

Malpractice liability

in general and in particular in Czechia

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Malpractice and law abroad

- All developed and rich countries and most developing and poor countries apply law on health care for making it safe and efficient.
- There are different legal traditions as regards law addressing medical malpractice.
- Different proportion of private, administrative and criminal law used for the purpose.
- As regards private liability, common law and civil law, different mixture of legislation and case-law.

Language problems

- The Summer Law School is held in English, because it is the only language of communication of European students and teachers.
- English is language of common (anglo-american) law which significantly differs from civil (continental) law.
- Medical malpractice law is specific application of „tort law“ which is hard to translate.
- Inspiration is - for me - German law, which is better studied and applied than Czech one. Problems are thus increased.

Heritage of socialism in health care

- Socialist Czechoslovakia 1948-1989
- Totally nationalized health care providers (hospitals, ambulances etc.)
- Financing of health care by state
- Health care was provided essentially for free to population.
- Basic treatment generally available.
- Limited modernization of health care in period of socialism.

Development of Czech health care in the last twenty years

- Socialist regime collapsed in 1989
- Dissolution of Czechoslovakia in 1992
- Privatization of ambulances, spas, clinics.
- Introduction of public health insurance
- Health care providers are financed by public health insurance funds according to agreements concluded among them.
- Rapid modernization - new methods and pharmaceuticals.
- Increasing problems with financing, efforts to increase private spending depend on politics.

Outdated legislation in the Czech Republic for health care malpractice

- Statute (20/1966 Sb.) on Health of Nation. Never amended in period of socialism. Amended many times every year after the collapse of socialism
- Civil Code of 1964. Significantly amended in 1991.
- Both laws are outdated.
- Draft laws replacing these laws are discussed in the Parliament and close to enactment.
- However, new approaches were developed as reinterpretation of these laws.

Types of liability

- Private, administrative and criminal laws shall deter physicians, other health care practitioners and institution from dangerous and futile practices in health care.
- Private (civil) liability shall compensate damages caused to patients.
- Administrative law shall serve public interest, including quality and safety
- Criminal law shall punish and prevent dangerous behavior of individuals.
- We will focus on private liability (tort law).

Who is liable?

- Health care provider is liable.
- Individual physician – practitioner.
- Legal entity if operates health care facility with employed physicians, nurses and other health care professionals.
- No direct liability of employees towards patient (if compared with USA, Germany etc).
- Other liability system established with labour law (subsequent liability) – employees are liable towards their employers for damages caused to clients etc., albeit in limited extent.

Definition of good and bad medical practice

- Good medical practice: medical care or treatment in accordance with prescribed and recognized standards.
- Standards develop gradually with increasing knowledge.
- Standards are rarely established as law.
- Scientific literature, results of research etc. are used for evaluation of compliance.
- Experts are asked to evaluate whether the care or treatment complied with standards or not.
- Latin phrase *lege artis* („rules of the art“) – term used only in central Europe for good practice.

Error, negligence and intention

Recognition that health care need not to be successful.

Treatment is legally perfect even if it is totally unsuccessful (including death of patient).

- German legal practice tries to distinguish between excusable error and inexcusable negligence.
- Czech law accepts it spontaneously without elaborate distinction.
- Intentional harm is rare. Negligence is usual source of malpractice.

Liability for products

- Health care providers, traders and manufacturers are liable for health damages resulting from use of faulty product (pharmaceuticals or medicinal products in health care).
- Negligence need not to be shown by damaged patient to liable individual or entity.
- Why? It would be difficult, quality measures can be introduced and insurance is available.

Compensation for damages

- Czech civil code provides for complicated system of compensation of damages.
- Economic damages are assessed (lost wage/profit etc., costs of necessary treatment, assistance etc.)
- Compensation for suffered pain and suffering (smart money).
- Compensation of death of relatives.
- Compensation of emotional distress according.
- Different courts decide on various types of compensations according to special rules.
- Partial compensation is awarded by criminal courts.

Compensation for damages II

- Courts gradually abandoned restrictions established in legislation for compensation of various types of harms, pains and emotional distress.
- Compensations in millions CZK are awarded in dozens of cases.
- Judges learn how to estimate compensations.
- Nevertheless, there is no recognized methodology of calculation of damages.

Liability insurance

- Private health care providers are required to purchase liability insurance. Public providers are backed by the states, regions and cities.
- Policies (insurance contracts) are of different quality. Some cover liability and risks only partially or even not at all.
- Better care should be payed for terms of policies. The Czech Chamber of Physicians and professional associations start to engage in negotiation.
- It is hard for insurers to calculate risks and compete effectively.

