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The Presumption of Fault of Provider of Medical Services Under the Civil Code of Georgia

The presumption of fault of medical service provider is established by the Civil Code of Georgia. However, the denial of presumption of fault of medical service provider takes place in court decisions and the scientific literature, which shall be conditioned by neglecting of legal method of interpretations of the norms. The issue is extremely important, because it is related to the procedure of distribution of the burden of proof between the parties. The purpose of article is to facilitate further study of an issue and establishment of the uniform judicial practice in the relevant field.

Key Words: *The presumption of fault, burden of proof, doctrine of Res ipsa loquitur.*

1. Introduction

Since the day of reestablishing the State independence, the need for complex reforms has emerged in Georgia, the success of which, first of all, depended upon the effective reform of the legislation. The Civil Code of Georgia, [1] (hereinafter referred to as the CCG), adopted in 1997, was based on the Civil Code of Germany. Despite the content convergence of separate norms, in Georgia, unlike Germany, "the more different legal terminology and new understanding of the concepts" [2] has been established. During the process of working on CCG and following its enactment, the provision and teaching of legal methodology has not been implemented in Georgia at proper level, which was very important for understanding and comprehension of mostly continental-European model-oriented laws.[3]

The article 1007 of CCG on compensation for damage inflicted by the medical institution does not have an analogue in the Civil Code of Germany. In accordance with the mentioned article, in the process of undertaking the treatment (consequences of surgical operation or incorrect diagnosis, and etc.) in the medical institution, the damage inflicted to a person's health shall be compensated in accordance with the general basis. The injurer is exempted from the responsibility, if he/she proves that he/she is not at fault in occurrence of damage.

While analyzing the separate court decisions on compensation of damage inflicted by the medical institution under the present research, the tendency of confusion of legal concepts, as well as neglecting of legal method of interpretation of the norms, given in special literature, has been distinguished.

It must to be noted that the Code of Civil Law of neither 1923 [4] nor 1964 [5] contained the special provision about compensation of damage inflicted by the medical institution and, probably, these circumstances

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1 The Civil Code of Georgia, the Parliamentary Bulletin, № 31, 24.07. 1997.

2 Preface: *Bernhard Shloer* and *Zeno Reichenbecher* in work: *Zippelius R.,* Introduction to German Legal Methods, Tbilisi, 2006, XI.

3 Ibid.

4 The Code of Civil Law of Soviet Socialist Republic of Georgia dated 1923.

5 The Code of Civil Law of Soviet Socialist Republic of Georgia (Bulletins of Supreme Council of Soviet Socialist Republic of Georgia, 1964, №36, Article, 662).

have conditioned the lack of researches implemented for the relevant direction. It must be also noted that, at a certain stage, there was a practice established, according to which the state medical institutions were exempt from civil legal responsibility, for the cases of infliction of damage to the health of patient by the doctor employed at the same institution.[6] As for the modern approach to the issue, it must be noted that during interpretation of article 1007 of CCG, in some works and in the decisions made by the Supreme Court of Georgia, the denial of the presumption of guilt of a doctor under the law of torts, can be encountered.

In the decision of Chamber of Civil Cases, the Supreme Court of Georgia, made in 2010 year, the court has defined that "proceeding from the specificity of the relationships generated between the patient and the doctor, the doctor is responsible only for incorrect medical actions, and the assumption of guilt (presumption) towards his/her activities is not applied". [7] In the decision of Chamber of Civil, Entrepreneurial and Bankruptcy Cases, the Supreme Court of Georgia, made in 2005 year, different position is encountered; according to the above position, the defendant shall be imposed the civil responsibility in case if the conditions for imposing of responsibility for infliction of damage are present, in particular, if there is a damage, which is inflicted by unlawful action, there is a causal relationship between unlawful action and the damage caused and an injurer is at fault. In addition, the Chamber indicates that "during infliction of damage there is a presumption of guilt – the injurer is considered as the guilty person, if the fact of absence of his guilt is not proved".[8] In contrast to the above noted, the availability of assumption (presumption) of guilt towards the doctor's activity is denied in the decisions[9] made by the Chamber of Civil Cases, the Supreme Court of Georgia in 2011 and 2013 years.

