Schlichtungsstellen and Gutachterkommissionen: The German Approach to Extrajudicial Malpractice Claims Resolution

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I. INTRODUCTION

Many commentators have contended that medical negligence cases are peculiarly inappropriate for determination through traditional civil litigation and have advocated the use of alternative dispute resolution (ADR) methods in such cases. It is argued that ADR can provide more competent decisionmakers than the juries or judges who commonly decide civil cases avoid the very high costs imposed by traditional civil litigation; reduce the trauma imposed on physicians by a public accusation of incompetence in civil litigation and by the discovery and trial process, help plaintiffs better understand the nature and cause of their injury; make available to the plaintiffs high quality experts; permit creative and reconcilatory solutions to disputes; facilitate the handling of small claims; and dispose of frivolous or marginal claims.[1]

During the malpractice crisis of the mid-1970s, many states embraced ADR in hopes of stemming the flood of malpractice litigation.[2] Twenty-two states enacted legislation that created screening panels to evaluate cases at

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[1] Stephen Meili & Tamara Packard, *Alternative Dispute Resolution in a New Health Care System: Will it Work for Everyone?*, 10 OHIO ST. J. ON DISP. RESOL. 23, 26-28 (1994); Thomas B. Metzloff, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429, 435-37 (1992); James W. Reeves, *ADR Relieves Pain of Health Care Disputes*, DISP. RESOL. J., Sept. 1994, at 14, 15.

[2] OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS 25-29 (1993).

the outset of civil litigation. The aim of these panels is to facilitate settlement of cases early in the litigation process, in particular, to discourage at the outset the pursuit of patently frivolous cases or the defense of obviously meritorious ones.[3] Fifteen states have enacted legislation offering either mandatory non-binding or voluntary binding arbitration, again attempting to divert malpractice claims from the litigation process.[4] ADR continues to be a popular malpractice reform.[5]

On the whole, however, experience with ADR in the medical malpractice area has been disappointing.[6] While a few states have had positive experiences with ADR approaches,[7] many have not. Most legislation establishing screening panels has passed initial constitutional scrutiny in state courts.[8] However, courts in five states eventually found screening panel legislation unconstitutional as applied, finding that the panels imposed excessive delays and barriers to litigation on plaintiffs.[9] Several states, including Ohio, repealed screening panel legislation because the groups that initially supported the legislation found its results disappointing in practice.[10] While several empirical studies have found that the ADR schemes of some states have facilitated quicker disposition of cases,[11] other studies have found that ADR schemes contribute to delay in

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[3] OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS 25-29 (1993).

[4] *Id.* at 40.

[5] Eleanor D. Kinney, *Learning from Experience: Malpractice Reforms in the 1990s: Past Disappointments, Future Success?*, 20 J. HEALTH POL., POL'Y & L. 99, 99 (1995).

[6] *See* Dennis J. Rasor, *Mandatory Medical Malpractice Screening Panels: A Need to Reevaluate*, 9 OHIO ST. J. ON DISP. RESOL. 115, 123, 138 (1993).

[7] Private contractual programs also report some success. *See* Armand Leone, *Is ADR the Rx for Malpractice?*, DISP. RESOL. J., Sept. 1994, at 7, 12.

[8] *See* Rasor, *supra* note 6, at 124.

[9] Aldana v. Holub, 381 So.2d 231 (Fla. 1980); State v. Gaertner, 583 S.W.2d 107 (Mo. 1979); Jiron v. Mahlab, 659 P.2d 311 (N.M. 1983); Mattos v. Thompson, 421 A.2d 190 (Pa. 1980); Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983). The Pennsylvania court found that only 37 of the 2909 claims brought before the screening panels were resolved during the three-plus years the plan was in operation. *Mattos*, 421 A.2d at 194.

[10] Debra L. Fortenberry, *Screening Panels: Corrective Surgery or Amputation?*, 4 OHIO ST. J. ON DISP. RESOL. 255, 260-61 (1989). *See also* John P. Desmond, *Michigan's Medical Malpractice Reform Revisited--Tighter Damage Caps and Arbitration Provisions*, 11 COOLEY L. REV. 159 (1994) (discussing negative experiences with Michigan's arbitration program leading to repeal in its former form).

[11] PETER E. CARLIN, THE GEORGE WASHINGTON UNIVERSITY, MEDICAL MALPRACTICE PRETRIAL SCREENING PANELS: A REVIEW OF THE EVIDENCE 29 (1980); Irving Ladimer et al., *Experience in Medical Malpractice Arbitration*, 2 J. LEGAL MED. 433, 436 (1981).

the resolution of cases and do not significantly facilitate settlement.[12] Plaintiffs and their attorneys have been particularly dissatisfied with dispute resolution programs, though defense attorneys are not wholly supportive of them either.[13] On the whole, ADR methods apparently have not had a significant impact on the volume or cost of malpractice litigation.[14]

While the American experience with ADR in malpractice has been generally negative, Germany has had more positive results. In 1993, the most recent year for which statistics are available, Germany's malpractice claims resolution panels received 6715 medical negligence cases.[15] The number of cases submitted to these panels is constantly growing. Five years earlier, for example, the panels received 5376 claims.[16] It is impossible to know how many medical negligence claims were filed in the civil courts during the same period, as statistics are not kept on this basis. Informed estimates indicate, however, that the number was approximately 3000,

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[12] Catherine S. Meschievitz, *Mediation and Medical Malpractice: Problems with Definition and Implementation*, LAW & CONTEMP. PROBS., Winter 1991, at 195, 213–15; Stephen Shmanske & Tina Stevens, *The Performance of Medical Malpractice Screening Panels*, 11 J. HEALTH POL., POL'Y & L. 525, 525 (1986); GEN. ACCT. OFF., U.S. CONGRESS, MEDICAL MALPRACTICE: FEW CLAIMS RESOLVED THROUGH MICHIGAN'S VOLUNTARY ARBITRATION PROGRAM 7 (1990).

[13] Jonathan S. Aronie, *Alaska's Medical Malpractice Expert Advisory Panel: Assessing the Prognosis*, 9 ALASKA L. REV. 401, 414–23 (1992); Jona Goldschmidt, *Bargaining in the Shadow of ADR: Analysis of Judicial and Attorney Attitudes Toward Settlement Under a Medical Screening Panel System*, JUST. SYS. J. 15, 29, 30 (1994).

[14] OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, *supra* note 2, at 65–68, 70; PATRICIA M. DANZON, THE INSTITUTE FOR CIVIL JUSTICE, NEW EVIDENCE ON THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS (1986). *But see* Frank Sloan, *State Responses to the Malpractice Insurance "Crisis" of the 1970s: An Empirical Assessment*, 9 J. HEALTH POL., POL'Y & L. 629 (1985) (cautiously concluding that screening panels have negative effect on malpractice premiums). *See also* Jona Goldschmidt, *Where Have all the Panels Gone? A History of the Arizona Medical Liability Review Panel*, 23 ARIZ. ST. L.J. 1013, 1051–94 (1991) (reviewing research on screening panels and finding research supporting the effectiveness of the panels to be flawed).

