PRÁVNICKÁ
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Univerzita Karlova

THE LEGAL LIABILITY IN HEALTHCARE

READING MATERIALS

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Introduction

Dear participants in the course Legal Liability in Healthcare,

Welcome to the course Legal Liability in Healthcare held by lecturers Martin Šolc and Helena Van Beersel Krejčíková!

Please allow us to briefly introduce the nature and goals of this course. As you may realize having already had the first look at this Reading Material, the Reading Material is not meant to be a textbook, nor is the course supposed to consist of lectures. The main idea is, that we will work together, in an interactive way, so you can gain the theoretical knowledge through dealing with relevant case law, selected legal provisions, real life case studies, newspaper articles etc. Besides, the course will also target your ability to conduct critical analysis, together with the ability to reason for and communicate your opinion and to have a challenging discussion regarding highly controversial issues.

As the name of the course implies, our discussion will include more branches of law, i.e., mainly civil law and criminal law, with some overlapping administrative law. You shall be prepared to solve a case whilst bearing in mind the legal position of the patient, the attending healthcare workers, the healthcare provider, and other subjects relevant to the case, from the perspective of each of the above mentioned branches. In addition, you will learn to be aware of the different approaches (and results) every legal branch might offer, which at the end should provide you with a deeper understanding of the whole legal structure of mutual rights and duties of the subjects involved in providing healthcare.

Looking forward to meeting you all soon!

Martin Šolc and Helena Van Beersel Krejčíková

1. Legal Liability in Healthcare – Introduction

In our quest to gain some understanding of civil liability in healthcare, we will be accompanied by a single case study. We will try to identify all the relevant legal problems that arise from the case, analyse their possible solutions, and compare them to other jurisdictions' approaches.

Case Study:

Early in the morning, a mother with a child came to the paediatrician's office. The child suffered from a sudden pain in the right side of her abdomen. The doctor took her medical history, physically examined her (using a palpation examination and listening to her heart) and recommended dietary measures. After returning home, the pain started to worsen gradually. The mother, however, was very insecure regarding what to do. Even though the child was relentlessly crying, the mother did not take her to the ER (emergency room) of the near hospital before the next day's late evening.

An ER physician interpreted the child's condition as an acute abdominal event with suspected appendicitis. Such a condition requires urgent intervention. The child's father was unavailable at the time (he was on a business trip and did not respond to the mother's calls). The doctor explained the situation to the mother, including the advantages of laparoscopic surgery. Based on this information, the mother provided her consent with laparoscopy. Nevertheless, she was not informed on the risks and disadvantages of laparoscopy. Some of these disadvantages are a reduction in the surgeon's field of view and her limited sensory contact with the tissues.

After the child's surgery, internal bleeding caused by the damage to the surrounding tissues was found. Another invasive procedure was required to solve the situation. During the subsequent hospitalisation, the surgical wound from the second surgery was infected by MRSA. Even though the physicians used all possible antibiotics, none of them were successful in suppressing the infection. Sepsis developed, resulting in particularly serious bodily harm (damage to the brain). The hospital claims that it provided care on the appropriate professional level, and therefore it cannot be held legally liable.

1. The term legal liability

Legal liability can be defined as the "responsibility that someone has for their actions".[1] Among different jurisdictions, there are several ways to understand the term legal liability. Generally, it denotes a secondary duty that arises as a consequence of the breach of a primary duty. For example, if a health professional fails to fulfil their (primary) duty to comply with the standard of care, there might arise a (secondary) duty to compensate the patient or their relatives.

There are also different ways to understand the term. For example, current Czech civil law is based on the so-called prospective concept of legal responsibility (we should notice that the Czech language does not know the difference between the terms liability and responsibility). It means that one is responsible for fulfilling their duty. Therefore, responsibility latently accompanies the primary duty and only materialises and gives rise to a secondary duty in case of a breach of the primary duty. Nevertheless, we might here use the more generally understandable retrospective concept of legal responsibility. It is the one we have described above: i.e., responsibility (liability) as a secondary duty arising from the breach of the primary obligation.

Legal liability might be considered one of the basic mechanisms of the application of the law. With a grain of salt, it could even be said that the law is based on liability since primary duties are, as a rule, only enforceable by the threat of secondary duties.

Legal liability is just one of several types of responsibilities that exist in society. Sometimes the term "political responsibility" is used in the media, which apparently exceeds the boundaries of legal liability: even behaviours that are legal can still be considered unacceptable in terms of political responsibility (arguably at least in the context of a healthy political culture). In a similar way, we sometimes talk about "managerial responsibility", which is understood as a certain kind of strict responsibility for the outcomes of the manager's projects regardless of the potential bad outcome is directly caused by the manager's particular fault.

Nevertheless, the other types of responsibility, even more important for society's life, are often overlooked in everyday life. Sometimes, it takes a crisis – either personal or collective – to ask the question of what kinds of responsibility we encounter in our lives.

Several kinds of responsibility were described, among other authors, by a German psychiatrist and philosopher Karl Jaspers in his book "The Question of German Guilt", first published in 1947. As the title suggests, the book deals with the question of how it was possible that the German nation engaged in the Nazi atrocities of World War II. Jaspers defined four categories of guilt: criminal, political (which also encompasses the level of compliance with the Nazi regime on behalf of ordinary citizens), moral (regarding one's personal life and choices), and metaphysical (consisting in choosing to stay alive rather than risk one's life and die in the protest against the Nazi regime).[2] We might see how each category of guilt is stricter than the previous one, making it harder to remain "not guilty".

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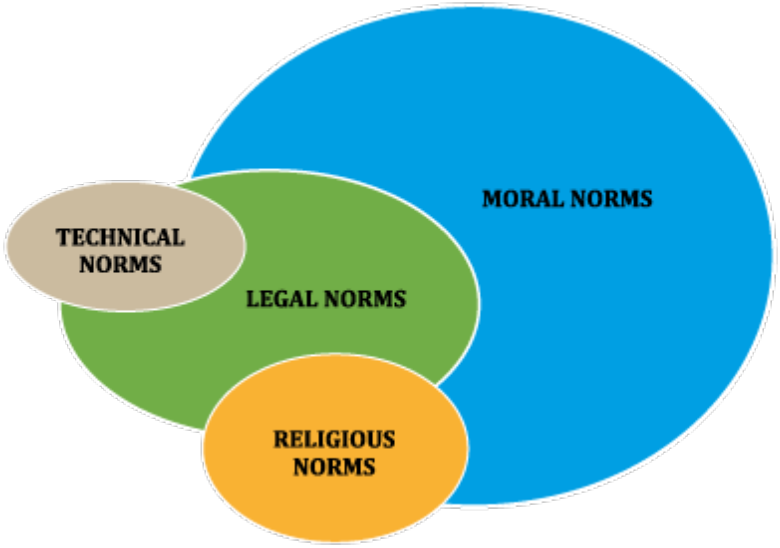
1 https://dictionary.cambridge.org/dictionary/english/legal-liability.

2 JASPERS, K. The Question of German Guilt. Fordham University Press, 2001.
As cited in KNAPP, V. Teorie práva [The Theory of Law]. Praha: C. H. Beck, 1995, p. 85.

We might not need to go as far as to tyrannical regimes. Our legal liability only relates to actions linked to a qualified reprehensibility or danger to others or society. For example, to show compassion and comfort to a deeply disturbed person may be a very important imperative of etiquette and general morality, but (perhaps unless the person is clearly suicidal) it could hardly be considered a legal obligation.

The above-outlined principle was aptly described by the Austrian lawyer Georg Jellinek who famously stated that "the law is the minimum of morality".[3] This could be loosely illustrated in the **following way:**



Undoubtedly, the presented diagram is simplifying. Nevertheless, it tries to describe the relations between the basic categories of norms, while a special kind of responsibility corresponds to each category:

- Moral norms – arguably the broadest category, encompassing all norms of behaviour that is considered morally good in the society, from proper greetings on the street to a prohibition of murder. They encompass both general moral norms (which apply to everyone) and special moral norms (which only apply to particular categories of people, e.g., the norms of political culture apply to politicians).

- Legal norms – we can arguably describe them as the norms enacted in a source of law (yes, it is a circumstantial definition by far) and enforceable by the authoritative power of the state. Violations of legal norms establish legal liability.

- Religious norms – the norms presented as more or less binding in the context of particular religious traditions. Even though it is easy to ignore it, many of these norms overlap with moral and/or legal norms: for example, the prohibition of murder, stealing, or slander. Some of them apply only to the particular religious tradition, such as the rules of religious rites, the definition of the appropriate dietary regime, etc.

[3] As cited in KNAPP, V. Teorie práva [The Theory of Law]. Praha: C. H. Beck, 1995, p. 85.

- Technical norms – usually detailed norms for repeatable technical tasks. In the broader meaning, the standard of care in medicine (the so-called lex artis that we will discuss later) belongs to these norms. They usually have a clear legal relevance since certain legal norms require that these technical norms are adhered to. If a professional fails to comply with the relevant technical norms, they might be held legally liable. We might also argue that technical norms are closely related to moral norms since they ultimately aim at achieving moral goals (such as the protection of human health and life, the improvement of the human condition, etc.), but that is a rather philosophical question.

There could arguably be identified different categories of norms. Nevertheless, the basic relations between the above-described categories might suffice to help us understand how the different types of norms – and corresponding responsibilities – help to hold society together.

Some authors argue that the protection of social cohesion – or homeostasis – is a basic function or aim of law.[4] If legal norms did not support social cohesion, society would eventually come to a destructive disruption, resulting perhaps in mass riots, civil war, or another deep crisis that would sooner or later lead either to complete undoing of the particular society and its absorption by another society, or to a formulation of new legal norms that will ensure social cohesion. In this important task, legal norms have traditionally been widely assisted by other types of norms, especially moral and religious ones. As the general acceptance of moral and religious norms fades in pluralistic post-modern societies, legal norms are ever more burdened with the task to reconcile the interests of different groups of people and keep society coherent. While this is not possible without the social acceptance of legal norms as reasonable and fair, legal liability plays a crucial role in this process.

Questions to ponder:

How could any beliefs about the functions or aims of law affect the legislation and/or case law on liability in medical malpractice cases?

Can court rulings in medical malpractice cases have any effect on social cohesion?

Are the courts allowed to consider the need to strengthen social cohesion in their decision making in individual cases? Should they be allowed to consider it?

[4] See for example, – in the Czech language – ELIÁŠ, K. Komentář k § 420 [Commentary to Section 420]. In ELIÁŠ, K. (ed.). Občanský zákoník. Velký akademický komentář. 1. vyd. § 1-487 [The Civil Code. The Great Academic Commentary. 1st ed. Sections 1-487]. Praha: Linde, 2008, p. 795.

2. Basic elements of liability

What needs to happen before legal liability (in the sense of a secondary legal duty) can be established? We usually recognise three or four basic elements of liability. While this simple distinction has been criticised as too simplistic, we may use it as a fundamental structure that will help us with our analysis of liability. Each element of liability will be further analysed in the next lessons.

a. Breach of duty

Obviously, a primary duty must be breached before a secondary duty can be established. In medical malpractice cases, the primary duty that is breached is most often is the obligation to provide care following the professional standards or the obligation to secure the patient's valid informed and free consent before providing any health services.

b. Harm

A mere breach of primary duty is not sufficient to establish a secondary duty in civil law (adifferent situation is in case of some crimes). The plaintiff must always claim and prove that they suffered compensable harm. The harm is a necessary element forthe establishment of liability. It is what is compensated – so the amount of compensation is based on the type and extent of harm. At the most basic, harms can be divided into material and immaterial ones.

c. Causation

It might happen that someone breaches their primary duty and someone else suffers harm, but the harm occurs for a completely unrelated reason. For example, a physician might overlook suspicious changes in a patient's blood count, but the patient might die of a heart attack the next night for a completely unrelated cause. For liability to be established, there needs to be a causal link between the breach of primary duty and the harm. There are more concepts of causation – we will analyse them later. The most basic of them is the but for test (also known as the condicio sine qua non test), according to which the causation is established if the harm would not have occurred, or if it would have occurred differently, had the duty not been violated.

d. (Culpability)

In some cases, liability also requires culpability (fault). Culpability might be defined as a subjective relation of the tortfeasor to the illegality of their actions and/or its possible consequences. The basic division of culpability is between intention and negligence. There are also special circumstances defined by the law in which culpability is not required: in these cases, we talk about non-fault or strict liability.

3. The joint fault of the injured person

Sometimes, the injured person is found to be at least partially responsible for the harm they suffered. In such cases, we talk about the injured person's joint fault, and the compensation is proportionally reduced. This principle is aptly described in Section 2918 of Czech Act No. 89/2012 Sb., the Civil Code (Civil Code or CC):

*If damage has been incurred, or if it has increased also as a result of **the circumstances attributable to the victim**, the tortfeasor's duty to compensate for damage is **proportionately reduced**. However, if the circumstances which are to the detriment of one or the other party have contributed to the damage only to a negligible extent, the damage is not divided.*

The concept of joint fault is based on the premise that whoever wants to claim for compensation for harm must pay proper attention to their own affairs. It would not be fair if the tortfeasor had to compensate for the full harm if they only partially caused it.

There must be circumstances attributable to the injured person. We might imagine a driver who causes an accident in which a cyclist without a helmet is involved. The expert witnesses might conclude that if the cyclist fulfilled their obligation to wear a helmet, the caused harm would be significantly less severe. The cyclist bears the harm to the extent they inflicted it on themself by their risky behaviour.

The injured person's joint fault is not taken into consideration by the courts of their own motion (ex offo). The tortfeasor must claim and prove the relevant facts. It will probably be easy in the case of a helmet-free cyclist, but it might be challenging in more complex or less clear cases.

Our cyclist partially caused their injury by their passivity since they did not undertake measures to prevent the harm. The joint fault might also consist in the active behaviour of the injured person, for example:

- if a pedestrian was injured while crossing the street against a red light or not using a pedestrian crossing
- if a person voluntarily boards a vehicle that is driven by a driver under the influence of alcohol or another addictive substance; if the driver causes an accident in which this person is injured, it will be considered their joint fault (they undertook the risks of using a car with a drunk driver)

The above-mentioned cases are quite typical. Nevertheless, a court will impute to the injured person any circumstances that belong to the sphere of influence of the injured person and can be attributed to them. For example, if the injured party will be at fault if they were bitten by a dog after teasing it and provoking it to fight. If the dog owner or the person who was taking care of it at the moment did not breach any duty, the injured party might even be solely responsible for their own injury.

For the joint fault to be established, the injured person must have tort capacity. Therefore, the joint fault cannot be automatically attributed to a child who ran to the street.

In the case of a joint fault, the damage will be proportionally shared between the injured person and the tortfeasor. Each party will share a part exceeding 0 % and below 100 %. The proportion can be 50:50 as well as 90:10.

The compensation can be reduced not only for the injured but also for the secondary victims (close persons who suffer emotional or psychiatric harm as a result of the primary victim's death or serious bodily injury). It might seem unfair because the secondary victims did not do anything wrong. However, it protects the tortfeasor from having to compensate more than they caused.

The opposite of joint fault is inseparable damage when the whole damage is born by one party. Even damage caused partly by the injured person might be inseparable in one of the following ways:

- in case of insignificant, negligible, joint fault of the injured person or tortfeasor's intent – the whole damage is born by the tortfeasor
- the whole damage might also be born by the injured party – for example, in the case of rally spectators who disregarded the safety measures and watched the races from close proximity[5]

4. Recommended readings to the next lesson

- ŠUSTEK, P. Current Debates on Medical Liability in the Czech Republic. *Journal de Droit de la Santé et de'l Assurance Maladie.* 2019, No. 23, pp. 63-66 (sub-chapters I and II), pp. 68-70 (sub-chapter 5).
- GOOLD, I., HERRING, J. *Great Debates in Medical Law and Ethics.* 2nd ed. London: Palgrave, 2018, pp. 77-85 (chapter "To what standard of care should the doctors be held?").
- HOLČAPEK, T. Liability for Medical Malpractice in the Czech Republic. *Responsabilità medica: Diritto e pratica clinica.* 2019, No. 3, pp. 383-386 (sub-chapters 1-3).

[5] See the decision of the Supreme Court of the Czech Republic, Rc 26/2008.

2. Civil Liability for Medical Malpractice

1. Breach of duty

The first element of liability is a breach of duty. Czech legal doctrine recognises two essential obligations of the provider of health services that correspond to the patient's basic rights. These are the obligation to provide care on the appropriate professional level and to refrain from any interference with the patient's physical or psychological integrity without the patient's valid informed consent (with several narrow exceptions defined by the law).6 In this lesson, we will focus on the breach of the first of the named obligation, i.e., on the provision of care not according to the relevant professional standards.

1.1. Breach of statutory v. contractual obligation

The Civil Code distinguishes between the breach of a statutory obligation and the breach of contractual obligation.

1.1.1. Breach of contract

A breach of contractual obligation gives rise to a non-fault liability.7 It means that the tortfeasor can be held liable even if they did not act intentionally or even negligently. If someone willingly enters into a contract, they should be expected to fulfil their resulting contractual duty.

The basic provision of contractual liability is Section 2913(1) of the Civil Code, which states:

*If a party **breaches a contractual duty**, such a party shall **provide compensation** for the resulting damage to the other party or the person who was evidently intended to benefit from the fulfilment of the stipulated duty.*

In the vast majority of cases, health services are provided on the basis of the contract for healthcare – a special contractual type regulated in Section 2636 and following of the Civil Code. The plaintiff can sue either for a breach of a contractual or statutory obligation (since the provider of health services and health professionals are obliged to comply with the standard of care not only by the contract but also by the law8). It might be more advantageous for the plaintiff to choose contractual liability as there is no need to prove culpability. Nevertheless, the practical difference is usually not very significant.

The reason lies in the content of the contractual duty that is potentially breached. Even under a contract for healthcare, health services providers are usually not responsible for a favourable outcome. Application of such a broad strict liability to a very complex field of medicine would be arguably unjust, it would unbearably burden the providers of health services and the health system as a whole, and it would strengthen the undesirable phenomenon of the so-called defensive medicine (when unnecessary diagnostic and even therapeutic interventions are carried out only to cover the providers in case of litigation).

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[6] See – in the Czech language – SALAČ, J. Pacient podle zákona o zdravotních službách [The Patient Under the Act on Health Services]. In ŠUSTEK, P., HOLČAPEK, T. (eds.) *Zdravotnické právo [Health Law].* 1st ed. Praha: Wolters Kluwer, 2016, pp. 211-212.

[7] See sub-chapter 2.3 on culpability below.

[8] See sub-chapter 2.1.2 below.

For these reasons, the contract for healthcare obliges the provider to comply with the standard of care, as we can read in Section 2643(1) of the Civil Code:

The provider shall proceed under the contract with due professional care as well as in accordance with the rules applicable to his field.

Therefore, the provider cannot be held liable for a negative outcome of care if they exerted due professional care (unless they explicitly guaranteed certain outcome in the contract, which might be imagined most likely in the context of aesthetic medicine, but even in this field it will be rare). The standard of "due professional care" under the above-cited provision is understood as being the same as the standard of care on appropriate professional level9 under Act No. 372/2011 Sb., on Health Services and the Conditions of Their Provision (Act on Health Services). Therefore, both under contractual and statutory liability, the plaintiff must prove the same basic fact: that the provider failed to comply with the standard of care. As negligence is presumed under statutory liability, the plaintiff's situation is very similar in both cases.

Furthermore, there are liberation grounds defined in Section 2913(2) of the Civil Code:

*A tortfeasor is **released from the duty to provide compensation** if he proves that he was **temporarily or permanently prevented from fulfilling his contractual duty due to an extraordinary, unforeseeable and insurmountable obstacle created independently of his will**. However, an obstacle arising from the tortfeasor's personal circumstances or arising when the tortfeasor was in default of performing his contractual duty, or an obstacle which the tortfeasor was contractually required to overcome shall not release him from the duty to provide compensation.*

All the grounds for liberation must be fulfilled cumulatively to liberate the defendant from contractual liability. The burden of proof is born by the defendant. Section 2913(2) of the Civil Code is nevertheless a nonmandatory rule which means that parties can agree on different grounds for liberation.10

Regarding the individual grounds for liberation (which might nevertheless be all met cumulatively), we may outline their content in a very brief manner:

- The unforeseeability of the obstacle
    - Section 4(2) of the Civil Code defines foreseeability (or the lack of it) generally for the whole CC in the following way: *Where the legal order makes a specific consequence dependent on one's knowledge, it means knowledge reasonably acquired by a person knowledgeable of the case having considered the circumstances which must have been obvious to him in his capacity. This applies by analogy if the legal order connects a certain consequence with the existence of a doubt.*

[9] See sub-chapter 2.2 below.

[10] For the limitation of this contractual freedom, see Section 2898 of the Civil Code: A stipulation which excludes or limits in advance the duty to provide compensation for harm caused to the natural rights of an individual, or caused intentionally or due to gross negligence is disregarded; a stipulation which precludes or limits in advance the right of the weaker party to compensation for any harm is also disregarded. In these cases, the right to compensation may also not be lawfully waived.

- in the medical context, we always need to take evaluate the (un)foreseeability from the perspective of a professional according to Section 5(1) of the CC: A person who offers professional performance as a member of an occupation or profession, whether publicly or in dealings with another person, demonstrates his ability to act with the knowledge and care associated with his occupation or profession. If the person fails to act with such professional care, he bears the consequences.

- The insurmountability of the obstacle

- the party (provider of health services) should do everything they can (what they can be reasonably required to do) in order to fulfil their duty

- an obstacle is not considered insurmountable if the duty can still be fulfilled, even though under difficult conditions (e.g., with higher costs or with the help of another person)

- The creation of the obstacle independently of the provider's will

- an obstacle must have arisen outside of the provider's control; in other words, it must be an external circumstance that occurs objectively (the so-called vis maior or the "superior force")

- explicitly is not mentioned the unavoidability of harm

- the liberation will not be possible if the party could have avoided the emergence of an obstacle with all reasonable effort that can be required

1.1.2 Breach of a statute

The liability for a breach of a statute is based on fault. Section 2910 of the Civil Code states:

*A tortfeasor who is **at fault for breaching a statutory duty**, thereby interfering with the victim's absolute right, shall **provide compensation** to the victim for the harm caused. A tortfeasor also becomes obliged to provide compensation if he interferes with another right of the victim by a **culpable** breach of a statutory duty enacted to protect such a right.*

In civil law, culpability is presumed in the form of simple negligence.[11] This is different from administrative law or criminal law, where culpability is not presumed. The presumption of negligence in civil law is rebuttable, nevertheless, it is only seldom rebutted. As we have already established, it is one of the reasons why the practical difference between statutory and contractual liability in the context of medical malpractice cases is usually not very important.

1.2. The appropriate professional level of care (the standard of lex artis)

Even though we do not find this term in any legal regulation, both the case law and doctrine usually talk about the standard of *lex artis*. If the carrying out of a procedure was in accordance with this standard, we say that the procedure was performed *de lege artis*. This stems from the Latin phrase *de lege artis medicinae*, meaning "according to the rules

[11] See sub-chapter 2.3 below.

of the art of medicine". Nowadays, we can say that *de lege artis* procedure was carried out in accordance with the rules of science and the law – as it should be.

1.2.1 Definition of appropriate professional level of care

Not surprisingly, lex artis has no petrified content (even though it is based on certain basic ethical and scientific premises). It is an indefinite legal concept that is in each case interpreted ad hoc.

Appropriate professional level is defined in Section 4(5) of the Act on Health Services as:

(…) the provision of health services according to the rules of science and acknowledged medical procedures with the respect to the individuality of the patient and with regard to the particular conditions and objective possibilities.

