

# Washington International Law Journal

---

Volume 16 | Number 3

---

6-1-2007

## The Applicability of the Consumer Protection Law in Medical Malpractice Disputes in Taiwan

Ya-Ling Wu

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wilj>



Part of the [Comparative and Foreign Law Commons](#), [Consumer Protection Law Commons](#), and the [Medical Jurisprudence Commons](#)

---

### Recommended Citation

Ya-Ling Wu, Comment, *The Applicability of the Consumer Protection Law in Medical Malpractice Disputes in Taiwan*, 16 Pac. Rim L & Pol'y J. 805 (2007).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol16/iss3/10>

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

# THE APPLICABILITY OF THE CONSUMER PROTECTION LAW IN MEDICAL MALPRACTICE DISPUTES IN TAIWAN

Ya-Ling Wu<sup>†</sup>

*Abstract:* The issue of whether or not no-fault liability under the Consumer Protection Law (“CPL”) applies in medical malpractice disputes has been a contentious battle in Taiwan. In *Bo-Li Li v. Mackay Memorial Hospital*, the Taipei District Court interpreted medical care as “services” under Article 7 of the CPL. Under this interpretation, patient services must meet “reasonably expected safety standards,” while health care providers are subject to no-fault liability. This interpretation was strenuously opposed by the medical profession and invoked much debate over its validity in the legal field. After the *Bo-Li* case, the lower courts expressed different views on this issue. The Taiwan Supreme Court was also silent for seven years until recent decisions where the Court refused to apply the CPL to medical malpractice. Despite this, it is still unclear whether the interpretation will be codified, as the Legislature was reluctant to exclude medical care from the reach of consumer protection. The *Bo-Li* case reveals current policy and practicability concerns in Taiwan. Under the current scheme, it is difficult to prove the culpability of doctors in medical injury cases. Thus, no-fault liability under the CPL may serve as an alternative avenue to compensate victims. However, Taiwan does not have an insurance network and social welfare system that is favorable to this possibility. Under the current arrangement in Taiwan, instituting no-fault liability would eventually force health care providers to practice defensive medicine. Weighing all these factors, this Comment proposes that no-fault medical liability is currently impractical. Instead, Taiwan should aim to resolve issues under the current scheme to improve the litigation process, strengthen the duty of informed consent, and increase the use of malpractice insurance.

## I. INTRODUCTION

Medical malpractice law in Taiwan has a relatively short history compared to the U.S.<sup>1</sup> It was developed in the early 1990s with the institutionalization of a centralized National Health Insurance Program (“NHIP”).<sup>2</sup> Under Taiwanese law, the legal basis for medical malpractice lawsuits derives from criminal liability,<sup>3</sup> breach of contract, or tortious

---

<sup>†</sup> The author would like to thank Prof. Veronica Taylor, Judge Fu-Lang Lin, Shinrou Lin, Clark Lin and the editors of the Pacific Rim Law & Policy Journal for their help in the development of this Comment. For consistency, the Wade-Giles system is used for romanization throughout this comment.

<sup>1</sup> HSIU-I YANG, *MEDICAL MALPRACTICE IN TAIWAN: MYTH AND REALITY* 1 (J.S.D. dissertation, Stanford University, 1997).

<sup>2</sup> *Id.*

<sup>3</sup> See *Chung hua ming kuo hsing fa* [Criminal Code] (Taiwan) arts. 276, 284 [hereinafter Criminal Code] (a person who negligently causes bodily injury or death to others shall be punished).

liability.<sup>4</sup> The burden of proof for a tort-based claim is on a plaintiff to prove standard of care, breach of the standard (negligence), causation, and damages.<sup>5</sup> However, the burden of proof in a medical negligence case presents several problems.<sup>6</sup> A patient seldom has the information necessary to bring a claim.<sup>7</sup> The need for expert testimony also poses an obstacle for patients.<sup>8</sup> In Taiwan, plaintiffs do not have the discretion to introduce medical experts or evidence at trial. Instead, the judge has the sole authority to determine which experts will be called.<sup>9</sup> A court typically employs the Medical Review Committee (“MRC”) under Department of Health, the Executive Yuan,<sup>10</sup> which reviews medical records and offers expert opinions on the medical standard of care.<sup>11</sup>

The MRC is an administrative agency operated by the Bureau of Medical Affairs (“BMA”) under the Medical Care Act of 1986.<sup>12</sup> Prior to 1987, courts and other judicial organizations routinely consulted with the Medical Dispute Reviewing Committee (“MDRC”) formed by the Taiwan Physician’s Association.<sup>13</sup> Because the MDRC was composed entirely of physicians,<sup>14</sup> the public questioned its neutrality. In response to this concern, the Executive Yuan Department of Health founded the MRC in 1987 as the first official medical review board.<sup>15</sup> The MRC consists of physicians, lawyers, scholars, and social personages.<sup>16</sup> In addition to providing expert opinions for the judiciary, the MRC also handles various matters such as reviewing new medical technologies and discussing reform agendas.<sup>17</sup> The MRC has been known to favor defendants, such as medical institutions and

---

<sup>4</sup> See Ming fa [Civil Code] (Taiwan) art. 184 [hereinafter Civil Code] (a person who intentionally or negligently violates the right of another is liable to make compensation for the damage resulting therefrom).

<sup>5</sup> YANG, *supra* note 1, at 41.

<sup>6</sup> *Id.* at 50.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 52.

<sup>9</sup> *Id.* at 52-3.

<sup>10</sup> See Department of Health, Executive Yuan, R.O.C. (Taiwan), Hsing cheng yuen wei sheng shu I shih shen I wei yuen hui tsu chih kui ch’eng [Department of Health, Executive Yuan, Medical Review Committee Organization Regulation], available at <https://wiki.blinkenarea.org/bin/mini?u=21> (last visited May 5, 2007).

<sup>11</sup> YANG, *supra* note 1, at 55-6.

<sup>12</sup> I liao fa, [Medical Care Act] ch. VIII (Taiwan) [hereinafter Medical Care Act].

<sup>13</sup> YANG, *supra* note 1, at 54.

<sup>14</sup> *Id.* at 55-6.

<sup>15</sup> *Id.*

<sup>16</sup> See *id.* art. 100 (providing that “[m]embers of the medical review committee referred to in the preceding two Articles shall include medical experts, legal experts, scholars, and social personages, excluding legislators/councilors and representatives of medical juridical persons, of which legal experts and social personages shall account for at least one-third of the number of members”).

<sup>17</sup> See Department of Health, Executive Yuan, R.O.C. (Taiwan), *supra* note 10.

physicians.<sup>18</sup> In addition to this impediment, the complexity and cost of litigation deter and even prevent victims of medical malpractice from seeking legal remedies.

Because it is difficult to prove negligence under the conventional scheme, plaintiffs often seek other avenues to recover losses from medical injuries, such as the no-fault compensation scheme under the CPL.<sup>19</sup> The CPL was enacted in 1994. The underlying legislative purpose was to protect consumers, traditionally the weaker parties, from the abuses of business operators.<sup>20</sup> The CPL forces business operators to comply with the reasonably expected standard, which is detailed in the Enforcement Rules of the CPL.<sup>21</sup> Subsequent to the passage of the CPL, there was and is still much disagreement over the definitions of “service,” “consumer,” and “business operator” in its statutory language.<sup>22</sup>

For the first time in Taiwan, the Taipei District Court adopted a no-fault medical liability rule under the CPL in *Bo-Li Li v. Mackay Memorial Hospital*.<sup>23</sup> This case signaled a potential change in patients’ right to seek remedies in medical malpractice disputes. However, this case also triggered debates over whether medical personnel should be subject to no-fault liability.

