

CONCEPTUAL ANALYSIS OF CAUSATION IN LEGAL DISCOURSE

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Abstract:

This article deals with the conception of causation in legal discourse. Authors firstly examine causation in the scientific, philosophical and common-sense discourse. Does it make sense to use general causal terms when examining causality in law? We can ask whether legal causality isn't only artificial construct, legal fiction of a causal relationship. Some authors claim that legal causation is not essentially a causation in the true common sense and thus only a pragmatic political decision regarding the application of distributive and corrective justice, and economic evaluation of benefits in society, others on the contrary point out that causality in law as such is equal to its common everyday use or even in the scientific sense. What are the criteria in the legal sense that lead us to judge that certain event causes harm? Which issues relevant to philosophical discourse may be in legal discourse ignored as irrelevant? The authors show the necessary connection between terms causality in different branches although they conclude that causality is pluralistic concept. The issue of this article is to find out solution for causal connection in particular paradigmatic cases and set up some causal formulas that could be used in legal practice.

Key Words: causation, tort law, legal liability

Introduction:

This article¹ deals with the concept of causation in legal discourse. Out of this reason, it first deals with the concept of causation on the level of science, philosophy and in a commonly used language. When exploring problems of legal and moral responsibility, it is necessary to cope with the problems of the sense of causation, causal nexus, a cause and effect. Subsequently, there is a number of questions to be explored in detail. Is the causation in a legal

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sense distinguished from the causation in science, everyday life, or is it understood in its metaphysical sense? Does the terminological accord in the term of causation have its substantiation?² Does it make sense to come out of some theories on general causation, when exploring the legal causation? Isn't the legal causation only an artificial construct, which eventually under certain conditions accepts fiction of causal relation that is a basis for accepting legal responsibility? In this case, spectrums of opinions differ, while some authors claim that in principle the legal causation does not mean the causation in a proper sense of the word and therefore it only concerns pragmatic political decision-making on assertion of distributive and corrective justice³, or efficient allocation of resources in society⁴, others hold, to the contrary, that causation as such has, even in law, its substantiation in the common use of this word, i.e. in the „*common sense*“⁵ or even directly in the scientific sense⁶. Thus, what criteria in the legal sense of the word lead us to being able to say that from the legal perspective, an action, or event is a cause of harm? What questions relevant for the

² Michael S. Moore, a modern theorist of causation, points out in the introduction to his ground breaking book *Causation and Responsibility* that it is necessary to review this semantic accord also as to its contents. „*It is of course possible that although the law uses the word 'cause', it does not refer to causal relation. It is possible, in other words, that what doctrines call causation has nothing to do with causation as a relation in the world.*“ MOORE, M. S. *Causation and responsibility: an essay in law, morals, and metaphysics*. New York: Oxford University Press, 2009, xxvi, p. 3.

³ Compare, e.g. the criticism of normative causation in the publication GREEN, L., *The Causal Relation Issue in Negligence Law*. *Michigan Law Review*, vol. 60, no. 5, 1962, pp. 543-576, or the article of Wex Malone: MALONE, W., S. *Ruminations on Cause-in-Fact*. *Stanford Law Review*, Vol. 9, No. 1 (Dec., 1956), pp. 60-99

⁴ Compare, e.g. CALABRESI, G. *Some Thoughts on Risk Distribution and the Law of Torts*. *Yale Law Journal* (The Yale Law Journal Company, Inc.) vol. 70 (4): 499, 1961.

⁵ Eg. Hart and Honoré come out of an analysis of a common semantic use of this and at the same time they point out to its plural meaning. Compare HART, H. L. A., HONORÉ, T. *Causation in the law*. 2nd ed. New York: :Oxford University Press, 1985, lxxxi, 516 p.

⁶ Eg. Moore: „*The central idea that organizes the book is that causation as a prerequisite to legal liability is intimately related to causation as a natural relation lying at the heart of scientific explanation.*“ MOORE, M. S. *Causation and responsibility: an essay in law, morals, and metaphysics*. New York: Oxford University Press, 2009, xxvi, 605 p., s. vii.

philosophical discourse can be ignored in the legal discourse as non-essential in a way, so that the sense of the whole institute cannot be impaired?

The first part of this article shall refer to the fact that both philosophical, as well as scientific causation theories have their impact on legal causation. Understanding of causation and its construct in law responds to the social discourse and principles of applied ethics, which are reflected in legislation, or judicial decisions. Thus, the first part of this article will deal with theoretical approaches to causation in the scientific, philosophical and legal discourse. The second part will deal with a question, whether it is suitable to use the institute of causal relation even in the future, as a key guideline in asserting legal responsibility. Some theorists, especially causal minimalists, who have their supporters among theorists in economic analysis of the tort law⁷, therefore propose different criteria for the settlement of compensations for caused harm on the basis of the so-called “risk theory”⁸. However, if we want to answer the question as to whether the institute of a causal relation should be utilized even in the future, it is necessary to respond at least briefly to the following raised questions: What is the function of the tort law? What is the function of causation in law? These questions should be briefly resolved in the second part of this article.

In what cases the currently developed causal tests and models fail? The last question will be resolved in the third chapter. The fourth part should then

⁷ The beginning of this school can be dated back to the 60s of the 20th century and it connects with the names of Ronald Coase and Guido Calabresi.

⁸ The idea of this theory consists in the fact, that an act which in its essence risks the causing of damage represents itself a basis for creation of responsibility, no causal relation between the wrongful act and damage is necessary. Subsequently, the full competence for an act carrying a possibility of infliction of damage is in the hands of an actor. It is irrelevant whether this possibility is materialized, with regard to the fact that it is not his merit, whether the damage was eventually caused, but it depends on circumstances beyond dispositions of an acting entity. Compare especially with FLETCHER, G. P., Fairness and Utility in Tort Theory *Harvard Law Review*, Vol. 85, No. 3 (Jan., 1972), pp. 537-573

suggest a pragmatic, or conceptual approach to resolve causation, i.e. such an approach, which could provide methodologically suitable approach to solving individual problematic issues of law, e.g. such as „*overdetermination cases*“ and „*preemption cases*“.

