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PROOF OF CAUSATION IN MEDICAL MALPRACTICE CASES IN THE CZECH REPUBLIC[1]

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Abstract: *Proof of causation between malpractice and damage is usually one of the key issues in the civil procedure. Scientific circles abroad hold wide discussions on whether the concept of causal nexus should not be abandoned in some cases. Proof of causation is extremely complex especially in medical malpractice cases. We know the input, we know the output, but what is happening in the organism remains to be a „black box". This article will try to focus on the current judicial practice in the Czech Republic, its shortcomings and it will also refer to legislative shortcomings. An attempt will be made to outline this with regard to the Principles of the European Tort Law (PETL).*

Key words: *causation, liability, medical malpractice cases, tort law*

INTRODUCTION

Proof of causation between malpractice and damage is usually one of the key issues in the civil procedure. Scientific circles abroad hold wide discussions on whether the concept of causal nexus should not be abandoned in some cases. Proof of causation is extremely complex especially in medical malpractice cases. We know the input, we know the output, but what is happening in the organism remains to be a "black box".

Out of this reason, we expected that with the adoption of the new Civil Code an expert discussion would be aroused even on this subject. Unfortunately it was not the case. Except for minor exceptions, expert literature does not deal with this topic. This article will try to focus on the current judicial practice in the Czech Republic, its shortcomings and it will also refer to legislative shortcomings. An attempt will be made to outline this with regard to the Principles of the European Tort Law (PETL). In the first part of the Article the regulation of the old Civil Code (no. 40/1964 Coll.) will be compared with the new Civil Code (89/2012 Coll.) and with the regulation in the PETL principles. In the second part an analysis of the current practice of the courts will be made and compared again with the PETL principles. In the last part it will be suggested that the existing practice of courts must be reviewed at least in medical malpractice cases.

I. LEGAL RULES REGARDING CAUSATION IN THE CZECH REPUBLIC

The new Civil Code (the Act no. 89/2012 Coll., the Civil Code) came into force on 1. 1. 2014. It replaced the so far effective Civil Code of 1964 (the Act no. 40/1964 Coll., the Civil Code). This Code brought vast changes to the area of civil law and moved the Czech law away from socialistic traditions and back to the traditions following the pre-war Czechoslovak

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legislation and classical civil codes (ABGB, BGB). Even though a more detailed regulation similar to the one in the PETL[2] was discussed in connection with the new Civil Code, it was finally not implemented and the regulation of causation remained almost unnoticed at the legislative level[3].

The legal regulation in the Act no. 40/1964 Coll., did not expressly included the term of causation itself,[4] it derived it from the verbal notion *"inflicting of damage"*. This can be found in Section 420 and Section 420a (1).[5] Hence causation was analogical to the term "infliction", a more detailed regulation was absent in the Act no. 40/1964 Coll. Interpretation of this term was therefore left partly to legal theory and partly to practice of courts.

The new Civil Code also does not use the notion of causation and derives it from the notion "inflict" harm, or damage. Such absence of more specific provisions is generally not harmful, after all, other traditional civil codes usually also do not specify the notion of "causing" damage in a more detailed manner. More detailed specification of this notion is frequently left to the legal doctrine and also the editors of the new Civil Code took this option into account.

The actual problem, however, lies in the fact, that no more significant discussion was aroused on this topic, though it is necessary due to incoherent judicial decisions of courts and unsufficient doctrinal debate in the Czech Republic. Nevertheless, these problems are still topical abroad and expert debates on causation have been held for decades[6].