[15] TATIGKEITSBERICHT 1991 DER BUNDESÄRZTEKAMMER [FEDERAL PHYSICIANS' COUNCIL ACTIVITY REPORT] 259, 345 (1991) [hereinafter BUNDESÄRZTEKAMMER 1991]. The numbers are not strictly comparable because the 1993 numbers contain claims from the states of former East Germany as well.

[16] AUSZUG AUS DEM TÄTIGKEITSBERICHT 1995 DER BUNDESÄRZTEKAMMER [FEDERAL PHYSICIANS' COUNCIL ACTIVITY REPORT] 259 (1995) [hereinafter BUNDESÄRZTEKAMMER 1995].

fewer than half the number submitted to the dispute resolution panels.[17] The vast majority of cases submitted to these panels are resolved by panel decisions and do not result in further litigation.[18]

The panels take one (or sometimes both) of two names—Gutachterkommission or Schlichtungsstelle.[19] Gutachterkommission means expert commission. Schlichtungsstelle means place of settlement. The goal of these entities is to achieve a quick and thorough examination of the alleged medical error in order to facilitate the settlement of well-founded claims in favor of the patient and the disposition of unfounded claims.[20] A distinction is often drawn between the two forms of organization. The Schlichtungsstellen include the liability insurers in their proceedings and are more directed toward achieving a settlement, while the Gutachterkommissionen merely offer an expert opinion on whether or not an injurious error occurred.[21] In practice, however, the institutions function quite similarly from state to state. They will be referred to collectively in this article as claims resolution panels or as panels.

This article is based on a study I did of these panels in the summer of 1995. In the course of this study I visited with members or representatives of four of the panels: the Bavarian Schlichtungsstelle, North German

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[17] H.G. Krumpasky & R. Sethe, Presentation at the European Health Care Management Association Annual Conference (July 5, 1995). These statistics are far from certain, however. Another commentator estimated that in 1986 only about 35-40% of the total liability claims in North Rhein were filed before the panels, the rest before the courts. *See* Pia Rumler-Detzel, *Die Arbeit einer Gutachterkommission aus der Sicht eines Oberlandesgerichts* [*The Work of a Gutachterkommission from the Perspective of an Appellate Court Judge*], *in* GUTACHTERKOMMISSIONEN UND SCHLICHTUNGSSTELLEN, ANSPRUCH, PRAXIS, PERSPEKTIVEN [GUTACHERKOMMISIONEN AND SCHLICHTUNGSSTELLEN, CLAIMS, PRACTICE, PERSPECTIVES] 93, 93 (H. Makiol et al. eds., 1990) [hereinafter GUTACHTERKOMMISSIONEN]. The vast majority of claims—perhaps 80-90%—are settled directly by the liability insurance companies without further judicial or panel proceedings. Krumpasky & Sethe, *supra*.

[18] *See infra* notes 100–15 and accompanying text.

[19] Thomas Ratajczak, *Verfahrungsordnung und Richtigkeitsgewähr* [*Procedural Rules and Accuracy Guaranty*], *in* GUTACHTERKOMMISSIONEN, *supra* note 17, at 3.

[20] *Id.* at 5–6.

[21] J.F. Freund, *Arbeitsweise der Gutachterkommissionen und Schlichtungsstellen—aus der Sicht der Schlichtungsstelle* [*Functioning of the Gutachterkommissionen and Schlichtungsstellen—From the Viewpoint of the Schlichtungsstelle*], *in* 5 GUTACHTENKOLLOQUIUM [EXPERT OPINION COLLOQUIA] 93, 96 (G. Hierholzer et al. eds., 1990); Reinhard Bodenburg & Karl-Heinz Matthies, *Ärztliche Gutachter- und Schlichtungsstellen—Theorie und Praxis eines Modells* [*Physician Gutachtersstellen and Schlichtungsstellen—Theory and Practice of One Model*], 29 VERSR [INSURANCE LAW] 729, 729 (1982).

Schlichtungsstelle, the North Rhein Gutachterkommission and the North-Baden-Württemberg Gutachterkommission. I also discussed the panels with German academic experts and surveyed German literature on the topic. The article reviews the operation of the panels, examines their strengths and weaknesses, and reflects on why alternative claims resolution seems to have succeeded to a considerable degree in Germany while it has on the whole been unsuccessful in the United States.

II. THE CREATION AND NATURE OF THE SCHLICHTUNGSSTELLEN AND GUTACHTERKOMMISSIONEN

The first Schlichtungsstelle was established in Bavaria in 1975.[22] In the same year, a Gutachterkommission was established in Düsseldorf for North Rhine.[23] By 1978, Schlichtungsstellen or Gutachterkommissionen were available throughout West Germany.[24] After German reunification a new Schlichtungsstelle was established in Saxony, and the other new states joined the North German Schlichtungsstelle in Hannover.[25]

Curiously, the idea for these panels may have come from the United States. West Germany experienced its own malpractice crisis in the mid-1970s, and the screening panel approach that was beginning to appear in the United States readily took hold in West Germany.[26] These institutions are uniquely German, however, and are best understood in the context of German medical law and the German health care system.

First, the panels were created to forestall the increasing use of criminal malpractice proceedings. In Germany, malpractice has traditionally been viewed as a matter for the criminal as well as the civil courts.[27] For example, killing a patient or injuring the patient's body is a crime.[28] Even today there are probably as many criminal as civil complaints brought

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[22] J.F. Freund et al., *Gutachterkommission für Fragen Ärztlicher Haftpflicht [Gutachterkommission for Questions of Physician Liability]*, *in* 108 FORTSCHRITTE DER MEDIZIN [MEDICAL PROGRESS] 633, 633 (1990).

[23] *Id.*

[24] *Id.*

[25] GERT CARSTENSEN ET AL., GUTACHTERKOMMISSIONEN UND SCHLICHTUNGSSTELLEN IN PRAXIS DES ARZTHAFTUNGSRECHTS [GUTACHTERKOMMISSIONEN AND SCHLICHTUNGSSTELLEN IN PRACTICE OF PHYSICIAN LIABILITY LAW] 105 (Alexander P.F. Ehlers & Maximilian G. Broglie eds., 1994).

[26] ERWIN DEUTSCH, ARZTRECHT UND ARZNEIMITTELRECHT [PHYSICIAN AND DRUG LAW] 164 (2d ed. 1991).

[27] *Id.* at 140-41.

[28] STRAFGESETZBUCH [STGB] [CRIMINAL LAW BOOK] §§ 222, 230 (F.R.G.).

against doctors.[29] Civil litigation is very costly to the patient in Germany, and until recently, it was difficult for patients to get access to their medical records. Increasingly in the 1970s, patients who believed they had been injured due to medical malpractice began to file criminal complaints so that the prosecuting attorney or coroner could conduct initial discovery and case review to determine whether there was a case for litigation.[30] This was obviously traumatic to physicians who were investigated for a crime.[31] The Gutachterkommissionen and Schlichtungsstelle provided a less confrontational means for patients to get information about their treatment.

Second, the panels were created in response to the growing mistrust of the medical establishment, particularly on the part of the courts, that became pronounced in the 1970s.[32] The Gutachterkommissionen and Schlichtungsstellen were established in part to restore confidence in the medical profession by providing free and impartial expert opinions to patients injured by medical malpractice.

