

COMPENSATION SCHEMES FOR DAMAGE CAUSED BY HEALTHCARE AND ALTERNATIVES TO COURT PROCEEDINGS IN THE CZECH REPUBLIC

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Abstract: *The article introduces the basic principles of compensation for medical malpractice, mainly by means of a civil liability system, in the Czech Republic. It outlines the normative framework and illustrates its application in practice on selected case law of Czech courts. As the judicial system has both advantages and disadvantages, available alternatives to court proceedings are also discussed even if they tend to be used rather conservatively. Furthermore, the text presents changes to the law, including those already carried out by the relatively new Civil Code and some potential future developments, together with remarks about the overall legal context in which the system of compensation for harm from healthcare operates.*

Keywords: *medical malpractice, civil liability, compensation, alternative dispute resolution*

I. COMPENSATION SCHEMES FOR DAMAGE CAUSED BY HEALTHCARE

Compensation scheme organization

In the Czech Republic, the relationship between a health care provider (physician, hospital or any other) and a patient is a private (or: civil) law one, albeit influenced by public law regulation of the whole health care system.² The relationship is typically built on a contract for health care, although in some situations, care is provided without contract (e.g. emergency situations, obligatory treatment of serious contagious diseases, obligatory vaccinations etc.). This principle applies equally even when the health care provider is a public institution, e.g. a public hospital. In other words, type and organizational structure of a health care provider do not affect the legal nature of the provider-patient relationship.

The notion of medical malpractice is usually understood to encompass various cases in which a health care provider fails to adhere to professional standards within the relationship with the patient. As a result, the patient may suffer harm in more than one form, e.g. personal injury, loss of earnings, emotional distress etc. For our purposes, we will use the notion of medical malpractice in this sense. There are other duties which the health care provider may breach, e.g. with respect to public authorities which supervise the health care system (such as exercising medical profession without proper licence) or towards health insurance companies (e.g. fraudulent billing), but we will leave those aside and focus on the situation in which a patient claims compensation for harm suffered due to medical malpractice in the sense outlined above.

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¹ This article has been prepared on the basis of a questionnaire for national reporters for the XXth General Congress of the Academy of Comparative Law and predominantly follows its structure and focal points.

² A detailed description of the Czech health care system, its legal regulation and roles of its individual actors is provided in ŠUSTEK, P., HOLČÁPEK, T. et al. *Zdravotnické právo* [Health Law]. Praha: Wolters Kluwer, 2016.

The consequences of failure to provide proper care, in particular the duty to repair harm caused to the patient, is regulated by private law as well,³ mainly by the Civil Code.⁴ These rules also apply equally to private and public health care providers. The law operates on the principle of reparation. Ideally, the wronged party should be put in the same position in which they had been before the incident. Obviously, this is only possible in cases of harm to property and not even in all of them. If the patient loses capacity to work, the loss of income may be replaced by monetary compensation. However, in cases of injury to physical or mental health, personal integrity, privacy, dignity etc. the harm is actually never entirely compensated (in the sense of putting the patient in the same position in which they had been), but rather repaired indirectly – by providing some satisfaction which should balance out the injury. If the patient loses sight because of a surgery gone wrong, monetary compensation will not replace it, but may provide at least some solace.

Generally, Czech law does not recognize the principle of punitive damages. Compensation in civil litigation is supposed to be awarded to repair the suffered injury as much as possible, reflecting all individual and special circumstances of the case and the interests of justice and decency but not creating a profit for the harmed party.

The overall compensation scheme for medical malpractice is based on the initiative of harmed patients who seek reparation (typically by means of monetary compensation, but in some cases e.g. an apology may be sought instead or in addition) under the principles of civil law. If it is not provided voluntarily, the patient may claim in civil courts in the standard process of adversarial litigation.

There is no administrative system for compensation of injured patients. The patient may file a complaint against the health care provider, either to public authorities supervising health care⁵ or to the relevant professional association,⁶ but the aim of any ensuing proceedings is not to adjudicate (or at least preliminarily evaluate) the merits of any claim for compensation, but rather to enforce professional standards and impose administrative sanctions (fines, revocation of licence etc.) on health care providers and individual medical professionals who breach their obligations. There is no mixed administrative/judicial approach to compensation for malpractice.