The complexity of grasping causation problems is then usually illustrated through medical liability cases. In this context options of alternative approach to these problems are often considered. The first reason is that the topic of personal injury (bodily harm) is always a very sensitive topic. According to an extensive study of the European Committee of 2006, 78% of inhabitants of the EU states feel the medical malpractice to be a grave problem[7]. All of this despite the fact that the percentage of occurrence of malpractices in health care is not high. The second reason is simplification of an injured party's role in medical malpractice cases. An alternative is being sought of how to alleviate the burden of proof for the patient, when proving causation in the litigation. Due to their health condition, the injured party is found in a difficult situation and therefore it is suitable to „assist" them in the framework of proceedings. At the same time, in the cases of malpractice by a physician it is extremely onerous to identify whether causation exists between such a malpractice and the consequent (damage). In these cases a big number of causes may exist. A patient enters the medical treatment process already with some medical problems

[2] Eg. Tichý suggested that this regulation would be added at least within a scope, which is regulated in the principles being proposed by the European Group of Tort Law - PETL. Cf. Tichý, L. Proving of causation and proportionate liability for damage. In: Tichý, L. (ed.). *Prokazování příčinné souvislosti multikauzálních škod*. Praha: Faculty of Law of the Charles University in Prague, 2010.

[3] With the exception of Section 2915 Civil Code.

[4] Although this regulation was replaced on 1st of January 2014, it is necessary to mention it, as: a) the current regulation follows out of it, b) a number of disputes will be considered according to the original regulation by Section 420.

[5] Section 420: *"Everyone shall be liable for damage inflicted by violating a legal duty."*
Section 420a (1): "Everyone shall be liable for damage inflicted to somebody else by operational activities."

[6] Eg. Hart, Honoré, Wright, Moore, in Austria for example Koziol, Bydlinski, etc.

[7] Medical errors, SpecialEurobarometr, 2006, awailable at:
http://ec.europa.eu/public_opinion/archives/ebs/ebs_241_en.pdf, [2012-06-20].

and it is not clear whether an illness aggravated even without the doctor's malpractice. Foreign literature uses an indicative metaphor "black box"[8] for this element. Although we know all input empirical data, as well as output empirical data, it is, however, unclear what the inside processes are. The issue of causation[9] is therefore quite a sensitive and problematic issue. A large scale of models, which are to find a starting point to resolve this situation, is offered. However, until now the Czech Republic has chosen quite a conservative approach and the problems are disregarded, or as the case may be, "judicial intuitivism" prevails in the area of application of law.

II. POTENTIAL RISKS OF PERSONAL INJURY CLAIMS FROM THE CAUSATION PERSPECTIVE

In the traditional legal models the plaintiff must prove causation. The Czech law also comes out of this rule and before filling an action against a health care provider a patient must realize that as a plaintiff he is the one who bears the burden of proof. A potential failure to bear this burden of proof will result in losing the case. In practice it is on the patient to prove that there is a causal relation between the doctor's malpractice and the caused harm.

However, the proving of such a causal relation can often pose a serious problem. Not even experts with the latest scientific knowledge are able to identify an origin of biological processes in progress or already started biological processes. This situation is not at all exceptional in medical litigations. There are just few cases, in which the court was not confronted with the fact that it was almost impossible to identify an exact cause of damage to the patient's health. A human body is specific to an extent that its reactions are often unpredictable and incalculable and the existing scientific knowledge is insufficient to explain them.

A certain problem in resolution of this type of cases is also the fact that determination of the causal relation is more like a factual question, not a legal one. In the Czech legal environment the constant practice of courts endorses an opinion that it is a factual question. Such a conclusion can be found e.g. in the resolution of the Supreme Court, file mark 25 Cdo 2440/2005, or the judgment of the Supreme Court, file mark 21 Cdo 300/2001. It directly reads as follows: *"As causation is a natural and social law, it concerns finding of a phenomenon, which induced the damage. Out of the whole chain of general causation (each phenomenon has its own cause, however at the same time it is a cause of another phenomenon) only those causes and consequents must be pursued, which are crucial for liability for damage"*. Similarly the Regional Court in Hradec Králové emphasized in its judicial de-

[8] cf. for example: SCHIEMANN, G. Problems of Causation in the Liability for Medical Malpractise in German Law. In: Tichý, L. (ed.). *Causation in Law*. Praha: Univerzita Karlova Praha, 2007, p. 187.

