

## CROSS-BORDER PROVISIONAL AND PROTECTIVE MEASURES FOR PRESERVING OF PHYSICIAN'S FUNDS SUBJECT TO A LIABILITY CLAIM IN THE EU

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**Abstract** Patients frequently opt for medical treatment outside the public health system. This means that the patient enters into a contract with an individual physician, which commits the physician to perform a medical procedure for the patient, and the patient undertakes to pay for this procedure. If the physician does not act with due diligence or does not achieve an outcome that they have explicitly committed to reach, a situation may arise where the patient has a monetary claim against the physician. If the physician does not repay the claim voluntarily, the patient has certain options available to ensure that their claim is forcibly repaid. In this paper, we deal with the position of the +patient as a creditor who does not yet have an enforceable title in relation to the physician and the debtor, and with a patient who already has such an enforceable title. The field of study is limited to the situation when Slovenian law applies for decision on the responsibility of a physician and patient wants to claim the funds that the physician has in bank accounts in the European Union.

**Keywords**  
physician's,  
patient,  
provisional and  
protective measures,  
liability claim,  
European account  
preservation order

## 1 Introduction

The patient can seek medical care in a public health institution<sup>1</sup>, a private healthcare provider or from an individual physician who performs a profit-making activity. In this paper, we discuss a case where a patient opts for treatment outside the public health system.<sup>2</sup>

The type of contract to be concluded between the physician and the patient and the issue of liability depend on the substantive law applicable to a particular contract or individual case. In the event that Slovenian law applies<sup>3</sup>, the provisions of the Obligations Code (OZ) are used to define the contractual relationship between the patient and the physician.<sup>4</sup> Determining the nature of the contractual relationship between the physician and the patient is also important in order to determine what claims the patient can make. In this paper, we will briefly define the types of claims the patient can make, but we will focus on the physician's liability for damages.

A patient who wants to claim compensation from a physician needs to obtain an appropriate legal address. If the physician does not voluntarily fulfil an obligation, the patient has the right to demand the fulfilment of the obligation(s) in an enforcement procedure. In the event that the patient has a monetary claim against the physician and there is a risk that recovery will be prevented or considerably hindered due to certain circumstances, the patient has the right to apply to the court for a provisional measure to preserve the physician's funds.

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<sup>1</sup> Even if the physician performs work in a public institution, the relationship with the patient will be of a contractual nature. In this case, the patient will enter into a contract with a public institution (Debevec, 2019, p. 7).

<sup>2</sup> If the patient decides to be treated in a public institution, the same rules regarding the definition of a legal relationship will nonetheless apply. It should be pointed out that in the case of public treatment, it can be expected that there will be more cases of treatment of urgent medical conditions that are legally defined differently than the treatment of non-urgent conditions. Emergency medical procedures are characterised by the fact that the patient is not in a condition that would allow them to form their own will, which is why the physician's conduct is deemed emergency management without an order (Judgment of the Supreme Court of the Republic of Slovenia ref. No. II Ips 148/2017 of 25 October 2018, p. 30). There is also a difference in the fact that a physician in a public institution will always be in an employment relationship with a public institution. This means that on the basis of the first paragraph of Article 147 of the Obligations Code, the wrong done by a physician at work or in connection with work to a third party, is the responsibility of the public institution where the physician was working at the time the damage was caused. The patient is able to claim compensation directly from the physician if the physician caused it intentionally. However, the employer is able to claim compensation from the physician for the damage paid to the patient if it turns out that the physician caused the damage intentionally or through gross negligence.

<sup>3</sup> The application of the law is determined by an article 4(1b) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4. 7. 2008, p. 6–16). Unless the doctor and the patient agree otherwise, Slovenian law shall apply if the physician has a habitual residence in the Republic of Slovenia.

<sup>4</sup> National Gazette RS, no. 83/01, 28/06, 40/07, 97/07, 64/16.

## **2 The contractual nature of the patient-physician relationship**

### **2.1 Introduction**

The fundamental basis for the existence of rights and obligations in the patient-physician relationship is the contract on the provision of health services.<sup>5</sup> The patient's obligation is to pay for the services provided,<sup>6</sup> and the physician's obligation is to fulfil the agreed medical service.<sup>7</sup> The physician and the patient enter into a contract at the moment when the patient approaches the physician and the physician begins to perform activities that fall within the scope of their activity. The contract does not need to be in written form and can be concluded implicitly (Ovčak Kos, Božič Penko, 2017, p. 12).

Given the nature of the services that a physician commits to perform for a patient, a physician cannot guarantee success. Therefore, his or her obligation is usually exhausted by exercising due care. In other words, the physician cannot guarantee the patient that they will recover or that the patient's health condition will be flawless after the performed medical service. Nonetheless, the physician undertakes to achieve what is in the best interest of the patient.<sup>8</sup> The physician will not be held accountable to the patient if he or she does not succeed, but will be held accountable if he or she does not exercise due diligence.

The patient-physician relationship described in this way has the characteristics of a contract or mandate (Možina, 2016, p. 260). The fact that the success of treatment also depends significantly on the patient's personal circumstances and characteristics makes it difficult for the physician to commit to a particular outcome. Instead, the physician can only commit to strive to achieve a preferred result exercising due diligence. These factors also militate in favour of the view that such a relationship has the characteristics of a contract of mandate. Another characteristic of the

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<sup>5</sup> The physician and the patient will not enter into a contract on the provision of health services in the event that an emergency medical procedure is required and the patient is unable to form his or her own will (Novak, 2021, p. 29).

<sup>6</sup> In the case of the provision of health services outside the public health system, the patient will make the payment themselves or will make the payment through a health insurance scheme.

