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## Introduction

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## MEDICAL MALPRACTICE AND COMPENSATION IN GLOBAL PERSPECTIVE: INTRODUCTION

KEN OLIPHANT\* AND RICHARD W. WRIGHT\*\*

Medical malpractice and compensation for medical injuries are highly visible, controversial, and publicly debated topics that regularly create tension and innovation in legal systems around the world, but the analysis and debate in each country is often limited to national audiences with an assumption that the issues are unique to that location. The papers in this and the following issue of the *Chicago-Kent Law Review* address this subject matter in a uniquely global context that demonstrates the universal nature of the issues and the diversity of approaches currently taken around the world and reveals key areas of tension and the likely direction of future developments. Wherever possible, the analysis is supported by reference to the available empirical data, though in many countries this is unfortunately very limited.

The papers in this collection are drawn from a symposium held in Vienna in December 2010 under the joint organization of the *Chicago-Kent Law Review* and the Institute for European Tort Law of the Austrian Academy of Sciences, in collaboration with the European Centre of Tort and Insurance Law. Like the conference, these special issues of the *Law Review* bring together expert commentators from fourteen national or regional legal systems, spread across six continents: Austria, Brazil, Canada, China, France, Germany, Italy, Japan, New Zealand, Poland, Scandinavia, South Africa, the United Kingdom and the United States. The aim was to ensure a good mix of common law and civil law systems, advanced and emerging economies, primarily private and primarily public healthcare systems, and representatives of the major legal families (common law, Germanic, Romanic, Nordic, communist, and post-communist). The countries selected include those that rely primarily on traditional civil liability (whether tor-

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tious or contractual) and those (in particular, France, New Zealand and the Nordic countries) where no-fault approaches have emerged.

The papers will also be published in a volume in the series Tort and Insurance Law, which is published by De Gruyter (Berlin/Boston) on behalf of the Institute for European Tort Law and the European Centre of Tort and Insurance Law. This publication will coincide with the second of the two Chicago-Kent Law Review special issues.

## I. ISSUES ADDRESSED

The issues that we asked the contributors to cover included (but were not limited to) the following.

### A. *Overall Scheme*

We asked contributors to give a general account of the overall scheme that exists in each legal system for preventing, redressing, and otherwise providing appropriate accountability for medical errors and adverse events, including regulation, criminal and civil liability, and social and private insurance, and the relationships between these various systems.

As a matter of definition, we took “regulation” to include government licensing authorities for doctors and hospitals, voluntary medical guidelines by hospitals and other medical groups, mandatory and/or voluntary reporting of medical errors and adverse events to these or other entities, and the availability of such information to other parts of the overall schemes, including the public. “Liability systems” referred, to the extent applicable, to liability under criminal law, tort law, contract law, and any other liability system. We asked contributors not just to describe each liability and compensation system but also to describe the relationships, if any, between the different systems. As regards civil liability, an initial question within each system was whether the liability for medical malpractice is grounded in tort or contract or both. Lastly, we took “compensation systems” to include (in addition to the liability systems mentioned above) social and private insurance, as well as statutory compensation schemes for criminally-caused injuries.

As regards the relationships between the various systems and their effects on prevention, compensation, and accountability, we asked the contributors to consider a number of issues. One very important issue, especially in many civil law countries, is the extent to which the patient’s compensation claim can (theoretically and in practice) be resolved in conjunction

with a criminal prosecution initiated by a public prosecutor or by the patient, and the advantages that this may have (e.g., speed of resolution, costs borne by the prosecuting agency rather than the claimant) over a claim brought in the civil courts, as well as the dangers that this may create in blurring the distinction between the purposes of and criteria for criminal and civil liability. Another important issue is the extent to which social or (mandatory or voluntary) private insurance displaces civil liability for medical malpractice or limits the recovery of damages to injuries and/or losses not covered by the social or private insurance systems. We also asked whether information on medical errors and adverse events that is provided to social or private insurers is available for use in the regulatory and liability systems and to the general public, and whether social and/or private insurers are able, through subrogation or otherwise, to claim reimbursement from the source of the medical error or adverse event (by a damage claim or by any other mechanism) for payments made to compensate for the expenses and losses caused by the error or adverse event. We were particularly interested to find out, in systems where this is theoretically possible, the extent to which it actually occurs in practice.

