

Hungarian Rules of the Liability for Game Damage

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In the legislation in force at the closure of my study, the provisions establishing liability for damages caused by game that may be hunted are found in the new Hungarian Civil Code (Act V of 2013, hereinafter referred to as Civil Code) and in the Act on the Protection of Game, Game Management and Hunting (Act LV of 1996, hereinafter referred to as the Hunting Act) as well as its implementing decree (79/2004. (V. 4.) FVM decree, hereinafter referred to as Vhr.). The Code Civil contains the general rule: “*Reimbursing the damage caused by game that may be hunted, liability befalls on the person licensed to hunt from whose hunting range the game has arisen. If the damage did not occur on any hunting territory, liability befalls on the person licensed to hunt from whose hunting range the game has arisen.*”¹

According to this, the Hunting Act contains a special rule: “The obligee shall, as defined in this Act, be liable to the aggrieved person for reimbursing the part exceeding 5% of the damage caused by red deer, fallow deer, roe deer, wild boars and moufflons in agriculture and forestry as well as the damage caused by roe deer, hares and pheasants in vineyards, orchards, arable and afforested areas as well as nurseries.” In this study I present the special rule’s elements.

I. Basic features of the hungarian regulation of hunting

Pursuant to Article 1, Section 3 of the Hunting Act the hunting right is a right representing assets which constitutes an inseparable part of the land proprietary rights.

¹ Civil Code Article 1, Section 6:653. [Liability for damage caused by game that may be hunted]

Hunting rights are the totality of rights and obligations pertaining to

- a) the protection of game and its natural habitat and
- b) game management, furthermore
- c) the killing or capture of game living free in the hunting ground by a party authorized to hunt
- d) the collection of cast antlers and of eggs of winged game that can be legally hunted, and the appropriation of the carcass of perished game²

Pursuant to Article 1, Section 3 of the Hunting Act the hunting rights may be claimed by the owner of the land that is defined as a hunting ground. It follows from the cited legal provisions that the essential legal criterion to acquire, exercise and utilize hunting rights is the establishment of the hunting ground. The hunting ground shall be established by the declaration of its boundaries upon request (Hunting Act Article 1, Section 19) on the object of which an administrative decision is made by the hunting authority. As long as such a decision is not made, hunting rights cannot have a meaning.³

Pursuant to the current regulation the territorial criterion of a hunting ground is an extension of minimum 3,000 hectares and the distance between the opposite borderlines of the territory shall be at least 3,000 metres. A further criterion is that the game on the hunting ground

- a) finds the necessary feed
- b) the conditions for its natural reproduction, and
- c) its natural needs for movement, lair and rest are provided⁴

The setting of boundaries of the hunting ground is for the period of the game management plan, thus the all-time land owners are bound by it for this period. Pursuant to the provisions in force the game management plan is for 10 years as a primary rule.

² Hunting Act Section 2.

³ High Court of Debrecen (Debreceni Ítéltábla) Pf. II. 20.468/2009/5.

⁴ Hunting Act Article 1, Section 8.

Pursuant to Article 1, Section 4 of the Hunting Act if the hunting ground is

- a) exclusively owned by a single person – including also the State of Hungary- this person shall be entitled to the hunting rights independently (independent hunting rights)
- b) owned by several persons – including also the State of Hungary – the owners of the

hunting ground shall be entitled to the hunting rights jointly (joint hunting rights).

In case of joint hunting rights the provisions of joint ownership of the Civil Code shall apply as a general rule to the relationships among the owners of the hunting ground.⁵

In case of joint hunting rights the landowners shall decide on issues of

- a) the form of representation of the owners, the appointed representative
- b) initiating a petition in accordance with the provisions of this Act on establishing or altering the boundaries of the hunting ground
- c) the methods and conditions of exercising or utilizing hunting rights

by majority vote of owners of all the land considered at the establishment of the hunting ground – including also the watercourse – in proportion to their ownership share on the Hunting Community of Landowners' Assembly (hereinafter referred to as the Landowners' Assembly), and any expenses or benefit related to the exercise or utilization of hunting rights shall be borne by the co-owners in the same proportion.⁶

The Hunting Community of Landowners shall be entitled to have rights and undertake obligations and shall bring an action or may be subject for litigation individually during the administration of matters related to the exercise or utilization of hunting rights.