A patient may benefit from a specific aspect of criminal proceedings: If the health care provider (e.g. a physician) is criminally prosecuted, in this context typically for negligently causing harm to health⁷, and found guilty, the criminal court may order the defendant – in addition to any punishment – to compensate the injured party. In doing so, the criminal

³ Although civil liability never provides the full picture in itself, at least part of the losses and costs incurred by an injured party are transferred to the society through the public systems of social and health care insurance. E.g. even if civil liability of a hospital for incorrect surgery is never established in a particular case, the patient's loss of earnings due to the incident will be reduced by social security benefits and subsequent care for her will be financed by public health insurance system just like with any other patients.

⁴ Act No. 89/2012 Coll., the Civil Code, as amended. The Code has been in force since 1st January 2014.

⁵ Typically, a locally competent Regional Authority, i.e. the executive branch of the local (regional) administration.

⁶ Czech Medical Association, Czech Dental Association or Czech Pharmacists Association. All are autonomous professional organizations set up by the law, with mandatory membership and similar structure and roles, regulating their members – physicians, dentists and pharmacists. There is no similar organization for other medical professions, e.g. nurses – these may have their own associations, but they are purely private and voluntary.

⁷ Sec. 147 and 148 of the Act No. 40/2009 Coll., the Criminal Code, as amended, although these are not its sole provisions relevant for health care.

court applies the rules of civil liability for determination of appropriate compensation. The aim of this ancillary process⁸ is to avoid the need for the patient to file a civil lawsuit if the responsible person was convicted of a criminal offence in respect of the same event.

Compensation for malpractice in health care realized through civil litigation has the same benefits and disadvantages as are found in other fields of human activity in which civil liability applies. Patients decide autonomously whether to pursue compensation and they may seek it in pecuniary and non-pecuniary (e.g. an apology) forms. Awards of damages reflect seriousness and consequences of the malpractice incident and do not privilege any health care providers. As the law prescribes mandatory insurance of providers for civil liability, successful claims for compensation are usually not prevented by lack of funds of the providers. Courts are independent and the system of appeals and other legal remedies allows for correction of wrong first-instance decisions.

On the other hand, judicial proceedings may take years; this happens regularly in malpractice cases mainly because of the need for expert opinions. Experts may come to different conclusions and additional expert evidence is often introduced in an attempt to clarify the situation. The result is that in some circumstances there may be e.g. three or four differing expert opinions, significantly complicating the resolution of the case and lengthening the proceedings.

For many patients, the issue of costs of civil proceedings is also relevant. While the monetary costs are not prohibitively high and there are mechanisms which alleviate them (e.g. exemption from court fees, legal aid etc.), for some claimants they may still pose an obstacle to initiate the lawsuit. However, an even greater difficulty lies in the effort which a claimant (or her representative) needs to exercise in obtaining evidence and presenting a coherent case in order to succeed. Evidence in medical malpractice often consists in medical records and their evaluation by experts, which is a complicated and time-consuming process. These factors influence some of the potential claimants to prefer making a criminal complaint to the police instead of a civil lawsuit, with a view that if criminal proceedings are indeed commenced, the claimant may later be able to utilize the ensuing findings and save at least part of the costs and effort of civil litigation.

Overall, the system of compensation by means of civil litigation provides reasonable fairness and average efficiency, i.e. neither particularly high nor unacceptably low. This leads to periodical attempts or proposals to improve it by gradual reform, e.g. by adjustment of rules of evidence to lighten the burden borne by the patients in some cases, increase of legal aid availability and greater promotion of out-of-court settlement by means of alternative dispute resolution. Currently there are no serious proposals to completely abandon the established civil liability system.

Normative framework for medical malpractice liability

The elements of civil liability include a wrongful act or omission, an ensuing harm and a causal link between them. Czech law traditionally used to treat fault in a narrower sense as a separate notion different from wrongfulness and describing the mental relationship

⁸ Called “adhesive proceeding” in jurisprudence related to criminal procedure, though not in the actual text of criminal procedure laws.

of the perpetrator towards her act or omission. Whereas wrongful means basically contrary to law in the broad sense, i.e. health care objectively failing to adhere to professional standards would be considered wrongful, fault described the subjective element – either intent or (subjective) negligence of the responsible party. Admittedly, from the practical perspective wrongfulness and fault usually go hand in hand, because objective failure to provide proper medical care is typically also subjectively negligent.