We can divide this definition **into three elements:**

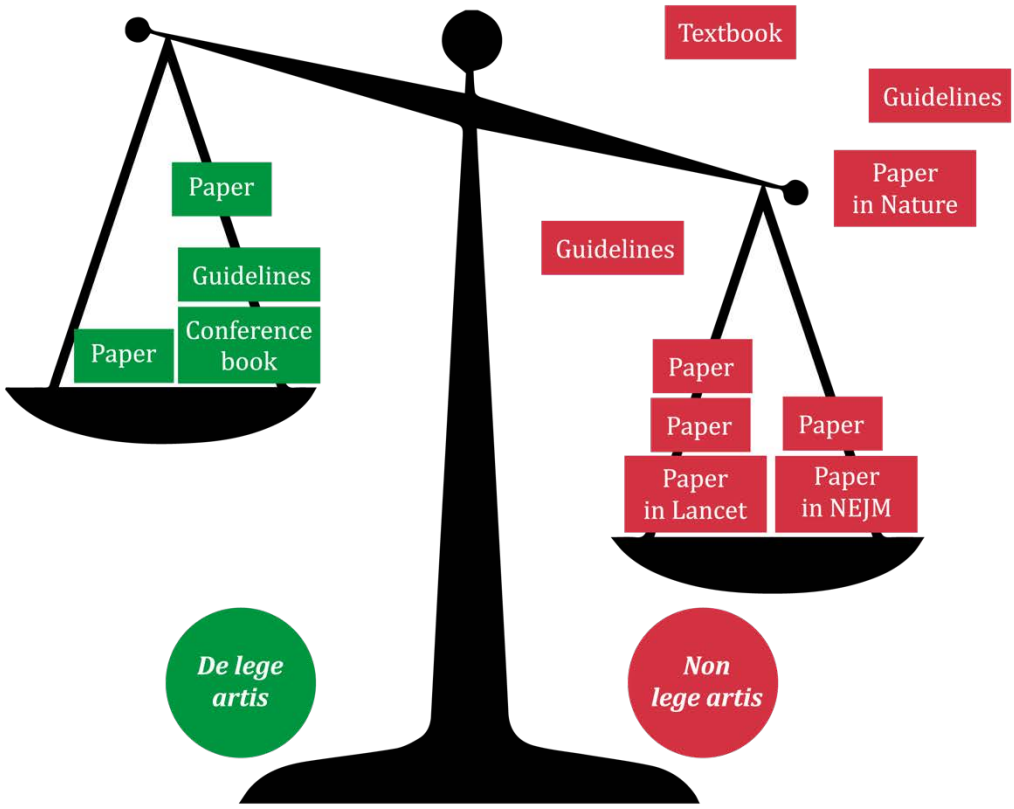
a. Compliance with the rules of science and acknowledged medical procedures

The rules of science and acknowledged medical procedures are a set of professional and ethical rules that are almost continually developing, changing depending on the development of medical research, theoretical and practical experience, and skills. It would be highly impractical – or rather outright impossible – to try to reflect on this ever developing body of principles and rules on the level of legal regulations. The legislative process is unbearably lengthy for this purpose, and it could never reflect all the developments in science. Even decrees of the Ministry of Health or similar legal regulations could never fulfil this task.

For this reason, the content of *lex artis* is defined in extra-legal norms, which are provided with legal relevance by the above-cited Section 4(5) of the Act on Health Services. These extra-legal norms or rules are to be found in professional publications, papers in scientific journals, scientific research findings, guidelines, recommended procedures, medical protocols, textbooks, etc. In the Czech Republic, recommendations of professional societies (such as the Czech Surgical Society, Czech Gynecological and Obstetrics Society, etc.) of the Czech Medical Association of J. E. Purkyně (ČLS JEP) are widespread and very relevant. Another source of the *lex artis* standard are the Ministry of Health documents. All of these documents are legally non-binding but can be used in court as evidence that the procedure was performed *de lege artis*. Only the so-called binding opinions of professional chambers – such as the Czech Medical Chamber (ČLK) – are formally binding for the chamber's members – but the compliance with these opinions does not automatically exonerate the physician in all possible cases.

All of the above-mentioned documents (including the binding opinions) need to be understood as indications that the procedure was carried out *de lege artis*, not definite proof. A procedure is considered *de lege artis* if the relevant part of the professional public in the specific field considers it to be so. Therefore, it does not have to be the very best procedure or the newest one, etc. In practice, there are usually more procedures possible for one indication, all of them being *de lege a*rtis until the professional public deems one of them too obsolete, risky, or uncertain, that it should not be carried out anymore.

Bearing this in mind, we can imagine the sources of the *lex artis* standard as weights we put on scales to assess whether a procedure – or the way it was carried out – should be considered *de lege artis* or not. Each paper in a prestigious scientific journal, each guideline or even each textbook may contribute to the result of this balancing.



On this schematic illustration, we can see how different sources contribute to assessing whether a particular procedure should be considered *de lege artis*.
The size of the rectangles roughly equates to its relative importance (its "weight") for the assessment of efficacy and safety of the procedure. The same principle applies not only to medical procedures in a narrow sense but also to the use of a particular medicinal product or medical device.

Let's suppose there was a new and promising procedure. The first study was only conducted on a small number of patients, and it seemed that the procedure is beneficial. This result was presented at a conference and then published in a conference book. A professional society from one country then adopted guidelines where it highly recommends the procedure.

However, broader studies seem to have refuted the efficacy of the procedure. It appears that the early promising results are not reliable due to the small scale of the first study. Several refuting studies were even published in some of the world's most prestigious medical journals (such as The Lancet or The New England Journal of Medicine). Then, there are other papers (albeit less prestigious) with the same results. A professional society in a different country is now planning to issue guidelines where the procedure will be explicitly rejected. Furthermore, a paper in another very prestigious journal confirming the scepticism towards the new procedure is about to be published. A famous university professor is now starting to write a textbook where he will refute the procedure as well.

On the other hand, a new (and rather insignificant) paper that strives to confirm the procedure's benefits is about to be published – but it is not very important and cannot change the overall procedure's assessment. **The scales are now indicating that the procedure should not be considered *de lege artis*.** In this way, the science secures that only evidence-based procedures will be applied to patients on a larger scale.

Nevertheless, the situation could be reversed. If there were enough evidence and suggestions that the procedure works and is safe, it could be considered *de lege artis*, even if there were sources opposing this conclusion.

b. the procedure with respect to the patient's individuality

While contemporary medicine is rightly proud to be evidence-based, the results of scientific studies cannot be automatically applied to all patients in all cases. In fact, "blind adherence to guidelines or protocols would itself be negligent".[12] Each patient is a unique individual, and each case might differ from other similar cases. An elementary example might be a patient who is allergic to a medicinal product which is recommended in the guidelines for the patient's indication. In practice, much more complex cases can arise when the guidelines must be modified and tailored to help a particular patient. Last but definitely not least, the unique psychological, social, and spiritual needs and wishes of the patient must be respected and taken into account in clinical decisions.

c. local conditions and objective possibilities are taken into account

We would like to live in a perfect world where all the health facilities at all times were able to provide cutting-edge care at the highest level. However, that is not possible. The material, personal, and financial resources will always differ among health facilities, and with them, also the quality of care will vary. The care that will be provided in a research university hospital on a Tuesday morning will, in many cases, be higher than that of care provided in a small regional hospital on Saturday night when most of the personnel is at home. This factual inequality is inevitable, but it must not exceed a certain threshold when it would violate the patient's right to the protection of health.13

The Act on Health Services explicitly reflects the inevitable and defines the lex artis standard with regard to the local conditions and objective possibilities. It means that the care provided in the above-mentioned regional hospital will be considered *de lege artis* even if the university hospital would have proceeded differently in certain aspects. If the provider of health services is not able to carry out a diagnostic or therapeutic intervention a patient necessarily needs, it is obliged to transfer the patient to another health facility (unless the transfer is not objectively possible, which is, under normal conditions, unlikely).

[12] BRAZIER, M., CAVE, E. *Medicine, Patients and the Law.* 6th ed. Manchester: Manchester University Press, 2016, p. 208.

[13] See Article 31 of the Charter of Fundamental Rights and Freedoms.

Even the smallest provider is still obliged to provide care on a level acceptable as complying with the rules of science and acknowledged medical procedures. They are perhaps not able to provide the most modern or the most expensive *de lege artis* procedure, but they cannot perform procedures that are not accepted as *de lege artis*, and they have to keep a sufficiently decent level of their services.

1.2.2 *Non lege artis* procedure

A health professional's conduct that is not in accordance with the *lex artis* standard is called *non lege artis*. We can describe it as a situation in which a health professional in the exercise of their profession does not act in accordance with the said *lex artis* standard with regard to the scope of their duties under the terms of employment.

A mistake in diagnosis does not necessarily mean a *non lege artis* conduct. Once again, we need to apply the principle that providers of health services and health professionals are responsible for the *de lege artis* conduct and not for its outcome. Nevertheless, all available diagnostic methods must be used for the procedure to be *de lege artis*.

We may recall the last element of the definition of *lex artis* – the consideration of local conditions and objective possibilities. Suppose the provider does not have resources (e.g., necessary medical devices) to perform a certain diagnostic procedure. In that case, they are not to be held liable for it unless they suspected (or should have suspected) that there is an urgent need to carry out the procedure. In that case, the provider is obliged to transfer the patient to another facility where the procedure can be performed.

When we assess the health professional's conduct – no matter whether its aim was diagnostic, therapeutic, preventive, or any other – we cannot base our judgment on all the information we know now in hindsight. As one Czech saying goes, "after the battle, everyone is a general". A health professional's conduct must always be evaluated *ex ante*, i.e. based on information available to them at the time of making the decision.

Fulfilling the risk of complication connected to a certain procedure does not constitute the *non lege artis* conduct if there was no misconduct. This principle might apply to all possible complications in medicine, including the adverse effect of a medicinal product or injury to surrounding structures during surgery. Under certain conditions, even confusion of similarly looking anatomical structures (in the case of atypical anatomical structures in a particular patient) can arguably be considered a "mere" complication of surgery.

1.2.3. *Lex artis largo sensu*

All we described above in sections A and B can be summarised as the standard *lege artis stricto sensu,* or the standard of care in a narrow sense. Especially in the doctrine, we can also encounter the term *lege artis largo sensu* (or, accordingly, *non lege artis largo sensu*) – the standard of care in a broad sense. It can be described as compliance with organisational, administrative, communication and similar rules aiming at securing that the medical procedure itself will be performed according to the *lex artis stricto sensu*.

Therefore, *non lege artis* conduct *largo sensu* might consist in a variety of errors, for example:

- misconduct in preoperative evaluation
- organisation and administrative errors
- medical records mismanagement

Let's suppose that because of a series of errors – each of which could have been easily prevented or remedied – the surgeon has the wrong information about which kidney should be extracted from the patient's body. The chain of errors might have started with an unclear communication with the patient and the physician who determined the diagnosis or with a wrong note in the patient's medical records. There might have been several occasions when the health professional could have checked the accuracy of medical records, but they failed to do so. The patient might have been informed too briefly the day before the surgery, or there might have been no communication between the patient and the surgeon at all, clearly violating the rules of appropriate conduct. In the end, the consequences of such a series of seemingly small failures might be fatal. A similar case happened in the Czech Republic when two physicians were criminally convicted: the doctor who made the wrong note in the patient's ambulant card (a part of medical record) and the surgeon who has not studied the whole medical record and only relied on the latest note.

Less severe consequences of the breach of *lex artis largo sensu* are more common. Nevertheless, it would be a mistake to underestimate them. For example, communication errors can harm a patient's psychological well-being or even health. Furthermore, we can conclude that a part of this broad understanding of *lex artis* is also the correct keeping of medical records. If any procedure is not sufficiently noted in the medical record, either intentionally or negligently, it could make it significantly more difficult for the patient to prove their claims in case of litigation. Several years ago, this problem was solved by the case law, which enabled the courts to shift the burden of proof under specific conditions (we will analyse this concept in more detail later in the lesson dedicated to the procedural aspects of medical malpractice cases).

1.2.4. *Vitium artis* – an outdated concept

Another term that used to complement *the lex artis* standard was *vitium artis*. It literally means a fault in art. While there were various interpretation and its precise content was never consensually established, *vitium artis* denoted an unintentional mistake in the technical performance of otherwise flawlessly indicated procedure. We can also define it as a failure of medical art which can happen even in the context of *de lege artis* procedure when the procedure itself is correct, but the expected diagnostic or therapeutic outcome is not achieved due to certain imperfection in the performance of the procedure. It might have been a minor error in the course of an otherwise flawless procedure. *Vitium artis* was, therefore, a certain kind of an intermediate step between the *de lege artis* and the *non lege artis*.

The case law abandoned the concept of vitium artis,[14] primarily because of its ambiguity. The courts should only work with the terms *de lege artis* and *non lege artis*.

Therefore, there are only two options nowadays:[15]

- the risk of a medical procedure has materialised without any misconduct *(de lege artis)*
- the risk of a medical procedure has materialised as a result of professional misconduct (even if in unconscious negligence), in other words, a health professional has caused the occurrence of a complication that would otherwise have not occurred *(non lege artis)*

2. Harm

Under civil law, breach of duty does not give rise to tort liability in itself. Since the basic functions of tort law consist in restitution to a previous state or compensation, there must be certain harm that could be eliminated or compensated.

The right to physical and psychological integrity represents one of a person's natural rights. We may recall Section 81 of the Civil Code which guarantees the protection of natural rights of the person and demonstratively lists the most important ones of these rights:

(1) Personality of an individual including all their natural rights are protected. Every person is obliged to respect the free choice of an individual to live as they please.

(2) ***Life and dignity*** *of an individual, their* ***health*** *and the right to live in a favourable environment, their respect, honour, privacy and expressions of personal nature enjoy particular protection.*

[14] See the Supreme Court of the Czech Republic judgment of 26 October 2011, file no. 25 Cdo 4223/2009.

[15] See ŠUSTEK, P. Náležitý odborný postup (lex artis). Obecně [Appropriate Professional Conduct (Lex Artis). General Remarks] ŠUSTEK, P., HOLČAPEK, T. (eds.) *Zdravotnické právo [Health Law].* 1st ed. Praha: Wolters Kluwer, 2016, p. 265.

A violation of a person's natural rights might cause both immaterial and material harm, and both are compensable as explicitly specified in Section 2956 of the CC:

Where a tortfeasor incurs a duty to compensate an individual ***for harm caused to their natural right*** *protected by the provisions of Book One of this Act, they shall* ***compensate the damage as well as non-pecuniary harm thus caused;*** *compensation of the non pecuniary harm shall also* ***include mental suffering****.*

The general definition of the manner and extent of compensation is embodied in Section 2951 of the CC:

(1) Damage is compensated by the ***restoration to the original state****. If this is not reasonably possible, or if so requested by the victim, damage is* ***payable in money****.*

(2) ***Non-pecuniary harm*** *is compensated by* ***appropriate satisfaction****. Satisfaction must be* ***provided in money unless real and sufficiently effective satisfaction for the harm incurred can provide for satisfaction otherwise****.*

Therefore, non-pecuniary harm should be compensated in the form of moral satisfaction (such as an apology). Only if moral satisfaction is not sufficient, there can be awarded pecuniary compensation (i.e. compensation in money) for non-pecuniary harm.

Nevertheless, harm to health (even though it is non-pecuniary harm) must always be compensated by a pecuniary satisfaction. This is made clear in Section 2958 of the CC:

In the case of ***bodily harm****, the tortfeasor shall compensate the victim for such harm* ***in money****,* ***fully compensating for the pain and other non-pecuniary harm suffered****; if the bodily harm resulted in an impediment to a better future for the victim, the tortfeasor shall also* ***compensate them for the deteriorated social position****.* ***Where the amount of compensation cannot be determined in this manner, it is determined according to the principles of decency.***

2.1. Immaterial harm

Based on the above-cited Section 2958 of the CC, there are three types of immaterial harm that can give rise to three independent claims. The plaintiff might use all these claims or only some (or one) of them.

Three independent claims:

a. **compensation for pain**
b. **compensation for deteriorated social position**
c. **compensation for other non-pecuniary harm**

While drafting the Civil Code, the legislature wished to abandon the system of tables-based compensations for immaterial harm to health. The idea was that the rules for determining the amounts of satisfaction need to be very vague so the courts can find justice in each case without being restricted in their discretion. The legislature hoped that with time, the case law would establish new rules which will represent an "organic" result of many cases.

However, many felt that the resulting legal uncertainty is hardly bearable for the needs of the practice. For example, insurance companies were suddenly unable to safely estimate possible costs (and, therefore, premiums). A private group of experts swiftly commenced works on a new methodological system for determining the amounts of compensation. There were several Supreme Court judges in this group, but the Supreme Court as an institution was never involved in its activity. Nevertheless, the Supreme Court (more precisely, its civil law and business law collegium) officially endorsed the resulting document on 12 March 2014. Since then, the document is widely known as the **"Supreme Court's Methodology for the Compensation of Immaterial Harm to Health (the Pain and Deterioration of Social Position According to Section 2958 of the Civil Code)"** *(in Czech: "Metodika Nejvyššího soudu k náhradě nemajetkové újmy na zdraví: bolest a ztížení společenského uplatnění podle § 2958 občanského zákoníku")* or simply "the Methodology".

The original intention of the legislature, therefore, did not survive much more than two months after 1 January 2014 when the Civil Code came into effect. While the Methodology is not legally binding and, strictly speaking, the courts do not have to take it into account, it has become a generally accepted basis for the considerations of satisfaction amounts. It seems to be very likely that incidental "dissenting" court decisions would be reversed by the Supreme Court, which would probably use its competence to "unify the case law" to uphold the Methodology. Furthermore, the courts mostly welcomed the Methodology anyway. It enables them to get rid of the burden of total uncertainty in determining the amounts of compensation and provided them with reliable tools to navigate their decision in a manner that is both foreseeable and easily justified from the formal perspective.

Compensations for pain and for deterioration of social position are, therefore, once again based on tables, even though this time, the compensations are significantly higher and reflect more aspects of cases. The calculation of compensation for the deterioration of social position is so complicated that there arose a new expert witness specialisation for these assessments.

On the other hand, the third category of a possible claim, the so-called other non-pecuniary harms, are somewhat nebulous. Lawyers have discussed their precise meaning and context for a long time and have not yet come to a consensual conclusion. The most important question is whether these harms include mental suffering that accompanies any physical harm, or if it only encompasses very specific harms related to the individual case (e.g., the inability to be present at one's child's wedding) while the "normal" mental suffering is included in compensation for pain.

In general, mental suffering denotes any adverse effects in the immaterial psychological sphere, any disturbance of mental well-being. It might take the form of experienced anguish, fear and suffering, negatively perceived stress, sadness and bereavement, fright, discomposure, perceived humiliation, and other psychological or psychiatric problems. It can also be accompanied by physical symptoms such as crying, stutter, etc. The regulation of compensation for mental suffering was broader and vaguer in the previous Civil Code, which was in effect before 1 January 2014. Nowadays, mental suffering needs to be put to one of the above-described categories of immaterial harm to be compensable.

2.2. Material harm

Bodily injuries can cause a variety of material harms as well. In this context, the Civil Code regulates several claims:

a. compensation for the costs associated with healthcare
Section 2960

b. compensation for the loss of earnings
Section 2962

c. compensation for the difference between the earnings which the victim was gaining before the harm arose and the earnings gained after the temporary unfitness to work ended, including, where applicable, any disability pension under another legal regulation Section 2963(1)

d. compensation for the increased exertion or effort the victim needs to exert to gain earnings after the end of the temporary unfitness to work
Section 2963(2)

e. compensation for the loss of pension in the amount of the difference between the pension to which the victim became entitled, and the pension to which they would have become entitled if the basis used to determine the pension had included the compensation for loss of earnings after the end of the temporary unfitness to work which the victim received at the time decisive for the determination of the pension
Section 2964

f. compensation for the loss of gratuitous work the victim used to carry out for another person (provided to the person who lost the victim's gratuitous work, e.g., the one who the victim used to help in the workshop, in the garden, or in the household)
Section 2965

g. in the case of killing, the tortfeasor shall provide a pecuniary pension to reimburse the costs of maintenance for the survivors whom the decedent, on the day of his death, was providing or was obliged to provide maintenance; the survivors are entitled to reimbursement equal to the difference between the pension system benefits provided for the same reason and the amount which the victim could have provided to the survivors from these costs according to reasonable expectations, had they not been injured; for the sake of decency, a contribution to maintenance and support may also be granted to another person if the killed person provided such performance to the person without being obliged to do so by a statute
Section 2966

h. **Compensation for the** funeral costs
Section 2961

3. Culpability

Culpability is an inner mental relation of the tortfeasor to the consequences of their actions.16 This classical definition has been challenged by modern law, which, to a certain extent, blurs the distinction between culpability as a mental relation to the consequences of the tortfeasor's action on the one hand and objective standards of conduct on the other hand. In cases of negligence, it can be difficult to find the difference between the breach of duty and culpability – if the physician violated their obligation to provide the de lege artis care and did so unknowingly, but they were obliged to know better, where exactly is the distinction between the breach of duty and culpability?17

Nevertheless, culpability remains an independent and very important element of liability. Fault liability cannot arise without culpability. There are also very limited cases when culpability is not required for the existence of liability: this type of liability is called non fault or strict.

3.1. Fault liability

The vast majority of tort law cases occur in the regime of fault liability. Nevertheless, if harm was caused by the breach of statutory duty, a fault in the form of unconscious negligence is presumed (Section 2911). If the defendant wants to refute culpability, they have to prove that they did not act in unconscious negligence.

There are several **degrees of fault**:

a. Intention

- Direct intention – the tortfeasor knew what consequences could arise from their actions and wanted to cause these consequences
- Indirect intention – the tortfeasor knew what consequences could arise from their actions and did not care whether they arise or not

b. Negligence

- Conscious negligence – the tortfeasor knew what consequences could arise from their actions and, without reasonable care, relied on the hope these consequences will not arise
- Unconscious negligence – the tortfeasor did not know what consequences could arise from their actions but, given their personal circumstances, they should have known it

All these degrees of negligence might represent simple negligence or grave negligence (in the latter case, the tortfeasor's negligent approach to the requirement of reasonable care testifies to their apparent ruthlessness).

16 See KNAPP, V. Teorie práva [The Theory of Law]. Praha: C. H. Beck, 1995, p. 201.

17 See HOLČAPEK, T. Občanskoprávní odpovědnost. Prvky odpovědnosti [Civil Liability. Elements of Liability]. ŠUSTEK, P., HOLČAPEK, T. (eds.) Zdravotnické právo [Health Law]. 1st ed. Praha: Wolters Kluwer, 2016, p. 319.

3.2 Non-fault (strict) liability

In some cases, the law does not require culpability to establish liability. These cases are exhaustively listed in the Civil Code based on its Section 2895 which states:

A tortfeasor has the duty to pay damage regardless of their fault in cases specifically provided by a statute.

Non-fault liability is usually justified by the notion that a person who gains profit or otherwise benefits from risky activities should also bear damage should it occur from the said activity. Therefore, non-fault liability relates to chosen activities with a relatively higher risk inherent to them. Some of the cases of strict liability might be especially relevant to health care:

3.2.1 Damage resulting from operating activities

Liability for damage resulting from operating activities is defined in Section 2924 of the Civil Code:

*A person who operates an **enterprise or another facility intended for gainful activities** shall provide compensation for the **damage resulting from the operations**, whether it was caused by the actual operating activities, by a thing used in these activities or by the impact of the activities on the environment. The person is **released** from this duty if they prove that they have exercised **all care that can be reasonably requested to prevent the damage**.*

Generally, this liability applies to damage caused by actual operating activity (as defined in the tortfeasor's scope of business) as well as a thing used in operating activity (which may be anything regardless of the tortfeasor's knowledge of its safety or defect; it does not have to be actively used but must be involved in operating activities, such as an X-ray generator falling on a patient) or the impact of operating activity on the environment (most often a physical, biological, or chemical effect; no matter when long- or short-term).