<sup>7</sup> Judgment of the Supreme Court of Republic of Slovenia, ref. no. II Ips 290/2017 of 17. 5. 2018, p. 15, ECLI:SI:VSRS:II.IPS.290.2017.

<sup>8</sup> For certain services, however, the physician will commit to achieving a certain result. Such services are, for example, cosmetic procedures, sterilisation, abortion, extraction or implantation of a tooth, etc. (Ovčak Kos & Božič Penko, 2017, p. 12).

patient-physician relationship is that there is a certain confidentiality and that, as a rule, a personal performance of the service applies.<sup>9</sup>

Slovenian case law and legal doctrine posits that the contract on the provision of health services has the nature of a service contract, whereby the physician commits to perform work with due care, which is required by the physician's profession, in order to achieve the patient's recovery. However, the physician is not responsible for the patient's health (Debevec, 2019, p. 9).<sup>10</sup> This means that the physician's obligation consists of a duty of reasonable effort, which is a key feature of a contract of mandate.

In accordance with Article 3 of the Obligations Code, the physician and the patient can expressly agree that the physician will also guarantee the success of the medical procedure, i.e. the patient's health. In this case, there can be no doubt that a service contract has been concluded between them (Možina, 2016, p. 260). However, in theory, there is a view that a contract between the physician and the patient should be considered as a separate contract, which should be regulated accordingly (Ovčak Kos & Božič Penko, 2017, p. 13).<sup>11</sup> Given that those contracts are very common (people conclude these contracts on a daily basis), and given the specific nature of the legal relationship, I agree with the view that these contracts should be properly regulated.

Regardless of whether the contract on the provision of health services constitutes a service or a mandate contract, the physician must fulfil a duty of disclosure in relation to the patient. By fulfilling the duty of disclosure, the physician ensures that the patient is aware of the type of procedure, the consequences of the procedure, etc. The Supreme Court of the Republic of Slovenia has defined how a physician must fulfil their duty of disclosure, namely:

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<sup>9</sup> Judgment of the Supreme Court of Republic of Slovenia, ref. no. II Ips 148/2017 of 25. 10. 2018, p. 30, ECLI:SI:VSRS:II.IPS.148.2017.

<sup>10</sup> Judgment and Order of the Supreme Court of Republic of Slovenia, ref. no. II Ips 94/2015 of 2. 7. 2015, point 13, ECLI:SI:VSRS:II.IPS.94.2015 and the judgment and decision of the Supreme Court of the Republic of Slovenia, ref. no. II Ips 342/2014 of 22. 1. 2015, p. 15, ECLI:SI:VSRS:II.IPS.342.2014.

<sup>11</sup> Judgment of the Supreme Court of Republic of Slovenia, ref. no. II Ips 148/2017 of 25. 10. 2018, p. 30, ECLI:SI:VSRS:II.IPS.148.2017.

- the scope and details of the disclosure must be inversely proportional to the urgency of the procedure,
- the warning must refer to common risks of the procedure, which means the typically and statistically more frequent risks,
- the warning must also cover the rare risks of the procedure if those risks could endanger the patient's life and health, and are comparable to or exceed the natural course of the treated disease and could affect the patient's consent.<sup>12</sup>

In summary, the fulfilment of the duty of disclosure includes the physician's explanation of the risk, the therapeutic explanation, and the explanation of the diagnosis.<sup>13</sup> If the physician correctly fulfils the duty of disclosure, this allows the patient to opt for a particular treatment and to be aware of the risks associated with that treatment. The physician must provide the patient with general information, realistically explaining both the severity and the basic characteristics of the procedure.<sup>14</sup> A patient can validly consent to treatment only if the doctor has fulfilled his or her explanatory duty (Ovčak Kos & Božič Penko, 2018, pp. 15-16). In other words, the fulfilment of the duty of disclosure ensures that the patient has sufficient grounds to decide on the preferred treatment and that the possible complications would not come as a surprise. However, it is not necessary for the physician to explain all the characteristics of the procedure to the patient, nor is it necessary for the physician to list all possible forms of risk and describe their details (Ovčak Kos & Božič Penko, 2018, p. 16).<sup>15</sup>

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<sup>12</sup> Judgment and Order of the Supreme Court of Republic of Slovenia, ref. no. II Ips 94/2015 of 2. 7. 2015, ECLI:SI:VSRS:II.IPS.94.2015.

<sup>13</sup> Order of Higher Court in Celje, ref. no. Cp 526/2018 of 10. 5. 2019, ECLI:SI:VSL:CP.526.2018.

<sup>14</sup> The court ruled that the physician fulfilled his duty of disclosure because he presented the patient with an optimistic and a pessimistic version, not guaranteeing the patient 100% success, but explaining to the patient that he would be able to see as well after the operation as he was able to with glasses before the operation. The court also ruled that it was sufficient for the physician to explain to the patient that the patient had a certain diagnosis or a condition, but he was not obliged to explain to the patient what this diagnosis covered in detail, as it could be expected that the patient as a layperson would not understand it (Order of Higher Court in Celje, ref. no. Cp 437/2018 of 23. 1. 2019, ECLI:SI:VSL:CP.437.2018).

<sup>15</sup> Order of Higher Court in Ljubljana, ref. no. I Cp 1161/2014 of 25. 11. 2014, p. 12. and 13, ECLI:SI:VSL:I.CP.1161.2014.

## 2.2 Rules on the contract of mandate

As we have already explained, a physician and a patient enter into a mandate contract if they agree that the physician does not guarantee the success of the procedure. With the mandate contract, the physician undertakes to perform a certain service or a procedure for the patient (Article 766 of the Obligations Code). The physician's obligation has the nature of a duty of reasonable effort, as the physician only undertakes to complete the service and strives to act in the best interest of the patient, while exercising due diligence (Plavšak, 2009, p. 190).