Famous and landmark cases

- Czech courts decide often in lengthy proceedings lasting for five-ten years.
- Superior courts often reverse judgments of inferior courts (three-four tier judiciary)
- Solely judgments of supreme courts (the Supreme Court, the Supreme Administrative Court and the Constitutional Court) are published systematically.
- Reports in newspapers, journals and TV is often simplified and confusing. Nevertheless, it is important source of information.

Exchanged newborns in *Třebíč*

- Birth center of a regional hospital discharged two infants to wrong parents.
- One father was suspect of his paternity. Testing has shown no paternity and maternity.
- Interchanged babies were returned to their biologic parents.
- Scandal resulted in liability case before courts. The courts awarded different compensations of emotional distress to both couples and to babies themselves. 3.2 M CZK were awarded.

Removal of healthy kidney instead of ill one in *Hradec Králové*

- Physicians of university hospital mistakenly removed healthy kidney instead of ill and deficient one.
- Elder patient is thus dependent on dialysis and vanishing perspective of transplantation. His quality of life is thus significantly decreased.
- The court awarded 860 K CZK.

Coerced treatment of delivering mother and delivered child in *Brno*

- Regional court in Brno awarded 50 K CZK to mother and newborn each for coerced transportation after home delivery to nearby hospital.
- Physician of emergency care argued with danger of bleeding in umbilical cord.
- Judge argues with freedom of patient to refuse treatment and protection of alternative approaches towards medicine.
- However, applicability of provision related to care for children facing imminent treat was not analysed.
- Judgment is expected to be reversed.

Insane pregnant woman jumping from window

- The Supreme Court confirmed judgments of inferior courts of lawsuit filed against hospital on behalf of pregnant woman.
- The woman in sudden and unexpected insanity opened window, jumped and suffered miscarriage.
- All courts came to conclusion that there was no negligence of health care professionals in the hospital.

Heparin murders in *Havlíčkův Brod*

- The most tragic and horrific case in Czech health care
- Male nurse *P. Zelenka* killed several patients and tried to kill or harm others with heparin injections causing internal bleeding.
- Motives were debated: mercy killing, killing confirming power, alleged testing of doctors, insanity etc.
- He was condemned to life imprisonment and to compensation of damages to relatives. As regards it, however, he is and will be insolvent.
- Courts now decide, whether hospital (entity) is liable.
- Is murder committed by nurse damage in framework of health care.
- Criminal proceedings for negligence had mixed results.

Sterilization of Roma women allegedly without informed consent

- Roma are ethnic minority in Czechia. They are often poor, unemployed, uneducated, high criminal rates etc.
- Disputes before courts driven by human right activists related to alleged sterilization of delivering women after cesarean section without informed consent approx 10 years ago.
- Practice of sterilization of women after two and more deliveries as measure of birth control was normal in period of socialism.
- Several courts concluded that period for claim for compensation lapsed, other – including the Constitutional Court - decided otherwise and require taking into consideration various conditions.

The most serious cases of malpractice in *Prague, Prostějov, Sokolov* resulting in lifelong serious harm

- 11Y boy awarded 12 M CZK for brain damage resulting from botched recovery from abdomen operation
- 43Y mother awarded 18 M CZK for permanent coma resulting from injection of contrast substance for angiography without checked for allergy
- Newborn awarded 16 M CZK for brain damaged due to botched treatment just after birth.
- Appellate courts confirmed these sums. How have they calculated these sums? Why do they rarely resort to not resort to annuity (rent)?

Lack of formal harmonization in Europe, spontaneous convergence

- The European Union: health care is competence of the member states. Similarly, there is little competence related to tort law. There are significant differences among member states.
- Several standards of health care result from interpretation of fundamental rights and freedoms enforced by the Council of Europe and its European Court for Human Rights.
- There is, however, spontaneous convergence of malpractice laws caused with increasing awareness for individual liberties and rights, foreign inspiration among lawyers and in general public.

Lawsuits for compensation and public prosecution

- Nevertheless, tendency to complain to the Czech Chamber of Physicians (can ban exercise of profession).
- There is also widespread resort to reporting crime. Physicians and other healthcare practitioners are investigated by police and often prosecuted because it is cheaper than civil lawsuit.
- Lawsuits for compensation are tendency since 2000.
- Judges responded affirmatively with many claims.
- Attorneys are prepared and willing to assist patients as their clients.
- „Mene tekel USA“: defense medicine, skyrocketing premiums for insurance etc.?

Improvement of quality and safety

Prevention of malpractice is the best solution.

To what extent recent trends in malpractice liability contribute to improvement of quality and safety of care?

Pressure of insurers, fears of managers of health care providers?

There are various international standards for improvement of quality and safety. These standards can be adjusted to Czech needs.