This case of strict liability also applied to health facilities.[18] However, the established case law excluded medical procedures from it.[19] According to the courts, the special nature of medical procedures (their high complexity, inherent risks, and the physician's obligation to perform the procedures) does not allow for a reasonable application of strict liability. While this case law originates in the times of the previous Civil Code, they are most likely still relevant today.

According to the doctrine,[20] the only exception might be harm caused by **nosocomial infections** – hospital-aquired infections such as MRSA *(Methicillin-resistant Staphylococcus aures)* or other suber-bugs (bacteria resistant to many antibiotics). In these cases, it is likely that the provider of health services could be held liable regardless of their fault.

[18] According to the Explanatory Report to the Civil Code, the term another facility intended for gainful activities does not only encompass those with paying clients, but also those with revenue from the public budget, e.g., public hospitals.

[19] See for example the Regional Court in Hradec Králové judgment of 17 September 1997, file no. 25 Co 167/97.

[20] See ŠUSTEK, P., HOLČAPEK, T. Občanskoprávní odpovědnost. Odpovědnost obecná a zvláštní [Civil Liability. General and Special Liability]. ŠUSTEK, P., HOLČAPEK, T. (eds.) *Zdravotnické právo [Health Law].* 1st ed. Praha: Wolters Kluwer, 2016, pp. 306-307.

However, they could still be released from duty to compensate if all reasonable care is proven. As we have already seen in Section 2924 of the CC, there is a liberation ground that enables to evade liability for damage resulting from operating activities if the defendant *has exercised* ***all care that can be reasonably requested to prevent the damage***. For this reason, it can be even questioned whether strict liability for damage resulting from operating activities does not incline significantly to fault liability. Nevertheless, the reasonably requested care does not only mean the compliance with obligations imposed by law or contract but everything that seems to be rational with regard to the nature of the particular operating activity. The economic rationality of measures must also be taken into account in assessing whether the defendant can be liberated.

In the context of nosocomial infections, it means that the provider of health services must apply good hygienic standards (including the rules regarding epidemiologically significant activities, personal hygiene of the staff, reporting of infectious diseases, disinfection and decontamination, etc.). Nosocomial infections occur even in the best and safest hospitals in the world. Once again, we assess whether the provider has done everything they can be reasonably required to do. If this is proven to be true, the harm caused by a nosocomial infection is considered a non-compensable materialisation of an inherent risk of being hospitalised.

3.2.2. Damage caused by a thing

Another case of strict liability consists in the liability for damage caused by a thing as it is defined in the following Sections of the Civil Code:

Section 2936

The person who is obliged to provide a performance to someone and, in doing so, uses a ***defective thing*** *shall provide compensation for the damage caused by the* ***defect*** *of the thing. This also applies in the case of the provision of health care, social, veterinary and other biological services.*

Section 2937(1)

If a thing causes damage ***by itself****, the person who should have had supervision over the thing shall pay compensation for the damage; if such a person cannot be otherwise determined, the owner of the thing is conclusively presumed to be such a person. A person who proves* ***not to have neglected due supervision*** *is released from the duty to provide compensation.*

Under the previous Civil Code (Section 421a), there was established strict liability for damage caused by circumstances originating in the nature of a tool or other thing used to perform an obligation. Liberation from this liability was not possible. This was apparently a very broad type of liability that was deemed to be too burdensome. For that reason, Section 2936 of the Civil Code No. 89/2012 Sb. establishes strict liability for damage caused by a defect of a thing. While liability under Section 2937(1) might remind us of Section 421a of the previous Civil Code at first sight, its main difference consists in the possibility of liberation in case that due supervision over the things was not neglected.[21]

[21] See VOJTEK, P. Dvě otázky medicínského práva, pro něž bude nový občanský zákoník přelomový [Two Questions of Medical Law the New Civil Code Will be Crucial For]. *Soudní rozhledy.* 2013, Vol. 19, No. 4, 2013, p. 122.

3.2.3 Damage caused by incorrect information or harmful advice

If a professional causes harm by providing incorrect information or advice for remuneration, they can be held liable regardless of their fault based on Section 2950 of the Civil Code:

A person who offers professional performance ***as a member of a vocation or profession, or otherwise acts as an expert****, shall* ***provide compensation for damage caused by their provision of incomplete or incorrect information or harmful advice*** *provided for* ***consideration*** *in a matter related to their expertise or skill. Otherwise, only damage intentionally caused by providing information or advice is subject to compensation.*

4. Recommended readings to the next lesson

ŠUSTEK, P. Informed Consent in the Czech Republic. *Responsabilità medica: Diritto e pratica clinica.* 2019, No. 3, pp. 393-397.

ŠUSTEK, P. The concept of secondary (reflective) damage: Peculiar situation in the Czech Republic. *Czech Yearbook of Public and Private International Law.* 2019, Vol. 10, pp. 321 334.

GOOLD, I., HERRING, J. *Great Debates in Medical Law and Ethics.* 2nd ed. London: Palgrave, 2018, pp. 32-38 (chapter "How much information must be given before there is consent?").

3. Civil Liability and Informed Consent

1. Informed consent

In Section 91 of the Civil Code, we read a straightforward proclamation:

An individual is inviolable.

It may sound like a "mere" symbolic declaration, but in fact, the cited provision highlights a fundamental principle (not only) health law is built upon. On the constitutional level, the right to inviolability of the person's integrity is guaranteed in Article 7 (1) of the Charter of Fundamental Rights and Freedoms:

The inviolability of the person and of their privacy is guaranteed. They may be limited only in cases provided for by law.

According to the Explanatory Report to the Civil Code (its Special Part, to Sections 91 to 103), **the civil law protection of physical integrity consists of three basic rules:**

- **the general prohibition of interference with the physical integrity of another without their consent**
    - this rule is in more detail regulated in Section 93 and following of the Civil Code)
- **the human body and its parts, even if separated from the body, give rise to financial gain**
    - this rule is based on Article 21 of the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (the "Convention on Biomedicine" or the "Oviedo Convention")
    - in the Civil Code, Section 493 excludes the human body and its parts, even those separated from the body, from the category of things in a legal sense; the only exception is embodied in Section 112 of the CC according to which hair or similar parts of the human body, which can be painlessly removed without anaesthesia and which are naturally restored, are considered movable things
- **the human body remains under legal protection even after the death of an individual** (Section 92(1) of the CC)

We will now focus on the first of these rules – the general prohibition of interference with another's physical integrity without consent. Generally, any such interference is against the law. This rule applies to every and any interference, be it great or small: for example, we are not allowed to bump into strangers intentionally or touch them without their permission. Nevertheless, requirements on the consent differ among various contexts and types of interference.

Every interference with the physical or psychological integrity of a person needs to be based on legal grounds. Otherwise, it would constitute an illegal interference, hence a violation of the victim's personal right, particularly their natural right to the inviolability of their integrity. The most common of these grounds is the consent of the person whose integrity will be interfered with. In order to be legally valid, the consent needs to be both free (without any coercion) and informed.

These basic features of informed consent are also embodied in Article 5 of the Convention on Biomedicine which embodies the general rule of consent:

An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.
This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.
The person concerned may freely withdraw consent at any time.

If we are to concretise these rules in the context of Czech law, we may begin with Section 93(1) of the CC which states:

Except as provided by a statute, no one may interfere with the integrity of another individual without their consent granted with the knowledge of the nature of the interference and its possible consequences. If a person consents to serious harm being caused to them, it is disregarded; this does not apply if the interference is, given all the circumstances, necessary in the interest of the life or health of the individual concerned.

We can see that any consent to interference with one's integrity must be based on sufficient knowledge of crucial facts: what will the interference consist of and what are its possible consequences. Furthermore, we read that health services – or other interventions necessary to protect life or health – have a special position: they can justify even serious bodily harm, which is otherwise banned and excluded from the possibility of consent. This is very important since it enables the performance of a significant part of health procedures. We may not normally realise it, but many such procedures, for example, most surgeries, are connected with interference with bodily integrity which would be considered serious bodily injury under different conditions. Even a surgical incision – the first cut in a patient's body – often leads to a risk of blood loss, potentially dangerous infection, and may scar (after all, there is a very good reason only highly specialised professionals are allowed to operate on patients).

The above-cited crucial aspects of any consent – i.e. the knowledge of the nature of the intervention and its consequences – need to be specified in the healthcare context. This is true mainly for two reasons.

First, medical interventions are often connected with serious interference with bodily integrity, as we outlined above. Furthermore, even a relatively insignificant procedure has its risks.

Second, unless the patient is a health professional themselves, there is usually a significant difference between knowledge and understanding of the human body and its ailments between the physician and the patient. In legal literature, we may even encounter the opinion that one of the crucial aims of informed consent is to (at least partly) equalise the information deficit between the two parties.[22] Therefore, it is sometimes challenging for the patient to sufficiently understand the complex information about the procedure. Since this understanding is both very important and difficult, informed consent requirements are elaborated in legal regulation, case law, and doctrine.

1.1. The scope of information

Informed consent is regulated in several laws. In the context of healthcare, the most important one is a special regulation embodied in the Act on Health Services. Its Section 31(2) includes the list of information that must be provided to the patient so their consent may be considered informed and, therefore, valid. These include information on the following issues:[23]

- **the cause and origin of the disease, if known, its stage, and expected development**

    - It is a patient's right to know about their own body and the health problems they suffer from. Furthermore, any medical intervention needs to be based on weighing its possible benefits and risks. The very basic alternative of any such intervention merely is – doing nothing. The patient must know what their health condition consists in and what its prognosis is. Without understanding this information, the patient cannot possibly determine whether the proposed interventions are worth their risks and discomfort.

- **the purpose, nature, expected benefits, possible consequences and risks of the proposed health services, including individual procedures**

    - It can be roughly narrowed to explaining *"what we propose to do, what we want to achieve by it and with what probability, and what can go wrong and with what probability"*. This requirement might be perceived as the core of information provided to the patient. It might even be a dangerous presumption – we need to always keep in mind that even with the perfect information on the proposed health services, the consent would be invalid if the patient was not informed about other relevant facts. Nevertheless, the discussion between the health professional and the patient will probably focus mostly on this aspect of information.

[22] See SALAČ, J. Informovaný souhlas jako nástroj vyrovnání informačního deficitu ve vztahu lékař-pacient [Informed Consent as an Instrument of Equalizing the Information Asymmetry in the Physician-Patient Relationship]. In *Paneurópske právnické listy*. 2019, Vol. II., No 1., available at: <https://www.paneuropskepravnickelisty.sk/index.php/salac-j/>.

[23] For more details, see HOLČAPEK, T. Obsah a podoba poučení [The Content and Form of Information]. In ŠUSTEK, P., HOLČAPEK, T. (eds.) *Zdravotnické právo [Health Law].* 1st ed. Praha: Wolters Kluwer, 2016, pp. 241-245.

- Regarding the **nature of the procedure**, the patient should be informed about the body part that will be interfered with, the extent of the intervention, whether there will be anything extracted from or inserted into the body, whether the procedure will be carried out under general or local anaesthesia, etc.

- The expected **benefits** of the procedure may be a relatively uncomplicated category from the legal perspective. Nevertheless, the patient also needs to be truthfully informed about the likelihood of these benefits so they- can weigh them against the procedure's risks and uncomfortable consequences.

- The category of **consequences** is broad. It encompasses short-term side effects as well as long-term limitations, the expected length of hospitalisation, the duration and severity of pain, the length of the temporary unfitness to work, etc. No consequence can be known for sure in advance: we are always talking about reasonably expectable consequences based on evidence and clinical experience.

- Health professionals are sometimes reluctant to talk about the **risks** of the proposed procedure. This is often done in good faith: they do not want to unnecessarily scare the patient, worsen their anxiety, demotivate them etc. However, information on risks is a crucial and necessary part of informed consent. The risks and their probability need to be explained with regard to the patient's individuality (e.g., older persons might have higher risks of complications etc.).

- The notion that the patient should not be informed about all the risks is not overtly paternalistic, though. In fact, informing about literally every risk is not even possible.[24] Virtually every procedure is connected to an almost unlimited number of possible risks (that could be materialised with more than zero probability). There are very rare allergic reactions, infections of small wounds with rare complications, etc. The crucial question is: how probable must the risk be for the obligation to inform about it to be established? Unlike German case law, the law in the Czech Republic never came up with a quantified threshold.

- Nevertheless, the basic rule is the same everywhere: the more serious the risk is, the lower probability suffices to establish the duty to inform. Therefore, the patient should be informed even about a relatively low risk of death (even though it is acceptable if they are not informed about an extremely low risk). On the other hand, even a much higher risk of a neglectable side effect may not establish the duty to inform.

- It is not enough if the patient is only informed about the general course of treatment. On the contrary, it is necessary to provide sufficient information on **each individual procedure** offered to the patient. Of course, the scope of information (how detailed it is) will depend on its seriousness and risks.

[24] See also the Supreme Court of the Czech Republic judgment of 29 April 2015, file no. 25 Cdo 1381/2013.

- **alternative possibilities of providing health services, their suitability, benefits and risks for the patient**

    - Information on alternative possibilities is too often neglected. However, from the legal perspective, it is as important as any other aspect of information that needs to be provided to the patient. While the physicians propose one procedure or intervention, they are obliged to truthfully disclose all other reasonable alternatives with their benefits and risks, advantages and disadvantages. The extent of information on the alternatives must be comparable with the information provided about the proposed procedure. It is important to keep in mind that the patient must be informed about all reasonable alternatives provided in the Czech Republic, even if they are not offered in the same health facility or by the same provider of health services. It may even be argued that alternatives provided in other European countries must be explained to the patient too.

- **further treatment needed**

    - If another treatment follows the initial one, the patient will need to be informed about it. Otherwise, they would give consent to the subsequent procedures without even knowing it – or they could find themselves in a situation when they would be harmed by refusing procedures that they never wanted or even knew about.

- **lifestyle restrictions and recommendations with regard to the health status**

    - Lifestyle restrictions and recommendations can be understood as a special case of long-time consequences. Without knowing about them, the patient could hardly make their own risk-benefit balance. Different people have very different lifestyles and values, so this might be a significantly individualised issue: some limitations might be perfectly acceptable to one and unimaginable to another.

- **the right to reject the information on health status**

    - Being informed is the patient's right, not duty. Health professionals are not allowed to force information to a patient who explicitly waives this right. This waiver must be included in the patient's medical records so they cannot later claim that the information was illicitly withdrawn from them. However, according to Section 32(1) of the Act on Health Services, the waiver of the right to information is not valid if the information contained a diagnosis of infectious or other diseases that could endanger other persons' health or life.

- **the right to identify persons who can be informed about the patient's health status and/or grant the consent if the patient would not be able to do that; and the right to prohibit the provision of information to certain persons**

    - In the informed consent forms, patients are frequently asked to identify persons entitled to be given information on the patient's health status or to grant consent by proxy. For the obvious practical reasons, it is

> commendable that they do so. In any case, they can also do the exact opposite and name a person (or persons) who will then be excluded from any information on the patient, even if they were close relatives. However, even these persons would be provided with the information necessary for the protection of their health.[25] We may imagine, for example, a situation of a man who has AIDS and who does not want to disclose his HIV-positive status to his wife. In such a case, doctors would be allowed to inform the wife to the necessary extent.[26]

A patient has the right to ask additional questions that must be answered. Both the basic information and the answers to additional questions must be provided in an understandable way (Section 31(1) of the Act on Health Services). There is no general objective standard of "understandable". On the contrary: all the relevant information must be explained in a way that will enable the particular patient to understand. A very different explanation will be needed to a professor of anatomy, a professional musician, and a seasonal worker with only elementary school education. A perfect textbook description ofthe procedure that is incomprehensible for the patient would invalidate the informed consent. Of course, health professionals cannot be expected to ensure that the patient truly understands the information in all cases. For example, if a patient claims that they understand everything, and there is no apparent reason not to believe them, then doctors can rely on these statements.

The law requires that the information is provided orally. The idea is that the patient should be informed in a trustful live conversation. Too often, informed consent is reduced to signing a written form. While such a form can represent relevant evidence, and there is nothing wrong with them *per se*, it is vital that the patient at the very least has a real opportunity to ask questions. Moreover, any leaflets, drawings etc., can only serve as supplements to live conversation between the patient and the health worker.

The information is provided to the patient by a health professional who cares for the patient and is qualified to provide the relevant health services (Section 31(3) of the Act on Health Services). If the information regards open heart operation, it must be provided by a cardiothoracic surgeon. If it regards nursing procedures, a nurse shall provide it.

Apart from this regulation in the Act on Health Services, the Civil Code is also relevant to informed consent. It regulates consent to any interference with physical integrity in Sections 94 and following. Furthermore, special regulation on informed consent in the context of a contract for healthcare is embodied in Sections 2638 and following.

Health professionals are still allowed to withdraw the information from the patient in very specific circumstances. This institute is called "therapeutic privilege". It means that the information about their own health condition (diagnosis, prognosis etc.) can be withdrawn from the patient in the necessary scope and for the necessary time if it is reasonably assumed that the information could cause serious harm to the patient's health. Therapeutic privilege is meant to be only applied in rather exceptional cases. It is regulated in Section 32(2) of the Act on Health Services and Section 2940 of the Civil Code.

[25] See Section 33(5) of the Act on Health Services.

[26] See also the European Court of Human Rights judgment *Colak and Tsakiridis v. Germany* of 5 March 2009, app. no. 77144/01.

A different case of withdrawal of information regards the absence of information on a minor (or a person with limited legal capacity) provided to a legal representative, foster parent or another caregiver if there is a suspicion that this person could sexually or otherwise abuse the minor (or the person with limited legal capacity) and that the provision of the information might endanger the patient (Section 32(3) of the Act on Health Services).

1.2 Forms of informed consent

Generally, informed consent can be granted in any form. In practice, it is most often given orally or implicitly. If the patient comes to the doctor's office, shares information about their health problems, and willingly cooperates with the physician, the consent has been implicitly granted by the described patient's conduct.

The written consent is only required in situations taxatively listed in the law. In Section 96 of the Civil Code, we find the following general cases of **obligatory written consent**:

- consent to separation of a body part which will not regrow
- consent to a medical experiment
- consent to an intervention which is not required with respect to the health condition of an individual; this does not apply in the case of cosmetic intervention not resulting in any permanent or severe consequences.

Another general case of the obligatory written consent is set by Section 34(2) of the Act on Health Services:

- consent to hospitalisation

Furthermore, both the provider of health services and the patient are entitled to require the other party to provide them with a written confirmation of what the consent was granted for (Section 2642 (2) of the CC). The same right is also embodied in Section 34(2) of the Act on Health Services. In practice, providers very often require written consent in cases they would not have to. From the perspective of legal certainty, it is a commendable practice. At the same time, it should be kept in mind that it may increase the administrative burden on health professionals and annoy some patients.

Based on the Act on Health Services' same provision, written consent might also be required by special laws. Obligatory written informed consent to specific health services is based, for example, on Act No. 373/2011 Sb., on Specific Health Services, or the so-called Transplantation Act No. 285/2002 Sb.

Section 97(1) of the Civil Code makes it clear that:

The consent granted may be withdrawn in any form, even where the consent must be granted in writing.

1.3 Consent by proxy

A patient is not always competent or capable to grant informed consent. It is nevertheless necessary that, if possible, the consent is granted by someone close to the patient.

The very basic provision in this context is Section 93(2) of the Civil Code, which generally states:

The legal representative may give consent to the interference with the integrity of the person represented if it is for the direct benefit of the person who is unable to give the consent themselves.

Obligation to secure adequate care for the child's health is a part of the so-called parental responsibility. We find the relevant regulation in Section 876 of the Civil Code:

(1) Parents exercise parental responsibility in mutual accord.

(2) If there is a danger in delay when deciding on the matters of a child, one of the parents may make the decision or give permission themselves, but is obliged to immediately inform the other parent of the state of affairs.

(3) If one of the parents themselves performs acts in a matter of the child with respect to a third person who acts in good faith, they are presumed to be acting with the consent of the other parent.

A minor patient (younger than 18-years-old) without full legal capacity may grant valid informed consent if the following cumulative criteria under Section 95 of the Civil Code are met:

- it is a usual matter
- it is adequate to the intellectual and volitional maturity of minors of this age
- the intervention does not result in any permanent or severe consequences

This solution is, in fact, quite restrictive: even many usual matters, such as tooth extraction, result in permanent consequences. Nevertheless, even if the minor is not able to grant consent to the particular intervention, their opinion needs to be taken into account when making the decision. The weight of the opinion increases gradually with the minor's intellectual and volitional maturity (Section 35(1) of the Act on Health Services). According to Section 35(4) of the Act on Health Services, these rules also apply to adult patients with limited legal capacity – in that case, the patient's age is not relevant. Proxy consent for an adult patient is usually granted by their guardian.

The autonomy of minors whose age is fourteen and above is especially protected by Section 100 of the Civil Code:

*(1) In the event of interfering with the integrity of a minor who has reached at least the **age of fourteen years** and has not acquired full legal capacity, and **who seriously objects to the intervention, although their legal representative consents to it**, the intervention*

*may not be performed without **court approval**. This also applies where an intervention is carried out on an adult person without full legal capacity.*

*(2) If the **legal representative does not consent** to an interference with the integrity of a person under Subsection (1), although the **person so wishes**, the intervention may be performed on the application of the person concerned or their close person only with **court approval**.*

The courts do not only protect minors' autonomy, but also their health itself from the free exercise of the right to grant proxy consent on behalf of their parents. Section 101 of the CC states:

If the integrity of an individual incapable of judgement is to be interfered with in a way resulting in permanent, irreversible and serious consequences or a way associated with a serious threat to their life or health, the intervention may only be carried out with the leave of a court. This does not affect the provision of Section 99 [i.e., interventions that are immediately necessary].

The last-cited rule applies to all persons incapable of granting consent – not only to minors or persons with limited legal capacity but also to all those who are (even temporarily) unable to make a decision, most often as a direct result of their health condition.For this last category of persons who do not have a legal representative, Section 98(1) of the Civil Code applies:

*If a person cannot give consent due to the inability, even temporary, to express their will, and has no legal representative, consent of the **present spouse, parent or close person** is required. If none of these persons is present, consent of the **spouse** is required, and in their absence, the consent of a **parent or another close person** if they can be easily identified and contacted and if it is evident that there is no danger in delay. If consent cannot be obtained in any of the above ways, it may be granted by **another person present who has demonstrated extraordinary interest in the individual concerned**.*

The term "close person" is delineated into three categories under Section 22(1) of the Civil Code:

A close person is a relative in the direct line, sibling and spouse or a partner under another statute governing registered partnership (partner); other persons in a familial or similar relationship shall, with regard to each other, be considered to be close persons if the harm suffered by one of them would reasonably be perceived as their own harm by the other. Persons related by affinity and persons permanently living together are also presumed to be close persons.

The requirement of "reasonable perception of harm as one's own" is intentionally vague, enabling the courts to assess the particular relationship's intensity. If the court finds this requirement met, even a very close friend can arguably be considered a close person.

1.4 Previously expressed wishes

According to Article 9 of the Convention on Biomedicine, *"[t] he previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express their wishes shall be taken into account".*

In the national legislature, the legal regulation of previously expressed wishes was first introduced with the Act on Health Services. In Section 36, the law sets relatively strict formal criteria for a previously expressed wish to be valid. There are two forms of it:

- **the general previously expressed wish**
    - formal requirements: written information on the consequences of the previously expressed wish, the previously expressed wish itself must be made in writing with the patient's officially verified signature
- **previously expressed wish regarding health services provided by a particular provider**
    - a less formalised version
    - this wish is expressed at the moment of admission to care or during hospitalisation
    - it only applies to health services provided by the same health services provider
    - this previously expressed wish is included in the patient's medical records with the signature of the patient, a health professional, and a witness

The law exhaustively lists conditions under which the previously expressed wish does not have to – or even must not – be respected. It will be disregarded mostly when it would lead to actively causing death to the patient or endangering other persons. Furthermore, since the validity of previously expressed wishes has no time limit, they do not have to be respected if the progress in medical services achieved in the meantime makes it possible to reasonably assume that the patient would agree with their provision.