Main Text:

Contemporary approaches to causation

Questions about causation in the philosophical discourse occur from its beginning, however the opinion spectrum differs and a lot of different theories exist.⁹ The lack of consensus on this fundamental question persists and therefore uncertainty about the resultant understanding of this notion remains. Unfortunately such a consensus may not be even reached. Monist theories exist, which refer to the fact that there is only one type of the causal relation; the causal pluralists, who claim that the notion of causal relationship can include more various relations, however all of them fill an analogical abstract model, therefore it is suitable to explore them under a unifying criterion of causation, and the causal eliminativists (e.g. such as Russel), who claim that all use of the word "causation" should be replaced in a scientific approach with another, more suitable construct. In law, as a practical tool for materialization of relations in society, a bigger number of terms appears, which are unified under the notion of causation. On the basis of a pragmatic test of utility, it is then suitable in individual causal theories to utilize their

⁹ "Philosophers have been interested in the nature of causation for as long as there has been philosophy. They have been interested in what we say about the world when we say that one thing caused another, and in whether there is anything in the world that answers to the causal claims we make about it. Despite the attention, there is still very little agreement on the most central question concerning causation: what is it? Is it a matter of the instantiation of regularities or laws, or counterfactual dependence, or manipulability, or transfer of energy, for example?" BEEBEE, H., HITCHCOCK, CH. a MENZIES, P. *The Oxford handbook of causation*. Oxford: Oxford University Press, c2009, xv, 790 p. Oxford handbooks in philosophy. ISBN 01-992-7973-X, s. 1

capacity for action in legal order, as all of these theories have their limitations¹⁰.

Basic dimensions of the conflict in understanding causation can be defined approximately as follows: Is causation an ontological fact, i.e. independent of human mind and existing in an objective world, or is it merely a subjective attitude of mind to reality, i.e. is causation understood as epistemic relation (intellectual conception)? In other words, do mental events provide a correct picture of causal relations in a real world and are identical with it, or do they differ from it, or is the causation reality even dependent upon the forming mind?¹¹ Scientific knowledge points out that our cognition of the world in an intuitive form is often incorrect and different from the real world - is this also true in a causal sense?

The basic historical origin rather understood causation in its ontological sense. The ontological basis of causation was dealt with even by Ancient Greek philosophers, Plato dealt with it, when Timaios claims in a dialog, that all what comes into existence, necessarily stems from a certain cause¹² and especially Aristotle, who distinguished four kinds of cause (formal, material, efficient, and final cause), which must function together.¹³

The turning point in understanding causality toward gnoseological concept is brought by the Hume's *An Enquiry Concerning Human Understanding*.

¹⁰ Compare with this LOSEE, J. *Theories of causality: from antiquity to the present*. New Brunswick, N.J: Transaction Publishers, p. 175. All the theories are either too inclusive, or conversely too exclusive, or both.

¹¹ KANT, I., *Kritik der reinen Vernunft*. Stuttgart: Reclam, 1989. ISBN 31-500-6461-9.

¹² PLATO,. *Timaios*: <http://www.gutenberg.org/cache/epub/1572/pg1572.txt> dated 18.10.2013

¹³ ARISTOTLE, *Physics* 194 b17–20; see also: *Posterior Analytics* 71 b9–11; 94 and 20.

Hume does not find causation in the external world¹⁴, but as a certain kind of a psychological necessity in our perception derived from experience and formulating itself in the principle of habit.

Hume laid his concept of causation in two definitions, one is considered to be an external definition¹⁵ the other is an internal definition¹⁶, i.e. a definition which refers to the perceiving mind. In his work, he then based causation on these basic points¹⁷: 1. A cause and its effect must be in conjunction both temporally and spatially; 2. A cause must precede an effect; 3. There must be a permanent bond between a cause and effect, which cannot be eliminated; 4. The same cause is followed by the same effect and the same effect never

¹⁴ „When we look about us towards external objects, and consider the operation of causes, we are never able, in a single instance, to discover any power or necessary connexion; any quality, which binds the effect to the cause, and renders the one an infallible consequence of the other. We only find, that the one does actually, in fact, follow the other. The impulse of one billiard-ball is attended with motion in the second. This is the whole that appears to the outward senses. The mind feels no sentiment or inward impression from this succession of objects: consequently, there is not, in any single, particular instance of cause and effect, any thing which can suggest the idea of power or necessary connexion.“ HUME, Enquiry, SECTION VII

OF THE IDEA OF NECESSARY CONNEXION, PART I, <http://18th.eserver.org/hume-enquiry.html>, dated 18.10.2013

¹⁵ „We may define a cause to be ‘an object precedent to and contiguous to another and where all the objects resembling the first are placed in like relations of precedence and contiguity to those objects that resemble the latter’“ HUME, D. *A Treatise of Human Nature. Reprinted from the Original Edition in three volumes and edited, with an analytical index, by L.A. Selby-Bigge, M.A., Oxford: Clarendon Press, 1896*, quoted from http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=34_2&Itemid=28 date 18.10.2013

¹⁶ „A cause is an object precedent and contiguous to another, and so united with it, that the idea of the one determines the mind to for the idea of the other, and the impression of the one to form a more lively idea of the other.“ HUME, D. *A Treatise of Human Nature. Reprinted from the Original Edition in three volumes and edited, with an analytical index, by L.A. Selby-Bigge, M.A., Oxford: Clarendon Press, 1896*, quoted from http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=34_2&Itemid=28 date 18.10.2013

¹⁷ Humes’ definition of causation: An event c is a cause of an event e, if, and only if, i) c precedes e in time, ii) c and e are events of the T1 and T2 type in a way, that every T1 type event is followed by the T2 type event. Quoted according to: STRAWSON, G., *The Secret Connexion: Causation, Realism, and David Hume*. Oxford: Clarendon Press, 1989.

comes into existence in another way than from the same cause. This principle is derived from experience and it is a source for the majority of our philosophical derivations.

The most frequently the so-called reductionist theories come from the Hume's causal theory, i.e. the theories which do not see a real relation in causation, but only our construct and they refer to another essence of these relations¹⁸. The so-called regularity theories and the INUS theory is usually placed here, but also the counterfactual theory, which, however comes from the second part of the definition in Enquiry.

Regularity theory of Causation

The most typical theory comes from the principle of regularity, i.e. according to this theory the relation between an event c and an event e is a causal relation, if, and only if the events of the e type regularly follow after the c type event. A problem of these theories of regularity view of causation¹⁹ is the fact that they do not differentiate between regular succession of any two actions (events) and a causal connexion of two actions (events)²⁰. At the same time this definition has difficulties in dealing with singular causal statements, which do not allow for generalization. According to this definition „*the causal relation is de facto a constant sequential*

¹⁸ MACHULA, T. *Causa efficiens: příčina účinná a princip kauzality mezi realismem a redukcionismem*. Edition 1. České Budějovice: Jihočeská univerzita v Českých Budějovicích, 2009. 92 p. Scientia; volume. 3. p. 27

¹⁹ After Hume, it is possible to mention, e.g. Karl Pearson, who defined the cause as follows: „*Karl Pearson defended a regularity view of causality. In agreement with Hume's „official position“, he insisted that there is no necessity involved in causality. Causes do not produce their effects. There is only the experience of a repeated sequence of perception.*“ LOSEE, J. *Theories of causality: from antiquity to the present*. New Brunswick, N.J: Transaction Publishers, p. 57.

