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THE DOCTRINE OF PATIENT'S INFORMED CONSENT IN THE LEGISLATION AND JURISPRUDENCE OF CZECH REPUBLIC, AUSTRIA AND THE LATVIAN REPUBLIC

The article represents the history, emergence and the contemporary state of development of the legal doctrine of the patient's informed consent to medical interventions in Czech Republic, Austria and the Latvian Republic. The authors focus on the vaults of the doctrine of the doctor's obligation to abstain from conducting any medical interventions without the consent, or against the will of the patient, since the expression of the patient's will is the central element of his right to self-determination. In order to discover the main features of informed consent in the civil law perspective, the authors discuss the historical and current legal developments of the legal institute of patient's informed consent. The authors conclude that the formation of the institute owes to the right to body integrity and limitation of the exercise of medical profession by practitioners, and that the civil law doctrine of informed consent differs from Anglo-American tort law, relying on statutory-based civil liability for negligence, as well as minor penal liability for battery, an occasional interpretation of unauthorized medical intervention. The authors emphasize, that the existing bodies of Austrian, Czech and Latvian case law relating to informed consent, which span for over a century, are sufficient to become a branch of Continental medical malpractice case law

alongside with aged and well-developed French or Belgian medical jurisprudence, whereas the Latvian medical jurisprudence, despite having a rich history of emergence since the 1920s, has developed a solid body of case law in regard with patient's rights relatively recently.

Key words: medical law, informed consent, patient's rights, patient's autonomy, civil law.

1. Introduction

The principle of informed consent can be observed as a long-sought and finally found form of legal protection for the patient that restores the original, natural, ethical and *de facto* inequalities in the legal relationships between the doctor and the patient. In most cases, the patient usually has no special medical knowledge and is dependent on the person treating him, or her, and thus agrees to trust their professionalism. Trust between the doctor and the patient was, in fact, historically the first legally determined form of legal relationships between the patient and physician, which was designated as an implied contract, though Sir William Blackstone claimed, that by committing a fault in treating the patient, the doctor committed a *breach of trust* [1, p. 91–92/121]; learned historical-legal scholars admitted, that the contractual theory was not in use until the XIX century [2, p. 1196–1199; 1205–1206]. On the one hand, there is the risk for the health of the patient, who entrusts his or her health and life to the medical practitioner, and on the other hand, there is a risk for the medical practitioner, as he or she is not immune to medical errors, bearing civil and criminal responsibility*. In some sense, the historical development of the concept of informed consent could be observed as a compensation for 'natural inequalities' deriving from paternalistic medicine (to the legal aspects of which we will turn later), which is the patient's right to consent to or refuse medical interventions, as well as the patient's right to information about his or her medical condition, and the obligation of the medical practitioner and the medical institution to ensure this right to the patients.

* In Latvian Republic, serious faults of medical practitioners are criminally punishable. See: Krimināllikums. 1998.gada 17.jūnijā, spēkā no 01.04.1999. Latvijas Vēstnesis, 199/200 (1260/1261), 08.07.1998., 138.pants. In jurisprudence, see the case of Tatjana Gurjanova (civil plaintiff – K. Murzina), *Latvijas Republikas Augstākās tiesas*, Senata Kriminālietu Departamenta 2002. gada 3. Septembra spriedums, Kriminālieta No. 2330005900 (Lieta No. SKK – 01 – 253/02), Latvijas Vēstnesis Nr. 160, 05.11.2002. Moderate negligence, involving a lack of informed consent, may incur civil liability on basis of Art. 1644–1645, 1775, 1778 and 2347–2349 of the Civil Code (Lat. *Civillikums*), Art. 36, 37 and 72 of the Medical Treatment Law (Lat. *Ārstniecības likums*), as well as diverse provisions of the Patient's Rights Law (Lat. *Pacientu tiesību likums*), Art. 5 (6); 6 (1)–(5) of which are devoted to the necessity of the obtaining the patient's informed consent. In case law, see, *A. pret. Rīgas Austrumu klīniskā universitātes slimnīca*, Vidzemes Apgabaltiesa, Civillietu tiesas kolēģija, 2018. g. 10.septembrī, Lietas arhīva Nr. CA-0212-18/14.

Apparently, the Anglo-American and Continental legal cultures of informed consent differ much, primordially in their legal basis and the interpretation of the patient's right to autonomy (self-determination) by the Continental courts. In this article, we would like to stress the following aims:

- to discover the legal nature of informed consent in the Continental legal system, and to analyze the historical and contemporary legal precedents, which gave the rise to the doctrine of informed consent in its civil law shape, as well as to deduce the statutory legal basis for it;

- to define the historical roots of informed consent in European jurisdictions, and compare the roots of informed consent with Anglo-American jurisprudence (i.e. on basis of England and United States);

- to elucidate on the international-legal instruments, providing the basis for the principle of informed consent in healthcare, especially in the view of the Oviedo Convention*, which is currently the only legally-binding instrument relating to patient's rights.

- to conduct a comparative analysis of the current legislation and case law of the Czech Republic, Austria and Republic of Latvia, involving a discussion of the historical roots of medical liability relating to unconsented medical interventions and the patient's right to body integrity in the aforesaid jurisdictions.

The methodological basis of the article involves the method of comparative legal analysis of the jurisprudence of three selected jurisdictions (namely, Czech Republic, Austria and Republic of Latvia), including a historical-legal analysis for determining the roots of the patients informed consent in the previously mentioned jurisdictions. The authors decided to select the law of Latvia, as they represent a Latvian institution; the authors decided to select Czech Republic and Austria because of the origination of their legal systems in the legal system of Austro-Hungary. As it may be deduced from the legal history, both the courts of Austrian Republic and the First Czechoslovakian Republic continued to apply the provisions of Austro-Hungarian Civil and Criminal Codes, as they remained in force in the said jurisdictions.

2. History and the present day of informed consent

Overall concept of patient's rights

Patient's rights are based upon a different set of legal doctrines from Roman law to the universal principle of human dignity (Art. 2 of Oviedo Convention of 1997), as well as the general rule of conducting medical interventions only with the consent of the patient and the protection of legally incapable people, who are unable to make conscious decisions (Art. 5 and 6 of the said Convention). *Integrity*, in our view, refers to the physical and mental integrity of the patient's body, unless the patient himself has given his informed consent to undergo a certain medical intervention, or there has been a legitimate reason to do so,

* Convention on Human Rights and Biomedicine (ETC No. 164), 4 April 1997.

medical decisions on behalf of a legal representative, carried out for the benefit of a legally incapable patient, are a legitimate derogation of the principle of autonomy*. Since the middle of the 20th century, courts in civil law jurisdictions operate the term «physical integrity» and «body integrity» (in French, they are pronounced as «l'intégrité physique» and «l'intégrité du corps») to refer to this concept**. Therefore, we may conclude that to exercise his 'autonomy', a patient should be legally capable, and no undue influence affects him or her; what is more, the patient should possess the alternatives of choosing the methods of medical treatment and the place of medical treatment. Apparently, there may be circumstances, which may have impact on his 'autonomy', unrelated to the patient's legal capacity, to which we will turn in the chapter of the history and contemporary days of the concept of informed consent. Within the framework of the European Convention of Human Rights, the patient's right to self-determination is enshrined by Art. 8 (1) of the ECHR, providing it as a constituent of the patient's right to privacy, which was recognized in the case of *Pretty v. The United Kingdom* (2002)***. In *Csoma v. Romania* (2013), the European Court of Human Rights, dealing with a medical malpractice case, affirmed that the Contracting States**** need to ensure necessary legislation ensuring that patients should be provided proper and relevant information about the risks the patients might face: «...the Contracting States are bound, by virtue of this obligation, to adopt the necessary regulatory measures to ensure that doctors consider the foreseeable consequences of a planned medical procedure on their patients' physical integrity and to inform patients of these consequences beforehand, in such a way that the latter are able to give informed consent». Next, the European Court adds the abovementioned passage by the following: «...In particular, as a corollary to this, if a foreseeable risk of this nature materialises without the patient having been duly informed in advance by doctors, the State Party concerned may be directly liable under Article 8 for this lack of information»*****. Thus, lack of patient's consent to a medical intervention is actionable under ordinary circumstances (i.e. the medical treatment was not emergent, the patient was legally capable of deciding upon it, and was not unconscious during the medical intervention with no legal representative nearby) if the case reaches the European Court of Human Rights.

Patient's rights and informed consent, in particular, are closely associated with the principle of human (and patient's) dignity. The normative-descriptive

* *Cour d'Appel de Bruxelles*, 11 janvier 1962, Pas. 1963 II 23, 24–25.

** See, for instance, the decision of Belgian cassational court of 1948: *De Mulder-Grolles c. Dr. X.*, Cour de Cass (Belge), 1^{re} Ch., 16 decembre 1948, Journal des Tribunaux (Bruxelles), Anno 1949 (Nr. 3797, 6 fevrier 1949), p. 84–85 (note R. Savatier).

*** *Pretty v. United Kingdom*, Cour Europeene des Droits l'Homme, Quatrieme Section, 29 Apr. 2002, App. No. 2346/02, para. 61.

**** That is, the signatories of the European Convention of Human Rights.

***** *Csoma v. Romania*, Cour Europeene des Droits de l'Homme, 15 Jan. 2013, App. No. 8759/05, para. 41.

sense of the term ‘patient’s dignity’ is very sophisticated from a legal point of view, as few courts have explained the term of what does ‘patient’s dignity’ or ‘patient’s autonomy’ mean to a court – not to a physician, a nurse, a patient or a lawyer. In short, this principle is a key element between the departure from paternalistic medicine and modern medical law, upon which the hospital personnel are obliged to treat the patient in a sense of a person with its own feelings and thoughts, which cannot be ignored. Let us provide a couple of court citations, which may resolve what the principle of ‘patient’s dignity’ mean. The Superior Court of Quebec in its 1960 judgment in the case of *Dufresne c. X* held: «...*The doctor must treat the patient, not as a technical equal, but as a human equal. He [the doctor] must respect his freedom in the formation and execution of a free contract. Even when circumstances destroy this freedom, the doctor must, at the very least, respect in the patient, his equal, all the attributes of human dignity*»*. The Supreme Federal Court of Germany in a 1982 judgment relating to access to plaintiff’s medical records held the following relating to the patient’s right to have insight into his medical records: «... *It is an auxiliary contractual obligation [in terms of contract between the physician and the patient], which derives from the [patient’s] right to self-determination, which is characterized by basic rights [of the patient], and [derives from] the personal dignity of the patient, which inhibits to ‘designate’ him a role of a mere object in the context of medical treatment*». As it follows from the court reports cited above, the doctrine of modern medical law does not tolerate the attitude to patients as speechless objects of medical treatment. Instead, modern medical law presupposes an active participation of the patient in the process of his medical treatment, frequently giving him or her a decisive role in determining what medical interventions to undergo, and from which to abstain.

According to the overall legislation and legal doctrines, it is sound to ascertain, that patient’s rights involve the following rights:

[1] a right to a free expression of the will relating to medical interventions and medical examinations (i.e. informed consent);

[2] a right to choose the alternatives of medical treatment, in some occasions – the right to choose a treating physician;

[3] a right to maintain confidentiality of all personal data relating to the patient’s state of health, unless the transfer of such data is explicitly and clearly provided by the acting legislation**;

[4] a right to access to medical records relating to medical treatment, which are usually confined to objective findings relating to a patient;

* *Dufresne c. X.*, Cour supérieure du Québec, 1960, *original citation*: [1961] C.S. 119: *extended citation*: Rapports Judiciaires Officiels de Quebec (Canada), Year 1961, p. 119, para. 29.

** See, for instance, the judgment of the Latvian Senate No. SKA-41/2020: *Latvijas Republikas Augstākās tiesas*, Senāta Administratīvo lietu departamenta 2020.gada 6.novembra Spriedums, Lieta Nr. A420305915, SKA-41/2020, para. 10–19 (p. 5–10).

[5] a right to refuse medical treatment, though each jurisdiction is free to set out its own boundaries of such right (i.e. in many European states, 'passive euthanasia' is not permitted). In Latvian law, there is no definite boundaries relating to the said right, despite such right is guaranteed by Art. 6 (3)–(5) and Art. 7 (1)–(7) of Patient's Rights Law, however, since Art. 7 (8)–(9) allows physicians to act without the patient's free consent in emergencies, it is sound to hold that a patient's refusal to undergo medical intervention in a critical state would not matter*.

Concept of medical paternalism and patient's autonomy in law

The concept of '*paternalistic medicine*' appeared in medical and legal literature of the 1970s, describing the position of legal relations, according to which the doctor makes all decisions about his treatment for the patient, acting (in his view) in the best interests of the patient. In the English-language literature, the term arose in the course of extensive debate over mid-to-late-70s judgments of the American courts related to the termination of life-supporting treatment for the patients, who were in a vegetative state**. Initially, it was assumed that paternalistic medicine presupposes a very limited or virtually nonexistent patient's autonomy in making decisions on their treatment, an absolute trust in the advice and the guidance of the physicians, a presumed right of the doctors to conceal certain diagnoses from their patient, or to 'soften' them, indicating a 'milder' diagnosis in the patient's *historia morbi* [3, p. 341–348]. Over the years, the essence of this concept has not changed;

* At the same time, any types of euthanasia are prohibited in Latvia, and the issue of legitimacy of withdrawing life-support from terminally-ill patients (or a doctor's right to make an omission to his obligation to save the patient's life, as the patient would be against it) has not been resolved by Latvian courts before (at least, by the time we are concluding the article, we are unaware of a single court judgment, which was handed down upon this subject in Latvia).

** We assume, that such cases include:

- *In the matter of Karen Quinlan, an alleged incompetent*, Supreme Court of New Jersey, 31.03.1976, *original citation*: 70 N.J. 10, 355 A 2d. 647 (NJ 1976); *extended citation*: New Jersey Supreme Court Reports (United States of America), Vol. 70, p.p. 10–55; Atlantic Reporter (United States of America), 2nd ser., Vol. 355, p. 647–672.
- *Superintendent of Belcher-town State School et al. v. Joseph Saikewicz*, Supreme Judicial Court of Massachusetts, 28.11.1977, *original citation*: 383 Mass. 728; 370 N.E. 2d 417; *extended citation*: Massachusetts Supreme Court Reports (United States of America), Vol. 383, p.p. 728–759; North-Eastern Reporter, 2nd Ser. (United States of America), Vol. 370, p. 417–435.
- *Eichner v. Dillon*, Supreme Court, Appellate Division, 2nd Dep. (New York), 27.03.1980, *original citation*: 73 A.D. 2d 431; 426 N.Y.S. 2d 517; *extended citation*: Appellate Division (N.Y.) Reports (United States of America), 2nd Ser., Vol. 73, p.p. 431–478; New York Supreme Court Reports (United States of America), 2nd Ser., Vol. 426, p.p. 517–551.

however, in modern civil law medical paternalism has frankly outlived its usefulness and came to naught, yielding to a more liberal model of patient autonomy. Even in jurisdictions possessing a post-traditional system of law, such as Japan, where a deception in the diagnosis of cancer patients was widely practiced in the 20th century [4, p. 24], medical paternalism and the adherence of the physicians to proven, but old-fashioned, and often not the most effective methods of treatment have ceased to justify themselves, and the medical practices in the 1990s began to transform into a more modern, Western manner*.

