZZDej), Article 179, para. 2.
[10]Ljubljana Higher Court, Judgement, II Cp 5167/2007, 16.1.2008.
[11]Ljubljana Higher Court, Judgement II Cp 2340/2009, 23.9.2009.
[12]Hereinafter the Slovenian abbreviation ZVPSBNO.

trial without undue delay[13]. There are no specific legal provisions in the existing legal framework which would allow an individual who has been deprived of the right to a trial within a reasonable time while proceedings are pending and who has suffered damage in this respect to claim just satisfaction within the meaning of the ECHR[14].

The possibility of the payment of financial compensation for the purpose of just satisfaction for the violation of a human right recognised by the ECHR and its Protocols is not expressly regulated by the ZVPSBNO. This does not mean, however, that the legally recognised right to a trial within a reasonable time is not regulated in our legal order. The only question is whether it is sufficiently regulated. The CCRS has taken the view that just satisfaction for a violation of the right to a trial within a reasonable time within the meaning of the ECHR does not constitute compensation in the classical sense under the criteria of civil liability for pecuniary and non-pecuniary damage. The same applies to compensation under Article 26 of the Constitution of the Republic of Slovenia, which is a form of compensation whose primary purpose is to award damages for the State's failure to comply with its positive duty to ensure that the system or organisation of procedures is such as to enable the individual to obtain a decision within a reasonable time[15].

Literature Review

In the area of the regulation of the judicial protection of rights in healthcare, previous studies by foreign authors are based on: (I) the study of the role of the court - judicial responsibility in the protection of the right to health as the highest attainable standard of health, especially in crisis and emergency situations - Covid-19[16], (II) analysing monitoring data on access to justice as a key component of the universally recognised right to health[17], and (III) examining the power of law to achieve the highest attainable standard of health[18]. Yamin & Lander[19] note that judicial decisions in the context of health rights litigation have far-reaching consequences, not only directly for litigants, but also indirectly for the wider population. The rule of law and accountability, and consequently access to effective remedies, are central aspects of human rights-based approaches to health.

The researchers have sourced information for the study of access to justice as a fundamental right of the individual protected by the EU acquis from: (I) a review of the relevant case law of the courts, (II) a literature review, (III) analyses of country reports and their findings, and the final recommendations of the expert working groups analysed by each country in relation to access to justice and the

[13]Ibid., Article 15, para.1.
[14]CCRS, decision U-I-65/05, 22.9.2005, para. 8.
[15]See CCRS Judgement U-I-65/05, 22.9.2005, para. 9.
[16]Flood Colleen & Bryan (2020) at 177–196; Gutiérrez Silva (2023); Pollard Sacks (2021).
[17]Pautassi (2018) at 185–197.
[18]Gostin, Monahan, Kaldor, DeBartolo, Friedman, Gottschalk, Kim, Alwan, Binagwaho, Burci, Cabal, DeLand, Evans, Goosby, Hossain, Koh, Ooms, Roses Periago, Uprimny & Yamin (2019).
[19]Yamin & Lander (2015) at 312.

definition of guarantees for access to justice in health matters. In the context of the general definition of the fundamental principles of justice, there are a number of studies by authors that clarify and highlight the role and importance of the application of the general principle of effective justice. The authors' studies are based on reflection and interpretation: (I) the importance of the procedural exercise of the right to effective judicial protection[20], (II) the role of the court in the implementation of the principle of effective judicial protection[21], (III) methodologies for assessing the independence and accountability of the judiciary[22], and (IV) the role of constitutional traditions in shaping effective justice in the EU and its impact on national jurisdictions[23].

Van Belle[24] argues that, following the EU's move to implement the ECHR, the fundamental principles of judicial protection are directly implemented through the protection of fundamental human rights and freedoms. Both the Council of Europe and the EU independently guarantee human rights at the same supranational level. The Council of Europe, on the basis of the ECHR and through the ECtHR, carries out an external review of acts, actions and omissions 'inter alia' of all EU Member States. Wojtyczek[25] points out that the ECtHR has developed a very rich case law which establishes a minimum of human rights protection in Europe. He also states that case law is indispensable in clarifying the meaning of the provisions of the ECHR.

Camp Keith[26] points out that an independent judiciary can play an important role in guaranteeing constitutionally protected human rights and is an indispensable link in the mechanism for ensuring individual protection against human rights abuses by the state. Conkle[27] discusses the right to effective judicial protection in relation to the protection of human rights in the context of examining selected aspects of constitutional law and the exercise of judicial review in cases in which constitutionally protected individual rights are invoked. On the other hand, Van Belle[28] and Contini & Mohr [29] examine procedural and institutional innovations of the EU acquis and the ECHR system, generally analysing procedural innovations before the ECtHR.