⁵ Code Civil Section 5:73-5:84.

⁶ Hunting Act Section 12.

The Community of Landowners shall draw up a rule of procedures defining the methods and conditions of exercising and exploiting hunting rights, including also provisions on the representative's obligation to account, as well as the account of the lease fees in case of leasing hunting rights.

II. Character of the liability

The term wild animal or game refers to those animals that live under conditions of freedom and are driven by their instincts, and on the different manifestations of their natural circumstances man may have only indirect influence, and therefore the possibility of direct control or possession thereof is missing.⁷ Game animals can be classified by different categories such as beneficial or noxious; may be legally hunted or may not be legally hunted; small game or large game, etc. A guiding principle for legal provisions on the damage caused by game is that the consequences of such damages cannot be fully eliminated or avoided even if all due human preventive deeds had been exercised.

The qualification of the obligation of reimbursement regarding wild game damage is treated differently in specialist literature on liability and hunting law. Although earlier fine representatives of tort law and hunting law (such as Géza Marton, Gyula Eörsi and Ödön Zoltán) regarded the obligation of reimbursement related to game damage as a separate liability formation by its features. Despite this in the course of the two codification processes of the Civil Code, they placed more emphasis on its classification of liability establishment. The new Civil Code concerning this matter promulgated by Act CXX of 2009, but not in force did not imply a firm standpoint since the Act CXX of 2009 – dogmatically incompatible with this theoretical trend – placed the obligation of reimbursement into the chapter on liability for damage caused by animals entitled “*Liability for game damage.*” In contrast, the new Civil Code only integrates liability for damage caused outside the sphere of agriculture and forestry into its provisions, while the provisions for liability for game damage will be left within the ambit of the special field legislation outside the code as a rule “*lacking the logic of liability establishing liability.*”

By way of derogation, my view is that the obligation of reimbursement of game damage is not a simple rule of establishing liability, but it is a distinct and strict type of liability. The following legal theoretical

⁷ The Curia of Hungary Pf. I. 21493/1961.

standpoints that are currently generally accepted and, as the case may be, codified, have been considered to be a point of departure. (a) the basis for liability is in every case a tortious breach of duty which may be realised either by action or inaction. (b) Also, when regarding transgressing the “outer limits” of liability is realised, I hold that there is always a possibility of exemption from tortious liability. Thus, establishing liability is always conditional where exemption does not apply, only honouring obligations shall apply at most, not liability.

Regarding the current legislative environment, the existence of the first condition may be attributed to the licensed hunter’s obligation to prevent and mitigate any damage. The obligation of loss allocation shall always be examined against the given injured party in a specific claim reimbursement relationship and by such an approach game damage may fully be eliminated. In my opinion, the decision to honour one’s obligations of mitigating and eliminating damage to protect agricultural or forestry holdings is dependant and based upon primarily economic aspects by the person authorised to hunt. The question of where the person authorised to hunt would rather bear the loss is dependant upon their decision of in which given sector they choose. This only honors the obligation in part or even fails to do so, which then will result in the tortious breach of duty in default resulting in damages being established.

One starting point of proving the second condition is that, according to judicial practice, the provisions of the second phrase of Section 79 (2) of the Hunting Act⁸ is to be construed exclusively as a loss-distribution rule. In my view, the appropriateness of this practice may already be refuted in the legislative environment currently in force. The starting point of my rebuttal is that game damage may even be entirely eliminated as the case may be. If prevention has failed beyond a reasonable doubt as a result of the injured party’s failure of obligatory contribution or the fact that the injured party did not consent without due cause to setting up game damage repellent equipment, the person licensed to hunt, in my view, may be exempted from game damage reimbursement pursuant to Section 79 (2) of the Hunting Act. With regard to the above, applying the provision may not only result in loss-distribution, but it may also function as a rule of exemption.

⁸ Pursuant to Section 79 (2) of the Hunting Act, “If the landuser does not honour his obligation of contribution belonging to normal management under this law, or does not consent without due cause to setting up facilities and equipment necessary for the elimination of damage caused by wild game, the damage resulting from this conduct shall be held against the landuser.”