Comparison of the above decisions clearly indicates that diverse court practice is established with regard to the issue of presumption of guilt for medical service provider.

2. The Burden of Proof

It is stated in the scientific literature that according to the Civil Procedural Law of Georgia, "the burden of proof is fully assigned to the parties and this burden is equally distributed between them".[10] In terms of distribution of burden of proof, it is important to determine, whether there is a contradiction between the rules established under article 1007 of CCG and Civil Procedural Code of Georgia [11] (hereinafter referred

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[6] The decision is available in the publication: indicate – is available in journal "Soviet Justice" («Советская Юстиция»), №9, 1937, 52. The citizen, brought in hospital in unconscious condition, for treatment of which the medical heaters were used (by the prescription of a doctor), got the burn on the body and it took six months treatment for recovery. The patient submitted a claim against the medical institution . Based on article 403 of Civil Code of the Russian Soviet Federated Socialist Republic, the first instance court satisfied the claim, but the Supreme Court changed the decision and indicated that the court, instead of article 407 (where it was noted that the institution is responsible for injury inflicted by incorrect action of official, only in case separately specified by the law, if, at the same time, the incorrectness of action of official is recognized by the appropriate court or administrative body), has incorrectly used the article 403 of the Code. According to the court, imposing of responsibility for the damage inflicted by the medical institution could not be implemented, because there was not a reference in the law about the possibility of imposing of liability upon the hospital employees. Therefore, the citizen was refused to receive compensation for the damage.

[7] The decision of Chamber of Civil Cases, the Supreme Court of Georgia, made on 25 May, 2010 (Case №AS-1268-1526-09), <http://goo.gl/XhEK1T>, [28.08.15].

[8] The decision of Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia, made on 13 April, 2005 (Case №AS -33-406-05), <http://goo.gl/vcF2Ym>, [28.08.15].

[9] The decision of Chamber of Civil Cases of the Supreme Court of Georgia, made on 27 June, 2011 (Case №AS-260-244-11), <http://goo.gl/Hk7MUs>, [28.08.15]; The decision of Chamber of Civil Cases of the Supreme Court of Georgia, made on 25 December, 2013 (Case #AS-1163-1092-2012), <http://goo.gl/GGvUfa>, [28.08.15].

[10] *Liluashvili T., Khrustali V.,* Commentary to the Civil Procedure Code of Georgia, Tbilisi, 2004, 196.

[11] Parliamentary Bulletin, 47-48, 31.12.1997.

to as CPCG), according to which each party shall prove the facts, on which it bases its claims and counterclaim.[12]

Herman notes that according to article 102 I of CPCG, each party shall prove the circumstances, which are favorable for them, but "the law also considers the exceptional cases for article 102, CPCG. These articles are: first section of article 394, articles 995, 996 and 997 of CCG. According to these norms the defendant is obliged to prove its non-guiltlessness, when in other cases, according to basic principles of article 102 of CPCG, the plaintiff would be charged with burden of proof, as guiltiness is one of the lawful preconditions for existence of the claim".[13] Therefore, the author identifies "the exceptional cases of article 102 of CPCG" only in indicated articles, in particular, in the article 394 I, articles 995, 996 and 997 of CCG.

One group of authors notes that the norm of article 102 I of CPCG is the expression of principle of competition and "the contradiction existing between the procedural and substantive laws, as a rule, is decided in favor of the latter"[14] (hereby, one of the decisions is provided as an example, where the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia noted that the burden of proof related to illegitimacy and lack of guilt lies with the defendant; "the defendant did not submit sufficient evidences on the circumstances indicated in the counterclaim. According to the report of the forensic-medicine examination appointed by the court's initiative… it is established that the operations were carried out incorrectly – with technical defects. The defending party failed to submit evidences to the court, which would exclude their guiltiness"[15]). Authors note that "in this case, the court gave the preference not to procedural norm, but to the substantive law norm"[16] (in particular, article 1007 of CCG).