²⁰ A classic example, which is usually mentioned, is for example this one: the day regularly succeeds the night, however this does not mean that the night is a cause of the day.

conjunction²¹, although one event does not have to be a cause of the other. According to Karl Pearson, it is not possible to say that causes produce their effects it is merely possible to refer to repeated sequences of our perception. Thus far, he follows up with Hume, however he defines the causal relation specifically in a way, that any time „Whenever a sequence of perception *D, E, F, G* is invariably preceded by the perception *C*, or the perceptions *C, D, E, F, G* always occur in this order, that is, form a routine of experience, *C* is said to be a cause of *D, E, F, G*, which are then described as its effects.“²²

Counterfactual theory

The counterfactual theory comes again from David Hume, however this time from his second definition stated in Enquiry: „if the first object had not been, the second never had existed“²³. The most eminent representative of this theory is David Lewis, who comes exactly from the Hume's second definition of causation²⁴. According to him, it is more suitable to consider this definition as an independent starting point, not an alternative theory to the theory of regular succession, as is the case in Hume. Therefore, it is necessary to come from the basic construction of the counterfactual theory²⁵, which says that „*c* is the cause of *e*, if, and only if, if *c* had not occurred, then

²¹ „On this reading, Hume defines „causal relation“ to be a „de facto constant sequential conjunction.“ This position will be referred to henceforth as Hume's „official position“ on causal relations.“ LOSEE, J. *Theories of causality: from antiquity to the present*. New Brunswick, N.J: Transaction Publishers, p. 29.

²² PEARSON, K., *The Grammar of Science*. Adam & Charles Black in 1911, 3. Ed., s., p. 130

²³ „if the first object had not been, the second never had existed“ HUME, D. *An Enquiry Concerning Human Understanding*, Harvard Classics Volume 37, Copyright 1910 P.F. Collier & Son, citováno z <http://18th.eserver.org/hume-enquiry.html> dated 18.10.2013

²⁴ „A promising alternative is not far to seek. Hume's "other words" – that if the cause had not been, the effect never had existed – are no mere statement of his first definition. They propose something altogether different: a counterfactual analysis of causation.“ LEWIS, D., *Causation*, *The Journal of Philosophy*, Vol. 70, Is. 17, Oct 11, 1973, p. 556

²⁵ Lewis uses a counterfactual analysis, however he strives for its reductive understanding without the use of modal notions, i.e. he does not understand causation as a modal notion.

*e would not have occurred*²⁶. Nevertheless, even this theory has a number of controversial spots. This is especially problem of *overdetermination*²⁷ and the *causal pre-emption*²⁸.

Probability theory (Probabilistic causation)

Some philosophers coming from the Hume's skeptical doubt and after the Popper's reference to impossibility to justify universal truthfulness of induction on the basis of the induction itself²⁹, they rather incline to the method of probability than to a causal relation. Insisting on a theory that the event C will always cause an event E, cannot be proved, it can be only empirically tested and based upon this expressed in a probability form. According to the first supporters of this theory, C is then a probable cause of E, if, and only if the occurrence of C increases probability of occurrence of

²⁶ „True, we do know that causation has something or other to do with counterfactuals. We think of a cause as something that makes a difference, and the difference it makes must be a difference from what would have happened without it. Had it been absent, its effects – some of them, at least, and usually all - would have been absent as well.“ LEWIS, D., Causation, *The Journal of Philosophy*, Vol. 70, Is. 17, Oct 11, 1973, p. 557

²⁷ “Causal overdetermination in its standard form involves symmetrical causal contributions by multiple causal processes.” PAUL, L., A., Counterfactual Theories. In BEEBEE, H., HITCHCOCK, CH., MENZIES, P. CH. *The Oxford handbook of causation*. Oxford: Oxford University Press, c2009, xv, 790 p. Oxford handbooks in philosophy, p. 177

²⁸ “The cases of the so-called preemption are such cases, when C causes E, but if C had not caused E, one or more back-up causes (merely potential causes) would have caused E instead.” PAUL, L., A., Counterfactual Theories in BEEBEE, H., HITCHCOCK, CH., MENZIES, P. CH. *The Oxford handbook of causation*. Oxford: Oxford University Press, c2009, xv, 790 p. Oxford handbooks in philosophy, p. 173

²⁹ “For the principle of induction must be a universal statement in its turn. Thus if we try to regard its truth as known from experience, then the very same problems which occasioned its introduction will arise all over again. To justify it, we should have to employ inductive inferences; and to justify these we should have to assume an inductive principle of a higher order; and so on. Thus the attempt to base the principle of induction on experience breaks down, since it must lead to an infinite regress.” POPPER, K. Repr. 2007 (twice). London: Routledge, 2002, p. 5.

E. Following that Salmon³⁰ adjusted this variant. The reason was that unambiguously causal sequences of conditions exist, which occur with a smaller probability (e.g. exposure to radiation and a subsequent occurrence of leukemia, which is for example 5% probability), it is however provable, that such an occurrence is statistically higher in the case, when the event C (in this case exposure to radiation) really takes place.³¹

Causal realism

Positions of causal realism do not reduce causation to another relation than the causal relation, but they try to give a meaning to this relation. They generally presume, that a real ontological relation of causation is reflected in the causal relation and therefore it is not a mere construct of thought, it cannot be reduced to a custom, as done by Hume, it even cannot be derived merely from the logical system of conditions. According to this conception, the causal relation is scientifically objective and therefore it is possible to find an objective standpoint for its assessment. This concerns neo-aristotle, or neo-thomistic theories, which create an alternative to a dominant regularity theories spectrum. All come out of a conviction on the existence of a real external world, which we are able to perceive by our senses and reason.³²

³⁰ Salmon comes from an objectively scientific explanation of the world order, however distinguishes probability from causation. Compare with SALMON, W. C. *Causality and explanation*. New York: Oxford University Press, 1998, xiv, 434 p., p. 58 consequ.

³¹ LOSEE, J. *Theories of causality: from antiquity to the present*. New Brunswick, N.J.: Transaction Publishers, p. 106.

³² Compare with HARRÉ, R., MADDEN, E.H., Conceptual and natural necessity. In GROFF, R. ed. *Revitalizing causality: realism about causality in philosophy and social science*. New York: Routledge, 2008, xiv, 265 p. ISBN 02-039-3263-3, p. 60. „*The natural necessity in the world is reflected in a conceptual necessity in discourse about the world. Predicates are bound into ensembles by virtue of the joint origin of the properties they ascribe to things, in the natures of those things. When we think there is a natural necessity between manifested properties and hypothesised dispositions, that is, a real connection via the nature of the*