III. The liable

The liable is the holder of hunting rights (authorized). Although game is owned by the state,⁹ (Article 1, Section 128 of the Civil Code, Article 1, Section 9 of the Hunting Act) the killed, captured or perished game comes under the ownership of the holder of hunting rights, and therefore the holder of hunting rights enjoys the benefits of the game. This is the reason why liability for damages caused by game – by applying the damage transfer rule – also lies on the holder of hunting rights.

Authorized:

- is the owner of the hunting ground in case of independent hunting rights
- are the owners of the hunting ground in case of joint hunting rights
- is the fiduciary of State of Hungary's independent hunting rights
- is the lessee of hunting rights in leasing relationship

As regards the holder of rights being liable for damages, it is worth investigating how the liability is divided among the members of the landowners' community with joint hunting rights if not all members are engaged in hunting.

If the landowners' community exercises its hunting rights as a community itself, the hunting potentials of landowners shall be determined by the provisions of the rule of procedures.¹⁰ The non-hunting members of the community shall be entitled for an extra fee for the excess use, which lies on those members of landowners who exercise their hunting rights on the hunting ground.

With a view to the fact that landowners shall define and accept the detailed rules on exploiting their rights on the hunting ground in a rule of proceedings, these rules shall be applicable as primary ruling to the liability for damage caused by game. Landowners may stipulate in their rule of procedures for example that the holders of hunting rights in the community shall exclusively be liable for the damages.

⁹ Civil Code Article 1, Section 5:53., Hunting Act Article 1, Section 9.

¹⁰ Article 1, Section 6 of the Government Decree No 79/2004. (V. 4.) FVM on the Rules of Application of the Act on the Protection, Management of Game and Hunting (hereinafter referred to as: Rules of Application)

If the liability for damages has not been provided for by the rule of procedures, the general provision of the Hunting Act shall apply, stipulating that the landowners shall be liable for damages in proportion to their ownership share of the whole land defined when establishing the expansion of the hunting ground (Section 12 of the Hunting Act).

IV. Conditions of the liability

The obligation for compensation of the damage caused by game has three cumulative conditions:

- hunting rights in the hunting ground
- hunting right to hunt the game that caused damage
- the place where the event which resulted in damage occurred is the hunting ground of the holder of hunting rights or the collection of game that caused damage in the hunting ground of the holder of hunting rights (Article 2, Section 75 of the Hunting Act)

The primary regulation regarding the first condition has already been cited in this study. As regards the second condition, it arises as a question how the liability of the holder of hunting rights changes in case he is entitled to hunt the game that caused damage in the hunting ground, but the hunting authority issues a hunting ban during the period when the damage has been caused. Pursuant to the previous Hunting Act the state was entitled to hunting rights in the whole territory of the country.¹¹ On the basis of this rule the specialist literature took the position that if “the damage is caused by any game that breeds in a territory where hunting is permitted (...) the holder of hunting rights in the hunting ground where the event that caused damage occurred may not be claimed liable for compensation, since the holder may not manage, shoot or exploit the large games mentioned above. (...) The state as the owner of large game that caused damage and the exploiter of hunting rights shall compensate for the damage caused by game.”¹² Under the provisions of the current Act hunting rights constitute an inseparable part of the land property which belongs

¹¹ Article 1, Section 32 of the VII. Act of 1961 on Forest and Game Management

¹² Dr. Zoltán, Ödön: Felelősség a vadkárért és a vadászattal kapcsolatos egyéb károkról, im., pp. 137.

to the owner of the territory that is defined as a hunting ground (Article 1, Section 3 of the Hunting Act). Hence it follows that the exploiter of hunting rights may not be obliged to compensate for the damage that has been caused during the period of the hunting ban. Therefore, Article 1, Section 75 shall also apply for the liability for damages caused during the period of the hunting ban, that is the holder of hunting rights shall have absolute liability. It is important to mention that during the period of the hunting ban the holder of hunting rights may not be deprived of the right to avert the damage in the most appropriate way, that is, to hunt, since it may be requested from the hunting authority to give or issue permission for hunting during the period of the hunting ban in order to prevent continuous damage caused by game in case of overpopulation of specified game species.