[9] Causation meant specifically in the legal sense, not in the philosophical sense. The research in the philosophical sense and the connection between legal and philosophical causation would completely exceed the scope and limits of this introduction into a discussion on causal relation in medical litigations. It is always necessary to keep in mind that legal causation can ignore a number of pressing questions associated with causation in the philosophical discourse. Cf. for example STAPLETON, J. Causation in the Law. In: Beebee, H., Hitchcock, Ch., Menzies, P. (eds.). *The Oxford Handbook of Causation*. Oxford: Oxford University Press, 2009, p. 745 and subseq.

cision[10] that, *"the Court does not create a causal relation, it merely ascertains in a positive, or negative sense"*. In comparison with this the older practice of courts adopted also an opposite opinion. Eg. The Supreme Court handled this question in its resolution under the file mark 7 Cz 11/68 as follows: *Consideration of causal relation is a legal question, for the resolution of which the court must obtain needed factual findings, especially through an expert evaluation of the subject matter. However, the causation in the outlined sense must be proved beyond any doubts.*

The question regarding a solution of whether this concerns a factual, or normative (legal) issue has, of course, deep philosophical and legal connotations, which cannot be resolved within the scope of this article.[11] However, at the same time, it is also necessary to realize that this issue has significant impacts on procedural possibilities of defendant in medical malpractice cases.

As far as the Czech legal jurisprudence is concerned, it is not entirely unified. Albeit a majority of authors point out that an evaluation of causation has a character of factual question, there are also opposite opinions here. For example Holčapek holds that: *"whether causation existed, or did not exist between conduct, or an intervention and a harmful consequent, is at a general level more like a legal question, as the "relation", or "relationship" is not an objectively observable phenomenon of the outside world, but a product of a thinking activity - a judgment. A part of legal evaluation is to determine, between what factual circumstances this relation should be identified, or as the case may be, whether and what circumstances are capable of ruling it out."*[12] This opinion leans on foreign models, when an Austrian author Bydlinski puts it in a similar way: *"Therefore in law, causation is always a normative fact because it assists in solving issues (normative) responsibility in a legal context"*[13]. We believe, however, that in the given case this should more like concern a judgment towards facticity, not normativity. Nevertheless, this deliberation should consequently have two levels. As Fumerton asserts: *"We should distinguish between two levels here. In the first level, we operate as lawyers, and deploy a notion of actual causation that is non-normatively factual or empirically based. At a second, or meta-level, we justify our deployment of a factual, nonnormative concept of actual causation at the first level, the level of the actual practice of lawyers and courts. This meta-level justification may be fully normative. This is a perfectly coherent strategy, consistent with one perspective on what legal positivist methodology has been at least since Jeremy Bentham."*[14]

A majority of the European legal orders therefore uses the so-called dual test[15]. The factual causation traditionally comes from the *"conditio sine qua non"*, test or the *"but for test"*. No major disagreements arise here among individual European states. We can, how-

[10] Regional Court in Hradec Králové; 19 Co 215/96; SoRo 98, 4: 86; ASPI registration number: 17349 (JUD).

[11] The Wright's „NESS" analysis, i.e. of basic elements and conditions sufficient for a resulting effect following up to the Hart's and Honoré's theory, is extremely popular today.

[12] HOLČAPEK, T. *Dokazování v medicínskoprávních sporech.* Praha: WoltersKluwer, 2011, p. 135.

[13] BYDLINSKI, F. Causation as a Legal Phenomenon.In: Tichý, L. (ed.). *Causation in Law.* Praha: Univerzita Karlova Praha, 2007, p. 8.

[14] FUMERTON, R., KRESS, K. Causation and the Law: Preemption, Lawful Sufficiency and Causal Sufficiency, Law and Contemporary Problems. *Fall.* 2001, Vol. 64, No. 4, p. 86, quoted from http://scholarship.law.duke.edu/, [2012-09-20].

[15] The first part of the test, its factual analysis is sufficient only in Belgium.

ever, find a number of approaches in the question on legal causation.[16] The Czech practice of courts leaned toward a theory of the so-called adequate causation[17], which was manifested in a number of judicial decisions.

