

# Shear victory: patient wins compensation for lost surgical scissors

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## Facts

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## Comment

The Supreme Court recently granted compensation for pain and suffering for mental strain to a patient after a piece of broken scissors was left in his body post-surgery.<sup>(1)</sup> The compensation was granted despite the fact that the claimant suffered no physical pain.

### Facts

The claimant underwent heart surgery at a public hospital. During the surgery, the tip of the dissecting scissors broke and slipped into the left pulmonary vein. An attempt to retrieve the tip failed, so the broken tip of the scissors (approximately 1 centimetre in length) remained in the patient's body. Typically, foreign bodies are integrated into the body quickly. The organism covers the surface of the foreign body with a layer of endothelial cells, after which blood platelets, leucocytes and fibre encapsulate the foreign body, thus protecting the organism from potential absorption of parts of the foreign body and germs.

Post-surgery, there was an elevated risk of localised inflammation or even sepsis due to the retained piece of scissor, but this risk did not materialise. The foreign body had no effect on the general health of the claimant. He suffered no physical pain. Further, the scissor tip did not constitute a mental injury in relation to his medical state. Although the claimant was assured that late complications were highly unlikely, he was concerned that the tip of the scissors would migrate in his body or might otherwise harm his health.

The removal of the scissor tip was impossible without substantial damage to the pulmonary tissue. The surgery would require an opening of the chest, with a high probability that part of the left lung would need to be removed. Although this intervention has only a minor risk, from a medical standpoint, it was inadvisable.

The claimant sued the hospital (first defendant) and the manufacturer of the scissors (second defendant) for future damages and compensation for pain and suffering in the amount of €9,500.

### Decisions

#### *First-instance court*

The first-instance court dismissed both claims against the hospital with prejudice (as the surgery has been conducted according to the law of the art) and legally established the responsibility of the manufacturer of the dissecting scissors for future damages caused by the broken scissors. It also granted compensation for pain and suffering in the amount of €5,500, despite the fact that the claimant had no physical pain and had not suffered mental injury. The compensation was instead granted in consideration of the plaintiff's discomfort and uncertainty and the remaining small risk of late complications. Finally, the court held that the second defendant was liable under product liability law.

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### **Appellate court**

The appellate court reduced the compensation to €500. It confirmed the defendant's responsibility, but held that simple uncertainty and discomfort do not justify compensation for pain and suffering. However, because the attempt to retrieve the scissor tip prolonged the surgery, the court granted compensation in this regard. The appellate court allowed an appeal to the Supreme Court because the plaintiff's uncertainty could qualify as mental strain due to a physical injury.

### **Supreme Court**

The Supreme Court accepted the claimant's appeal.

The court held that compensation for pain and suffering is granted for all physical and mental injury that can be expected in the ordinary course of events. Feelings of displeasure caused by bodily injury must be taken into account. Mental strain can be compensated, provided that it is the consequence of a physical injury. In the case at hand, these factors had to be taken into account, even if they were not explicitly asserted. It was irrelevant whether the mental strain constituted a medical condition or required medical treatment.

However, mental strain which is not caused by physical injury can be compensated only in exceptional cases (eg, a significant intrusion into someone's psyche). Simple annoyance, anxiety, fear or shock are not enough. A mental impairment which constitutes only discomfort or feelings of displeasure is insufficient to be treated as equal to a physical injury.

According to the Supreme Court, the appellate court failed to consider sufficiently that 'physical injury' is defined as any impairment of physical or mental health and integrity. The Supreme Court referred to a prior decision<sup>(2)</sup> in which it was held that even cutting someone's hair without consent is a physical injury, although it does not cause pain or impair the general health state and recovery can be expected (ie, the hair will grow back). *A fortiori*, the court held that the retention of the scissor tip qualified as a physical injury, as there was the possibility of late complications. The court further confirmed that any surgery constitutes a physical injury if it causes negative effects.

The plaintiff's distress and uncertainty therefore were not only mental impairments which constituted discomfort and displeasure, but rather understandable mental consequences of a physical injury. Contrary to the appellate court's opinion, the Supreme Court considered this uncertainty to be a mental strain following a physical injury and granted €5,000 in compensation.

### **Comment**

According to Section 1 of the Product Liability Act, a manufacturer or importer that imports a defective product into the European Economic Area will be liable for bodily injury or damage to goods caused by the defective product. This liability also comprises compensation for pain and suffering. However, the Austrian courts have been reluctant to award compensation for pain and suffering. Although the courts constantly stress that compensation should be awarded "for all physical and mental injury", there is an unofficial tariff to calculate the amount of compensation that should be awarded per day (€100 for mild pain, €200 intermediate pain and €300 for severe pain). In this context, the adjudicated amount in the case at hand is rather generous, although in other jurisdictions higher compensation would likely have been granted.

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### **Endnotes**

(1) Supreme Court decision of March 30 2016, 4 Ob 48/16m; JBl 2016, 385.

(2) Supreme Court decision of December 12 1974, 6 Ob 246/74.