As for the third condition the simple grammatical analysis of the provision may lead to different interpretations when defining the persons liable for damage if it has been caused by game in the hunting ground of the holder of hunting rights but collected from another hunting ground. In order to sort out this problem we should rely on the judicial practice. Pursuant to the judicial practice “the base for establishing liability for damage is the fact that the game caused damage on the hunting ground of the holder of hunting rights. Another reason is that if the holder of hunting rights is entitled to hunt for game that dwell in the hunting ground regardless of which ground they have arrived from, the holder of rights shall be liable for damages caused by game. In the court’s view, therefore, the second phrase of the third legal condition is subsidiary, and may be used in case the game may not be hunted in the hunting ground where the harmful event occurred, or the place of the damage is not a hunting ground. (...) If the damage occurs in the hunting ground of the holder of hunting rights, only the hunting authority that is entitled to hunt is liable for the damage. The hunting authority’s liability for damage that is entitled to hunt and from whose ground the game has been collected may only be established if the damage has been caused in another hunting ground.”¹³

The deficiency of the Hunting Act is that it sets forth no provision when it is not possible to know which hunting area the game has arisen from or how liability is dealt with if the damage is caused by a lot of game arisen from different hunting areas but belonging to the same species. The rule applying to the legislation on the ownership of the game could be a solution to the former in that in case of doubt the person licensed to the

¹³ Court of Baranya County (Baranya Megyei Bíróság) 2. Pf. 20656/2000/3. (BDT2003.821)

hunting area closest to the place of the incurred damage where the game may be hunted should be held liable. In the latter case, I should think the arrangement of the liability issue feasible by providing for the number of game to be hunted set forth in the annual game management scheme for the game causing damage among the licensed parties in due proportions, or stipulating joint and several liability in respect thereof.

V. Game species under the special rule's effect

It is specified by law when liability may be established in the case of special game species that cause damage. Article 1, Section 75 of the Hunting act defines in a taxative way that the damage caused by game shall mean damages caused only by “*red deer, fallow deer, roe deer, wild boar and moufflon as well as, hare and pheasant.*” If we compare this list with Article 1 of the Ministerial Decree 79/2004 (V.4.) on the rules of application (hereinafter: Decree) we can find that a large game species (Sika deer) and numerous small game species (e.g. hare, musk rat, fox, etc.) have not been specifically identified. The reason of the legislation behind this is that although many of the game species not listed certainly cause damage by their way of life,¹⁴ these damages are so insignificant that it is not justified to use the special liability in question.

VI. Place and method of game damage

Article 1, Section 75 of the Hunting Act also defines the place where the harmful event occurred as the criteria to apply for liability for damages caused by game. On the basis of this, we categorize the game species specified in Article 1 into two groups, that is, damage caused by game is the damage caused by

- *red deer, fallow deer, roe deer, wild boar and moufflon in „agriculture or forestry” and*
- *roe deer, hare and pheasant in „vineyards, orchards, farmland, afforestation and nursery gardens”*

¹⁴ see: Klátyik, József (2003): Nemzeti kincsünk a vad – vadkárrok, vadászati és vadban okozott kárrok, INGA-V GSZI Kiadó, Pécs, pp. 22-23.

Interpretation and therefore applying the law are made difficult in that Sections 82 (2)¹⁵ and 83 (2)¹⁶ of the implementing decree¹⁷ (hereinafter referred to as Decree) limit the place of damage to arable land, vineyards and orchards in respect of agricultural game damage, while in the case of game damage caused in forestry they do so in afforested areas. With regard to the referred provisions of the Decree, the primary question is whether they are mandatory, that is, the damages outlined only in them may be classified as game damage under Section 75 (1) of the Hunting Act; or, consequently, whether the enumeration of places of damage is exhaustive.

In connection with the analysed provisions of the Decree, the Curia has recently adopted a decision strengthening my legal interpretation as outlined above. In its decision No. Pfv.VI.20.742/2012, also published as civil law decision on principles No. 11/2013, relating to an action initiated for reimbursing game damage, the Curia held that *“the Decree may not in any way restrict the scope of game damage as defined by law.”*

As for the method of damage, it is also Sections 82 (2) and 83 (2) of the Decree that contain specific provisions which define damaging methods as the game’s nutrition, poaching of soil, rooting and breaking in game damage in agriculture. While, in the case of game damage, the game’s chewing, peeling, rooting, treading, breaking, chewing and breaking terminal growth as well as consuming forest seeds in forestry. Referring to what has been expounded upon above, these enumerations may not be considered exhaustive, only to be the enumeration of damages resulting in the most significant damage in practice.

