

Work accident compensation in Hungarian labour law – liability rules and compensation

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Introduction

The legislative framework for compensating work injuries varies tremendously from country to country. However, it is a general feature of various national systems that they represent a complex field of jurisprudence, possibly including, among others, labour law, tort law (civil law), social security law, administrative law, health and safety. It is generally accepted that the ultimate and common goal of all related legal rules should be to bring about safer workplaces and to enhance the broad idea of the ‘healthy workplace’.

There is widespread consensus among leading global and regional agencies, including the World Health Organization (WHO), the International Labour Organization (ILO) and also the European union (EU) that the health, safety and well-being of workers is of top importance. It is crucial not only to workers and their families, but also to the productivity, competitiveness and sustainability of enterprises/ organizations, and thus to the national economy of countries and, at the end of the day, to the global economy. In other words: the vast economic cost of workplace injuries can hamper economic growth and competitiveness.

A recent WHO-report stresses the significance of workplace-related health issues as follows:

“The ILO estimates that two million women and men die each year as a result of occupational accidents and work-related illnesses. WHO estimates that 160 million new cases of work-related illnesses occur every year, and stipulates that workplace

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conditions account for over a third of back pain, 16% of hearing loss, nearly 10% of lung cancer; and that 8% of the burden of depression can be attributed to workplace risk. Every three-and-a-half minutes, somebody in the European Union (EU) dies from work-related causes. This means almost 167,000 deaths a year in Europe alone, as a result of either work-related accidents (7,500) or occupational diseases (159,500). Every four and- a-half seconds, a worker in the EU is involved in an accident that forces him/her to stay at home for at least three working days. The number of accidents at work causing three or more days of absence is huge, with over 7 million every year.”²

The WHO drafted a global definition of a healthy workplace. According to this definition, “a healthy workplace is one in which workers and managers collaborate to use a continual improvement process to protect and promote the health, safety and well-being of all workers and the sustainability of the workplace by considering the following, based on identified needs:

- health and safety concerns in the physical work environment;
- health, safety and well-being concerns in the psychosocial work environment including organization of work and workplace culture;
- personal health resources in the workplace; and
- ways of participating in the community to improve the health of workers, their families and other members of the community.”³

This definition, and the overall concept of occupational health and safety is intended principally to focus on prevention, as the prevention of workplace-related injuries or illnesses is of utmost importance. In line with this concept, incentivisation of prevention is a central idea behind various workers’ compensation and employers’ liability systems. In other words, legal rules and systems of compensation must be designed in a way to have meaningful behavioural consequences by enhancing the prevention of workplace injuries and diseases. Legal rules must provide incentives for employers to minimise the risk of occupational accidents and diseases.

² WHO *Healthy Workplace Framework and Model: Background and Supporting Literature and Practices*, Joan Burton (ed.), February 2010, WHO Headquarters, Geneva, Switzerland, p. 7.

³ WHO *Healthy Workplace Framework and Model: Background and Supporting Literature and Practices*, p. 16.

Workers' compensation and employers' liability in context

One of the most crucial questions in the design of national work injury compensation systems is the relationships between tort-based compensation (employers' liability under civil and / or labour law – the 'private track') and non-tort compensation (workers' compensation, mostly under social security law – the 'public track'). The two systems can function either exclusively or in 'tandem' (in mutual combination). Virtually in all countries exists some kind of workers' compensation scheme (and social benefits). On the other hand, the scope of employees' additional right to sue under civil (or labour) court systems varies to a great extent from country to country (and the limited, marginal role for employers' tort-based liability is not at all an exception⁴). In principle, both systems should strive to motivate the preventive attitude of employers, but each system might contain different tools for enhancing prevention, as we shall see later.

Employers' liability is generally based on the fact that employees are obliged to obey their employers and employers have almost full control over matters of safety. As a consequence, employers' liability takes the concept of business / professional risk ('Betriebsrisiko', 'risque professionnel') as a starting point, and liability is usually strict, objective.⁵ In employers' liability schemes employees must turn to courts for remedy, and employers can rely on specific grounds for exemption and defence (the grounds for exemption and the burden of proof vary from country to country; we will present the Hungarian system later).

Employers' liability schemes can always be supplemented by voluntary liability insurance programs (purchased from the private insurance market) on the side of employers. Liability insurance programs can protect both parties: employers are protected from unpredictable court-rulings, while employees are protected from employers' insolvency.

Workers' compensation for damage from occupational accidents and occupational diseases is a specific form of social security which has its legal foundation in international standards

⁴ For example, many European countries have come close to the 'pure compensation model', such as Germany, France, Austria etc. In these countries employers' liability represents minimal weight; the main source of compensation is the insurance scheme. In other countries, employers' liability is more commonly used (e.g. UK, Spain, Italy etc.).