The current Civil Code uses a somewhat altered approach and distinguishes contractual and non-contractual liability. For contractual liability (i.e. based on breach of contract), wrongful act or omission, harm and causation are sufficient and there is no need to consider fault as an additional element. As the greater part of health care is provided within a contractual relationship, this triad applies to most cases of medical malpractice. If the health care provider fails to adhere to the relevant standard of care and thereby causes harm to the patient, liability may arise.⁹ In non-contractual liability (based on breach of the law where there was no contractual relationship) fault is required in addition to the basic triad; however, if a breach of legal obligation is established, fault in the form of negligence is presumed.¹⁰ This presumption is rebuttable but in the context of health care it is rather difficult to rebut it separately, without (at the same time) refuting the wrongfulness of the act or omission in question.¹¹ Consequently, the distinction between contractual and non-contractual liability in health care is rather minor and (subjective) fault is no significant precondition for success of a compensation claim.

The first critical aspect of civil liability for malpractice is wrongful act or omission, i.e. one which breaches a legal obligation. The law refers to professional standards as an important part of standard of care which a health care provider must exercise.¹² Not adhering to them is therefore a breach of a legal obligation and may lead to liability. As health care is a specialized, demanding activity, it is not enough to act as a *bonus pater familias*, but rather as a reasonable professional with expert knowledge and skill which an average professional should possess and utilize in any comparable situation.

The law makes no express territorial limitation of what is accepted medical knowledge. It is built on an implicit assumption that medical science (to which it refers) is the same domestically and internationally. It can surely be argued that this might not be true

⁹ Theoretically, the provider may escape liability if they prove that fulfilment of contractual obligations was prevented by an extraordinary, unforeseeable and unpreventable obstacle independent of the provider's volition [see sec. 2913(2) of the Civil Code], but this liberation ground is extremely rare in medical practice as it consists in *vis major* (*force majeure*) uncommon in normal health care settings.

¹⁰ By sec. 2911 of the Civil Code.

¹¹ It would have to be a case in which the health care provider failed to provide care of the required standard but at the same time was not negligent. In all likelihood this would again be a case of *vis major*, i.e. an extraordinary outside factor which caused the care to fall below the expected level without any blame on the part of the provider.

¹² According to sec. 28(2) of the Act No. 372/2011 Coll., on Health Services, as amended, a patient is entitled to health care of appropriate professional quality; according to sec. 4(5) of the same statute, such qualitative level requires providing care in compliance with rules of science and recognized medical methods, with respect to individuality of a patient, specific conditions and objective possibilities. This does not comprise solely the duty to perform correctly (from a "technical" perspective) a medical intervention, but needs to be interpreted broadly, covering also the general organization of care by a particular provider, respect for patients' rights etc. Cf. the ruling of the Constitutional Court of the Czech Republic of 9th January 2014, File No. III. ÚS 2253/13.

throughout the world. But the law's aspiration here is that Czech health care practice is not qualitatively worse than in similar developed countries of Euro-American cultural sphere.

Generally, the health care provider has an obligation of means, i.e. to act diligently and in conformity with relevant professional standards, but without any responsibility for achieving a particular outcome. However, the provider could assume a contractual obligation to achieve such outcome (e.g. in certain cases of aesthetic medicine¹³). In addition, if the particular performance in question has a rather technical nature, such as a laboratory analysis of a blood sample or making of an implant (but not its actual insertion into human body), it can be viewed as performance of a work whose successful completion can be reasonably expected; failure to achieve it could therefore be considered as a breach of obligation.

Because health care often consists in attempts to influence processes which take place in a human body and medicine is unable to fully control them, even proper care may be unsuccessful. Any medical intervention is always associated with risk of failure. This may mean not just failure to achieve the desired result, but also occasioning additional harm to the patient. The law and jurisprudence recognize this fact; provided that the health care provider acted in compliance with all relevant obligations and standards of care, materialization of such accidental risk does not give rise to liability.