The Slovenian legal literature cites a number of authors who clarify the rationale and, within the general definition of the foundations of judicial protection, interpret and justify: (I) the right to effective judicial protection[30]; (II) the term "judicial protection"[31] and (III) the right to an impartial, independent and lawful judge[32]. While some other authors address the exercise of the right to

[20]Arroyo (2021); Görisch (2017); Szente (2017); Yamkovyi (2001); Garth & Cappelleti (1978).
[21]Smokoyych (2018); Lacchi (2016); Bondareva & Ahbra (2010); Ahbra (2010).
[22]Van Dijk & Vos (2018).
[23]Gentile (2022); Bonelli (2019) ; Ravo (2012); Norbert (2005) ; Marton (2005).
[24]Van Belle (2013).
[25]Wojtyczek (2020) at 241.
[26]Camp Keith (2002).
[27]Conkle (2022).
[28]Van Belle (2013).
[29]Contini & Mohr (2007).
[30] Avbelj & Šturm (2019) at 50 ; Šturm (1998); Galič (2019) at 215; Jambrek & Černič (2014).
[31] Legal protection, in Dictionary of legal terminology (2018) at 275.
[32] Čebulj (2019) at 208; Novak (2019) at 273; Kovač (2019); Pavčnik (2019); Novak (2003).

justice from the perspective of the trial in civil and criminal cases[33] as well as in administrative cases[34].

From a theoretical point of view, the right to justice has often been discussed as a fundamental human right. Letnar Černič[35] argues that human rights require an equal approach and equal treatment of all human rights violations and the introduction of preventive measures to prevent future violations. Pavčnik[36] points out that fundamental (human) rights constrain state power and define the limits within which it can move. He emphasises that fundamental rights are legally protected fundamental entitlements in relation to the state and its organs, as well as in relation to individuals and other legal entities. Petrič[37] highlights the importance of the ECtHR and other regional human rights courts as an expression of a historically significant shift in the assertion of human rights as an international jurisdiction. The ECHR enables an individual to sue his or her own state for violation of (his or her) rights before an international, impartial tribunal.

Judicial protection of healthcare rights is also ensured through the application of tort and criminal liability. This has been discussed in the RS in the area of liability for damages, in particular by Cigoj[38]; Jadek Pensa[39]; Plavšak (2003)[40]; Plavšak, Juhart & Vrenčur[41]; Ivanjko[42]; Škrk Berger[43]; Ovčak Kos & Penko[44]; Rijavec[45]; Žnidaršič Skubic[46]; Možina[47]; Fikfak[48]. In the field of criminal liability, Novak[49] and Zobec[50] , have argued and discussed the relevance of a judge's proven unlawful conduct in relation to a trial. The tort and criminal liability of a doctor or other health professional for crimes against human health has been discussed in the context of the definition of criminal liability for medical errors by Korošec & Novak[51]; Korošec & Balažic[52]; Pitako, Valenčič, Korošec, & Balažic[53]; Jaklič & Šepec[54].

[33]Bošnjak & Žaucer Hrovatin (2019); Galič (2019).
[34]Kovač (2019); Smrekar, (2019): Kerševan (2020); Steinman (2019); Farmany (2019); Kerševan & Androjna (2017); Pirnat (2013); Potisek (2014); Jerovšek (2002).
[35]Letner Černič (2017) at 6.
[36]Pavčnik, (2019) at 164.
[37]Petrič (2010) at.407.
[38]Cigoj (1978) at 15.
[39]Jadek Pensa (2003).
[40]Plavšak (2003) at 144.
[41]Plavšak, Juhart & Vrenčur (2009) at 474.
[42]Ivanjko (2010) at 178.
[43]Škrk Berger (2010) at 28.
[44]Ovčak Kos, Božič Penko (2017).
[45]Rijavec (2017) at 44.
[46]Žnidaršič Skubic (2018) at.81.
[47]Možina (2019) at 258.
[48]Fikfak (2020) at 341.
[49]Novak (2019).
[50]Zobec (2015) at 116.
[51]Korošec & Novak (2009) at 71.
[52]Korošec & Balažic (2019) at 67.
[53]Pitako, Valenčič, Korošec & Balažic (2019) at 94.
[54]Jaklič & Šepec (2021) at 30.

Methodology/Materials and Methods

The methodological approach of this research is generally based on the already established methods of legal science, using historical, normative-dogmatic, comparative, axiological and sociological methods. An analytical and descriptive approach was used to explain the individual findings, and the rules of logical reasoning were followed. In the study of legal content, both inductive (from the study of individual provisions to teleological interpretations of laws) and deductive (the study of legal practice, precedents and the material legal sources used) modes of reasoning and inference were applied in a meaningful way. In the concluding part of this research, the findings and conclusions of the research study are presented in the synthetic phase of the study. The research findings are substantiated by applying established methods of legal science, which are interrelated.