2. Health services provided without consent

The prohibition of the provision of health services without consent is not without exceptions. In these cases, the legal grounds of health services provision are the law, a contract. The exceptions are exhaustively listed in the law:

- **the state of necessity**
    - Section 38(3) of the Act on Health Services
    - a person is in sudden danger to their life or health, and their consent cannot be obtained (we may imagine, for example, an unconscious person who was rushed to the emergency room by the ambulance)
    - the procedure must be necessary for the patient's health (it must be to their direct benefit)
- **hospitalisation of a patient who endangers themselves or their surroundings immediately and seriously and who shows signs of or suffers from a mental disorder or is under the influence of an addictive substance, unless the threat to the patient or their surroundings can be averted otherwise**

- **isolation, quarantine, compulsory treatment, compulsory vaccinations**
    - under Act No. 258/2000 Sb., on the Protection of Public Health
- **protective treatment**
    - under Act No. 40/2009 Sb., the Criminal Code
    - especially if the perpetrator of a criminal offence or not criminally responsible due to insanity or committed the offence in a state caused by a mental disorder, and their stay at liberty is dangerous
- **compulsory examination of health status**
    - in the course of judicial proceedings
    - under procedural laws: Act No. 99/1963 Sb., the Civil Procedure Code, Act No. 292/2013 Sb.., on Specific Court Proceedings, or Act No. 141/1961 Sb., the Criminal Procedure Code

3. The tort law consequences of invalid informed consent

Apart from the exceptions mentioned in sub-chapter 3.2., medical procedure performance without valid informed consent will give rise to potential claims on behalf of the patient. There are basically two types of these claims: moral damages and, in some cases, compensation for bodily injury.

3.1 Moral damage

Carrying out a procedure without valid informed consent will represent moral damage in itself – even if the outcome was beneficial for the patient. It will be a clear violation of the patient's right to physical and psychological integrity protected – in the civil law context – by Section 81 and following of the Civil Code.27 According to Section 2951(2):

Non-pecuniary harm *is compensated by* ***appropriate satisfaction****. Satisfaction must be* ***provided in money unless real and sufficiently effective satisfaction for the harm incurred can provide for satisfaction otherwise.***

In cases of invalid consent, an appropriate satisfaction might sometimes consist in apology. Nevertheless, there can be cases when the patient suffers rather psychological severe consequences resulting from a perceived loss of one's dignity, safety, etc. Then, relutary satisfaction may be necessary.

3.2 Bodily injury?

Another problem might arise if the outcome of the procedure is not positive. It can happen that even though the procedure was carried out flawlessly, its inherent risk materialised, causing harm to the patient. Then, the patient can claim that they were not provided with sufficient information. The crucial question related to these cases is: should the provider be held liable not only for moral damage but also for bodily injury that occurred to the patient?

There have been a few cases of this type resolved before the courts. We will take a closer look at the **Supreme Court of the Czech Republic judgment of 29 April 2015, file no. 25 Cdo 1381/2013**.

The patient underwent thyroid surgery, resulting in damage to both recurrent laryngeal nerves. The patient then suffered from permanent dyspnea (shortness of breath) and slower and quieter speech. It was proven that the surgery was performed *de lege artis*. However, the patient was not informed about two crucial facts: first, the possibility of recurrent laryngeal nerves damage, and second, alternative procedures. While the patient was informed of a risk of a change of voice quality, the court of first instance concluded that recurrent laryngeal nerves damages are so severe that it cannot be considered a mere part of the said risk. The provider of health services was held liable and the court of appeal confirmed the judgment. The courts argued that causation consisted in the fact that if the surgery were not unlawfully conducted, its risk would have never materialised. Therefore, the following principle can be deduced: whoever unlawfully interferes with a patient's health is responsible for a potential harmful effect of the interference.

[27] See above, especially sub-chapter 2.2.

The Supreme Court, however, disagreed with this principle for a number of reasons, for example: it has no basis in substantive law; excessive liability can be very detrimental for the health care system; the interference with the physical integrity of the patient without informed consent is compensable as such. Therefore, the Supreme Court concluded that the provider of health services is only liable for bodily harm if it is realistically probable that the patient would have not consented with the procedure if they had been provided with all the relevant information. The burden of proof regarding this claim bears the patient (in the position of the plaintiff).

4. Causation

In chapter 2, we discussed three elements of liability: breach of duty, harm, and culpability. Another element of liability is causation. It means that between the breach of duty and the harm occurred, there is a relationship of cause and effect. While it might seem trivial at the first sight, causation can be a very complex and uncertain issue. There is a lot of theories of causation. While it is a fascinating topic, we will limit our brief introduction to two basic concepts: natural and legal causation. We will go back to causation in chapter 4 when we (among other topics) focus on the standard of proof.

4.1 Natural causation

Natural (or factual) causation is also known as the condicio sine qua non (csqn) test. In the common law context, it is called the but for test: the harm would never have occurred but for the breach of duty (i.e. the defendant's act). Without the breach of duty, the harm would not have occurred, or it would have at least not occurred in the same way. At first sight, this test seems to be fairly uncomplicated and reasonable. However, if we think it through, we can see that it can hardly be a sufficient test of causation. The problem is that, as a rule, we may identify an almost infinite set of necessary causes of any harm.

For example, there might have been bleeding which would not have occurred but for the surgeon's negligent failure to comply with the standard of care. Nevertheless, the harm would not have also occurred if the patient had not needed the surgery in the first place. What if they lived an unhealthy lifestyle – should there be joint accountability? Perhaps the harm would have never occurred, but for the surgery taking place on the specific date. And absolutely surely, it would not have occurred should the patient never have been born, or should their grandfather died before getting married. *Ad absurdum,* almost the whole world could be a necessary cause of the harm.

Therefore, we need to find a way to limit causation. Various approaches to this limitation are called legal causation.

4.2 Legal causation

Legal causation encompasses certain normative criteria which limit natural causal link. In Czech law, the most important legal causation theory is adequate causation which is based on the foreseeability of harm. Only reasonably foreseeable harm resulting from certain action (breach of duty) can be considered adequate and, therefore, compensable. According to this theory, it would be unjust to hold the tortfeasor liable for harm that was not sufficiently foreseeable: for example, if the breach of duty was rather insignificant and only because of an extremely unlikely, bizarre chain of events it leads to someone's serious injury.

This is also reflected in the PETL (Principles of European Tort Law). Its Article 3:201 a) lists among the factors relevant for the imputability of harm to a tortfeasor also:

(…) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity (…)

Harm is not adequate if it is not a regular consequence of the tortfeasor's act according to the general life experience and normal course of life. The assessment standard is based on the so called hypothetical objective observer who concentrates all the experience of their time – meaning the time when the tortfeasor acted.

There are several conditions under which the test of adequacy will not be applied, and the tortfeasor will be held liable even for damage that would normally be considered unforeseeable. It especially regards the following cases:

- intentionally caused harm, or
- egg-shell skull doctrine (the tortfeasor is liable for harm which occurred because of a hidden physical or psychological fragility of the victim).

5. Case Study

An ambulance transports an unconscious patient with extensive epidural bleeding to the hospital. Urgent craniotomy is indicated as a life-saving intervention. The patient's identity is being searched for at the moment while the patient does not have any IDs or other documents with her and there is nobody available who would know her. Craniotomy is performed successfully and the patient regains consciousness at the neurological ICU. Later, the patient asks a nurse for a paper and a pen. She writes down that she does not wish to be resuscitated. A nurse and a physician who are present in the room sign the paper alongside the patient. The doctor then includes the patient's wish in her medical records. During the next shift, the patient suffers a cardiac arrest. The attending physician who is present at the time disregards the nurse's objection regarding the patient's wishes, saying that he saves lives. With these words, he carries out the resuscitation. The patient survives, her health status is increasing unexpectedly well in the next days and she eventually goes home, capable of an independent life.

- Please ponder the legal (and perhaps also ethical) permissibility of craniotomy and resuscitation in the above-outlined case.

6. Recommended reading to the next lesson

ŠUSTEK, Petr. Current Debates on Medical Liability in the Czech Republic. *Journal de Droit de la Santé et de'l Assurance Maladie.* 2019, No. 23, pp. 66-68 (sub-chapters III and IV).

GOOLD, Imogen, HERRING, Jonathan. *Great Debates in Medical Law and Ethics.* 2nd ed. London: Palgrave, 2018, pp. 85-100 (chapter "Should a lost chance of a better medical outcome be compensated?").

4. Procedural Aspects of Medical Malpractice Cases

1. Basic outline of civil procedure

In the Czech Republic, civil liability claims give rise to the civil proceeding before ordinary (general) courts. There are no special panels for health law in the courts. There are also no arbitration courts or similar institutions where health-related claims would be solved.

There system of general courts in the Czech Republic consists of the following courts:

- District Courts *(okresní soudy*; in Prague, there are 10 District Courts called *obvodní soudy*; in Brno, there is one District Court called *městský soud)* – in sum, there are 86 District Courts; the courts of the first instance for most cases

- Regional Courts (*krajské soudy*; in Prague, there is one Regional Court called *městský soud*) – 8 Regional Courts (even though there are 14 regions as the so called higher-level territorial self-governing units in the Czech Republic); courts of appeal and, for some cases, courts of the first instance

- High Courts *(vrchní soudy)* – there are two High Courts, one in Prague and one in Olomouc (in Moravia); courts of appeal if the case was heard in a Regional Court in the first instance

- Supreme Court of the Czech Republic *(Nejvyšší soud České republiky)* there is one Supreme Court located in Brno; the Supreme Court only hears the cases in which the lower courts have already issued their final decision; there is an independent Supreme Administrative Court, also in Brno, which is nevertheless not directly relevant for civil law cases

The Constitutional Court of the Czech Republic *(Ústavní soud České republiky)* formally stands apart from the system of general courts. It only decides on the constitutionality of court decisions and legal regulations.

The crucial role in medical malpractice cases belongs to expert witnesses. An expert witness must be enlisted in a special public register under the relevant field and specialty. The expert opinion is issued either at the request of the court or one of the parties. The expert witness might also be summoned to court to testify in person. The court must assess the expert witnesses' opinion in the same way as any other evidence. Therefore, it must be critically evaluated (from the perspective of its consistency, logical cogency, etc.) and assessed in connection with other evidence. The principle of free evaluation of evidence applies in procedural law, so the court must decide on the weight of any evidence in each case *ad hoc*. Nevertheless, it cannot take the expert witnesses' opinion as granted and base the decision uncritically on it. It is rather sad that the courts still tend to do just that, even though the situation might have improved in the last years.

The role of expert witnesses is also limited because they are only competent to comment on the questions of facts and not the questions of law. The elements of liability – including the breach of duty and causation – are questions of law, so only the court can decide on them. The information provided by the expert witness is very often necessary to make such a decision, but it cannot replace the court's consideration.

For persons in financial difficulties, court fees are lowered, and there are options for some legal aid. In general, the losing party shall pay the costs of the proceedings (the parties can also share the costs).

2. Burden of proof

2.1 Standard of proof

In general, the standard of proof in non-criminal cases is set as practical certainty. In medical malpractice cases, such a high standard of proof can be almost impossible to meet for the plaintiffs. This is especially (but not only) true with regard to causation. Medical practice is always connected with some level of uncertainty. If the plaintiff were expected to prove the causal link with practical certainty, they would have to exclude all other possible causes of harm including natural processes in the human body and materialisation of the inherent risk of any medical procedure.

Nevertheless, the courts gradually developed a new standard of proof for medical malpractice cases.[28] Nowadays, the standard of proof in medical malpractice cases is set as a "high probability", making it much more realistic for the plaintiffs to bear their burden of proof successfully.

2.2. Reversal of the burden of proof

In deciding a case, the court is largely informed by the expert witness – and the expert witness is informed on the realities of the particular case by the patient's medical records. There were cases when the plaintiff was unable to prove their claims because their medical records were missing or did not contain the particular relevant entry. Such a situation was apparently unjust – the provider of health services benefited from their breach of duty to keep medical records.

For many years, the outlined situation was not solved sufficiently in the Czech Republic. An interesting source of inspiration came from Germany when the case law – and, since 2013, also the German Civil Code – reversed the burden of proof. If any procedure was not included in medical records, a rebuttable presumption applies according to which the procedure was not performed. Its performance must be proven by the healthcare provider.

Meanwhile, the Czech case law was struggling with the idea. Finally, the Constitutional Court made it clear in the decision of 9 May 2018, file no. IV. ÚS 14/17, that a similar rule is also applicable under Czech law.

The case in which the decision was made was a very typical example of situations where causation is very difficult to prove. A pregnant woman was brought by ambulance to a local hospital for bleeding. Since the only qualified doctor was not available (attending another patient at the moment), the patient was transferred to a university hospital in Brno.

[28] See the Constitutional Court of the Czech Republic decision of 12 August 2008, file no. I. ÚS 1919/08, and also the Supreme Court of the Czech Republic judgment of 30 September 2003, file no. 25 Cdo 1062/2002, or the Supreme Court of the Czech Republic judgment of 3 February 2015, file no. 25 Cdo 1222/2012.

The child was born almost dead after severe hypoxia. A claim was filed against the provider of ambulance service and the local hospital. The patient's medical records from the local hospital were lost.

The claim was denied in the court of the first instance only to be granted on appeal. However, the Supreme Court quashed the appellate decision, returning the case to the court of appeals which denied the claim after additional evidence. The reason for denying the case was the lack of causation. Since hypoxia of a child in childbirth occurs minutes (maximally tens of minutes) after the start of bleeding, none of the defendants were really able to help the child.

In the above-cited decision, the Constitutional Court quashed both the appellate court and the Supreme Court decisions. Based on expert witnesses' opinions, causation was not excluded categorically. The plaintiff's claims would need to be proven by her medical records which were missing. The Constitutional Court decided that it is the requirement of just distributing the burden of proof that this burden is shifted to the defendant regarding the facts in lost medical records. The plaintiff should not bear the burden of proof if it is impossible to satisfy due to the breach of duty on behalf of the defendant.

Nevertheless, the reversal of the burden of proof is a measure of last resort. It must only be considered by the court if the plaintiff's claims cannot be proven by any other means including the defendant's explanatory obligation under procedural law.

3. Loss of Chance

Imagine the following situation:

A man comes to a colon cancer screening. During the colonoscopy, a neoplasm is found inside the patient's colon. A histological specimen is collected and sent to a laboratory for diagnosis. It is identified as a malignant tumour. In the meantime, both the patient and his attending doctor went home. A nurse includes the laboratory report into the patient's medical records, planning to inform the doctor the next day. However, many patients are coming the next morning, and the nurse forgets to mention the laboratory results. The medical records are in their place, and it does not occur to the doctor to check them. The patient believes that nothing important was found since nobody contacted him. Many months later, he develops increasing symptoms: constipation, bleeding, loss of weight. When he finally comes to the doctor again, the laboratory report is found in his file. The oncological treatment is started right away, but the cancer has metastasised in the meantime. Statistically speaking, the patient's chances to survive the next five years are low. Had the treatment been started soon after the histological examination, the patient would most likely be cured.

Unfortunately, similar cases are not very rare. However, it is very difficult to claim for compensation successfully. There are two problems with such cases:

- Causation – the plaintiff needs to prove that the harm would have never occurred but for the defendant's breach of duty. It is rather difficult given the usually long time between the breach of duty and harm, the relative unforeseeability of disease development in individual cases, etc.

- Harm – an even more pressing question is what actually is the harm here. The patient has not lost his health or life – yet. It is not possible to be compensated for the harm that has not yet occurred. Furthermore, it is (fortunately) not clear whether the harm will occur or not, and if it will, what exactly it will consist in (death, permanent loss of working ability, etc.).

The concept of loss of chance is meant to enable the patients to claim for compensation even when the harm has not yet occurred but unlawful conduct of a defendant deprived them of a chance to improve or keep their health. It is not consensually accepted whether the loss of chance is a concept related to causation or harm. It might be argued that it related to harm since it actually establishes a whole new type of harm: the difference between the statistical probability of a good outcome had the unlawful conduct never occurred and the statistical probability of this good outcome resulting from the unlawful conduct.

For example, if our patient had a 90% statistical chance of living for five years at the time of his colon cancer screening and histological examination, but now these chances are only 30 %, the harm would consist in the loss of 60 % of chances.

The compensation is then proportionally lowered: the plaintiff will be awarded the percentage of full compensation for the bodily injury, equating their loss of chance. In our case study, the question is what should be regarded as the full compensation, given death is not compensable to the deceased person. Nevertheless, suppose we worked for example with the full exclusion from life activities or any particular bodily injury. In that case, the patient could hope for 60 % of what would be the full compensation.

The loss of chance concept apparently helps the plaintiff with bearing their burden of proof. For this function, loss of chance is often understood as a procedural instrument to alleviate the plaintiff's burden of proof regarding causation. It might be even criticised for enabling the plaintiffs to sue in cases when causation is very weak and could not possibly satisfy the normal standard of proof.

Another problem with loss of chance is that it could lead to compensation of harm that never occurred. For example, if our patient sued for the loss of 60 % of chances of 5-year survival, the proceeding might take a much longer time, and the patient could still be alive and relatively well long after the 5-year horizon. How is it that the proceedings continue when the plaintiff's individual probability of 5-year survival is now known to be 100 % (therefore, zero per cent probability of death in the time horizon that had been chosen to base the claim on)? The obvious counter-argument is that the harm consisted in the loss of chances in their statistical sense itself, regardless of whether the feared negative outcome ever materialises. On the other hand, it may be asked whether it makes sense to calculate the compensation for such harm as a percentage of the hypothetical compensation for bodily injury.

The Czech case law approaches loss of chance as a question of causation. It might be very cautiosly tending to accept it[29] but its direction is open for discussion.[30]

4. Alternative dispute resolution

Not every dispute must be resolved before the court. At the beginning of the first hearing in the case, the judges usually invite the parties to try to resolve their case in mediation. Perhaps more importantly, the parties can always find a way to settle out of court.

Generally speaking, the term alternative dispute resolution (ADR) contains several techniques varying widely in the level of formalisation: most importantly, there is a negotiation and early apology, mediation, and arbitration.[31]

While there is no arbitration court for healthcare-related disputes, other less formalised ADR techniques can be used. There are known for being cost-effective and less burdensome on all the parties. For example, the data from several mainly American studies suggest that early disclosure and apology programmes are a good prevention of litigation (given that they include sufficient psychological training of staff; otherwise, an early apology might even increase the number of legal actions against the provider). On the other hand, ADR does not guarantee the same procedural standards as the courts and usually leads to lower compensation. It is sometimes even claimed that ADR may be contrary to the right to access to justice. For this reason, it might be argued that ADR should remain voluntary.[32]

[29] See the Constitutional Court decision of 20 December 2016, file no. III. ÚS 3067/13.

[30] See ŠUSTEK, P. Current Debates on Medical Liability in the Czech Republic. *Journal de Droit de la Santé et de'l Assurance Maladie.* 2019, No. 23, pp. 67-68.

[31] See ŠUSTEK, P., HOLČAPEK, T. Alternative Dispute Resolution in Medical Malpractice Disputes. In ZELJKO, R., RONCEVIC, A., YONGQIANG, L. *Economic and Social Development: 22nd International Scientific Conference on Economic and Social Development – "The Challenges of Modern World": Book of Proceedings.* Varazdin: Varazdin Development and Entrepreneurship Agency, 2017, p. 234.

[32] For the more detailed analysis of the fact mentioned in this paragraph, see ibid., pp. 233-242.

5. Foreign Approaches to Civil Liability in Healthcare

Comparative law is an invaluable source of the understanding of legal norms and concepts. It enables us not only to compare particular legislative solutions and case law regarding particular legal questions, but also to understand the underlying legal principles and legal philosophical questions which may make us look at problems from new perspectives.

Since various legal systems are often differently structured, comparative law books and conferences are usually based on clearly defined questions the individual authors answer in their contributions. In this way, it is ensured that the readers or audience will be able to compare their reports and benefit from them.

In the session dedicated to foreign approaches to civil liability in healthcare, we will organise a moot comparative law conference. The students will be divided into several groups, each of which will be assigned a foreign country. Ideally, several legal systems (Romano-Germanic and Anglo-American law) will be represented, while the choice of particular jurisdictions will reflect their relevance for legal liability in healthcare, especially in the Central European context. For example, France or Italy, Germany or Austria, England, and Denmark or New Zealand could be represented (where there are very specific systems of no-fault compensation of iatrogenic harms).

The moot conference will be based on the following questionnaire:

- Please answer the following questions from the perspective of your country.
- Both answers together should be 5-10 standard pages long.
- Please divide your answer to the first question according to the sub-topics you find important and interesting, especially if their regulations are different from Czech law (or remarkably similar to it).

Questions:

What are the basic concepts related to the compensation for medical negligence in your country? How does your system of compensation for medical negligence work? (e.g., is it based on litigation or a certain kind of special public system of compensation; is the liability fault-based or is there an important role of no-fault liability; what types of immaterial and material harm are compensable; are there any other interesting approaches to the elements of liability?; what is the role of case law/are there any organs other than courts that regularly make relevant decisions?; etc.)

How would “our case” (the one we have been solving throughout the course) be assessed and solved in your country?

6. Selected Special Issues of Civil Lability

1. Inheritability of claims for damages for health injury and the question of secondary damages

Unfortunately, it sometimes happens that the victim dies before the court can award compensation. Therefore, any tort law regulation needs to address the question of whether – and under what conditions – the claims for damages for bodily injury are **inheritable**.

In the Czech Republic, this question is answered rather clearly by Section 1475(2) of the Civil Code:

A decedent's estate consists of the entire assets and liabilities of a decedent except for the rights and duties exclusively bound to him personally, ***unless they have been acknowledged or enforced as a debt before a public body****.*

The claims for the compensation of immaterial harm resulting from bodily injury[33] constitute a right exclusively bound to the victim personally. The general exclusion of these claims from inheritability may be logical since when the victim dies, there is nobody left whose actual harm could be compensated by these claims.

However, the practical consequences of Section 1475(2) of the Civil Code are often unfortunate. While the victim is dying, their closest persons are forced to bring the claim before the court. They are sometimes racing against time to file a lawsuit in the name of the victim instead of focusing fully on a peaceful and deep farewell.

Another consequence is that from the civil law perspective, it is literally cheaper to kill than to cause a grave bodily injury. If the person dies and nobody filed the lawsuit for them, the close persons can only sue for secondary damages.

Secondary damages are based on Section 2959 of the Civil Code:

In the case of ***killing or particularly serious bodily harm****, the tortfeasor shall compensate the spouse, parent, child, or other* ***close person*** *for the* ***mental suffering*** *in money, fully compensating their suffering. Where the amount of compensation cannot be determined in this manner, it is determined according to the principles of decency.*

According to the case law, the basic amount of compensation for secondary damages for the closest persons is twenty times higher than average monthly salary in the country in the year preceding the occurrence of primary harm.[34] For death occurring in 2021, this basic amount of secondary damages will be approximately 700,000 CZK. It can be increased or decreased by the court regarding the circumstances of the individual case. Nevertheless, compensation for the deteriorated social position can be much higher in cases of particularly serious bodily harm.

[33] See sub-chapter 2.2.1.

[34] See the Supreme Court of the Czech Republic judgment of 19 September 2018, file no. 25 Cdo 894/2018.

In light of the outlined problems, the question of inheritability of claims for the compensation of bodily injury has undergone changes in several jurisdictions. In **Germany**, Section 847(1) of the German Civil Code (BGB) required similar conditions to Section 1475(2) of the Czech Civil Code before 1990. It was strongly criticised, namely because of the above-mentioned races with death *(Wettlauf mit dem Tod)*. Today, the compensation for immaterial harm is a part of inheritance (Section 253(2) of the BGB). Nevertheless, there is still required a certain minimum time period between the harmful event and death. Usually, survival in in a matter of minutes (e.g., 30 minutes) is considered sufficient to enable inheritability of the claim.