INUS theory

The so-called INUS („*Insufficient but Necessary part of a set of conditions that is itself Unnecessary but Sufficient for the result*”) theory was introduced by John Mackie, who modifies ideas of Johna Stuarda Milla³³ in his analysis. Thus according to Mackie, the cause is insufficient, however a necessary part of the condition, which is itself not necessary, however sufficient for the result.³⁴ At the same time, Mackie also introduced a notion of the so-called causal field³⁵, when according to him singular causal statements are always relative to a certain causal field. According to some authors, such as for example Michael Scriven, however the notion of cause as the INUS condition is in the case of Mackie again derived from the notions, which implicitly contain causation in them, even if it is hidden. For the necessary and sufficient cause are terms, through which he created in the notion of causation a definition by circle.³⁶ Similarly as Mill, Mackie also does not differentiate between circumstances of a phenomenon and a cause of this

thing, then we are entitled to make a conceptual link, incorporating the power or tendency to manifest the property within the concept of the thing or substance.“

³³ „*The cause, then, philosophically speaking, is the sum total of the conditions, positive and negative taken together; the whole of the contingencies of every description, which being realized, the consequent invariably follows.*“ MILL, J., S. *A System of Logic Ratiocinative and Inductive, Being a connected view of the Principles of Evidence, and the Methods of Scientific Investigation*. Quoted from <http://www.gutenberg.org/files/27942/27942-pdf.pdf> dated 14.9.2013, p. 407

³⁴ MACKIE, J. *The cement of the universe: a study of causation*. Oxford: Clarendon Press, 1980, xvi, 329 p. Clarendon library of logic and philosophy.

³⁵ „*In all such cases, the cause is required to differentiate, within a wider region in which the effect sometimes occurs and sometimes does not, the sub-region in which it occurs: this wider region is the causal field.*“ MACKIE, J. L. *Causes and Conditions*. *American Philosophical Quarterly*, Vol. 2, No. 4 (Oct., 1965), pp. 245-264

³⁶ „*A notion of cause can be derived merely from a simple example, which can be demonstrated, but cannot be defined by means of notions not containing causation, at least in a hidden manner. The effort to define cause in a non causal manner would be like an effort to define morality in an amoral manner.*“ MACHULA, T. *Causa efficiens: příčina účinná a princip kauzality mezi realismem a redukcionismem*. Edition 1. České Budějovice: Jihočeská univerzita v Českých Budějovicích, 2009. 92 p. Scientia; volume. 3. p. 28

phenomenon. Particularly³⁷ his theory does not function in some scientific fields, especially in the processes controlled by statistical laws.³⁸ However it has its application in legal theory.

Singular theory

In 1926, Curt Ducasse drew attention to unfitness of all general conceptions of causation in common social discourse. If we talk about causation, then according to Ducasse we do not want to search for scientific succession of conditions or constant conjunction, but we talk about single difference, which give rise to an effect. Ducasse utilized some typical examples. According to him, if a car engine fails, we do not ask about a sequence of events, we are merely interested in the difference between original circumstances, under which the engine operated, and the circumstances under which it does not operate. Therefore, he defines as a cause a particular and unique change in the immediate environment, which occurred directly before occurrence of a particular effect in question. Ducasse distinguishes between assumptions, which are to explain laws and assumptions, which

³⁷ Apart from this, it is also possible to mention David Lewis's objection. Let's assume that a cause has two effects: b and c. B does not have a further effect (it is a causal blind alley), c has an effect d. Then it holds, that in spite of the fact that b is a causal alley, it is an insufficient, but necessary part of a set of factors (a, b, c), which are sufficient, but not necessary, for the existence of d. Or: b is a causal alley and at the same time it is a cause of d. The second problem, to which Lewis refers, is the following. Let's have events a and b, out of which each can cause c. However if a and b occur simultaneously, the event a will prevent the event b in causing c, therefore the only cause of c is the event a. Since it is true that if a did not prevent b, b would cause c, b is an insufficient but necessary part of a "bundle" of factors, which are sufficient for c, but not necessary. Therefore B is under INUS a cause of c and at the same time it is not.

³⁸ „The INUS interpretation is useful in many causal contexts. However, this modified sufficient-condition analysis fails to account for causal realtions in processes governed by statistical laws.“ LOSEE, J. *Theories of causality: from antiquity to the present*. New Brunswick, N.J: Transaction Publishers, p. 99.

only explain a course of singular events³⁹, while the causal relation arises only between singular events, during the change between one condition and the other condition.⁴⁰ The problem of a singular approach manifests itself in the fact that it is not possible to create a general theory, based upon which clear decisions could be made in individual cases.⁴¹

Causal pluralism

Causal pluralism is then a theory, which holds that „*causation is not the single kind of relation or connection between things in the world. Instead, the apparently simple and univocal term 'cause' is seen as masking an*

³⁹ Popper also articulated a similar idea. However, for the sake of causal explanation, he presumed conjunction of both kinds of inferences. *“We have thus two different kinds of statement, both of which are necessary ingredients of a complete causal explanation. They are (1) universal statements, i.e. hypotheses of the character of natural laws, and (2) singular statements, which apply to the specific event in question and which I shall call ‘initial conditions’. It is from universal statements in conjunction with initial conditions that we deduce the singular statement,...”* POPPER, Karl. Repr. 2007 (twice). London: Routledge, 2002, p. 38.

⁴⁰ „*The next thing to consider is the important difference between conjectures explanatory of laws and conjectures explanatory of particular events. The latter are conjectures as to some other particular event. For example, the particular event that this wax has melted is tentatively explained by the conjecture that the wax was exposed to heat, and by mention of the empirically known law that exposure of wax to heat causes it to melt. But a law, for instance the one just mentioned, is not an event, and since only an event, viz., a change or a “non-change,” can strictly speaking be a cause or an effect, the conjecture explanatory of a law cannot, as with an event, be that a certain event occurred, which stood to that law as cause to effect. Rather, what explains a law is always something standing to it in the relation of conceptual implicans to implicate; and a theory, in the sense we are essentially concerned with here, is always something standing in that relation to what it explains.*” DUCASSE, C., *Philosophy as a Science*, 1941, chapter 11, section 5, quoted from <http://www.ditext.com/ducasse/duc-cont.html> dated 9.10.2013

⁴¹ „*From the ordinary meaning of singular causal statements we cannot draw any conclusions about what causation is. They are simply neutral on this matter.*” BEEBEE, H., HITCHCOCK, CH., MENZIES, P. CH. *The Oxford handbook of causation*. Oxford: Oxford University Press, c2009, xv, 790 p. Oxford handbooks in philosophy. ISBN 01-992-7973-X, p. 15.

*underlying diversity.*⁴² Thus causal pluralism uses more approaches to causation however it also refers to hermeneutic diversity of meanings, even if their name remains the same.⁴³ Some authors then consider the conceptual diversity of the notion of causation as the basic problem of the current philosophical, as well as scientific discourse,⁴⁴ nonetheless others⁴⁵, on the contrary acknowledge advantages of the conceptual use of the term of causation.