Results

Protection of Patients' Rights

The enforcement of constitutional rights is extended through case law in the doctrine of fundamental human rights to the field of health care, where the protection of patients' rights is implemented. The protection of patients' rights and (indirectly) the exercise of the right to health protection in national legislation *lex specialis* is governed by the Law on Patients' Rights (ZPacP)[55].The current legal regime in the RS only provides legal protection to the patient on the basis of the provisions laid down in the ZPacP[56], by exercising the right to have a violation of the patient's rights addressed. This gives the patient the possibility to exercise the right to have the infringement of patient's rights addressed in the procedure for the request for the protection of patient's rights (in the procedure for the request for the first and/or second hearing of the infringement)[57]. Whereas the patient is guaranteed the right to judicial protection exclusively in administrative litigation, where the protection of the patient's legal position is ensured against final administrative acts which interfere with the patient's rights and legal interests[58]. This means that the patient is only guaranteed the right to a judicial remedy once the procedure for requesting a second hearing before the Commission of the Republic of Slovenia on the infringement of the patient's rights has been completed, and not while the infringement has occurred and is still ongoing.

Galič[59] submits that the right to a fair trial cannot be understood as a formal right, nor as a theoretical possibility of access to a court. The latter must ensure the effectiveness of justice both at the substantive level (ensuring the protection of a right to which a party is entitled under substantive law) and in the conduct of the

[55]Further in this article I use Slovenian abbreviation ZPacP; Ibid., Article 5.
[56]ZPacP, Article 5.
[57]ZPacP, Article 47, Article 48.
[58]ZPacP, Article 79, para. 2; Administrative Dispute Act (ZUS-1), Article 2, para. 1.
[59]Galič (2019).

proceedings. Case-law shows that the time limits set by law for the courts to give a decision are linked to the requirement to ensure effective judicial protection, not just fast justice[60]. A procedure is effective only if it ensures the substantive legal correctness of the court decision, and thus the legal protection of an existing right[61].

Exercising the right to judicial protection in a case where there has been an alleged infringement and the procedure has already been completed does not constitute judicial protection. The CCRS in Case U-I-65/05[62] relied on this very fact, equating it with a situation where the person affected has had no or no access to justice at all, "justice delayed is justice denied". The legislator adopted the ZVPSBNO[63] for this purpose, in view of the shortcomings highlighted. It provided for the possibility of seeking just satisfaction only in those cases where, despite the party's efforts to expedite the judicial proceedings, he is not granted a trial within a reasonable time. It does not apply, however, with a view to exercising the right to a trial without undue delay, directly when the infringement is still ongoing and depending on the degree of seriousness of the infringement (which may affect the deterioration of the patient's state of health). In establishing the system of judicial protection of the right to a trial without undue delay in the ZVPSBNO, the legislator pursued the aim of achieving the protection of this right by means of expedited legal remedies. The Act allows a party to a judicial proceeding, a party to a case under the law governing non-judicial proceedings and an injured party in a criminal proceeding, to have his rights, obligations and the charges against him in his case before the court decided by the court without undue delay [64].

According to the case law of the ECtHR, effective judicial protection of the right to a trial within a reasonable time is only guaranteed if it includes the protection of "just satisfaction", which is awarded by the Court to an individual who has suffered a violation of his or her rights in proceedings that have already been concluded. It is a pecuniary compensation awarded by the ECtHR to the injured party for the State's failure to comply with its positive obligation to ensure that the system of procedures is organised in such a way as to enable the individual to obtain a decision of the Court within a reasonable time. The institution of just satisfaction does not mean compensation in the classical sense according to the criteria of civil liability for pecuniary or non-pecuniary damage, which is also the case for Article 26 of the Constitution of the Republic of Slovenia[65]. There are no specific legal provisions in the Republic of Slovenia which would allow an individual who has suffered a violation of his or her rights to claim the right to just satisfaction within the meaning of the ECHR[66].

If you have been deprived of your right to a trial within a reasonable time and have suffered damage as a result, you can seek redress by bringing an action in

[60]Administrative Court of the Republic of Slovenia, Court Decision I U 1145/2015, 14. 8. 2015, para. 99.
[61]Galič (2004).
[62]CCRS Judgement U-I-65/05, 22. 9. 2005, para. 8.
[63]Ibid., Article 1, para. 1.
[64]Ibid., Article 2.
[65]CCRS Judgement U-I-65/05, 22.9.2005, para. 13.
[66]See ECHR, Article 41.

court. According to the CCRS, such a right can only be decided by a court in civil proceedings under the general rules of the law of damages governed by the Civil Code[67]. The recognised right to compensation ensures that everyone has the right, in accordance with the law, to claim compensation for the damage caused to him by the unlawful wrongful conduct of the State and its institutions[68]. Given the nature of the right itself (a right of a procedural nature), this implies that the State must provide it in a substantive sense. It does not necessarily mean, however, that in the event of a violation, the individual has acquired a right to a pecuniary claim against the State based on the rules of tort law. The latter does not directly provide for such a legal consequence by law. It could only be established by analogy, that there is a legal vacuum, in the area of the payment of pecuniary compensation for non-pecuniary damage[69].