III. THEORY OF AN ADEQUATE CAUSE IN JUDICIAL DECISION MAKING OF THE CZECHOSLOVAK AND CZECH COURTS.

In the Czech Republic, or in the CSSR, the theory of an adequate cause is reflected in the search for an immediate (proximate) cause. Already in 1965, the Supreme Court of the CSSR stated in the resolution R NS 5 Cz 39/65: *"In a mutual sequence of processes, each consequent has several interrelated causes, as well as each cause has several interrelated consequents. Further to this, each cause is a consequent of other causes and the consequent is a cause of other consequents. In a sequence of interrelated causes, which cause a certain consequent, not all the causes are of the same significance. Some of them are more significant (the main causes) and these are decisive for a certain consequent, others are less significant, but necessary for a certain consequent, others are marginal and insignificant for a consequent. An evaluation of which causes are the main and which are marginal is the subject of the evaluation of all circumstances of a particular case. If a wrongful act".. "is one of the causes of the damage incurred , and it is one of the main causes, it establishes a causal relation between this act and the incurred damage".*

Subsequently, this theory appeared in the decision of the Supreme Court of the CSSR, file mark Cpj 37/74. The Court stated that with regard to the damage, an event had to be in a causal relation: *"The basic condition of an organization's liability for an accident within the meaning of the provision of Section 190 and subseq. Provisions of the Labor Code is a causal relation between the accident process and the personal injury of an employee. However, at the same time, it must be emphasized that there does not have to be only one cause of an accident, it is sufficient that it is one of the causes, but an important, significant and substantial one. Since the exploration of the causes, which lead to a certain disturbance of health, fall within the field of a medical science, it is necessary to come out of expert opinions submitted in a specific case, the contents of which consentingly show that the working performance in the considered case was an inducing factor of a certain damage".*

The Supreme Court of the Czech Republic brought extended reasoning of this approach in its decision file mark 25 Cdo 2101/2002. In the given case this concerned a situation, when a plaintiff (an owner of a building, which was burgled by an unknown perpetrator) sued a company providing the building security services. It followed out from the fact-finding of the case that the burglary and theft took place in the time period between 6 PM and 6 AM, when the defendant's employees were obliged to patrol in irregular intervals at least once per an hour and that they had not fulfilled duly their duty to keep guard over the plaintiff's building, while they patrolled almost in regular intervals approx. 20 minutes longer than one hour. Hence, according to the Supreme Court their inactivity (omission) contributed significantly

[16] For more details, cf. the Principles of Tort Law, p. 43 a subseq.

[17] Cf. VLASÁK, M. \textit{Předpoklady odpovědnosti za škodu v principech evropského deliktního práva} [online]. [*Prerequisites of liability for damage in the principles of the European tort law*] 2009 [quoted 2012-12-10]. Masaryk University, Faculty of Law. Thesis supervisor. Available from: <http://theses.cz/id/5iwgm0/> p. 89.

to the fact that a third person entered the locked area of the plaintiff without them noticing it. Even if the main cause of occurrence of damage was an illegal action of an unknown perpetrator, one of the causes, which significantly contributed to this unfavorable consequent (damages for which are in question), was the fact that the defendant's employees had not carried out outside guarding in such a way, as the defendant had undertaken to do. It is important for the theoretical attributes of this decision, that at the same time the Supreme Court stated that: *"a causal relation is established, if damage occurred due to an illegal action of an perpetrator, i.e. if their act and damage are in a mutual relation of a cause and a consequent and if it is therefore proved, that if it were not for this illegal action, no damage would occur. If a cause of occurrence of damage was another fact, the liability for damage does not occur; the cause of damage can merely be the circumstance, without existence of which no harmful consequent would occur. At the same time, there does not have to be only one cause, it is sufficient, if this is one of the causes, that contributes to the unfavorable consequent, the damages for which are in question, and this being an important, significant and substantial cause. The procedure in ascertaining causation consists in the necessity to remove damage from its general nexus and explore it separately, solely from the perspective of its causes. As causation is natural and social law, it concerns the finding of a phenomenon, which caused the damage. Out of the entire chain of general causation (each phenomenon has its cause, however at the same time it is a cause of another phenomenon) it is necessary to monitor only those causes and consequents, which are important for the liability for damage".*