⁵ Cf. Deli Petra: A dolgozó munkáltatóval szemben fennálló anyagi felelősségének egyes anyagi jogi kérdései a szocialista munkajogban kitekintéssel a Német Demokratikus Köztársaság szabályozására, *Pécsi Munkajogi Közlemények* IV. évf. II. szám, 2011. szept. p. 52.; Mattéi, Bruno: Fogadjuk el természetesként a munkahelyi baleseteket-avagy a szakmai kockázat fogalmának feltalálása, *Esély* 1997/5.

(most importantly, ILO Convention 121⁶) and, in most countries, is included in national social security systems (in the form of government-mandated compensation funds and / or insurance systems).⁷ The funding source of such schemes is virtually exclusively employers. In all countries the amounts paid out from compensation systems are standardised, and hence limited. Thus, normally there can be some parallel and supplementary role for employers' civil law-based liability (e.g. non-economic losses are usually not compensated by social security⁸). Workers' compensation systems are usually 'no-fault'-based. However, according to Walters, a trend is obvious in several countries⁹: some reorientation of national 'no fault' compensation systems towards a closer fit with civil law models. As he observes, 'perceived inadequacies in levels of compensation available through social insurance combined with perceptions of injustice over employer immunity from redress under the civil law have led to these changes'.¹⁰ Funding problems might also contribute to such tendencies. Many countries have mixtures of state and private insurance systems (however, as LaDou points out, among the EU countries, 19 have monopoly systems).¹¹ In most countries work accident insurance is a separate component of the social security system, but in some countries integration is absolute within the overall social security system (like in Hungary). Nearly all systems make a distinction between the social security treatment of occupational and non-occupational injuries (and occupational injuries traditionally enjoy a preferential status). Some workers' compensation systems make it possible to hold employers accountable with sanctions (such as counterclaims by the insurer) for violating safety rules.

Analyzing the prevention-oriented elements in the two distinct (but usually parallel) systems, the following concerns are to be taken into account. As far as employers' liability is concerned, it is often suggested that full and objective liability (the so-called 'no fault' model) is not really able to motivate prevention, as it fails to differentiate between negligent and non-negligent employers. However, according to another argument, objective (or no-fault) liability

⁶ Convention concerning Benefits in the Case of Employment Injury (Entry into force: 28 Jul 1967), Adoption: Geneva, 48th ILC session (08 Jul 1964). At present, only 24 of 183 member countries have ratified the treaty, including only about half of the European countries. Hungary hasn't ratified it.

⁷ The 'Bismarckian' German workers' compensation system of 1884 is a landmark model of workers' compensation through social insurance. As LaDou notes, most industrialized nations now have national workers' compensation programs based on the German model. LaDou, Joseph: The European influence on workers' compensation reform in the United States, *Environmental Health* 2011, 10:103, <http://www.ehjournal.net/content/10/1/103> (Last visited: 11. 10. 2013.), p. 1.

⁸ However, the system of Switzerland is an exception.

⁹ In the UK, for instance.

¹⁰ Walters, David: *An International Comparison of Occupational Disease and Injury Compensation Schemes*. A Research Report prepared for the Industrial Injuries Advisory Council (IIAC), March 2007, Cardiff Work Environment Research Centre, Cardiff University, p. 37.

¹¹ LaDou, Joseph *op. cit.*, p. 4.

can and must have a strong deterrent and retentive effect which is able to induce prevention.¹² In the Law and Economics perspective¹³ employer's liability will have the greatest prevention results because the 'polluter pays for the pollution' and this should stimulate maximal carefulness.

As regards workers' compensation systems based on insurances, prevention can be steered by various implied incentive mechanisms. National systems vary significantly with respect to how they finance workers' compensation systems, but, in principle, all systems are trying to promote workplace safety somehow. For instance, employers' contributions can be linked to the incidence of injury within the firm, or contributions can be differentiated along the degree of risk of the given business activity. All in all, various adjustments are usually trying to reflect individual employer risk and safety efforts. In theory, this should push employers to focus more on safety. However, in some countries (including Hungary) a flat-rate contribution is applied to all enterprises whatever the activity and its risks. Furthermore, Philipsen states that giving a system the responsibility for both compensation and prevention (as it is the case in Germany) may have a beneficial effect on the accident rate.¹⁴

In contrast with the general assumptions about the possible preventive effects of workers' compensation systems, it is remarkable that some recent research results reveal disappointing conclusions. For instance, Eshuis states – in the research project “Worker's compensation and prevention under construction” – that there is only limited empirical evidence for the relationship between workers' compensation and prevention. Furthermore, that evidence is not at all in the same direction. According to this research, in general, compensation systems hardly affect the working conditions (even if there are significant differences between systems). In other words: there are no indications of a direct causal link between the number of available (financial) prevention instruments and preventive changes within the organization.¹⁵ Quite similarly, Klein and Krohm state that there is no widely accepted “perfect system” of workers' compensation that maximizes all of the desirable objectives

¹² For instance, this concern was the main underlying official idea behind the former Hungarian Labour Code's (1992) fully objective employers' liability rule.