This Comment addresses several subjects arising out of this issue. Part II provides a summary of the *Bo-Li* case. Part III examines in depth the *Bo-Li* court’s interpretation of the CPL’s scope. Part IV discusses the issues related to the burden of proof in a medical malpractice case. Part V analyzes other judiciary holdings, including the recent Taiwan Supreme Court’s opinion, as well as the Legislature’s position. Finally, this Comment addresses the practicality of applying no-fault liability to medical injury lawsuits and suggests future directions in Part VI and VII. This Comment

---

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> Hsiao fei che^ pao hu fa [Consumer Protection Law] (Taiwan) [hereinafter CPL], available at <http://www.cpc.gov.tw/en/index.asp?pagenumber=638> (last visited Apr. 4, 2007). No-fault liability applies both to goods and services under the CPL. The essence of no-fault liability is similar to implied warranty of merchantability and strict liability in the U.S. law.

<sup>20</sup> See *id.*, art. 1.

<sup>21</sup> Hsiao fei che^ pao hu fa shih hsing his tse [Enforcement Rules of the CPL] art. 5 (Taiwan) [hereinafter Enforcement Rules]. Enforcement Rules of the CPL supplements the CPL. Article 5 of the Enforcement Rules provides that “[d]anger to safety or sanitation” as mentioned in Paragraph 1, Article 7 of the Law shall be present if the goods, when circulated into the market, or the services, when provided, lack the generally and reasonably anticipated safety, except where such goods or services are up to the then scientific and technical or professional standards.”

<sup>22</sup> See *infra* Part V.

<sup>23</sup> *Bo-Li Li v. Mackay Mem’l Hosp.*, 1998 CHINESE(TAIWAN) (Taipei Dist. Ct., Jan. 2, 1998) (85 Docket No. SU 5125) [hereinafter *Bo-Li*].

also translates the reasoning of the original court opinion and addresses the debate over whether medical care is under the scope of the CPL.

## II. CASE SUMMARY OF *BO-LI LI V. MACKAY MEMORIAL HOSPITAL*

The seminal case applying the CPL in the medical context was a birth injury lawsuit decided in 1998.<sup>24</sup> The plaintiff, Bo-Li Li, was born at Mackay Memorial Hospital on December 5th, 1994. Before Li's birth, his mother Tan had regular prenatal check-ups at Mackay Memorial Hospital by Dr. Cheng-Chieh Cheng. Over the course of Tan's labor, an emergency situation called shoulder dystocia occurred. Shoulder dystocia occurs when the fetal head has been delivered but the shoulders are stuck and cannot be delivered.<sup>25</sup> In response to the medical condition, Dr. Cheng performed a procedure called the "McRoberts maneuver" to assist with Tan's labor. Soon after Li was born, his parents discovered that Li's right forearm was paralyzed due to brachial plexus injuries that are generally associated with shoulder dystocia.<sup>26</sup> Even though Li received further surgery and physical reconstruction, his injured arm was still unable to achieve normal function. As a result of his injury, his right arm could only move 130 degrees, instead of the normal range of 180 degrees.<sup>27</sup> His medical condition was confirmed by the MRC and was not disputed by either party.<sup>28</sup>

Shoulder dystocia is considered an unpredictable emergency. However, maternal obesity, diabetes, and fetal macrosomia are prenatal factors associated with the incidence of shoulder dystocia.<sup>29</sup> The plaintiff Bo-Li Li brought a tortious claim against the defendant, the Mackay Memorial Hospital, for the malpractice of its employee, Dr. Cheng-Chieh Cheng.<sup>30</sup> The plaintiff also contended that the defendant was liable under Article 7 of the CPL for failing to provide necessary services to ensure Li's safety, despite several indications of risk over the course of Tan's

---

<sup>24</sup> *Id.*

<sup>25</sup> Robert B. Gherman, et al., *Shoulder Dystocia: The Unpreventable Obstetric Emergency with Empiric Management Guidelines*, 195(3) AM. J. OBSTET. GYNECOL. 657, 658 (2006).

<sup>26</sup> National Institute of Neurological Disorders and Stroke, NINDS Erb-Duchenne and Dejerine-Klumpke Palsies Information Page, [http://www.ninds.nih.gov/disorders/brachial\\_plexus\\_birth/brachial\\_plexus\\_birth.htm](http://www.ninds.nih.gov/disorders/brachial_plexus_birth/brachial_plexus_birth.htm) (last visited Feb. 16, 2007) (The brachial plexus is a network of nerves that conducts signals from the spine to the shoulder, arm, and hand. Brachial plexus injuries are caused by damage to those nerves).

<sup>27</sup> See *Bo-Li*, *supra* note 23.

<sup>28</sup> See *infra* Part IX for the translation of *Bo-Li*.

<sup>29</sup> Gherman, et al., *supra* note 25, at 659. The term "fetal macrosomia" is used to describe a newborn infant with an excessive birth weight.

<sup>30</sup> See *Bo-Li*, *supra* note 23. Dr. Cheng was sued in a separate case for occupational negligence and was found not liable both by the Taipei District Court (84 Docket No. Tzu 427) and Taiwan High Court (85 Docket No. SHANG-I 2132).

pregnancy.<sup>31</sup> First, Tan was considered an overweight mother.<sup>32</sup> She originally weighed eighty kilograms and had reached 90.8 kilograms by the last prenatal visit.<sup>33</sup> The plaintiff was a macrosomic infant with an excessive weight at birth.<sup>34</sup> Dr. Cheng estimated his weight at week thirty-eight as equivalent to that of a forty-week fetus, but failed to give any warning.<sup>35</sup> The defendant responded that in light of current medical knowledge, the care provided met the standard of reasonably expected safety and sanitation. Although the doctor was found not to be at fault, the Taipei District Court held that the hospital was liable under the CPL.<sup>36</sup>

The case was appealed to the Taiwan High Court, which affirmed the district court's holding.<sup>37</sup> However, the Taiwan Supreme Court did not express its position as to the applicability of the CPL.<sup>38</sup> The case was remanded for further factual findings on whether Dr. Cheng's procedure complied with the reasonably expected safety standard. Ultimately, the parties settled.

Subsequent to this case, courts' opinions have varied regarding the applicability of the CPL in medical malpractice cases.<sup>39</sup> Although this issue was first brought to the courts several years ago, it is still unclear whether medical care is within the scope of the CPL in Taiwan.

### III. THE *Bo-Li* COURT EXTENDED THE SCOPE OF THE CPL TO MEDICAL CARE

The key question about the scope of the CPL arises from how the statutory language of the CPL should be construed. Particularly, there has

---

<sup>31</sup> See *Bo-Li*, *supra* note 23. The original provision of Article 7, Paragraph 1 of the CPL provides that "business operators engaging in the provisions of services shall ensure that services provided by them are without danger to safety or sanitation." In 2005, the original language was amended to "business operators engaging in the design, production or manufacture of goods or in the provisions of services shall ensure that goods and services provided by them meet and comply with the contemporary technical and professional standards of the reasonably expected safety prior to the sold goods launched into the market, or at the time of rendering services." See CPL, *supra* note 19, at art. 7.

<sup>32</sup> See *infra* Part IX for the translation of *Bo-Li*.

<sup>33</sup> See *infra* Part IX for the translation of *Bo-Li*.

<sup>34</sup> See *infra* Part IX for the translation of *Bo-Li*.