In civil litigation arising from medical malpractice, the claiming patient has to prove the wrongful act or omission on the part of the health care provider, suffered harm and causal link between the two.¹⁴ If these elements are established, the care provider could raise a defence of *vis major*, but that is very rare in medical context (see above). Much more often, the defence will consist in denying the mentioned elements of liability and offering evidence to weaken them as a basis of the claim. If the health care provider can show that they adhered to generally accepted professional guidelines, it may lead to the conclusion that all relevant professional standards were maintained; however, guidelines are not binding and neither they create an absolute defence nor is it impossible to refute a claim even if the guidelines were not followed, if the provider can show that they acted on the basis of a reasonable, scientifically defensible medical opinion.

The patient is expected to provide proof of the alleged facts to the level of certainty or “practical certainty”, i.e. a rather demanding standard with no special means of alleviation.¹⁵ In 2008, the Constitutional Court called for re-evaluation of this rigid rule in an obiter dictum related to proof of causation and noted that the requirement to prove causal link with 100% certainty could not be inflexible and was unrealistic.¹⁶ The court did not

¹³ The health care provider may calculate that an increase in costs due to liability for outcome may be outweighed by economic benefits due to increase in consideration received for such care (due to higher prices or more patients seeking care from such provider).

¹⁴ The rules of evidence in medical malpractice disputes in the Czech Republic were thoroughly discussed in HOL-ČAPEK, T. *Dokazování v medicínskoprávních sporech* [Evidence in Disputes Arising from Medical Care]. Praha: Wolters Kluwer, 2011.

¹⁵ In its judgement of 27th September 1990, File No. 1 Cz 59/90, the Supreme Court speaks about the necessity of proving the alleged facts “safely” and expressly notes that mere probability is not sufficient.

¹⁶ Ruling of the Constitutional Court of the Czech Republic of 12 August 2008, File No. I. ÚS 1919/08.

establish any new rule but suggested that courts were not strictly bound by the traditional rule and might develop a new approach. However, the predominant case law is still based on the principle that all basic constituent elements of liability need to be proved with practical certainty.

One of the possible exceptions may relate to situations of lacking medical records. The health care provider has a statutory duty to keep detailed records related to the patient and provided care. If the records are not properly kept, or are missing altogether, the health care provider is in breach of this obligation. Nonetheless, in such case the patient may lack a particularly important piece of evidence to prove any errors in the actual treatment and so the care provider may enjoy an unfair advantage based on a breach of law. In a 2016 ruling,¹⁷ the Supreme Court held that it may sometimes be acceptable to shift the burden of proof to the care provider, especially when not doing it would mean that the claimant could be objectively unable to prove the necessary facts.¹⁸ However, whether this judgment signals an incoming overall change remains to be seen, as it goes against numerous decisions based on the traditional opinion.

Both in the legal doctrine and in a minor part of case law,¹⁹ the concept of loss of chance doctrine and its potential applicability has been discussed. However, the critical question is whether it really represents an independent type of compensable damage or whether it is in fact just an attempt to bypass the need to prove causation with practical certainty in cases when it would be particularly difficult.²⁰

The law of civil liability sets up no particular conditions for claimants in cases of medical malpractice and treats them similarly to any other claims for compensation of damage. Claimants have a general duty to ask potential defendants to provide compensation voluntarily before commencing judicial proceedings (by means of a pre-trial notification), but that is a common sense principle. There are no special pre-trial filters such as a requirement to first obtain a medical evaluation from a neutral expert, although having a favourable neutral expert opinion at her disposal will obviously strengthen the patient's case. If a claimant succeeds in the lawsuit, she will typically be entitled to recover litigation costs, but attorneys' fees are limited by the law, which sets a tariff on the basis of which they are calculated. However, this tariff is applied not just to medical malpractice cases but to all types of civil litigation. There are no particular time limits to commence a malpractice lawsuit apart from the general rules of limitation. Claims for compensation of harm are usually barred after elapse of three years since the moment when it first became possible to sue.²¹

¹⁷ Judgment of the Supreme Court of the Czech Republic of 28th June 2016, File No. 30 Cdo 1144/2014.

¹⁸ From a comparative perspective, we may point out sec. 630h(3) of the German Civil Code (BGB) shifting the burden of proof in case of lacking medical records.