Article 1007 of CCG not only contradicts the rules established under the article 102 I of CPCG, but also indicates and determines the procedure of distribution of burden of proof between the parties. In the comment for the article 102 of CPCG it is noted that "often, indicating which party shall prove which facts, is determined under the substantive norms",[17] i.e. there is no contradiction between the norms of procedural and substantive laws and there is not the need for decision in favor of any norm of this non-existent contradiction. The following position coheres to this consideration: "the legislative presumptions have two functions, procedural and substantive. The first is reflected in the fact that these presumptions in separate cases change the rule of proof considered under section I, article 102 of CCG and lay the burden of proof with another party, which is connected to the risk for the latter, that it can fail in a suit, if the evidence is not admitted. The substantive function is that one of the constituent elements of descriptive section of the norm, is considered as given in relation to the specific process and between the specific parties, even when establishment of such circumstances could not be made objectively."[18]

When the legislator establishes the rule of distribution of burden of proof between the parties, according to substantive law norm, as it is carried out in the article 1007 of CCG ('the injurer is exempted from the responsibility, if it is proved that he is not at fault in occurrence of damage~), it is incorrect to prove that the presumption of guilt is not applied towards the doctor's activity, allegedly under the Private Law.

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[12] Article 102 I, the Civil Procedural Code of Georgia.

[13] *Hermann T.,* Law of Evidence (synopsis), Tbilisi, 2016, 8.

[14] *Todua M., Willems H.,* Law of Obligations, Tbilisi, 2006, 49.

[15] The Decision of Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia, made on 13 April, 2005 (Case №AS-33-406-05), <http://goo.gl/vcF2Ym>, [28.08.15].

[16] *Todua M., Willems H.,* Law of Obligations, Tbilisi, 2006, 49.

[17] *Liluashvili T., Khrustali V*., Commentary to the Civil Procedure Code of Georgia, Tbilisi, 2004, 196.

[18] *Bölling H., Lüttringhaus T.,* A Systematic Analysis of Fundamentals of Separate Claims of Civil Code of Georgia, Tbilisi, 2009, 68-69.

According to the definition provided by the professor Liluashvili, "the procedural essence of presumption (assumption) considered under the Civil Law is fully exhausted by distribution of burden of proof between the parties. Distribution of burden of proof between the parties based on the claims proceeding from the different institutions of substantive law, is directly or indirectly regulated by the law, which gives the court possibility to accurately determine, which circumstances belong to the facts contained in the grounds of claim, to be proved by the plaintiff, and which circumstances belong to the grounds of counterclaim, to be proved by the defendant."[19]

The following reasoning indicates on the presumption of guilt of medical service provider: "In case if the patient's claim is not satisfied, the illegal action of medical service provider must be excluded by the court decision. In addition, the presumption of guilt of injuring party under article 1007 of the Civil Code is applied and, accordingly, it must be proved that the damage is not result of his/her action. The injured party is not bound by the burden of proof of guilt of medical worker."[20] According to definition, provided by professor Chikvashvili, "the civil responsibility is characterized by ... the principle of presumption of guilt for the injuring party. Injuring party is considered as guilty, if he/she does not prove the fact of absence of his/her guilt."[21]

There is an opinion expressed in the scientific literature, according to which "during imposing the payment for contractual damage the creditor shall prove only the existence of the contract. The debtor's business is to prove that non-fulfillment of the contract is caused by external circumstances, which could not be changed by the debtor. As it is said, the debtor is considered to be guilty. During delict liabilities, quite the contrary, injured party (the creditor) is obligated to justify the defendant's fault. This difference is diminished by the fact that, even in the area of contractual responsibility, when the case refers to certain means belonging to one group, sometimes, the creditor has to prove that the debtor did not act as a good business executive, and, on the other hand, diverse presumptions are established by the law for delict responsibility."[22] The mentioned position is shared in some works: the correlation of contractual and non-contractual requirements is important, as in the first case, the debtor (doctor) is obligated to prove that non-fulfillment of obligations is the result of external factors and he is not guilty in occurrence of damage, but in case of non-contractual liability, the injured party (patient) is imposed the burden of proving the defendant's guilt."[23] The similar position can be encountered in other works: „The doctor is responsible for only the false medical action and the assumption (presumption) of guilt is not applied towards his/her activity."[24] In addition, one group of authors indicate that the CCG "introduces the principle of presumption of non-guiltiness of debtor"[25] and, then notes that "injured party does not have to prove the guiltiness of a person, but, on the contrary, the debtor is imposed the liability to prove that he is not guilty in occurrence of damage."[26] Obviously, if the debtor is required to prove that he is not guilty in occurrence of damage, then the presumption of guilt of debtor, but not "the principle of presumption of non-guiltiness of debtor",