<sup>35</sup> See *infra* Part IX for the translation of *Bo-Li*.

<sup>36</sup> See *Bo-Li*, *supra* note 23. Judge Hui-Rou Tsai presided over the *Bo-Li* case in the Taipei District Court.

<sup>37</sup> See the Taiwan High Court 87 Docket No. SHANG 151. The judicial system in Taiwan comprises three levels of courts: district courts, high courts and the Supreme Court. The Taiwan High Court is the intermediate appellate court in the northern part of Taiwan.

<sup>38</sup> See The Taiwan Supreme Court 90 Docket No. TAI-SHANG 709.

<sup>39</sup> See *infra* Part V.

been much debate on whether the *Bo-Li* court's interpretation of Article 7 of the CPL is consistent with the legislative intent and underlying policies.

A. *The Bo-Li Court Adopted a Broad Statutory Interpretation of "Services" Under the CPL*

The *Bo-Li* court stated that "any business or enterprise that provides services to consumers, due to its relation with consumers' safety and sanitation, is subject to the CPL regardless of whether the services are related to merchandise."<sup>40</sup> Although medical care is not a trade directly related to merchandise, it certainly provides services concerning consumers' safety and sanitation. Therefore under this definition, medical care providers are "business operators" under the CPL. In order to determine whether seeking medical care is a form of consumption, the *Bo-Li* court also employed economists' interpretation to define "consumption." It reasoned that consumption is "an activity to reach an individual's life goals."<sup>41</sup> Under this broad definition, patients are considered consumers because receiving medical care is an act performed in order to fulfill individual needs.

The legal and medical fields have also expressed different views on the interpretation of Article 7 of the CPL. A legal study argued that the way the court interpreted "consumption" was too indefinite.<sup>42</sup> It proposed that this issue should turn on the examination of the activity's purpose and the legislative intent of the CPL.<sup>43</sup> First, the scope of consumption should be limited to activities that are for personal, not professional purposes.<sup>44</sup> Since medical care is private, it should be within the scope of "consumption." Second, because the legislative intent of the CPL is to ameliorate the unequal bargaining power between business operators and consumers, anyone who is subject to risks related to merchandise or services ought to be within the scope of consumer protection.<sup>45</sup> This study also explained why the CPL is distinct from product liability laws in Western countries.<sup>46</sup> Although it came to the same conclusion as the *Bo-Li* court, the test employed by this study is narrower than the court's approach. Still, there

---

<sup>40</sup> See *infra* Part IX for the translation of *Bo-Li*.

<sup>41</sup> See *infra* Part IX for the translation of *Bo-Li*.

<sup>42</sup> Chung-Wu Chen, *I liao hsing wei yu hsiao fei che^ pao hu fa fu wu tse jen chih shih yung ling yu* [Medical Care and the Applicability of the CPL to Service Liability], 7 TA'I-WAN PEN T'U FA HSUEH TSA CHIH [TAIWAN LAW JOURNAL] 36, 47 (Feb. 2000) (Taiwan).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 47-8.

<sup>46</sup> *Id.*

continues to be disagreement in the legal academy as to whether the scope of the CPL should extend to medical care.<sup>47</sup>

In the medical profession, the predominant view is that the scope of the CPL should not extend to medical care. Doctors unanimously oppose medical personnel being classified as “business operators,”<sup>48</sup> and strongly disagree with the notion that patients are consumers.<sup>49</sup> The medical field has contended that the relationship between doctors and patients should not be treated as a business relationship, because seeking medical care is not consumption.<sup>50</sup> Physicians’ main concerns are the implied risks associated with the medical profession.<sup>51</sup> While the danger to consumers is predictably associated with inherently dangerous goods, the medical risks are generally unforeseeable and beyond the doctor’s control.<sup>52</sup> Therefore, it is unfair to allocate all the risks to medical care providers.<sup>53</sup>

Furthermore, unlike Taiwan, most other jurisdictions do not award damages to medical malpractice cases under no-fault liability. Thus, the medical field urges that courts should prioritize other applicable laws such as the Medical Care Act or the Physicians Act<sup>54</sup> before the CPL. Since 1995, Taiwan’s medical care has operated under a national insurance scheme and is more analogous to a non-profit service than to a business operation. Accordingly, the CPL, which primarily deals with business corporations, should not apply to medical care.<sup>55</sup>

#### *B. Medical Personnel’s Conduct Is Measured by a “Reasonably Expected Safety” Standard Under the No-Fault Liability Scheme*

A second inquiry in the *Bo-Li* case was whether the medical care provided by the defendant complied with the “no danger to safety or sanitation” standard set forth in Article 7 of the CPL. The Enforcement Rules define “danger to safety or sanitation” as lacking “the generally and

<sup>47</sup> *Id.* at 40.

<sup>48</sup> Chung-Hsin Hsu, *Hsiao fei che^ pao hu fa yu i liao fu wu chih shih yung yu chieh shih* [Interpretation of the CPL and Its Applicability to Service Liability], 7:3 I SHIH FA HSUEH 49, 49 (Sept. 1999) (Taiwan).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Fu-Hsien Wang, *Ts’ung i liao hsing wei shih yung hsiao fei che^ pao hu fa chih cheng i shih lun i liao cheng i wei lai tsou hsiang* [Applicability and Interpretation of the CPL], 56:9 FA LING YUEH K’AN [LAW MONTHLY] 30, 42 (1999) (Taiwan).

<sup>53</sup> See Hsu, *supra* note 48, at 49.

<sup>54</sup> I shih fa [Physicians Act] (Taiwan) [hereinafter Physicians Act].

<sup>55</sup> Tzu-Yu Li, *I liao hsing wei wu kuo shih chih yen chiu — chien lun 2004 nien “I liao fa” ti pa shih erh t’iao chih hsiu cheng* [Study of Medical no-fault liability], 3 CHUNG HUA JEN WEN SHE HUI HSUEH PAO 62, 64 (2005) (Taiwan).



reasonably anticipated safety” standard.<sup>56</sup> In 2004, the language in Article 7 was changed from “no danger to safety or sanitation” to “reasonably expected safety standard” and reflected the standard set out in the Enforcement Rules.<sup>57</sup> If a physician’s conduct fails to satisfy the “reasonably expected safety” standard under the CPL and the Enforcement Rules, he is liable for the injury caused to the plaintiff regardless of whether he is at fault.

Applying the rule in this case, the *Bo-Li* court held that the hospital was liable because the medical service did not meet the “reasonably expected safety” standard. The court reached this decision despite the fact that Dr. Cheng exercised all possible care. One issue arising from this reasoning is whether the no-fault liability scheme is essentially a fault-based system adopted by the *Bo-Li* court only with a higher standard. In other words, the question is, under the no-fault liability system, whether there is a difference between negligence and failing to meet the reasonably expected safety measure.

One study suggested that the reasonably expected safety standard is an objective determination of “abnormal or unreasonable risks” associated with medical care, whereas negligence is a subjective measure of the defendant’s conduct.<sup>58</sup> Because abnormal or unreasonable risks are unforeseeable, they are irrelevant to defendant’s actions.<sup>59</sup> Accordingly, no-fault liability should apply to injuries caused by this type of risk. In contrast, a service provider’s fault is determined by his conduct, such as whether he breached the duty to prevent foreseeable risks. Therefore a fault-based scheme should be used under these circumstances.<sup>60</sup>

The same study suggested that no-fault liability should apply to “medical accidents,” not “treatment failure.”<sup>61</sup> “Medical accidents” are unforeseeable injuries outside the scope of medical care.<sup>62</sup> These injuries are neither side effects nor ineffective medical outcomes. Under these circumstances, it is rational to apply the “reasonably expected safety standard” under the no-fault scheme to protect patients from unpredictable

<sup>56</sup> See Enforcement Rules, *supra* note 21, at art. 5.