In general, the concept of paternalistic medicine provides for an archaic model of legal relationships between a doctor and a patient (if such can be considered legal relationships at all), consisting in the unquestioning and completely silent performance by the patient of everything that the doctor orders to do, without challenging any of his decisions, and of course, without asking unnecessary questions – after all, by them, in fact, he would doubt the competence of the doctor. The concept of a doctor's negligence and responsibility before the law was inconceivable in the minds of medical colleges of past centuries – but, as it turned out, not in the minds of the patients themselves, and most importantly, of the courts. So, if we recall the *'Domfront'* judgment in France in 1830**, where the obstetrician, being unable to deliver a complicated birth, 'freed' the child by cutting off both of his hands, concluding he was unable to act anyhow else, and not consulting other doctors before doing so. The child's father sued him, and the case was heard before the civil court of Domfront. Then the medical board, from which the court asked for an expert assessment of the circumstances of the given case, was ultimately reluctant to admit the responsibility of the obstetrician, who was obliged to pay out a large compensation to the plaintiff's family, including the child, who survived despite being mangled by defendant. Even the defendant himself, who had apparently committed a reckless act, declared in court that he could not bear any responsibility for the actions he had committed in the course of exercising his profession 'to anyone but himself'. The court did not take into account the defendant's argument, and admitted his guilt***. In fact, this in no way

* See the following judgments: Supreme Court of Japan, Judgment of 25 April 1995, 1991 (O) 168, Minshu Vol. 49 (4), 1163, Sec. II-IV; Supreme Court of Japan, Judgment of 27 November 2001, 1998 (O) 576, Minshu Vol. 55 (6), 1154, Section II-IV.

** This judgment was not reported in regular court reporters, such as *Dalloz* or *Recueil Sirey*. The text was re-typed in a case-law compilation of *Dalloz Methodique* in the late 1850s, Vol. 39, p. 316–317. The case notes of the later judgments that related to medical malpractice or lack of patient's consent (including the issue of aesthetic surgery, which displayed a number of tremendous achievements in France since the 1910s), occasionally discussed this judgment as one of the older examples of medical malpractice, see, for instance, *Docteur Dujarrier C. epoux Le Guen*, Cour d'Appel de Paris (1re Chambre), 12 mars 1931, Dall. Per. 1931 II 141, 142, 144; Dall. Heb. 1931, p. 259–260.

*** *Foucault c. Helie*, Trib. civ. de Domfront, 28 septembre 1830, Dall. Meth. Vol. XXXIX (39), at p.p. 316–317.

speaks of the banal legal illiteracy of the obstetrician: even the medical board did not hesitate to declare in its opinion that it would protest against bringing doctors to justice in court.

Thus, the concept of ‘medical paternalism’ not only presupposes that the patient unconditionally trusts the physician, who supposedly acts exclusively in the patient’s interests, but also that negligence on the part of doctors should be viewed as something obsolete and hardly possible; and if it is possible, then it is certainly not punishable (at least in the view of the physicians, hospital boards and medical committees). Actually, in the days of the French *Ancien Regime*, the parliaments of France, that is, the highest courts operating in the 13 regions of France, repeatedly arrived to different conclusions concerning the responsibility of doctors – In some cases, courts could rule that doctors were not responsible for negligence during the exercise of their profession at all, though some parliaments (Fr. *Parlement*) fined or reprimanded doctors for negligence [5, p. 196–200]. One of the oldest judgments of that era was dated April 25, 1427, and this case was adjudicated by the Parliament of Paris, in which the doctor was reprimanded for using a medicine to treat a patient, which, according to a semi-legendary description by Dr. Jacques-Pierre Brillon, could cure a patient in a few hours, however, due to the use of this medicine, the patient could die – just within a few hours as well. The case note was short, and the fate of the patient remained unknown, though since the doctor was only reprimanded, let us presume that the patient survived [6, p. 337].

The question of the oldest legal cases on medical malpractice has arisen quite long ago, and there is no position concerning which legal cases should be considered to be the oldest [2, p. 1195–1203; 7, p. 10-11]. The matter is not only in the legal cases themselves, but in terms of their actual reporting, and the possibility of searching such cases in special casebooks or archives. For instance, if we take France, some medical malpractice cases were cited in collections of jurisprudence of the *Ancien Regime*. One interesting case, cited by the Methodic Encyclopedia of Jurisprudence (1782)*, Guyot (1783) [8, p. 467], Merlin (1807) [9, p. 300], Journal du Palais 1791–1850 repertoire [p. 424 / para. 109], du Saule (1874) [10, p. 186], Dubrac (1882) [11, p. 97 / para. 92], de Bonnechose (1962) [12, p. 91], was heard before the Parliament of Paris on June 22, 1768, which condemned a privileged surgeon to pay out fifteen thousand livres** damages because owing to his negligence in treating a fractured arm of a young man whose arm had to be amputated in order to remedy the consequences of his negligent treatment of a fracture, as well as forbade defendant to exercise surgery in the future***. The original court report was found among the court books of Parliament of Paris, and the name of the case, according to it, was *Leullier c. Callé*, where the patient was a son of a wig-maker in Paris and the

* Encyclopedie methodique. Jurisprudence, Tome II, Paris & Liege, 1783, p. 618

** A French *livre* is a currency, which was used within Ancien Regime.

*** M. Guyot, Repertoire universel et raisonne de jurisprudence civile, criminelle, canonique et beneficiale, Tome III, Paris, 1784, see. *Chirurgie*, Section III, p. 467.

defendant Antoine Edme Callé, was a privileged surgeon. In 1767, the young man was unfortunate to have broken his arm; defendant was called to treat him and reduce the fracture; however, a gangrene developed several days after bandaging, compelling the young man to undergo the amputation (the court report held – that firstly, it was the hand, and next, it was the patient's forearm to be amputated). The patient's father (the court report mentioned, that the patient was a minor) filed a criminal complaint against defendant, demanding 15.000 damages in the order of civil reparation and damages for other treatment costs. Defendant filed a counterclaim for damages, claiming he was slandered, but lost it. The Parliament of Paris condemned defendant to pay out the damages as the plaintiff claimed, and forbade defendant to exercise surgery thereafter*. De Saulle mentioned, that the actual sum of damages was enormous by the time of when the case was adjudicated [10, p. 186]. A number of sources, namely Brillon (1711) [15, p. 129], Guyot (1783) [16, p. 482], Merlin (1812) [17, p. 283], indicate a ruling by the Parliament of Paris dated 9 July 1599. An apothecary (defendant), who revealed that his indebted client was suffering from a venereal disease, was fined. According to Brillon (1711), the given case was heard before the Chambre de la Tournelle (the criminal chamber of Parliament of Paris), and the hearing lasted *in camera* [15, p. 129]. What is peculiar, the Chamber de la Tournelle historically heard cases, where offenders were tried for the most serious offences, which existed within the Ancien Regime, though the defendant (whose name was not mentioned in the existing casebooks) was only fined. Guyot (1783) mentioned that the object of the revelation was a 'disease, whose [defendant's] wisdom would not allow [him] to disclose [to third parties]' [16, p. 482]. There is no preserved information relating to the fact of actual codification of medical secrecy violations before the Napoleon's Code was enacted (Art. 378 (1)), but the authors found that the legislative lacuna was filled by case law, as well as the provisions of medical faculty statutes, which bore an obligation of medical secrecy to the doctors [18, p. 2–3]; in terms of case law, the doctors, who revealed the communications obtained from their patients, were fined, condemned to repay damages in civil reparation order, and were prohibited from exercising medicine for several years [19, p. 13]. Hallays (1890) mentioned in his doctoral thesis on medical confidentiality that ancient French case law was very severe in relation to revelations of professional secrecy [20, p. 44].

Due to the low development of medical science (especially, compared with the 21st century), there were very few treatment methods. Doctors could quite legally decide on an urgent operation without the patient's consent (including carrying out a completely different operation, not the operation on which the patient and the physician had previously agreed), as the situation required so. For example, in the judgment of the Brussels civil court of 1895, the court

* *Leullier c. Calle*, Parlement de Paris, 22 juine 1768, Recueil d'arrêts du Parlement de Paris, Tome I / par P. Bardet, C. Berroyer, C. N. Lalaure, Avignon, 1782, Chapitre XVIII, p. 324–325.

decided in favor of two defendant physicians, who were sued by the husband of a woman, who had her uterus removed shortly after giving birth to a baby, despite the fact that she initially entered the premises of the hospital to clear the uterus: the woman had cervical cancer, and the doctors have made a decision to act urgently. Unfortunately, the woman died four days after the operation, but the expert opinions showed that the defendants were not in fault for her demise, with which the court agreed, finding that defendant acted in an emergency situation, as the operation could not be postponed, and did their best to save the patient's life – the death was an unfortunate event with no negligence involved*. Medical paternalism was also dictated by the fact that medical assistance in the rural area was not always available, and the physicians frequently had to deal with shortages in the means of providing it, having a shortage of medical and surgical instruments, transport and other necessary equipment. In a 1877 case in Spain, a doctor was blamed in the death of a woman in labor, having no actual possibility to deliver the child because of a lack of surgical instruments and having no doctor colleagues to assist him, as the case of delivery was complicated; even his attempt to employ a blacksmith for manufacturing a necessary instrument did not help – it was too late. Fortunately, the Supreme Court found the physician innocent, considering his possibility to provide medical assistance of the woman in labor**. As for another example, in a 1923 case heard before the Supreme Court of First Czechoslovakian Republic, a nurse was found to be negligent for not calling a physician to care for a woman after her labor, whose child delivery caused a rupture from the back of the womb to the rectum (the claim was based upon Art. 1299 of the Civil Code). The Court, however, also found that the plaintiff should have done something in order to avert the deterioration of her health condition (i.e. to call a doctor by herself), augmenting that it was not customary to call a physician to deliver a birth those days***. Thus, medical paternalism was a consequence of the surrounding circumstances often other methods and means of treatment could simply not exist, and doctors could act without the consent of the patient, or make decisions about carrying out completely different medical interventions due to the comparative or real urgency of the patient's situation.

Informed consent in civil law and common law

The right to patient autonomy provides for freedom of patient's expression of his will in the context of an upcoming medical intervention based on the

* Trib. civ. de Bruxelles, 24 juillet 1895, Médecine légale et jurisprudence médicale (Bergeron, Le Blond, Dabout, 1897, p. 54–56).

** Tribunal Supremo, 5 de Julio de 1877, No. 331 (4037), Jurisprudencia criminal, Tomo 17, p. 26–28 (*por D. Bonifacio Caramés*).

*** Nejvyšší soud Československé republiky, Rozh. ze dne 19. června 1923, Rv I 167/23, Vážny (Civil Cases), Vol. 5, p. 1068–1069 [Čis. 2740].

explanations of the treating physician and other medical personnel. It is apparently necessary to find out where this legal concept derives from. To date, there is no unanimous point of view of the origin of the concept of free expression of the patient's will, and it can be assumed that its legal nature is mixed, including both archaic and modern civil law norms, as well as and judicial practice (i.e. case law), as well as many non-legal concepts based on philosophy and medical ethics, which, is actually confirmed in modern Czech legal literature [21, p. 55]. In our work, we are quite far from the opinion that the non-legal concepts of the patient's autonomy are essential from the point of view of the legal application of the concept, since the analysis of the historical judicial practice of the Continental Europe states does not show any correlation between the philosophical concepts or medical ethics with the concept of the patient's will. In the given passage, we will provide the reader a number of examples in order to prove our statement.

So, the question of the patient's free expression of the will initially lay in the area of the legitimacy of the doctor's activity, which is unthinkable being performed without the patient's consent, since such act entails a violation of bodily integrity. Such illegal act may also involve an experimental medical intervention without a therapeutic goal, based on the doctor's desire to employ a new method of treatment in action rather than really cure a patient: for example, in France, the courts did not deny that it is impossible to achieve progress in the treatment of severe or orphan ailments, if the doctors do not implement new, sometimes experimental methods of treatment. At the same time, an experimental medical intervention done for the purpose of a scientific experiment, and experimental medical interventions done in order to cure and save the patient's life are diametrically opposed concepts: if the latter deserves praise for the prowess and skill of a physician, the former is an illegal act if conducted without the patient's consent. The said principle was repeatedly affirmed in legal doctrine [22, p. 1070–1072] [23, p. 186–187] [24, p. 591–597] [25, p. 47–53], and case law*.

The issue of the patient's free expression of the will and the physician's duty to warn on the risks of medical procedures was raised in German law in the middle of the 19th century, where in 1856 the High Court of Appeals of the Free City of Lübeck ruled in favor of the plaintiff Bracker against defendant, Juris Albrecht, M.D., who allowed his wife to work as a wet-nurse for a child, who was suffering from congenital syphilis, although the doctor knew that the child was sick, but did not warn the woman about this fact: as a consequence,

* *Min. Publ. c. Guyenot et Gailleton*, Trib. corr. de Lyon, 15 dec. 1859, Dall. Per. 1859 II. 87, 88; *Cons. Chavonin c. Dr. L...*, *Admin. de l'Assistance Publique et Soc. de laboratoires Thorande*, Trib. civ. de la Seine (1 Chambre), 16 mai 1935, Dall. Heb. 1935.390, 390-391, Dall. Per. 1936 II 9, 13-14; *L. c. Consorts Chavonin et Cie des produits chimiques de la Sorbonne*, Cour d'Appel de Paris, 1 Chambre, 11 mai 1937, Dall. Hebd. 1937.340, 340-341; *M.P. et D. c/ D., L., P. et V.*, Trib. Corr. de Charleroi, 29 mars 1983, Rev. Reg. Droit 1983, p. 248 (p.p. 248–253).

the whole family fell ill with syphilis. The legal basis for the decision was Art. 3 of the Medical Ordinance of 1818, upon which physicians are responsible for negligence within the performance of their professional duties*. In French and Belgian law on the slope of the 19th and the dawn of the 20th century, the courts attributed the patient's lack of consent to a medical intervention as negligence from the side of the physician (Articles 1382–1383 of the Civil Code of France and Belgium). At first, the question was raised only relating to the banal consent of the patient to a medical intervention, but later, the courts began to pay attention to the issue of an inappropriate informing of the patients about the possible negative consequences of then-day-modern methods of treatment, such as Roentgen therapy and diathermy: in the first decades of the active use of such devices, the patients frequently suffered from burns due to imperfection and poor quality of medical equipment, as well as violation of the rules for its operation by the personnel of medical institutions**.