The Supreme Court of the Czech Republic deliberated similarly also in its resolution file mark no. 25 Cdo 1946/2000, or file mark no. 25 Cdo 1520/2001. However, the Constitutional Court of the Czech Republic tackled this issue in the most comprehensive manner in its judgment of 1. 11. 2007, file mark no. I. ÚS 312/05. Apart from the problem of an adequate cause it also dealt with a problem of forseeability of damage: *"In the cases relating to damages, general courts are obliged to properly explain existence, or absence of causation between the act of a potential wrongdoer and the damage incurred. A basic contentual particular of an explanation for the decision on causation, must be a consideration about criteria, by which legally significant causes differ from legally insignificant courses, as well as application of these criteria to a concrete case. The solution to this question is brought partly by a theory of protective purpose and partly by a theory of adequacy of causal nexus.*

…

The theory of adequacy of causal nexus comes from the fact that the purpose of the subjective liability for damage is to order compensation for damage in the case, where the wrongdoer caused damage, although it can be held against him that he had not had to cause it, that he could have acted otherwise. Therefore, this liability presumes that it was humanly possible to foresee that the said behavior would cause the said damage. Hence, the basic criterion, from which the theory of adequacy stems, is foreseeability of the consequence of damage. By this it largely resembles another prerequisite of the subjective liability for damage, this being the criterion of fault, or more precisely its negligent form. They only differ in the subject, according to which foreseeability of the consequent is measured. In the case of fault it is the (standardized) acting subject itself, while in ascertaining adequacy of causation the criterion is a hypothetic experienced (the so-called optimum) observer, i.e. an imaginary person, who entails all experience of their time.

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A rational solution, which considers the aforementioned starting points, represents a requirement of adequate causation between intentional legal behavior and damage incurred. Therefore, it is not necessary for the liability for damage, that occurrence of certain damage can be specifically foreseeable for the actor, but it is sufficient that occurrence of damage is not highly improbable for the aforementioned ideal observer.

Thus, for ascertaining liability of the secondary participant according to the theory of adequacy of causal nexus it is crucial, whether he intentionally breached his relationship resulting from an obligation. Further, whether this intentional breach of contractual obligation was an objectively necessary condition for occurrence of damage and whether this consequent had not been apparently improbable for the ideal observer."

It can be said that the courts merely follow up with the older Czech legal doctrinal position[18] This doctrine also sought the so-called most proximate cause. If the behavior was not the most proximate cause with respect to damage, then it concerned the so-called indirect causing of damage: *"therefore, we talk about indirect causing of damage, when an event was a cause of a certain result and only this result is a cause of actual damage"*.[19]

IV. ANALYSIS OF OTHER CAUSAL ISSUES IN MEDICAL MALPRACTICE CASES

An absolutely crucial role in considering factual causation has an expert, or an expert opinion developed by an expert. Based upon this expert opinion, the court decides on existence of causation and its adequacy. However, with respect to the aforementioned uncertainties, an expert (experts) is unable, in numerous cases, to answer the questions relating to causation. Once they do it, an even more complex issue arises. It is an issue of quantifying part of the physician's negligence in the personal injury /i.e. a sort of percentage expression/. This is connected with issues of multi-causal cases of liability for damage, which are relatively frequent in the area of health care.[20]

Therefore, in the area of proof of causation we explore especially two groups of problems: the first of them covers situations, when it is impossible to determine, whether the physician's negligence contributed to occurrence of damage. The second one subsequently affects a situation, when it is known, that the physician's negligence contributed to occurrence of damage, however it is impossible to determine an exact scope, in which this happened.