<sup>57</sup> See CPL, *supra* note 19, at art. 7.

<sup>58</sup> Chung-Wu Chen, *I liao shih ku yu hsiao fei che^ pao hu fa fu wu tse jen chih shih yun yao chien (shang)-t'ai-wan t'ai pei ti fang fa yuen pa shih wu nien tu su tzu ti wu i erh wu hao yu t'ai wan kao teng fa yuen pa shih ch'I nien tu shang tzu ti I wu i hao (ma chieh chi nien i yuen chien nan ch'an an chien) p'an chueh tsai p'ing shih [Medical Accidents and the Applicability of the CPL, Part I]* 17 T'AI-WAN PEN T'U FA HSUEH TSA CHIH [TAIWAN LAW JOURNAL] 75, 80-102 (Dec. 2000) (Taiwan).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 102-7.

<sup>62</sup> *Id.*

risks.<sup>63</sup> On the other hand, “treatment failure” refers to the uncertainty associated with medical care.<sup>64</sup> Because of the variation among patients’ symptoms and physical conditions, perfect results are not guaranteed. It is impossible to avoid side effects or negative medical outcomes. Accordingly, no-fault liability should not apply to injuries caused by “treatment failure.”<sup>65</sup> This study concluded that the analysis is consistent with the underlying policy of the CPL to protect patients (consumers) in malpractice cases.<sup>66</sup>

Nevertheless, in practice it is difficult to differentiate “treatment failure” from “medical accidents” and whether the risks are foreseeable or reasonable. Thus, the measurement of physicians’ conduct remains a problem when determining the applicability of the CPL in medical malpractice settings.

### C. *No-Fault Liability Is Subject to the Exception of the Then Technical and Professional Standard*

The Enforcement Rules provide a technical defense: goods or services that are up to the current scientific and technical or professional standards may be exempt from the CPL.<sup>67</sup> In essence, it is similar to the state-of-the-art defense under U.S. product liability. That is, if the defendant can prove that at the time the product was manufactured, the state-of-the-art did not allow for production of a safer product at a reasonable cost, the defendant is not liable for injury caused to the plaintiff.<sup>68</sup> The concept of the technical defense under the Enforcement Rules originates from the European Union Product Liability Directive.<sup>69</sup> Article 7 of the Directive provides that “[t]he producer shall not be liable as a result of this Directive if he proves . . . that the state of scientific and technical knowledge at the time when he put the product into circulation *was not such as to enable the existence of the defect to be discovered.*”<sup>70</sup> Accordingly, the technical

---

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See Enforcement Rules, *supra* note 21, at art. 5.

<sup>68</sup> See 63A AM. JUR. 2D *Products Liability* § 1319 (1997).

<sup>69</sup> Chung-Wu Chen, I liao shih ku yu hsiao fei che^ pao hu fa fu wu tse jen chih shih yun yao chien -- t'ai wan t'ai pei ti fang fa yuen pa shih wu nien tu su tzu ti wu i erh wu hao yu t'ai wan kao teng fa yuen pa shih ch'I nien tu shang tzu ti I wu i hao (ma chieh chi nien i yuen chien nan ch'an an chien) p'an chueh tsai p'ing shih-shang [Medical Accidents and The Applicability of Consumer Protection Law to Service Liability, Part II] 18 T'AI-WAN PEN T'U FA HSUEH TSA CHIH [TAIWAN LAW JOURNAL] 39, 41-2 (Jan. 2001) (Taiwan).

<sup>70</sup> Council Directive 85/374, art. 7, 1985 O.J. (L 210) 29 (EU), *available at* [www.dehp-facts.com/upload/documents/document42.pdf](http://www.dehp-facts.com/upload/documents/document42.pdf) (last visited Feb. 21, 2007) (emphasis added).

defense under the Enforcement Rules refers to undetectable risks based on technical or professional standards *at the time* the service was provided. However, the definition of “standards” is unclear, as they are variable depending on location and specialization.

The *Bo-Li* court employed a strict interpretation of this technical defense, reasoning that “the determining factor is not whether a particular manufacturer who complies with the typical objective group standard could recognize the risks or defects. Instead, it is whether *anyone* would know the risks in an objective standard.” In other words, the technical exception applies only when no one in the world would recognize the medical risks associated with the most advanced technology available. Under this strict construction, the Mackay Memorial Hospital could not raise the technical defense, as Tan’s obesity would have been recognized as a possible cause for shoulder dystocia. Consequently, it would be irrelevant whether the shoulder dystocia was unpredictable or unpreventable.<sup>71</sup>

Compared to *Bo-Li*, courts in subsequent opinions employed a more lenient interpretation with respect to technical defenses. Even if the court held the CPL applicable, defendants have prevailed by raising the technical defense in the medical dispute setting.<sup>72</sup>

#### IV. THE *BO-LI* CASE REFLECTS PROBLEMS WITH THE PLAINTIFF’S BURDEN OF PROOF IN MEDICAL MALPRACTICE CASES

The burden to prove negligence in a medical malpractice case is highly technical and requires professional expertise. Similar to the U.S. scheme, proof of a medical malpractice claim in Taiwan requires a showing of the standard of care, breach of the standard by the defendant, injury, and causation. Unless the burden is shifted to the defendant,<sup>73</sup> the plaintiff bears the burden to demonstrate defendant’s fault in a medical negligence suit.<sup>74</sup>

Under the American tort scheme, plaintiffs are permitted to introduce expert testimony of their choice to establish the standard of care. The expert’s role is to help the fact-finder to understand technical subject matters outside common knowledge. In contrast, a Taiwanese plaintiff usually does not have the ability to introduce expert testimony in court. Instead, the court

---

<sup>71</sup> See *infra* Part IX for the translation of *Bo-Li* (emphasis added).

<sup>72</sup> See, e.g., Yueh-Chen Yang v. Hung-Hui Kuan CHINESE(TAIWAN) (Taichung Dist. Ct. Dec. 25, 2003) (91 Docket No. CHUNG-SU 936).

<sup>73</sup> See, e.g., Enforcement Rules, *supra* note 21, at art. 6 (providing that a defendant has the burden of proof if raising the technical defense under the CPL).

<sup>74</sup> Min shih su sung fa [Code of Civil Procedure] (Taiwan) art. 277 [hereinafter Code of Civil Procedure].

orders the MRC to investigate medical disputes and offer advisory expert testimony concerning a defendant's negligence and causation. Because courts usually do not have the knowledge and experience to evaluate a physician's conduct, they typically adopt the MRC's conclusions in making their decisions.<sup>75</sup>

The review procedure of the MRC in a medical dispute comprises screening, preliminary peer review, and secondary review.<sup>76</sup> At the screening stage, the clerk of the BMA registers the judicial inquiry of a case and checks the sufficiency of information.<sup>77</sup> If the MRC decides to take on a case, it will assign the file to a medical institution for preliminary peer review. The appointed institution then conducts the review and delivers a written opinion within weeks of the MRC's request.<sup>78</sup> At the stage of secondary review, the MRC will discuss the preliminary review and render opinions.<sup>79</sup> Physicians on the MRC will provide further medical opinions, while non-physicians can raise concerns about the laws and plaintiffs' interests.<sup>80</sup> A final report is submitted to the inquiring organization after the MRC members reach a unanimous decision.<sup>81</sup>

Although the new structure of the MRC was intended to balance the interests of medical personnel and patients, several concerns about its objectivity have been raised. First, the MRC's review is based solely on the documents provided by the inquiring organization.<sup>82</sup> Patients are not entitled to participate in the MRC meeting during the review process.<sup>83</sup> Second, patients do not have easy access to medical records, which are often incomplete or illegible.<sup>84</sup> Third, the identities of parties involved in a suit are not concealed, raising a possibility of bias and favoritism.<sup>85</sup> Moreover, there are accusations of a "conspiracy of silence" within the medical profession.<sup>86</sup> It is rare that a physician will testify against another in a medical malpractice case. A recent study showed that between August 1, 1999 and September 30, 2005, the MRC found negligence in only 13.4% of

---

<sup>75</sup> YANG, *supra* note 1, at 59.