Finally, the corporate nature of German professional practice facilitated the establishment of these panels and made their establishment a natural response to the problems described above.[33] A key value of the German health care system is "Selbstverwaltung," self-governance.[34] The system is guided by federal law and overseen by state ministries, but in the end is largely administered by organizations that represent the key interest groups. One of the most important of these institutions is the Ärztekammer, literally physician council, that fulfills many of the functions of our state medical licensure boards and state medical associations. For example, these bodies discipline errant doctors, regulate specialty practice, and supervise

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[29] Krumpaszky & Sethe estimate that 5 - 13 criminal judicial inquiries take place annually per thousand inhabitants (5,000 - 10,000 total) in Germany. Krumpaszky & Sethe, Presentation at the European Health Care Management Association Annual Conference (July 5, 1995). Only perhaps one percent of these inquiries result in convictions.

[30] Edgar Kohnle, *Entlastung der Gerichte und Staatsanwaltschaften durch die Ärztlichen Gutachterstellen [Relief of the Burden of the Courts' and States' Attorneys Through the Physician Liability Screening Panels]*, *in* 61 DEUTSCHE RICHTERZEITUNG [GERMAN JUDGES' NEWS] 140, 142 (1983); Felix Meyer, *Zur Tätigkeit der Gutachter- und Schlichtungsstelle für ärztliche Behandlungen bei der Landesärztekammer Hessen [Regarding the Activity of the Gutachtersstelle and Schlichtungsstelle for Physician Treatment of the State Physicians' Chamber of Hesse]*, *in* 9 HESSISCHES ÄRZTEBLATT [HESSE PHYSICIANS' JOURNAL] 436, 436 (1991).

[31] Meyer, *supra* note 30, at 436.

[32] CARSTENSEN ET AL., *supra* note 25, at 107.

[33] *See* Kohnle, *supra* note 30, at 140.

[34] DOUGLAS WEBBER, ASSOCIATION FOR THE STUDY OF GERMAN POLITICS, THE POLITICS OF GERMAN REGULATION 209, 210 (Kenneth Dyson ed., 1992).

continuing education.[35] In most German states, the Ärztekammer has established the Schlichtungsstelle or Gutachterkommission. The Schlichtungsstellen of Bavaria and North Germany, however, were established by the Ärztekammer in conjunction with the Verband der Haftpflicht-, Unfall- und Kraftverkehrversicherer (HUK-Verband), the corporate body that represents the liability insurance companies.[36] This system seems to be a natural arrangement in Germany.[37]

There are currently between nine and thirteen Schlichtungsstellen and Gutachterkommissionen, depending on how the panels are counted.[38] Bavaria, Hesse, Saarland, Saxony, and the Rheinland-Palatinate each has its own panel. Baden-Württemberg has five panels and North Rhine-Westphalia has two panels. The North German Schlichtungsstelle, located in Hannover, covers most of northern and eastern Germany, including the states of Berlin, Brandenburg, Bremen, Hamburg, Mecklenburg-Vorpommern, Lower Saxony, Saxon-Anhalt, Schleswig-Holstein, and Thüringia.

Although the panels pursue the same basic tasks, they vary in structure and procedure from state to state. The panels are organized pursuant to ordinances of the Ärztekammern.[39] The membership of the panels varies, but they usually have from three to five members.[40] One member of the panel is always legally trained—often a retired judge; the rest are doctors, usually representing a range of medical specialties.[41] In practice, cases are often decided by a single doctor and lawyer working together.[42]

The jurisdiction of the panels is in most instances limited to claims against medical doctors, although in some states, by special agreement, they can also hear claims against hospitals.[43] They do not have jurisdiction over

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[35] MICHAEL ARNOLD, HEALTH CARE IN THE FEDERAL REPUBLIC OF GERMANY 34 (Kevin Sullivan trans., 1991).

[36] Bodenburg & Matthies, *supra* note 21, at 729.

[37] Lothar Eberhardt, *Zur Praxis der Schlichtung in Arzthaftpflichtfällen* [*Regarding the Practice of Settlement of Physician Liability Cases*], *in* 12 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] [NEW LEGAL WEEKLY] 747, 750 (1986).

[38] Sometimes the five panels from Baden-Württemberg are counted as one.

[39] Ratajczak, *supra* note 19, at 5, 13–35. These pages contain a table summarizing and comparing the ordinances of the various states.

[40] *Id.* at 14–15.

[41] ERWIN DEUTSCH & KARL-HEINZ MATTHIES, ARZTHAFTUNGSRECHT: GRUNDLAGEN, RECHTSSPRECHUNG, GUTACHTER- UND SCHLICHTUNGSSTELLEN [PHYSICIAN LIABILITY LAW: FOUNDATIONS, LEGAL PRINCIPLES, GUTACHTERSSTELLEN AND SCHLICHTUNGSSTELLEN] 102 (1988); Ratajczak, *supra* note 19, at 16–17.

[42] DEUTSCH, *supra* note 26, at 166.

[43] Ratajczak, *supra* note 19, at 7.

claims against nurses or other health care professionals.[44] Thus, the panels are seriously limited in complex cases where multiple professions are potentially at fault.[45]

III. PANEL PROCEEDINGS

Cases usually begin with a claim filed by a patient, the legal representative of a patient, or the next of kin of a deceased patient. It is also possible for a doctor who believes that his or her reputation is under attack to request a panel review.[46] Use of the panels by patients is, in most instances, voluntary; patients have the option of either going to the panel or going directly to court. If a doctor required his or her patients to sign a contract agreeing to use the panels in the event of a malpractice claim, the contract would probably be unenforceable under German law.[47] One important exception to the principle of voluntariness is the requirement by some courts that indigent patients go to the panels before granting them legal aid. This requirement is very controversial, and is discussed further below.[48]

Claimants usually file their claims directly with the panel, although in Bavaria, the claim must first be submitted to the physician's liability insurer, and the panel will not consider it before the insurer refuses payment.[49] The claim need not take any particular form, but the panel must be able to determine the nature of the complaint and at whom it is directed.[50]

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[44] Ratajczak, *supra* note 19, at 7.

[45] *Id.* at 9.

[46] DEUTSCH & MATTHIES, *supra* note 41, at 102.

[47] Dieter Giesen, *Gutachterkommissionen, Schlichtungsstellen: Anspruch, Praxis, Perspektiven* [*Gutachterkommissionen, Schlichtungsstellen: Claims, Practice, Perspectives*], *in* GUTACHTERKOMMISSIONEN, *supra* note 17, at 77, 82.

[48] *See infra* notes 142–46 and accompanying text.

[49] W. Grill, *Erfahrung der Schlichtungsstellen Bayern* [*Experience of the Bavarian Schlichtungsstelle*], *in* CHIRURGIE UND RECHT [SURGERY AND LAW] 181, 182 (R. Häring ed. 1993).

[50] Wilfried Fitting, *Über die Arbeitsweise der "Gutachterkommissionen für Ärztekammer Nordrhein" aus der Sicht des Geschäftsführenden Kommissionsmitgliedes* [*Regarding the Functioning of the Gutachterkommissionen for the North Rhein Physician's Chamber from the Perspective of the Members of the Executive Commission*], *in* GUTACHTERKOMMISSIONEN, *supra* note 17, at 46, 47.