Despite the aforementioned obstacles, the court must decide the case. However, pursuant to traditional rules of procedure, the plaintiff would be usually unsuccessful and the court would dismiss the case. Therefore, in these cases, judges find themselves in quite a complicated dilemma - to break traditional rules on the onus of proof in the dispute? Or to dismiss a complaint of an innocent victim of proven medical negligence only in the consequence of the fact that the victim is not able to fully prove causation between this negligence and occurrence of damage?[21]

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[18] Cf. BAUER, F. *O povinnosti k náhradě nepřímé škody.* Praha: Václav Tomsa, 1945, pp. 73–74.

[19] BAUER, F. *O povinnosti k náhradě nepřímé škody.* Praha: Václav Tomsa, 1945, p. 74.

[20] Cf. TICHÝ, L. Dokazování příčinné souvislosti a proporcionální odpovědnost za škodu. In: Tichý, L. (ed.). *Prokazování příčinné souvislosti multikauzálních škod.* Praha: Právnická fakulta Univerzity Karlovy v Praze, p. 57.

V. COURTS PRACTICE IN MEDICAL MALPRACTICE CASES IN THE CZECH REPUBLIC

Up to this time the courts in the Czech Republic have observed rules, when the burden of proof is fully on the plaintiff. The Supreme Court of the Czech Republic also endorses this approach[22], which requires proof of causation between wrongful act and damage at 100%[23]. Nevertheless, in practice this leads to a situation, when the majority of medical malpractice cases ends up unsuccessfully for a patient - plaintiff, as he is not able to prove at 100% certainty causation between malpractice of a medical facility and inflicted damage. However, this situation is not sustainable in the long run. Hence, opinions arose that these traditional approaches should be modified. Partly the academic discourse, but also a resolution of the Constitutional Court of the Czech Republic file no. I. ÚS 1919/08 are crucial for potential new debates in the Czech Republic. In *obiter dictum* of this resolution of 12. 8. 2008 the Constitutional Court problematizes the hitherto position of constant judgments and puts it that:

"Beyond the scope of its own judicial review of the contested resolution, the Constitutional Court finds it suitable to make a comment on the actual meritorious decision of the first instance court. As already mentioned, although the first instance court found the behavior of the attending physician to be wrongful, it did not find "any causal relation" between this behavior and the patient's death. In the reasoning, the court stated that "mere probability of causation, or a circumstance indicating its existence is not sufficient" causation must be always established" (page 7 of the judgment). The following is stated on this issue in individual expert opinions. It is speculative, whether in case of other medical procedure the occurred consequent could be prevented, considering the fact that the cervical cancer treatment success rate is evaluated statistically by the so called five year survival after treatment and to a significant extent it depends on the disease progression rate and other factors. Therefore, theoretically it is possible to estimate that if the disease of M.B. was diagnosed earlier at a lower level of clinical progression, the hope of survival would be better, or conversely it is possible to say that in the case of propagation of the disease from the stage I to the stage II, the survival forecast gets worse by 15%, in the case of progression from the stage II to the stage III by 30%, however it must be added that at any stage of the clinical extent of

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[21] The current Director of the European Institute of Tort Law Ken Oliphant wrote *„problems of proving damage caused by medical and scientific uncertainty - especially with respect to proving causes of diseases in specific cases - urged the courts of several European jurisdictions to search for alternatives to their regular practice in proving causation"* Tichý, L. (ed.). *Prokazování příčinné souvislosti multikauzálních škod.* Praha: Právnická fakulta Univerzity Karlovy v Praze, p. 30.