<sup>76</sup> Taiwan Health Reform Foundation, Medical Disputes Reference Brochure, *available at* [http://www.thrf.org.tw/Page\\_Show.asp?Page\\_ID=340](http://www.thrf.org.tw/Page_Show.asp?Page_ID=340) (last visited Mar. 17, 2007).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> YANG, *supra* note 1, at 58.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 60.

<sup>85</sup> *Id.* at 57-8.

<sup>86</sup> *Id.* at 52.

medical malpractice inquiries.<sup>87</sup> In addition, the growing number of medical malpractice lawsuits increased the judicial inquiries of medical review. The number rose from an average of 198 in 1995 to 465 inquiries in 2003.<sup>88</sup> The increased inquiries also cause delay in the medical review and public skepticism as to its quality.

The *Bo-Li* case exemplifies the long-standing problem of proving negligence in a malpractice case. The plaintiff in *Bo-Li* brought a tortious claim against the hospital for failing to ensure his safety. However, based on the medical review supplied by the MRC, the court was unable to reach a conclusion regarding the defendant's fault. Under the U.S. expert system, such a case might have found negligence, as Dr. Cheng did not give any warning despite a number of risk indications over Tan's pregnancy. In fact, the academics have questioned whether Dr. Cheng failed to exercise his duty of informed consent.<sup>89</sup> As an alternative avenue to compensate the plaintiff, the *Bo-Li* court held that medical personnel should be subject to no-fault liability under the CPL. Accordingly, although the Mackay Memorial Hospital was found faultless, it was held liable for Bo-Li Li's plexus injuries resulting from shoulder dystocia.

#### V. THE SUPREME COURT REFUSES TO EXTEND THE SCOPE OF THE CPL TO MEDICAL CARE, WHILE THE LEGISLATURE'S ATTITUDE IS UNCLEAR

##### A. *The Lower Courts Hold Different Views on the Scope of the CPL from That of the Bo-Li Court*

Since the *Bo-Li* case, lower courts have been split on the interpretation of Article 7. For example, in *Rui-Liang He v. Taipei Yang-Ming Hospital*, the Shi-Lin District Court indirectly affirmed that medical care is within the scope of the CPL, although the case was dismissed because of the statute of limitation.<sup>90</sup> However, in *Shu-Han Hsu v. Hung-Chih Hsu*, another shoulder

<sup>87</sup> TSE-CHENG WU, TS'UNG PING HUAN KUAN TIEN T'AN T'AO YIN CH'I I LIAO CHIU FEN CH'AN SHENG TE YUEN YIN YU LEI HSING --I T'AI-WAN FA YUEN P'AN CHUEH TZU LIAO WEI CHI CH'U [THE STUDY OF CAUSES AND TYPES OF MEDICAL MALPRACTICE FROM PATIENT'S PERSPECTIVE — BASED ON DECISIONS OF COURTS IN TAIWAN] (Masters' Thesis, National Taiwan University Jan. 2006) 5 (using five characteristic indexes to screen all district court decisions on civil lawsuits, excluding non-malpractice and repeated cases and selecting 162 cases for study).

<sup>88</sup> Ching-Te Lai, Tui i liao shang hai ch'u li fa ts'ao an te cheng fan mien i chien [Pros and cons of Medical Injury Management Proposal], available at [http://morpheus.typepad.com/iait/2007/02/post\\_1.html](http://morpheus.typepad.com/iait/2007/02/post_1.html) (last visited Feb. 24, 2007).

<sup>89</sup> See discussion *infra* Part VII.B.

<sup>90</sup> See *Rui-Liang He v. Taipei Yang-Ming Hosp.*, 2001 CHINESE(TAIWAN) (Shi-Lin Dist. Ct., May 8, 2001) (89 Docket No. SU 1185).

dystocia and birth injury case, the Taipei District Court reached a different conclusion.<sup>91</sup> In contrast with the *Bo-Li* case, the *Shu-Han* court emphasized that medical care should be exempt from the CPL.<sup>92</sup> The court in *Shu-Han* reasoned that seeking medical care is not consumption within the meaning of the CPL, as it is neither merchandise nor for the purpose of profit. As medical care is closely associated with public health, it should be regulated by health-related laws such as the Medical Act, not the CPL.<sup>93</sup>

The court deciding *Sheng-Hsiung Huang v. Shu-Hsun Chu* rejected applying the CPL and utilized the approach of “teleologische reduktion” (teleological or purposive reduction).<sup>94</sup> That is, when the literal interpretation is not consistent with the legislative intent, the statute must be construed restrictively to comply with its purpose.<sup>95</sup> Courts adopting this theory believe that no-fault liability would drive doctors to practice “defensive medicine” and avoid liability rather than benefit patients.<sup>96</sup> Under this theory, although medical care is within the literal interpretation of services under the CPL, imposing no-fault liability is inconsistent with the legislative purpose to protect the interests of consumers (patients).<sup>97</sup> Similarly, other courts considered the public policy of preventing defensive medicine and refused to extend the scope of the CPL.<sup>98</sup>

*B. The Taiwan Supreme Court Refuses to Extend the Scope of the CPL to Medical Care*

Despite the existence of different views among the lower courts, the Taiwan Supreme Court was silent on the scope of the CPL for seven years. In *Chin-Ying Yao Su v. Miao-Li Hospital, Department of Health*, a case involving a birth injury dispute, the Supreme Court spoke on the issue for the first time, and held that “medical care is not within the scope of the

---

<sup>91</sup> See *Shu-Han Hsu v. Hung-Chih Hsu*, 2000 CHINESE(TAIWAN) (Taipei Dist. Ct. Sept. 20, 2000) (87 Docket No. SU 4511) [hereinafter *Shu-Han*]. Judge Kun-Tien Liu presided over the *Shu-Han* case in the Taipei District Court.

<sup>92</sup> See *id.*

<sup>93</sup> See *id.*

<sup>94</sup> See, *Sheng-Hsiung Huang v. Shu-Hsun Chu* 2002 CHINESE(TAIWAN) (Taipei Dist. Ct. Feb. 6, 2002) (88 Docket No. SU-TZU, 5027) [hereinafter *Sheng-Hsiung*]. Judge You-Ching Liu presided over the *Sheng-Hsiung* case.

<sup>95</sup> Wang, *supra* note 52, at 45-6 (providing explanation of Teleologische Reduktion).

<sup>96</sup> Defensive medicine: Medical practices designed to avert the future possibility of malpractice suits, <http://www.medterms.com/script/main/art.asp?articlekey=33262>.