Modern approaches in legal theory

Hans Kelsen –differentiation of factual causation and normative imputation

An important turning point in understanding the relation of cause and effect in the legal order is brought by an approach of the Kelsen's Pure Theory of Law. Kelsen comes from the Hume's thesis, which in summary claims that a normative conclusion cannot be deduced from purely factual premises. On the basis of this thesis Kant distinguishes two attitudes of human intellect, causal and normative (sein and soll, i.e. what "is" and what "ought" to be). According to Kelsen, we can then talk about the principle of imputation in

⁴² GODFREY-SMITH, P. Causal Pluralism. In BEEBEE, H., HITCHCOCK, CH., MENZIES, P. CH. *The Oxford handbook of causation*. Oxford: Oxford University Press, c2009, xv, 790 p. Oxford handbooks in philosophy, p. 326

⁴³ „*The causal pluralist, on the other hand, does not believe that one can refer to a single relation R to define causation, but that causation is a generic term for a (finite) number of relations R1, R2, R3,..., and that again, for some reason which the causal pluralist has to provide, it is better or more convenient to refer to these notions (or certain combinations of these notions) as "causation" instead of using their specific names R1, R2, R3,...*“ FROEYMAN, A., De VREESE, A., Unravelling the methodology of causal pluralism, in *Philosophica* 81 (2008), p. 74

⁴⁴ „*Perhaps 'cause' is a generic term whose application to the world is parasitic on the semantic properties of a range of terms (such as 'burn' and 'scrape') that pick out specific kinds of physical connection.*“ GODFREY-SMITH, P. Causal Pluralism. In BEEBEE, H., HITCHCOCK, CH., MENZIES, P. CH. *The Oxford handbook of causation*. Oxford: Oxford University Press, c2009, xv, 790 p. Oxford handbooks in philosophy, p. 327

⁴⁵ FROEYMAN, A., De VREESE, A., Unravelling the methodology of causal pluralism, in *Philosophica* 81 (2008), p. 74

social sciences determining social law - this way it is possible to understand the conjunction between the hypothesis of a norm and sanctions as a result, unlike causation, which is present in natural sciences. The bond in causation is expressed by the modal verb "must", while on the legal (or moral) level the modal verb is the verb "ought". Similarly, in the normative system we talk about validity of rules, not about their existence. According to Kelsen: *“Causality and imputation are, as being remarked, two different kinds of functional connection, two different ways in which two states of affairs can be connected together as condition and consequence. The difference between the two is this: imputation (i.e. the relation between a certain behaviour as condition and a sanction as consequence, described by a moral or legal law) is produced by an act of will whose meaning is a norm, while causality (i.e. the relation between cause and effect described by a natural law) is independent of any such intervention. Another difference is that every concrete cause has to be considered as the effect of some other cause, and every concrete effect as the cause of some other effect, and so — by the very nature of causality — the chain of cause and effect is endless in both directions. In the case of imputation, the situation is completely different. ... A sequence of imputation does not have an unlimited number of elements, as a sequence of causality, but essentially only two elements”*⁴⁶

The theory of dualist concept was then manifested in differentiation of purely factual concept of causality interconnected with counterfactual form in the condition of *conditio sine qua non* and in the normative framework of imputation of a rule, where it manifests especially in a protective purpose of

⁴⁶ KELSEN, Hans. *Všeobecná teorie norem*. 1. edition. Translation by Milan Kubín. Brno: Masarykova univerzita, 2000, 470 s. Spisy Právnické fakulty Masarykovy univerzity v Brně, sv. 240. p. 39

the rule, theory of adequate and immediate condition, foreseeability of damage and other normative limitations of the scope of responsibility.

Hart a Honoré – „common sense“ and “INUS system”

In their publication of 1959 „*Causation in the Law*“ Hart and Honoré came from a methodological analysis of a common language and tried to prove that the concept of causation both in law, as well as in common language does not embrace one concept of causal conjunction, but more concepts⁴⁷. Thus, to a certain extent they point out that on the level of a pluralist concept of causation in the philosophical discourse however they rather presume, that the concept of causation in law does not reflect philosophical and scientific causation, but rather a common-sense notion of causation in a ordinary language. According to them this is exactly the concept relevant for actual application practice of courts, or as the case may be, for law-makers. According to them, causation is more empiric than analytic or logical relation. Hart a Honoré, similarly as Mackie, eventually utilize the INUS system of causation, even if there are some differences in their conception⁴⁸. At the same time, for legal discourse, they distinguish two models of statements „*causing harm*“, and „*occasioning harm*“, i.e. the model, which encompasses that one event (i.e. either human behavior, or an action) causes another (effect), or a model of the so-called interpersonal relationship

⁴⁷ „...the concept of causation, as we use it in ordinary life, is not a unitary one. There is rather a central concept of physical manipulation or intervention round which cluster a whole group of concepts, which can in a broad sense be termed causal, and which are related in differrent ways to the central case.“ HART, H. L. A., HONORÉ, T. *Causation in the law*. 2nd ed. New York: Oxford University Press, 1985, lxxxi, 516 p., p. XXXIII

⁴⁸ Regarding differentiation of individual problematic causal cases and critical comments on these theories compare especially MACKIE, J. *The cement of the universe: a study of causation* Oxford: Clarendon Press, 1980, xvi, 329 p. Clarendon library of logic and philosophy. Chapter 5, pp. 117-142 and HART, H. L. A., HONORÉ, T. *Causation in the law*. 2nd ed. New York: :Oxford University Press, 1985, lxxxi, 516 p., pp. xxxvii to xlii

between people, i.e. for example, when one person forces another to do something (instruction, aid, order, etc.)⁴⁹.

Wright – NESS system

Similarly as Hart and Honoré, Wright also comes from the concept, which focuses on the problems of a cause as a set of conditions. At the same time he unambiguously asserts that causation is a factual concept, not the political or normative one. In order to adjust his theory, he criticizes his predecessors for confusing inappropriately causal and non causal factors. Based upon this Wright asserts: *„We are not interested in all the possible causes, but only those that were tortious. This is the tortious-conduct inquiry. Policy considerations determine whether certain conduct will be treated as tortious. The second step, after the identification of tortious conduct which may have contributed to the injury, is the application of the actual-causation requirement, which requires that the tortious conduct actually have contributed to the injury. This is the causal inquiry. At this stage it is irrelevant that there may also be other contributing factors (causes). ...“*⁵⁰ Therefore Wright differentiates three steps in solving legal responsibility - firstly , exploration of other responsibility conditions, secondly, exploration of factual causation and thirdly, exploration of problems of immediate and adequate cause. On the basis of Hart and Honoré’s ideas, Wright creates the NESS (Necessary Element of a Sufficient Set) test: *“...the NESS test states that a particular condition was a cause of a specific consequences if and*

⁴⁹ Hart and Honoré state the following example: *„it may be that X simply shot Y or it may be that he made a soldier under his command shoot him.“* HART, H. L. A., HONORÉ, T. *Causation in the law*. 2nd ed. New York: :Oxford University Press, 1985, lxxxi, 516 p. ISBN 01-982-5474-1, p. 23. The term mental causation is also used in the continental environment, when a harmful action is only a reaction to the first action.