Patients may be represented by lawyers in panel proceedings, though only about half are represented.[51] Attorneys can help focus the work of the panel and are very important in the negotiations with the liability insurance company that follow the successful conclusion of panel proceedings.[52] One study found, however, that patient success rates in panel proceedings were about equal for represented and unrepresented patients.[53]

After the claim is filed, the panel decides whether it has jurisdiction. Panels will only hear claims less than five years old that credibly allege patient injury from either medical negligence or lack of informed consent.[54] Panels will not hear cases already being considered in civil or criminal litigation or cases that allege that a medical opinion was rendered negligently, in a workers' compensation case, for example.[55]

The panel next notifies the doctor that a claim has been filed and asks the doctor to participate in the proceedings. Again, participation is voluntary, and doctors sometimes refuse to participate.[56] In North Germany, the doctor's liability insurer is also a party and can refuse to participate. Participation is refused in almost 10% of the cases in North Germany, but in the other states the rate of refusal is negligible.[57] Though the doctor's participation is voluntary, once the doctor agrees to participate he or she has a professional obligation to fully cooperate with the process.

A considerable number of cases are dismissed either because of refusal by the doctor to participate or for jurisdictional reasons. Of 6091 cases concluded in 1993 by the panels, 2021, about a third, were concluded with either a dismissal of the case on jurisdictional grounds, the refusal of the doctor or insurer to participate, or withdrawal or nonpursuit of the claim by the claimant.[58] The panels are sometimes criticized for disposing of too many cases on procedural grounds, thus limiting their effectiveness in resolving substantive disputes, but their jurisdictional requirements also

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[51] CARSTENSEN ET AL., *supra* note 25, at 105; Neuman, *Gutachterkommissionen in Baden-Württemberg: Ergebnisse 1994* [*Gutachterkommissionen in Baden-Württemberg: Results 1994*], B1 (1994). Only a small fraction of doctors, 3% in one study, are represented by attorneys. *Id.*

[52] DEUTSCH & MATTHIES, *supra* note 41, at 128; Heinrich Weltrich, *Gutachterkommissionen und Schlichtungsstellen—Anspruch, Praxis, Perspektiven* [*Gutachterkommissionen and Schlichtungsstellen—Claims, Practice, Perspectives*] *in* GUTACHTERKOMMISSIONEN, *supra* note 17, at 107, 110.

[53] Freund et al., *supra* note 22, at 635.

[54] DEUTSCH & MATTHIES, *supra* note 41, at 102; Ratajczak, *supra* note 19, at 5.

[55] *Id.*

[56] Eberhardt estimates the rate of refusal at about 2%. Eberhardt, *supra* note 37, at 750.

[57] BUNDESÄRZTEKAMMER 1995, *supra* note 16, at 260.

[58] *Id.* at 259–60.

serve to screen out many cases for which expert review would provide little benefit.[59]

Once the doctor has agreed to participate, the panel collects all relevant medical records. This includes not only the records of the treating doctor, but also any relevant hospital records and the records of doctors who treated the patient before and after the alleged negligent event.[60] Laboratory test results, x-rays, and other images are also collected if relevant. These records are then reviewed by a medical member of the panel, who formulates a series of questions, usually with the help of the panel's legal member or advisors.[61] Though the questions raised by the panel need not be limited strictly to those raised by the complaint,[62] the panel often does not look beyond the complaint, particularly with respect to questions of informed consent.

The questions and records are then sent to a "Gutachter," a medical expert with relevant expertise.[63] The Gutachter could be a member of the panel, as in North Rhine, where the panel is quite large and includes representatives of most important specialties,[64] but the expert is usually not a panel member. The experts are usually chief doctors in hospitals or university professors and are well-respected.[65] In most panels, the identity and expertise of the expert is known to the participants.[66] The use of anonymous experts has been sharply criticized, as it is difficult to evaluate the work or to trust the impartiality of an anonymous expert.[67] The expert may examine the patient as well as the record.[68] In complex cases involving several specialties, more than one expert may be summoned.

Once completed, the opinion of the expert is reviewed by the medical and legal members of the panel, who work from it to devise a final opinion.[69] In all jurisdictions, the opinion addresses the question of whether

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[59] DEUTSCH & MATTHIES, *supra* note 41, at 108-11.

[60] Fitting, *supra* note 50, at 49.

[61] J.F. Freund, *supra* note 21, at 97.

[62] Fitting, *supra* note 50, at 49.

[63] DEUTSCH & MATTHIES, *supra* note 41, at 103.

[64] Fitting, *supra* note 50, at 49.

[65] DEUTSCH & MATTHIES, *supra* note 41, at 103-04.

[66] In Westphalia, on the other hand, the expert remains anonymous. Christoph-M. Stegers, *Die Anrufung der Gutachterkommission für ärztliche Haftpflichtfragen: Eine Rechtspflicht für die minderbemittelte Prozeßpartei [The Appeal to the Gutachterkommission for Physician Liability Questions: A Legal Duty for the Indigent Litigant]*, 3 ANWBL [LAWYER'S PAPER] 137, 138 (1989).

[67] Giesen, *supra* note 47, at 77, 78; Ratajczak, *supra* note 19, at 8-9.

[68] Meyer, *supra* note 30, at 437.

[69] DEUTSCH & MATTHIES, *supra* note 41, at 104.

or not a medical error occurred and usually whether the medical error caused the patient's injuries.[70] Some panels address only these questions, while others go on to establish the extent of injury.[71] No panels, however, specify a precise amount of damages, which is a matter for negotiation between the parties.[72] If facts are contested, some panels will decline to offer an opinion or offer alternative opinions based on the two versions of the facts.[73] The North German panel, by contrast, will decide the case based on the facts as they would be determined given the allocation of the burden of proof as it would apply in judicial proceedings.[74] The panels do not, as a rule, hear oral evidence.[75]

The proceedings of the panels are private and confidential: only the parties learn of the results. In particular, the Ärztekammern are not usually apprised of allegations against their members, so that panel claims do not become the basis for disciplinary proceedings. Some panels, however, attempt to assemble aggregate information for educational purposes.[76] The failure of the Ärztekammern to draw on the panels for education of the professions has been criticized.[77]

While this is a general description of panel practice, it varies significantly from panel to panel. The North German panel attempts to involve the participants at every step of the process, giving them a chance to respond to both the questions posed to the expert and to the expert's opinion before finally deciding the case.[78] Since the case is usually reviewed first by a panel expert and then by an outside expert, the claimant in Northern Germany gets the benefit of two expert opinions. The Baden-Württemberg panel offers the opportunity for an oral discussion of the expert's opinion with the parties before it reaches a final decision.[79] North Rhine offers an

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[70] Fitting, *supra* note 50, at 52.

[71] J.F. Freund, *supra* note 21, at 98.

[72] Kohnle, *supra* note 30, at 143; H. Weltrich & W. Fitting, *Aufschlußreiche Umfrage zur weiteren Entwicklung abgeschlossener Begutachtungsverfahren* [*Instructive Inquiry Regarding Further Development of Concluded Expert Panel Proceedings*], *in* 22 RHEINISCHES ÄRZTEBLATT [RHEINISH PHYSICIAN JOURNAL] at 4 (photo. reprint 1993).