The concept of informed consent of the patient in its modern meaning is likely to originate from the case of *Chavonin* in France, which was adjudicated by the Seine Civil Court as the court of first instance (1935) and Paris Court of Appeals (1937) as the appellate court. In this case, a factory worker, who had previously suffered from venous ailments, was invited by his former attending physician to the hospital, who claimed that it was a visit for a routine examination. However, in reality, the patient was called for an experiment of which he was not informed, involving an aortography examination, conducted as a practical part of a medical research by two postgraduate students of a local medical university. The patient died from the negative consequences of the injection of a special opaque into his veins, which had caused a gangrene, and the family of the deceased recovered damages from defendants. The Seine Civil Court used the term '*consentement libre et éclairé*' (En. '*free and informed consent*') to mean that the patient was required to be informed about the experiment being carried out, which is banned without his informed consent. The Paris Court of Appeal upheld the ruling of the first-instance court***.

* *Carl Joachim Christian Bracker, Klager, gegen Dr. Juris Albrecht, mand. nom*, Oberappellationsgericht zu Lübeck, 30 Dezember 1856, Sammlung von Erkenntnissen und Entscheidungsgründen des Ober-Appellationsgerichts zu Lubeck, etc. Band 3, 1re Abteilung, Sache No. 16, P. 172, 176–190.

** *Demarche c. Dechamps*, 27 Nov. 1889, Trib. civ. de Liege, Belgique Judiciaire 1890.471, Pas. 1890 III 83, 85; Journal des Tribunaux (Belge) 1890 p. 8; Jour. de. Trib. et. Rev. j. 1890.76; appeal: *Dechamps c. Demarche*, Cour d'Appel Liege, Pas. 1891 II 78, 80; Sirey 1895 II 237, 237–238; Dall. Per. 1891 II 281; Pas. 1891 II 78, 79-80; *Chinic. Coconni*, Trib. de. Aix, 22 October 1906, Dall. Per. 1907 II 41, 43; *Bours c. Consorte Prevost*, Trib. de Amiens, 14 Fevr. 1906, Dall. Per. 1907 II 44, 45; *Epoux N c. Docteur Lenormant*, Cour d'Appel de. Paris, 28 Juin 1923, Dall. Per. 1924 II 116, p.p. 116–117; *Vve Seignobos c. Docteur H.*, 31 octobre 1933, Cour de Cass., 1934 Sirey I p.p. 11, 11–12.

*** *Cons. Chavonin c. Dr. L...*, *Admin. de l'Assistance Publique et Soc. de laboratoires Thorande*, Trib. civ. de la Seine (1 Chambre), 16 mai 1935, Dall. Heb. 1935.390, 390-391, Dall. Per. 1936 II 9, 13–14; *L. c. Consorts Chavonin et Cie des*

The Brussels Court of Appeals reduced the term to ‘*consentement éclairé*’ in a 1962 case, where a man attempted to recover damages for the misfortunes, which occurred during his electroconvulsive therapy, inter alia, claiming he had never consented to it, in fact having expressed a firm opposition for undergoing it. However, the plaintiff suffered from a number of mental illnesses since the 1930s, and the decision to treat him by the means mentioned hereinabove was made by his family. The court found, that the patient was incapable of announcing his will in relation to the medical procedure, holding that in such situation, it was not only the right of the doctor to apply the treatment he found suitable to cure the patient, but even his duty (moreover, the facts of the case showed that other means of treatment were repeatedly applied to the patient in vain). The court held, that the doctor could not be reproached for lack of plaintiff’s consent. As to the second claim, the patient blamed the doctor for immobilizing his leg in a wadded gutter after a fracture of the neck of the femur, which occurred within one of the courses of electroconvulsive treatment (in fact, fractures during electroconvulsive therapy were not seldom in the mid-20th century), claiming that the physician did not provide decent care to the fracture. The Court of Appeals, however, found that it was the best solution for this situation, taking into account the patient’s age and his poor health and mental condition, rejecting the second claim and announcing a verdict for defendant*.

In 1937 the French Court of Cassation affirmed the condemnation of a doctor and two his affiliates for conducting vasectomy procedures in the case of Bartosek, Harel and Prevotel (1937), where an Austrian doctor performed fifteen vasectomy operations in Bordeaux, the French Court of Cassation recognized the doctor’s actions to be a personal injury and castration (Art. 311 and 316 of the Criminal Code). The court report stated that the patients opted for such procedure voluntarily. The Court of Cassation held that the victim’s consent does not exclude premeditation, finding that the appellate court’s decision was correct**. Technically, the Court assimilated the acts of the physician to a voluntary assault and battery, done with premeditation. The defendant physician was condemned to 3-year imprisonment in April 1936, but since the appellate court reduced defendant’s conviction to one year, he was released already by the time of the appellate court’s judgment. This case apparently had nothing to do with the French doctrine of ‘*consentement libre et éclairé*’: vasectomy was illegal in France until 2001 (Law No. 2001-588, Art. 26). The ligation of fallopian tubes or vas deferens for contraceptive purposes became legal only for adult persons, and could be performed entirely upon the free will and with the informed (written) consent of the patient, after a consultation with

produits chimiques de la Sorbonne, Cour d’Appel de Paris, 1^{re} Chambre, 11 mai 1937, Dall. Hebd. 1937. p. 340, 340–341.

* *Cour d’Appel de Bruxelles*, 11 janvier 1962, Pas. 1963 II p. 23, 24–25.

** *Bartosek, Harel, Prevotel*, Cour de Cassation, Ch. Crim., 1 juillet 1937, Sirey 1938 I p. 193, 193–194.

the physician, who shall provide the patient with all information concerning the risks of the medical information and the consequences of the medical intervention, and the procedure may be performed at least four months after the first medical consultation with the doctor*. Upon the applicable French case law, it may be found, that in some occasions, women voluntarily submitted for tubal ligation, and the doctors had an obligation to inform patients upon all the risks of such intervention, including even a small possibility of pregnancy after tubal ligation**. Tubal ligation of fallopian tubes could be legitimately performed only for therapeutic necessity and contraceptive purposes prior to 2001***. Article 27 of Law No. 2001-588 expressly prohibits the aforesaid procedures to be performed on minor patients. In terms of patients, who are legally incapable, the aforesaid procedure may be performed in very limited occasions for contraceptive purposes upon the request of the patient his immediate family (father and mother), or legal guardians, and it must be authorized by the court; the only cases when such procedure is allowed are: 1) an absolute medical contraindication of using the contraceptive methods; 2) a proven impossibility of using them effectively. Within the court proceedings, a committee of experts consisting of doctors and of disabled people associations should give its opinion upon the issue concerned; immediate family or the legal representatives must be heard by the court; in case the patient is able to express his will, the patient's consent should be systematically sought; information should be provided to the patient upon his (her) level of understanding****. In the late 1960s, a case relating to gender reassignment was heard in Belgium. The Correctional Court of Brussels acquitted three physicians in the case of *Fardeau, Slosse and Leclerc* (1969), who performed a sex reassignment operation, during which the patient unfortunately died of pulmonary embolism: it was proved that doctors were not negligent in the course of the medical intervention, and the patient, in fact, was aware of all the consequences of this operation, and he would be happy to become a woman; thus, the death of the patient in this case was only an unfortunate accident in which the doctors were in no way at fault*****.

Thus, historically, 2 legal schools of understanding of the concept of the patient's will have emerged in the legislation and case law: 1) continental, which

* Loi n° 2001-588 du 4 juillet 2001 relative à l'interruption volontaire de grossesse et à la contraception, Art. 26.

** *Cour de Cassation*, Chambre civile 1, du 9 mai 1983, 82-12.227, Publié au bulletin des arrêts Cour de Cassation Chambre civile 1 N. 140.

*** *Cour de Cassation*, Cour de cassation saisie pour avis, du 6 juillet 1998, 98-00.006, Bulletin 1998 AVIS N° 10 p. 11.

**** Loi n° 2001-588 du 4 juillet 2001 relative à l'interruption volontaire de grossesse et à la contraception, Art. 27.

***** *Min. Publ. c. Fardeau, Slosse et Leclerc*, Trib. corr. Bruxelles (22 ch.), 27 septembre 1969, Journal des Tribunaux Vol. 1969 (15.11.1969), No. 4676, p. 635, at p. 635–638; 639–641; also reported in *Pasicrisie*, Vol. 1969, p. III, p.p. 114–128).

is based on the concept of a) the legitimate activities of doctors and medical institutions; and b) the concept of the patient's bodily integrity, which cannot be violated without his consent, and 2) the Anglo-American, which arose in common law, in which the judicial practice not only relies on centuryfold principles of tort law, as well as the professional *customs* in various activities, including medical care. Speaking about the latter school, it is not at all necessary either to legitimize the need to obtain the patient's consent to medical intervention, or even to possess a certain judicial precedent, where a court ruled that a surgical or any other medical intervention is legitimate only with the patient's consent. Simply put, in case it is *customary* for the physicians to seek the patient's consent prior to medical intervention*, then they do not need to be aware of some judicial precedent that occurred at some immemorial time in the past, but to act this way only because it is *customary* within the medical profession. Interestingly, the two 'schools' of the concept of the patient's will, apparently did not overlap in any way. For instance, one of the 'fathers' of the concept of patient's right to autonomy in Anglo-American, Faden, Beauchamp and King (1986), do not mention anything regarding the presence of firmly-developed jurisprudence from France, Belgium and other European states concerning the issues of patient's informed consent [3, p. 116–125], which significantly complicates the understanding of the features of concept of informed consent in Anglo-American and continental systems of law. For these reasons, there is even no uniform position of where did the concept of informed consent actually derive from. For instance, *Earle* (1999) indicated that the concept of informed consent is an American-bred legal doctrine to extend tort liability of the medical practitioners and promote the patient's rights. [27, p. 235–237]. He cited a 1982 judgment from Massachusetts, namely *Harnish v. Children's Hospital Medical Center***, where the Supreme Court of Massachusetts discussed the issue of the doctor's duty to disclose all significant medical information to the patient in a comprehensive manner. At the same time, not even mentioning the case of Chavonin, the term '*consentement libre et éclairé*' appeared in relation with the issue of patient's consent to a medical examination in the case of *Seignobos*, adjudicated by the French Court of Cassation as early as 1933***.

Now, let us discuss the development of the concept of 'informed consent' in the Anglo-American system of law. A certain paternalism may be the reason for the low number of judicial precedents in the United Kingdom. However,

* *Slater v. Baker and Stapleton*, original citation: [1767] 2 Wils. KB 359, p. 361–362; 95 E.R. 860.; extended citation: Wilson's King's Bench Reports (United Kingdom), Vol. 2, p. 359, at p. 361–362; English Reports, Vol. 95, p. 860.

** *Janine Harnish v. Children's Hospital Medical Centre & others*, Supreme Judicial Court of Massachusetts, 05.03.1982 – 13.08.1982, original citation: 389 Mass. 152; extended citation: Massachusetts Reports (United States of America), Vol. 389, p.p. 152–159, at p. 155.

*** *Vve Seignobos c. Docteur H.*, 31 octobre 1933, Cour de Cass., 1934 Sirey I p. 11, 11–12.

several outstanding cases of the twentieth century can be noted as well. For example, in *Holmes v. Heatley* (1936), heard before the High Court of Justice of Ireland, the patient was a minor of age sixteen, who was suffering from exophthalmic goiter. Both the young man and his parents agreed to the proposed operation at Mercer Hospital (Dublin, Ireland), where he had already received treatment earlier. However, during the operation, the patient became extremely restless and required to be relaxed. The physicians decided to apply general anesthesia, for which they used two drachmas of chloroform, after which the patient soon died on the operating table. His relatives filed a claim against the doctor based on the *Fatal Accidents Act, 1846* (9 & 10 Vic c. 93). During the court hearing, the parties of the proceedings actively debated concerning the legality of performing a medical intervention without the consent of the patient, as well as the need to obtain the consent of the parents of the minor patient. However, the Court ruled that the doctor acted properly in an emergency, and did not inflict bodily harm on the patient, deciding the case in favor of the defendant*. The next important judgment is the case of *Bolam v. Friern Hospital Management Committee* (1957), ruled by the High Court of England and Wales (Queen's Bench Division). The plaintiff was a patient at Friern Hospital psychiatric clinic in London, England. He once agreed to undergo electroconvulsive therapy, and was not given a muscle relaxant, because of which he sustained damages, including a fracture of the acetabulum of the hip joint. He filed an action against the trustees of the hospital, claiming that he had sustained damage as a result of the fact that plaintiff was not given muscle relaxants, and also that the doctors did not provide necessary fixation measures of the patient's body during the medical procedure, and that the doctors also did not inform him concerning the risks of this type of treatment. Nevertheless, the Court, relying on the opinion of expert physicians, stated that, firstly, many doctors had a negative opinion of muscle relaxants, secondly, in case the fixation measures was applied, this would increase the risk of fractures even more, and thirdly, it was a common practice for doctors not to inform patients about the risks of treatment, unless the patients themselves asked doctors about this). The Court mentioned, that in reality, there was an actual rule in hospitals not to operate on patients and not to carry out medical interventions without the consent of the patient concerned. However, in fact, everything could depend on many circumstances. The Court also determined that if a doctor fulfills his obligations under certain well-established medical practices, then he is not guilty of negligence. The Court rendered the judgment in favor of defendant**. The *Bolam* case, cited hereinabove, was rather a medical negligence case more, than a case relating to informed consent. Moreover,

* *Holmes v. Heatley*, High Court of Justice of Ireland, 26 Nov. 1936, 3 Irish Jurist p. 74, 74–76 (1936).

** *Bolam v. Friern Hospital Management Committee*, High Court of Justice of England and Wales / Queen's Bench Division, 26 April 1957, original citation: [1957] 1 WLR 582, p.p. 585–594 [1956 B. No. 507]; extended citation: Case 1956 B. No. 507,

the so-called «Bolam test», which means that it has to be determined, whether the doctor demonstrated a certain degree of skill and care in each concrete situation*. In fact, the doctrine of reasonable degree of skill is not new in English tort law. In terms of medical malpractice, it was elaborated by the Nisi Prius in the Court of Common Pleas in the case of *Lanphier v. Phipos* (1837), upon which: firstly, the person, who enters a learned profession, as a physician, or an attorney, needs to possess a reasonable level of prudence in exercising his profession; secondly, it is impossible to expect that a doctor will always succeed in curing the patient's disease; thirdly, it is impossible to expect that a medical practitioner will possess the highest possible degree of skill, but it expected that a medical practitioner has a reasonable degree of skill**.

The American counterpart of French '*consentement libre et éclairé*' (or simply '*consentement éclairé*') was coined two decades later than the case of *Chavonin* in the 1957 case of *Salgo v. Leland Stanford Jr. University Board of Trustees*, adjudicated by the Californian Court of Appeals, where a patient of age 55, diagnosed with abdominal aorta occlusion, was recommended to remain at a hospital for a further evaluation of his health condition. Within his stay, he was told he ought to undergo an examination of his aorta by an aortagram, and his gastrointestinal act by Roentgen. The aortagram, which was reported to be successful, rendered the patient to be paralyzed, so that he sued defendants for negligence, also claiming that no details relating to the potential risks of the medical procedure were ever disclosed to him (which was not disputed by defendant doctors, though they claimed to have discussed the procedure itself with the plaintiff). The hospital (which lost the appeal in the case at stake) was found liable for damages – plaintiff was awarded 213.000 USD***. The shape of informed consent was laid down in a form of «duty to disclose» relating to the risks of the medical procedure, which could be also found in French case law at the dawn of the 20th century****. In fact, the issue of patient's consent in

Weekly Law Reports (United Kingdom), Year 1957, p. 1, p.p. 582–594 (referred to at p.p. 585–594).