The patient's instructions form the basis for carrying out the service, which the physician must follow. The physician must remain within the confines of the service and pay attention to the patient's interests for guidance. However, the physician is not bound by the patient's instructions regarding the manner in which the service is performed. The criterion for assessing whether a physician has performed the service is whether his or her conduct met the standard of due diligence. If the mandate contract is remunerated, the physician must act according to the standards of professional care, which is assessed by asking what an average medical professional<sup>16</sup> would do under the same circumstances (Plavšak, 2009, pp. 191, 223). The physician also has a duty of disclosure to warn the patient of the circumstances that are important for the realisation of the patient's interests and of the circumstances that would make the execution of the order detrimental to the patient. The physician performs the duty of disclosure correctly if he or she has complied with the standards of professional care, and in the event of non-fulfilment of the duty of disclosure, the physician is liable for damages (Plavšak, 2009, pp. 227-229).

The physician is also liable for damages if he or she does not perform the service correctly. In this case, the patient can insist on the correct fulfilment of the service or withdraw from the contract and demand compensation for the damage. In the event that the physician is late in carrying out the service, the patient may claim compensation for the damage, if any. However, the patient may withdraw from the

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<sup>16</sup> The question arises as to whether the criterion of the average caring physician also applies to a physician who has above-average abilities in a certain field or has above-average knowledge. In legal theory, the view has emerged that such physician (i.e., a physician who exceeds mediocrity in a particular field) would be liable if he or she provided the patient with mediocre service. Either intentionally or because he or she wouldn't try hard enough, even though he or she could (Rijavec, 2017, p. 6).

contract under certain conditions if the physician fails to perform the service. In this case, the patient also has the right to claim damages (Plavšak, 2009, pp. 239-240).

### **2.3 Rules on the service contract**

If the physician and the patient explicitly agree that the physician is responsible for the success of the procedure, this means that they have entered into a service contract. With a service contract, the physician undertakes to perform a certain transaction (Article 619 of the Obligations Code).<sup>17</sup> The subject of a service contract is not only the physician's work, but also the end result, which means that the service contract is an obligation of result. The patient gives the physician instructions which define the scope of the transaction and the final result that they seek, as well as instructions on how to perform the service (Plavšak, 2009, pp. 726-728).

As with a mandate contract, the physician also has a duty of disclosure in relation to the patient under a service contract, which means that the physician must draw the patient's attention to the circumstances that are important for the realisation of the patient's best interest. For example, the patient's interest is to recover from an illness, elimination of a physical defect, etc. The impact that the disregard of the duty of disclosure would have depends on the individual patient, their interests and the consequences that may arise for the patient outside the physician's workplace. If the disregard of the duty to disclosure affected the incorrect nature of the work performed, this would represent the basis for the physician's liability for substantial errors, which means that the physician would be liable for the error even if the error does not originate from the physician's workplace (Plavšak, 2009, pp. 774-775). As part of the duty of disclosure, the physician must also warn the patient of all the circumstances that could affect the final result of the procedure, and explain to the patient how the circumstances could affect the patient's interests. However, the physician is obliged to draw attention only to those circumstances that they know, or should know, would affect the patient's interests had they acted with due diligence (Plavšak, 2009, p. 778).

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<sup>17</sup> The law broadly defines the type of transaction, namely physical or mental work, or the manufacture or repair of a thing.

After the physician has done the work, the patient must check that the procedure or the work has been performed. The patient must do this as soon as possible after the normal course of the procedure and they must also inform the physician immediately of any errors found. After the examination and end of the procedure, the physician is no longer responsible for the errors that the patient should notice during the routine examination. However, the physician is responsible for these errors if they knew about them and failed to inform the patient of them (the first and second paragraphs of Article 633 of the Obligations Code). If the patient later develops a defect that he or she could not detect during a routine examination, he or she must inform the physician of the defect as soon as possible or at the latest within one month of discovering it. In any case, after two years of having the procedure done, the patient can no longer refer to potential errors (Article 634 of the Obligations Code). The patient should also take into account that they must exercise their rights in court within one year of informing the physician of the errors. However, the physician cannot invoke the time limit on the patient's right to seek redress if the error relates to facts which were known to the physician or could not remain unknown, but the physician still did not inform the patient or the physician deceived the patient in order to prevent the patient's exercise of their rights in time (Article 636 of the Obligations Code).

A patient who has properly informed the physician of the defects may request the physician to rectify the defect within a specified reasonable time. In doing so, the patient is also entitled to compensation for the wrong caused to them. The physician may refuse to correct a defect if correcting the defect would require excessive costs. In this case, the patient has the right to request a reduction in payment for the service or may withdraw from the contract. However, the patient always has the right to seek compensation for damage (Article 637 of the Obligations Code). If the work is useless due to an error or the transaction is performed in violation of explicit contractual conditions, the patient does not have to request the elimination of the error, but can withdraw from the contract and demand compensation (Article 638 Obligations Code). However, if the transaction has a defect, due to which the work is not useless, or if the transaction is not performed contrary to explicit contractual conditions, the patient is obliged to allow the physician to eliminate (i.e., cure) the defect within a reasonable time. If the physician does not correct the error by the deadline, the patient has the options to get it corrected at the physician's expense, request a reduction in the payment or withdraw from the contract. In any case, the



patient also has the right to seek compensation for damage (Article 639 of the Obligations Code).