[73] CARSTENSEN ET AL., *supra* note 25, at 111; Meyer, *supra* note 30, at 438.

[74] Eberhardt, *supra* note 37, at 751.

[75] Fitting, *supra* note 50, at 51.

[76] *Id.* at 52–53.

[77] Ratajczak, *supra* note 19, at 11.

[78] Interview with members of North German panel (July 5, 1995).

[79] Hans Christ, *Gutachterkommissionen und Schlichtungsstellen—Anspruch, Praxis, Perspektiven—Erfahrungen mit der Gutachterkommission Stuttgart* [*Gutachterkommissionen and Schlichtungsstellen—Claims Practice, Perspectives—Experience with the*

opportunity for the party who receives an adverse decision to appeal for a rehearing by the full panel.[80] The Bavarian statute provides for evaluation of the expert opinion by a panel including a representative of the patient and doctor,[81] but in practice decisions are made by the panel's doctor and lawyer.[82]

Once the claimant receives the final decision, he or she decides how to proceed. If the decision is favorable to the claimant, the liability insurers will often, but by no means always, settle. Surprisingly, patients often do not pursue a settlement after obtaining a favorable decision, possibly because they were only seeking vindication or an explanation.[83] If the insurer does not settle, the patient may go to court. The statute of limitations is tolled while the panel proceedings are underway, so the patient is not usually prejudiced by the delay in seeking judicial resolution.[84] If the decision is adverse to the patient the insurer is much less likely to settle, though the patient can still go to court, and sometimes does so successfully.

The decision of the panel is available to the court and can be considered if neither party objects.[85] Malpractice cases in Germany are decided by judges (usually a panel of three), not juries, and the judges summon their own experts.[86] The panel opinion carries no more weight than any other

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Gutachterkommission Stuttgart], *in* GUTACHTERKOMMISSIONEN, *supra* note 17, at 27, 38; Kohnle, *supra* note 30, at 141.

[80] Fitting, *supra* note 50, at 50; Ratajczak, *supra* note 19, at 5.

[81] *Geschäfts- und Verfahrensordnung einer Schlichtungsstellen zur außergerichtlichen Erledigung von Haftpflichtstreitigkeiten zwischen Ärzten und Patienten* [*Operational and Procedural Rules of the Schlichtungsstelle for Extrajudicial Disposal of Liability Disputes Between Doctors and Patients*], *in* 6 BAYERISCHES ÄRZTEBLATT [BAVARIAN MEDICAL JOURNAL] 440–42 (1975).

[82] Bodenburg & Matthies, *supra* note 21, at 730.

[83] *See infra* notes 102 and 114 and accompanying text; *infra* note 114.

[84] BÜRGRLICHES GESETZBUCH [BGB] [CIVIL LAW BOOK] § 852 Abs. 2, *cited in* DEUTSCH, *supra* note 26, at 169. While this statement is generally true, the matter is quite complex. In particular, if a claim is brought against multiple defendants, the statute is tolled only against those who are parties in the proceedings before the panel. The legal bases for tolling of the statutes, and potential exceptions to the general rule, are discussed in detail in Bodenburg & Matthies, *supra* note 21, at 732–33.

[85] Bodenburg & Matthies, *supra* note 21, at 734; Eberhardt, *supra* note 37, at 750; Ratajczak, *supra* note 19, at 4; Rumler-Detzel, *supra* note 17, at 94.

[86] Rumler-Detzel, *supra* note 17, at 94.

private expert opinion offered to the court.[87] A party with grounds to object to a panel decision may keep that decision out of the judicial proceedings.[88]

The entire panel process is without cost to the participants. The costs are generally borne by the Ärztekammer, though in some states the insurer must pay for the expert opinion.[89] When cases are brought against public or university hospitals they usually carry the costs of the proceeding.[90] Each party must bear the costs of his or her own attorney, and, unlike the normal German judicial practice, the costs of representation are not shifted to the losing party.[91]

IV. THE RESULTS OF PANEL PROCEEDINGS

In 1993, the most recent year for which statistics are available, 6091 claims were decided by panels.[92] Over 2000 claims did not reach a resolution on the merits because they were withdrawn or dismissed on jurisdictional grounds, or because the doctor, or the insurer (in Northern Germany) refused to participate.[93] Of the 4070 decisions on the merits, 2787, or 68%, were wholly favorable to the doctor.[94] In 34 cases, the panels found a lack of informed consent and in 1031, an injury-causing treatment. This total of 1065 favorable decisions constituted 25% of the total cases considered on the merits and 17.5% of the total cases filed.[95] In 118 cases, medical error was found, but not causation, and in the remaining cases the panel was unable to decide whether or not the claim was valid.[96] The rate of finding either injury-causing medical error or a violation of informed-consent rights varied from 11% in Bavaria to 34% in Hesse.[97] The low rate of errors found in Bavaria is at least partially due to the requirement there that patients first submit their claims to the doctor's liability insurance company before patients come to the Schlichtungsstelle. This permits the insurance company to settle cases of obvious fault.[98] The

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[87] Rumler-Detzel, *supra* note 17, at 94.

[88] Judgement of May 19, 1987, BGH (Supreme Court), *noted in* 37 NJW 2300 (1987) (F.R.G.). VI ZR 147/86 (Frankfurt).

[89] DEUTSCH & MATTHIES, *supra* note 41, at 116.

[90] DEUTSCH, *supra* note 26, at 167.

[91] Bodenburg & Matthies, *supra* note 21, at 734-35.

[92] BUNDESÄRZTEKAMMER 1991, *supra* note 15, at 259.

[93] *Id.* at 259-60.

[94] *Id.* at 261.

[95] *Id.*

[96] *Id.*

[97] BUNDESÄRTEKAMMER 1991, *supra* note 15, at 261.

[98] Grill, *supra* note 49, at 182.

duration of proceedings varies from three to six months in Baden-Württemberg to fourteen months in North Rhein, with most proceedings ranging from nine to twelve months.[99]

Statistics regarding the actions that patients take following panel proceedings are not collected on a nationwide basis, but several studies have been conducted at the state level. A recent study of the North Rhein Gutachterkommission received 657 responses from physicians surveyed who had participated in the 665 cases decided in 1990.[100] Of those 657 panel decisions, the panel found physician error in 218 cases and found no error in 439 cases.[101]

Fifty-one of the 218 patients who received a favorable decision did not further pursue their claim.[102] In many of these cases, the panel did not find that physician error had caused harm to the patient. By the time of the survey, 117 of the remaining 167 patients who received favorable decisions had reached settlements with the liability insurer.[103] In cases where the amount of settlement was known, the settlements ranged from under DM 10,000 (about $7,200) to DM 417,000 (about $300,000). Over 72% of the cases were settled for under DM 20,000 (about $14,500).[104] Of the forty-eight remaining cases, the patient proceeded to civil court in forty-three cases, and the patient filed a criminal complaint in five cases.[105] Of the forty-three civil cases, eleven were settled by the parties, four cases were decided in favor of the patient, and three cases were decided in favor of the doctor.[106]

In 378 of the 439 cases in which no error was found, the patient proceeded no further.[107] Of the remaining sixty-one "no error" cases, the insurance company settled six (two cases for under DM 1000). In fifty-four cases, the patients filed civil suits. In the one remaining case, a criminal suit was filed.[108] Of the twenty-five "no error" civil cases completed at the time of the survey, the doctor completely prevailed in twenty-one cases and the patient partially or completely prevailed in four cases.[109] In sum, 85.2% of

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[99] Eberhardt, *supra* note 37, at 748. Several more months may pass, of course, before a final settlement is reached with the insurer.