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[19] *Liluashvili T., Khrustali V.,* Commentary to the Civil Procedure Code of Georgia, Tbilisi, 2004, 196.

[20] *Kvantaliani N.,* The Rights of Patient and Fundamentals of Civil Liability of Health Care Personnel (thesis work), Tbilisi, 2014, 190.

[21] *Chikvashvili Sh.,* Commentary to the Civil Code of Georgia, book IV, Vol. II, Tbilisi, 2001, 387. This Position is Shared in the Work: *Kochashvili K.,* Fault, as the Condition for Civil Liability (comparative legal research), „Law Journal ", №1, 2009, 84, <http://goo.gl/aHljoe>, [15.02.15].

[22] *Dundua M.,* Correlation of Delict Liability and Contractual Responsibility, „Law Journal ", №1, 2009, 56.

[23] *Gelashvili I.,* Civil Legal Condition of Embryo (thesis work), Tbilisi, 2012, 133.

[24] *Kvachadze M., Manjavidze I., Kvantaliani N., Mirzikashvili N., Gvenetadze N., Azaurashvili G.,* Book for Patients: Human Rights and Health Care (guide), Tbilisi, 2011, 118.

[25] *Todua M., Willems H.,* Law of Obligations, Tbilisi, 2006, 48.

[26] Ibid.

is evident. The position is shared in the present work, according to which "the presumption of guiltiness is characteristic to delict liabilities, which means that until the person does not prove absence of guilt in his activities (which is indicated by the creditor), he is considered as guilty."[27]

3. Doctrine of Res ipsa loquitur. The Concept of Negligence

If party, which is imposed burden of proof, cannot prove the circumstances favorable for him/her, the hearing can be completed with undesirable results: "these are the cases, when party does not submit evidences at all, or cannot convince the judge by means of the submitted evidences."[28] In addition, the burden of indication of facts and the burden of proof of these facts may not coincide with each other."[29] In terms of comparative legal research of issue, the doctrine of res ipsa loquitur[30] common in Anglo-American law of torts, is interesting.[31]

The representatives of medical field state that "a doctor is not imposed the criminal or disciplinary responsibility for medical mistakes."[32] Hereby, an opinion of Pirogov[33] is cited („I made as a rule nothing to hide to my disciples, during my first ascending to the chair; to acknowledge… mistakes made during setting a diagnosis, or during treatment of disease" [34]), and it is mentioned that: „to acknowledge our mistakes before the colleagues and not the patients and relatives, especially, before lawyers. It is not allowed to endlessly destruct the corporation of medicine." [35]

In general, the doctrine of res ipsa loquitur is considered as effective mean against the phenomenon of so-called "corporate solidarity" (many doctors support their colleague, even if they know that a crime has been committed).[36]

Res ipsa loquitur represents the rule of evidence (and not the norm of substantive law[37])[38] on the cases

[27] The Decision of Chamber of Civil Cases of the Supreme Court of Georgia, made on 29 June, 2006 (Case №AS-1363-1588-05), <http://goo.gl/qAJ5Yx>, [04.09.15].

[28] *Hermann T.,* Law of Evidence (synopsis), Tbilisi, 2016, 10.

[29] *Liluashvili T., Khrustali V.,* Commentary to the Civil Procedure Code of Georgia, Tbilisi, 2004, 197.

[30] Lat. "the thing speaks for itself" (See, Wex Legal Dictionary (Cornell Law School, The Legal Information Institute), <https://goo.gl/KI2dVA>, [03.09.16].