¹⁹ E.g. ruling of the Constitutional Court of the Czech Republic of 12th August 2008, File No. I. ÚS 1919/08, judgment of the Supreme Court of the Czech Republic of 31st July 2014, File No. 25 Cdo 1628/2013, or ruling of the Constitutional Court of the Czech Republic of 20th December 2016, File No. III. ÚS 3067/13.

²⁰ Cf. HOLČAPEK, T. Doctrine of Loss of Chance in Medical Malpractice Cases: Comparative, International and Transnational Aspects. In: ŠTURMA, Pavel et al. *Czech Yearbook of International Public & Private Law*. Vol. 8. Praha: Česká společnost pro mezinárodní právo, 2017, p. 445–449.

²¹ Sec. 629(1) of the Civil Code. In claims for compensation of damage, it may be relevant for commencement of the three-year period when the claimant became (or objectively should have become) aware of the harm and identity of the responsible person.

As the underlying legal principle is that compensation should be as proportionate to the harm as possible, there is no fixed upper limit on amount of monetary satisfaction, whether for tangible or intangible harm. The courts should award compensation which is just and decent. This rule is constitutionally solid, but creates a risk of grossly dissimilar awards in like cases. To mitigate this risk, there are some guidelines to help courts reach comparable amounts of compensation.²²

A successful claimant is typically awarded a lump-sum compensation for intangible harm (physical or mental pain, suffering, loss of faculties, loss of privacy etc.). While this approach has its disadvantages, e.g. that the patient may be over- or undercompensated for loss of amenities if she subsequently lives much shorter or longer than expected, it also provides the benefit of protecting the patient against future demise or insolvency of the health care provider (or its insurer) and allows her to make a one-time investment in life-improving facilities (e.g. redesigning her home to help her better cope with disability caused by the malpractice incident). However, tangible harm (loss of earnings etc.) is usually compensated by pension (i.e. regular payment by the liable party) unless the court, on the basis of an important reason and request by the claiming patient, awards a lump sum in its stead.

Specific issue: secondary victims

A specific problem in medical malpractice compensation cases is posed by the so-called secondary victims, i.e. victims different from the primary victim whose damage was directly caused by the incident. An example of a secondary victim is someone who suffered shock due to witnessing wrongful death of a close family member (who was the primary victim of the wrongful conduct). In 1976, the Supreme Court of Czech Republic denied claim for compensation of such secondary victims on the basis of an alleged lack of causation. In its reasoning it considered the secondary damage to result from the primary damage, but not from the event itself. In this approach, the primary damage interrupts the causal chain between the event and the secondary damage.²³ This reasoning has been constantly repeated in the Supreme Court of the Czech Republic case law ever since.²⁴

Notwithstanding that, by the end of 1990's courts started to award compensation to the deceased's family members for violation of their own right to private and family life.²⁵ A 2004 amendment to the old Civil Code (then in force) introduced an explicit compensation scheme for secondary victims in case of an unlawful death of a close family member, setting an exhaustive list of persons entitled to compensation and fixed amounts of

²² The most relevant one is a 2014 methodology developed by a group of experts in which several Supreme Court judges participated. This methodology attempts to offer a structured system of evaluation of various types of pain and suffering and loss of faculties or amenities and also certain principles for assessing an increase or decrease in compensation in a particular case. In practice, the methodology is also often utilised by patients, health care providers and their insurers in out of court settlement of malpractice cases.

²³ Judgment of the Supreme Court of the Czech Republic of 30th November 1976, File No. 2 Cz 36/76.

²⁴ E.g. judgment of the Supreme Court of the Czech Republic of 12th June 2008, File No. 25 Cdo 2692/2006.

²⁵ E.g. judgment of the Regional Court in Ostrava of 23rd January 1998, File No. 23 C 52/96, ruling of the Constitutional Court of the Czech Republic of 1st March 2000, File No. II. ÚS 517/99, or judgment of the Supreme Court of the Czech Republic of 28th February 2005, File No. 30 Cdo 1678/2004.

damages for each of them.²⁶ In practice, relatives of the deceased could then claim both these statutory damages and compensation for violation of private life (the amount of the latter being set by courts at their discretion).