[100] Weltrich & Fitting, *supra* note 72, at 5.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 6.

[105] Weltrich & Fitting, *supra* note 72, at 5–6.

[106] *Id.* Twenty-five remained pending at the time of the survey three years later.

[107] *Id.*

[108] *Id.*

[109] *Id.*

the total cases did not proceed to court. In only seven of the cases where subsequent judicial proceedings were filed and the results were known, the court reached a conclusion opposite to that of the panel.[110]

A study conducted in Bavaria considering decisions from 1989-1990 found decisions of no liability in 350 of 405 cases.[111] Of the 350 cases, only 38 went to court: 18 of these were rejected or withdrawn, 10 resulted in settlements, and 10 were still pending at the time of the survey.[112] In the other 312 "no error" cases, the patient accepted the negative decision without further action.[113]

A 1991 study of the ninety-one decisions favorable to patients reached by the Baden-Württemberg panel in 1989 found that twenty-six patients (28.6%) who prevailed before the panel took no further action, four patients (4.4%) were refused payment by the liability insurers, twenty patients (22%) reached a settlement with the insurance company, twenty-eight patients (30.8%) went to civil court, and one patient's (1.1%) case went to criminal proceedings.[114] Of the 382 cases from 1989 in which no liability was found and a response to the survey was received, 88% were abandoned by the patients, 1% were settled, 1.4% resulted in criminal complaints, and 8.3% resulted in civil proceedings.[115]

In sum, winning before the panel does not assure a favorable settlement with the liability insurer. Indeed, settlement is much less common than is generally believed. In about a quarter to a third of the cases in which the patient prevails, the patient ends up going to court to obtain payment. If the panel finds a claim ungrounded, on the other hand, settlement is very unlikely. But only about 10% of claimants who do not obtain a favorable opinion from the panel go to court. In most instances, the courts reach the same result as the panels.

V. STRENGTHS OF THE CLAIMS RESOLUTION PANELS

Most of the advantages of ADR noted at the outset of this article are arguably present with the German claims resolution panels. The most

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[110] Weltrich & Fitting, *supra* note 72, at 5-6.

[111] Grill, *supra* note 49, at 188.

[112] *Id.*

[113] *Id.*

[114] *Gutachterkommissionen in Baden-Württemberg, Evaluationen 1989 und 1991* [*Gutachterkommiissionen in Baden-Württemberg, Evaluation 1989 and 1991*] (1991). Twelve (13.2%) of the cases were still unsettled at the time of the survey. The survey included ninety-one of the total of ninety-six favorable decisions from 1989 in which a survey response was received.

[115] *Id.*

significant advantage of the panels, widely touted by their advocates, is that the proceedings are costless to the patient.[116] Although patients are not responsible for the costs of the proceeding itself, patients must still pay their own lawyer if they choose to use one. But the fact that patients can obtain free expert evaluation of their case is a significant boon, particularly if the cash value of the claim is small. The panels undoubtedly handle many claims that would never be litigated in the United States because they are so small.[117]

Litigation is expensive in Germany. Lawyers are not permitted to operate on a contingent fee basis.[118] Lawyers' fees are high, and lawyers' and court filing fees are proportionate to the amount claimed in the case.[119] If patients ultimately lose, they usually must bear the defendant's litigation costs. Thus, the availability of a free claim evaluation is a significant benefit.

A second advantage of the panels is that the patient gets the benefit of what is often a high quality expert analysis of the case.[120] The panels usually rely on experts from the specialty at issue and often obtain chief doctors from hospitals or university professors to provide opinions. The panels have access to medico-legal expertise and submit the claims to legal as well as medical analysis, though the rigor of this analysis varies from panel to panel.

A third advantage of the panels is that they proceed relatively quickly compared to judicial proceedings.[121] Of course, the time consumed in settlement negotiations must be added to the time taken by the panels themselves, and if the patient fails to achieve a settlement through the panels and is forced to go to court, the time spent in the court proceeding must be added. However, if the panel decision leads directly to a settlement, the patient can receive justice with relative speed.

A final advantage of the panels is that they can potentially resolve conflicts in a setting less confrontational than civil or criminal litigation. Patients who are more interested in an explanation of what happened than in

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[116] Fitting, *supra* note 50, at 48; Meyer, *supra* note 30, at 436.

[117] A study of a small sample of malpractice lawyers conducted in 1990 found that 56% would not take malpractice cases involving less than $50,000 in damages; 16% would not take cases involving less than $100,000. Goldschmidt, *supra* note 14, at 1057.

[118] DIETER GIESEN, INTERNATIONAL MEDICAL MALPRACTICE LAW, ¶ 991 at 485, n.13 (1988).

[119] *See* Erhard Blankenburg, *Legal Insurance, Litigant Decisions, and the Rising Caseloads of Courts: A West German Study*, 16 LAW & SOC'Y REV. 601, 605 (1981-82).

[120] Bodenburg & Matthies, *supra* note 21, at 730.

[121] Freund et al., *supra* note 22, at 635.

financial compensation can often obtain such an explanation.[122] In addition, doctors have the benefit of a private decision vindicating them or pointing out their error outside of the public eye. Finally, compromise solutions can be reached in the subsequent settlement process when the questions of fault or causation are not entirely clear.[123]

VI. CRITICISMS OF THE PANELS

The question raised most often by critics of the panels is whether they are truly independent and objective.[124] The fact that the panels are appointed by the state physician councils, that their membership overwhelmingly consists of doctors, and that their activities are often financed in part by liability insurers, makes objectivity an obvious concern.[125] The panels are very sensitive to this criticism and argue vehemently that they are, in fact, independent and render unbiased opinions.[126]

One way to evaluate the claim of bias is to look at the respective success rates of doctors and patients. The average patient success rate of 25% of claims that were accepted by the panels compares favorably with the 10% success rate found for plaintiffs who sued in German courts.[127] This statistic is similiar to the 28% plaintiff success-rate in American cases tried to verdict.[128] Since cases of obvious liability are settled directly by the liability insurance companies and do not make it to the panels, the panel caseloads do not include some of the cases that involve the clearest errors. However, by another measure of bias—patient confidence in objectivity—the panels do not fare well. According to one study, nearly half of patients who receive positive decisions from the panels stated that their trust in the

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[122] Brigitte Herbrand, *Leistung und Wirkung der Gutachterstellen* [*Performance and Operation of the Gutachterstellen*], *in* GUTACHTERKOMMISSIONEN, *supra* note 17, at 89.

[123] DEUTSCH & MATTHIES, *supra* note 41, at 124.