¹³ Cf. Bouckaert, B. and G. De Geest (eds.): *Encyclopedia of Law and Economics*, Cheltenham, Edward Elgar, 2000; Faure, M.: Compensation for occupational diseases and the importance of prevention: A law and economics perspective. *European Journal of Social Security*, 2007, 9(2), 127–168.

¹⁴ Philipsen, N. J.: Compensation for industrial accidents and incentives for prevention: a theoretical and empirical perspective, *Eur J Law Econ* (2009) 28:163–183.

¹⁵ Eshuis, W.A.: *Workers' compensation and prevention within organizations*, Conference Paper, 10th European Conference of the International Labour and Employment Relations Association (ILERA), 20-22 June 2013, Amsterdam.

(among which better incentive for safety is of primary importance).¹⁶ LaDou observes that the ‘weak point of most of the compensation systems is, however, a lack of simple correlation between preventive activities and financial benefits.’¹⁷ Philipsen also remarks that it is impossible to state to what extent the different compensation systems have had an influence on the prevention of accident and one could even argue that this influence is limited.¹⁸ Eshuis suggests a conceptual change: we must say goodbye to the idea that financial incentives or objective knowledge can lead to the desired prevention. He proposes new paradigms which can really influence the organizations’ attitude (responsiveness and communicative relationships). His two new prevention paradigms are the intervention paradigm and the pragmatic prevention paradigm. The intervention paradigm intends to go ‘behind the front door’ of organizations by, for example, dialogue, interfering care, formal urge etc. The pragmatic prevention paradigm builds on shared learning, practice based knowledge, involvement of all related stakeholders etc.¹⁹

The generally perceived advantages of worker’ compensation systems are – among others – their automatic, speedy, transparent and fair results in recompensing victims of occupational injuries and diseases. Workers’ compensation schemes are generally considered to reduce adversarial approaches to claims and to have positive impact on industrial relations. On the other hand, there are some standard arguments against workers’ compensation systems. For instance, it is often noted that insurance-based worker’ compensation systems offer the employers the chance to shift off the risk of liability to the (insurance) collective. The preventive effect of insurance can only be enhanced, at least to some extent, by introducing financial, economic incentives into the system as described above (risk-based differentiation, ‘experience and/or merit rating’, bonus-malus and various rewards for preventive performance etc.). Furthermore, workers’ compensation system increases the regular financial burdens of employers (by the obligation to pay regular contributions).

The generally perceived advantages of employers’ liability systems are as follows. In principle, they can differentiate between negligent and non-negligent employers, so they can motivate prevention. Furthermore, such a tort-based scheme can assure full compensation (in case of successful justification) covering both economic and non-economic losses. However,

¹⁶ Klein, Robert W. and Krohm, Gregory: *Alternative Approaches to Funding Workers’ Compensation*, June 2006, Working Paper 06-3, Center for Risk Management and Insurance Research, Georgia State University, Atlanta, p. 21.

¹⁷ LaDou, Joseph *op. cit.*, p. 4.

¹⁸ Philipsen, N. J. *op. cit.*, p. 181.

¹⁹ Eshuis, W.A. *op. cit.*, p. 13-14.

court procedures of employers' liability can be costly, time-consuming and their outcome is rather vague. For employers, they can represent incalculable risks.

From a historical perspective, Parsons makes a differentiation among three phases in the development of compensations systems. However, as he notes, one phase or another has been omitted in some countries and there are many variations in matters of detail. The three phases identified by Parsons are as follows²⁰:

- (1) A "common law" period (or civil law period), when work injury compensation was governed by the ordinary principles of tort law / civil law.
- (2) A period of employers' liability law, when more specific tort-based rules have been developed in order to impose specifically strict liability upon the employer.
- (3) A period of workers' compensation law, either in addition to or in substitution for employers' liability law. In this context, workers' compensation law usually takes the form of some kind of (social) insurance law.