Section 1475(2) of the Czech Civil Code is heavily inspired by **Austrian** law, in particular by Section 1325 of the Austrian Civil Code (ABGB). However, this regulation was originally based on the already-abandoned understanding that the claim for compensation starts to exist when it is enforced before a public body (and not at the moment of the incurrence of harm). Also in the Austrian context, the phenomenon of "races with death" provoked strong criticism. Requirements of previous acknowledgment or enforcement of the claim vanished in the case law in the 1990s.[35]

2. Wrongful Birth and Wrongful Life actions

2.1 Definition of terms

A wrongful birth denotes "a medical malpractice claim brought by the parents of an unwanted child who was conceived or born due to a medical negligence".[36] (Black's Law Dictionary, 6th ed., p. 1612).

Sometimes, the term *wrongful conception* (wrongful pregnancy) is used, which is "a claim by parents for damages arising from the negligent performance of a sterilisation procedure or abortion, and the subsequent birth of a child".[37] (Black's Law Dictionary, 6th ed., p. 1612).

Wrongful life is a medical malpractice claim brought by the person with disability who was conceived or born due to a medical negligence. The person sues for a compensation for their own suffering resulting from life with disability.

2.2. Wrongful Birth

2.2.1 Types of wrongful birth claims:

1) **Wrongful birth in the narrower sense**

This claim is brought by the parents of an impaired child. The breach of duty exists when negligent treatment or advice deprived the plaintiffs of the opportunity either to avoid the conception or terminate the pregnancy. In particular, the defendant's negligence consists of a negligent performance of prenatal diagnosis or abortion, or a provision of inaccurate information regarding the embryo's or foetus' diagnosed condition or the related risks.

35 See the Austrian Supreme Court (OGH) decision of 30 September 1996, file no. 6 Ob 2068/96.

36 CAMPBELL BLACK, H. (ed.). Black's Law Dictionary. 6th ed. St. Paul: West Publishing, 1990, p. 1612.

37 Ibid., p. 1612.

2) Wrongful pregnancy (wrongful conception)

Wrongful pregnancy/conception claim is brought by the parents of a healthy child. The defendant's negligence consists of a negligent performance of sterilisation or abortion, or a provision of inaccurate information regarding the success or reliability of sterilisation or abortion.

The alleged harm is the violation of the parent's rights to self-determination and privacy, as well as the financial burden of raising a child. Therefore, the claim can be divided by the compensation of different harms:

- Immaterial harm
    - the loss of control over one's own life; pain and inconvenience associated with pregnancy and giving birth; mental suffering
- Material loss
    - maintenance costs; loss of profit

2.2.2 Legal Defences

There are several possible defences against wrongful birth claims. It can be claimed that awarding compensation for the existence of a child is simply immoral. Under Czech law, such an argument would be based on the contradiction with good morals or public order (the principles the fundamentals of society are built upon).

This argument can be based on the premise that every child should be understood as "a blessing", a good in itself. Even though the birth of a child might bring about a lot of complications in a particular case, the society arguably needs to keep this approach to all children in order to prevent their discrimination and psychological harm. It might be argued that wrongful birth claims blur the necessary distinction between the child and the harms that occurred to the parents – the parents might "only" want a compensation for the consequent harms, but they are literally claiming that they would have been better off had the child never been born.

On a more pragmatic level, there are concerns that awarding damages for wrongful birth would strengthen defensive medicine. The fear of wrongful birth claims might force physicians to encourage women to terminate pregnancies even if the women are unsure about this choice or when there is only the slightest suspicion of an ailment.

In a narrower sense, in wrongful birth cases it can also be argued that there the causal link is absent. Medical negligence caused the birth of the child but did not cause their impairment. The child's health condition has a completely independent cause (genetic mutation etc.). If the parents claim that the harm consists in the child's health impairment and its consequences, then there is arguably no causal link between the negligence and the harm.

2.2.3 Wrongful Birth from a Comparative Perspective

A. The Czech Republic

- **Surviving twin**

An 18-year-old woman got pregnant with twins after repeated unprotected sex with her boyfriend. After an abortion, she came late to check-ups. As a result of negligent performance of abortion, one of the twins survived. When it was found out, it was too late to perform another abortion. A healthy child was born. The mother sued the health care provider for immaterial harm: mental suffering during and after pregnancy, the fear of having a child with disability as a result of abortion, the influenced on the plaintiff's whole future life.

Municipal Court in Brno judgment of 29 February 2008, file no. 24 C 66/2001:

During the first trimester, the applicable law unequivocally prefers the rights and interests of the pregnant woman to both the interests of the foetus and the interest of society in the protection of unborn life. The plaintiff's right to self-determination was violated. Unless there is a social consensus, the courts cannot deprive the plaintiff of her right to compensation on basis of good morals. A woman who decides to undergo abortion usually understands the possibility of birth of a child as a harm and not as a blessing, happiness, or gift. Because of the plaintiff's contributory fault, there was only awarded compensation of 80,000 CZK (as 1/3 of 240,000 CZK which might have been awarded otherwise according to the court).

High Court in Olomouc judgment of 15 July 2009, file no. 1 Co 192/2008:

The birth of a child itself is not a harm. The defendant's argument of good morals was nevertheless rejected since the plaintiff did not see the violation of her rights in the birth of a child but rather in the negligent performance of abortion. Compensation of 80,000 CZK was considered adequate.

- **(Un)reliable sterilisation**

A woman underwent a voluntary sterilisation and was informed about the irreversibility of its effects. After one year, she got pregnant – her fertility was spontaneously restored, which is a very rare but well-known possibility.

Regional Court in Prague decision of 1 December 2008, file no. 36 C 50/2007:

The sterilisation was performed *de lege artis* (in one of 5,000 cases, fertility is spontaneously restored). The spontaneous restoration of fertility was therefore to be considered a result of *vis maior (force majeure)*. The breach of duty consisted in the provision of incomplete information (without the information of the possibility of spontaneous restoration of fertility). Patients have a right to information, especially if the information is unknown to the general public. The provision of incomplete information violated the patient's right to information (Article 17 of the Charter of Fundamental Rights and Freedoms). However, there was no causal link between the incomplete information and the unwanted pregnancy. A very low compensation of 30,000 CZK (sued for 500,000 CZK) was awarded.

High Court in Prague decision of 13 October 2009, 1 Co 114/2009

The provision of incomplete information to the patient did not represent a violation of her right to privacy. From the objective perspective, the violation of the right to privacy cannot consist of the birth of a child (which is, in fact, the realisation of the right to life). The occurrence of spontaneous restoration of fertility is so rare that it cannot be foreseen – even the complete information would not have any effect on the outcome since the plaintiff would have behaved the same way. Furthermore, the mother did not ask for an abortion but went to all standard medical examination in pregnancy, suggesting she accepted the pregnancy.

B. Germany

In Germany, wrongful birth is simply considered a damage resulting from a breach of duty. Resulting cases are understood as not fundamentally different from other civil litigations. The courts usually award damages for both immaterial and material harm including loss of profit and maintenance costs.

C. Austria

According to the Supreme Court (OGH) case law, pregnancy is not considered a bodily harm. Therefore, damages for immaterial harm not awarded. Instead, compensation is based on Bydlinski's argument: when the questions of dignity of a human being are concerned, the right to compensation principles can be applied only in cases when the maintenance costs of the child represent exceptional burden on the parents.[38] The justifying idea is that the compensation of special maintenance costs is not related to the child's personal value.

D. The United Kingdom

- *McFarlane and Another v Tayside Health Board (decision of the House of Lords of 21 October 1999):*

A healthy child was born after negligently performed vasectomy. According to the House of Lords, *"[t]he doctor undertakes a duty of care in regard to the prevention of pregnancy: it does not follow that the duty includes also avoiding the costs of rearing the child if born and accepted into the family."* There was awarded compensation for her pain and suffering in pregnancy and immediately consequential financial losses. On the other hand, the claim for the compensation of the costs of raising an unwanted healthy child was dismissed.

- Later case law has been compensating the additional cost of raising an unwanted disabled child over and above the normal costs of having a child.[39]

[38] See for example the decision of the Austrian Supreme Court of 25 May 1999, file no. 1 Ob 91/99k, or the decisions of the Austrian Supreme Court of 29 January 2015, file no. 9 Ob 37/14b.

[39] See for example Parkinson v St James and Seacroft University Hospital NHS Trust (11 April 2001).

2.3. Wrongful Life

In wrongful life cases, a child brings an action before a court against their parents forletting them be born with a known (probable) physical or social handicap. The argument goes that the parents should had foreseen that the child would be better off should they have never been born. The child's life is thus seen as a foreseeable and preventable harm.

2.3.1 Problems of wrongful life claims

Wrongful life claims can easily be seen as implying the lower value of life of persons with disabilities, or at least their inferior social position. This could have a direct negative impact on people with disabilities (making them feel offended, overlooked, dehumanised, etc.), but also influence the society as a whole (dehumanisation of people with disabilities, lowering the perceived value of human life).

It could also be argued that wrongful life claims lack logic since the plaintiff actually shows their will to live by filling the lawsuit (otherwise, they would not wish for the compensation which can only be used in life).

2.3.2 Wrongful Life from Comparative Perspective

A. France

- **Perruche Case**

Mrs. Perruche was pregnant when her four-year old daughter contracted rubella. Knowing that rubella in pregnant women can lead to serious defects in foetuses, Mrs. Perruche underwent several tests. After the tests, Mrs. Perruche was told she was immunised against rubella. However, the laboratory made a mistake – in fact, Mrs. Perruche suffered from rubella. As a result of the disease, her son Nicolas was born with Gregg's syndrome which causes mental retardation, deafness, partial blindness, and other health problems.

The physician and laboratory were sued for both wrongful birth and wrongful life. The case led to almost 15 years of litigation. In 2000, *Cour de Cassation* granted Nicolas Perruche's claim for wrongful life (along with the wrongful birth claim). In the following years, *Cour de Cassation* allowed several other wrongful life claims, provoking intense protests mainly from physicians and persons with disabilities. In 2002, the French parliament adopted the so-called *Kouchner Act* or *Anti-Perruche Act* (Loi 2002-303 du 4 mars 2002 relative aux droits des malades et ŕ la qualité du système de santé). Article 1 of the Act states: "No one can avail themselves of a harm from the fact of their birth alone." Medical liability only applies if the disability was directly caused by the physician's negligence.

B. Israel

Supreme Court decision in case *Zeitsov v. Katz*, CA 518/82 of 1986:

A physician ensured the parents that their foetus does not carry a gene responsible for Hunter's syndrome (leading to abnormalities in many organs and, in severe cases, death in teenage years). The parents made it clear that they would abort the foetus with the gene. In spite of the result of medical examination, the child had the gene and later developed Hunter's syndrome. The parents sued the physician on their own behalf and on behalf of the child. The claim was awarded by the Supreme Court.

The Supreme Court did not make a distinction between wrongful life and wrongful birth claim. As a result, Israeli courts also started to award wrongful life claims. There were many cases of such successful claims based on Down syndrome, spina bifida, fragile X syndrome, blindness, and other conditions.

Supreme Court decision in case *Hammer v. Amit*, CA 1326/07 of 28 May 2012:

Since this landmark decision of the Supreme Court, wrongful life claims are no longer actionable. They are deemed immoral since they imply the inferior position of persons with disabilities in society and as such, they contradict the Equal Rights for Persons with Disabilities Act (1998). According to the Supreme Court, there is no way to evaluate the life of any person and no life as such can be considered harm.

C. Italy

Supreme Court decision 16754/2012 of 2 October 2012:

Before 2012, only wrongful birth claims were awarded. This was the first time a wrongful life claim was awarded in Italy. The Supreme Court reasoned that misdiagnosis of the foetus affects the child's right to health, not the right to be born. In this understanding, the child is compensated for not being born healthy and therefore having to bear the consequences of misdiagnosis.

Supreme Court decision 25767/2015 of 22 December 2015:

In this decision, the Supreme Court overruled its own previous judgment and made wrongful life claims unacceptable again. A misdiagnosis in such cases does not represent harm since death by abortion is grater harm than being born with a disability. In the same manner, life with a disability cannot be considered harm. Any comparison of life with disability and non-existence is subjective. Awarding wrongful life claims could lead to valuing human life with disabilities less than a healthy human life. Furthermore, it would in fact compensate for the lack of resources in social welfare which would disrupt the function of civil liability.

3. Liability from harm occurred in medical research

3.1. Types of medical research

Three main branches of medical research:

- **The clinical research of medicinal products**
  Pharmaceutical research
  Act No. 378/2007 Sb., on Pharmaceuticals

- **The clinical evaluation of medical devices**
  Act No. 89/2021 Sb., on Medical Devices, Act No. 268/2014 Sb., on In Vitro Diagnostic Medical Devices

- **The evaluation of new methods not yet established in the clinical practice**
  Act No. 373/2011 Sb., on Specific Medical Services

Clinical studies: medical research on human participants

- Types of clinical studies:
  clinical trials (interventional studies)
  observational studies

The main problem with liability in research is that the usual understanding of the standard of care cannot be applied in this area. By definition, research exceeds acknowledged medical procedures.[40] Especially in the case of interventional clinical studies, civil liability for harm is relatively unclear. It has not been satisfactorily clarified in what cases (if any) the strict liability might be applied or which subject is liable for harm in particular types of situations. These questions remain open for the doctrine, case law, and perhaps the legislature to answer.

[40] See the analysis of the standard of care in sub-chapter 2.1.2.

7. General Introduction to Criminal Liability in Healthcare

In order to discuss the criminal liability of a healthcare worker and/or a healthcare provider, first and foremost, one needs to know under which circumstances a particular criminal act (such as the Czech Criminal Code) is to be applied. Therefore, we will start the introduction into criminal liability in healthcare by discussing the local and time applicability of the Czech Criminal Code, based on a real case of a Czech citizen who attended an assisted suicide of a patient in Bern in 2009.

Then we will analyse the absolutely crucial element for establishing criminal liability for a crime against life or health of a patient, i.e., the failure to provide healthcare on an appropriate professional level (also known as non lege artis treatment).

Last but not least, during this introduction session into criminal liability in healthcare, we will point out the link between the criminal liability of a healthcare worker (as an individual) and healthcare provider (as an artificial person), as criminal liability of a healthcare provider for crimes against life and health have been recognised since December 2016.

1. Read the case study: Assisted suicide in Switzerland

In 2009, whilst conducting her Ph.D. research in Bern, a young Czech researcher H. met patient A. who wanted to commit a suicide with the assistance of a help-to-die organisation called ExInternational. At that time, H. was in the process of finishing her Ph.D. thesis regarding euthanasia.

On 2 November 2009, in a flat rented by the organisation, Mrs. A. drank, in the presence of H., a lethal dose of a drug provided by a doctor who had been contacted by the help to die organisation. The doctor wrote the prescription for the drug on the basis of an evaluation of the whole health record of the patient and her actual health state.

According to Article 115 of the Swiss Criminal Code, any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable for a custodial sentence not exceeding five years or a monetary penalty.

1.1 If the suicide was committed in the Czech Republic, would be H. held criminally liable?

1.1A. If your answer was yes, discuss with a co-student, which crime would H. committed. Explain.

1.1B. If your answer was no, discuss with a co-student your reasoning.

1.2 What crimes (if any) might be taken into consideration? Why yes/not? Analyse the decisive elements of the crimes concerned.

2. Read the case study again. This time, keep in mind that the suicide took place in Switzerland. Which criminal law should be H. subjected to, Swiss or Czech?

2.1. What are the arguments for the applicability of Swiss Criminal Code?

2.2. What are the arguments for the applicability of Czech Criminal Code?

2.3. Read Article 115 of the Swiss Criminal Code (below). Would H. be criminally liable for conducting assisted suicide?

Article 115 of the Swiss Criminal Code: Inciting and Assisting Suicide

Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable to a custodial sentence not exceeding five years or to a monetary penalty.[41]

3. The suicide was committed in 2009, but H. was not convicted until 2011.

On 1 January 2010, the new Czech Criminal Code came into effect. Which law should H. subjected to and why? You can find the relevant provision of both acts below:

Criminal Act, No. 140/1961 Sb. (effective till 31 December 2009):
S. 230 Accessory to Suicide

(1) Whoever encourages another person to commit suicide or assists another person in committing suicide, shall be sentenced, if at least an attempted suicide occurred, to imprisonment for 6 months up to three years…

X

Criminal Code, No. 40/2009 Sb. (effective from 1 January 2010):
S. 144 Accessory to Suicide

(1) Whoever encourages another person to commit suicide or assists another person in committing suicide, shall be sentenced, if at least an attempted suicide occurred, to imprisonment for up to three years….

[41] https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en#a63.

4. Was H. held criminally liable? Why?

5. Read the following text regarding what is known as *lege artis treatment*:

According to the Act on Health Services, a treatment shall be provided to a patient only if the patient gave the informed consent to the treatment (if a statute does not state otherwise). 42 Besides, the treatment concerned must be provided at an adequate professional level, i.e., according to the science and acknowledged medical guidelines, with respect to the individuality of the patient, with regards to concrete conditions and objective possibilities.[43], [44], [45] The wording adequate professional level is used by many experts as a synonym for *lege artis* treatment.[46] The definition of *lege artis* is not found in the Czech legislation, yet the term itself is used on the daily basis by the Czech courts.[47]

Sometimes, the authors of medical expertise comment on de facto legal issues (e.g., whether there is a causal link). However, it is the court who shall (based on the persuasiveness of the medical expertise)[48] conclude whether the particular treatment in question was provided according to the law, i.e., at the adequate professional level, whether informed consent was given or there were other reasons stipulated by the law to provide the treatment and, last but not least, whether the whole process was properly documented in the medical reports.

42 S. 28 Para 1 of the Czech Act on Health Services. Providing healthcare without a consent (either of the patient concerned or another entitle person on behalf of the patient, such as a guardian or legal representative – most likely a parent) does not typically result in criminal liability of the healthcare professional. However, as exceptions to this rule hospitalisation without consent could be mentioned (S. 171of the Czech Criminal Code: illegal restraint), together with performing an abortion without the consent of the woman (S. 159 of the Czech Criminal Code), sterilisation without consent of the woman (S. 145 grievous bodily harm).

43 S. 4 Para 5 of the Act on Health Services.

44 S. 28 Para 2 of the Act on Health Services.

45 Cf. also the duty to carried out any intervention in the health field, including research, under relevant professional obligations and standards (Art. 4 of the Convention on Biomedicine) and the duty to follow the binding opinions of the Czech Medical Chamber (S. 2 Para 2 i) of the Act No. 220/1991 Sb., together with S. 1 Para 2 b) of the Disciplinary order of the Czech Medical Chamber).

46 Treatment in accordance to the rules of (medical) art. In.: CÍSAŘOVÁ, D., SOVOVÁ, O. a kol., Trestní právo a zdravotnictví (Criminal Law and Healthcare System), 2nd ed., publishing Orac 2004, p. 21.

47 Cf. e.g., the decision of the Supreme Court of the Czech Republic: 25 Cdo 878/2014.

48 Decision of the Constitutional Court: III. ÚS 299/06. Available on-line in Czech at: www.usoud.cz . Accessed 10th November 2020.

5.1 With the knowledge of the decision of the Czech Constitutional Court No. III. ÚS 299/06 (see below), decide what is the role of a medical expertise/expert opinion:

An expert opinion must be assessed as carefully as any other evidence, as it does not possess any greater probative force and must be subjected to an all-round review not only of legal correctness but also of substantive correctness. It is necessary to evaluate the whole process of decision making of the expert including his/her preparation, his/her work with sources, the course of expert examination, the credibility of the theoretical grounds by which the expert justifies his conclusions, the reliability of the methods used by the expert, and the way of concluding the expert's opinion. Not to challenge the factual accuracy of the expert's opinion and to blindly trust by the expert's conclusions would result in denial of the principle of free assessment of evidence by the court, privilege position of expert opinion among other evidence and transfer of responsibility for the factual accuracy of judicial decision-making to experts; such a procedure cannot be accepted from constitutional point of view.

6. Read the case study:

A mother of a child visited a GP in the early morning due to the fact that the child had been suffering from a sudden acute pain on the right side of the child's belly. The GP took the anamnesis, examined the child (through palpation and auscultation) and he recommended some dietetic measures. After their arrival home, the patient's pain got worse. However, the mother was not sure what to do and despite the unstoppable crying of the child, she waited to drive her child to an emergency at the local hospital (Hospital) until the next day in the evening. The doctor at the emergency diagnosed an acute abdomen and suspected acute appendicitis with a need of an urgent surgery. The father of the child was not available (as he was on a business trip and did not pick up the phone), so it was the mother who was provided the explanation regarding the situation and the advantages of a laparoscopic surgery, to which she gave her informed consent. However, she was not informed about the risks and disadvantages of the laparoscopic surgery, such as a diminished optical control and a reduced sensoric contact with the tissues. After the surgery, the patient developed internal bleeding as a consequence of the damage caused to the surrounding tissues during the surgery, which required another invasive intervention. Later during the hospitalisation, the wound was infected by MRSA, which did not respond to any antibiotic treatment. The patient developed sepsis resulting in a serious bodily harm (brain injury). The Hospital claims the patient was provided with a care on appropriate professional level and no legal liability shall be imposed upon them.

6.1. What information do you need that is not written in the text? Why do you need it?

6.2. What values were affected in this case? Which of them might be relevant for criminal liability?

6.3. Whose action might have led to the brain damage of the child?

7. Read the following sections of the Czech Act on Criminal Liability of Legal Persons, Act No. 418/2011 Sb.[49]

Section 7: Criminal Acts

Criminal acts for the purpose of this Act are to be understood criminal acts stipulated by the Criminal Code, with the exceptions of the criminal act of manslaughter (S. 141), Murder of a Newborn Child by its Mother (S. 142), Accessory to Suicide (S. 144), ...

Section 8: Criminal Liability of a Legal Person

(1) a criminal act committed by a legal person is an unlawful act committed in its interest or within its activity, if committed by

a) a statutory body or member of the statutory body or other person entitled to act on behalf of or for the legal person,

b) a person performing managerial or controlling activity within the legal person, even if they are not a person as mentioned in Letter a),

c) a person with a decisive authority on management of this legal person, if their act was at least one of the conditions leading to a consequence establishing criminal liability of a legal person, or

d) an employee or a person with similar status (employee) while fulfilling their duties/tasks, even if they are not a person as mentioned in Letters a) to c),

given that the act can be attributed to the legal person in accordance with Paragraph 2.

(2) the commitment of a criminal act as specified in S. 7 can be attributed to a legal person, if committed by

a) an action of bodies or persons mentioned in Paragraph 1 Letters a) to c), or

b) an employee mentioned in Paragraph 1 Letter d) on the grounds of a decision, approval or guidance of bodies of the legal person or persons mentioned in Paragraph 1 Letters a) to c), or because the bodies of the legal person or persons mentioned in Paragraph 1 Letters a) to c) did not take measures required by other legal regulation or that can be justly required, namely that they did not perform obligatory or necessary supervision over the activities of employees or other persons, they are superiors to, or they did not take necessary measures to prevent or stave off the consequences of a committed criminal act.

(3) the criminal liability of a legal person is not obstructed by the fact that a concrete natural person who has acted in a way specified in Paragraphs 1 and 2 cannot be identified.

(5) A legal person shall be released from criminal liability under Paragraphs 1 to 4, if it has made all efforts which can be justly required in order to prevent the illegal act committed by the persons referred to in Paragraph 1.

[49] https://www.unodc.org/res/cld/document/criminal-liability-of-legal-persons-and-proceedings-against-them_html/418-2011_Act_on_Criminal_Liability_of_Legal_Persons_Czech_Republic.pdf (Unofficial translation by Ministry of Justice of the Czech Republic), with adjustment made by HK, accessed in September 2020.