The current Civil Code further widens the extent of secondary victims' claims. In sec. 2959 it enables compensation of secondary victims in case of primary victim's serious bodily harm (i.e. not just death), broadens the scope of persons entitled to compensation and replaces fixed amounts of compensation with the requirement of full compensation of secondary victims' suffering in accordance with principles of decency. In addition, sec. 2971 of the Civil Code grants, under certain conditions, the right for compensation of intangible harm to everyone who legitimately perceives such harm as their own personal misfortune, provided that it cannot be repaired otherwise. However, the Supreme Court has so far adhered to the abovementioned approach of breach in causation, leading to a paradox: emotional harm may be compensated (under sec. 2971 of the Civil Code, which does not distinguish primary and secondary victims), but when it is so serious that it may be medically diagnosed as damage to (mental) health, it becomes a claim of a secondary victim barred by interruption in causal link. It is rather likely that future case law will evolve to overcome this paradox.

II. ALTERNATIVES TO COURT PROCEEDINGS

The right of access to court is one of the fundamental rights and every person who claim to suffer harm as a result of medical malpractice is entitled to sue in court. It is theoretically conceivable that there could exist an obligatory non-judicial proceeding for assessment of claim of this sort.²⁷ However, because of constitutional law considerations and the overriding legal force of the right of access to courts and fair trial, any such alternative mechanism would have to be subject to full judicial review with respect both to the law and the facts and it would probably have to be obligatory only for the health care providers – patients would most likely have to be entitled to choose whether they wish to utilize it. Currently, there is no such mechanism for medical malpractice cases in Czech law either in being or in preparation.²⁸

Voluntary alternative dispute resolution without direct involvement of a public authority is generally supported, but is not tailor-made to suit medical malpractice litigation and sometimes cannot be used for it at all (see below). Its techniques are diverse; in the Czech Republic negotiation, mediation and arbitration are those most commonly discussed.

In the malpractice context, it is quite normal that the patient, usually assisted by a lawyer, enters into negotiation with the health care provider about an out of court settlement, often with the participation of the provider's insurer. Such negotiation does not

²⁶ Sec. 444(3) of the Act No. 40/1964 Coll., the Civil Code (predecessor of the current one).

²⁷ E.g. a system of non-judicial panels for pre-trial screening of claims, or independent boards for resolution of complaints which could exert pressure on the care providers to offer compensation to the patient.

²⁸ Such non-judicial proceedings do exist in respect of several other types of claims. E.g. disputes between banks and their clients who are consumers may to a certain extent be adjudicated by the Financial Arbiter (who, despite the name, is a public official appointed by the Cabinet), if requested by the consumer-client. Any party may subsequently go to court, who is entitled to fully review the decision and amend it in any aspect.

require special legal regulation and is primarily motivated by common interest to avoid potentially lengthy litigation with uncertain outcome.

Mediation, i.e. negotiation facilitated by a neutral third-party mediator, may also be commenced if both parties agree. Its principles are not specific for malpractice disputes and are regulated by a statute. It is possible before a lawsuit is initiated; in addition, a court may direct the parties to take part in a meeting with a mediator listed in a special register of mediators with a view of their agreeing to commence mediation. However, they may only be forced to hold an introductory meeting with the mediator; if either of them does not wish to proceed further, the case will return to court for normal adjudication. The same applies if any party of a commenced mediation wishes to terminate it for any reason.

Generally speaking, the parties could also agree on arbitration. However, the relevant law on arbitration²⁹ does limit the scope of its potential application to disputes related to property (in the broadest sense, but still excluding matters of life, health, privacy, personal integrity etc. and therefore arguably also compensation for harm affecting these intangible goods). In addition, the statute as currently worded also precludes arbitration in disputes from contracts between consumers and businesses and a significant part of health care is provided under exactly such contracts, even if they are concluded informally. For these reasons, arbitration is not utilized for medical malpractice litigation in the Czech Republic. Due to the described legal constraints it is equally inapplicable to cross-border healthcare disputes.

It can be summarised that the alternative techniques framework is rather conservative and does not offer any experimental methods with an aim to reduce the role of ordinary litigation. Civil liability of health care providers is adjudicated under the ordinary courts' framework with decentralised first-instance decision making and a system of appeals and other judicial means of redress. Negotiation and mediation are employed, but there are no detailed analyses of their efficiency in respect of medical malpractice; any promotion of such techniques is rather built on general assumptions and anecdotal evidence that a speedy out of court settlement is usually preferable to protracted litigation.