In Hungary, as we will see below in more details, the former Labour Code contained a specific (strict, objective) formula for employers' liability. The new Labour Code takes a step back towards the ordinary principles of civil law and while formally maintains the strict formula, it broadens the possibility of employers' exemption from liability, so, all in all, it reduces the risk of employers to some extent. As we will also see below, Parsons' third phase (workers' compensation) is still underdeveloped in Hungary, since currently there is no specific, independent insurance scheme against accidents at work and occupational diseases. These risks are covered by the general insurance systems for sickness, invalidity and survivors. Thus, occupational injury benefits are funded and administered by the pension and health insurance funds. These are compulsory insurance systems for the active population and some other groups financed by contributions and taxes, and providing benefits in kind and earnings-related cash benefits.²¹ As a consequence, the state has not established any real insurance-related incentives for prevention in occupational safety and health in Hungary. However, it must be mentioned that a planned separate workers' compensation insurance branch has been discussed in Hungary for a long time on the policy agenda level (including an incentive-based bonus-malus mechanism).

²⁰ Parsons, Chris: Liability Rules, Compensation Systems and Safety at Work in Europe, *The Geneva Papers on Risk and Insurance* Vol. 27. No. 3 (July 2002) 358 – 382, p. 60.

²¹ The EU's Mutual Information System on Social Protection (MISSOC). <http://www.missoc.org/MISSOC/INFORMATIONBASE/COMPARATIVETABLES/MISSOCDATABASE/comparativeTableSearch.jsp> (Last visited: 30. 10. 2013)

Changing rules of employers' liability in Hungarian labour law

In Hungary, victims of workplace injury can only get some basic compensation via social security and they need to resort to private law (labour law) for supplementary compensation. Articles 174–187 of *the former Labour Code (Act XXII of 1992)* contained the rules of employers' liability. The main rules are presented below.²²

According to these former rules, the employer shall bear full liability, irrespective of intention or neglect, for damage caused to the employee within the scope of his/her employment. The employer is exempted from liability if he/she proves that the damage was brought about by an unavoidable cause outside his/her field of operations or exclusively by the behaviour of the aggrieved party where such behaviour is unavoidable.²³ The employer's field of operations includes causes arising from behaviour connected with activities pursued by the employer in the course of his/her duties and from the quality, condition, movement and operation of the materials, equipment and energy that are used. The employee shall prove that there is a causal link between the damage incurred and his employment. That part of the damage caused by the employee's culpable behaviour shall not be compensated.

The employer is obliged to compensate for all damages caused to the worker. The following are included here: lost earnings, loss of goods, any expenses in connection with the damage, non-material damages. The employer shall also compensate the employee's close relatives for their damages and justified expenses arising in connection with the damages caused. If the employee dies as a result of injuries sustained or disease inflicted, his/her dependent relatives may, in addition to the above, claim compensation to substitute for the provision of a sum that ensures the meeting of his/her needs, at the level maintained prior to the grievance it is necessary to be taking into account his/her actual or expected wage and income.

²² For further details, see: Hajdú József: *Labour Law in Hungary*, Kluwer Law International, 2011. Part I. Chapter 8.

²³ Attention must be drawn to the view represented by the Labour Department of the Supreme Court according to which, in judging whether or not damage was caused by an act of a worker, the unfavourable effects and special conditions of the work must be taken into consideration. Even if an accident was the result of inattention, carelessness, neglecting technological and safety regulations on the part of the worker, this does not necessarily mean that these were the only causes; while performing his/her duties a worker is influenced by many other factors connected with the activity of the employer which may result in inattention. Similarly, if the employer knows of violations of regulations, the worker alone cannot be blamed for the accident. It must also be considered whether an indisposition or sickness of a worker are linked with the particular working conditions or with any kind of excess strain (e.g. too much overtime).

If the extent of the damage or a part of it cannot be precisely calculated, the employer shall pay a sum in general compensation, which would appropriately and fully compensate the aggrieved financially. General compensation may also be established in the form of an allowance.

A conceptual change in the system of employer's liability for damages is reflected in the new *Labour Code (Act I of 2012)*: while maintaining the employer's strict, objective liability (which is not conditional upon culpability), the new Code excludes in some instances compensation against employee losses caused for reasons emerging beyond the so-called scope of supervision and thereby limits the overly broad interpretation of the employer's scope of operation that had lately developed in the judicial practice. All in all, the new regulation of the employers' liability for damages has changed to reduce the risk of employers to some extent.

Pursuant to Article 166 of the new Code the employer shall provide compensation for any loss caused to its employee in connection with his employment. The employer shall be exempt from liability if it proves that the damage was caused by an external circumstance beyond its control which the employer did not have to reckon with and in the case of which the employer was not expected to avoid the emergence of the circumstance giving rise thereto or to eliminate the same. The employer shall also be relieved from liability if able to prove that the damage was caused solely by the unavoidable conduct of the employee. These two grounds for defence – especially the first, modified one – offer relatively good chance for the employer to defeat the claims of injured workers.