7.1. Decide on your role: either a police organ examining the case, or a legal representative of the Hospital defending the hospital and its employee. Argue your case.

7.2. Based on your knowledge of the Explanatory report to the Act No. 183/2016 Sb. (see below), decide whether a Czech help-to-die society could be criminally liable for helping a patient to die:

Explanatory report to the Act No. 183/2016 Sb. (amendment to **the Act on Criminal Liability of Legal Persons**), pp. 16 – 17, available (in Czech only) on https://www.psp.cz/sqw/text/tiskt.sqw?o=7&ct=304&ct1=0

Reasons to exclude criminal liability for crimes enlisted in § 7 are as follows:

First group is represented by crimes, which could not be conducted by a legal person per se, based on the wording of the definition of the crime. These crimes obviously could be only conducted by a natural person (e.g., Murder of a newborn by its mother, Insobriety …)

Similarly, the other group consists of crimes which are related to an offender – natural person to an extend which makes it hard to assume that such a conduct could be attributed to a legal person (e.g., Intercourse among Relatives).

…

Crimes where punishment is – based on the principle ultima ratio - not considered to be adequate or desirable (Accessory to Suicide, Defamation).

8. Harm to a Patient as an Element of a Crime

During this session, we will focus on the remaining elements of a crime besides the one already discussed (conduct) in order to understand how the definition of a crime is constructed and structured and what are the consequences of this structure. Based on that knowledge, you will be able to read and understand the Czech Criminal Code properly, knowing for example whether a crime needs to be committed with intent (or whether negligence suffices to commit the crime), even though nothing about the state of mind of the offender is explicitly stated in the relevant legal provision.

Then we will deal with the distinction between endangering the health or life of a patient and the actual harm to the health or life, not leaving aside the definition of bodily harm and what is known as grievous bodily harm. Besides that, you will be shown that harm to a patient may also lie in breaching another of their rights than the right to (protection of) health and life.

1. Read the text regarding criminal liability:

In order to be held criminally liable for a crime, the offender needs to fulfil the features set by the criminal law. First of all, the person committing a crime (either a natural or artificial/legal person) needs to possess qualities defined by the criminal law. These are called general elements.

Then, the elements typical for the particular criminal offence (type elements/ sometimes also known as "facts of the case") need to be given. Obligatory, they are:

The object: i.e., value protected by the criminal provision.

The objective element: i.e., how the crime is reflected in the external world; consisting of a conduct, end result and casual link between the two of them.

The subject: defining the offender more closely (adding other requirements to general elements)

The subjective element: the inner state in which the offender was whilst committing the crime. Did they act with an intent, or negligence? Or did the result occur due to a pure accident?

Some criminal offences require other elements besides these obligatory elements, for example, the offender needs to commit the crime with a weapon, with a specific motive etc. (facultative elements).

2. Discuss with your co-student:

2.1. What is the ultima ratio? See S. 12 Para 2 of the Czech Criminal Code.

2.2. What statutes shall be considered to fall under the term criminal law?

2.3. What are the general elements of a crime?

2.4. Read the statutory definition of Failure to Provide Assistance (S. 150 of the Czech Criminal Code) and find the above-mentioned elements, particularly: the object, subject, conduct, end result, causal link, and subjective element.

Section 150 Failure to Provide Assistance

(1) Whoever fails to provide necessary assistance to another person in danger of death or showing signs of a serious health disorder or a serious disease, even though they can do so without endangering themselves or another person, shall be sentenced to imprisonment for up to two years.

(2) Whoever fails to provide necessary assistance to another person in danger of death or showing signs of a serious health disorder or a serious disease, even though they are required to provide such assistance by the nature of their employment, shall be sentenced to imprisonment for up to three years or to the prohibition of an activity.

3. Generally, what might be an end-result of a crime?

4. Read the case study again:

A mother of a child visited a GP in the early morning due to the fact that the child had been suffering from a sudden acute pain on the right side of the child's belly. The GP took the anamnesis, examined the child (through palpation and auscultation) and he recommended some dietetic measures. After their arrival home, the patient's pain got worse. However, the mother was not sure what to do and despite the unstoppable crying of the child, she waited to drive her child to an emergency at the local hospital (the Hospital) until the next day in the evening. The doctor at the emergency diagnosed an acute abdomen and suspected acute appendicitis with a need of an urgent surgery. The father of the child was not available (as he was on a business trip and did not pick up the phone), so it was the mother who was provided the explanation regarding the situation and the advantages of a laparoscopic surgery, to which she gave her informed consent. However, she was not informed about the risks and disadvantages of the laparoscopic surgery, such as a diminished optical control and a reduced sensoric contact with the tissues. After the surgery, the patient developed internal bleeding as a consequence of the damage caused to the surrounding tissues during the surgery, which required another invasive intervention. Later during the hospitalisation, the wound was infected by MRSA, which did not respond to any antibiotic treatment. The patient developed sepsis resulting in a serious bodily harm (brain injury). The Hospital later admitted the patient had not been provided with a care on appropriate professional level regarding the hygiene standards.

4.1. What is the end result of the inappropriate care provided by the Hospital? Cf. S. 122 of the Czech Criminal Code.

Section 122 Bodily Harm and Grievous Bodily Harm

(1) Bodily harm shall be understood such a state consisting in disorder of health or a sickness that by disturbing of regular physical and mental functions complicates, not only for a short period of time, the regular way of life of the injured person and that requires medical attention.

Grievous bodily harm shall be understood a serious disorder of health or a serious sickness. Under these conditions grievous bodily harm considered

a) disablement,

b) loss or substantial limitation of working capability,

c) paralysis of a limb,

d) loss or substantial limitation of a sensual function,

e) injury of a vital organ,

f) mutilation,

g) inducing an abortion or killing a foetus,

h) torturous suffering, or

i) a long lasting health disorder.

4.2 What is the end result of the inappropriate information provided to the mother before the surgery?

4.3 Trial:

Police v. Hospital advocating the care provided after the surgery

Police v. Hospital advocating the surgery including gaining the informed consent

5. Based on the end result defined in S. 181 of the Czech Criminal Code, decide whether the doctor infringed the rights of the patient:

On 19 June 2019, during an examination conducted in his private office and after the nurse had already left, the gynaecologist twice inserted his penis into patient's vagina.
The patient did not anticipate such an action and could not resist it. Immediately after the patient articulated her refusal, the doctor backed up. The patient was free to leave the room.

If the answer is No, is there another crime which might be taken into consideration?

6. Read the case study:

During a ski course which took place in January 2003, a doctor provides the class with medical assistance. However, according to the prosecution, the doctor failed to provide one child with necessary medical care, as the child developed breathing problems, sore throat, vomiting, and diarrhea on 24 January. The doctor did not react adequately on the child's health deteriorating until the end of the course (on 25 January) when the child was returned home and immediately transferred by the parents to the hospital. After 2 weeks, when the child had been removed from intensive care unit to a standard room, the child died due to a sudden septic shock. The cause of the septic shock has never been explained. No autopsy was performed.

6.1. Based on legal principles regarding causality as written below, decide with your co-student, whether the causal link is given in this case scenario. Explain your position:

a. The principle of artificial isolation of causality: Out of all possible causes leading to the result it is necessary to detect the ones which are criminally relevant in the particular case.

b. The principle of gradation of causality: Not every cause is important enough to be criminally relevant

c. A cause is every phenomenon without which another phenomenon would not occur or would occur, but under different circumstances (time, place, extent of the result etc.)

d. There is a breach of causality, if another independent cause occurs.

7. Read the text on the concept of confidentiality:

The right to a private life is in general terms guaranteed by Article 7 of the Bill of Fundamental Rights and Freedoms; for the area of healthcare services then more specifically by Article 10 of the Convention on Biomedicine. According to the latter, everyone has the right to respect for private life concerning information about their health. Furthermore, everyone is entitled to know any information collected about their health. However, the wishes of individuals not to be so informed shall be observed.

Healthcare providers and through them, their employees possess the duty of confidentiality regarding all the information they obtain while providing healthcare services.[50] Information about the health of a particular patient is considered sensitive data, protected by law.[51] Breaching medical confidentiality whilst wrongfully publishing, communicating personal data of a patient, or making personal data of the patient access to another person constitutes unlawful disposal of personal data under S. 180 of the Czech Criminal Code if the personal data has been obtained in connection to performing one's occupation, profession, or function and through the wrongful disposal of the personal data

[50] S. 51 of the Czech Act on Health Services.

[51] Act No. 101/2000 Sb., the Personal Data Protection Act, replaced by Act No. 110/2019 Sb., on Personal Data Processing; General Data Protection Regulation.

serious harm was caused to the rights or rightful interests of the patient. The crime could be committed both out of intent or negligence.

The duty of confidentiality is not absolute. The law anticipates several exceptions when disposing of the health information is either allowed or even required. First and foremost, there is no breach of confidentiality, if the patient (or person entitled on behalf of the patient, such as patient's guardian or legal representative - parent) gives their permission to dispose of the health information. If the patient is not in a state enabling them to give such permission, the next of kin of the patient have a right to receive information regarding the current health state and to access the medical records of the patient, unless the patient explicitly forbids to inform them.52 Persons taking care of the patient are also entitled to information necessary for providing the patient with proper care and for protection of the caretakers.

Besides, even without the patient's permission to dispose of their data, the healthcare provider is entitled to provide another healthcare provider or social care provider with all necessary information in order to ensure the continuity of the treatment.[53] Furthermore, the healthcare provider/ healthcare professional must notify the authorities, namely either the police or prosecution, if there has been a crime committed listed in S. 368 of the Czech Criminal Code; otherwise, they will be charged with failure to report a crime. Similarly, they have to report to the child protection authority when they have a suspicion that a child in their care is endangered.[54] If there is an infectious patient under S. 53 of the Act on Protection of Public Health, the healthcare provider needs to notify the public health authority. The doctors who have realised that their patients had lost their ability to drive are under a duty to notify the responsible municipality of this information.[55]

In addition, no legal liability arises if confidentiality is breached by a healthcare provider and their employee worker whilst they are defending themselves in a dispute over the healthcare provided to a patient (in a criminal, civil, or administrative procedure).[56] Last but not least, the duty of confidentiality could be released from the healthcare provider/ professional by a criminal judge's approval under S. 8 Para 5 of the Czech Criminal Procedure Code. The approval needs to be targeted (and limited) only towards the information which is necessary for a particular criminal procedure. As a rule, the approval shall not be granted for all the health information available: That is why an approval to disclose all medical records consisting of hundreds of pages when the information needed was actually written on one particular page was found unconstitutional. 57

7.1 What is the harm caused by a breach of confidentiality?

[52] S. 33 Para 3 of the Czech Act on Health Services.

[53] S. 51 Para 2 of the Czech Act on Health Services.

[54] Act No. 359/1999 Sb.

[55] S. 54 of the Act No. 258/2000 Sb.

[56] S 51 Para 3 of the Czech Act on Health Services.

[57] The decision of the Czech Constitutional Court II. ÚS 2499/14. Available on-line in Czech at: www.usoud.cz . Accessed 10th November 2020.

9. Selected Offences in Healthcare

During this session, we will look at typical and/or highly interesting offences conducted whilst providing healthcare and – where it is possible – their mutual relations (esp. the one between the failure to provide aid under S. 150(2) and offences against life and health under S. 140 ff.). The cases to be discussed have been selected in order to provide you with the basic knowledge of the most common situation you can face as a criminal lawyer specialized in medical law.

1. Read the following text regarding special duty to act v. duty to provide aid because of the offender's employment

Anyone older than 15 can commit the crime of failure to provide aid under S. 150(1) of the Czech Criminal Code and is not necessarily exclusively a healthcare professional. To commit failure to provide aid under S. 150(2) of the Czech Criminal Code requires the offender to possess a duty to provide aid because of the nature of the offender's employment.

This duty shall be distinguished from the special duty to act according to S. 112 of the Czech Criminal Code as can be demonstrated on these examples:

a. An unconscious person is lying on the street. A law student is aware of the fact that a person is in danger of death or showing signs of a severe health disorder or a severe disease. Nevertheless, the student willingly does not provide the person with necessary aid even though she can do that without endangering herself or another person. Even if the person dies afterwards, the student is not going to be charged with murder but is going to be held criminally liable for failure to provide aid under S. 150(1) of the Czech Criminal Code, with the punishment of imprisonment up to 2 years (the student is neither under a special duty to act towards the stranger nor under a duty based on the nature of her employment).

b. An unconscious person is lying on the street. A doctor coming home from his night shift in the hospital, i.e., in his free time, is aware of the fact that person is in danger of death or showing signs of a severe health disorder or disease. However, the doctor willingly does not provide the person with the necessary aid. Even if the person dies afterwards, the doctor is not going to be charged with murder but is going to be held criminally liable for failure to provide aid under S. 150(2) of the Czech Criminal Code, with the punishment of imprisonment up to 3 years (the doctor did not possess a special duty to act towards the stranger, yet the punishment is stricter due to his duty because of the nature of his employment).

c. An unconscious person is lying on the street. A bystander to whom the person is a stranger, and he is not aware of the fact that the person is in danger of death or showing signs of a severe health disorder or a disease (the bystander indeed beliefs that person A is just drunk). The bystander fails to provide the person with the necessary aid.
Even if the person dies, because of the lack of intent and lack of special duty to act towards the person, the bystander is to be held liable neither under S. 150 of the Czech Criminal Code (failure to provide aid) nor under S. 143 of the Czech Criminal Code (killing by negligence).

d. An unconscious person is lying on the street. An ambulance is called, yet the attending doctor does not provide the person with necessary aid. The person dies. Because the doctor was on duty, he possessed a special duty to act, that is why he is not going to be charged with failure to provide aid under S. 150(2) of the Czech Criminal Code but is going to be held criminally liable depending on the state of the mind of the doctor for killing by negligence (most likely) or for murder.

1.1. What is an error in the criminal law (cf. S. 18 and 19 of the Czech Criminal Code)?

1.2. Analyse the four (A-D) scenarios. What is the difference between special duty to act and duty to provide aid because of the offender's employment and what are the legal consequences?

2. Read the case study

On 15 October 2017, patient A. (36) delivered her child at her home in the presence of her midwife, in whose care A. was during her whole pregnancy. It was a second labour of A., and during the first one which had taken place two and half years ago there had not been any complications. During her second pregnancy A. developed severe anaemia. In her third trimester, A. wrote down her birth plan regarding the place of the labour (at her home), the healthcare worker(s) present (just her midwife) and she stressed out she wanted as much of a natural labour, as possible. However, during the labour, complication occurred, and the midwife was thinking of calling an ambulance. A., who was overwhelmed by pain, refused. The baby was born with asphyxia and A. died as a result of massive bleeding.

2.1 Together with your co-student, explain the following terms:

in advance written birth plan v. advance directive according to S. 36 of the Czech Act on Health Services (see below)

anaemia (was it relevant for the decision to give birth at home?)

asphyxia

S. 36 Previously expressed wish

(1) The patient may, in case of anticipating a state of health, which will not allow the patient to give an informed consent with or refusal of the provision of health services and the way they are provided, express their own will (previously expressed wish).

(2) The provider will take into account previously expressed wishes of the patient, if it is available, and under the condition that at the time of providing the above-mentioned health services the predictable situations occurred to which the previously expressed wish applies, and the patient is in such a state of health when they are not able to express actual informed consent or refusal. Only such a previously expressed wish is to be respected that was made on the basis of written information regarding the consequences if patient's decision, provided to the patient by the patient's GP, or another physician with a specialisation to which the previously expressed wish is related.

(3) The previously expressed wish must be in writing with an officially verified signature of the patient. The written information pursuant to paragraph 2 must be included within the previously expressed wish.

(4) The patient may express their previously expressed wish also durning the patient intake process or anytime during hospitalization, for the provision of health services provided by this provider. Such a previously expressed wish shall be written down in the medical records of the patient; the record shall be signed by the patient, healthcare worker, and a witness; in this case it shall not be proceeded in accordance with paragraph 3.

(5) A previously expressed wish

a) does not need to be followed if, since the time it was expressed, there has been such development in the provision of healthcare services, to which this wish relates, that it can be reasonably assumed that the patient would have agreed to their provision; ...

b) may not be followed if it encourages such practices, which result in an active cause of death,

c) may not be followed if its fulfilment could endanger other persons,

d) may not be followed if certain medical procedures have already been started because the previously expressed wish was not available for the healthcare provider at the relevant moment and the interruption of these procedures would lead to an active cause of death.

(6) Previously expressed wishes do not to apply in the case of minors or patients with limited legal capacity.

2.2. Argue your position as a police and legal representative of midwife.

2.3. What criminal offence(s) might have been committed?

2.4. What criminal offence(s) might have been committed if the midwife did not respect a properly written previously expressed wish the will of the patient not to interfere with the labour (mind S. 36 Para 5)?

3. Read the case study:

In the evening hours of 18 May 2012, five-year-old K. was injured. There was no one present at the event, but it was assumed that the boy had fallen from the balcony, i.e., from a height of about 3 meters. The boy was confused, unable to describe the mechanism of the accident, and was immediately taken by his parents in the car and taken in about 6 minutes distant hospital, where Prof. MUDr. A.B had a shift in the emergency department. The nurse, who phoned the doctor's room, told the doctor that the boy had a broken arm after falling off the balcony and did not communicate at all. A doctor told his parents there was no children's department or emergency unit for children and adolescents, and he advised the parents to transfer the boy to a 30-km district hospital. Here the patient was thoroughly examined, the only injury - the broken arm - was properly treated.

3.1. Discuss with your co-student whether the professor shall be criminally liable for the bodily harm of the patient. Is there another reason to charge him?

3.2. What role does the special duty to act play in this scenario?

4. Read the case study

A police officer suffering from vertebrogenic algic syndrome (i.e., neurological diagnosis) was hospitalised and treated by a doctor specialised in neurology and psychiatry.

As the patient only realised afterwards, during his whole stay, the official diagnosis of the patient was F 45.4 (persistent somatomorf disorder), as the healthcare provider did not possess the licence to provide neurologic care. The healthcare provider obtained more than 15,000 CZK from the health insurance company for the treatment provided to the patient.

4.1. What criminal offences might have been committed?

5. Read the case study

Patient A. was a five-year-old boy, who – according to his mother – suffered from a disturbing range of unspecific symptoms, so A.'s GP was supposed to repeatedly check A.'s state of health. The boy seemed to be absolutely fine, though. After a while, as the mother intensified her pressure on more and more examinations of the boy (incl. colonoscopy) to be performed, the GP came to the conclusion that the mother suffers from what is known as Munchausen by proxy syndrome.

5.1. What is Munchausen by proxy?

5.2. What is the GP supposed to do?

5.3. What if the GP informed the employer of the mother to warn them about the mother's diagnosis?

6. Read the case study

A patient with a nephrological disease (resulting in a kidney failure) has been admitted to a hospital to have a surgery the next day. The patient was examined by a nephrologist N., who informed the patient about the fact that the left kidney needs to be removed to save the patient's life, whereas the other kidney, also affected by the disease, could still functioning to some (limited) extend. The next day, surgeon S., removed the right kidney. After the surgery, S. claimed it was explicitly written by N. in the medical record that the right kidney needs to be removed.

6.1. Who is liable for removing the wrong kidney?

6.2. What is the main evidence in this case?

6.3. What crimes might have been conducted here?

10. Foreign Approaches to Criminal Liability in Healthcare

Criminal law remains heavily based on national law, with only a limited influence of international or European law and varies from state to state. Therefore, it is the knowledge of the national criminal law that remains the crucial quality of every criminal lawyer. Nevertheless, at least a basic orientation in foreign criminal law could provide you with a better understanding of the universal legal principles behind a particular legal provision and thus enable you to analyse it critically within a broader context.

Being aware of other possible solutions of a legal issue could further lead to a sharpened ability not only to see the upsides and downsides (and flaws) of the current national law but also to suggest relevant amendments (suggestions *de lege ferenda*) to it. Furthermore, this session could be understood as mental preparation for cases with foreign elements which should be expected to occur in your practice, as not only the world but also criminality is subjected to the phenomenon of globalisation.

1. Look at the table. What are the main difference between the structure of a crime in the Czech Republic, Germany, and England?

Structure of a crime:

Czech Criminal Law	**German Criminal Law**	**English Criminal Law**
1. Illegality of the act i.e., either absence of defences or incompliance with legal requirements	1. Explicitly recognised as a crime by the German Criminal Code	1. Explicitly recognised as a crime by the statutory law or case law
2. Explicitly recognised as a crime by the Czech Criminal Code	2. Type elements of the crime Result Conduct Causal link	2. Actus reus (guilty act)
3. Type elements of the crime (obligatory) Object Objective element: Conduct Result Causal link Subject Subjective element: intent, negligence	3. Type elements of the crime Subjective element	3. Mens rea (guilty mind) excl. legal persons
4. Type elements of the crime (facultative) Place, time, motive, …	4. Other type elements of the crime Place, time, motive, …	4. Absence of defence Insanity, provocation, …
5. Social harmfulness	5. Illegality of the act i.e., absence of defence (rechtferdigende)	
	6. Culpability sanity, age, absence of error excess of the defence (entschuldigende)	
Procedural rule: Principle of legality	Procedural rule: Principle of legality	Procedural rule: Principle of opportunity

2. Read the following scenario

Three students - Jana, Gertruda, and John were writing their Ph.D. thesis regarding the legal regulation and practice of assisted suicide in the Czech Republic, Germany, and England respectively. During their research stay, they helped a patient to commit suicide. According to S. 144 of the Czech Criminal Code, S. 2017 of the German Criminal Code, and S. 2 of the English Suicide Act 1961 recognised assisted suicide as a criminal offence (see below for the exact wording).

Section 144 of the Czech Criminal Code

Accessory to Suicide

(1) Whoever encourages another person to commit suicide or assists another person in committing suicide, shall be sentenced, if at least an attempted suicide occurred, to imprisonment for up to three years.

(2) An offender shall be sentenced to imprisonment for two to eight years, if they commit the act referred to in Sub-section (1) on a child or a pregnant woman.

(3) An offender shall be sentenced to imprisonment for five to twelve years, if they commit the act referred to in Sub-section (1) on a child under fifteen years of age or on a person suffering from a mental disorder.

Section 217 of the German Criminal Code58

Facilitating suicide as recurring pursuit

(1) Whoever, with the intention of assisting another person to commit suicide, provides, procures, or arranges the opportunity for that person to do so and whose actions are intended as a recurring pursuit incurs a penalty of imprisonment for a term not exceeding three years or a fine

(2) A participant whose actions are not intended as a recurring pursuit and who is either a relative of or is close to the person referred to in subsection (1) is exempt from punishment.

Section 2 of the English Suicide Act 196159

Criminal liability for complicity in another's suicide.
(1) A person ("D") commits an offence if—
(a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and
(b) D's act was intended to encourage or assist suicide or an attempt at suicide.

(1A) The person referred to in subsection (1)(a) need not be a specific person (or class of persons) known to, or identified by, D.

[58] https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1954

[59] https://www.legislation.gov.uk/ukpga/Eliz2/9-10/60#commentary-c626781

(1B) D may commit an offence under this section whether or not a suicide, or an attempt at suicide, occurs.

(1C) An offence under this section is triable on indictment and a person convicted of such an offence is liable to imprisonment for a term not exceeding 14 years.

(2) If on the trial of an indictment for murder or manslaughter of a person it is proved that the deceased person committed suicide, and the accused committed an offence under subsection (1) in relation to that suicide, the jury may find the accused guilty of the offence under subsection (1).

(3) The enactments mentioned in the first column of the First Schedule to this Act shall have effect subject to the amendments provided for in the second column (which preserve in relation to offences under this section the previous operation of those enactments in relation to murder or manslaughter).

(4) No proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.

Decide in your group (Czech Republic, Germany, England), whether there might be circumstances, under which Jana, Gertruda, and John are not to be prosecuted or the charges against them are to be dropped.