Consequences of Infringements for Non-pecuniary Damage

The mitigation of the consequences of breaches for non-pecuniary damage is one of the classic controversies of the legal system, whether it includes, rejects or offers coherent solutions, leaving room for endless doctrinal and judicial disputes[70]. The individual approach to the remedy of the breach of a right and the award of monetary compensation for non-pecuniary damage in the form of just satisfaction, in the field of health care, focuses on the protection of human rights and the resulting sub-normative rights of patients and the existence of liability for damages. The existence of damage in healthcare and the right to compensation for it are among the legally protected goods which are protected by the Constitution and laws at national level in a democratic society, and by the ECHR and the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention on Human Rights and Biomedicine[71]) in the context of European Union law.

The ECtHR and the CJEU rarely award compensation for non-pecuniary damage in the context of tort law or liability law in general, non-pecuniary damage refers to damage that is difficult to qualify in monetary terms. This is because the occurrence of such damage is of a qualitative nature and is not directly linked to personal property, wealth or income[72]. By awarding compensation for non-pecuniary damage, the ECtHR recognises that the violation of a fundamental human right has resulted in non-pecuniary damage, such as mental and physical suffering, which in the broadest sense reflects the gravity of the damage. It is therefore often reasonable to presume a causal link between the alleged violation and the moral harm. Applicants do not need to provide any further evidence of

[67]Ibid., Article 179, para. 2.
[68]Ljubljana Higher Court, Judgement II Cp 5167/2007, 16.1.2008.
[69]Ljubljana Higher Court, Judgement II Cp 2340/2009, 23.9.2009.
[70]Truichici & Neagu (2020).
[71]Interpretative Report - ETS 164 - Human Rights and Biomedicine (Convention), 1997, Article 24.
[72]Havu (2019).

their suffering. It is in the nature of non-pecuniary damage that it cannot be precisely calculated and therefore does not need to be precisely quantified or substantiated. The applicant may leave the amount of the financial compensation for just satisfaction to the discretion of the ECtHR.

Like EU case law, the case law of national courts is extremely diverse. For example, when national courts in the RS rule on a plaintiff's claim for non-material damage, they rule on negative changes reflected in the plaintiff's state of health, such as: (I) pain (physical[73] and mental[74]), (II) physical and mental suffering[75], (III) emotional perception (fear[76]), (IV) damage to reputation and other damage to personality rights (of natural persons[77] and legal persons[78]), (V) a state of insecurity[79], (VI) loss of opportunities[80] and, last but not least, (VII) loss of pleasure[81].

ECHR, Article 41 - Just Satisfaction

The national legislation of the Republic of Slovenia allows an injured party who has suffered a legally recognised loss as a result of an interference with his or her personality to claim compensation from the person responsible in the form of just pecuniary compensation, in accordance with the conditions and in the manner prescribed by law. Meanwhile, the ECHR protects the interference with the Convention rights and its Protocols. The ECHR provides for liability for interference with a legally recognised human right in the form of monetary compensation for non-pecuniary damage in the form of "just satisfaction" for the violation of a right that interferes with an individual's legal sphere. It is clear from the case-law that just satisfaction is the least justified part (contingency) of the text of the ECtHR's case-law. The ECtHR awards pecuniary compensation for non-pecuniary damage where the damage suffered is the result of an established violation of a human right under the ECHR and its Protocols and where the non-pecuniary damage suffered cannot be remedied by establishing that violation alone[82].

The ECtHR has a wide discretion in regulating the question of compensation for non-pecuniary damage suffered. It awards just satisfaction to the injured party if it finds that there has been a violation of the ECHR and its Protocols; in so far as the domestic law of an EU Member State permits, the court may, if necessary ("if necessary"), award just satisfaction in the form of financial compensation to the injured party, subject to the conditions set out in Article 41 of the ECHR[83]. The precondition for the invocation of the ECHR's protective mechanism is an alleged