The respective rules of the former Labour Code for exemption were much stricter for the employers, using the term of the employers' field of operation instead of the new term (field of control). As we have already seen, the former wording was as follows (Section 174 of the previous Labour Code of 1992): an employer shall be relieved from liability if able to prove that the damage was caused by an unavoidable event outside his field of operations or solely by the unavoidable conduct of the aggrieved party. The legal practice (based on an extremely broad interpretation of "operation") established the employer's liability for damages even in cases where the employer could not have even indirect influence on the damage done and by doing so, irrespective of the nature of the employer's activity, it made the liability for hazardous operations contained in civil law general with respect to the employer's liability for damages. On the whole, the new Code replaces the concept of "operation" with "control". The expressed and obvious aim of the modification is to narrow down the extremely broad scope

of employer's liability for damages, which has emerged in the jurisprudence of courts. The danger of this change is indirect and comes from an economic argument: as the danger of accountability decreases, employers will have less incentives to avoid harms (and to take a proactive attitude).

As we can see, the employer cannot be exempted from liability for damages concerning damage done under his control. All those circumstances of the operation (tools, energy, employees) which can be effectively influenced by the employer in the course of his activity shall be regarded as normally being under his control. As regards liability for damages in case of damages caused by external circumstances beyond the employer's control, the employer can be exempted if two cumulative conditions are met. He can be exempted only if damage was done by a circumstance the emergence of which he could not have expected (lack of 'foreseeability'), and the employer was not expected to eliminate that circumstance.

It is remarkable that the above described new rules for employers' exemption (Art. 166. of the Labour Code) are 'transplanted' – almost word by word – from the new Civil Code of Hungary (Act V of 2013). More concretely, the civil law rules of contractual liability (Article 6:142 of the Civil Code) are used as a model for employers' liability. This concept is problematic by nature as damages of workers (such as occupational accidents and diseases) are not at all of a typical contractual nature. All in all the new rules of employers' liability have become more civil law-like. In our opinion, this civil law-character regulation of employers' liability could only be sustained if it would be based on and connected with an independent, automatic, prevention-oriented workers' compensation scheme in social security, as it has been proposed many times before (see below).

Pursuant to Article 167, the employer shall compensate the employee for the totality of his loss. No compensation shall be provided against damage, in connection with which the employer proves that its emergence was not foreseeable at the time it was caused ('foreseeability clause'). Also, no compensation shall be provided against the part of the damage which was caused through the employee's culpable conduct or which arose from the fact that the employee failed to meet his obligation of damage alleviation (splitting up of the compensation on the basis of contributory negligence).

The above mentioned new, so-called 'foreseeability clause' is also controversial and debatable, since it has the potential to further limit employers' liability (especially in cases of occupational diseases and commuting / work-related traffic accidents). Foreseeability

describes what one can see or know beforehand. The doctrine serves to limit damages to the average level. As the General Reasoning of the new Labour Code states, the provision of foreseeability enforced in respect of liability for damages encourages the parties to provide extensive notification as this may, in the given circumstances, give rise to the other party's liability. Thus, in principle, this rule should motivate employees for more careful behaviour and to ex ante notify employers about all extraordinary circumstances. On the other hand, the foreseeability clause is an additional possibility for partial exemption for employers. This, in turn, in the long run, might reduce employers' incentives for meaningful prevention and might lead to more careless behaviour by employers. In general, the employer will have little incentive to improve safety and prevention, if (full or partial) exemption from liability is rather simple. Nevertheless, it is presumed that in legal practice the foreseeability clause will not limit the scope of employers' liability to a great extent. This can be partly explained by the so-called eggshell skull rule (or thin skull rule) which is a well established legal doctrine. This rule holds one liable for all consequences resulting from his or her tortious activities leading to an injury to another person, even if the victim suffers an unforeseeable and uncommon damage (e.g. due to a pre-existing peculiar vulnerability or medical condition). It means that as long as the injury itself is foreseeable, the employer can be liable for all the related harm (without analysing foreseeability).²⁴ It is also established in legal practice that in case of personal injuries, only the type (category) of harms need to be foreseen, not the concrete extent of damages.

The court, under special and equitable circumstances, may grant partial exemption from liability to the employer held liable for damages, upon weighing the financial standing of the parties, the gravity of the infringement and the consequences of providing compensation.

Concerning the detailed rules pertaining to the calculation of compensation to be paid for the employee, the new Code did not intend to considerably change the rules contained in the previous Labour Code and the court jurisprudence based on them.

The 'background' law of the rules pertaining to the employer's liability for damages is the civil law and its rules relating to compensation for damages caused outside contract. It means that in matters not regulated by the Labour Code, the rules of civil law shall be applicable.

²⁴ See for more details: Ben-Shahar, Omri: Causation and Forseeability, In: Bouckaert, Boudewijn and De Geest, Gerrit (eds.), *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*, Cheltenham, Edward Elgar, 2000.