3. Read the following case study.

The ambulance is called to a man who suddenly dropped on the street in the centre of Prague. There was no information available regarding the man's identity, health, social, or family anamnesis etc. The attending doctor immediately started the resuscitation although he could clearly see a tattoo on the man's chest consisting of the letters D, N, R.

3.1 What is the meaning of the abbreviation DNR?

3.2 Do you approve the doctors action? YES/NO

3.3 What is your reasoning?

What might be the legal consequence of ignoring the DNR order?

What might be the legal consequence of following the DNR order?

3.4 What if the same situation happened in Germany or England?
Bear in mind the below written relevant legal definition:

The crime of battery is defined by English common law *as unlawful application of force by the defendant upon the victim* (*R v Ireland* [1997] 3 WLR 534).

The crime of bodily harm is defined by the § 223(1) of the German Criminal Code as follows: *Whoever physically assaults or damages the health of another person incurs a penalty of imprisonment for a term not exceeding five years or a fine.*

What might be the legal consequence of ignoring the DNR order?

What might be the legal consequence of following the DNR order?

How should the doctor proceed then?

4. Read the case study.

In Germany, a mother of a child visited a GP in the early morning due to the fact that the child had been suffering from a sudden acute pain on the right side of the child's belly. The GP took the anamnesis, examined the child (through palpation and auscultation) and he recommended some dietetic measures. After their arrival home, the patient's pain got worse. However, the mother was not sure what to do and despite the unstoppable crying of the child, she waited to drive her child to an emergency at the local hospital (Hospital) until the next day in the evening. The doctor at the emergency diagnosed an acute abdomen and suspected acute appendicitis with a need of an urgent surgery. The father of the child was not available (as he was on a business trip and did not pick up the phone), so it was the mother who was provided the explanation regarding the situation and the advantages of a laparoscopic surgery, to which she gave her informed consent. However, she was not informed about the risks and disadvantages of the laparoscopic surgery, such as a diminished optical control and a reduced sensoric contact with the tissues.

After the surgery, the patient developed internal bleeding as a consequence of the damage caused to the surrounding tissues during the surgery, which required another invasive intervention. Later during the hospitalisation, the wound was infected by MRSA, which did not respond to any antibiotic treatment. The patient developed sepsis resulting in a serious bodily harm (brain injury).

10.4.A. Decide on the criminal liability of the surgeon.

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Attachments:

Selected provisions of the Czech Criminal Code:

CRIMINAL CODE OF THE CZECH REPUBLIC

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PART ONE: GENERAL PART

CHAPTER I: APPLICABILITY OF CRIMINAL LAWS

Division 1: No Crime without Law

§ 1 Prohibition of Retroactivity
An act shall be criminal only if its criminality has been stipulated by law prior to its commission.

Division 2: Time Applicability

§ 2 Criminality of an Act and Time of Conduct

(1) Criminality of an act shall be assessed in accordance with the law effective at the time of the conduct; it shall only be assessed in accordance with a later law if it is more favourable to the offender.

(2) If the law has changed during the conduct of an act, the law effective at the time of completion of the act shall be applicable.

(3) In case of later amendments to the law effective at the time of the completion of the act, the most favourable law shall be applied.

(4) A conduct of an act takes place at the time when the offender or accomplice act or in the case of omission, when they were obliged to act. It is irrelevant when the consequences occurred or were supposed to occur.

§ 3 Applicability of the Law Effective at the Time of Decision Making

(1) An offender may only be imposed a penalty admissible by law which is effective at the time of deciding on the criminal offence.

(2) Protective measures shall always be decided in accordance with the law effective at the time of deciding on the protective measures.

Division 3: Local Applicability

§ 4 Principle of Territoriality

(1) The criminality of an act conducted in the territory of the Czech Republic shall be assessed in accordance with the law of the Czech Republic.

(2) A crime shall be considered being conducted in the territory of the Czech Republic

a) if an offender conducted the act here, either entirely or partially, even though the violation or endangering of an interest protected by the criminal law occurred or was supposed to occur, either entirely or in part, abroad, or

b) if an offender violated or endangered an interest protected by criminal law or if such a result was supposed to occur, even only partially, here, even though the act was conducted abroad.

(3) Complicity is conducted in the territory of the Czech Republic, a) if the offender's conduct has taken place here; whilst the place of conduct is to be assessed analogically according to Para (2), or

b) if the accomplice's conduct, taking place abroad, has taken place also partially here.

(4) If the accomplice's conduct has taken place in the territory of the Czech Republic, the law of the Czech Republic shall be applied, regardless of whether the conduct of the offender is criminal abroad.

§ 5 Principle of Registration

The criminality of an act committed outside of the territory of the Czech Republic, on a ship or another vessel, aircraft, or other means of air transport, which is registered in the Czech Republic, shall also be assessed in accordance with the law of the Czech Republic. The place of conduct shall be assessed according to § 4(2) and (3).

§ 6 Principle of Personality

The law of the Czech Republic shall also be applied to assessment of criminality of an act conducted abroad by a citizen of the Czech Republic or a person with no nationality, who has been granted a permanent residence in its territory.

§ 7 Principle of Protection and Principle of Universality

(1) The law of the Czech Republic shall apply to assessment criminality of the crimes: Torture and other cruel and inhumane treatment (§ 149), Forgery and alteration of money (§ 233), Uttering forged and altered money (§ 235), Manufacture and possession of forgery equipment (§ 236), Unauthorised production of money (§ 237), Subversion of the Republic (§ 310), Terrorist attack (§ 311), Terror (§ 312), Sabotage (§ 314), Espionage (§ 316), Violence against public authority (§ 323), Violence against a public official (§ 325), Forgery and alteration of public documents (§ 348), Participation in organised criminal group pursuant to § 361 (2) and (3), Genocide (§ 400), Attack against humanity (§ 401), Apartheid and discrimination against groups of people (§ 402), Preparation of offensive war (§ 406), Use of prohibited means and methods of combat (§ 411), War cruelty (§ 412), Persecution of population (§ 413), Pillage in the area of military operations (§ 414), Abuse of internationally and state recognised symbols (§ 415), Abuse of flag and armistice (§ 416) and Harming a conciliator (§ 417), even when such a criminal offence was committed abroad by a foreign national or a person with no nationality, who has not been granted permanent residence in the territory of the Czech Republic.

(2) The law of the Czech Republic shall also be applied to assessment of criminality of an act conducted abroad against a Czech national or a person without a nationality, who has been granted permanent residence in the territory of the Czech Republic, if the act is criminal in the place of its conduct, or if the place of its conduct is not subject to any criminal jurisdiction.

§ 8 Subsidiary Principle of Universality

(1) The law of the Czech Republic shall also be applied to assessment of criminality of an act conducted abroad by a foreign national or a person with no nationality, who has not been granted permanent residence in the territory of the Czech Republic, if

a) the act is criminal also under the law effective in the territory of its conduct, and

b) the offender was apprehended in the territory of the Czech Republic and was not extradited or transferred to another state or to another authority entitled to criminal prosecution.

(2) The law of the Czech Republic shall be applied apply to assessment of criminality of an act conducted abroad by a foreign national or a person without a nationality to who has not been granted permanent residence in the territory of the Czech Republic, also when the act was conducted in favour of a legal entity with a registered office or branch in the territory of the Czech Republic.

(3) However, the offender cannot be imposed a more severe penalty than the one stipulated by the law of the state, in which territory the crime was conducted.

§ 9 Jurisdiction Stipulated by International Treaty

(1) Criminality of an act shall be assessed in accordance with the law of the Czech Republic also if an international treaty incorporated into the system of law (international treaty) stipulates so.

(2) The provisions of §§ 4 to 8 shall not be applied if it is not admissible according to an international treaty.

CHAPTER II: CRIMINAL LIABILITY

Division 1: Fundamentals of Criminal Liability

§ 12 Principle of Legality and Principle of Subsidiarity of Criminal Repression

(1) Only criminal law shall define crimes and stipulate criminal penalties that may be imposed for conducting a crime.

(2) Criminal liability of an offender and criminal consequences associated with it may only be applied in socially harmful cases where application of liability according to other legal regulations does not suffice.

§ 13 Criminal Offence

(1) A crime is an illegal act identified as criminal by criminal law, which shows the characteristics stated in it.

(2) A necessary element of criminal liability is intent, unless the criminal law expressly stipulates that negligent culpability suffices.

§ 14 Misdemeanours and Felonies

(1) Crimes are divided into misdemeanours and felonies.

(2) Misdemeanours are all negligent crimes and such intentional crime for which criminal law stipulates a penalty of imprisonment with the upper limit up to five years.

(3) Felonies are all crimes that are not classified as misdemeanours under criminal law; particularly serious felonies are those intentional crimes for which criminal law stipulates a penalty of imprisonment with the upper limit at least ten years.

Division 2: Fault

§ 15 Intent

(1) A crime is conducted intentionally if the offender

a) sought to violate or endanger, in a manner specified under criminal law, any interest protected by the criminal law, or

b) was aware that their conduct may cause such violation or endangering, and for the case they cause it, they agree to it.

(2) This agreement shall be understood also as offender's acceptance of the fact that they may violate or endanger an interest protected by criminal law in the manner stipulated by criminal law.

§ 16 Negligence

(1) A criminal offence is committed out of negligence if the offender

a) was aware that they may violate or endanger an interest protected by criminal law in the manner stipulated in criminal law, but without adequate reasons they believed that they would not cause such violation or endangering, or

b) was unaware that their conduct may cause such violation or endangering although they could and should have been aware of it considering the circumstances and their personal situation.

(2) A crime is conducted out of gross negligence if the offender's approach to the requirements for due diligence shows evident irresponsibility of the offender for the interests protected by criminal law.

§ 17 Fault regarding Particularly Aggravating Circumstance

Circumstance, which is a prerequisite for imposing more severe penalty, shall be taken into consideration,

a) regarding graver result, even if the offender caused it out of negligence, except for cases when the criminal law requires intent, or

b) regarding another fact, even if the offender was unaware of such a fact, although they could and should have been aware of it considering the circumstances and their personal situation, except of cases when criminal law requires that the offender was aware of such a fact.

§ 18 Error in Fact

(1) Whoever does not know nor presume, whilst conducting an act, a factual circumstance, which is an element of a crime, does not act intentionally; this does not affect liability for a crime conducted out of negligence.

(2) Whoever erroneously presumes, whilst conducting an act, a factual circumstance that would fulfil elements of a less serious intent crime, shall be sentenced only for this less serious crime, unless it is a crime conducted out of negligence.

(3) Whoever erroneously presumes, whilst conducting an act, factual circumstances that would fulfil elements of a more serious intent crime, shall be sentenced for an attempt of this more serious criminal offence.

(4) Whoever erroneously presumes, whilst conducting an act, factual circumstances excluding its criminality does not act intentionally; this does not affect liability for a crime committed out of negligence.

§ 19 Error in Law

(1) Whoever is unaware of illegality of their conduct, whilst conducting a crime, is not at fault, provided that they could not avoided the error.

(2) The error could be avoided if the duty to acquaint with the relevant legal regulation resulted for the offender from the law or another legal regulation, administrative decision, or a contract, from their employment, occupation, position or function, or if the offender could identify the act as illegal without any apparent difficulties.

Division 3: Preparation and Attempt of Criminal Offence

§ 20 Preparation

(1) Conduct that consists in intentional creation of conditions for the conduction a particularly serious felony (§ 14 Para (3)), especially in its organisation, acquisition or adaptation of the means or instruments for its conducting, in conspiracy, unlawful assembly, in inducing of or assistance to such a crime, shall be considered a preparation only if the criminal law expressively stipulates it for a specific crime and an attempt or completion of a particularly serious felony did not occur.

§ 21 Attempt

(1) A conduct imminently leading to completion of a crime, which has been undertaken by the offender with the intent to commit such crime, shall be considered an attempt to conduct an offence, unless the offence was completed.

Division 4: Offender, Accomplice and Accessory to a Criminal Offence

§ 22 Offender

(1) An offender of a crime is anyone who fulfilled the elements of the crime or attempt to or preparation of it if they are criminal.

(2) An offender of a crime is also anyone who uses for conducting it another person, who is not criminally liable due to lack of age, insanity, error or because they acted within the scope of self-defence, necessity, or other defences excluding criminal liability, or who did not themself act at all or did not act out of fault. An offender of a crime is also anyone who uses for conducting a crime a person who did not act with a special intention or out of a motive stipulated by the law; in such cases is the criminal liability of such a person for another offence committed by this conduct not excluded.

§ 23 Accomplice

If a crime is conducted by joint intentional conduct of two or more persons, each of them shall be criminally liable as if they alone had committed the offence (accomplices).

§ 24 Participant

(1) A participant in a completed crime, or an attempt to conduct an offence, is anyone who intentionally

a) plotted or directed conducting a crime (an organiser);

b) instigated another person to conduct a crime in (instigator); or

c) enabled or facilitated commission of a criminal offence by another person, in particular by providing the means, removing of barriers, eliciting the aggrieved person to the crime scene, keeping watch during commission of an act, providing advice, encouraging the resolve or promising to participate in a criminal offence (accessory).

§ 25 Age

Anyone who has not reached the fifteenth year of age at the time of conducting a crime, shall not be criminally liable.

§ 26 Insanity

Anyone who due to a mental disorder cannot recognised the illegal nature of an act at the time of conducting it or control their conduct, shall not be criminally liable for such an act.

§ 27 Diminished Sanity

Anyone who due to a mental disorder suffers from a substantially diminished capacity to recognise the illegal nature of an act at the time of conducting it or to control their conduct, is in a state of diminished sanity.

CHAPTER III: DEFENCES EXCLUDING ILLEGALITY OF AN ACT

§ 28 Necessity

(1) An act otherwise criminal, by which a person repels an impending danger to an interest protected by criminal law, shall not be considered a crime.

(2) It is not necessity if such danger could have been repelled otherwise under the given conditions, or if the result caused is obviously equally serious or even more serious than the results which was imminent, or if the person in danger was obliged to bear it.

§ 29 Self-Defence

(1) An act otherwise criminal, by which a person repels an impending or progressing attack to an interest protected by criminal law, shall not be considered a crime.

(2) It is not self-defence, if the self-defence was obviously grossly disproportionate to the manner of the attack.

§ 30 Consent of the Aggrieved Party

(1) A crime is not committed by those who act with the consent of the injured person, who is fully competent to decide about their interests that are affected by such an act. 13

(2) The consent according to Para (1) must be given in advance or during the act of the person committing the otherwise criminal act, voluntarily, certainly, seriously and comprehensibly; if such consent is granted after commission of the act, the offender shall not be criminally liable if they could reasonably assume that the person referred to in Para (1) would otherwise grant such a consent with regard to circumstances of the case and their personal situation.

(3) With the exception of consent to medical intervention, which are in the time of conduct in accordance with the law and medical knowledge, a consent to bodily harm and killing shall not be considered the consent according to Para (1).

§ 31 Admissible Risk

(1) A crime is not conducted by those who, in accordance with the current state of knowledge and information available to them at the time of their decision-making on taking further procedures, perform a socially beneficial activity as part of their employment, occupation, position or function, by which they imperil or violate an interest protected by criminal law, unless the socially beneficial result could have been achieved otherwise.

(2) It is not admissible risk if such activity imperils the life or health of a person without their consent given in accordance with another legal regulation, or if the result to which it leads evidently does not correspond to the degree of the risk, or if the performance of the activity clearly contravenes the requirements of another legal regulation, public interest, principles of humanity or if it contravenes good morals.

CHAPTER V: CRIMINAL SANCTIONS

Division 3: Protective Measures

Sub-Division 1: General Principles for Imposing Protective Measures

§ 96 Principle of Proportionality

(1) A protective measure may not be imposed if it is disproportional to the nature and seriousness of the conducted act and to the threat the offender will represent in the future to the interests protected by criminal law, as well as to the personality of the offender and their situation.

(2) Harm caused by the imposed and executed protective measure must not be greater than what is necessary for reaching its purpose.

Section 97 Imposition of Protective Measures

(1) Protective measures may be imposed under the legal conditions individually or combined with a penalty.

(2) In combination to a penalty of similar nature a protective measure may only be imposed if imposing it individually would not be sufficient with regard to the person concerned and to protection of society.

(3) If conditions for imposing several protective measures are met, they may be imposed combined with each other, unless the criminal law states otherwise. However, if the required effect on the person who the protective measures are imposed to and the appropriate protection of society may be reached by imposing only one measure, the court shall impose only this single protective measure.

(4) If the court imposes several protective measures combined with each other that cannot be executed simultaneously, it shall determine the order in which they shall be executed.

Sub-Division 2: Protective Measures and Imposition thereof

§ 98 Types of Protective Measures

(1) Protective measures are protective therapy, protective detention, forfeiture of a thing or other asset value and protective education.

(2) Imposition of protective education shall be governed by the Justice over Juveniles Act.

(3) Protective therapy may not be imposed in parallel to protective detention.

§ 99 Protective Therapy

(1) A protective therapy may be imposed in a case referred to in § 40(2) and § 47(1), or if the offender of an act otherwise criminal is not criminally liable for insanity and may be dangerous if remained free.

(2) The court may impose a protective therapy if

a) the offender conducted the crime in a state incited by a mental disorder and may be dangerous if remained free,

b) the offender who abuses an addictive substance conducted the crime under its influence or in connection to its abuse; however, the court shall not impose protective therapy, if it is clear with regard to the personality of the offender that its purpose cannot be reached.

(3) The court may impose protective therapy also combined with a penalty or when conditionally waiving execution of a penalty.

(4) According to the nature of the disease and medical possibilities, the court shall impose protective therapy either in inpatient or outpatient form. If a penalty of imprisonment is imposed combined with inpatient protective therapy, the protective therapy shall generally be provided after being imprisoned. If the inpatient protective therapy cannot be provided in prison, it shall be provided in a medical facility before the imprisonment, if the purpose of the therapy could be reached better this way, otherwise it shall be provided after the penalty has been served or terminated in other ways. An outpatient protective therapy shall generally be provided after being imprisoned; if the protective treatment cannot be provided in the prison, it shall be provided after the penalty is served or terminated in other ways. In case the duration of the imprisonment is not sufficient for reaching the purpose of the protective therapy, the court may decide on its continuation in a medical facility providing outpatient or impatient treatment.

(5) The court may post facto transform inpatient treatment to outpatient treatment and vice versa. The court may transfer inpatient protective therapy to protective detention under the conditions stipulated in § 100(1) or (2). Without the conditions of § 100(1) or (2), the court may transform institutional protective therapy into protective detention, if the imposed and executed protective therapy does not fulfil its purpose or does not provide sufficient protection of the society, especially in case the offender has escaped from a medical facility, used violence against employees of the medical facility or other persons whilst being provided with protective therapy or repeatedly refused examination or treatment procedures or otherwise demonstrated negative attitude to the protective therapy.

(6) A protective therapy shall last as long as it is required for reaching its purpose. An inpatient protective therapy shall not last longer than two years; if the therapy has not been finished at that time, the court shall decide on prolonging this period before it expires, also repeatedly, for another two years at most; otherwise it shall decide to discharge the person concerned from the protective therapy or transform it into an outpatient protective therapy, unless it is the offender's fault that the court could not decide; in such a case the court decides as soon as the obstacle is removed. Duration of a protective therapy imposed according to § Para (2)(b) may be terminated, if it is found during its performance that the required purpose cannot be reached; if there is a threat the convict

shall commit another criminal offence, the court shall impose surveillance over them for up to five years in the decision on discharge from protective therapy; execution of the surveillance shall be governed by §§ 49 to 51 accordingly. The court decides on the discharge from protective therapy.

(7) The court may waive performance of protective therapy, if the circumstances for its imposition cease to exist before it starts.

§ 100 Protective Detention

(1) The court shall impose protective detention in a case referred to in § 47(2), or if the offender of an act otherwise criminal that would fulfil statutory features of a felony is not criminally liable, they could be dangerous if remained free and it cannot be expected that imposing a protective therapy would lead to sufficient protection of society with regard to the nature of the mental disorder and possibilities of influencing the offender.

(2) The court may impose protective detention if with regard to the character of the offender and their previous life and circumstances

a) the offender has committed a felony in a state incited by a mental disorder, they could be dangerous is remained free and if it cannot be expected that imposing a protective therapy would lead to sufficient protection of society with regard to the nature of the mental disorder and possibilities of influencing the offender, or

b) the offender, who indulges themselves in using an addictive substance, has repeatedly committed a felony, even though they have previously been sentenced for an especially serious felony committed under influence of an addictive substance or in connection to its use to an unsuspended sentence of imprisonment for at least two years, and if it cannot be expected that imposing a protective therapy would lead to sufficient protection of society, also with regard to previously expressed attitude of the offender towards protective therapy.

(3) The court may impose protective detention individually, in case of waiver of penalty, or in parallel to a penalty. If the protective detention was imposed in parallel to an unsuspended sentence of imprisonment, it shall be executed after serving the sentence of imprisonment or other termination thereof. If an unsuspended sentence of imprisonment is imposed during execution of protective detention, its execution shall be suspended for the time of execution of the sentence of imprisonment. Execution of the protective detention shall be resumed after serving the sentence of imprisonment.

(4) Protective detention shall be executed in a facility for executing protective detention with a special security and with medical, psychological, educational, pedagogic, rehabilitation, and activity programmes.

(5) Protective detention shall remain in effect for as long as is required for protection society. The court shall at least once in every twelve months and in case of juveniles once in every six months review whether the reasons for further continuation are still present.

(6) The court may transfer a protective detention into an institutional protective therapy, if the reasons for which it was imposed cease to exist and at the same time conditions for imposing institutional protective treatment are present.

(7) The court shall waive execution of protective detention if the reasons for its imposition cease to exist before it starts.

CHAPTER VIII

EXPLANATORY PROVISIONS

§ 110 Criminal Law

The Criminal Code shall be understood as this Code and according to the nature of the matter in question also the Criminal Justice over Juveniles Act.

§ 111 Concept of a Criminal Act

As a criminal act shall be understood solely an act punishable *per curiam,* and unless individual provisions of the Criminal Code imply otherwise, also a preparation of a criminal act, an attempt of a criminal act, organising, instructing and assisting therein.

§ 112 Omission

As conduct shall also be understood omission of such a conduct the offender was obliged to perform according to another legal regulation, official decision or a contract, as a result of a voluntary acceptance of a duty to act, or if such a special duty derives from their previous endangering conduct or which they were obliged to perform for other reasons according to the circumstances and their relations.

§ 113 Concept of an Offender

As an offender shall also be understood an accomplice and participator unless individual provisions of the Criminal Code provide otherwise.

§ 122 Bodily Harm and Grievous Bodily Harm

(1) As a bodily harm shall be understood such a state consisting in disorder of health or a sickness that by disturbing of regular physical and mental functions complicates, not only for a short period of time, the regular way of life of the injured person and that requires medical attention.

As grievous bodily harm shall be understood a serious disorder of health or a serious sickness. Under these conditions is grievous bodily harm considered

a) disablement,
b) loss or substantial limitation of working capability,
c) paralysis of a limb,
d) loss or substantial limitation of a sensual function,
e) injury of a vital organ,
f) mutilation,
g) inducing an abortion or killing a foetus,
h) torturous suffering, or
i) a long-lasting health disorder.

§ 123 Mental Disorder

A mental disorder shall also be considered, besides a mental disorder resulting from a mental illness, a deep disorder of consciousness, mental retardation, serious asocial personality disorder, or another serious mental or sexual deviation.

§ 124 Obligation of Silence Imposed and Recognised by State

A state-imposed or recognised duty of silence shall be considered a duty of silence imposed or recognised by another legal regulation. A state-recognised duty of silence according to the Criminal Code shall not be considered such a duty, the extent of which is not determined by another legal regulation but derives from a legal act performed on the basis of another legal regulation.