<sup>97</sup> See CPL, *supra* note 19, at art. 1, para. 1 (providing that “the Consumer Protection Law . . . is enacted for the purposes of protecting the interests of consumers, facilitating the safety of the consumer life of nationals, and improving the quality of the consumer life of nationals”).

<sup>98</sup> See *e.g.*, *Yu-Ying Chi v. Te-Chao Chen*, 2001 CHINESE(TAIWAN) (Taipei Dist. Ct., Feb. 14, 2001) (87 Docket No. SU 1521).

CPL.”<sup>99</sup> Although the Court did not give any reasoning for its interpretation, the *Chin-Ying* case delineated the Taiwan Supreme Court’s position on the issue of scope. Last year, the Supreme Court reaffirmed its position in *Sheng-Chan Chien v. Fang-Ping Chen*.<sup>100</sup> This case was about a vacuum extraction that led to permanent brain lesions in a newborn. The plaintiff sued the hospital under the no-fault liability clause in the CPL. The Taiwan Supreme Court refused to apply the CPL, reasoning that the legislative intent of the CPL was to impose no-fault liability to deter manufacturers from bringing dangerous goods into the market.<sup>101</sup> However, current medical knowledge is in fact quite limited as to treatment options.<sup>102</sup> If no-fault liability is imposed on medical care, doctors may undertake procedures based on the severity of side effects or give up a more effective but high-risk procedure to avoid liability.<sup>103</sup> This would delay timely treatments, increase unnecessary waste of medical resources, and would not benefit society or patients.<sup>104</sup> The Court reasoned that defensive medicine obviously runs counter the legislative intent of the CPL to protect the interests of consumers, and concluded that the CPL should be construed restrictively under teleologische reduktion.<sup>105</sup> The Taiwan Supreme Court held that medical care should be excluded from the scope of the CPL.<sup>106</sup>

In *Sheng-Chan*, the Supreme Court explained why the CPL should not apply to medical care at length.<sup>107</sup> Like the *Sheng-Hsiung* court,<sup>108</sup> the Supreme Court refused to extend the scope based on legislative intent and policy concerns of preventing defensive medicine. Although *stare decisis* does not apply to Taiwan’s civil law, the highest court’s opinion can strongly influence a future interpretation of a law by lower courts.<sup>109</sup> In fact, the Taipei District Court cited the Supreme Court’s holding in a recent medical

---

<sup>99</sup> See *Chin-Ying Yao Su v. Miao-Li Hosp., Dept. of Health*, 2005 CHINESE(TAIWAN) (Taiwan S. Ct., June 23, 2005) (94 Docket No. TAI-SHANG 1156). See also Chin-Tien Chiu, *I liao hsing wei ping pu shih yung yu Hsiao fei che^ pao hu fa chih kui ting* [The CPL is Not Applicable to Medical Care] 9:11 CH’UAN KUO LU\_ SHIH [TAIWAN BAR JOURNAL] 64, 72 (Nov. 2005).

<sup>100</sup> See *Sheng-Chan Chien v. Fang-Ping Chen*, 2006 CHINESE(TAIWAN) (Taiwan S. Ct., Sept. 28, 2006) (95 Docket No. TAI-SHANG 2178) [hereinafter *Sheng-Chan*].

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See CPL, *supra* note 19, at art. 1, para. 1.

<sup>106</sup> See *Sheng-Chan*, *supra* note 100.

<sup>107</sup> *Id.*

<sup>108</sup> See *Sheng-Hsiung*, *supra* note 94.

<sup>109</sup> However, the Taiwan Supreme Court may designate a particular opinion to be a binding precedent as “Pan-Li.”

dispute case.<sup>110</sup> However, only the legislature may make the law under the civil law system, so the ultimate definition of the CPL's scope is still a legislative issue.

C. *The Legislature's Stand on the Scope of the CPL Is Unclear*

After *Bo-Li* was decided, the medical field began campaigning for the Legislative Yuan to exclude medical care from the scope of the CPL through legislation.<sup>111</sup> However, although the Legislative Yuan amended the CPL several times, it has been reluctant to codify the scope in the statute or give guidance in the Enforcement Rules.<sup>112</sup>

The *Bo-Li* case also prompted academics to discuss the interplay between the Medical Care Act and the CPL on the issue of no-fault liability. The Medical Care Act was enacted in 1986 for the purposes of promoting medical development and improving national health.<sup>113</sup> Since the *Bo-Li* case, doctors have advocated for the legislature to clarify the scope of medical liability under the Medical Care Act. In response to physicians' lobbying, Article 82 of the Medical Care Act was added in 2004 to limit medical liability to acts that were "deliberate or [committed] by accident."<sup>114</sup> As the amended Act only stipulates the liability for these specific categories, the medical profession contended that no-fault liability under the CPL should not apply. However, this argument's validity has been questioned.<sup>115</sup> Although the Medical Care Act excludes no-fault liability, it does not exclude the applicability of the CPL to medical care.<sup>116</sup> Until the scope of the CPL is clearly defined in the statute itself, medical care is still within the reach of services under Article 7.

<sup>110</sup> Hao Hsiung v. Cathy General Hosp., 2006 CHINESE(TAIWAN) (94 Docket No. I 6) (Taipei Dist. Ct., Oct. 23, 2006).

<sup>111</sup> The Legislative Yuan is the legislative body in Taiwan.

<sup>112</sup> The CPL was last amended on Feb 5, 2005.

<sup>113</sup> See Medical Care Act, *supra* note 12, at art. 1, para. 1.

<sup>114</sup> See Medical Care Act, *supra* note 12, at art. 82. This Comment adopts the official Chinese reading of Article 82 of the Medical Care Act, which is different from the official English translation. The official English translation of Article 82 of the Medical Care Act reads as "[t]hose conducting medical practices shall pay proper attention to medical care procedure. Medical care institutions and their medical personnel who harm patients in the execution of practice, whether deliberate or by accident, shall be responsible for compensation."

<sup>115</sup> Shinrou Lin & Hsiu-I Yang, Kao pieh ma chieh chien nan ch'an shih chien? hsin i liao fa ti 82 tiao ti erh hsiang p'ing his [Farewell to the Bo-Li Case? Discussion of Article 82 of the Medical Act], 112 YUEH TAN FA HSUEH [TAIWAN JURIST] 24, 24 (Sept. 2004).

<sup>116</sup> *Id.* at 25.



## VI. IT IS CURRENTLY IMPRACTICAL TO INSTITUTE NO-FAULT MEDICAL LIABILITY IN TAIWAN

Notwithstanding the judicial and legislative treatment of no-fault liability for medical malpractice, there remains the question of whether it is practical to use the CPL as a medical compensation scheme in Taiwan.

### A. *The CPL May Not Account for the Difference between Product Liability and Service Liability*

From a comparative law standpoint, the CPL is a rare instance of legislation that combines product and service liabilities into one law.<sup>117</sup> The “reasonably expected safety standard” under the current Article 7 is derived from product liability law,<sup>118</sup> where it is used to measure defects in a product without having to prove the manufacturer’s negligence. However, the scope of the CPL also encompasses service liability.<sup>119</sup> A practical concern is that a standard used to measure product liability may not apply straightforwardly to services. Because products are tangible, it is easier to measure product defects against a reasonableness standard. By contrast, the conduct of a service provider is intangible. Thus, it is harder to apply this standard and draw the line between negligence and the reasonably expected safety standard in service liability.<sup>120</sup> In addition, the ambiguity of the technical defense standard also poses a practical problem for instituting no-fault medical liability under the CPL.<sup>121</sup>

Another concern arising from this rare legislation is the scarcity of legal references and precedents.<sup>122</sup> Because most other jurisdictions apply separate laws to products and services, there is not much guidance on the interpretation of service liability in a case such as *Bo-Li*. This presents a problem when the judiciary deals with difficult cases such as malpractice disputes.