Concerning the employer's liability for damages, the Code maintains an exceptional solution according to which a collective agreement may only depart from the provisions in the employee's favour. As such, the rules of employers' liability are an exception to the principle of general (absolute) disposition in the collective agreement.

International responses

The International Labour Office (ILO) issued a Technical Memorandum on the draft Labour Code of Hungary on 9 November 2011. The Office examined the draft Labour Code in light of both international labour standards and comparative labour law and practice at the request of the six Hungarian trade union confederations (ASZSZ, ÉSZT, LIGA, MSZOSZ, MOSZ and SZEF).²⁵ The ILO comments were prepared with a view to providing support to the social dialogue process. The ILO Memorandum mainly provides comments on those provisions for which the Office recommends changes to ensure their full compliance with ratified international labour Conventions. In making these comments, the Office referred to the authoritative jurisprudence of the ILO Supervisory bodies (Committee of Experts on the Application of Conventions and Recommendations and of the ILO Committee on Freedom of Association) which examines how ILO Member States are applying in law and practice ratified International Labour Conventions.²⁶

As regards employers' liability, the ILO recommended maintaining the wording of the old Labour Code in this respect since ILO standards do not recognise such elements of 'force majeure' as an acceptable ground for refusing employment injury compensation: 'With the exception of some limitative enumerated cases, ILO instruments aim at ensuring that employment injuries should be compensated with no fault imputed to either side, and compensation shall be provided without any question being raised as to whether the injury was attributable to fault on the part of the employer, the employee or any third party.'

The ILO also stressed the need for 'greater clarity as to how labour law inter-relates with social security law', while underlying that 'employers' liability should normally come as a

²⁵ The ILO comments are provided on the basis of an English translation prepared by the Office of the draft labour code dated 26 September 2011.

²⁶ http://www.ilo.org/budapest/information-resources/press-releases/WCMS_168516/lang--en/index.htm (Last visited: 01. 11. 2013.)

complementary element of protection in case of occupational injury granted in addition to social security compensation'.²⁷

In general, it must be emphasized that there is no universally applicable, decisive model of an ideal work injury compensation system (there is no such standard either on the international – ILO –, or on the EU-level, and no harmonization is on the agenda). This can be explained by the diversity of national systems, their deep embeddedness into national social protection systems and the complications stemming from the combination of various related legal fields (such as labour law, social security law, civil law, health and safety law etc.).

Regulatory ideas and proposals

In Hungary, those who suffered work accidents can be treated in accordance with the health insurance and pension insurance regulation as the social security treatment of these people is not independently organized. However, in several countries the work accident insurance is organized as an independent, distinct branch of insurance. As Klein and Krohm notes, probably this distinct system is the most widespread model globally. Furthermore, it is a noteworthy fact that mostly less developed countries integrate fully their social insurance schemes, because imposing an independent and complex funding scheme for occupational risks requires sophisticated rating systems, professional administrative resources, in-depth research on workplace risks and audited, detailed records of employers. In their opinion, as an economy develops, the establishment of a separate system of workers' compensation becomes more likely. As the economy grows, the system can become more complex and sophisticated.²⁸ There have been several proposals to introduce the distinct, independent model into the Hungarian system, but, so far, such proposals haven't produced success. The 'evergreen' counter-argument is that the costs of such a system could be unaffordable for employers.²⁹

More concretely, the minister for social and family affairs submitted a joint proposal with the minister for health care to the Government in March 2000 suggesting a revision of the act on

²⁷ Memorandum of Technical Comments on the Draft Labour Code of Hungary, International Labour Office, November 2011, (Available at: www.szakszervezetek.hu), p. 10-11.

²⁸ Klein, Robert W. and Krohm, Gregory *op. cit.*, p. 5., 8., 20.

²⁹ In contrast, the costs of compensation system do not appear to be a major cause for concern in other countries and in research. Walters, David *op. cit.*, p. 37.

work safety by the Parliament that could eventually result in establishing the basics of a new and independent work accident insurance scheme. As a result, the decision of the Parliament number 20/2001 on the countrywide program of work safety was adopted based on the previous government proposal. As a consequence, one of the most important goals of this program was to make the employers economically interested in work safety and this goal was thought to be achieved by establishing an independent branch of work accident insurance separating this scheme from other insurance branches and using differentiated contribution-rates proportionate to the risks of the given job and to the (potential) accident-record of the employer (experience rating). The 2084/2002 (III.25) Government Decision spelled out the short-term duties of the foundation of the separate accident insurance. Nevertheless, these plans have never been realized.