[22] E.g . the Resolution of the Supreme Court of the ČR NS - R 21/1992 and 25 Cdo 168/2003, when the Supreme Court stated the following: *"Causation between intentional illegal behavior of the defendant and occurrence of bodily harm must be safely established; mere probability is not sufficient in this respect" and further "Causation between a treatment procedure, which was not lege artis , and the harm done to the patient's health must be established for sure; in this case the burden of proof rests on the plaintiff."*

[23] Exceptions to this rule in judicial practice are extensively dealt with in HOLČAPEK, T. *Dokazování v medicínskoprávních sporech.* Praha: Wolters Kluwer, 2011.p. 139 a conseq. Nevertheless, these cases concerned relatively inconsistent approach of courts, which non conceptionally utilized the principle of discretionary weighing of evidence. However, this deliberation cannot be consider appropriate as it significantly impairs the principal of legal certainty.

the disease, certain percentage of the sick dies in spite of adequate treatment" (quoted from the opinion of MUDr. J. B., CSc.). It is a speculative question whether a patient would not die, if the lege artis medical procedure was observed, earlier diagnosis in invasive cervical tumors improves statistical chances of survival. Unfortunately, even today in concrete cases, if all lege artis procedures are complied with, women die even at earlier stages and on the contrary even more advanced stages have a statistically defined cure rate" (from the opinion of the Teaching Hospital of Obstetrics and Gynecology, FN Motol).

Conclusions of the first instance court with respect to a "hundred per cent" proof of objective causation seems to be unrealistic to the Constitutional Court, as it is unachievable and unsustainable. It is extremely complicated in itself to determine a simple relation of a cause and consequent in medical procedures. Actually the essence of medicine is to enter the entire chain of causes and consequents, to enter the processes, which are taking place in a human body, and influence these processes through an outside intervention, change their direction, action, etc. The physician's intervention in itself changes the "natural course of events" in a human body, it interferes in complex relations of causes and consequents. Even in the case of active behavior of a physician, who chooses a certain treatment procedure, it is very difficult, or even impossible to determine beyond all reasonable doubts, whether this procedure was the only cause of an occurred harmful condition. This is far more difficult in the case of malpractice, when a physician fails to choose a procedure, which he could and was to choose based upon contemporaneous and available medical expertise. It is virtually impossible to prove that this very and only malpractice forms an unimpaired relation with a harmful consequent. Due to this, the position of an injured party is significantly weaken.

Besides, it was this reason why the common law orders in these cases abandoned the requirement of (probable) proof of causal nexus and created the doctrine of the so-called "loss of chance", or "loss of expectation"), according to which the court measures, or estimates probability of achievement of some chances, if a certain procedure was elected and reflects these chances as to whether they are higher, or lower than those, which could be expected during unimpaired, or regular course of events. To put it in other words, we come from what statistical chances (forecast) of full cure, full aversion of death, or prolongation of the patient's life by a certain period of time there would be in case of the lege artis medical procedure; in more detail see e.g. the resolution of the British House of Lords Gregg v. Scott of 2005, http://www.parliament.the stationeryoffice.co.uk/pa/ld200405/ldjudgmt/jd050127/greg-1.htm.

With regard to the fact that the notion of causation is not defined in any way by legal regulations in the Czech Republic, which was also emphasized by the first instance court in its judgment, nothing prevents the Czech courts from reassessing the requirement of the "hundred per cent" proof of causal relation and adopting more adequate and realistic construction of "infliction of damage", which would compensate the weaker position of injured persons. According to the conviction of the Constitutional Court, the suggested solution used in the common law countries is getting closer to the idea of a fair solution of consequences originating from the physician - patient relationship, that must be viewed as a dominion, in which the physician has a dominant position, however especially due to expertise reasons. Therefore it is necessary to be more consistent in protecting the patient's basic right of bodily integrity and lastly, as the case in question demonstrates, also the right of life, and this is done even through interpretation of appropriate provisions of the Civil Code relating to damages.

However, neither this recommendation of the Constitutional Court[24] has altered the deliberative practice of courts and no such new judicial doctrine has affected understanding of causation in the currently pending cases (see e.g. the resolution of the Supreme Court of 31. 3. 2010, file mark 25 Cdo 4758/2008).