## **2.4 Liability for damages**

In this article we are analysing cases<sup>18</sup> where the physician violates the contractual relationship because they do not act in accordance with the standards of professional care, and the patient suffers injury.<sup>19</sup> Even if the physician performs the procedure in accordance with the standards of the medical profession or *lege artis*, they still may be liable for damages if they disregarded the duty of disclosure and the risk, which they should have warned the patient about.<sup>20</sup> While the physician may act professionally in a faultless manner, in the event of the disregard of the duty of disclosure, medical errors may occur as a result of the occurrence of consequences which the physician has not warned the patient about.

In the past, a physician's liability for damages was deemed to be a non-contractual liability, which was fault-based. The patient had to prove that the physician had acted unlawfully, that the patient had suffered injury and the causal link between the injury and the physician's unlawful conduct. The physician's blame was presumed and the physician could be exculpated if they proved that they acted with professional diligence. Recent case law has seen a shift in the direction of service liability,<sup>21</sup> as it is a breach of a contractual obligation (Ovčak Kos & Božič Penko, 2017, pp. 12-13).

A physician's liability for damages exists if certain preconditions are met, namely: (i) breach of a business obligation that shows signs of illegal conduct, (ii) cause of breach originates from the contracting party, (iii) damage, and (iv) causal link between damage and the breach. The breach of a business obligation must be asserted and proven by the patient, and the breach occurs if the physician has not successfully completed the transaction and could have performed the transaction successfully if they had acted with due diligence. The law presumes that the cause of

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<sup>18</sup> Otherwise, four types of harmful behaviour of physician are known in Slovenian legal theory. Those are: medical error, treatment without the patient's consent, breach of the obligation to provide emergency medical care and breach of the obligation to conclude a health service contract (Rijavec, 2017, p. 2).

<sup>19</sup> Medical malpractice liability.

<sup>20</sup> Liability for the disregard of duty of disclosure.

<sup>21</sup> Judgment and Order of the Supreme Court of Republic of Slovenia, ref. no. II Ips 342/2014 of 22. 1. 2015, p. 15, ECLI:SI:VSRS:II.IPS.342.2014.

the violation originates from the sphere of the physician, but the latter can prove that this is not the case. The damage encapsulates all the negative consequences caused by the breach of contract by the physician. The patient must also prove that there is a causal link between the physician's breach and the damage caused to the patient (Plavšak, 2009, p. 236-238). After reviewing the case law, it can also be concluded that there is a substantive difference between a medical malpractice and a medical error. A medical malpractice occurs when a deterioration in a patient's health is the result of a breach of due diligence. The medical error or complication occurs during the treatment, which was carried out professionally and with the utmost care. The occurrence of a medical error is rare, accidental, and despite predictability cannot be prevented (Strnad, 2002, p. 3). A physician is liable for damages stemming from medical malpractice but not from those stemming from a medical error. When judging if a particular phenomenon is a medical malpractice, the important criteria for determining the standards of due diligence are the rules of the profession, the rules of medical science, and customs. However, the capabilities of medical science and practice at the time of the procedure should also be considered.<sup>22</sup> Failure by a physician to exercise due diligence, according to the rules of medical science and profession, and customs, and assuming the physician does not prevent harm to the patient or causes the patient's health to deteriorate, is a medical malpractice.<sup>23</sup> The physician will not be held responsible for the deterioration of the patient's health as a result of the normal course of the disease and which could not have been prevented. The patient assumes the risk of accidental damage caused by such a deterioration in health.<sup>24</sup>

The question of whether there has been a medical error<sup>25</sup> or a medical or professional malpractice<sup>26</sup> is a legal question. The court decides on this issue, and in order to clarify the issue, and because the court lacks such expertise, it is necessary to appoint a forensic expert<sup>27</sup> who informs the court about the rules of the

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<sup>22</sup> Judgment of the Supreme Court of Republic of Slovenia, ref. no. II Ips 1145/2008 of 28. 1. 2010, p. 9.-10, ECLI:SI:VSRS:II.IPS.1145.2008.

<sup>23</sup> Judgment of the Higher Court in Ljubljana ref. no. II Cp 2586/2013 of 6. 5. 2014, ECLI:SI:VSL:II.CP.2586.2013.

<sup>24</sup> Judgment of the Supreme Court of Republic of Slovenia, ref. no. II Ips 334/2010 of 31. 5. 2012, ECLI:SI:VSRS:II.IPS.334.2010.

<sup>25</sup> A medical error occurs in the following cases: errors in the procedure or choice of treatment, errors in keeping medical records, errors in the organization of work and implementation of supervision and errors in the use of medical devices (Samec Berghaus & Felicijan Pristovšek, 2016, p. 112).

<sup>26</sup> Example of medical or professional malpractice is when a breakdown occurred despite due diligence, by a coincidence that did not exist can be prevented (Rijavec, 2017, p. 3).

<sup>27</sup> An expert is essential in the procedure for the liability of doctors (Rijavec, 2017, pp. 6-7). Due to the specifics of a concrete situation, it may happen that only one expert in Republic of Slovenia will be suitable for preparing a

profession and the valid medical doctrine.<sup>28</sup> The expert will need to determine: (i) how the physician or medical staff acted in the specific case, (ii) how a diligent professional would act in a given situation, and (iii) and make a assessment of whether the way the medical staff acted corresponds to the conduct of a particularly diligent professional or not.<sup>29</sup> Based on the expert's opinion, the court also assesses whether the physician acted unlawfully in relation to the patient.<sup>30</sup>