⁵⁰ WRIGHT, R.,W., *Causation in Tort Law. California Law Review*, vol. 73, is. 6, 12-31-1985, p. 1744

only if it was necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence.”⁵¹.

Causation in practice - what problems we can face and how to deal with them

Legal causation model should follow the solution of philosophical or scientific discourse. Unfortunately no consensus on the right sense of causation was reached. Generally speaking there are three ways of defining causation. Monist theories exist, which refer to the fact that only one type of a causal relation exists, causal pluralists, who claim that more various relations can be covered under the notion of causal relation, however all of them fill a similar abstract model, therefore it is suitable to explore them under a unifying criterion of causation, and causal eliminativists (such as for example Russell), who claim that use of the word "causation in scientific approach could be replaced with another, more suitable construct. In law, as a practical tool for materialization of relations in society, a bigger number of terms appears, which are unified under the notion of causation. On the basis of a pragmatic test of utility, it is then suitable in individual causal theories to utilize their capacity for action in legal order, as all of these theories have their limitations⁵².

But for test (conditio sine qua non)

In the law, as a primary element, the counterfactual theory is utilized, which is connected with the so-called "but for"test, or the *conditio sine qua non*,

⁵¹ „As elaborated here, the NESS test states that a particular condition was a cause of a specific consequences if and only if it was necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence.” lb. p. 1774

⁵² Compare with this LOSEE, J. *Theories of causality: from antiquity to the present*. New Brunswick, N.J: Transaction Publishers, p. 175. All the theories are either too inclusive, or conversely too exclusive, or both.

considered as a factual condition of causation⁵³. This condition is expressed in the PETL principles in the Article 3:101 in the following manner: “*An activity or conduct (hereafter: activity) is a cause of the victim’s damage if, in the absence of the activity, the damage would not have occurred.*” There is a number of obstacles connected with pure utilization of this formulation:

The first consists in the problems of an infinite sequence of causes within the meaning of general causation, which must be limited in a certain manner. In this case, the cause must be legally relevant, whereby we come from the factual judgment to the level of normative inference about subsumption of a given action under a criterion stipulated in the normative order. Here, the limitations can be considered especially such normative criteria such as the protective purpose of the rule, adequacy and immediacy of a cause, interruption of a causal chain (mental causation), or foreseeability of damage. The problem also consists in the fact that in a scientific sense, we cannot talk about one cause, as this would not cause an effect in the absence of other conditions.

The second consists in the cases of the so-called causal uncertainty, when it is not possible to give in evidence regarding a hundred per cent causal relation. This problem is connected with the problems of multicausal damage and its proving in the case, when there is a causal uncertainty about whether a wrongdoer really caused the harm. Typically, these are for example medical malpractice disputes, when we know the input action as well as the output in form of the current condition of the patient, but what lies between (causal nexus) is not completely clear (this is described as the

⁵³ In his essay on causation, Koziol claims that if we were to agree on a unifying element of legal responsibility in the European Union countries, it would be the *conditio sine qua non* test. (KOZIOL, H., Natural and Legal Causation in TICHÝ, L., ed. *Causation in Law: Praha 2007*. Beroun: IFEC, 2007, 223 p.,, p. 53)

so-called black box element). For this reason, a number of opinions increases that in medical and legal disputes it would be more suitable to utilize other models⁵⁴, for example the mentioned theories of foreseeability and risk, or as the case may be compulsory liability insurance and the payment on the basis of strict liability, or settlement of the situation on the basis of the probabilistic theory⁵⁵ an utilization of the model of the causal proportional liability,⁵⁶ or possibly a model of partial liability.⁵⁷ Possible recourse is also a remedy of turning the burden of proof, which can - in its essence - transform the purely factual causation into a non causal institute.⁵⁸

The third problem is then connected with the problems of preemption causation and concurrent causation. In the first case, we talk about such an action, which would lead to a certain effect, however it would not be overdetermined by another action, which had caused the same effect before. However, the result would occur only on the basis of the first action.⁵⁹ In the second case we talk about such a situation, when it is not

⁵⁴ More information on this for example. DOLEŽAL, T. Kompenzační schémata v případě odpovědnosti zdravotnických pracovníků za škodu na zdraví. *Právník*. Year. 150, no. 10 (2011), pp. 987-1003.

⁵⁵ Compare with BYDLINSKY, F., Causation as a Legal Phenomenon. In TICHÝ, L., ed. *Causation in Law: Praha 2007*. Beroun: IFEC, 2007, 223 s., s. 11

⁵⁶ With this compare, e.g. GILEAD, I. Kauzální proporcionální odpovědnost – základní kategorie a právně-politické úvahy. In TICHÝ, L. and HRÁDEK, J. *Prokazování příčinné souvislosti multikauzálních škod*. Praha: Center of Comparative Jurisprudence, Legal Faculty of Charles University in Prague, 2010, 119 p., p. 11 and conseq. or OLIPHANT, K. Anglické právo a proporcionální odpovědnost. *Ibidem*, p. 30 and conseq.

⁵⁷ Compare with KOCH, B., A. Kauzalita a dělená odpovědnost z hlediska rakouského práva. *Ibidem*, p. 46 and conseq.

⁵⁸ HART, H.L.A., HONORÉ, T. in TURNER, S. ed. *Causality*, 1st ed. Thousand Oaks, CA: SAGE Publications, 2010, p. cm. vol. II, s. liv

⁵⁹ Wright states a typical example, as follows: „For example, D shoots and kills P just as P was about to drink a cup of tea that was poisoned by C.” WRIGHT, R., W., *Causation in Tort Law*. *California Law Review*, vol. 73, is. 6, 12-31-1985, p. 1775

possible to make an objective conclusion, which event caused the effect, however at least one of these events had to cause the effect.⁶⁰

The fourth problem comes into existence in connection with the damage caused on the basis of failure to act (in the so called omissive delicts). Eg. Moore does not consider the failure to act as an event (action), i.e. neither as an event (action) causing a contingent effect. The problem in the case of the counterfactual assessment of causal relation in connection with the failure to act is obvious for the reason that the failure to act consists in the absence of one particular action, even if there could be an infinite number of other acts. Even here, deliberations are clearly filled with normative contemplation, when a causal relation is expressed in a way that if A had not violated his duty resulting from the legal order, a harmful event would have not occurred.

Protective purpose of a legal rule

Out of the above mentioned reasons, non causal institutes are often used in legal practice, which are to ensure functionality of the *conditio sine qua non* test. These institutes include other than a causal condition of attributability, therefore they have a normative character and their assertion is given on the basis of a political decision of the law-maker, or a judge. In the European law, the non causal element limiting the causation is considered to be especially the protective purpose of a legal rule and subsequently an adequate or immediate cause and foreseeability of infliction of damage. The protective purpose of a rule results from the scope of this rule, out of its interpretation on the basis of traditional methods, in conjunction with its purpose, which consists in preventing the occurrence of damage. We are

⁶⁰ "C and D independently start separate fires, each of which would have been sufficient to destroy P's house. The fires converge and together burn down the house. Each fire was a duplicative cause of the destruction of the house." WRIGHT, R.,W., Causation in Tort Law. *California Law Review*, vol. 73, is. 6, 12-31-1985, p. 1776

able to infer legal responsibility merely in the context with this purpose. This normative framework is described by the PETL principles in the article 3:201 Scope of liability.