* See, for instance, a discussion on the case of Bolam by the High Court of Australia in the given case: *Rogers v. Whitaker*, High Court of Australia, 19 November 1992, Case No. F.C. 92/045, *original citation*: [1992] HCA 58; 175 CLR 479, *extended citation*: High Court of Australia, Year 1992, p. 58 (at para 6-13); Commonwealth Law Reports (Australia), Vol. 175, p. 479.

** *Lanphier v. Phipos*, *original citation*: 8 C. & P. 475, 475–479 (1838), *extended citation*: 1838, Nisi Prius at the Court of Common Pleas (United Kingdom), Frederick Augustus Carrington & Joseph Payne Reports, Vol. 8, p.p. 475–479.

*** *Salgo v. Leland Stanford etc. Bd. Trustees*, California Court of Appeals, First Dist., Div. One, 22.10.1957, Civ. No. 17045, *original citation*: 154 Cal. App. 2nd 560; *extended citation*: California Court of Appeals Reports (United States of America), 2nd Ser., Vol. 154, p.p. 560–579.

**** *Chini c. Cocconni*, Trib. de. Aix, 22 October 1906, Dall. Per. 1907 II p.p. 41, 41–43.

American case law dates back to late 1880s*. In 1914, the New York Court of Appeals issued a judgment in *Schloendorff v. Society of New York Hospital*, where it was announced that every legally capable person has the right to decide whether to submit to a medical intervention or procedure, which equates to a technical battery without the patient's consent; but in terms of *respondeat superior*, the defendant hospital, as a charitable institution, could not be held liable for the faults of the doctors giving services there, as in case charitable bodies employ physicians to give their services to the sick, no master-servant relationship emerges between them**. The aforesaid principle was taken from earlier authorities, which mentioned the patient to be the 'final arbiter' in deciding of whether to submit to medical interventions, or not to submit***.

3. A comparative analysis of Czech, Austrian and Latvian legislation and case law

3.1. Austria-Hungary (1849–1918) and First Czechoslovakian Republic (1918–1938)

The responsibility of medical practitioners and hospitals in modern Czech law is a transformation of the older doctrines of civil and criminal liability for the commission of professional negligence (by a doctor, or another professional employee), originating from the law of Austria-Hungary, the norms of which have found their application in the legislation and judicial practice of the First Czechoslovakian Republic, where the civil and criminal codes of Austria-Hungary were in still in force. In Austria-Hungary, there was no official distinction between the cases in which the negligence of medical personnel would be assessed under Art. 1299–1300 of the acting Civil Code, and in which the negligence committed by a medical practitioner would be treated according to Art. 335, 356–358 of the Criminal Code. Based on judicial practice, criminal

* For instance, one of such old time American cases directly covers the issue of patient's consent to medical treatment. See: *State, Use of Mary R. Janney et al., Appts., v. Philip B. Housekeeper et al.*, Maryland Court of Appeals, 10.01.1889, *original citation*: 2 L.R.A. 587; 70 Md. 163, *extended citation*: Lawyers' Reports Annotated (United States of America), Vol. 2, p.p. 587–589.; also reported in Reports of cases argued and adjudged in the Court of Appeals of Maryland (United States of America), Vol. 70, p.p. 163–172.

** *Schloendorff v. Society of New York Hospitals*, New York Court of Appeals, 14.04.1914, *original citation*: 211 N.Y. 125, *extended citation*: New York Reports (United States of America), Vol. 211, p.p. 125–136.

*** See, for instance, *Mohr v. Williams*, Supreme Court of Minnesota, 23.06.1905, Lawyers' Reports Annotated, New Series (United States of America), Book 1, p. 439–446, see especially at p. 444; Edgar B. Kinkead, Commentaries on the law of torts; a philosophic discussion of the general principles underlying civil wrongs ex delicto // San-Francisco, Bancroft-Whitney Company (United States of America), 1903, para. 375 (p.p. 735–738).

liability of medical practitioners could arise in cases wherein the negligence, committed within the course of exercising their professional activity exposed the life and health of the patient to a serious risk, or caused the death of the patient; this also included the failure to provide patients with necessary medical care*.

In the case No. 5721 of the Austrian-Hungarian Supreme Court, a doctor was held liable for the damage caused to the patient as a result of an incorrect provision of information about the upcoming medical intervention, and not simply as a result of negligence: moreover, negligence on the part of the doctor did not exist as such in the sense of his acts related to medical treatment. A woman (plaintiff) consulted a doctor for depilation of her forearm hair, and the doctor suggested that it be performed using X-rays, stating that this operation was painless. However, during this manipulation, an equipment failure had occurred, and the patient received a burn. The courts of first and second instance decided in favor of the defendant, noting that the doctor did not commit any negligence in treatment, and the equipment failure occurred due to fluctuations in the energy of X-rays, which could not be fully controlled during the treatment of the patient, and the doctor, in accordance with the then-existing state of development of medical science, had the right to give the patient a guarantee he had given. However, the Supreme Court disagreed with such conclusions, stating that this did not exclude liability for the damage suffered by the plaintiff, as a result of the doctor's guarantee. Knowing that a 100% guarantee of safety with new (at that time) methods of treatment cannot be given, the defendant could not claim this, found the Court, noting that the defendant's fault was that by false assurance he prompted the plaintiff to agree to a medical intervention, due to which she suffered damage that she would not otherwise have suffered**.

Largely, the courts of the First Czechoslovakian Republic have utilized the same principle, as did the Austrian-Hungarian courts. In practice it turned out that most of the cases related to the responsibility of physicians for the damage caused to patients were civil actions, and only a small part of these were criminal trials; in such cases, a doctor was guilty of a criminal offense (Art. 335, 356–358) if his misconduct resulted in the death of the patient, or

* *K. K. Oberster Gerichtshof*, Entsch. v. 21 Juli 1851, № 39, EOG Str. Bd. I, S. 26; *K. K. Oberster Gerichtshof*, Entsch. v. 27 Januar 1857 № 783, EOG Str. Bd. II, S. 3; *K. K. Oberster Gerichtshof*, Entsch. v. 2 Juni 1858 № 862, EOG Str. Bd. II, S. 77–78; *K. K. Oberster Gerichtshof*, Entsch. v. 6 Februar 1861 № 978, EOG Str. Bd. II, S. 182–183; *K. K. Oberster Gerichtshof*, Entsch. v. 12 Sept. 1867 № 1193, EOG St. Bd. II, S. 389–390), at the same time, a more «ordinary» negligence of the doctor could impose civil liability under Art. 1299-1300 of the Civil Code, see *K.K. Oberster Gerichtshof*, Entsch. v. 20 April 1904, Nr. 5721, EOG Ziv. S. Bd. 41 (NF Bd. 7), Nr. 2672, S. 250–251; *K. K. Oberster Gerichtshof*, Entsch. v. 7. Sept. 1915 Nr. 7557, Rv I 448/15, EOG Ziv. S. Bd. 52 (LII) S. 844, 845–848.

** *K.K. Oberster Gerichtshof*, Entsch. v. 20 April 1904, Nr. 5721, EOG Ziv. S. Bd. 41 (NF Bd. 7), Nr. 2672, S. 250–251.

caused serious damage to his health, or put the patient's life at a substantial risk, irrespective of the type of medical treatment. It is important to note here, that at the time of the First Czechoslovak Republic, the lands of Slovakia possessed a Criminal Code, which was different from Austrian-Hungarian Criminal Code (1852), which did not provide for separate norms regarding the negligence of doctors, and therefore, in the case No. Zm. III 407/32 adjudicated by Supreme Court of First Czechoslovakian Republic, the charge was based on Art. 310 of the Slovak Criminal Code, which provided for punishment for negligence within the performance of professional duties. If we proceed from the existing jurisprudence of the Supreme Court of the First Czechoslovakian Republic featuring trials against medical personnel for committing serious faults within medical treatment, then in one of such cases, a nurse committed a serious fault, having made an injection of gasoline to a patient, confusing a container with gasoline with a container with saline solution, placed next to it; the physician under whose supervision she performed her duties was also found guilty*, in an another case, typical for medical malpractice, a surgeon left a tampon in the patient's body after the operation**. The distinction between the application of the aforesaid provisions of the Criminal Code of Austria-Hungary is quite complicated, and upon the applicable case law, it existed as follows. Art. 356 (and 357, according to the Supreme Court***; this provision was not mentioned in the context of doctors, as it was related to other medical personnel), which provides the physician with a privileged position in relation to his patient, must be used, if the doctor committed a negligent act, or an omission within exercising the medical profession, featuring an erroneous or an incompetent ignorance, deriving from the imperfections of his scientific training or the lack of practice. It has to be denoted, that under the sanction of Art. 356 of the Criminal Code, the physicians, who committed gross negligence owing to their ignorance, were abstained from any medical practice until the moment they were able to prove their competence by passing a special examination****. Based on the complexity of determining the fault of the physician due to the aforesaid peculiarities, the defendants could lodge a 'confusion complaint' (Cz. «*Žaloba pro zmatečnost*»), which is a remedy

* *Nejvyšší soud Československé republiky*, Rozh. ze dne 7. listopadu 1935, Zm I 1148/34, Vážny (Penal Cases), Vol. 17, p.p. 420–424 [Čís. 5420].

** *Nejvyšší soud Československé republiky*, Rozh. zo 14. decembra 1932, Zm. III 407/32, Vážny (Penal Cases), Vol. 14, p.p. 353–355 [Čís. 4567].

*** See case Zm I 1148/34, at p. 422–423; Art. 356 provides for doctor's negligence, whereas Art. 357 refers to the term «*Ranhojič*» (also '*felčar*'), which is a development of a Medieval term «*Barber surgeon*», being a nurse, a paramedic or other medical auxiliary staff in the sense of the 20th century. Art. 357 was applied in the context of the defendant nurse, who committed a fault by injecting gasoline to a patient instead of saline solution.

**** *Nejvyšší soud Československé republiky*, Rozh. ze dne 14. února 1938, Zm II 253/37, Vážny (Penal Cases), Vol. 20, p.p. 93–96 [Čís. 6134].

referring to a claim that the investigation of the case heard before the court below was somewhat ‘confusing’, usually containing procedural errors, or an incorrect interpretation of the facts, or that the court has not considered all the existing facts – in the case of doctors, who were tried for negligence, they could strive to prove that their faults were not that severe and apparent, even admitting they were actually in fault*.

So, as we have deduced above, the faulty behavior of doctors and other medical personnel tolled to a criminal misdemeanor in case their negligence caused the patient’s death or brought his life to a very serious risk. The civil cases of the Supreme Court of Czechoslovakia on medical malpractice suggested that civil liability under Art. 1299–1300 of the Civil Code resulted in moderate negligence within carrying out medical procedures and interventions, as well as in cases, where the physician was not diligent in his precautionary measures for various medical procedures. At the same time, due to the specificities of medical procedures and the misfortunes, which may happen during them, each case was carefully assessed according to the facts. Let us discuss a couple of civil cases on medical malpractice, which were adjudicated by the Supreme Court of the First Czechoslovakian Republic.

In the case Rv I 1816/26, defendant physician made an injection of benzene to a minor patient, contained in a packaged bottle of tebecine, an anti-tubercular medicine, made on basis of arsenic. Plaintiff sued both the doctor for negligence under Art. 1299 of the Civil Code, and the manufacturer of the medicine. The court of first instance dismissed the claims against both defendants; the court of appeals left the judgment unchanged. The Supreme Court vacated the part of the decision of the trial court and the court of appeals against the physician, remanding it to the trial court, but left the part of the decision in favor of the defendant medicine manufacturer unchanged. As to the motives of the decision, they were the following. As it went from the trial court’s judgment, the plaintiff (the judgment report does not precisely reveal the relationship between plaintiff and the minor patient, but it is obvious that it was either a parent, or a guardian) ascertained that defendant physician did not safeguard an enhanced level of caution before the injection, as provided by Art. 1299 of the Civil Code. The trial court found upon the expert conclusion, that when the doctor is about to perform an injection to the patient, he does not smell the substance his is going to administer, as he trusts upon the high quality of the substance, as it is supposed, that the medicine is made upon official supervision, and is contained in a manufacturing package, and thus, the contamination of the substance is thus impossible. From the facts, provided by Supreme Court’s report, it may be deduced, that the 20-gram bottle was corked by a cortical, paraffin-drenched plug, covered with a paper cap with a lace round the bottleneck – that is, the bottle was supplied in an ideal condition. Moreover, the doctor claimed, that he had obtained the said bottle the day he did the injection to the child, and he confirmed, that the original package of the bottle was not damaged, when it

* See case Zm II 253/37, p.p. 94–96.

was opened by him. It was not mentioned by plaintiff, how the benzene liquid appeared in the packaged bottle. The Supreme Court held, that the doctor should always ascertain himself that the medicines are safe to be used for injections to patients. The fact that the defendant used benzene as tebecine, could be observed as a fault, as the defendant, who took over his obligation to treat the patient, took over an obligation requiring a specific expertise (i.e. in medical science) and thus requiring extraordinary diligence. It was found, that the defendant did not subject the bottle to any verification, as he even did not notice that the content of the bottle was lighter than tebecine was. Had he acted in a more diligent way before performing the injection, said the court, defendant would have avoided committing the fault on the patient – as it was clarified upon the facts, the defendant noticed that the substance he administered was *not* tebecine. Therefore, the Supreme Court found that upon the given facts, the doctor was negligent, and held to remand the part of the judgment (claim against the doctor) to the trial court. In terms of the alleged fault of the manufacturer (referred as company «B» in the court report), the Supreme Court dismissed the appeal against the manufacturer. The court of appeals held before, that it is impossible to close the bottles in such a way, that a third person could not open the said bottles. Finally, there was no conclusion regarding the genuine reason of how did benzene appear in the bottle, where tebecine was supposed to be*.

Another case considered the issues of anti-smallpox vaccination. So, in the case R I 98/30, plaintiff sued a district physician, who vaccinated plaintiff against smallpox, and made a subsequent injection in the next quarter of hour (15 min.), which, according to plaintiff, caused him a serious ailment that resulted to a mental illness in the future (the names of the ailments were not clarified in the court report). This occasion happened in 1922 (the judgment was handed down in 1930). The defendant held, that he made the anti-smallpox vaccination in accordance with the Law of 15 June 1919 No. 412, and he was a public servant performing his duties. It was established, that defendant was appointed as a district doctor in the circuit S. on February 24, 1921; and the letter of the district administration, dated October 25, 1929, held that the defendant, under Ordinance No. 10998/22 (14.04.1921), was entitled to perform vaccination of minors of age 1, 7 and 14** for the costs of the provincial fund. So, he was a ‘public servant’ within the meaning of the Law of 15 June 1919 No. 412. And thus, since the Habsburg Royal Decree No. 758

* *Nejvyšší soud Československé republiky*, Rozh. ze dne 9 června 1927, Rv I 1816/26, Vážny (Civil Cases), Vol. 9, p.p. 1007–1009 [Čís. 7136].