[31] *Prosser W.L.,* Res Ipsa Loquitur in California, "California Law Review", Vol. 37, Issue 2, June, 1949, <https://goo.gl/KSS3We>, [15.07.16]; In addition, *Johnson M.R.,* Rolling the "Barrel" a Little Further: Allowing Res Ipsa Loquitur To Assist in Proving Strict Liability in Tort Manufacturing Defects, "William & Mary Law Review", Vol. 38, Issue 3, 1997, <http://goo.gl/XULZbh>, [15.07.16]; *Carpenter C.E.,* The Doctrine of Res Ipsa Loquitur, "University of Chicago Law Review", Vol. 1, Issue 4, 1934, < https://goo.gl/06eDar>, [15.07.16].

[32] The article of professors of Oncology Department of Tbilisi State Medical University (TSMU): *Shavdia M., Ghvamichava R., Bakradze I.,* Ethics in Oncology, Journal "Modern Medicine", №16, May-June, 2010, <http://goo.gl/l2QbKe>, [15.02.14].

[33] *Nikolai Ivanovich Pirogov*, 1810–1881; Russian surgeon, Professor.

[34] *Pirogov N.I.*, Life Issues. Diary of Old Doctor (the manuscript is dated 1881), <https://goo.gl/W8qtdj>, [05.08.16], indicated: *Shavdia M., Ghvamichava R., Bakradze I.,* named work.

[35] *Shavdia M., Ghvamichava R., Bakradze I.,* Ethics in Oncology, Journal "Modern Medicine", №16, May-June, 2010, <http://goo.gl/l2QbKe>, [15.02.14].

[36] *Fishman P., "*Res Ipsa Loquitur" in Medical Negligence Legal Practice, 2016, <http://goo.gl/uykdJf>, [01.08.16].

[37] The decisions: Benedict v. Eppley Hotel Co., 161 Neb. 280, 283, 73 N.W.2d 228, 230, (1955); Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 925, 62 N.W.2d 127, 129 (1954). Indicated: *Johnson S.C.,* Res Ipsa Loquitur: Pleading Acts of Negligence: Nuclear Corp. of America v. Lang, 338 F. Supp. 914 (D. Neb. 1972), "Nebraska Law Review", Vol. 52, №3, 1973, 406, <https://goo.gl/SFf9aE>, [01.08.16]; In addition, see, *Harper F.V.,* Book Review: Res Ipsa Loquitur: Presumptions and Burdens of Proof, "Virginia Law Review", Vol. 32, 1945, 211, <https://goo.gl/Sr76G5>, [30.08.16].

[38] Eng. "Rule of Evidence"; See, *Sharma B.R.,* Medical Negligence: an Overview of the Opinions and the Controversies, "Anil Aggrawal's Internet Journal of Forensic Medicine and Toxicology", Vol. 8, №2, July-December 2007, <http://goo.gl/hQNUDs>, [01.08.16].

of personal injury law and implies that harmful action is implemented as a result of negligence [39] of defendant party (medical service provider), in other words, we are dealing with rebuttable presumption in which case the fault is presumed, until the defendant party proves the opposite.[40] When a health of a person is damaged and direct evidence against injuring party does not exist, the principle of res ipsa loquitur implies that existence of indirect evidence is sufficient for imposing the compensation for damage. [41]

The purpose of the principle of res ipsa loquitur for cases of compensation of inflicted damage to the patient by the medical service provider, is to simplify for the injured person (patient) to administer the case, as proving that damage is inflicted by the fault of medical service provider, is extremely difficult.[42] For better understanding of the mentioned principle, generally the cases, when during surgical operations the medical instrument remains in the body of patient (any subject of medical purpose, for example, the medical tampon. [43]), are provide as examples.[44]

The doctrine of res ipsa loquitur implies several conditions; in particular, 1. The injury or damages sustained could not, under ordinary circumstances, occur without negligence on the part of the defendant; 2. *the injury is caused by an instrumentality within the exclusive control of the defendant* [45] and 3. The damage has to be caused independently from any type willful action of plaintiff.[46]