According to the original concept, the operation of the accident insurance should embody a complex, comprehensive tool – as part of a national health program – for the prevention of accidents and occupational diseases, the improvement of working conditions (based on systematic and targeted risk evaluation), the financing of complex rehabilitation and reintegration measures, the improvement of safety-related education and the support to employers' prevention-conscious health and safety activities.³⁰ The current separation hampers the development of such a holistic and coherent approach.

The current Hungarian system lacks prevention, financial incentives and effective rehabilitation. Accident insurance-type functions are fragmented within social security. Due to underreporting of accidents and insufficient processing of data on accidents and occupational diseases, we have no authentic statistics. The employers' liability-based compensation practices (the counterclaim of the insurer – so-called 'regress')³¹ don't provide full coverage for the cost of benefits and motivate the employer to hide away (and not to report) the events of accidents.³²

³⁰ Such a complex system operates in Germany, where the sectorally based insurance associations (BGs: Gewerbliche Berufsgenossenschaften) have widespread roles including compensation, prevention, inspection, rehabilitation, research, training, communication etc.

³¹ In social security laws we can find additional enforcement mechanisms for health and safety rules. For instance, it is important to note that according to the Health Insurance Act (Act LXXXIII. of 1997), the Health Insurance Fund is mandated with the right of counterclaim ('regress') towards the employer, if a health insurance benefit was paid with respect to an industrial accident or an occupational disease caused by the breach of health and safety rules. In other words: the employer is obligated to repay for the health insurance social security benefits arising from industrial accidents or occupational diseases, if the accident or illness is the result of the fact that he or his agent did not comply with the relevant health and safety rules, or if he or his staff caused the accident deliberately.

³² Juhász Ferenc: Elképzelések a balesetbiztosításról, 2003. <http://www.mvkepvisele.hu/biztositas.html> (Last visited: 01. 11. 2013.)

Although the draft of a new national work safety policy (2009-12) reaffirmed the need for an independent, self-governing branch of work accident insurance in 2009, the concrete steps have been failed again. It is remarkable that the prologue of this draft policy noted that the financial advantages of such a system are questionable, the expected inciting effect is rather small³³ and the institutional autonomy is unjustified while the additional costs are substantial.

Besides the above-described policy proposals, academic proposals also stress the need for an independent branch of work accident insurance in Hungary.

Alex Ember argues for the need to define work accident insurance as a totally independent branch of social security (generally linked to the liability of the employer) rather than using the current system of being divided into the branch of health insurance and that of the pension insurance. He points out the need for independence of the work accident insurance and demonstrates the necessary legal amendments that would enable the introduction of an independent insurance branch. In his view, the development of an independent branch of work accident insurance is necessary to strengthen the prevention of work accidents. The independent branch of work accident insurance would make the system of work accident insurance more transparent and easier to use and at the same time it could be operated by the state with better financial records and promoted the just determination and handling of the contributions, therefore strengthening the prevention. As the rate of contributions could be differentiated, the total cost of employment could be decreased from the aspect of several jobs. A higher amount of contribution should be paid based on employment in more dangerous jobs so the amount of the contribution could be linked to an objective circumstance. The system should be treated in such a way that it should provide proper sanctions or awards for employers based on their compliance with work safety regulation (bonus-malus). Ember also acknowledges that one of the biggest dangers of work accidents today is the fact that employers try to hide these accidents. The main reason of this is the employers' fear of social security claims against them. With the introduction of the independent branch of work accident insurance, the employer would not be interested in hiding the accidents anymore. Ember underlines the need for compulsory liability insurance

³³ It is argued quite widely that differentiated (risk-based) contribution rates are unlikely to exert strong influence on employers' attitude of prevention.

for employers.³⁴ In Hungary, there are few employers who conclude such agreements with insurance companies on a voluntary basis.³⁵

According to Alex Ember, the workers' compensation system could be responsible for recompensing victims for their health care expenses, loss of earning capacity and rehabilitation, and the related, currently existing labour law rules of employers' liability might even be abolished from the system.³⁶ In other words, employees' right to sue his or her employer can be restricted (for example to non-economic losses, which are usually not compensated via social security). Civil or labour law liability – as a supplementary tool – could be used only for recompensing victims for additional damages, such as lasting damage to physical or mental integrity or reduced quality of life.³⁷ On that point, Parsons observes that 'strict employers' liability is somewhat anomalous in a system where no-fault workers' compensation benefits are also available'. He also states that in most European countries employers' liability is of marginal importance (compared to no-fault workers' compensation). Most claims against employers (if any) are counterclaims for recovery by the insurers, direct claims by employees against employers are rather uncommon.³⁸ In general, employers' liability schemes can assure extra financial benefits for victims of workplace injuries that go beyond the compensation automatically available through insurance benefits. Some authors suggest that private law liability claims should only play a residual role in compensation in addition to insurance schemes.³⁹

In this context it is important to note that a new feature of the new Civil Code (Act V of 2013) is the introduction of the so-called exemplary compensation for wrongdoing ("sérelemdíj").⁴⁰ The exemplary compensation for wrongdoing replaces "non-pecuniary damages" that can be awarded based on the former Civil Code, but only for the case of infringing a person's moral rights, deduced from human dignity. Consequently "non-pecuniary damages" will cease to exist in the new Civil Code (and also in labour law). As a new sanction of moral damages, the

³⁴ In Europe, the UK is one of the very few countries where employers' liability insurance is compulsory (ELCI). See Employers' Liability Act of 1969. Parsons, Chris *op. cit.*, p. 367.