Adequate and immediate cause

The theory of an adequate cause was formed in the German legal school, already at the end of the 19th century. The probability method was utilized in legal theory by Von Kries. He differentiated between the so-called objective probability (Möglichkeit) and subjective probability (Wahrscheinlichkeit). According to Von Kries, we can constitute the concept of objective causation as follows: " *A given contingency will be the adequate cause of harm if and only if it satisfies two conditions: (i) it must be a sine qua non of the harm, (ii) it must have 'increased the objective probability' of the harm by a significant amount.*"⁶¹ The adequate cause theory serves for excluding improbable consequences from the tort liability.⁶² This is again a non-causal tool for the limitation of imputation of a rule. An immediate cause is usually also stated as a limiting tool, nevertheless it is more appropriate to reflect an adequate cause than state an immediate cause, as it is quite possible that a cause is temporally immediate, however absolutely inadequate for a harmful event.

Forseeability of causation of harm

⁶¹ Quoted according to HART, H.L.A., HONORÉ, T. in TURNER, S. ed. *Causality*, 1st ed. Thousand Oaks, CA: SAGE Publications, 2010, p. cm. vol. II, p. 5

⁶² The case of a coachman, who falls asleep and due to this the coach sets out on another route, than it should, is stated as an example of an inadequate cause (in spite of this the cause of *conditio sine qua non*). Subsequently, lightning hits this coach and kills a passenger. If the coachman had not fell asleep, the coach would have taken the right way and the lightning would not have hit the passenger. However, according to Von Kries, in this case, the falling asleep did not increase the probability, that the lightning would hit the coach. *Ib.* p. 6

The institute of foreseeability of caused harm is laid down in many legal orders. Its theory comes from a function of prediction, i.e. the possibility to see consequences of own acts. Generally, the criterion of foreseeability can be assessed according to two criteria, a subjective, or objective one. The subjective criterion considers a particular case, when a particular individual could, or could not foresee effects. The objective criterion consists in a general criterion of what can be expected with respect to a regular course of events and what can be expected as an effect of violation of a legal duty. While the first criterion is firmly connected with another, traditionally necessary element in the responsibility scheme, with the fault, the other criterion is limiting vis-à-vis the wide causal understanding of a cause as a *causa condition*.

Conclusion:

Proposal of a solution

Under current uncertainty about one definitive opinion on the concept of causation both on the general, as well as on the legal level, it is in our opinion the most suitable to come in law from a methodological approach introduced by Froeyman and De Vreese for natural sciences and everyday life, utilizing the conceptual analysis from the perspective of utility of causal schemes (the so-called "*theoretical utility perspective*"). This theory embodies a notion that the construction of causation should include both a sufficiently wide causal definition, which should be general to such an extent, so that it can embody diverse causal criteria of individual theories and

at the same time it could then solve utilization for conceptually diverse situations and cases.⁶³

We consider this approach to be suitable especially out the following reasons: in the legal context unlike the scientific context, it is necessary to resolve pragmatically doubts about causal connection, as it is necessary to decide on an individual specific case (prohibition of *denegatio justitiae*). In the scientific sense, research can be left without a clear decision, as cognition is not definite and moves on⁶⁴. Unless truth about causal connection is objectively established, or social consensus exists on what the causal connection is, it is possible to leave deliberation in the stage of research. Thus the use of the conceptual analysis in a legal sense is suitable also for the reason that normative aspects and findings significantly intervene with deliberation. At the same time a perspective of linguistic analysis of causal connection is hereby accepted, which occurs in our verbal expressions (by the mere fact that often it is possible to distinguish direct and indirect causal connection in expressions, this being on the basis of different verbs⁶⁵. At the same time it is necessary not to forget the fact that in the law as a pragmatic tool for finding justice, quite often the so called legal fiction and legal assumptions are used as suitable. Their substantiation is then possible also in causation, as if we intuitively understand something as morally right and it is

⁶³ „If we want to give an adequate description or characterization, we will have to provide an account about which criteria apply in which context. Rather than a simple disjunction of different rules, such an account would take the shape of a multi-dimensional network or cluster of causal relations and contexts.” FROEYMAN, A., De VREES, L., Unravelling the Methodology of Causal Pluralism, *Philosophica*, 81 (2008), p. 83

⁶⁴ Compare, for example, with HULSWIT, M., Causality and Causation: The Inadequacy of the Received View, retrieved from <http://www.library.utoronto.ca/see/SEED/Vol4-2/Hulswit%20abstract.htm> 9.10.2013

⁶⁵ In more detail, compare with, e.g. NEELEMAN, A., van de KOOT, H., The Linguistic Expression of Causation, In Everaert M, Siloni T, Marelj M (Ed.), *The Theta System: Argument Structure at the Interface* (pp. 20 - 51). : Oxford University Press, 2012, s. 79 and conseq. or WOLFF, P., Direct causation in the linguistic coding and individuation of causal events, *Cognition* 2003 May;88(1):1-48 p. 1-48

in accordance with general moral requirements, it would be then suitable to use a rule formulated in such a manner (from a pragmatic perspective) in the legal regulations. The said conceptual method also makes it possible to work better and correct a potential inconsistency of the general causal approach by our moral intuition in individual pragmatic cases. The above mentioned methodological approach to causation (which will be called as a "pragmatic approach" for the purposes of this article), can be utilized on the basis of some paradigmatic models.

In what way should this method work? First, it is necessary to find a general clause, which will be sufficiently general, so that it can encompass all cases of causal relations, even if it encompassed also non causal elements. Generally, it is possible to agree that causation is that what causes change, or diversity. A general condition of causal relations is their irreflexivness and asymmetry (i.e. if A causes B, then B does not cause A, at the same time no causal loops can be achieved so if $a \rightarrow b$ and at the same time $b \rightarrow c$ then it is not true that $c \rightarrow a$). Such a summary may not be valid in the natural causation however it is completely usable in the legal causation. Hence, this general scheme can be always used in a causal model.

This should be a starting point for the legal analysis however such a summary apparently contains a big number of non causal relations. It would be at variance with moral intuition to derive responsibility from this general model. Therefore, it is necessary to utilize also other concepts of causation, which can be found in a theory and apply them to a specific case.