VI. TIME FOR CHANGE? SHORT EXCURSION INTO POSSIBLE SOLUTIONS IN FOREIGN LEGAL DOCTRINES

The issues of determining causation abroad are also influenced by demands placed on its proof. In some legal orders, for example in Germany, it is requested that causation is established with certainty (*Gewissheit*)[25]. The evidence requires a full judicial conviction about truthfulness of a factual allegation.[26] In Switzerland it is required, so that causation can be established with a predominant degree of probability (*überwiegende Wahrscheinlichkeit*). Similar demands are also placed on proof of causation in Austria. A lower degree of proof is required in England, where it is sufficient to prove that it is *"more likely then not"*[27] that damage occurred in consequence of alleged wrongful conduct. The Czech Republic[28] ranks among the first group of countries, where the demands placed on proof of causation are high. Causation must be established with certainty. However, this position of jurisprudence significantly reduces the possibility of the patient's success. As already indicated above, the hundred per cent (certainty) proof of causation is impossible in the majority of medical malpractice cases. Therefore a number of these cases ends up unsuccessfully for the patients.

In the foreign doctrine and judicial practice some solutions have been already put through, which reassessed traditional rules of burden of proof and onus of proof and quite apparently meet needs of a patient, who found themselves in a difficult situation. According to some authors[29] the causal proportional liability determined according to the degree of probability, which reflects more difficult procedural situation of a patient, seems to represent legally and politically more correct model. In practice, other alternatives also appear. Such solutions include creation of legal assumptions and fictions (Great Britain), acceptance of the concept of "loss of chance" (France) and a prospective reversal of the burden of proof /Germany/.

In the Czech Republic none of these solutions have been adopted yet, although some sporadic efforts to adopt the "loss of chances" doctrine can be seen in practice, or some efforts to at least partially mitigate the patient's position by reversing the burden of proof.

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[24] At the same time, this opinion was subjected to criticism due to its factual incorrectness, see DOLEŽAL, T., DOLEŽAL, A. Otázky úpravy právní odpovědnosti zdravotnických pracovníků – několik úvah k aktuálním tématům. *Právní rozhledy*. 2010, č. 12, pp. 436–440; HOLČAPEK, T. *Dokazování v medicínskoprávních sporech*. Praha: WoltersKluwer, 2011.

[25] See § 286 ZPO (Zivilprocessordnung).

[26] TICHÝ, L. Dokazování příčinné souvislosti a proporcionální odpovědnost za škodu. In: Tichý, L. (ed.). *Prokazování příčinné souvislosti multikauzálních škod*. Praha: Právnická fakulta Univerzity Karlovy v Praze, p. 61.

[27] *"On the balance of probabilities"*.

[28] The Slovak jurisprudence also adopts a similar position.

[29] Eg. Gilead, I., Green, M. D., Oliphant, K., Graziano, T., K. and other authors. However, all of them point out some risks, which are brought by this concept, as well as the necessity to consider carefully, in which categories of proof of causation, this alternative for *csqn* can be utilized.

CONCLUSION

The position of a patient in medical malpractice cases will never be absolutely optimal. A patient will always be in the weaker position, and therefore it is obvious that it is more than legitimate to contemplate potential mitigation of a "hundred per cent proof" of causation. However, in the Czech Republic during judicial application this has been happening hitherto rather in an ill-judged manner. Although constant jurisprudence declares the doctrine of a hundred per cent proof, some courts do not show interest in this doctrine in practice. Such an approach, however, does not contribute to a legal certainty, as the courts decide unpredictably. From this perspective it would be suitable, if the judicial practice got inspired by the already proven foreign models. This requirement is even more legitimate, as the new civil code, similarly as the existing one, does not deal with issues of causation and it fully leaves it to the judicial practice. Therefore, it is a big question, in what way courts will further proceed in the cases of medical malpractice cases. It would be suitable if a certain concept was created, which would be uniformly applied. Psychological influence of the person's disease on a judge is not desirable. We are convinced that the hundred per cent proof of causation is not fully sustainable especially in these cases. In principle it prevents identification of a fair and well-balanced solution in these cases. For the identification of a certain concept, which would reflect a specificity of these cases is more than necessary.