** Since this fact was mentioned in the court report, we may assume that plaintiff was a minor at the time when the immunization happened in 1922. So, he should have been 22 by the time of the Supreme Court’s decision, despite the age of plaintiff was not mentioned. However, the court report does not refer to any facts that he was represented by a legal representative, so he was already an adult by the time of the proceedings. The dates of the trial court and appellate court decisions were not stated.

of 14 March 1806, which was in force in the First Czechoslovakian Republic provided that lawsuits against public servants performing their duties, have to be immediately terminated. So, the action was dismissed. The court of appeals quashed this judgment, and returned it to the trial court for reconsideration. The appellate court rejected the view of the trial courts' application of the 1806 decree, finding that it would not be correct to find a district doctor to be a 'public servant', even if he is entitled to perform vaccination. The second vaccination, held the appellate court, was a fault of the doctor under Art. 1299 of the Civil Code. The Supreme Court decided to renew the judgment of the trial court. Defendant, carrying out anti-smallpox vaccination, which was ordered by the State Administration, complied with the legal obligations imposed on public doctors (Sections 2, 5(1) of the Law No. 332 of 1920), and even though he had re-vaccinated plaintiff, it was the same official act for which he was entrusted, and which, by its nature, was the performance of the duties of medical police, the procurement of whose duties was taken over by the state under the 1920 act mentioned above. So, defendant, procuring the tasks of the state, performed the duties of a civil servant, that is, a public doctor (Art. 2 of the aforesaid law), despite at that time he was not in a contractual relationship with the state. Thus, the district doctor, who performed anti-smallpox vaccination, was covered by the Decree of 1806. So, the Supreme Court had decided to renew the judgment of the trial court*.

It is important to note that the question of the legal responsibility of doctors for carrying out an operation without the patient's consent was practically not raised in the judicial practice of the First Czechoslovakian Republic. In one case, adjudicated by the Supreme Court in 1926 (case Rv I 1413/25), the plaintiff sued a doctor after sustaining burns during diathermy treatment, claiming that he had told her that the treatment was completely safe, and that it is being used by many patients and so, the plaintiff has agreed to treatment. The court of first instance did not uphold the claim of the plaintiff, stating that there was no fault on the part of defendant, however, the court of appeal decided in favor of plaintiff, though without indicating the norm of law on the basis of which the court came to this conclusion. According to the judgment report, the logic of the court of second instance presupposed that the defendant is guilty of assuring the plaintiff of the harmlessness of the treatment. However, the Supreme Court overturned this decision, considering that the defendant had simply dispelled the plaintiff's doubts about the harmlessness of the treatment, and did not give a 'harmful' advice to the plaintiff, all the more deliberately. Also, the Supreme Court took into consideration the judgment of the Supreme Court of Austria-Hungary of 1904 (Nr. 5721)**, explaining that

* *Nejvyšší soud Československé republiky*, Rozh. ze dne 4 dubna 1930, R I 98/30, Vážny (Civil Cases), Vol. 12, p.p. 485–486 [Čís. 9792].

** Number according to the Glaser-Unger collection of the Austro-Hungarian Supreme Court judgments, original citation: *K.K. Oberster Gerichtshof*, Entsch. v. 20 April 1904, Nr. 5721, EOG Ziv. S. Bd. 41 (NF Bd. 7), Nr. 2672, p.p. 250–251.

in that case, the physician's advice was 'harmful', since the defendant in the cited case knew that a depilation by means of a Roentgen therapy was not at all a 100% harmless procedure. Moreover, it was not sufficiently proven in practice, which could not be said at that time about diathermy, which was already widely used in the 1920s. Thus, the Supreme Court did not find the doctor's fault for the patient's burns, overturning the decision of the lower court, and returning it for reconsideration to the court of appeals*. In a 1927 case, defendant, a father of a son, who was suffering from a contagious disease, and transferred to a specialized infirmary without his consent, litigated against the Land Fund of Moravia, which had claimed compensation for his treatment at the infirmary. The land fund was entitled to compensation, as by the mere fact, that the patient was transferred there according to an official decision of a regional political administration, the father's obligations to care for the life, health and nutrition of the child did not cease (under Art. 139 and 141 of the Civil Code). The treatment and nutrition costs, according to the judgment, were not included into the meaning of 'isolation', and thus were required to pay by the parent; since the provincial fund paid it for defendant under Art. 1042 of the Civil Code, and thereby was entitled for a refund of the costs. At the same time, the expenses on the observation and isolation of the said minor patient were covered by the state under the acting legislation (in fact, the legislation, cited by the Court, was enacted earlier in Austria-Hungary, but remained in force in the First Czechoslovakian Republic)**.

3.2. Czech Republic (1993 – present day)

The current legislative developments of informed consent in Czech Republic are anchored in the Law No. 372/2011***, which is a general law on healthcare in the Czech Republic, providing also for the patient's rights. The issue of patient's consent to any medical interventions and medical examinations are covered by Art. 31–36 of the given law, whereas the issue of consent to medical treatment is guided by Art. 34 and 35 of the said law, the latter applying to minor patients. Under Art. 34 (1) (b) of the law, the consent of the patient to a medical intervention is considered as informed, in case the information provided to the patient corresponds with Art. 32 (1) of the law; the patient may also refuse to accept such information, which should be written to the respective medical record. A written form of informed consent is required, in case an another legal regulation than the aforementioned law requires so; informed consent to hospitalization is mandatory to be provided

* *Nejvyšší soud Československé republiky*, Rozh. ze dne 12. ledna 1926, Rv 1413/25, Vážny (Civil Cases), Vol. 8, p.p. 44–46 [Čís. 5638].

** *Nejvyšší soud Československé republiky*, Rozh. ze dne 18. ledna 1927, Rv II 707/26, Vážny (Civil Cases), Vol. 9, p.p. 98–100.

*** Zákon č. 372/2011 Sb. Zákon o zdravotních službách a podmínkách jejich poskytování (zákon o zdravotních službách).

only in written form; the patient is allowed to receive a copy of his informed consent upon his request (Art. 32 (3) of the law). The patient may withdraw his consent to a medical intervention, but it will not be effective in case the medical intervention had already begun, and its interruption may cause serious damage to the health of the patient (Art. 32 (4)). Written consent forms or forms of refusal to medical treatment are kept in the patient's medical record, and in case a patient refuses to sign such document, this document is signed by the physician and a witness. The law also provides for the patient's right to access his medical records under Art. 31–32 of the law, with an exception of legally incapable or people with limited legal capacity and minors, whose legal representatives are entitled for receiving information relating to the health condition of the person under their care (Art. 31)*. Under Art. 31 (6) of the law, in case the health condition, or nature of the patient's ailment requires so, the healthcare provider is entitled to communicate the medical information, who personally are in care for the patient, which is necessary to such care, or to protect their health. In some occasions, the information on an unfavorable diagnosis or prognosis of the state of health may be withheld from the patient to a certain extent, and a limited amount of time, in case it is reasonably concluded that its revelation may harm the patient's health, but this provision cannot be followed, if: a) such revelation is the only existing means to enable the patient take up preventive measures, or undergo treatment from a certain ailment presumably at an earlier stage of its development; b) the patient's condition constitutes a risk to his surrounding; c) the patient firmly requests precise and truthful medical information to manage is personal matters (Art. 32 (2) (a), (b), (c)**).

There had been many medical malpractice claims, brought before the Supreme Court of Czech Republic and of the lower courts, though relatively few concerned the issue of informed consent, though in some medical malpractice claims, filed because of an allegedly negligent treatment, the plaintiffs claimed, *inter alia*, that the medical intervention, which damaged their health, was done without their informed consent (i.e. without a sufficient provision of information by the doctors of the risks of surgery or other medical interventions), though these cases mainly related to malpractice and the issue of informed consent was quite secondary***, though some actions dealt both with malpractice and lack of provision of necessary medical information****. Herein, we have to clarify, that it does not mean that in case an operation is performed without the consent of the patient that it is *not* performed *de lege artis*. At the same time, the fact that an unconsented operation was performed *de lege artis* does

* Zákon č. 372/2011 Sb. Zákon o zdravotních službách a podmínkách jejich poskytování (zákon o zdravotních službách).

** *Ibid.*

*** Nejvyšší soud České republiky, Rozsudek ze dne 30.03.2017, 25 Cdo 773/2017; Nejvyšší soud České republiky, Rozsudek ze dne 14.05.2020, 25 Cdo 3118/2019.

**** Nejvyšší soud České republiky, Rozsudek ze dne 20.06.2017, 25 Cdo 5311/2016.

not mean that it is legitimate under ordinary conditions*. Only in case that the medical intervention is performed to save the patient's life, who is in an urgent condition, unconsented medical intervention is legitimate**. A failure to provide sufficient information to the patient is a civil wrong under Art. 420–421 of the Civil Code***. Moderate medical malpractice of the physicians and other medical personnel is assessed in terms of Art. 421 of the Civil Code****, whereas penal liability could incur only in cases of extremely rude negligence from the side of medical practitioners, for instance, a neglect of medical examinations which considerably damaged the health of the patient, brought his life to a serious risk, or caused the death of the patient (Art. 142, 147 and 224 of the Criminal Code)*****.

The most significant court decision relating to the nature of informed consent in Czech Republic is the 2015 judgment of the Supreme Court of Czech Republic in the case No. 25 Cdo 1381/2013. The facts of this case were the following. In 2007, the plaintiff underwent a thyroid surgery at the hospital of defendant, during which both of the reversible nerves were impaired, which caused permanent damage to patient's health, causing breath shortness and the inability to speak quickly. At the same time, the expert's conclusions indicated that the operation was not conducted negligently, no mistakes during medical treatment were committed. The court found that defendant's liability for damages lies not in negligence, but in the lack of instruction of the patient on the risk of damaging reversible nerves and a failure to inform plaintiff of alternative methods of medical treatment. According to the trial court, plaintiff had no information on all the risks and had no choice whether to undergo surgery, or other treatment (that was not offered to her). For such reasons, the trial court found for plaintiff. The court of appeals upheld the trial court decision, finding that the instruct and consent of the patient was not sufficient in relation to the possible risk of adverse consequences of thyroid and parathyroid surgery, no evidence from the side of defendant provided that it was otherwise, thus finding a causal link between defendant's breach of obligation to inform the patient on the possible adverse consequences of medical treatment, and the damage to the plaintiff's health. Defendant filed an appeal in cassation to set aside the judgments of the trial and appellate courts considering the issues

* *Nejvyšší soud České republiky*, Rozsudek ze dne 29.04.2015, 25 Cdo 1381/2013.

** *Krajský soud v Hradci Králové*, Rozsudek ze dne 29.11.2006, 25 Co 285/2006, [Výběr VKS 98/2006].

*** *Nejvyšší soud České republiky*, Rozsudek ze dne 24.05.2007, 25 Cdo 1555/2005; *Nejvyšší soud České republiky*, Rozsudek ze dne 21.02.2012, 25 Cdo 5157/2009.

**** *Nejvyšší soud České republiky*, Rozsudek ze dne 29.05.1997, 2 Cdon 961/96, *Právní rozhledy*, 10/1997, p. 531.

***** See, for instance, *Nejvyšší soud České republiky*, Usnesení ze dne 7 Tdo 219/2005, 7 Tdo 219/2005; *Nejvyšší soud České republiky*, Usnesení ze dne 03.06.2015, 3 Tdo 636/2015; *Nejvyšší soud České republiky*, Usnesení ze dne 31.01.2018, 3 Tdo 1570/2017.

of whether the evidence from the side of defendant may be held trustworthy only because of the fact that the witness had employment relationships with the defendant, and whether it could be held possible that a medical facility is liable for damages due to insufficient or not a 'full' informed consent, especially under the condition that the surgery was conducted *de lege artis*, holding that the decisions of the lower courts are incorrect both in terms of fact and law, asking to remand the case to the trial court for further proceedings.

The Supreme Court gave its conclusions on the issue of informed consent and held to remand the case to the trial court for further proceedings. The Supreme Court held that the principle of informed consent was well safeguarded both by domestic law and international law (i.e. Oviedo Convention), signed and ratified by Czech Republic in 1998 and 2001 respectively, and thus was a part of the legal system of the Czech Republic. Citing Art. 5 of the Convention on informed consent, the Supreme Court held that the given principle enshrines the protection of the autonomy of the patient's will and freedom of decision-making in the sphere of healthcare. The Supreme Court explained, that 'informed consent' is the patient's consent given in a situation in which the patient, who has been aware of, inter alia, the purpose, the nature, the risks and the alternatives of the forthcoming medical procedure, as well as the consequences of not undergoing it, decides whether to undergo it without undue influence, with sufficient time to consider and ask necessary additional questions relating to medical treatment. Thus, performing a medical procedure without the patient's informed consent, i.e. also based on consent, that was not an *informed* one in the meaning denoted by the Court, which was mentioned above, is therefore a breach of Art. 420 (1) of the Civil Code. The nature of causation, however, was disputable. It was not disputed that the damages actually were suffered by the plaintiff. In overall, held the court, a causal link as a precondition for civil liability for damage is given if an illegal act (that is, a medical procedure performed to the plaintiff without informed consent) is the causative factor of the damage to plaintiff's health, i.e. this consequence would not occur unless the medical intervention took place. What is next, held the court, is that when assessing the existence of a causal link between insufficient provision of information and damage to plaintiff's health, it is necessary to evaluate what information the patient received, or what information he should have received. Such information, upon the Court's view, must be such that even an a person possessing no specific knowledge of medicine can consider the possible risks of the procedure and decide whether or not to undergo it. Thus, the responsibility of defendant (i.e. a medical facility) in these cases occurs only if the patient manages to prove that, having knowledge of the decisive facts (on which he should have been informed), it was realistically likely that he (she) would decide otherwise, i.e. that he would not undergo the medical procedure. And in many cases, held the Court, it will be true that even if the patient had the missing information before the performance of the medical procedure, he would decide in the same way – that is, he would consent to it.

So, found the Supreme Court, it was irrelevant whether the plaintiff was actually informed of the possibility of nerve damage, but rather of the adverse consequences in terms of her daily life. At the same time, the information on the risks of a certain medical procedure is not limitless itself, as there are unlimited amounts of hypothetical risks for each medical procedure. So, upon the view of the Court, it is necessary to consider the probability of the risks of the medical procedure and the severity of the consequences for the overall health of the patient. The court of appeals did not address the said issues discussed by the Supreme Court, which we have stated above, since it did not assess the possibility of disruption of the both of reversible nerves with its adverse impact upon plaintiff and how severe such consequences could be. With regard to an incomplete assessment of the nature of the medical intervention, the Supreme Court held that the establishment of a causal link is premature, and was based upon an unjustified inference that plaintiff would not consent to the operation in case of a proper clarification of facts relating to the risks of the medical intervention. Thus, the Supreme Court set aside the judgment of the court of appeals, referring the case back to the court of first instance for further proceedings*.