#### *B. Details of the Applicable Liability and Compensation Systems*

Here we posed a variety of questions to the project participants. What criteria define qualification for compensation? Under each relevant system, is compensation based on conduct generating legal liability (e.g., negligence), medical error, an adverse event, causation, or some other criterion or criteria? How are these criteria defined and how are they actually applied in practice? Is there liability for "loss of a chance" and, if so, is the liability proportional to the lost chance or for the entire injury (assuming the lost chance reaches a given threshold)? Is there liability for failure to obtain informed consent, construed as a dignitary or autonomy injury, regardless of any adverse physical consequence? Who has the burden of proof on these and other issues, what is the burden of persuasion (e.g., 'virtual certainty', 'beyond a reasonable doubt', 'preponderance of the evidence', 'balance of probabilities'), and how are these requirements actually applied in practice? If, as in some countries, a claim for compensation can be attached to and determined in a criminal action, are the burdens of persuasion different for criminal and civil proceedings and, if so, how is this handled when both criminal sanctions and the liability to compensate are litigated in the same action?

We also asked contributors to address issues relating to the wider claims process, including costs. Specifically: Who pays the costs of litigation, including attorney, expert, and court fees? Does “loser pays” apply, or does each side bear its own costs? And are there contingent or conditional fees? Lastly, we asked how easy or difficult it is to obtain evidence in the hands of the opposing party or held by a third party.

### *C. Empirical Data*

We asked contributors to provide information about available empirical data on medical errors and adverse events, the operation of the systems designed to prevent, redress, or otherwise provide appropriate accountability for such errors and events, and the prevalence and impact of measures designed to reduce medical errors and adverse events, improve system performance, or reduce system costs (including so-called “tort reform”). As mentioned above, this was at the heart of what we wanted to discover, though we were aware in advance that empirical data may not be generally available in a number of the legal systems covered.

### *D. Attitudes, Concerns, and Prospects*

A final set of issues related to attitudes to and concerns expressed about the existing legal systems for preventing, redressing and otherwise providing appropriate accountability for medical errors and adverse events and prospects for the future. In many countries, the existing systems are a subject of considerable controversy. Minor and major reforms are proposed and often enacted based on public perceptions that have little or no empirical support and with little or no analysis of the potential intra- and inter-system effects. We wanted contributors to give an indication of how well or poorly each country’s set of systems is perceived to operate (as a whole, as well as in its constituent parts), to critically evaluate any reforms that have been undertaken or proposed, and to assess the general prospects in the future.

## II. AIMS

It is our hope that the papers published in this and the next issue of the Law Review, which discuss the various schemes employed in different countries around the world to prevent, redress, and otherwise provide appropriate accountability for medical errors and adverse events, will provide a broader and sounder foundation for consideration of the difficult issues

involved and the pros and cons of the many alternative schemes available for addressing them. We hope not only to provide a better understanding of the various options by taking a global approach that transcends national boundaries, but also to contribute thereby to future policy formulation and legal development in this difficult but crucial area.

### III. PLAN

This issue of the Law Review contains papers discussing the existing schemes in Austria (Bernhard A. Koch), Canada (Colleen M. Flood and Bryan Thomas), France (Florence G'Sell-Macrez and Geneviève Helleringer), Germany (Marc Stauch), New Zealand (Stephen Todd), Poland (Dr. Kinga Bączyk-Rozwadowska), and South Africa (L.C. Coetzee and Pieter Carstens). The next issue of the Law Review will contain papers discussing the existing schemes in Brazil, China, Italy, Japan, Scandinavia, the United Kingdom, and the United States. It will also contain an extended comparative analysis of the issues and the range of possible approaches.