³⁵ Ember Alex: *The legal regulation of work accidents and the necessity of its legal amendment*, Thesis of PhD dissertation, Szeged, 2010.

³⁶ For example, in Belgium and Germany access to tort law is almost, but not completely, excluded. Philipsen, N. J. *op. cit.*, p. 182. Furthermore, the New Zealand no-fault system eliminated tort remedies. LaDou, Joseph *op. cit.*, p. 4. The Netherlands' compensation system retains an 'employers' liability' element, albeit a fairly small one. Parsons, Chris *op. cit.*, p. 362. All in all, in many countries, employers are protected from liability court-claims. Civil or labour law claims against employers are typically restricted to serious or intentional faults committed by employers (e.g. France, Belgium, Germany).

³⁷ Ember Alex: *Az üzemi baleset*, Pólay Elemér Alapítvány, Szeged 2013, p. 170.

³⁸ Parsons, Chris *op. cit.*, p. 363, 365.

³⁹ Philipsen, N. J. *op. cit.*, p. 166.

⁴⁰ Art. 2:52 of the Civil Code.

exemplary compensation is due merely because of causing grievance; the aggrieved party does not have to verify if he suffered any pecuniary or other loss/injury due to the grievance. This new rule might give an innovative and broader possibility for recompensing for moral-like damages. In terms of work injury compensation, it could be a proper supplement to a self-standing, insurance-based workers' compensation system.

Connected to the adoption of the new Labour Code and the debatable, above described transformation of employers' liability in it, several Hungarian labour law scholars have stressed again the vital need for the independent, self-governing branch of work accident insurance. For example, Kollonay emphasizes that damages from occupational accidents and diseases are recompensed automatically, on the basis of some kind of insurance in most developed countries. In her view, the adoption of the new Labour Code could have provided a unique opportunity for all stakeholders to make this risk obligatory insured and 'spread' this risk via an independent insurance-based risk pool (instead of turning back to a civil law-like model).⁴¹ Similarly, Horváth also contemplates about the obligatory insurance model when he criticizes the new liability rules in the Labour Code.⁴²

Concluding remarks

As we have seen, one of the most critical questions in the design of national work injury compensation systems is the relationships between tort-based compensation (employers' liability under civil and / or labour law) and non-tort compensation (workers' compensation, mostly under social security law). Even if the overriding decisive goal is prevention, there is no universally optimal model. In Hungary, there is a clear need to deeply rethink the relationship between labour law and social security law in this context. There are strong and recurring arguments in favour of the setting up of a new, independent, complex social insurance scheme for workers' compensation (including targeted financial incentives for prevention), while re-designing employers' liability. The new Labour Code's recent reform has mostly neglected these professional demands and arguments, and re-regulated employers'

⁴¹ Lehoczkyne Kollonay Csilla: Génmanipulált újszülött – Új munkatörvény az autoriter és neoliberális munkajogi rendszerek határán, In: *Az új munka törvénykönyve dilemmái* (ed.: Kun Attila), KRE ÁJK, Budapest, 2013. p. 53.

⁴² Horváth István: Fényárnyék. Húsz percen az új munka törvénykönyvéről. In: *Az új munka törvénykönyve dilemmái* (ed.: Kun Attila), KRE ÁJK, Budapest, 2013. p. 86.

liability via labour law without taking into account its wider context. Furthermore, the new Labour Code's respective rules purport a substantial risk shifting from employers to individual workers (and their families and society). In our opinion, this civil law-character regulation of employers' liability could only be sustained if it would be based on and connected with an independent, automatic, prevention-oriented workers' compensation scheme in social security, as it has been proposed many times before (see below).

When designing changes in compensating work injuries, regulators must take into account at least two fundamental concerns: 1. This is a complex field in the intersection of civil law, labour law, social security law, health and safety law, insurance law, administrative law and reforms cannot be done without proper and close policy-coordination. 2. All related systems must be designed with a view to prevention, taking into account that basically developments within organizations determine the appearance of preventive changes. As a consequence, compensation and liability schemes should be responsive to developments within organizations and should 'smartly' provoke prevention by influencing the attitude of organizations.