With regard to liability for damages, patient bears the burden of making a claim and the burden of proof on the evidence provided that justifies the adjudication of unlawful conduct and the causal link between the conduct and the damage caused. However, the patient is often unable to detect and collect all the necessary circumstances and evidence pertaining to their health condition and the performed procedures.<sup>31</sup> This is especially common in the case of procedures performed under sedation or general anaesthesia. On the other hand, the physician will have all the documentation on the procedure and they will know all the facts about the procedure, as they come from the physician's perceptual area. It is therefore necessary to proceed from reasonable requirements in such cases, which means that the burden of proof lies with the physician on the content of the legal standard of conscientious and medically correct treatment. If the physician does not prove this, they will not be relieved of the burden of proof (Ovčak Kos & Božič Penko, 2018, p. 17).<sup>32</sup> In addition to proof of due diligence, the physician must prove that there were circumstances which prevented the physician from fulfilling the contract properly because these circumstances arose after the conclusion of the contract and the physician could not prevent, eliminate or avoid them.<sup>33</sup>

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particular opinion. If the expert had been involved in a personal relationship with the physician against whom the procedure is being conducted, this may be the case for excluding the expert (if the allegation is concretized and supported by evidence). In this case the court will have to appoint an expert from abroad (Betteto, 1993, pp. 3-4).

<sup>28</sup> Judgment of the Higher Court in Ljubljana, ref. no. II Cp 2586/2013 of 6. 5. 2014, ECLI:SI:VSL:II:CP.2586.2013.

<sup>29</sup> Judgment of the Higher Court in Ljubljana, ref. no. I Cp 1277/2020 of 08. 12. 2020, p. 21, ECLI:SI:VSL:CP.1277.2020.

<sup>30</sup> As an example of unlawful conduct: The physician gives a patient a diagnosis and suggests urgent forced hospitalisation, while having no basis for this and without having examined the patient or verified the accuracy of the diagnosis. (Judgment of the Supreme Court of Republic of Slovenia, ref. no. II Ips 190/2016 of 25. 5. 2017, p. 13, ECLI:SI:VSRS:II:IPS.190.2016).

<sup>31</sup> This does not apply to breaches of the duty to explain, as the patient is considered to be able to detect a breach of this physician's duty (Ovčak Kos & Božič Penko, 2018, p. 20).

<sup>32</sup> Judgment of the Higher Court in Ljubljana ref. no. I Cp 1277/2020 of 8. 12. 2020, ECLI:SI:VSL:CP.1277.2020 and Judgment of the Supreme Court of Republic of Slovenia ref. no. II Ips 4/2014 of 10. 7. 2014, ECLI:SI:VSRS:2014:II:IPS.4.2014.

<sup>33</sup> Order of the Higher Court in Celje ref. no. Cp 526/2018 of 10. 5. 2019, ECLI:SI:VSL:CP.526.2018.

Regarding the violation of the duty of disclosure, the Supreme Court of the Republic of Slovenia<sup>34</sup> took the view that the fulfilment of the duty of disclosure constitutes the protection of the right to informed consent to a particular procedure in the context of the fulfilment of contractual obligations under a concluded contract. If the fulfilment of the duty of disclosure is not a condition for concluding a healthcare contract, the breach of this duty is assessed on the basis of service liability. Liability for breach of the duty of disclosure only exists if a risk has arisen that the patient's physician did not warn about, but should have. In other words: "liability for damages exists when legally recognised damage occurs as a result of the realisation of a risk that the physician should have alerted the patient to and did not".<sup>35</sup> In the event of a breach of the duty of disclosure, a causal link is established if there is a possibility that a properly fulfilled duty of disclosure could prevent a complication and damage; in other words, if the patient had the opportunity to judge whether to opt for a particular procedure or not. If the fulfilment of the duty of disclosure would not have changed the course of events, the consequences arising from a random complication during treatment would not be the responsibility of the physician.<sup>36</sup>

### **3 The patient's possibilities**

#### **3.1 Introduction**

If the court finds that the physician is liable for damages, the physician has to reimburse the patient or pay compensation. The physician can pay compensation voluntarily; otherwise, the patient needs to claim compensation in enforcement proceedings. If the physician avoids paying compensation or if the patient wants to preserve the physician's funds in advance, the patient can demand for provisional measures to be put in place to ensure that the physician's funds are frozen. The patient is in a similar situation when the patient has not yet filed a lawsuit against the physician for compensation or the court has not yet decided on their claim, and discovers that the physician wants to prevent the recovery of their claim by moving funds abroad.

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<sup>34</sup> Judgment and Order of the Supreme Court of Republic of Slovenia, ref. no. II Ips 94/2015 of 2. 7. 2015, p. 12. and 14, ECLI:SI:VSRS:II.IPS.94.2015.

<sup>35</sup> Judgment of the Higher Court in Ljubljana, ref. no. I Cp 2257/2017 of 23. 5. 2018, p. 19, ECLI:SI:VSL:I.CP.2257.2017.

<sup>36</sup> Judgment of the Higher Court in Ljubljana, ref. no. II Cp 1577/2018 of 7. 11. 2018, ECLI:SI:VSL:II.CP.1577.2018.

Under such circumstances, the patient has three options, namely: (i) they can obtain a provisional measure within a particular Member State, which is then recognised and enforced in the Member State in which the debtor has funds, (ii) they can obtain an order freezing bank accounts, or (iii) they can apply for a provisional measure directly in the country where the physician has funds.

The third option is not regulated by the European Union (EU) law and depends on the national law of the Member State in which the physician has funds. This option can be very beneficial for the patient, since they will achieve the freezing of assets directly on the basis of a court decision. However, this possibility also has obvious shortcomings, namely that the national laws of Member States differ considerably, and the patient may not know the national laws of individual Member States. The patient would have to obtain the assistance of a lawyer in another country or would have to know the national law, and such a procedure is already associated with certain additional costs due to linguistic differences.