In general, the rule applies, according to which the fault is not presumed (the presumption of negligence is not applied), "as a general rule, it may be stated that negligence is a fact which must always be proved and will never be presumed"[47] (in law of torts, the onus of proving negligence lies upon to the individual, who alleges that he has been injured[48]), but the doctrine of res ipsa loquitur represents an exception

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[39] For duty of care see Donoghue v Stevenson [1932], UKHL 100, Lords' Journals, May 26, 1932, <http://goo.gl/cDY0TV>, [31.08.16]; In addition: *Bryden D., Storey I.,* Duty of Care and Medical Negligence, "Oxford Journals", Medicine & Health BJA, CEACCP, Vol. 11, Issue 4, 124-127, <http://goo.gl/UtneQK>, [31.08.16].

[40] Thomson Reuters Business, Res Ipsa Loquitur, <http://goo.gl/BChznU>, [01.08.16].

[41] *Prosser W.L.,* Res Ipsa Loquitur in California, "California Law Review", Vol. 37, Issue 2, June, 1949, 191, <https://goo.gl/KSS3We>, [15.07.16]; California Civil Jury Instructions, Special Doctrines: Res ipsa loquitur, New September 2003; Revised June 2011, December 2011, <https://goo.gl/ZrCHHc>, [08.08.16]; In addition, see, *McBratney W.H.,* Res Ipsa Loquitur, "Washington University Law Review", Issue 4, 1952, <https://goo.gl/306WJQ>, [15.07.16]; *Konig A.H.,* Tort Law – Res Ipsa Loquitur in Medical Malpractice Actions: Mireles v. Broderick, New Mexico Law Review, Vol. 23, 1993, <https://goo.gl/r0F0Yu>, [10.08.16]; *Grady M.F.,* Res Ipsa Loquitor and Compliance Error, "University of Pennsylvania Law Review", Vol. 142, №3, 889, <https://goo.gl/Q89Me2>, [10.08.16].

[42] *Goguen D.,* When a Doctor's Negligence "Speaks for Itself", <http://goo.gl/GJVRfD>, [01.08.16]; *Fishman P.,* "Res ipsa loquitur" in medical negligence legal practice, 2016, <http://goo.gl/uykdJf >, [01.08.16]; *Burnham W.,* Introduction to the Law and Legal System of the United States, 2002, 426.

[43] The patient died in a short time following abdominal surgery. As a result of examination of corpse, it was found that the medical tampon was left in the body (see, Burden of Proof, Mahon v Osborne [1939], 1 All ER 535, CA <https://goo.gl/IvjqIl>, [01.08.16].

[44] Ibid. in addition, see, *Harland J.H.,* Res Ipsa Loquitur in Malpractice Cases in Canada, "Cleveland State Law Review", 302-303; 1961, <http://goo.gl/wXTgMx>, [14.07.16]; *Patel B.,* Medical negligence and res ipsa loquitur in South Africa, "South African Journal of Bioethics and Law", Vol. 1, №2, December 2008, <http://goo.gl/HF0i62>, [14.07.16]; *Tobin P.C.,* 25 Doctrines of Law You Should Know, 2007, 3; *Anderson J.,* What to Do if a Surgical Instrument is Left Inside of You, May 13th, 2013, <http://goo.gl/CkJDeo>, [12.07.16].

[45] Raber v. Tumin [1951], 36 Cal.2d 654, <http://goo.gl/RfXmi0>, [01.08.16]; *Steenson M.K.,* A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Products Liability, "William Mitchell Law Review", 1998, 34-46, <https://goo.gl/ELqctL>, [13.08.16]; See: *Heckel F.E., Harper F.V.,* Effect of Doctrine of Res Ipsa Loquitur, "Illinois Law Review", 1928, 725, <https://goo.gl/7A7GZ9>, [16.08.16].

[46] *Fricke G.L.,* The Use of Expert Evidence in Res Ipsa Loquitur Cases, Villanova Law Review, Vol. 5, Issue 1, 1959, 59, <https://goo.gl/ilnWHx>, [03.08.16]; Raber v. Tumin [1951], 36 Cal.2d 654, <http://goo.gl/RfXmi0>, [01.08.16].