[73]Supreme Court of the Republic of Slovenia (SCRS), Judgement II Ips 72/2009, 13.9.2012, para. 8.
[74]Maribor Higher Court, Judgement I Cp 1008/2018, 11.12.2018, para. 9.
[75]SCRS Judgement and decision II Ips 495/96, 22.4.1998.
[76]Koper Higher Court, Judgement Cp 503/2013, 7.11.2013, para. 16.
[77]Higher Labour and Social Court, Decision Pdp 79/2019, 20.3.2019, para. 10.
[78]Higher Labour and Social Court, Judgement Pdp 792/2013, 9.10.2013, para. 15.
[79]CCRS Decision Up-3871/07, U-I-80/09, 1.10.2009, para. 10.
[80]SCRS Decision II Ips 157/2017, 22.11.2018.
[81]SCRS Judgement II Ips 69/2020, 10.12.2019, para. 7.
[82]ECtHR *K.H. and Others v. Slovakia*, no. 32881/04, 6.11.2009, para. 77.
[83]Škrk Berger, 2010, p.28.

violation of a right that is reflected in a personal injury to the individual. The ECHR allows the ECtHR to provide the aggrieved party with monetary compensation in the form of just satisfaction (Article 41 ECHR) in addition to establishing and alleging human rights violations[84]. A review of the case law of the ECtHR in those cases relating to non-pecuniary damage (moral damage) shows inconsistency and has been criticised by a number of authors for its lack of reasoning and its unpredictability[85]. Shelton[86] argues that the compensation awarded by the ECtHR for non-pecuniary damage can hardly be understood as anything other than a subjective judgement on the moral worth of the victim and the perpetrator. The ECtHR's explanations do not set out the precise principles, nor do they present the explanations, that lead to its decision in relation to the assessment of monetary compensation for non-pecuniary damage awarded to a victim for interference with an article 41 ECHR right. It is clear from the case law that just satisfaction is the least well-founded part of the text of the ECtHR's jurisprudence.

ECtHR in I. v Finland[87] of 17.7.2008

The Court drew particular attention to the instrument of just satisfaction - it stated that a patient's personal data unambiguously form part of his or her private life (under Article 8(1) ECHR). In this particular case, the Court did not see a sufficient causal link between the established breach (unauthorised access to the patient's medical records) and the alleged pecuniary damage. However, it nevertheless held that the applicant had certainly suffered non-pecuniary damage as a result of the State's failure to adequately protect her medical records (the patient's privacy) against the risk of unauthorised access. The Court considered that just satisfaction would not be secured by a finding of infringement alone and therefore also awarded the appellant compensation on an equitable basis for the non-pecuniary damage suffered. Respect for the confidentiality of medical information is an essential principle in the legal systems of all States Parties to the ECHR. It is essential not only to respect the patient's privacy, but also to preserve the patient's confidence in the medical profession and in health services in general[88].

The CJEU has ruled on the question of the right to compensation for damage caused by processing of personal data carried out in breach of Article 82 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (and repealing Directive 95/46/EC (General Data Protection Regulation (GDPR)), in the following case for a preliminary ruling:CJEU in the case of UI v Österreichische Post of 4th May 2023.

[84]ECtHR *Vilela v Portugal*, no. 63687/14, 5.7. 021, para. 5.
[85]Altwicker Hamor, Altwicker & Peters (2015) at 4.
[86]Shelton (2005) at 20.
[87]ECtHR *I. v. Finland*, no. 20511/03, 17.7.2008, para. 55.
[88]ECtHR *I. v. Finland*, no. 20511/03, 17.7 2008, para. 36–38.

In a preliminary ruling in the context of a dispute between UI and Österreichische Post AG (Case C-300/21), the Court of First Instance ruled on the payment of compensation for non-pecuniary damage allegedly suffered by the appellant as a result of the processing by that company of data relating to the political affiliation of persons residing in Austria, in particular that person, even though he had not consented to such processing himself. The Court stated that the existence of damage caused by a breach of Article 82 of the GDPR is one of the conditions for the right to compensation, under which an injured party who has suffered material or non-material damage as a result of a breach of the GDPR has the right to obtain compensation from the controller or processor for the damage suffered. However, the right to compensation under Article 82 of the GDPR[89] may arise for both pecuniary and non-pecuniary damage, without the damage having to reach any degree of seriousness[90]. The Court stated that, in order to determine the number of damages under the right to compensation provided for in that Article, national courts must apply the national rules of each EU Member State concerning the scope of monetary compensation, while respecting the principles of equivalence and effectiveness of EU law[91]. The Court stated that Article 82 of the GDPR[92] indicates that the right to compensation is not conditional on the damage in question reaching a certain threshold of seriousness. Recital 146 of the GDPR[93] states that 'the concept of damage must be interpreted broadly, taking into account the case-law of the Court, in a manner [...] which fully reflects the objectives of the Regulation. It would be contrary to this broad interpretation of the concept of damage favoured by the Union legislator if that concept were limited to damage of a certain gravity"[94].