[124] Giesen, *supra* note 47, at 78; Ratajczak, *supra* note 19, at 7-8; Stegers, *supra* note 66, at 138.

[125] *See* Eberhardt, *supra* note 37, at 749.

[126] *See id.*; Kohnle, *supra* note 30, at 140.

[127] Eberhardt, *supra* note 37, at 751. Of the other 90%, 40% were won by the doctor and 50% resulted in settlements. *Id. See also* Bodenburg & Matthies, *supra* note 21, at 731. A study of thirty decisions of the Köln appellate court found that patients prevailed in eleven of seventeen judgements and achieved settlements in ten other cases. Rumler-Detzel, *supra* note 17, at 95.

[128] PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY 38 (1985).

medical profession had diminished because of their experience with the proceedings.[129]

A second criticism leveled at the panels is that they only consider the records and written statements of the patient and doctor, and do not test the value and validity of the claims of the parties in oral proceedings.[130] The panels do not have the power to subpoena witnesses or to take testimony under oath.[131] Experts are usually not subjected to oral interrogation.[132] In some cases, such as informed consent disputes, oral testimony may be necessary to decide what happened. In such instances, the panels are at a distinct disadvantage compared to the courts.

A third criticism questions the quality of the panels' expert opinions and evaluations to which the panels subject these opinions.[133] This issue of quality of experts is raised not only of patient advocates, but also of the liability insurers.[134] Panel members are not salaried, but serve on an honorary basis. Often they are retired doctors. These doctors are well-respected and have had long and distinguished careers. They are committed to the panels and give their time freely and generously. There is a risk, however, that they might become increasingly distant from the day-to-day practice as time goes on. At least one doctor found to have committed malpractice by a panel was successful in arguing that a panel decision against him should not be considered in a subsequent judicial proceeding because the expert's knowledge was out-dated.[135] In recognition of this

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[129] J.F. Freund, *supra* note 21, at 101.

[130] Giesen, *supra* note 47, at 79; Ratajczak, *supra* note 19, at 9.

[131] DEUTSCH & MATTHIES, *supra* note 41, at 112.

[132] Lothar Eberhardt, *Stellungnahme zur Situation der Ärztlichen Gutachter- und Schlichtungsstellen* [*Report on the Situation of the Physician Gutachtersstellen and Schlichtungsstellen*], *in* GUTACHTERKOMMISSIONEN, *supra* note 17, at 67.

[133] Peter Schierenbeck, *Die Gutachterkommissionen und Schlichtungsstellen aus der Sicht des Arbeitskreises Kunstfehler in der Geburtshilfe e.V.* [*The Gutachterkommissionen and Schlichtungsstellen from the View-of the Study Group of Professional Error in Obstetrics*], *in* GUTACHTERKOMMISSIONEN, *supra* note 17, at 55. An empirical study conducted by Deutsch and Matthies concluded that 27% of 123 opinions they analyzed were of inadequate quality because they were too superficial or did not adequately answer the questions raised by the case. DEUTSCH & MATTHIES, *supra* note 41, at 119.

[134] Christ, *supra* note 79, at 27, 38; Klaus Vogel et al., *Arbeitsweise der Gutachterkommissionen und Schlichtungsstellen aus haftpflichtversicherungs-rechtlicher Sicht* [*Method of Operation of the Gutachterkommissionen and Schlichtungsstellen from the Liability Insurance Law Perspective*], *in* GUTACHTERKOMMISSIONEN, *supra* note 17, at 59.

[135] Judgment of May 19, 1987, 37 NJW at 2300.

concern, the North German panel only permits doctors to serve as experts until they reach age seventy.[136]

The expertise of the external experts may also not be readily ascertainable by the parties, especially where the identity of the expert is not revealed. Under the practice of some panels, the patient may not even see the accused physician's report on the incident.[137] While evaluation of the expert opinion is the role of the panel, critics contend that expert opinions are, at times, incorporated into the opinion of the panel without adequate medical or legal analysis.[138]

A fourth criticism is that claimants lose legal advantages they would have had in the courts by proceeding before the panels.[139] German malpractice law is very complex. While the plaintiff generally bears the burden of proof, the burden shifts to the defendant in certain cases, such as where fault is obvious and serious but causation is at issue, or where medical records are deficient, altered, or destroyed.[140] Some of the panels focus only on the existence *vel non* of negligence as exhibited by the records and do not generally consider the law in regard to the burden of proof.[141] In particular, documentary deficiencies may cause a panel to hold that negligence cannot be established, whereas a court would shift the burden to the doctor to show non-negligent treatment.[142]

Finally, at the conclusion of the panel proceedings, the prevailing plaintiff has only an opinion as to fault, not a judgement as to damages. The plaintiff must still negotiate with a tough and sophisticated insurance

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[136] Interview with North German panel representatives (July 5, 1995).

[137] Ratajczak, *supra* note 19, at 6; Schierenbeck, *supra* note 133 at 57; Christoph-M. Stegers, *Das Verfahren vor der Gutachterkommissionen für Ärztliche Haftpflichtfragen bei der Ärztekammer Westfalen-Lippe; Bemerkungen über Entscheidungfindung und Akzeptanz [The Procedure Before the Gutachterkommissionen for Physician Liability Questions by the Physician Council Westphalia-Lippe; Observations About Decisionmaking and Acceptance]*, *in* GUTACHTERKOMMISSIONEN, *supra* note 17, at 99, 101-02.

[138] DEUTSCH & MATTHIES, *supra* note 41, at 120-21. Deutsch and Matthies concluded that 38% of the 34 opinions they analyzed were not subjected to adequate legal analysis. *Id.* at 121.

[139] Giesen, *supra* note 47, at 79-80; Stegers, *supra* note 137, at 101.

[140] DEUTSCH, *supra* note 26, at 148-56.

[141] DEUTSCH & MATTHIES, *supra* note 41, at 111-15; Eberhardt, *supra* note 37, at 751; Eberhardt, *supra* note 132, at 67; Schierenbeck, *supra* note 133, at 56. It has been noted, in defense of the panels, that the law is so confusing and unstable that it is not realistic to expect the panels to be fully apprised of the law at all times. *See* Herbrand, *supra* note 17, at 85, 86-87.

[142] DEUTSCH & MATTHIES, *supra* note 41, at 113-14.

company that is often very reluctant to pay, especially where large damages are involved.[143]

Critics of the panels become particularly vocal when the voluntary nature of the proceedings is at risk.[144] As long as the proceedings are strictly voluntary, the claimant may weigh the advantages and disadvantages of the panels and then decide how to proceed. Several lower state courts, however, have held that in cases involving indigents, assistance in paying for a lawyer (generally available to indigents in civil cases) will not be available unless the indigent first takes the case to a screening panel. The courts found that it would be "mutwillig" or capricious, for an indigent to proceed to court without taking advantage of a free review of the case.[145] Moreover, when the indigent does go to the screening panel and relief is denied, the courthouse door often remains closed to the indigent, because the court then refuses a subsequent request for legal assistance, deciding that the case is without merit.[146] Therefore, indigents in these jurisdictions are forced to go to the panels, sometimes without further recourse, while persons with money could go directly to court. Such differentiation in treatment violates strongly held German principles of equal protection.[147] Recent German court opinions reject this differentiation,[148] and the issue has not yet been addressed by courts at the federal level.