VII. Elements of damage

As for the compensation of *“damage”* there are no provisions under the Rule of Application of the Hunting Act, therefore, the general rules of the

¹⁵ Pursuant to Section 82 (2) of the Decree, “For the purposes of Section 75 (1) of the Decree, game damage in agriculture shall be defined as any damage leading to agricultural crop failure on arable land, in orchards and vineyards on account of the game’s nutrition, treading, rooting or breaking activity.”

¹⁶ Pursuant to Section 83 (2) of the Decree, “For the purposes of Section 75 (1) of the Decree, game damage in forestry shall be defined as any damage preventing the development of seedlings on account of the game’s chewing, peeling, rooting, poaching of the soil and breaking, as well as the damage leading to the loss of natural forest renewal due to the game’s consumption of forest seeds. The value of the forest shall be the grounds for determining the money value of the damage.”

¹⁷ Decree No. 79/2004 of 4 May 2004 issued by Ministry of Rural Development.

civil law shall apply, namely that on the grounds of indemnification, compensation must be made for any depreciation in value of the property of the injured person and any pecuniary advantage lost due to the damage as well as the indemnity or costs necessary for the attenuation or elimination of the material and non-material losses sustained by the injured person.¹⁸

As regards the damage that has been caused it should be noted that in case of the so-called forest damage caused by game in a forestry quantitative and qualitative damage shall be assessed. Quantitative damage causes the total extinction of forestation in the given area, which should be re-planted. In case of a qualitative damage the trees do not die, but their development declines.¹⁹ As regards this latter type of damage Article 3, Section 108 of the Forest Act shall be applicable, which lays down that the holder of hunting rights shall pay a forest conservation fee, if

- an individual of the game species that may be hunted causes damage to the leading shoots of major and minor species that amounts to a damage of more than 30% in the territory of the forestry that has been successfully renewed
- an individual of the game species that may be hunted endangers the renewal of the forest by feeding from the fruits of the tree species in the stock that ensure the natural renewal of the forest
- an individual of the game species that may be hunted causes damage to the individuals of the tree stock through rubbing and peeling in a territory of more than 0,1 ha amounting to more than 10% damage of the tree stock

VIII. Elimination of damages

Pursuant to Section 78 (1) of the Hunting Act, the licensed person shall:

- a) insofar as the living circumstances of the game justifies it, frighten it off
- b) in case of imminent threat of damage, notify the landuser
- c) make damage prevention hunting

¹⁸ Code Civil Article 2, Section 6:522.

¹⁹ Dr. Bán, István: Az erdei vadkár és a gímszarvas Magyarországon, Erdészeti Lapok volume CXL. No. 11, November 2005, pp. 325.

As regards game damages, the person licensed to hunt may, subject to the consent of the landowner or its user, set up countermeasure equipment.

In my view, the liability distinguished in points a) and b) of Section 78 (1) of the Hunting Act binds the person licensed to hunt regarding not only game damage, but also any damage caused by any wild game that may be hunted. This interpretation is based on the use of terms of the provision referred to. The wording of the examined law provides for prevention of “*damages*” which may not be considered equal to game damage, since Section 75 (1) of the Hunting Act foresees the use of “game damage” when referring to the type of damage laid down there. In support of the above, on the one hand, pursuant to Section 79 of the Hunting Act, the law explicitly provides for the prevention of “*game damages*” as regards landusers; on the other hand, the provisions concerning the determination of the damage also supports the above, since, as if they lifted the use of terms obligation under Section 75 (1) of the Hunting Act, they lay down that the legislator intended the “*damage*” as used in Section 81 to mean game damage, hunting damage as well as any damage incurred by the game combined.

The Curia concluded otherwise in its decision No. Pfv. III.21.033/2009/4. According to the decision, the obligation of the licensed hunter to mitigate and prevent any damage prescribed in Section 78 of the Hunting Act concerns only damages caused by wild game listed in Section 75. Therefore, neither the Hunting Act nor any other legislation requires any obligation to mitigate or prevent any damage obligating those authorised to hunt; furthermore, no such obligation arises from the general prohibition of causing damage, either, because the licensed person is not the owner of the animals.