3.3. Austria

The example of Austrian judicature in the field of informed consent is surprising for its unusualness, since courts delineate the concept of ‘medical negligence’ (in many jurisdictions, a medical intervention without the patient’s consent equates to negligence of the doctor), as of Art. 1299 of the Civil Code, lack of supplying the patient with reliable information about the forthcoming treatment (Art. 1311 of the Civil Code), and the implementation of medical intervention without the consent of the patient (Art. 110 of the Criminal Code). It is important to note, that the amount of information in each case may differ significantly depending on the clinical situation of the patient, and it is precisely its circumstances that are taken into account by the court when determining whether the doctor has provided sufficient information about the forthcoming treatment of the patient** It is concordant to mention that in Austrian legislation, little is given to the patient’s consent to medical intervention: its necessity is enshrined in par. 3. Art. 8 of Law on Hospitals and Sanatoriums (*Krankenanstalten- und Kuranstaltengesetz****), however the principles for obtaining consent, which would make medical intervention completely legal, are not spelled out in the law. Concerning the liability for medical faults in Austro-Hungary, see Chapter 3.1.

* *Nejvyšší soud České republiky*, Rozsudek ze dne 29.04.2015, 25 Cdo 1381/2013.

** *Oberster Gerichtshof*, Urt. v. 23.06.1982, 3Ob545 / 8.

*** BGBl. Nr. 1 / 1957 (original).

During the 20th century, the body of Austrian case law relating to patient's will to undergo medical treatment became substantial, and in a 1982 judgment, the Supreme Court issued a series of principles concerning informed consent:

1. The extent to which the physicians provide information to the patients should be primarily determined in terms of the patient's well-being and only secondarily (even though) taking into account his or her right to self-determination. So, if the operation is absolutely necessary, even if it is not urgent in the sense of the already mentioned Art. 8 Abs. 3 of the KAG, and § 110 Abs. 2 of the Criminal Code, then the doctor must weigh whether he can perform such an operation, taking into account the characteristics of the patient's personality. Excessive clarification of the peculiarities of forthcoming treatment may upset the patient and, under certain circumstances, lead to the refusal of the patient to undergo the necessary medical intervention, which in turn means that the patient will avoid the risks of surgery, but must accept the often disproportionate risks of his neglect to undergo treatment. Thus, the information should be less complete than the intervention required for the patient's health. In this context, the physician should be given some margin of appreciation.
2. In the case of a 'particularly anxious person', informing the patient can and should be limited to a minimum, so that such a patient would stay psychologically calm.
3. Therefore, according to what has been mentioned so far, the patient should not be forced to be provided with necessary medical information against his will. On the other hand, however, it is also unacceptable that the doctor can always indirectly conclude from the patient's 'missing question' that the patient does not want further clarification about the forthcoming medical intervention. This will depend on the circumstances of each particular case, to what extent, according to patient's behavior, it can be concluded that he or she is more or less interested in this or that form of such an explanation.
4. The patient can also give his consent to his doctor, expressing his confidence and directly or indirectly giving the doctor the opportunity to assess what is best for him: to dare to carry out the procedure or to refrain from it.
5. The minimum information on medical risks, which is absolutely necessary even in the case of absolutely necessary interventions and in the case of a 'particularly anxious person' or a patient who does not seek such information, should be given in such a way as not to have a disturbing psychological effect on the patient.
6. It is difficult to say unequivocally which risks of negative consequences of medical interventions are worth, and which ones should not be communicated by the doctor to his patient. It should be considered on a case-by-case basis.

7. In the course of the ever-increasing division of labor among doctors, information about the individual risks of treatment does not have to be repeated over and over again by each individual doctor, but a so-called continuous or step-by-step explanation is required. It is the responsibility of the physician performing the medical intervention to determine whether the explanation has already been followed up and to what extent by the referring therapist or other professionals invited for the preliminary examination.
8. As a rule, the physician cannot rely on the fact that the average patient is sufficiently educated, including in the field of medical science, and is obliged to possess good knowledge on the consequences of certain medical interventions without a specialist's explanation*.

So, for more than three decades, the contractual obligations of the doctor, among other things, include the need to provide information to the patient about the future of treatment, as well as its dangers and possible harmful consequences. This obligation exists not only when it is necessary to obtain the patient's consent to treatment, but also so that the patient would have the opportunity to decide independently, whether he can refrain from medical treatment or not. If the doctor understands, that certain medical interventions are necessary, he must inform the patient about their necessity, as well as about the risks of not providing necessary medical care**. Indeed, modern Austrian jurisprudence is very clear in its conclusions in cases involving unauthorized medical treatment: any medical treatment is illegal if there is no patient's consent to it. By itself, a medical intervention is a violation of patient's bodily integrity, and its performance requires the doctor to inform in advance about the type of medical intervention and its severity, as well as about the possible dangers and harmful consequences of treatment, or non-intervention, as well as about other methods of treatment. At the same time, it is rather difficult to determine the degree and the amount of information that the doctor should communicate to the patient, as it was previously mentioned in the conclusions of the Austrian Supreme Court in its 1982 judgment. It is worth agreeing with the conclusions of the Austrian Supreme Court in 1989, according to which the answer to this question '...lies in the area of contradiction between the patient's well-being, which must be guaranteed by the doctor first of all [...], and his or her [the patient's] right to self-determination'. In most of the cases, the patient lacks competence and knowledge in the medical sphere in order to evaluate the information from the doctor correctly, and hence the amount of information, that is expected to be communicated to the patient, must be assessed considering the aspects of good medical practice and experience, taking into account the circumstances of each particular case, as well as the personal characteristics of the patient***. According to the further jurisprudence of the

* *Oberster Gerichtshof*, Urt. v. 23.06.1982, 3Ob545/82.

** *Oberster Gerichtshof*, Urt. v. 25.01.1990, 7Ob 727/89.

*** *Oberster Gerichtshof*, Urt. v. 07.02.1989, 1 Ob 713/88.

Austrian Supreme Court, the obligation to inform the patient is an obligation arising from the treatment contract between the patient and the doctor (or a hospital), and thus is firmly enshrined in the contractual legal relationships in the field of healthcare*. At the same time, the courts correctly point out that it is not the responsibility of the doctor to inform the patient about hypothetically any consequences of medical treatment, as well as rare complications, which occur extremely infrequently in medical practice. However, a potential hazard of such complications, albeit such are very rare, may also in theory become necessary for communicating such information to a patient**. So, back in 1915, the Supreme Court of Austria-Hungary, dealing with a medical malpractice case which was a dispute between a woman (plaintiff) from Vienna, and the surgeon from a well-known surgical clinics in Vienna, who sued defendant after an unsuccessful operation to correct the X-shaped deformity of the knees (the physician, however, managed to improve the patient's condition of the lower extremities so she could exercise all daily activities and conduct some work, though she had bow legs instead of knock-knees, and the court found that the defendant committed no negligence, issuing a verdict in their favor), indicated that the doctor, having warned the patient about the possible dangers of the procedure, fulfilled his requirements and could not have responsibilities to inform the patient concerning all possible consequences that may exist in theory***. Thus, the Austrian case law tends to the fact, that the patient is an active participant in the legal relations between him and the physician, or a healthcare institution, who directly makes decisions about his medical treatment.

3.4. *The Latvian Republic (1918–1940) and contemporary Republic of Latvia (1991 – present day)*

In this sub-chapter, we have decided to divide it into a doctrinal (primary) and jurisprudential (sophomore) sections. The first part will deal with the general theory of the expression of the will, whereas the second will concern historical and contemporary development of the concept of informed consent in Latvian Republic.

In doctrine: informed consent in the aspects of a civil-legal deed.

According to the acting Latvian Civil Law, a legal transaction, or a deed is an act performed in an authorized manner for establishment, modification or termination of a certain legal relationship****. The Civil Law***** provides

* *Oberster Gerichtshof*, Urt. v. 03.09.1996, 19 Ob 2350/96.

** *Oberster Gerichtshof*, Urt. v. 02.07.1989, 1 Ob 713/88.

*** *K.K. Oberster Gerichtshof*, Entsch. v. 09.07.1915 – Rv I 448/15, EOG Bd. 52, S. 844, 847.

**** Latvijas Civillikums. Ceturtā daļa. Saistību tiesības. 1937. gada 28.janvārī, spēkā no 01.03.1993. «*Valdības Vēstnesis*», 46, 26.02.1937, Art. 1403.

***** *Ibid*, Art. 1404.

that a valid deed presupposes the observance of the subject, the expression of the will, its components and the form. The Latvian Supreme Court recognizes that the previously mentioned constituents are the characteristics of a deed that must exist for the legal transaction to be valid*. Thus, a transaction is an act of will, which distinguishes a deed from legal events, which are not of a will nature. At the same time, a deed is a legal fact [28, p. 264; 29, p. 34–35], but not specifically any legal act [30, p. 74]. A deed is the most widespread and concordant legal fact, which underlines the origin, transformation and termination of a civil relationship. In this context, a deed is traditionally perceived as an activity, which is aimed at establishing, transforming and terminating diverse civil rights and obligations. Within comparing a deed with an infringement of law, jurists stated that, *a legal deed is an expression of will which is stringently aimed at certain legal consequences, namely the establishment, transformation or termination of a legal relationship* [30, p. 73] Hence, a deed is a legal action that takes place in accordance with the requirements of the law. The deed determines the content of the commitment to its parties, who expressed a will to conclude the deed. When it comes to concluding a deed, we think about its important elements, namely the will itself, and the expression of the will. A mandatory precondition for concluding a transaction is the will of the parties to conclude the transaction, with the intention to achieve a specific result, i.e. there must be a free will, and the deed must reflect the actual will of the person**.

It can be concluded that the concept of a deed includes the following features:

- [1] a deed is a specific legal fact (legal action);
- [2] a deed is an act of the will which cannot be performed without the existence of awareness and will;
- [3] The deed is always subject to legal effects. This feature indicates the purpose of the transaction and distinguishes it from legal events, from the legal action, the legal consequences of which occur only when the result specified by law is achieved, regardless of where the actions of the person were directed; that this feature also distinguishes the deed from activities that do not produce a legal result;
- [4] A deed is a lawful legal act carried out in accordance with the requirements of the law. It also distinguishes the transaction from illegal activities (torts). The non-compliance of the transaction with the law makes it invalid [30, p. 74–75].

* *Latvijas Republikas Augstākās tiesas, Senāta Civillietu departamenta* 2010. gada 12. maija spriedums, Lietā Nr. SKC – 11.

** 1931. g. 20. maijā., Spr. No. 30, *Jāna Liskopa pilnv. zv. adv. V. Holemana lūgums atcelt Tiesu palātas spriedumu Lizes Vinstein mantojuma prasībā 70.000 rbl. vertībā pret Jāni Liskopu un prasītājas Lizes Vinstein pilnv. zv. adv. L. Lazdina paskaidrojums.* (L. No. 65.), 1931 Senāta CKD, p.p. 25–26.

According to Article 1412 of the Civil Law*, the subject-matter of a lawful deed may be not only an action, but also an inaction, or also an action the purpose of which is to establish or to restore a property right, as well as an action with any other purpose. As it was already mentioned in this work, a deed is an act of will, which also allows distinguishing a deed from a legal event, which is objective rather than willful. It is undeniable that a willingness to conclude a deed requires a will, so a will to do so. In defining a deed, the will has a subjective moment in the concept of action, and it is understood as a desire, an internal motivation, a motive, acquiring a legal meaning only in the presence of an objective moment, namely, expressing it. The expression of the will is the most important part of the transaction, which makes it possible to distinguish it from the event, that is, from the circumstances, which have arisen independently of the will of the person [30, p. 74–75].

The legal literature discusses the importance of will and expression of will in concluding deeds. Determining which act is more important, the will or its expression, a sequential question raises, namely: what is more decisive, the will or the expression of the will? Three groups of legal scholars could be indicated** upon the given issue:

- [1] the ones, who believe, that in all cases where a dispute arises, the will is recognized when it can be identified and distinguished, but its genuine meaning may be determined later. It is a theory of the will, with the main idea that in the event of a dispute, the will must be taken into account. This theory is reflected in the Civil Law, i.e. when translating a deed, the meaning of the words used in the transaction must be considered, and if they are not ambiguous, they must be strictly observed, unless they prove that they do not agree with the will of the participants***. If there is any doubt as to the meaning of the words, their meaning and the intention express or otherwise expressed by the parties to the deed must be observed****;
- [2] those, who consider that it is necessary to be guided by an expression of will, thinking that if the will has not been expressed in the necessary way, its content cannot be judged. It is a theory of the expression of the will;
- [3] those, who support correspondence between the expression and the will. The authors of the given opinion group itself concluded that where there is a difference between the expression of will and the will itself,

* *Civillikums*. Ceturtā daļa. Saistību tiesības. 1937. gada 28.janvārī, spēkā no 01.03.1993. 'Valdības Vēstnesis' 46, 26.02.1937.

** *Ibid*, p. 76.

*** *Civillikums*. Ceturtā daļa. Saistību tiesības. 1937. gada 28.janvārī, spēkā N° 01.03.1993. «Valdības Vēstnesis» 46, 26.02.1937, Art. 1504.

**** *Ibid*, Art. 1505.

the will is determined and the deed can be described as having taken place, the actual will is prevailing, not an expression of will*.

In conclusion, according to the authors, the *deed is based on will*. The will is what constitutes the deed, and when the will exists, the deed is recognized as an act of expression of the will, and is hereinafter valid. As already mentioned, one of the signs of a transaction is the will to go. Determining the cause of a deed and determining free will must undoubtedly be linked to the will. This is frequently done, when a deed is declared invalid: in this case, the will does not exist at all, so the deed is closed only in appearance, with no intention of creating legal effects corresponding to the deed. And otherwise, the real will of the deed may be hidden behind a fiction, i.e. the deed was concluded with the aim of hiding another deed. Such occasions are regulated by the Civil Law, i.e. when a deed is seriously desired, *when the deed is made with serious intent, but is concealed by another deed, then the former deed shall be in effect, unless there has been an intention to deceive a third person thereby or to do something illegal in general; but the latter deed, entered into for appearances only, shall remain in effect only insofar as deemed necessary in order to maintain the former in effect***.

It cannot be denied, that the obligation of a sick person to conclude a deed and to give consent to medical manipulations is not influenced by a will as such, but by a dead-end situation: if he does not give consent, the patient will not receive maternity care unless providing informed consent, the same applies to a patient who needs to be treated from an oncological ailment. The patient does not desire to get morbid, and, of course, would not desire to suffer from pain, that he frequently has to suffer during the treatment process in order to achieve a result, namely to be cured. The question arises: is there a different way out and is the deed concluded freely by the patient, with a free will, or for the sake of necessity? The theory of the will is based on the question «*what do I want?*», whereas the theory of the expression of the will can be expressed in the thesis «*what have I done?*» thinking that the reason for doing is the will itself. This clause justifies the existence of the following presumption: an expression of intent is in accordance with the will and the deed will be declared invalid in this respect only if the contractors prove, that in certain cases there was no will at all, the form of the will was wrong, or unintentional***. Informed consent is certainly not an offer to a patient by a medical practitioner to enter into a covenant for the provision of healthcare, that is to say, an offer, which

* *Civillikums*. Ceturtā daļa. Saistību tiesības. 1937. gada 28.janvārī, spēkā N° 01.03.1993.' «Valdības Vēstnesis» 46, 26.02.1937, Art. 1505.