### **3.2 Regulation (EU) NO 1215/2012**

The patient is able to propose the issuance of a provisional measure within a specific Member State.<sup>37</sup> Following the acquisition of a provisional measure, the patient has to obtain recognition and enforcement of that measure in the Member State in which the measure is supposed to take effect. The country in which the measure takes effect is the country in which the physician has the assets that the patient wants to seize. The scope of recognition and enforcement of provisional measures is regulated by the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation 1215/2012).<sup>38</sup>

For the purposes of recognition and enforcement of judgments, Article 2(a) of Regulation 1215/2012 stipulates that a judgment, under certain conditions, also covers provisional measures, including precautionary measures. Provisional measures are recognised and enforced if they are ordered by a court having

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<sup>37</sup> The conditions for granting a provisional measure depend on the national law of the Member State in which the patient applies for the issue of such a measure.

<sup>38</sup> OJ L 351, 20. 12. 2012.

jurisdiction by virtue of Regulation 1215/2012 and the defendant has been summoned before a court, unless the judgment containing the measure is served on the defendant prior to enforcement. In other words, under Regulation 1215/2012, only a provisional measure which the court has jurisdiction to rule on in the main proceedings in an adversary procedure is recognised and enforced. Thus, before applying for a provisional measure, the patient has to check which court has jurisdiction to decide the main proceedings.

While the condition of adversary proceedings is an absolute condition, the condition of the court's jurisdiction is relative. Namely, if the provisional measure has not been ordered by the court having jurisdiction in the main proceedings, such a provisional measure may be recognised and enforced abroad if there is a substantial link between the content of the proposed measure and the territorial jurisdiction of the Member State of the court (Ivanc & Kupec, 2021, p. 891).

A provisional measure that meets all the required conditions is recognised and enforceable in other Member States. No special procedure is required for recognition and enforcement (Articles 36 and 39 of Regulation 1215/2012). For the purposes of recognition and enforcement, the patient in the Member State of enforcement must present only the court decision, proof of service of the judgment and the certificate referred to in Article 53 of Regulation 1215/2012.<sup>39</sup> The certificate provided for in Article 53 of Regulation 1215/2012 confirms that the judgment is enforceable in the Member State of origin and that the court which issued it has jurisdiction to rule on the main proceedings (second paragraph of Article 42 of Regulation 1215/2012). The certificate is served on the debtor, or in this case on the physician, before the first enforcement measure, which means that the debtor becomes acquainted with the measure before its execution. This means that no surprise element is provided in this case and that the debtor is likely to have time to withdraw funds out of the creditor's reach. With regard to recognition and enforcement itself, it is important to note that the competent authority in the Member State addressed will review that the conditions for refusing recognition or enforcement of a judgment are met and may in certain exceptional cases refuse recognition or enforcement, but is under no circumstances allowed to review the substance of the judgment (Articles 45-51 of Regulation 1215/2012).

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<sup>39</sup> This is specified in more detail in Articles 37 and 42 of Regulation 1215/2012.

The provisional measure has the same effects in the Member State addressed as in the Member State of origin (Zilinsky, 2017, pp. 122–124).<sup>40</sup> If the judgment contains a measure or order which is unknown to the law of the Member State addressed, the measure or order shall, as far as possible, be adapted to the measure or order known to the Member State addressed. “The measure has to have equivalent effects and is aimed at meeting similar objectives and interests, but under no circumstances should it have effects that go beyond those known to the law of the Member State of origin”.<sup>41</sup> For example: if a measure in the Member State of origin provides for the possibility of repayment in addition to the freezing of financial assets, and the law of the Member State addressed does not allow for repayment under the measure, the latter will not be able to have those effects. Regulation 1215/2012 does not specify how the adjustment will be made and does not specify who will make the adjustment, but it follows from point 28 of the Preamble to Regulation 1215/2012 that this should be determined by each Member State (Requijo Isidro, 2014, p. 9). Adjusting the effects of a measure or order is a complex legal procedure that will require the authority making the adjustment to have an excellent knowledge of domestic and foreign measures or orders, and above all an excellent knowledge of their effects. Such a procedure can be time consuming, which also affects the position of the creditor or, in our case, the patient. At the same time, it introduces a certain unknown, as the creditor cannot know in advance with absolute certainty what effects their action will have. The only safeguard introduced by Regulation 1215/2012 to control the adjustment of effects is that it provides both parties to the proceedings with the right to challenge the adjustment of a measure or order, without specifying what that procedure should be by legal remedy (Kramer in (Dickinson, 2015, p. 974; Fitchen in Dickinson, 2015, p. 506). Regulation 1215/2012 does not stipulate that a creditor should post a security for the recognition or enforcement of a provisional measure,<sup>42</sup> but even stipulates that no security or deposit is required of a party because the party is a foreign national or does not have a permanent residence or does not reside in the Member State addressed (Article 56 of Regulation 1215/2012). If adjustment is not possible because no appropriate

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<sup>40</sup> Point 26 of the Preamble to Regulation 1215/2012.

<sup>41</sup> In theory, there is a view that an adjustment will be more appropriate in the case of a non-monetary order than in the case of money orders, as a money order is usually a retention of certain funds, while a non-monetary order may have various specifics unknown to all EU Member States' legal systems (Fitchen in Dickinson, 2015: 506); Kramer in Mankowski, 2016, p. 972). However, in my opinion, an adjustment will also be appropriate and common for money orders, as I explained above.