In the theory of civil law responsibility, the regular succesion can be used, which admittedly does not have to be generally valid in the science however it can be always utilized on the legal level. The concept of spatiotemporally contiguity, i.e. the cause and its effect must be temporally and spatially

connected, can be also used as a starting point. These rules reflect regularity theories. However, one of the starting points of legal responsibility is also the counterfactual theory embodied in the condition of *conditio sine qua non*. In connection with the test of *csqn* it is possible to use the procedure of elimination (i.e. the mental elimination of the action being assessed from the causal tests and ascertainment of a hypothetical effect, provided that the causal effect remains unchanged after taking out the action *c* from the causal chain, than *c* is not a cause of *e*) and the procedure of substitution (in the case of failure to act, i.e. replacement of an illegal action with an action in compliance with legal regulations and by exploration, whether a harmful event would occur in such a case).

On the contrary the Wright's NESS system can be applied in such cases, where the above mentioned *csqn* condition does not offer a correct solution (it is at variance with our intuitive conviction), i.e. in the case of multiplicity of sufficient causes. In such a case the *but for* test fails, however the Wright's NESS system can be used. The Wright's NESS system is a useful tool for resolving causal issues associated with the so-called concurrent causation and further to this in the case of competitive causation. However, it cannot be successfully applied in omissions, and in the case of the so-called asymmetrically overdetermined concurrent-cause cases.⁶⁶

With regard to the fact that legal deliberation on delicts must be always subordinated to normative framework of legal regulations, i.e to limit the range of causation to a specific spectrum of situations involving also the

⁶⁶ With this compare a more detailed analysis in ADAMS, E., The Flexibility of Description and NESS Causation. *The Journal of Philosophy, Science & Law*. Volume 10, April 12, 2010. A typical example for the asymmetric concurrent causation is a case, when two individual make a fire, one small and the other big, which together set a house to fire, which gets burnt down. However, in the case of a small fire, the house could have been extinguished, if it were not for the big fire.

conditions stated in the protective purpose of the regulation and a method of its limitation, it is then possible to use the Hans Kelsen's theory of imputation of legal standards. This is usable also for the so-called omissive delicts, as we attribute a particular effect to violation of duties on level of legal regulations.

Based upon an extended analysis for individual paradigmatic examples, it is then possible to create a pragmatic model of plural causation, which will be suitable for use in legal practice.

This outline of the method of causal pragmatism must be subsequently explored in line with moral intuition, which according to us can be explored on the basis of empiric studies and further to this in the context with individual areas, to which the law of tort relates. For example, it is possible to state a situation in the medical and legal disputes, where the causal uncertainty about the causal relation being detected is high and we can talk about the so-called "black box".⁶⁷ Admittedly, in such a case the following models appear as adequate: the model of general causation, consisting in the change of an event, or state of affair⁶⁸, non identical relation⁶⁹ and the

⁶⁷ „With regards to a possible liability of a doctor, the causation between the (wrong) diagnosis or the (wrong) therapy and the actual damage is difficult to prove. If the patient had been healthy he wouldn't have undergone medical treatment. So there is already some kind of "damage" when he consults the doctor. If the patient doesn't feel better or even gets worse after the treatment, it might have been caused by what the doctor did. But the result can also be the consequence of a "natural development", which would have occurred even without the doctor's mistake. The metaphor of a "black box" fits best for judging the consequences of medical treatment. We know the input in form of the current health condition of the patient. What lies in between – see the black box – often cannot be completely enlightened by the "test of causation". In these situations, the only things to determine are probable and statistical coherences." SCHIEMANN, G. Problems of Causation in the Liability for Medical Malpractice in German Law. In TICHÝ, L. ed. *Causation in Law: Praha 2007*. Beroun: IFEC, 2007, p. 187 and conseq.

⁶⁸ $c \rightarrow e$ is a causal relation, if, and only if on the basis of an event c a change occurred with an effect of e or if a change of a state affair c to a state affair e occurred.

⁶⁹ $c \rightarrow e$ is a causal relation, if, and only if an event (state of affairs) c is not identical with an effect e

relation of asymmetry⁷⁰, further to this, also the following rules of time sequence⁷¹ and spatial contiguity⁷² can be used in the test of causation. However, the theory of regular succession⁷³ is not usable in this case, as in the case of some disorder processes, only the singular approach to causation is adequate, therefore it is not possible to presume generally on the basis of type cases, identically as the theory of the counterfactual analysis⁷⁴, as in this case, it cannot be explicitly said, whether the effect would occur even without an illegal intervention of a doctor. Therefore, in such a case the *conditio sine qua non* is not suitable and the insistency of some legal orders upon proving the causal relation with a hundred per cent certainty⁷⁵ is indefensible and at variance with the corrective justice and thus also with the tort law principles. Similarly, neither the Wright's NESS test can be used as a model. However, it seems to be suitable to use the probabilistic theory⁷⁶, or as the case may be, the theory of statistical relevance⁷⁷, which currently found their practical models in some countries in the causal proportionate responsibility.

Conclusion

This whole article wants to draw attention to pluralism of causation theories not only in the scientific, but also in the legal and common language. However, these familiar theories also found their application in the scientific

⁷⁰ $c \rightarrow e$ is a causal relation, if, and only if it is true that c causes e , then it cannot be the case e causes c

⁷¹ $c \rightarrow e$ is a causal relation, if, and only if an event type c (a cause) temporally precedes an event type e (an effect)

⁷² $c \rightarrow e$ is a causal relation, if, and only if c a spatial contiguity with the type e (an effect)

⁷³ $c \rightarrow e$ is a causal relation, if, and only if e -type events regularly follow c -type events

⁷⁴ $c \rightarrow e$ is a causal relation, if, and only if, e is counterfactually dependent on c

⁷⁵ For example see the approach in the Czech Republic and the Slovak Republic.

⁷⁶ $c \rightarrow e$ is a causal relation, if, and only if, c raises the probability of e

⁷⁷ $c \rightarrow e$ is a causal relation, if, and only if, the occurrence of c is statistically relevant to the occurrence of e

field and in many cases specific methods for determination of a causal relation are often used in specific fields of science. For this reason, we believe and we have tried to outline in this text that a starting point for the use of legal causation is the causal pluralism following from a pragmatic method of the most suitable effect for specific paradigmatic models of causation, i.e. its conceptual use. This does not mean that we would give up an entitlement to real nature of causality, but we rather use the fact that law as a tool often utilizes intuitive irrefutable presumptions, which on the basis of their utility perform function of a practical tool. Based upon the pragmatic method, it is then suitable to implement the causal methods dominating in the current discourse into the legal order, where the *conditio sine qua non* method appears to be inappropriate, or needs to be supplemented. A rational analysis of such a test should be then performed on the basis of exploration, whether an action embodies relevant general elements of causal models. Determination of such a theoretical framework presumes considerable efforts in reassessing the so far practice, nevertheless the current solution to the problems of causal conjunction through the civilist doctrine, but also the application practice of the Czech courts is not sufficient and creates conditions for unjust decisions.