It may be argued that early disclosure and apology have an important role in preventing the breakdown of physician-patient relationship of trust and in resolving any disputes. However, fear of litigation may motivate physicians and health care providers to do the opposite, i.e. admit no responsibility. This approach may be based on the logical consideration that an early apology will be interpreted as admission of liability and subsequently exploited by the claiming patient in a lawsuit. Currently, Czech law does not contain any provisions which would render an early apology and admission of incorrect procedure unusable in litigation, or perhaps limit the amount of compensation which can be claimed when the health care provider admits liability early. Therefore, the law does not provide any particular incentive for timely disclosure and open communication about an error.³⁰

²⁹ Act No. 216/1994 Coll., on Arbitration Proceedings and Enforcement of Arbitral Awards, as amended.

³⁰ For a general introduction to the problem of alternative dispute resolution (including early disclosure and apology) and its benefits and disadvantages cf. ŠUSTEK, P., HOLČÁPEK, T. Alternative Dispute Resolution in Medical Malpractice Disputes. In: Z. Radic – A. Rončević – L. Yongqiang et al. *Economic and Social Development (Book of Proceedings)*, 22nd International Scientific Conference on Economic and Social Development – “The Legal Challenges of Modern World”. Varazdin: Varazdin Development and Entrepreneurship Agency, 2017, p. 233-242.

III. PROPOSALS DE LEGE FERENDA

Czech civil law has been recently restated and significantly amended by the relatively new Civil Code. The law increases emphasis, *inter alia*, on the importance of intangible, non-proprietary rights, including also right to protection of health, privacy, dignity and personal integrity. In the field of medical malpractice litigation, it is generally observed that the number of claims for compensation and the amounts claimed (both for tangible and intangible harm) are on the rise. The topics which are particularly debated in contemporary legal discourse include determination of proper amount of financial compensation in cases of personal injury,³¹ keeping or lowering of the rather demanding standard of proof, or finding methods for alleviation of burden of proof, liability for nosocomial infections or extent of liability for treatment performed without properly informed consent.

There are many more challenges for lawmakers and courts in relation to medical malpractice and while some of them may not have yet proceeded to the phase of changes in law, they may form the subject of such debate in near future. Cases of claims for wrongful birth (or claims of parents for birth of a child who would not have been born but for medical malpractice) may be rare, but they are controversial and may require the courts to determine what types of tangible and intangible harm should be compensated in order to balance the parents' right to private life with respect to the value of life of the child.³² The issue of secondary victims introduced above may also be expected to return for new consideration in light of the Civil Code emphasis on compensation of intangible harm, and it is quite possible that the Supreme Court will change its position and start to award compensation for secondary victims' mental injury. Furthermore, a discussion commences, at least on a theoretical level, about ontological harm (*danno tanatologico* in Italy, *pretium mortis* in France etc.) in the sense that compensation for unlawful death might be awarded to the deceased person herself and become part of her estate and inherited.

Procedural aspects, including the non-judicial avenues for dealing with medical malpractice cases, are also discussed but the legal practice arguably first needs to digest the changes in substantive law and gain more experience with mediation procedures.³³ There is no actual proposal for reform consisting in establishing a non-judicial system of malpractice compensation, although it is quite possible that an interest in one may arise rather quickly, especially if the trend of increasing litigation in this field continues.

Czech judges hold diverse views with respect to potential reform. Nevertheless, it can be argued that because of the constitutionally protected right of access to court, they would not support a system which would take medical malpractice disputes out of their supervision. Given the Civil Code's emphasis on fair and just reparation of harm and generally anthropocentric orientation, it is doubtful whether they would consider a non-ju-

³¹ Cf. e.g. the methodology on compensation for pain, suffering and loss of amenities mentioned above. Another closely related topic is compensation of relatives for the patient's wrongful death – there is no methodology for these cases and it is highly debatable what constitutes a fair satisfaction.

³² For a general analysis of wrongful birth claims cf. ŠUSTEK, P., ŠOLC, M. Court Decisions in Wrongful Birth Claims As Possible Discrimination Against the Child. *Espaço Jurídico Journal of Law*. 2017, Vol. 18, No. 1, p. 31-48.