ECtHR in Šilih v Slovenia[95] of 4.9.2009

The Court referred to the instrument of just satisfaction for damage caused by the length of the trial. It stated that, under Article 2 ECHR, States Parties have a duty to ensure an effective and independent judicial system to establish the causes of, and responsibility for, the deaths of patients, both in the network of public and private health care providers. The State must provide a patient who is the victim of medical negligence with an effective remedy, either in civil proceedings or in conjunction with a remedy in criminal proceedings, to establish the liability of the doctors and health professionals involved who caused the negligence. In that context, the victim of such an act must be granted appropriate civil redress in the form of compensation for the damage caused and/or publication of a judgment or disciplinary action. The Court stated that national legislation in a Member State must be effective in practice and not merely in theory.

[89]GDPR, Article 82.
[90]SEU *UI v. Österreichische Post AG*, no. C-300/21, 4. 5. 2023, para. 45.
[91]SEU *UI v Österreichische Post AG*, no. C-300/21, 4.5.2023, para. 60.
[92]Ibid., para. 1.
[93]Ibid., para. 3.
[94]SEU *UI v Österreichische Post AG*, no. C-300/21, 4.5.2023, para. 46.
[95]ECtHR *Šilih v Slovenia*, no. 71463/01, 9.4.2009, para. 192 - 195.

Limits and Extent of Adverse Effects

In a series of cases, the ECtHR has highlighted a number of risks that stem from the very essence of the Convention, namely respect for human dignity and human freedom. Human rights, which protect the life, health, safety, physical and mental integrity and dignity of the individual, are fundamental values of a democratic society which the State has a particularly active duty to protect, which means creating opportunities for the most effective exercise of human rights[96].

Respect for human dignity constitutes a binding legal norm in the sense of protecting the personal worth of the individual against unjustified interference, the demands of the State and its society. Article 19 TEU, which was incorporated into the Lisbon Treaty, provides that Member States shall establish legal remedies to ensure effective redress in areas governed by EU law[97]. This obliges EU Member States to guarantee the right of access to justice. The Member States' commitment to the right to access to justice is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union[98], taking into account the interpretation of Articles 6 and 13 of the ECHR[99] and the case law of the ECtHR on this provision.

ECtHR, Fernandes de Olivera v Portugal, 31.01.2019

In relation to the risk of suicide, the Court set out a list of relevant criteria with a risk assessment (to determine whether the authorities knew or ought to have known) that the life of the individual (mostly in police custody or detention) was at real and imminent risk[100]. In view of the nature and development of the case-law, the Court stated that the authorities have a general operational duty in relation to a voluntary psychiatric patient to take reasonable steps to protect him against a real and imminent risk of suicide. The specific measures required depend on the particular circumstances of the case, and those particular circumstances often differ depending on whether the patient is a voluntary or involuntary inpatient[101]. The Court emphasises that a positive obligation arises if the authorities knew or ought to have known that the person posed a real and immediate risk of suicide. In such circumstances, the Court proceeds from an assessment of whether the authorities have done all that could reasonably be expected of them to prevent that risk from materialising. Thus, the court shall assess whether, in the light of all the circumstances of the case, the risk in question was real and immediate[102].

[96]CCRS Judgement Up-555/03, Up-827/04, 6.7.2006, para. 25.
[97]Ibid., para. 1.
[98]Ibid.
[99]Ibid., Article 6, para. 1; Article 13.
[100]Ibid, para. 116
[101]Ibid, para. 124
[102]Ibid, para. 110.

ECtHR, Osman v the United Kingdom, 28.10.1998

In the case of a threat to life, the Court stated as early as 1998 that the authorities must take operational measures to prevent that threat from materialising, but that this does not apply to all possible threats, even minor ones. It stated that risks arising in the context of health care cannot relieve the State of its obligations to protect patients from the risks to their lives posed by those risks [103].

ECtHR, Lambert and Others v France, 25.6.2015

In its decision, the Court highlighted the notion of quality of life, which acquires significance through the implementation of Article 8 ECHR. It pointed out that "in an era of increasing medical sophistication combined with longer life expectancy, many people are concerned lest they should be forced to remain in old age in a state of advanced physical or mental debility which is at odds with strongly held notions of self or personal identity"[104].

ECtHR, Pretty v the United Kingdom, 29.4.2002

The Court stated that "in the field of medical treatment, a refusal to accept a particular treatment may inevitably lead to a fatal outcome. However, to impose treatment without the consent of a mentally competent adult patient would interfere with the physical integrity of the human being in a manner which makes it possible to invoke the rights protected under Article 8(1) of the Convention"[105].