<sup>42</sup> The position of the security may already be determined by the law of the country of origin, which depends entirely on the national law of Member States.

measure is available in the Member State of recognition or enforcement, the court will have to refuse recognition or enforcement. Refusal of recognition or enforcement is an extreme measure when no appropriate measure is really available (Kramer in Mankowski, 2016, p. 972; Kupec, 2021, p. 48).

### 3.2 Regulation (EU) NO 655/2014

Another option for the patient<sup>43</sup> is to propose the issuance of a provisional measure or an order to preserve bank accounts ('order'). The order is available to the patient before the commencement of the main proceedings against the debtor, or at any stage of the proceedings until the issuance of a court decision or the conclusion of a court settlement. The order is also available to a patient who has already obtained a judgment, court settlement or authentic instrument ('enforceable title'), from which it follows that the physician must pay their claim (Article 5 of Regulation 655/2014). The order is not issued in adversary proceedings, as the court will not send a notification to the physician about the application for the order and the physician will not be heard before the order is issued (Article 11 of Regulation 655/2014). This means that an element of surprise is provided which prevents the debtor or, in this case, the physician from transferring the funds.

The conditions for issuing an order vary depending on whether the patient already has an enforceable title<sup>44</sup> or if it does not already have such a title. The patient, who already has an enforceable title, must provide sufficient evidence to suggest that the issuance of the order is necessary because there is a real risk that the subsequent execution of the claim will otherwise be hindered or considerably hampered. If the patient does not yet have a legal title, in addition to the urgency and the actual risk, the patient must also demonstrate that they are likely to succeed in the main proceedings of the claim against the debtor (Article 7 of Regulation 655/2014). Article 8 of Regulation 655/2014 describes in detail the content of the application for the issuance of an order, whereby the patient must also indicate in the application the bank account of the physician whose funds they wish to preserve. There is a high

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<sup>43</sup> Regulation 655/2014 applies to all civil and commercial matters and has therefore designated a creditor and a debtor as the parties to the proceedings. For the purposes of this article and to make it easier to follow, we named the parties a physician and a patient.

<sup>44</sup> In Case C - 555/18, KHK v BAC and EEK, Case C - 555/18, KHK v BAC and EEK, Judgment of the Court (Sixth Chamber) of 7 November 2019. ECLI:EU:C:2019:93, the Court of Justice of the European Union ruled that an authentic instrument is not sufficient for a lower burden of proof, but must also be enforceable. With this explanation, the court further aggravated or tightened the conditions for issuing an order.



probability that the patient will not have information about the physician's bank account, which means that the patient will not be able to provide this information in the application and consequently the court will not issue the order. For such cases, Article 14 of Regulation 655/2014 introduced a solution, as the patient may request the acquisition of bank account information. The patient must submit this request at the same time as the application for an order, and this request will only be available to patients who already have an enforceable title. In the request, the patient will have to justify why he or she has a reasonable belief that the physician has one or more accounts with a bank in a certain EU country (the first paragraph of Article 14 of Regulation 655/2014).<sup>45</sup> It follows from point 20 of the Preamble to Regulation 655/2014 that the request is only available to patients who have an enforceable legal title because it concerns the special nature of the intervention of public authorities and access to personal data. Exceptionally, the request should also be available to a patient whose authentic instrument is not yet enforceable if the amount to be frozen is significant and the court is convinced on the basis of the evidence provided that bank account information is urgently needed because there is a risk that without this information the subsequent execution of the claim would be jeopardised and the patient's financial situation would significantly deteriorate (point 20 of the Preamble to Regulation 655/2014). At the same time, the patient should not be informed of the bank account information obtained on request, as the protection of personal data must be ensured. This information could be provided to the court requesting it and, exceptionally, to the patient's bank if the bank or other entity responsible for executing the order cannot identify the bank account.

An important difference, whether the patient has an enforceable title or not, lies also in the requirement to provide security. If the patient does not yet have an enforceable title, they will have to provide security for the issuance of the warrant. Pursuant to Article 12 of Regulation 655/2014, the court will determine the security in the amount sufficient to prevent abuse of the procedure of issuing the order and to compensate for any damage that the physician would suffer due to the issued order if the patient were responsible for this damage. The Court has the discretion to exceptionally dispense with the requirement for the provision of security if it considers that such a requirement is inappropriate. Such circumstances could be if

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<sup>45</sup> Point 20 of the Preamble to Regulation 655/2014 provides, for example, that a physician is presumed to have a bank account in the Member State in which they work, pursue a professional activity or have property there (point 20 of the Preamble to Regulation 655/2014).

the patient has particularly strong arguments for issuing an order and does not have sufficient resources to provide security and their claim relates to maintenance or to the payment of wages or if the size of the claim is such that the debtor is unlikely to suffer any damage (point 18 of Regulation 655/2014). The court also has the discretion to require the provision of security even if the patient already has an enforceable title. The court shall determine the amount and form of the security in an amount and form acceptable under the law of the State in which the court is situated. It follows from point 18 of the Preamble to Regulation 655/2014 that the security may take the form of a security deposit or a bank guarantee or a mortgage. A guideline in determining the amount of the security may also be the amount in which the order is to be issued (Cuniberti, 2018, 156-157). Until the patient provides security, the court will not issue an order.

As a safeguard against abuse of the procedure or order, Article 13 of Regulation 655/2014 also stipulates the patient's liability for damages. The latter would be liable for the damage that the physician would suffer due to fault on the patient's part. Regulation 655/2014 sets out the cases in which the rebuttable presumption of patient guilt applies. Pursuant to point 19 of Regulation 655/2014, Member States may determine additional grounds for liability, among others, Member States may introduce other types of liability<sup>46</sup> (Cuniberti, 2018, p. 15). The law of the Member State of enforcement shall apply to the decision or assessment of liability for damages. If the order is carried out performed in more than one Member State, the law of the Member State in which the physician has habitual residence shall apply. If the physician is not habitually resident in any of the Member States of enforcement, the law of the Member State of enforcement with which the case has the closest connection shall apply, taking into account the size of the amount preserved in each Member State of enforcement.