** *Ibid*, At. 1439.

*** 1931. g. 20. maijā., Spr. No. 30, *Jāna Liskopa pilnv. zv. adv. V. Holemana lūgums atcelt Tiesu palātas spriedumu Lizes Vinstein mantojuma prasībā 70.000 rbl. vertībā pret Jāni Liskopu un prasītājas Lizes Vinstein pilnv. zv. adv. L. Lazdina paskaidrojums*. (L. No. 65.), 1931 Senata CKD, p.p. 25–26.

contains the essential ingredients* and reflects the offerer's intention to enter into a covenant [31, p. 93]. The referent in this case is a medical practitioner, who does not offer to conclude the deed, because the text of the informed consent does not contain relevant characteristics, attributed to deeds. Thus, the idea of informed consent is to obtain the patient's consent to medical treatment (including examinations, specific medical interventions, analyses), i.e. to confirm the patient's understanding of what medical interventions were proposed, and what medical interventions are going to occur. The principle of obtaining the patient's free and informed consent is ensured in Art. 5 (6) and 6 (1), (2), (3), (4) of the Latvian Republic's Patient's Rights Law** of 2009. The doctor's failure to obtain the patient's free and informed consent constitutes a professional misconduct, i.e. malpractice, and is actionable***. When assessing the compliance of informed consent with the elements of a legal transaction, it is necessary to return to the norm of the Civil Law, namely, Article 1412, which stipulates that the object of a legal transaction may be an act of refusal, (...) as well as an act with another purpose****. However, contracts for something impossible are not valid*****.

It should not be forgotten, that the provision of medical treatment frequently ends sooner than the result of it occurs, and the time gap may be large. The result of medical treatment may occur partially or not at all (due to the nature of the patient's health condition, for example). Medical treatment can be judged from the legal point of view by how professionally it is performed, but not by the occurrence of result. In fact, this principle is well-known since the early days of French medical law, when the Court of Metz in its 1867 judgment held, that the courts should not interfere into the methods of medical treatment applied by the medical practitioners, but they may give assessment of whether the medical treatment was administered *de lege artis* upon the existing evidence, and deduce whether the doctor committed any malpractice, or he was prudent and thus was not in fault; the mere fact that the treatment was unsuccessful would not make the medical practitioner liable *per se******. The same principle could be found in the early jurisprudence of the Belgian courts as well*****.

* Civillikums. Ceturtā daļa. Saistību tiesības. 1937. gada 28.janvārī, spēkā no 01.03.1993. «Valdības Vēstnesis» 46, 26.02.1937, Art. 1470.

** *Pacientu tiesību likums*, Latvijas Vēstnesis, 205, 30.12.2009, Art. 5 (6); 6 (1)–(4).

*** A. pret AS «EZRA-SK Rīgas slimnīca “BIKUR HOLIM”», *Latvijas Republikas Augstākās tiesas*, Senāta Administratīvo lietu departamenta 2020.gada 24 marta spriedums, Lieta Nr. A420172018, SKA-790/2020, para. 12.

**** Civillikums. Ceturtā daļa. Saistību tiesības. 1937. gada 28.janvārī, spēkā no 01.03.1993. «Valdības Vēstnesis», 46, 26.02.1937., Art. 1412.

***** *Ibid*, Art. 1543.

***** *Richert c. Lævenbruck*, Cour de Metz (appel), 21 mai 1867, Recueil Sirey 1868 II p. 106, 107.

***** *Vrience c. Van Hoeter*, Cour d'Appel de Bruxelles, 2 decembre 1865, Pas. 1866 II 175, Belgique Judiciaire 1866.643.

In modern French law, the courts hold, that doctors have the «*obligation of means*», i.e. the obligation to provide medical treatment, but not an «*obligation of result*»*. This indicates an inability to predict the outcome of the deed, which underlines the fact that contracts or deeds for ‘something impossible’ are not valid. As is already known from practical experience, and even making a logical conclusion from Section 4 (3) of the Patients’ Rights Law, which stipulates that a patient has the right to information about the results of treatment, unforeseen outcome and its reasons, and therefore, informed consent is not a «covenant», because even assuming that it is intended to establish a civil relationship between a patient and a medical practitioner, it is not possible to conclude a transaction on the possible unpredictable outcome of the transaction. A legal deed is an act of the will of legal entities, the basic element of each deed within the meaning of Article 1427 of the Civil Law is a statement of will, that is, a private expression of will aimed at certain legal consequences, but as long as the will is not expressed, it thereby has no legal force**. The expression of the will of the transferee belongs to the essence of a legal deed***.

In conclusion, if the physician and patient cannot accurately predict the outcome of the medical treatment, then the purpose of informed consent is only to show that the patient allows him to intervene, not to prove that the patient comprehends the material facts about the situation and its development, since as it was already mentioned, the patient is usually not a medical professional****. The fact that treatment is permissible if the patient has given informed consent***** and that the patient’s feelings (fear, pain) do not indicate the patient’s free expression of will, but the imperative norm of normative act, which leads and uses the patient’s impasse. Informed consent is, in its own

* *Cour de Cassation*, 1re civ., 9 oct. 1985, n° 83-16.984, Bull. 1985 I N° 253 p. 226.

** *Latvijas Republikas Augstākās tiesas*, Senāta Civillietu departamenta 2010. gada 12.maija spriedums, Lietā Nr. SKC – 11, *Latvijas Republikas Augstākās tiesas*, Senāta Civillietu departamenta 2012.gada 25.janvāra spriedums, Lietā Nr. SKC – 11/2012.

*** *Latvijas Republikas Augstākās tiesas*, Senāta Civillietu departamenta 2011. gada 12.janvāra spriedums, Lietā Nr. SKC-7/2011.

**** We may presume that courts would usually treat the patient as a layperson in medicine, despite such presumption is not always correct, as outlined in the 1982 judgment by the Federal Supreme Court of Germany relating to patient’s right to access to medical records: *Bundesgerichtshof*, 23.11.1982; VI ZR 222/79, para. 17–27; 30. A year before, the Cologne Court of Appeals held, that even if the patient is a layperson and may not comprehend medical records, nothing would preclude him from employing legal and medical advisors to interpret them, *OLG Köln*, 12.11.1981, 7U 96/81, para. 24–25.

***** *Pacientu tiesību likums*, Latvijas Vēstnesis, 205, 30.12.2009, Art. 1 (2) (1) holds: «*a medical practitioner who heads the medical treatment of a patient, takes decisions related to the medical treatment of the patient and has overall responsibility for all the justification, purposefulness, continuity, quality and results of the medical treatment of the patient*».

sense, the authorization given to a medical practitioner to provide a treatment (or any medical interventions), but it is *not* a contract for healthcare services, as these documents have different legal nature and justification: if the former gives the medical practitioner a 'green light' to conduct necessary medical interventions, the latter one regulates a more 'financial' side of the healthcare services, apparently defining rights and obligations of the contractors. In fact, a contract, in the broadest sense of the term, is any agreement between legally capable people, which is concluded to establish, modify or terminate a certain legal relationship. A contract in the narrower sense is an agreement between several persons based upon an agreement, the purpose of which is to establish the 'law of obligations'*. «Informed consent» does not meet this definition due to the fact, that it contains only *one* person, namely the patient. Informed consent is not a *contract* within the meaning of the Latvian Civil Code, as it states that the essence of each commitment agreement is the promise of one party, and its acceptance by the other (i.e. unilateral agreement, deed), or the mutual promise and its acceptance by both parties (bilateral or multilateral agreement)**. A contract is a relationship of the will of a person, i.e. an agreement. It consists of a promise made by at least one party and accepted by the other party in respect of an activity having a property value. If the promise (assumption of obligation) is on a single party only, then the contract is called 'unilateral', but if a contract consists of mutual promises (and their acceptance), then the contract is called bilateral or multilateral. From the point of view of the classification of transactions, the covenant itself cannot be unilateral it requires the expression of the will of two or more persons [31, p. 81]. Assuming that the patient has a free will, i.e. the will not to give informed consent, which is not affected by the circumstances and the ailment, it can be assumed that informed consent is a unilateral deed, as the expression of the will of one subject is sufficient to produce certain legal consequences. A unilateral deed does not require the consent or other expression of the will of another person [31, p. 19]. A unilateral transaction usually establishes the rights and obligations of the person who concluded the deed, the rights and obligations of third parties arise, if it is specifically provided by law or the deed itself. In case of informed consent, the right of third parties to perform medical treatment, or medical interventions, in accordance with the law, occurs after signing of the patient's informed consent form.

The types of unilateral transactions are the following:

- [1] deeds establishing a right (will, power of attorney);
- [2] deeds that transform rights (fulfillment of obligations, acceptance of debt);
- [3] deeds terminating a right (set-off, waiver of a right).

* Civillikums. Ceturtā daļa. Saistību tiesības. 1937. gada 28.janvārī, spēkā no 01.03.1993. «Valdības Vēstnesis» 46, 26.02.1937, Art. 1511.

** *Ibid*, Art. 1512.

Unilateral deeds are also the ones that require and simultaneously do not require the perception of an expression of the will. Thus, a deed that requires the perception of an expression of will takes effect after it has become known to the other party, so most unilateral deeds require the perception of an expression of will. Before assessing the existence of the patient's will within giving informed consent, we may assume that that informed consent is a fiduciary deed (*fiducia*). Fiduciary deeds are specific, because of one feature that determines the legal nature of the deed, namely, is that they have the characteristics of a fiduciary relationship. A fiduciary deed is, for example (but not limited to) a power of attorney, an order, a maintenance contract with a supply, banking trust transactions. Loss of trust, i.e. termination of relationship of trust, may lead to termination of the deed. A fiduciary deed is, for example, a power of attorney, an order, a maintenance contract with a supply [28, p. 85]. Given health care services involve, for example, operations whose outcome is not always predictable, informed consent is an aleatory ('gambling') deed, i.e. a risky transaction ('lottery, betting'). The said deed is based on reciprocal risk, and the outcome depends on the occurrence or the non-occurrence of an accident and also on the ability of the participants [29, p. 477], so that execution depends on circumstances unknown to the parties at the time of the transaction.

The legal nature of the patient-physician relationships is contractual, as it has been established by the Belgian jurisprudence of the mid-20th century*, though it was not an uncommon practice far earlier: for instance, in England** and France contracts between the patients and physicians or the healthcare institutions***. In Canada, in the 1964 judgment of *Beausoleil*, Justice Badaux in his dissenting opinion opted for the following obligations arising from the contract of the patient and the physician:

- [1] to inform the patient;
- [2] to maintain professional secrecy;
- [3] to give care;
- [4] to give competent, attentive and conscientious care****.

In jurisprudence

In Latvian law, the issue of the patient's will has arisen for a long time. Indeed, in the early-to-mid 1930s, the authors K.V. (1932) and Jākobsons

* *Epx De Busschere c/ Docteur X.*, Trib. civ. De Bruxelles, 6 fevr. 1946, Revue Générale des Assurances et des Responsabilités (1946), No. 4104.

** *Dent v. Bennett*, (1839) 4 Mylne & Craig, p. 269, 271–272; 274–276; 41 Eng. Rep., Vol. 41, p.p. 105, at 106–107.

*** *Beltzer c. Hospices de la ville d'Auxonne*, Cour d'Appel Dijon, 18 mars 1903, Sirey 1906 II p. 17, 17–18.

**** *Beausoleil v. la Communauté des Soeurs de la Charite de la Providence et al.*, original citation: 53 D.L.R. 2d 65, extended citation: Dominion Law Reports (Canada), 2nd Ser., Vol. 53 (1964), p.p. 65–86 (p. 85).

(1936) devoted their works to the issue of the legitimacy of treating a patient without his consent, agreeing that at least in operations that pose a threat to life, this is in any case necessary [32]. At the same time, Jākobsons (1936) borrowed his findings solely from the legislation and case-law of foreign countries [33, p. 5–10]. Art. 218 of the Criminal Code of 1933 introduced the penal responsibility of a doctor for treating a patient without his consent. According to Jākobsons, this article was modeled on the basis of Art. 57 of the Transitional Law of the First Czechoslovakian Republic of 1926*. What is interesting, the Supreme Court of First Czechoslovakian Republic, according to the collections of Frantisek Vážný, hardly ever came across cases related to unauthorized surgical intervention at all, although this court considered many cases related to the medical malpractice. The only applicable judgments concerned the issue of the legitimacy of doctor's guarantee of diathermic treatment safety**, which we have discussed above, as well as a dispute relating to the reimbursement of treatment costs for a minor, who was suffering from a contagious disease, and was transferred to an infirmary without parental consent upon the decision of a local administration***. In the decision of the Civil Cassational Division of the Latvian Senate (No. 10/37) in the case of *Václav Gržibovski v. City of Riga* (1937), where a resident of Riga sued the city for failure to provide him medical assistance after a leg injury in a road accident (his non-admission to the hospital with an apparent delay in treatment resulted in the loss of a limb – he sued for 14,097 LVL for a loss of 75% of his working capacity, a large sum of money in 1930s Latvia), the appeal in cassation had mentioned the fact that plaintiff initially did not consent to the amputation of a portion of the lower extremity, after he was finally admitted to the hospital. The Senate, however, noted that this fact did not matter, since the Riga Chamber of Justice**** established that the gangrene of the leg did not develop due to the plaintiff's unwillingness to agree to amputation of the limb (at that time, however, only the foot was meant to be amputated), but it had developed soon after the injury, and was caused by an obvious delay in the medical treatment. The plaintiff won the case against the city, despite not prevailing in action over all the other defendants (the doctors and Latvian University, which governed the hospitals*****). Liability of physicians was

* *Beausoleil v. la Communauté des Soeurs de la Charité de la Providence et al.*, original citation: 53 D.L.R. 2d 65, extended citation: Dominion Law Reports (Canada), 2nd Ser., Vol. 53 (1964), p.p. 7–10.

** *Nejvyšší soud Československé republiky*, Rozh. ze dne 12. ledna 1926, Rv 1413/25, Vážný (Civil Cases). Vol. 8, p.p. 44–46 [Čís. 5638].

*** *Nejvyšší soud Československé republiky*, Rozh. ze dne 18. ledna 1927, Rv II 707/26, Vážný (Civil Cases), Vol. 9, p.p. 98–100 [Čís. 6707].

**** A Chamber of Justice (Lat. *Tiesu Palata*) was the name of the court of appeals during the First Independence of Latvia (1918–1940).