[47] Negligence–Res Ipsa Loquitur–Burden of Proof (Comment on Recent Judicial Decisions), Washington University Law Review, Vol. 13, Issue 2, 157, <https://goo.gl/e0B5js>, [19.08.16].

[48] *Heckel F.E., Harper F.V.,* Effect of Doctrine of Res Ipsa Loquitur, Illinois Law Review, 1928, 724, <https://goo.gl/7A7GZ9>, [16.08.16].

from above mentioned general rule.[49]

As for the concept of negligence, the tortious act, committed as a result of negligence considers that the party could take into account the expected damage, with high degree of probability. In case of negligence, the party creates inexpedient risk of infliction of damage, by action or inaction. At first glance, both the negligence as well as intention, reflect the psychical attitude of delinquent offender towards the expected results of actions implemented by him, but in case of such approach, only "careless" or "inattentive" persons could be found among the violators. Barnem notes that in this case there is a presumed fact that, usually, each member of society knows, which of his/her actions or inactions create unreasonable risk for infliction of damage.[50] Accordingly, in line with Restatement (Second) of Torts, §282, the negligence is determined as the action, which does not comply with the standard of care considered under the applicable law, the purpose of which is "to protect others from unreasonable risks of harm"[51] (delinquent's subjective attitude towards the action implemented by him does not have any legally significant meaning).Therefore, negligence means "a breach of duty".[52]

4. Conclusion

Diverse judicial practice, existing for such fundamentally significant issue as presumption of fault on the cases of compensation for damage inflicted by the medical institution, has been revealed in the present research. The analysis of norm specified in the article 1007 of CCG gives a clear basis for conclusion, according to which, the presumption of fault (the fault of defendant is presumed, if it is not proved by him otherwise) is applied to medical service provider (doctor, nurse, medical institution, etc.), under the Private Law, the procedural meaning of which directly relates to the issue of distribution of burden of proof (accordingly, the court determines the facts that must be proved by the plaintiff and the facts that must be proved by the defendant[53]) between the parties, but there is not any type of contradiction between the procedures determined by article 102 I of CPCG and substantive norm defined under the article 1007 of CCG.

In the present work the position is shared, according to which civil responsibility is characterized by the principle of presumption of fault of injuring party and the injuring party is considered as faulted, until the fact of absence of his/her fault is not proved by him/her.[54] Proceeding from the mentioned, it can be expedient to incorporate the last sentence ("The tortfeasor shall be released from liability if he/she proves that he/she is not responsible for the harm) provided in the article 1007 of CCG, in the article 992 of CCG (where the general rule for generation of delict liability as a result of infliction of damage is considered) and, for example, to formulate it as follows: "A person who unlawfully, intentionally or negligently causes damage to another person shall compensate the damage to the injured party. Unless otherwise provided by law, the injuring party is exempt from the responsibility, if he/she proves that he is not responsible at fault in the occurrence of the damage, unless otherwise specified by the law."

The issue requires further thorough research, not only within the framework of article 1007 of CCG, but fully under the framework of Private Law, which, will ultimately facilitate introduction of uniform judicial practice.

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[49] *Finger D.L., Finger L.J.,* The Delaware Trial Handbook (Online Edition), <https://goo.gl/b5iX9v>, [10.08.16]; in addition, see *Carver v. El-Sabawi,* 107 P.3d 1283 (2005), <https://goo.gl/F3cjiM>, [19.08.16].

[50] *Burnham W.,* Introduction to the Law and Legal System of the United States, Saint Paul, City P 2002, 424.

[51] Restatement (Second) of Torts, §282, American Law Institute 1965. Indicated: *Burnham W.,* Introduction to the Law and Legal System of the United States, *Saint Paul,* 2002, 424.

[52] *Burnham W.,* Introduction to the Law and Legal System of the United States, 2002, 424.

[53] *Liluashvili T.,* Khrustali V., Commentary to the Civil Procedure Code of Georgia, Tbilisi, 2004, 196.

[54] *Chikvashvili Sh.,* Commentary to the Civil Code of Georgia, Book IV, Vol. II, Tbilisi, 2001, 387.