### B. *Taiwan’s Social Circumstances Are Not Favorable to Instituting Medical No-Fault Liability*

Prior to *Bo-Li*, Congressman Fu-Hsueng Shen proposed a no-fault compensation plan modeled after the Swedish Patient Compensation

---

<sup>117</sup> Chen, *supra* note 42, at 42, 61.

<sup>118</sup> *Id.* at 50.

<sup>119</sup> See CPL, *supra* note 19, at art. 7.

<sup>120</sup> See *supra* Part III.B.

<sup>121</sup> See *supra* Part III.C.

<sup>122</sup> Chen, *supra* note 42, at 61.

Scheme, introduced in 1975.<sup>123</sup> Unlike the cause-based liability under the CPL, Shen's proposal was a first-party patient injury insurance system.<sup>124</sup> Sweden's initial insurance scheme was a voluntary contract between a consortium of Swedish insurers and the county councils, which are responsible for the public health. It was superior in compensation and cost, easy to operate, and acceptable to both physicians and patients. In 1997, it became mandatory for every health care provider in Sweden to compensate for injuries from medical procedures on a no-fault basis.<sup>125</sup>

Sweden is one of the few countries with a successful no-fault medical liability system. Its success is largely due to Sweden's public health system, part of the generous welfare system unique to Northern European countries.<sup>126</sup> In Sweden, the state funds all hospitals; only five percent of physicians are not employees of the state.<sup>127</sup> As a result, financial responsibility is allocated among the national government, county councils, and municipalities.<sup>128</sup> In addition, medical injuries are compensated by other social insurance systems such as public insurance, workers' compensation, security insurance, and no-fault medical drug insurance.<sup>129</sup>

Compared to Sweden, Taiwan does not have an especially favorable welfare system and likewise lacks a long tradition of insurance networks.<sup>130</sup> In fact, Shen's suggestion and a similar proposed "Medical Injury Management Law" were severely questioned as to practicability.<sup>131</sup> Unlike the patient compensation scheme in Sweden, the NHIP covers illness, injury, and child delivery, but not medical accidents.<sup>132</sup> Moreover, very few insurance companies offer first-party medical insurance plans to patients, as the use of these insurance policies is traditionally viewed as bad luck by Taiwanese people.<sup>133</sup> Unlike the Swedish system, no-fault liability under the CPL is purely based on cause.<sup>134</sup> Without the support of superior social welfare systems to compensate medical injuries, it is even less feasible to

---

<sup>123</sup> YANG, *supra* note 1, at 162-5.

<sup>124</sup> *Id.* at 164.

<sup>125</sup> Susan Hershberg Adelman & Li Westerlund, *The Swedish Patient Compensation System: A Viable Alternative to the U.S. Tort System?*, 89 BULL. AM. C. SURGEONS 26 (2004), available at [http://www.facs.org/fellows\\_info/bulletin/2004/adelman0104.pdf](http://www.facs.org/fellows_info/bulletin/2004/adelman0104.pdf) (last visited Feb. 21, 2007).

<sup>126</sup> See YANG, *supra* note 1, at 177-83.

<sup>127</sup> See Adelman & Westerlund, *supra* note 125, at 26.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> YANG, *supra* note 1, at 183.

<sup>131</sup> See *I liao shang hai ch'u li fa ts'ao an* [Medical Injury Management Law (proposal)] (2006) (Taiwan). See also Lai, *supra* note 88.

<sup>132</sup> See *Ch'uan min chien k'ang pao hsien fa* [the National Health Insurance Act], art. 2 (Taiwan).

<sup>133</sup> See YANG, *supra* note 1, at 183.

<sup>134</sup> *Id.* at 177-83.

require medical care providers to bear financial responsibilities regardless of fault. Because the required social circumstances are missing, it is currently impractical to apply cause-based or insurance-based no-fault medical liability in Taiwan.

C. *No-Fault Liability Would Encourage Defensive Medicine*

Defensive medicine is performed to avert the possibility of malpractice lawsuits.<sup>135</sup> It refers to the phenomenon where doctors take actions that reduce risk of liability rather than the risk of error. In the United States, defensive medicine is an emerging problem in the medical profession because of concerns over the threat of lawsuits and large damage awards.<sup>136</sup> A research study found that three-fourths of medical specialists agreed that every patient is viewed as a potential malpractice lawsuit because of concerns over malpractice liability.<sup>137</sup> In addition, 91% of specialists expressed the opinion that the medical liability system limits doctors' ability to provide the highest quality care.<sup>138</sup> In an effort to ameliorate the burden of medical professionals, several tort reform and alternative dispute resolution initiatives have attempted to cope with medical liability in the U.S.<sup>139</sup>

Similar to the U.S., the practice of defensive medicine in Taiwan is increasingly becoming an issue. Since the institution of NHIP, relatively low premium and comprehensive benefits have attracted more patients to seek medical care. In turn, there are more medical malpractice lawsuits filed in courts. Statistics show that in Taiwan, increased disputes also drive medical personnel to order unnecessary tests or avoid high-risk procedures altogether.<sup>140</sup> These facts seem to counter the *Bo-Li* court's reasoning that the practice of defensive medicine can be attributed to physicians' irresponsible attitudes.<sup>141</sup> It is foreseeable that without a well-structured compensation scheme, no-fault liability would boost the culture of defensive medicine among physicians seeking to avoid being sued. In fact, defensive

---

<sup>135</sup> See Defensive medicine, *supra* note 96.

<sup>136</sup> See Jonathan Todres, *Toward Healing and Restoration for All: Reframing Medical Malpractice*, 39 CONN. L. REV. 667, 684 (2006).

<sup>137</sup> See Michelle M. Mello, et al., *Caring for Patients in a Malpractice Crisis: Physician Satisfaction and Quality of Care*, 23 HEALTH AFF., 42, 48-49 (2004), available at <http://content.healthaffairs.org> (last visited Mar. 5, 2007).

<sup>138</sup> See *id.* at 49.

<sup>139</sup> See Todres, *supra* note 136, at 693.

<sup>140</sup> See Lai, *supra* note 88.

<sup>141</sup> See *infra* Part IX for the translation of *Bo-Li*.

medicine is a major concern raised by the Taiwan courts when they refuse to apply no-fault medical liability.<sup>142</sup>

Defensive medicine is the least desirable outcome in modern medicine due to the rise of litigation. Medical judgment is jeopardized, at least to some extent, by a desire to avoid risk of liability.<sup>143</sup> Because defensive medicine would inevitably expose patients to unnecessary risks, it is contrary to the underlying policy of the CPL to benefit patients. Accordingly, until Taiwan has the social capacity to compensate patients on a no-fault basis, it is against public policy to institute no-fault medical liability in Taiwan.

## VII. TAIWAN SHOULD WORK ON EXISTING PROBLEMS UNDER THE CURRENT MEDICAL MALPRACTICE SCHEME

Instead of a sudden jump to a no-fault scheme, this Comment proposes that Taiwan should aim to resolve existing problems under the traditional negligence-based system.