³³ The Act No. 202/2012 Coll., on Mediation, which provides legal platform for mediation carried out by registered mediators, came into force in 2012.

dicial system capable enough to provide sufficient satisfaction. Nevertheless, a reform which would give the patients an alternative procedural avenue, e.g. a recourse to an independent expert panel which could, after an informal hearing and review of medical records, order the health care provider to pay compensation, with both parties entitled to seek review of the decision in a court, could gain support, provided that the patient would not be obliged to utilize such recourse if she did not want to.

IV. SYSTEMIC REMARKS

Beside the typical cases of medical malpractice in which the health care provider commits an error in diagnosis or treatment, falling below the expected standard of care and therefore acting wrongfully, there may be cases in which harm to patient arises from insufficient overall level of health care quality or availability. This may be caused by inadequate financing and staffing, leading to long waiting lists or unavailability of modern, innovative techniques and medicaments. These issues do not fall under the notion of medical malpractice because they are usually not caused by one particular health care provider (and the health care providers are generally not liable for them at law), but rather the health care system as regulated and, more or less, organized by the state.

There is a constitutional right to protection of health and access to health care without direct payment.³⁴ This right can only be exercised under conditions and to the extent set by laws which implement the constitutional principle. Nevertheless, it is clear that the implementing laws cannot limit the right in such manner that they would deprive it of substance. Interpretation of right to free health care is a very difficult and contentious exercise, as it has direct connections with public policy, financial resources of the public health system etc. Czech Constitutional Court has already issued numerous decisions in this respect, discussing e.g. the issues of so-called “regulation fees” (payment by patients to general practitioners and other categories of physicians, to hospitals for inpatient treatment etc.) and potential distinction between basic care (available to all without direct payment) and premium (or: above-standard) care conditional upon additional payment by the patient.³⁵

A patient who claimed that she had suffered harm because of a long waiting time, or any other systemic unavailability of care, could possibly attempt to sue the state on the basis of infringement of the mentioned fundamental right. On the other hand, it is generally accepted that no health care system has unlimited resources. Therefore, any such claim would arguably have to show that the state could have prevented the harm by better organization of the health care system, even within the set financial constraints. This is however only a theoretical idea as there is not yet any established case law in this respect.

The public health insurance system is administered by health insurance companies set up on the basis of several relevant laws. Their duties include creating a network of health

³⁴ Expressed in Article 31 of the Charter of Fundamental Rights and Freedoms, a document which is formally separate from the Constitution but has equal legal force.

³⁵ Cf. e.g. the rulings of the Constitutional Court of the Czech Republic of 10th July 1996, File No. Pl. ÚS 35/95, of 4th June 2003, File No. Pl. ÚS 14/02, of 20th May 2008, File No. Pl. ÚS 1/08, or of 20th June 2013, File No. Pl. ÚS 36/11.

care providers, who are contractually linked with the health insurance company and undertake to provide health care to its clients. If improper administration of such network, or failure to create it, by the insurance company led to the patient's harm, it could be possible to initiate a lawsuit against the insurance company. However, this again would likely be a matter more of public than private law. Currently, there is no established jurisprudence on any such claims, but it can be expected to arise in the foreseeable future.

A different type of issues is connected with liability for defects in medical products. If any such defect leads to harm suffered by the patient, it is a matter of civil liability. This can be two-fold – one avenue is a claim against the health care provider under the normal rules of medical malpractice, on the basis that the provider used faulty equipment or medicament in performance of the obligation to care for the patient. An alternative approach is product liability of the manufacturer or supplier of the defective product (in the case of medicaments, this may also be the holder of registration of a particular product).

Finally, in cases of infringement of other non-tangible goods than health, e.g. privacy, dignity or personal integrity, we may distinguish two separate lines of thought. Under civil law, the health care provider may be liable for them just like for any event of medical malpractice. From the civil law point of view, the patient may commence a lawsuit for treatment without informed consent in a way very similar to a lawsuit for compensation of damage to health caused by incorrect surgery. Therefore, the general observations about civil liability for malpractice set out above apply here as well. The second line of thought concerns public supervision of e.g. processing of personal data. If privacy of the patient is breached by making her medical records unlawfully accessible to third parties, public authorities charged with protection of personal data may punish the health care provider with appropriate public law sanctions (fine, revocation of permission to operate etc.), depending on the seriousness of the incident.