Under national jurisdiction, the ZPacP gives the patient the right to decide on his/her own treatment, but not how and in what way to be treated. The decision on how to treat a patient is always subject to the professional judgement of the doctor. The doctor establishes the need for treatment by diagnosing the patient. The patient has the right to be informed in advance of all possible methods of treatment, diagnosis and their consequences and effects. He or she has the right to know the diagnosis of his or her illness, the extent, method, quality and expected duration of treatment, and the right to refuse the proposed medical intervention or treatment. A medical intervention is only allowed with the prior consent of the patient treated by the intervention and the possible consequences[106]. The patient may (or may not) follow the need for treatment by consenting to the medical treatment[107]. When a doctor makes a diagnosis, this does not constitute treatment, but only a decision on the need for, and the type and extent of, treatment. The doctor is obliged by law to explain to the patient or to the person entitled the manner and extent of the treatment and to take explicit account of the patient's

[103]ECtHR Osman *v* The United Kingdom, no. 87/1997/871/1083, 28.10.1998, Reports of Judgments and Decisions 1998-VIII, para. 116.
[104]ECtHR *Lambert and Others v. France*, no. 46043/14, 25.6.2015, para. 142.
[105]ECtHR *Pretty. The United Kingdom*, no. 2346/02, 29.4.2002, para. 63.
[106]Ljubljana Higher Court, Decision II Cp 2084/2014, 18.2.2015, para. 10.
[107]SCRS, Judgement VIII Ips 225/2013, 10.2.2014, para. 14.

right to participate actively in the choice of treatment after having received the explanation[108].

However, how and by what means can the interest of patient protection be realised in the event of discretionary of a doctor's decision which might not contribute to improving the patient's state of health? Perhaps the legislator should set guidelines and define the responsibilities of the doctor in the context of professional rules, to lay down requirements for transparent documentation of such a decision (which must be based on scientific knowledge and peer-reviewed methods), to ensure access to information (for persons who can legally consent to medical intervention or treatment) and to limit the discretionary power of the doctor within a clear legal framework. The commentary to Article 29 of the ZPacP makes it clear that a doctor who performs a medical procedure on a patient in accordance with this provision derives his explanation for the medical procedure from the presumed will of the patient. He may only perform the procedure if he is satisfied that the patient would not object to such a procedure or to the specific procedure in question. This also means that the doctor's decision is based on the presumption that, if the patient had the capacity to decide for himself, he would certainly have consented to the medical procedure or treatment.

SCRS in Case I Ips 10600/2010-347 of 24th October 2013

It is clear that the transfer of a patient to another health care institution within the network of public health care providers in the Republic of Slovenia (the purpose of which is to ensure appropriate treatment and the exercise of the patient's right to adequate, high-quality and safe health care) would allow for "appropriate doctrinal treatment" and ensure the need for "appropriate therapy"[109].

SCRS in Case I Ips 52609/2010 of 13th February 2020

The Court confirmed that a patient's condition may change as a result of "medical activity by a doctor which is contrary to the rules of medical science and profession and which is manifested in the manner of the perpetrator's work or the means he uses"[110] (e.g. inappropriate treatment, failure to take hygienic precautions or other unscrupulous conduct, etc.).

The merits of the doctor's decision are not given in the form of a final administrative act that affects the patient's legal position. It is also not entirely clear what remedies are available to the patient. This is particularly the case when the person entitled to make a decision under the law wishes to decide on behalf of the patient and to put into practice the requirement for appropriate doctrinal treatment, which would make it possible to request the patient's transfer to another doctor or to a healthcare provider in the network of public health service providers in the Republic of Slovenia. The main purpose of such decision-making is to enable the

[108]Administrative Court of the Republic of Slovenia, Judgement I U 1002/2020-22, 11.1.2022, para. 2.
[109]SCRS Judgement I Ips 10600/2010-347, 24.10.2013, para. 6.
[110]SCRS Judgement I Ips 52609/2010, 13.2.2020, para 7.

patient to be cured or to improve his/her state of health or to prevent his/her state of health from (re)deteriorating (in the first place). It cannot be said that the national legal order allows for direct judicial review of such a decision, nor is it entirely clear which competent authority may decide on the eligibility for a medical intervention or treatment by another doctor or a healthcare provider within or outside the public health network in the Republic of Slovenia. The ZPacP does not provide that the patient or insured person may decide independently on the method and type of treatment, but only grants the patient the right to consent independently to the medical intervention or treatment. Thus, the ZPacP grants the patient the right to decide independently on treatment only to a limited extent. The legislator has delegated to the doctor the right to choose the most appropriate treatment under the circumstances[111].

Perhaps the legislator should have previously regulated the criteria to determine the conditions and the manner in which remedies may be sought in all those cases which are not emergencies and where the patient does not require exclusively emergency medical assistance. [112] I would like to point out that a patient may have circumstances or a medical condition of temporary incapacity to take decisions about himself, which do not relate to a medical emergency, and that this may be exclusively a case of the need for appropriate therapy or doctrinal treatment at the time of the patient's treatment or medical care, but not at the time of the provision of emergency medical assistance, where a certain risk of a real and imminent threat to his life is created.