Likewise, non-indigent Germans may not always choose the panels freely. It has become increasingly common for Germans to belong to legal insurance schemes.[149] Some people believe these insurance schemes request that patients go first to the panels before they will authorize coverage for legal costs in a malpractice case. Hence, even for Germans who are not impecunious, the choice to go before the panels is not a real choice.

In the end, however, despite vigorous criticism leveled at the panels, patients continue to come to the panels for help in ever-increasing numbers. A significant number of claimants obtain the relief they seek from these

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[143] Bodenburg and Matthies, *supra* note 21, at 731.

[144] Giesen, *supra* note 47, at 80-82; Stegers, *supra* note 66, at 138.

[145] Judgment Mar. 16, 1984, LG [trial court], *noted in* 6 O 58/84 NJW 792 (1986), *aff'd.* Oldenburg, Sept. 4, 1984, OLG [civil court of appeals], *noted in* (F.R.G.); judgment of Feb. 3, 1987, LG Dortmund, *noted in* JZ 255 (1988).

[146] Giesen, *supra* note 47, at 81; Stegers, *supra* note 66, at 139.

[147] Giesen, *supra* note 47, at 81-82.

[148] Judgment of Jan. 16, 1989, OLG Düseldorf, *noted in* NJW 1989, 2955; judgment of June 14, 1988, OLG Oldenburg, *noted in* 88 MED R 274 (1988); judgment of May 5, 1988, OLG Celle. *See also* Rumler-Detzel, *supra* note 17, at 95 (explaining the decision of the Düsseldorf court).

[149] Blankenburg, *supra* note 119, at 605.

panels, and relatively few go on to court once they receive a final panel decision. The panels must be judged, therefore, at least a qualified success.

VII. COMPARATIVE PERSPECTIVES

We reach the central question: why have extrajudicial claims resolution panels generally succeeded in Germany while they have generally failed in the United States?

One answer given to me by a number of German observers is that Germans are less litigious than Americans. There is undoubtedly some validity to this claim. Though respect for the medical profession has been weakened somewhat in recent years in Germany, that respect is still probably higher in Germany than in the United States.[150] It is difficult to imagine large numbers of Americans trusting their malpractice claims to panels established by American state medical associations for evaluation. However, these cultural differences offer only a partial explanation.

The German experience is also attributable to differences in legal institutions. As noted above, litigation in Germany is expensive. Lawyers' fees and court costs are tied to the value of the claim and are quite high in large claims.[151] A loser must ordinarily pay the winner's costs.[152] Conversely, in the United States, litigants with meritorious cases of substantial value can work out contingent fee arrangements that do not require substantial advance payments, and filing fees are relatively small. As the courthouse door is more open in the United States than in Germany, alternatives to litigation are correspondingly less attractive.

Once a malpractice litigant gets to court in the United States, the plaintiff can have the case heard by a jury and can choose his or her own medical expert. A plaintiff with a skilled and experienced trial lawyer and a convincing expert witness may well have advantages at trial that would not be present before a malpractice screening panel. By contrast, in Germany, cases are usually heard before a three judge court[153] and expert witnesses are chosen by the court itself.[154] The expert chosen by the court will often have the same credentials as those designated by the claims resolution

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[150] *See* RICHARD A. KNOX, GERMANY: ONE NATION WITH HEALTH CARE FOR ALL 128 (1993).

[151] Blankenburg, *supra* note 119, at 605.

[152] *See generally* Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROB. 37 (Winter 1984).

[153] B.S. MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS 4 (1986).

[154] John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985).

panels, indeed the courts often turn to the Ärztekammern for assistance in identifying witnesses.[155] The advantages of litigation over dispute resolution panels are considerably diminished.

The nature of damages sought is also very different in Germany than in the United States. In the United States, medical costs and lost wages account for nearly two thirds of economic damages in medical malpractice cases.[156] In Germany, however, virtually all patients are insured under the statutory insurance scheme, which covers all medical costs. Disability pay is available under the social insurance scheme as well. Social Insurance funds can recover patients' medical expenditures, and employers can recover patients' disability pay from errant doctors. This recovery is of no direct benefit to the patient, and, for complex reasons beyond the scope of this Article, insurers and employers often forego these recoveries. The primary damages recoverable by patients are pain and suffering and the costs of personal care, medical transportation, or other forms of care not covered by social insurance.[157] The damages are usually much smaller than they would be in the United States. Understandably, patients might be willing to take their chances with panels that might lead to a settlement rather than proceed directly to the expensive court system.

If litigation costs are a major factor driving cases out of the courts and into the screening panels, one suspects that patients would be more inclined to turn to the panels when damages are smaller and to go directly to court for larger cases. Unfortunately, there are no empirical studies that test this hypothesis, and the experts with whom I spoke disagreed on the answer.[158] What little information there is on types of cases that end up in one set of fora or the other indicates that the largest category of cases heard in each is cases involving surgery. However, more cases involving anesthesia end up in court than before the panels.[159] While both fora hear cases involving birth injuries, the advocacy group that works with families of birth-injured children recommends that these families go directly to court rather than to the panels.[160] These cases usually involve considerable damages. It may be true, therefore, that the panels tend to hear smaller cases.

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[155] Interview, Dr. Schäfer, Nordrhein Ärztekammer [North Rhein Physician's Council] (June 30, 1995).

[156] GEN. ACCT. OFF., U.S. CONGRESS, MEDICAL MALPRACTICE: CHARACTERISTICS OF CLAIMS CLOSED IN 1984 44 (1987).

[157] Interview with Johann Neu, lawyer, North German Schlichtungsstelle (July 5, 1995).

[158] *See* Rumler-Detzel, *supra* note 17, at 97 (noting that the number of cases with heavy damages filed in the courts seems to be increasing).

[159] CARSTENSEN ET AL., *supra* note 25, at 117.

[160] Schierenbeck, *supra* note 133.

A major limitation of the American litigation approach to dealing with medical malpractice claims is its inability to handle small cases. The Harvard Medical Practice study concluded that the vast majority of patients injured by adverse medical events in the United States do not sue,[161] and that those persons who do not sue are predominantly those who have suffered minor injuries.[162] A recent survey of medical malpractice lawyers found that over half would not take malpractice cases worth less than $50,000.[163] Perhaps if we had a forum in the United States for obtaining a free medical evaluation of medical negligence claims where legal representation was not necessary and where there was a reasonable hope of settlement if the claim was found valid, that forum could become a popular alternative to medical negligence litigation for these claims. While this alternative might represent the greatest opportunity for us to emulate the German model of malpractice claims resolution, it is hard to conceive the American medical profession, which already feels heavily burdened by malpractice litigation, following the German example simply to open itself up to more claims.

In the end, the Schlichtungsstellen and Gutachterkommissionen provide us with a working alternative model for providing justice for patients and for doctors; a model that should inspire and be of interest to us, even though it may not be replicable in our very different culture and legal environment.

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[161] HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK 7-28 (1990)..

[162] *Id.* at 7-39.

[163] Goldschmidt, *supra* note 14, at 1057.