The landuser is also bound by the obligation to eliminate game damage and damage prevention.

In this context, in respect of recent judicial practice, the obligation of contribution shall be interpreted in a way that the obligation to prevent any game damage shall be effectively imposed on the person licensed to hunt, whereas the landuser shall be associated with the activity commenced or, at least, decided upon. Until the person licensed to hunt starts honouring this obligation, the landuser’s failure to honour the statutory obligation of prevention may not even emerge. In my view, the literal interpretation of the obligation of cooperation does not necessarily lead to accurate application of the law. From my perspective, the landuser is obliged to perform game damage elimination activities within the scope of normal management (such as individual bark protection of young trees

against hare and roe deer damage at the time of planting of orchards) even if they are not separately initiated by the person licensed to hunt.

In connection with the obligation of notification, it is ambiguous when it binds the landuser, i.e. what “*imminent danger of impairment or damage*” actually means. In the absence of any accurate definitions, one may conclude by invoking the judicial practice that honouring this obligation may be established if the landuser notifies the person licensed to hunt without delay of any damage subsequent or actual. This is particularly important in the event of setting up any new agricultural or afforestation culture about its creation prior to any planting (such as planting acorn or young plants), here notification must be made subsequently to its establishment even in the absence of any actual damage while in the case of an existing culture, following the detection of damage caused.

IX. Degree of the liability

The holder of hunting rights shall compensate “for the portion of the damage that exceeds five percent”. The reason for this is that the game constitutes a part of nature, and therefore, the aspects of nature conservation shall apply in the field of liability for damage caused by game. “The landowner (land user) cannot rely on the assumption that if no game lived on his land, he would have no damage, or if any game causes damage on his land, someone will compensate for the total damage anyway. The conservation of nature is everyone’s duty and the landowner (land user) shall have his liability for this by way of being liable for 5% of the damage caused by game.”²⁰

The 95% damage portion may not be compensated for by the holder of hunting rights if the injured party contributed to the damage caused, that is, the injured party failed to perform its duties under Article 1 and 2, Section 79 of the Hunting Act. The damage caused by game not attributable to the injured party shall be compensated for by the holder of hunting rights.²¹ Pursuant to this provision, therefore, further sharing of the 95% of the damage is made possible if the injured party fails to perform his due diligence in order to prevent damage, and as a result the occurrence of a specified portion of the damage is attributable to him. In certain cases

²⁰ Court of Csongrád County (Csongrád Megyei Bíróság) 1. Gf. 40038/2001/4. (BDT2001.541)

²¹ The Curia of Hungary Gf. I. 30.511/1986. (BH1987/49)

the extent of such due diligence shall be defined by considering all the circumstances of the specific event.

Based on the judicial practise, the holder of hunting rights and the landuser can agree to apportion the division of losses in the contract.²²

X. Special procedure for making a claim

The injured party can take their case to court directly or choose the special procedure which is regulated in the Hunting Act.

The compensation for the damage caused by game may be claimed within thirty days from the occurrence of the event that resulted in damage – in case of continuous damage, from the damage that last occurred.

In the special procedure, if there is no agreement between the parties, upon the claim of the injured party, the assessor of damage caused by game shall be appointed by the notary of the competent local authority where the event which caused damage occurred. The aim of the expert assessment of damage caused by game, which shall be conducted within eight days, is to settle the dispute between the parties out of court and as quickly as possible by their agreement.²³ A decision cannot be taken in the administrative damage assessment procedure, only the fact of agreement or the lack thereof shall be recorded in the minutes. The party which may not accept the determination of damage of the assessor appointed by the notary may claim the determination of the damage by initiating civil law litigation within thirty days upon receipt of the minutes. Failure to meet the deadline means the limitation of rights.

²² High Court of Győr (Győri Ítéltábla) GYIT-H-GJ-2010-77.; High Court of Pécs (Pécsi Ítéltábla) Pf.III.20.123/2011/4.

²³ Court of Csongrád County (Csongrád Megyei Bíróság) 1. Gf. 40038/2001/4. (BDT2001.541)