An essential advantage of the procedure to issue an order is that no other procedure is required for the recognition and enforcement of the order; nor is a declaration of enforceability required. Another advantage is that the patient can anticipate the impact of the order, as the order works in all Member States by preserving funds in the debtor's bank account. Regarding the procedure for enforcement and implementation of the order, Regulation 655/2014 sets minimum standards, while

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<sup>46</sup> Strict liability.

the first paragraph of Article 25 of Regulation 655/2014 stipulates that the order is implemented in accordance with the implementing acts applicable to the implementation of equivalent national orders in the Member State of enforcement.<sup>47</sup> However, Regulation 655/2014 provides that only amounts for which it is so determined by the national law of the Member State of enforcement (Article 31 of Regulation 655/2014) are exempt from seizure. With regard to the ranking of the order, Article 32 of Regulation 655/2014 provides that the order is to be placed on the same rank level as an equivalent national order in the Member State of enforcement.

Importantly, the order only affects the funds held by the physician in the bank account at the time of enforcement of the order. If the physician does not have funds in the bank account, the order will not take effect. If the physician has funds that are lower than the amount on the order, the order will only affect those funds. In the event that the physician receives additional funds after the execution of the order, the order will have no effect on those funds (Cuniberti, 2018, p. 224).<sup>48</sup> In this case, the patient will be able to re-propose the issuance of an order,<sup>49</sup> but it can be expected that the physician will redirect the cash flow to another bank account that is not known to the patient.

### 3.2 Brief comparison

Common aspects of the procedures under Regulation 1215/2012 and Regulation 655/2014 are that they each allow the free movement of provisional measures by which the creditor can obtain a temporary settlement of a certain legal or factual situation. While Regulation 1215/2012 allows the free movement of provisional

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<sup>47</sup> Equivalent national orders are orders *in personam*, which would be an interim order in the Republic of Slovenia.

<sup>48</sup> This provision is likely to be amended, as under Article 53 (1) of Regulation 655/2014, the Commission must submit a report to the European Parliament, the Council and the European Economic and Social Committee by 18 January 2022, assessing whether the amounts credited to the debtor's account after the execution of the order may be preserved on the basis of the order.

<sup>49</sup> In this case, the patient will have to make the declaration referred to in Article 16 of Regulation 655/2014, which means that in the application for an order they will have to declare whether they have already obtained such an order and the scope of the order (second paragraph of Article 8 of Regulation 655/2014). In the case of a meaningful application of Article 16 of Regulation 655/2014, the court will consider whether it is still appropriate to issue the order in full or in part.

measures regardless of their content,<sup>50</sup> Regulation 655/2014 allows for the free movement of a provisional measure intended solely to freeze bank accounts.

In my opinion, the patient will have to consider several circumstances before deciding on the optimal procedure for issuing a provisional measure. If the patient wants to achieve the element of surprise or prevent the physician from being able to transfer their property out of reach before the measure is implemented, a provisional measure in the form of an order from Regulation 655/2014 will be the most appropriate. Also, effects of an order from Regulation 655/2014 will always be the same. However, this procedure will be most appropriate for a patient who already has an enforceable title, as they will only have to demonstrate urgency and real risk. In this case, the patient will still be at risk of being ordered to provide security by the court, but this risk is lower than for a patient who does not yet have an enforceable title, as this patient will have to post security in any case. For a patient who does not yet have an enforceable title, an order will only be considered if he or she has information about the physician's bank account.

I believe that the patient's decision will also be influenced by the effects of the order or provisional measure. The essential difference between the effects is that the effects of an order will always be the same; however, the effects of a judgment issued or executed under the provisions of Regulation 1215/2012 will not necessarily always be the same. The effects of a judgment may largely depend on the Member State in which the judgment is to be recognized or enforced. Due to the adjustment or change of effects, the court decision itself will no longer have exactly the same effects as the creditor expected. It is also likely that the judgment will have not only different effects but also less effect than expected. The recognition or enforcement process itself will take longer and there is still a theoretical possibility of refusing recognition or enforcement if the law of the requested Member State does not recognize such a measure or order (Kupec, 2021, p. 138).

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<sup>50</sup> The creditor could also obtain a provisional measure to prevent the debtor from disposing of other types of property, such as movable and immovable property.

### **3 Conclusion**

In view of all the above, my view is that a patient who would like to preserve the physician's funds faces substantial obstacles. The question of liability for damages depends on the law that will apply to a particular legal relationship. If Slovenian law were applied, the physician would be liable for damages if they made a professional or medical malpractice that would cause a wrong to the patient. The physician could also be liable for damages if they breached the duty of disclosure and the patient would suffer injury because of a risk that the physician did not warn the patient about. The patient will have the burden of making a claim and satisfying the burden of proof, but they will have an easier task, as the physician bears the burden of proving the content of the legal standard of conscientious and medically appropriate treatment.

If the physician has funds in bank accounts abroad and does not want to reimburse the patient, the patient will be able to seize these assets. EU law provides the patient with the legal avenues to obtain the preservation of the physician's funds for the duration of the litigation in which the patient seeks compensation, as well as for the duration of debt recovery. In particular, EU law allows for the recognition and enforcement of provisional measures, which enables the free movement of provisional measures so that they can take effect in other EU Member States. At the same time, EU law allows the patient to obtain an order that is freely transferable across the EU and can preserve the physician's funds.

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