Discussion

Knowing the facts and potential errors when examining medical negligence committed in the delivery of healthcare is essential so that healthcare institutions and healthcare staff can correct any shortcomings and prevent similar mistakes. The prompt handling of such cases is important for the safety of all users of health services[113]. The judicial system must be effective - one that allows the cause of death of patients under the care of a doctor, whether in the public or private sector, and the doctor's potential liability to be established (Šilih v. Slovenia[114]; Powell v. United Kingdom[115]; Calvelli v. Italia[116]). In order to fulfil this obligation, such procedures must not only exist in theory but must also operate effectively in practice. In other words, the procedure must be completed within a reasonable time. It appears that both national jurisdiction and the provisions of the ECHR and its Protocols do not sufficiently provide for an adequate means of exercising rights and do not specify the necessary criteria for cases which would ensure the maximum possible health security for the complainant in the field of health care

[111]Medical Service Act (ZZdrS), Article 3, para 1.
[112]ZPacP, Article 2, para. 12.
[113]ECtHR *Lopez de Sousa Fernandes v Portugal,* no. 56080/13, 19.12.2017, para. 218.
[114]ECtHR *Šilih v. Slovenia,* no. 71463/01, 9.4.2009, para. 192.
[115]ECtHR *Powell v. The United Kingdom,* no. 45305/99, 21.2.1990, para. 49.
[116]ECtHR *Calvelli in Ciglio v. Italia,* no. 32967/96, 17.1.2002, para. 49.

during the exercise of the right to justice. The ZPacP does not provide for a method and procedure to ensure that the patient can exercise a change of decision on treatment (change of the consent declaration), and not only a refusal of treatment, which would ensure that the patient or other persons entitled under the law can exercise the protection of human rights and the dignity of the human being[117], and defend the intervention against the consequences and risks to which he or she is exposed in the course of the treatment. The law should allow the patient to modify the (existing) consent declaration in concrete circumstances. At the same time, the law should allow the patient to choose another health care provider that enables him or her to exercise the right to adequate treatment and the right to adequate, high-quality and safe health care.

It follows from the foregoing that the law does not provide for a method and procedure to ensure that the patient is able to implement the change after consenting to the treatment, and not only after refusing it. This would ensure that the patient or the person entitled under the law is able to exercise the protection of human rights and the dignity of the human being and to protect the intervention from the consequences and risks to which the patient is exposed during the course of the treatment. Ultimately, this would allow the patient to refuse or modify his/her declaration of consent and to freely choose another healthcare provider[118] in the network of public health service providers financed by the statutory health insurance. In so doing, he/she shall exercise the right to adequate, high-quality and safe healthcare (right to health) in the manner and according to the procedures laid down by law[119].

The existing regime of the PHC Act does not allow persons who are entitled under the Act to exercise their right to judicial protection against the merits (substance) of a decision of a doctor, which is not regulated by the PHC Act, how the patient or persons entitled under the law (who may consent to a medical intervention or treatment during the patient's temporary incapacity to take decisions for himself or herself) are enabled to defend and protect their legal interests against a meritorious (substantive) decision of a doctor relating to a medical intervention or treatment.

Conclusions

The recent case-law and the Rules of Procedure of the ECtHR do not provide precise principles or explanations leading to the Court's decision on the assessment of pecuniary compensation for non-pecuniary damage awarded to the victim as a result of the interference with a right under Article 41. It is also clear from a review of the case law of the ECtHR that case law in the area of non-pecuniary damage in the context of establishing liability continues to evolve. Courts should take a clear

[117]In accordance with the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: The Convention on Human Rights in Biomedicine.
[118]ZPacP, Article 9, para. 1.
[119]Higher Labour and Social Court, Judgement Psp 225/2022, 3.11.2022, para. 10.

position on the award of monetary damages for just satisfaction to adequately protect the consequences for the injured party when he or she suffers harm as a result of an interference with the constitutionally protected rights of the individual, rights recognised by the ECHR and its Protocols. The instrument of 'just satisfaction', as provided for in the ECHR and developed by the ECtHR, should be used as an important remedy in cases of violation of patients' rights where no other immediate judicial remedy is available; the right to a remedy should also be exercised by the legal system as part of an effective remedy, even while the violation is still ongoing. The mere fact that a patient's fundamental human rights (his private sphere) have been violated by an interference with a right protected by law should, without undue delay, lead the court to mitigate the ongoing violation and its consequences. In the Republic of Slovenia, specific statutory provisions should be adopted, as there is no general law on "just satisfaction" in all cases of human rights violations. The Court of Human Rights should also have the power to provide for a remedy for the violation of a patient's fundamental human rights. This would ensure that the patient is compensated as quickly as possible and that health care institutions have an incentive to respect the patient's rights to the fullest extent. It remains open to debate which violations of patients' rights should be subject to "just satisfaction" and in what procedure to ensure its swift effect.

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