***** *Prasītāja Vaclava Gržibovska un atbildētājas Rīgas pilsētas pilnvarnieku, zv. adv. J. Kuzis un J. Volkova, kasācijas sūdzības par Tiesu palātas 22.02.1937.*

based upon Art. 219 of the Criminal Code in 1933–1940 (Art. 497 in 1918–1933), and in fact was a misdemeanor, usually tolling to a fine; the aggrieved party usually joined the proceedings as a civil plaintiff. This provision covered all types of faults that could be committed by doctors. The plaintiffs frequently failed in their action being unable to prove the fault of the doctors, and the malpractice they claimed was, for instance an allegedly wrong prescription of glasses, which caused worsening of the eyesight*, negligent treatment of a wound**, a clumsy extraction of the tooth with a failure to meet even elementary precautions of a dental surgeon***, negligent filling of a tooth****, an allegedly negligent child delivery*****, not providing medical assistance to a woman after labor*****, as well as many other cases, heard before the justices of peace and district courts.

The First Senate repeatedly dealt with the issues of the will of the patient (for example, seriously ill, or mentally ill patient), such as formalizing deeds, concluding contracts or committing other acts carrying legal consequences. For example, in the case of *Lacis* (1936), the Senate refused to recognize the right of a guardian to file an action for divorce on behalf of a mentally ill woman, arguing that there are personal rights that cannot be exercised through legal representation, to which, respectively, the right of one of the spouses to file for divorce lawsuit also applies (Case no. CKD 72/36 in the official issue of the Senate's 1936 judgments)*****. In the cases No. CKD 7/38 and 90/38 (1938),

spriedumu Vacslava Gržibovska prasībā pret Rīgas pilsētu v. c. summā Ls 14.097. Latvijas Senāta Civilā Kasācijas Departamenta, 25. novembris 1937. 16 decembris, 1937., Spr. N. 10. Pašvaldības Balss, Nr. 7 (01.07.1939); Pašvaldību Darbinieks, Nr. 4 (01.04.1939).

* *Hermana Martinsons sūdzību pret ārstu Bertu Civiani, Sodū Lik. 219 p.*, Rīgas pilsetas 2 iecirkņa miertiesnesis, 1935 g. 28. Junijs, Lieta Nr. 152, Iec. Prok. Biedr. Reg. Nr. 277/33.

** *Ermana Kurta sudzību pret ārstu Viktoru Cilinski, Sodū lik. 219 p. un 447 p. II. d.*, Rīga Apgabaltiesa, Valmiera Apr. 1 iec. Izm. Tiesnesis, 1934 g. 16. jūlijs, Izmekšanas tiesnesa registra Lieta Nr. 89, Iec. prok. bied. reg. 3035/34.

*** *Ziberg pret Dr. Adamson*, Rīga Apgabaltiesa (Kriminalnodala), 1929 g. 31. maijs, Lieta Nr. 135.

**** *Vulfa Traub-Bina blakus sūdzību par Rīgas Apgabaltiesas Prokurora atteikšanos uzsākt criminal vajušanu pret Rīgas Centrālcietuma zobārsti O. Bertuls-Ziemels*, Rīga Tiesu Palata, 1931 g. 11. novembris, original number unknown. Preserved in LVVA, f. 1537 (9), Lieta Nr. 999.

***** *Zuzannas Aunins apsudzību Sodū lik. 219. p.*, Rīga Apgabaltiesa, Valmiera Apr. 2 iec. Izm. Tiesnesis, 1934 g. 31. augusta, Lieta Nr. 204, pec. iec. prok. reg. 267/34, Prok. Reg. no. 3806/1934.

***** *Artura Meija lieta*, Rīga Apgabaltiesa (I Kriminalnodala), 1925 g. 13. februāris, Lieta Nr. 49, pec prok. reg. 322/26.

***** 1936 g. 10. jūnijs, Spr. Nr. 72, *Atbildētāja Žaņa-Jēkaba Lāča pilnvarnieku zv. adv. A. Hāmaņa un zv. adv. N. Kronberga kasācijas sūdzība par Tiesu palātas*

the Senate dealt with the issue of impugning the validity of a testament – in the first case, the patient, who drew it up died in a psychiatric hospital (CKD No. 7/38)*, in the second, the patient made an oral will staying at a hospital a month before death (CKD No. 90/38)**. As the Senate noted in these judgments, the issue of the patient's legal capacity belongs to the factual part of the case, and, accordingly, is not subject to review in cassational order (Article 15 of the Law on the Judiciary)***. If there were significant inaccuracies in the arguments of the court of appeal, the Senate sent the case for reconsideration to the court of appeal (for example, in cases on charges of doctors for performing abortions, conflicting conclusions of experts often appeared, or the court could not determine for certain whether the fetus was alive at the time of the abortions, were there any contraindications to pregnancy, etc., but nevertheless issued a verdict on the punishment of a doctor, the Senate overturned such a decision – as it was in the cases KKD No. 537/26 (1926) in the *Londenberga* case, and KKD No. 124/28 (1928) in the *Sternbergs* case****. Therefore, if the court of appeal has reliably established that the patient was legally competent at the time of drawing up the will, then this fact was no longer subject to review. Accordingly, the fact of the patient's legal capacity, who showed the will to carry out certain deeds, was established by the courts with the help of evidence (in particular, expert witnesses, i.e. physicians), as well as conducting a forensic-psychiatric examination.

The necessity of patient's informed consent before any medical interventions is provided in Art. 6 of the Patient's Rights Law. It is not obligatory to submit an informed consent in writing, but in case a patient requests it, it may be submitted; in case it is provided in writing, the consent form shall contain the patient's signature, indicating the date and time, and the consent form must be attached to the patient's medical record (Art. 6 (2)–(3)) of the Patient's Rights

29.05.1935. spriedumu Anetes-Otilijas Lācis prasībā pret Žani-Jēkabu Lāci šķirt laulību (L. Nr. 1234). 1936 Senata CKD, p.p. 64–65.

* 1938 g. 27 janvāris, Spr. Nr. 7, *Prasītājas Annas Daraškevičs kasācijas sūdzība par Tiesu palātas 24.02.1937. spriedumu Annas Andreja m. Daraškevičs (Doroškevičs) prasībā pret Antonu Antona d. un Jāni Miķeļad. Daraškevičiem un mir. Konstantina Miķeļa d. Doroškeviča (Daraškeviča) m. m. viņas aiz- gādņības personā par mir. Konstantina Miķeļa d. Doroškeviča (Daraškeviča) privāttestamenta anulēšanu* (L. No 63.), 1938 Senata CKD p.p. 11–12.

** 1938 g. 24. Novembris, Spr. Nr. 90, *Atbildētāja Adama Bergmaņa pilnv. zv. adv. J. A. Kalniņa kasācijas sūdzība par Tiesu palātas 28.03.1938. spriedumu Aleksandra Stendera prasībā pret Adamu Bergmani par Ls 1010,00 un prasītāja Aleksandra Stendera pilnvarnieka zv. adv. A. Rotberga paskaidrojums* (L. Nr. 987). 1938 Senata CKD, p.p. 90–91.

*** *Tiesu likums*, Art. 15.

**** 1926 g. 28 sept. spr. *Londenberga* l. Nr. 537; 1928 g. 30 marta. *Sternbergs* l. Spr. No 124, Latvijas Senata Kriminālā Kasācijas Departamenta spriedumu tezu pilnīgs kopoījums, no. 1919 g. līdz. 1928 g. 31 decembrim (1928) // F. Kamradziuss, p.p. 306–311.

Law). The same provision guarantees a right of the patient to refuse medical treatment in three different ways:

- [1] to refuse in general, before the beginning of the treatment;
- [2] to refuse a method of treatment, but not medical treatment in general;
- [3] to refuse medical treatment during its provision (Art. 6 (4) of the Patient's Rights Law).

In such situation, the doctors have an obligation to inform the patient regarding the negative consequences of such refusal, which has to be certified by the patient's signature; in case the patient withstands from signing the refusal, two adult and legally capable witnesses have to certify the patient's refusal of medical treatment by their signatures (Art. 6 (6) of the Patient's Rights Law). In case the patient is unable to make decisions regarding his medical treatment, this should be done by the immediate family members or legal representatives; in case the persons mentioned hereinabove cannot reach to a conclusion concerning consenting to medical treatment, such decisions may be made by medical councils (Art. 7(2)–7(3) of the Patient's Rights Law). In emergency cases, when non-administering medical assistance and care, and when it is impossible to obtain the patient's consent the physicians may act upon their duties, providing all necessary examinations, medical and surgical interventions etc. without the consent of the patient in order to save the life of the patient. In case during a medical treatment procedure the physician judges that an unplanned medical intervention is necessary, and its non-performance may endanger the patient's life, he is entitled to perform the necessary medical interventions and procedures without the consent of the patient (Art. 7 (8)–(9) of the Patient's Rights Law).

In modern Latvia, the concept of the patient's autonomy and expression of the will has been touched upon by the Senate (i.e. by the court of cassation) at least twice (at least by 2021). Thus, in the case SKC-216/2013, which dealt with the legitimacy of placing a person in a psychiatric clinic without the patient's consent, the Senate noted the following:

- [1] treatment is legitimate with the consent of the patient, except for involuntary treatment, that is, where there is an imperative nature (i.e. in cases with a psychiatric patient – most often, upon a court order) of such treatment;
- [2] the patient's consent depends on:
 - a) the patient's ability to express his will;
 - b) the patient's awareness of the facts related to the future medical treatment;
 - c) a voluntary decision of the patient;
- [3] in itself, the patient's consent is also not an actual condition for providing the desired medical treatment (that is, when it cannot be carried out only at the patient's subjective request)*.

* *G.D. pret Valsts sabiedrību ar ierobežotu atbildību «Strenču psihoneiroloģiskās slimnīcā», Latvijas Republikas Augstākās tiesas, Senāta Civillietu departamenta, 2013.gada 18. oktobra, Lieta Nr. 216/2013, para. 8.5 (p. 11).*

In the case SKA-790/2020, the Senate also reaffirmed this principle, arguing that the patient's will to undergo surgery, impacted by his own desire, is not sufficient to form his «informed» consent. That is, if the doctor ignores his obligation to inform the patient about contraindications to this intervention based on the patient's mere desire to undergo this operation, he commits a professional misconduct*.

4. Conclusions

Having approached the corollary of the article, the authors highlight a further necessity of researching medical jurisprudence of the jurisdictions of Eastern Europe, whose emergence and development of medical law has very sophisticated roots, which lie in the predecessor jurisdictions. Modern Austrian law in terms of informed consent has remained its historical roots and developed a brand new body of case law in relation to the principles of the physician's duty to inform the patient in respect with the forthcoming medical interventions, though the positive law part remains relatively little. In turn, the law of Czech Republic is far more detailed in terms of the obligation of healthcare practitioners to inform the patients on their state of health and requires complying with a robust set of legislative norms, set out in Articles 31–34 of the 2011 Healthcare Services Law (No. 372/2011). The current medical law of Czech Republic has moved aside from old Czechoslovakian law, being impacted by EU legislation as well as international jurisprudence. The medical jurisprudence of the Republic of Latvia in relation with patient's self-determination is under development, and not much legal precedents have occurred in Latvian courts on the given subject, despite their amount has increased over the late 2010s, peaking by the Senate's ruling in the case of SKA-790/2020, created a valuable legal precedent on informed consent. The historical jurisprudence of Latvia (1918–1940) has created a number of outstanding cases on medical malpractice, though the problem of the patient's expression of will was nearly untouched apart of few cases. However, the Senate dealt with a number of cases, which considered the problem of the expression of the will by legally incapable, or allegedly legally incapable people, including those, who wrote their testaments being maintained in hospitals. In one judgment, namely CKD 72/36, the Senate ruled that a right to file a divorce action might not be exercised by the patient's guardian, as there may be rights, which are non-transferrable**.

The authors have come up with a multitude of original legal material relating to the history of informed consent, primarily in the doctrine of

* A. pret AS «EZRA-SK Rīgas slimnīca “BIKUR HOLIM”», *Latvijas Republikas Augstākās tiesas*, Senāta Administratīvo lietu departamenta 2020.gada 24.marta, Lieta Nr. A420172018, SKA-790/2020, para. 12–13.

** 1936 g. 10. jūnijs, Spr. Nr. 72, *Atbildētāja Žaņa-Jēkaba Lāča pilnvarnieku zv. adv. A. Hāmaņa un zv. adv. N. Kronberga kasācijas sūdzība par Tiesu palātas 29.05.1935. spriedumu Anetes-Otilijas Lācis prasībā pret Žani-Jēkabu Lāci šķirt laulību* (L. Nr. 1234). 1936 Senata CKD, p.p. 64–65.

Continental law. The mutual effort of the authors was fulfilled in the given article, as several previously underinvestigated issues were covered, for instance, the development and peculiarities of medical liability in the First Czechoslovakian Republic as well as Austro-Hungary and the generalized theoretical concept of informed consent as a civil-legal deed in Latvian law. The authors denote that a compound research on medical malpractice law in the two previously mentioned historical jurisdictions has not been conducted before, and such material is especially valuable for tracing the roots of medical law in Central and Eastern Europe. What is more, our discovery of historical jurisprudence approves the fact that Continental law possesses its own development of medical law (including the concept of the patient's free expression of the will), which is not interconnected or influenced by common law jurisdictions. For instance, authors have established the roots of informed consent originating from France, including the term «*consentement libre et éclairé*», which is much older than its American analogue, and this judgment (as of the case notes and the court report) was not influenced by common law court decisions, but by French jurisprudence and doctrine*. The authors have also traced the roots of the legal concepts of the terms 'medical paternalism', 'patient's dignity' and 'patient's autonomy', shaping them in legal boundaries: as it was held in the introductory chapter, it is complicated to define these terms from a legal point of view. In conclusion, we would like to state, that the developments of medical law in Central and Eastern Europe deserves more attention from the academic scholarship, as many aspects of Continental medical law remain undiscovered.

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**Доктрина інформованої згоди пацієнта в законодавстві
та юриспруденції Чеської Республіки, Австрії
та Латвійської Республіки**

Висвітлено історію виникнення, розвиток і сучасний стан правової доктрини інформованої згоди пацієнта на медичні втручання в Чехії, Австрії і Латвійській Республіці. Автори акцентують увагу на розвитку доктрини обов'язку лікаря утримуватися від будь-яких медичних втручань без згоди або проти волі пацієнта, оскільки волевиявлення пацієнта є центральним елементом його права на самовизначення.

Аналізуючи основні ознаки інституту інформованої згоди пацієнта в цивільно-правовій доктрині, автори доходять висновку про зв'язок цього інституту з правом на фізичну недоторканність та обмеженнями у провадженні медичної практики лікарями, а також, що цивільно-правовий інститут інформованої згоди в континентальному праві відрізняється від його аналога в англо-американському деліктному праві, зокрема цивільно-правовою відповідальністю за лікарську недбалість та, деякою мірою, кримінально-правовою відповідальністю за заподіяння тілесних ушкоджень, до якого прирівнюється проведення операції чи будь-якого іншого медичного втручання без згоди пацієнта. Судова практика Австрії, Чехії та Латвії стосовно питань інформованої згоди пацієнта та медичної недбалості є достатньо об'ємною, хоч і не має такої тривалої історії, як відповідна медична юриспруденція Франції чи Бельгії.

Ключові слова: медичне право, інформована згода, права пацієнта, автономія пацієнта, цивільне право.

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