§ 125 Next of Kin

As a next of kin shall be understood a relative in a direct generation, adoptive parent, adoptive child, sibling, spouse, and partner; other persons in family or similar relation shall be considered close to each other only if a detriment suffered by one would the other reasonably feel as his/her own.

§ 126 Child

As a child shall be understood a person under 18 years of age unless the Criminal Code provides otherwise.

§ 130 Addictive Substance

As addictive substance shall be understood alcohol, narcotic substances, psychotropic substances, and other substances capable to adversely affect human psyche, recognition or control abilities or social behaviour.

§ 131 Public Document

(1) As public document shall be understood a document issued by the court of the Czech Republic, by another public authority or another subject so designated or empowered by another legal regulation within the limits of its competence, confirming that it is an order or declaration of an authority or another subject that issued the document, or certifying a legally significant matter. A public document is also a document declared as public by another legal regulation.

(2) Protection according to § 348 is also granted to a public document issued by a public authority or another authorised subject of a foreign state or an authority of an international organisation if it is effective in the territory of the Czech Republic according to an international treaty.

§ 136 Files

As files shall be understood data, audio and visual records, illustrations, and other visualisations, unless individual provisions of the Criminal Code provide otherwise.

§ 137 Determination of Amount of Damage

When determining an amount of damage, the value for which the object of the attack is usually being sold in the time and place of the criminal act shall be considered.
If the amount of damage cannot be determined in this way, reasonably expended costs for obtaining the same or similar thing or restitution into the previous state shall be considered. Accordingly, shall be proceeded in determination of an amount of damage on another asset value.

§ 138 Thresholds of Damage, Profit, Costs for Liquidation of Environmental Damage, and Value of a Thing and Other Property Value

(1) *Damage not insignificant* shall be understood as damage amounting to at least 10,000 CZK, *damage not small* shall be understood as damage amounting to at least 50,000 CZK, *larger damage* shall be understood as damage amounting to at least 100,000 CZK, *substantial damage* shall be understood as damage amounting to at least 1,000,000 CZK and *extensive damage* shall be understood as amounting to at least 10,000,000 CZK.

(2) The amounts as specified in Sub-§ (1) shall apply *mutatis mutandis* to assess the amount of profit, cost for removing environmental damage and value of a thing or other asset value.

§ 139 Calculation of Time

Where this Code links an effect with lapse of a certain time period the day when the event which determined its start occurred shall not be counted into it.

PART TWO

SPECIAL PART SELECTED PROVISIONS FOR EDUCATIONAL REASONS

CHAPTER I

CRIMES AGAINST LIFE AND HEALTH

Division 1
Criminal Offences against Life

§ 140 Murder

(1) Whoever intentionally kills another person shall be sentenced to imprisonment for ten to eighteen years.

(2) Whoever intentionally kills another person with premeditation or after prior consideration sentenced to imprisonment for twelve to twenty years.

(3) An offender shall be sentenced to imprisonment for fifteen to twenty years or to an exceptional sentence of imprisonment, if they commit the act referred to in Para (1) or (2)

a) on two or more persons,
b) on a pregnant woman,
c) on a child under fifteen years of age,

d) on an official person in the service or execution of their competencies,
e) on a witness, expert, or interpreter in connection with the performance of their obligations,
f) on a medical worker during performance of the medical profession or employment aimed at saving life or health, or on a person who fulfilled their similar obligation of saving life, health or property arising from their employment, profession, position, or function, or imposed by law,
g) on another person for their true or presupposed race, belonging to an ethnical group, nationality, political beliefs, religion or because of their true or presupposed lack of religious faith,
h) repeatedly,
i) by a particularly cruel or agonising manner, or
j) with the intention to obtain for themselves or for another material profit,
or in an attempt to conceal or facilitate another criminal offence, or out of another condemnable motives.

(4) Preparation is criminal.

§ 141 Manslaughter

(1) Whoever intentionally kills another person in strong derangement caused by fear, shock, confusion or another excusable mental motion or as a result of previous condemnable conduct of the aggrieved person, shall be sentenced to imprisonment for three to ten years.

(2) An offender shall be sentenced to imprisonment for five to fifteen years, if they commit the act referred to in Para (1)

a) on two or more persons,
b) on a pregnant woman, or
c) on a child under fifteen years of age.

§ 142 Murder of a Newborn by its Mother

A mother, who - in a state of mental disturbance caused by the child's birth - intentionally kills her child during the labour or immediately after it, shall be sentenced to imprisonment for three to eight years.

§ 143 Killing by Negligence

(1) Whoever causes the death of another person out of negligence, shall be sentenced to imprisonment for up to three years or to prohibition of activity.

(2) An offender shall be sentenced to imprisonment for one year to six years if they committed the act referred to in Para (1) because they breached an important obligation arising from their employment, profession, position, or function, or it was imposed on them by law.

(3) An offender shall sentenced to imprisonment for two to eight years if they committed the act

referred to in Para (1) because they grossly breached the laws on environmental protection, laws on work safety or laws on sanitary.

(4) An offender shall be sentenced to imprisonment for three to ten years if they caused death to at least two persons by the act referred to in Para (1).

§ 144 Accessory to Suicide

(1) Whoever encourages another person to commit suicide or assists another person in committing suicide, shall be sentenced, if at least an attempted suicide occurred, to imprisonment for up to three years.

(2) An offender shall be sentenced of imprisonment for two to eight years, if they commit the act referred to in Para (1) on a child or a pregnant woman.

(3) An offender shall be sentenced of imprisonment for five to twelve years, if they commit the act referred to in Para (1) on a child under fifteen years of age or on a person suffering from a mental disorder.

Division 2: Crimes against Health

§ 145 Grievous Bodily Harm

(1) Whoever intentionally inflicts grievous harm to the health of another person, shall be sentenced to imprisonment for three to ten years.

(2) An offender shall be sentenced to imprisonment for five to twelve years if they commit an act referred to in Para (1)

a) on two or more persons,
b) on a pregnant woman,
c) on a child under the age of fifteen years,
d) on a witness, expert, or interpreter in connection with the performance of their obligations,
e) on a medical worker during performance of the medical profession or employment aimed at saving life or health, or on a person who fulfilled their similar obligation of saving life, health or property arising from their employment, profession, position, or function, or imposed by law,
f) on another person for their true or presupposed race, belonging to an ethnical group, nationality, political beliefs, religion or because of their true or presupposed lack of religious faith,
g) repeatedly or after having committed another especially serious felony connected to intentional causing of grievous bodily harm or death or attempt thereof, or
h) out of a condemnable motive.

(3) An offender shall be sentenced to imprisonment for eight to sixteen years, if they cause death by the act referred to in Para § (1).

(4) Preparation is criminal.

§ 146 Bodily Harm

(1) Whoever intentionally harms another person's health shall be sentenced to imprisonment for six months to three years.

(2) An offender shall be sentenced to imprisonment for one year to five years, if they commit the act referred to in Para (1)

a) on a pregnant woman,
b) on a child under the age of fifteen years,
c) on a witness, expert, or interpreter in connection with the performance of their obligations,
d) on a medical worker during performance of the medical profession or employment aimed at saving life or health, or on a person who fulfilled their similar obligation of saving life, health or property arising from their employment, profession, position or function, or imposed by law, or
e) on another person for their true or presupposed race, belonging to an ethnical group, nationality, political beliefs, religion or because of their true or presupposed lack of religious faith.

(3) An offender shall be sentenced to imprisonment for two to eight years, if they cause severe harm to health by the act referred to in Para (1).

(4) An offender shall be sentenced to imprisonment for five to ten years, if they cause death by the act referred to in Para (1).

§ 146a Bodily Harm out of Excusable Motives

(1) Whoever intentionally inflicts harm to the health of another person because of strong mental distress out of fear, dismay, confusion, or another excusable state of mind, or as a result of the previously condemnable conduct of the victim, shall be sentenced to imprisonment for up to one year.

(2) An offender shall be sentenced to imprisonment for up to three years, if they inflict grievous bodily harm by the act referred to in Para (1).

(3) Whoever intentionally inflicts grievous harm to the health of another person because of strong mental distress out of fear, dismay, confusion, or another excusable state of mind, or as a result of the previously condemnable conduct of the victim, shall be sentenced to imprisonment for up to four years.

(4) An offender shall be sentenced to imprisonment for one to six years, if they

a) commit the act referred to in Para (3) on two or more persons,
b) commits such an act on a pregnant woman, or
c) commits such an act on a child under fifteen years of age.

(5) An offender shall be sentenced to imprisonment for two to eight years, if they cause death by the act referred to Para (1) or (3).

§ 147 Grievous Bodily Harm out of Negligence

(1) Whoever inflicts grievous bodily harm to the health of another person out of negligence shall be sentenced to imprisonment for up to two years or to prohibition of activity.

(2) An offender shall be sentenced to imprisonment for six months to four years or to a pecuniary penalty if they commit the act referred to in Para (1) because they breached an important obligation arising from their employment, profession, position, or function, or imposed by law.

(3) Whoever causes grievous bodily harm out of negligence to at least two persons by grossly breaching environmental laws, laws on health, laws on work safety, laws on traffic safety, or sanitary laws, shall be sentenced to imprisonment for two to eight years.

§ 148 Bodily Harm out of Negligence

(1) Whoever negligently inflicts a bodily harm to another person by breaching an important duty arising from his employment, occupation, position or function or imposed law shall be sentenced to imprisonment for up to one year or to prohibition of activity.

(2) Whoever negligently inflicts a bodily harm to at least two persons because they have grossly violated regulations on environmental protection on work safety, laws on traffic safety, or sanitary laws, shall be sentenced to imprisonment for up to three years.

§ 150 Failure to Provide Aid

(1) Whoever fails to provide necessary assistance to another person in danger of death or showing signs of a serious health disorder or a serious disease, even though they can do so without endangering themself or another person, shall be sentenced to imprisonment for up to two years.

(2) Whoever fails to provide necessary assistance to another person in danger of death or showing signs of a serious health disorder or a serious disease, even though he is required to provide such assistance by the nature of their employment, shall be sentenced to imprisonment for up to three years or to prohibition of activity.

Division 4

Criminal Offences against Pregnant Women

§ 159 Illicit Abortion without the Consent of the Pregnant Woman

(1) Whoever performs a pregnancy abortion without the consent of the pregnant woman shall be sentenced to imprisonment for two to eight years.

(2) An offender shall be sentenced to imprisonment for three to ten years, if they

a) commit the act referred to in Para (1) on a woman under the age of eighteen years,
b) commit such an act by using violence, threats of violence, or threats of other severe harm,
c) commit such an act by abusing the distress or addiction of the pregnant woman,

d) commit such an act repeatedly, or
e) cause grievous bodily harm by committing such an act.

(3) An offender shall be sentenced to imprisonment for five to twelve years, if they cause grievous bodily harm to at least two persons by committing the act referred to in Para (1).
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(4) An offender shall be sentenced to imprisonment for eight to sixteen years, if they cause death to at least two persons by committing the act referred to in Para (1).

(5) Preparation is criminal.

§ 160 Illicit Abortion with Consent of Pregnant Woman

(1) Whoever artificially interrupts pregnancy of a woman with her consent otherwise than in a way admissible according to the Artificial Interruption Code, shall be sentenced to imprisonment for one to five years or to prohibition of activity.

(2) An offender shall be sentenced to two to eight years of imprisonment, if they

a) commit the act referred to in Para (1) on a woman under eighteen years of age,
b) gain a substantial profit for themself or for another by such an act,
c) commit such an act systematically, or
d) cause grievous bodily harm by such an act.

(3) An offender shall be sentenced to imprisonment for three to ten years, if they cause grievous bodily harm to at least two persons or death by the act referred to in Para (1).

(4) An offender shall be sentenced to imprisonment for five to twelve years, if they cause death to at least two persons by the act referred to in Para (1).

(5) Preparation is criminal.

§ 161 Assisting a Pregnant Woman to Abortion

(1) Whoever provides assistance to a pregnant woman to

a) interrupt her pregnancy by herself, or
b) to ask or let another to artificially interrupt her pregnancy otherwise than in a way admissible according to the Artificial Interruption Act, shall be sentenced to imprisonment for up to one year.

(2) An offender shall be sentenced to imprisonment for six months to five years

a) if they commit the act referred to in Para (1) on a woman under eighteen years of age, or
b) contribute to grievous bodily harm of a pregnant woman by such an act.

(3) An offender shall be sentenced to imprisonment for one to six years, if they contribute to death of a pregnant woman by the act referred to in Para (1).

§ 162 Soliciting a Pregnant Woman to Abortion

(1) Whoever solicits a pregnant woman to:

a) artificially interrupt her pregnancy by herself, or
b) to ask or allow another person to interrupt her pregnancy in a manner other than that admissible under the Law on abortion, shall be sentenced to imprisonment for up to two years.

(2) An offender shall be sentenced to imprisonment of from six months to five years, if they

a) commit the act referred to in Para (1) against a woman under the age of eighteen years,
b) commit such an act by abusing distress or dependence of the pregnant woman or,
c) contribute to a substantial bodily harm of the pregnant women by such an act.

(3) An offender shall be sentenced to imprisonment for one year to six years, if they contribute to death of the pregnant women by the act referred to in Para (1).

§ 163 Common Provision

A pregnant woman, who interrupts her pregnancy herself, or who asks another person or allows another person to terminate it, shall not be criminally liable for such act, not even under the provisions on instigator and accessory.

CHAPTER II

CRIMINAL OFFENCES AGAINST FREEDOM, PERSONAL, AND PRIVACY RIGHTS

AND CONFIDENTIALITY OF CORRESPONDENCE

Division 1

Criminal Offences against Freedom

§ 170 Illegal Confinement

(1) Whoever without authorisation imprisons or otherwise confines another person, shall be sentenced to imprisonment for two to eight years.

(2) An offender shall be sentenced to imprisonment for five to twelve years, if they

a) commit the act referred to in Para (1) as a member of an organised group,
b) commit such an act on another for their true or presupposed race, belonging to an ethnical group, nationality, political beliefs, religion, or because of their true or presupposed lack of religious faith,
c) cause physical or mental suffering by such an act,
d) cause grievous bodily harm by such an act, or
e) commit such an act with the intention to gain substantial profit for themself or for another.

(3) An offender shall be sentenced to imprisonment for eight to sixteen years, if they

a) cause a death by the act referred to in Para (1), or
b) commit such an act with the intention to gain extensive profit for themself or for another.

(4) Preparation is criminal.

§ 171 Illegal Restraint

(1) Whoever restrains another from enjoying personal freedom, shall be sentenced to imprisonment for up to two years.

(2) An offender shall be sentenced to imprisonment for up to three years, if they commit the act referred to in Para (1) with the intent to facilitate another criminal offence.

(3) An offender shall be sentenced to imprisonment for two to eight years, if they

a) commit the act referred to in Para (1) as a member of an organised group
b) commit such an act on another for their true or presupposed race, belonging to an ethnical group, nationality, political beliefs, religion, or because of their true or presupposed lack of religious faith,
c) cause physical or mental suffering by such an act,
d) cause grievous bodily harm by such an act, or
e) commit such an act with the intention to gain substantial profit for themself or for another.

(4) An offender shall be sentenced to imprisonment for three to ten years if they

a) cause death by the act referred to in Para (1), or
b) commit such an act with the intent to gain extensive profit for themself or for another…

Division 2

Criminal Offences against Rights for Protection of Personality, Privacy, and Secrecy of Correspondence

§ 180 Illicit Disposal with Personal Data

(1) Whoever even negligently wrongfully publishes, communicates, makes available, in otherwise processes or misappropriates personal data gathered on another person in connection to exercise of public competence and thereby causes a serious detriment on rights or rightful interests of the person concerned by the collected data, shall be sentenced to imprisonment for up to three years or to prohibition of activity.

(2) The same sentence shall by imposed to anyone who even negligently breaches a state-imposed duty of silence by wrongfully publishing personal data obtained in connection to performing their occupation, profession or function and thereby causes a serious detriment on rights or rightful interests of the person concerned by the personal data.

§ 181 Infringement of Rights of Another

(1) Whoever causes a serious detriment on rights of another by

a) misleads another person, or
b) uses error of another person, shall be sentenced to imprisonment for up to two years or to prohibition of activity.

(2) An offender shall be sentenced to imprisonment for up to three years, if they

a) cause by the act referred to in Para (1) a substantial detriment on rights of another,
b) gain by such an act a substantial profit for themself or for another,
c) impersonate a public official in such an act.

(3) An offender shall be sentenced to imprisonment for six months to five years, if they

a) cause by the act referred to in Para (1) an extensive detriment on rights of another, or
b) gain by such an act an extensive profit for themself or for another.

(1) Whoever makes a false statement about another capable of significantly threaten their reputation among fellow citizens, especially harm them in employment, disrupt their family relations or cause another serious detriment, shall be sentenced to imprisonment for up to one year.

(2) An offender shall be sentenced to imprisonment for up to two years or to prohibition of activity, if they commit the act referred to in Para (1) by press, film, radio, television, publicly accessible computer network, or in another similarly effective manner.

CHAPTER III

CRIMINAL OFFENCES AGAINST HUMAN DIGNITY IN SEXUAL SPHERE

§ 185 Rape

(1) Whoever forces another person to have sexual intercourse by violence or by a threat of violence, or a threat of other serious detriment, or whoever exploits the person's vulnerability for such an act, shall be sentenced to imprisonment for six months to five years.

(2) An offender shall be sentenced to imprisonment for two to ten years, if they commit the act referred to in Para (1)

a) by sexual intercourse or other sexual contact performed in a manner comparable with intercourse,
c) on a child, or
d) with a weapon.

(3) An offender shall be sentenced to imprisonment for five to twelve years, if they

a) commit the act referred to in Para (1) on a child under the age of fifteen,
b) commit such an act on a person in detention, serving a prison sentence, in protective treatment, in security detention, in protective or institutional therapy or in another place where personal freedom is restricted, or
c) cause grievous bodily harm by such an act.

(4) An offender shall be sentenced to imprisonment for ten to eighteen years, if they cause death by the act referred to in Para (1).

(5) Preparation is criminal.

CHAPTER V

CRIMES AGAINST PROPERTY

§ 209 Fraud

(1) Whoever enriches themself or another by inducing error in someone, by using someone's error, or by concealing material facts and thus causing damage not insignificant to property of another, shall be sentenced to imprisonment for up to two years, to prohibition of activity, or to confiscation of a thing or other asset value.

(2) An offender shall be sentenced to imprisonment for six months to three years, if they commit the act referred to in Para (1) and has been convicted or punished for such an act in the past three years.

(3) An offender shall be sentenced to imprisonment for one to five years or to a pecuniary penalty, if they cause larger damage by the act referred to in Para (1).

(4) An offender shall be sentenced to imprisonment for two to eight years, if they

a) commit the act referred to in Para (1) as a member of an organised group,
b) commit such an act as a person having a particular obligation to defend the interests of the aggrieved person,
c) committed such an act in a state of national emergency or a state of war, natural disaster or during another event seriously threatening the life or health of people, public order, or property, or
d) cause substantial damage by such an act.

(5) An offender shall be sentenced to imprisonment for five to ten years, if they

a) cause extensive damage by the act referred to in Para (1), or
b) commit such an act in order to facilitate or enable commission of a criminal offence of Treason (§ 309), Terrorist attack (§ 311) or Terror (§ 312).

(6) Preparation is criminal.

CHAPTER X

CRIMINAL OFFENCES AGAINST ORDER IN PUBLIC MATTERS

§ 350 Forgery and Issue of False Medical Report, Opinion and Finding

(1) Whoever forges a medical report, opinion or finding or substantially alters its content with the intention to use it in proceedings before an authority of social security or before another public authority, in criminal, civil, or other trial proceedings, or whoever uses in proceedings before an authority of social security or before another public authority in criminal, civil, or other trial proceedings such a report, opinion or finding as genuine, shall be sentenced to imprisonment for up to two years or to prohibition of activity.

(2) The same sentence shall be imposed to anyone who as a doctor or another competent medical person issues a false or grossly distorted medical report, opinion or finding or therein conceals significant matters of fact about their medical condition or medical condition of another for the purpose of using it in proceedings 155 before an authority of social security or another public authority, in criminal, civil, or other trial proceedings, or whoever uses such a medical report, opinion or finding in proceedings before an authority of social security or another public authority, in criminal, civil, or other trial proceedings.

(3) An offender shall be sentenced to imprisonment for six months to five years or to a pecuniary penalty, if they

a) gain for themself or for another substantial profit by the act referred to in Para (1) or (2), or
b) cause substantial damage by such an act.

(4) An offender shall be sentenced to imprisonment for two to eight years, if they

a) gain for themself or for another extensive profit by the act referred to in Para (1) or (2), or

b) cause extensive damage by such an act…

§ 367 Non-prevention of a Crime

(1) Whoever gains credible knowledge that another person is preparing to commit or is committing a criminal act of Murder (§ 140), Manslaughter (§ 141), Grievous bodily harm (§ 145), Torture and other cruel and inhumane treatment (§ 149), Illicit abortion of pregnancy without the consent of the pregnant woman (§ 159), Unauthorised extraction of tissues and organs (§ 164), Trafficking in human beings (§ 168), Illegal confinement (§ 170), Abduction under § 172 (3) and (4), Robbery (§ 173), Hostage taking (§ 174), Extortion under § 175 (3) and (4), Unauthorised use of personal data under § 180 (4), Rape (§ 185), Sexual abuse (§ 187), Abuse of a child for production of pornography (§ 193), Maltreatment of entrusted person (§ 198), Theft under § 205 (5), Embezzlement under § 206 (5), Fraud under § 209 (5), Insurance fraud under § 210 (6), Credit fraud under § 211 (6), Subvention fraud under § 212 (6), Participation under § 214 (3) and (4), Money laundering under §216 (4), Forgery and alteration of money (§ 233), … and does not try to prevent commission or completion of such a criminal offence, shall be sentenced to

imprisonment for up to three years; if this Act stipulates a lighter penalty for any of these criminal offences, they shall be sentenced to such a lighter penalty.

(2) Whoever commits an act referred to in Para (1) shall not be criminally liable, if they could not contravene the criminal act without exposing themself or a close person to danger of death, bodily harm, other serious detriment or criminal prosecution. However, stating a close person does not exclude the offender from criminal liability, if the non prevention concerns a criminal offence of Treason (§ 309), Subversion of the Republic (§ 310), Terrorist attack (§ 311), Terror (§ 312), Sabotage (§ 314), Espionage (§ 316), Genocide (§ 400), Attack against humanity (§ 401), …

(3) A criminal offense may also be contravened by a timely report to the public prosecutor or police authority; a soldier may report to their superior officer.

§ 368 Non-reporting of a Crime

(1) Whoever gains credible knowledge that another person committed a criminal act of Murder (§ 140), Grievous bodily harm (§ 145), Torture and other cruel and inhumane treatment (§ 149), Illegal confinement (§ 170), Hostage taking (§ 174), Abuse of a child for production of pornography (§ 193), Maltreatment of entrusted person (§ 198), … and fails to immediately report such a criminal act to the public prosecutor or police authority, or if a soldier is concerned, to their superior, shall be sentenced to imprisonment for up to three years; if this Act stipulates a lighter penalty for any of these criminal offences, they shall be sentenced to such a lighter penalty.

(2) Whoever commits an act referred to in Para (1) shall not be criminally liable, if they could not report the criminal act without exposing themself or a close person to danger of death, bodily harm, other serious detriment, or criminal prosecution.

(3) The report duty according to Para (1) does not apply to an attorney or their employee, who learns about commission of a criminal act in relation to performance of their legal profession or practice. The report duty also does not apply to clergymen of a registered church or religious society authorised to exercise special rights when they learn about a criminal offence in relation to performing a confession, or in connection with practice of similar confessionary secrets. The report duty for a criminal offense of Trafficking in human beings according to § 168(2) and Illegal confinement (§ 170) does not apply also to persons providing assistance to victims of crimes.