### A. *Taiwan Should Strive to Reform the Malpractice Litigation Process*

The foremost issue in Taiwan's medical malpractice scheme is the difficulty of proving fault in the current malpractice litigation process. It is partly due to prejudice in the current MRC medical review in favor of the defendant. Because plaintiffs cannot introduce expert testimony at trial, they are disadvantaged in medical malpractice litigation. This Comment proposes that Taiwan restructure the litigation process to reduce a plaintiff's burden of proving negligence. For example, the judiciary should frame inquiries to the MRC with more specificity, and evaluate the review more critically.<sup>144</sup> Courts should also require hospitals to conceal the identities of involved parties to prevent potential prejudice.<sup>145</sup>

Further, Taiwan should liberalize the expert review system. The judiciary could follow common law jurisdictions and allow both parties to present expert testimony at trial. Because patients generally do not have the requisite medical training, allowing expert testimony could alleviate the potential favoritism of medical review. Courts could also adopt the exception of common knowledge to allow a plaintiff to prove negligence

---

<sup>142</sup> See, e.g., *Sheng-Chan*, *supra* note 100.

<sup>143</sup> See *Todres*, *supra* note 136, at 685.

<sup>144</sup> See *YANG*, *supra* note 1, at 246.

<sup>145</sup> *Id.*

without expert testimony,<sup>146</sup> or expand the scope of *res ipsa loquitur* in cases involving gross or obvious negligence.<sup>147</sup> These approaches do not require MRC review, and could also serve as a solution to the current backlog problem with increasing judicial inquiries at the MRC. Finally, Taiwan should emphasize continuing legal education for lawyers and judges in medical malpractice, and place an emphasis on multi-disciplinary education in the study of law and medicine.<sup>148</sup> Although this will not replace the need for experts, this institutional change would certainly promote a better understanding of experts' opinions.<sup>149</sup>

*B. The Medical Field Should Emphasize the Duty of Informed Consent and Medical Malpractice Insurance*

The informed consent doctrine is a relatively new concept in Taiwan's legal field.<sup>150</sup> It did not receive recognition until the late 1990s. After the *Bo-Li* case, this doctrine was invoked by academics in the discussion of whether Dr. Cheng failed to exercise his duty of informed consent.<sup>151</sup> One study argues that the *Bo-Li* court's refusal to allow the defendant's technical defense implied that the defendant was in fact negligent.<sup>152</sup> However, the *Bo-Li* court was unable to find the defendant at fault based on the medical review supplied by the MRC. Had the doctor informed the patients about the risks of shoulder dystocia and allowed Ms. Tan to choose her birth method, this case might not have been litigated.

For a long time, physicians were viewed as paternal figures with supreme authority in Taiwan.<sup>153</sup> Patients were in awe of doctors and generally accepted a doctor's decision.<sup>154</sup> With the increase of medical malpractice, patients are realizing the importance of making informed decisions throughout the treatment process. In response to the change in health care, the legislature codified the duty of informed consent in the amended Physicians Act.<sup>155</sup> However, doctors do not seem to have kept up with the evolving patient-doctor relationship and are sometimes reluctant to

---

<sup>146</sup> Common knowledge refers to facts or information that is within the comprehension of a jury of laymen. This exception has been employed in the U.S. See *Pry v. Jones*, 487 S.W.2d 606 (Ark. 1972).

<sup>147</sup> See YANG, *supra* note 1, at 245.

<sup>148</sup> *Id.* at 247.

<sup>149</sup> *Id.*

<sup>150</sup> See Lin & Yang, *supra* note 115, at 24.

<sup>151</sup> See e.g., *id.*

<sup>152</sup> See *id.* at 31.

<sup>153</sup> See Lai, *supra* note 88.

<sup>154</sup> See *id.*

<sup>155</sup> See Physicians Act, *supra* note 54, at art. 12.1.

address patients' concerns or questions.<sup>156</sup> This Comment proposes that the medical field should emphasize the duty of informed consent through schooling and continuing education. Medical personnel should realize that consent is becoming a fundamental part of the patient-doctor relationship; decision-making is no longer a unilateral process in medical care.

In addition, Taiwan should promote widespread medical malpractice insurance. Unlike the prevalence of malpractice insurance in the U.S., statistics show that only five percent of physicians currently have medical liability insurance.<sup>157</sup> One reason for the low participation rate is physicians' fear of patients' skepticism and reputation damage. Another reason is the lack of feasible insurance plans. Most insurance plans require complex procedures such as a judicial order before being able to compensate an injured patient.<sup>158</sup> Because these insurance plans do not meet the expectations and demands of the insured, medical insurance is unpopular among medical personnel in Taiwan.<sup>159</sup>

This Comment proposes that Taiwan encourage doctors to participate in medical malpractice insurance. The government should take steps to assure the public that a physician's skill level has nothing to do with the need for malpractice insurance. Instead, having malpractice insurance indicates a doctor's degree of responsibility and ability to compensate a patient if an injury does occur. This Comment also proposes that the Taiwan government recommend that insurance companies institute compensation schemes that do not require doctors to be involved. Injured patients can request compensation directly from the insurance company, and speed up the compensation process. Further, to incentivize medical personnel to participate in medical liability insurance, the judiciary should grant expedited hearings to insured physicians so that they can reach a judicial decision sooner than with the uninsured. With the support of malpractice insurance, doctors are less likely to practice defensive medicine. Aggrieved patients are more likely to be compensated.

### VIII. CONCLUSION

The *Bo-Li* case triggered a debate about no-fault medical liability in Taiwan. The *Bo-Li* court extended the scope of the CPL to medical care and

---

<sup>156</sup> See Lin & Yang, *supra* note 115, at 33.

<sup>157</sup> See Yung-Jen Chiu, I chieh shih shih I liao pao hsien chih tu chih wo chien [My opinion on the medical insurance], available at [http://morpheus.typepad.com/iait/2004/10/post\\_6.html](http://morpheus.typepad.com/iait/2004/10/post_6.html) (last visited Mar. 25, 2007).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

held that the CPL should apply in medical malpractice. After seven years, the Taiwan Supreme Court rejected *Bo-Li*, predicting that no-fault liability would encourage defensive medicine. However, the legislature's stand is still unclear. The *Bo-Li* case illustrates the obstacles plaintiffs face when trying to prove a doctor's negligence. However, comparison to other systems reveals that a no-fault medical liability requires a superior social welfare system and insurance network. Therefore, it is currently impractical in Taiwan. This Comment proposes that instead of a sudden switch to no-fault liability, Taiwan should strive to solve existing problems under the traditional scheme by improving the litigation process, implementing the doctrine of informed consent, and encouraging the participation of medical malpractice insurance.

IX. TRANSLATION OF *BO-LI LI V. MACKAY MEMORIAL HOSPITAL*

The Taiwan Taipei District Court Civil Judgment 85 Docket No. SU 5125

[Case Holding:]

Regarding the damage compensation between the parties, the court's judgment is as follows: the defendant shall pay the plaintiff one million NT dollars from December 7, 1996 until the balance is paid off. The interest is calculated at the annual rate of five percent. The defendant shall be responsible for the litigation cost.

Reasoning:

Third,<sup>160</sup> the CPL merely defines "merchandise" in the statutory language but does not give any definition or restriction for "service." Any business or enterprise that provides services to consumers, due to its relation with consumers' safety and sanitation, is subject to the CPL regardless of whether the services are related to merchandise. Furthermore, consumption is an activity to reach an individual's life goals. Any activity based on living, seeking a convenient or comfortable life is within the scope of consumption; any activity calculated to satisfy an individual's desire for edibles or food, clothing, accommodation, transportation, education, or entertainment is consumption. In short, all activities related to human life are within the scope of consumption (with reference to Understanding the Consumer Protection Law, page 55 and Information on Questions and Answers of the Consumer Protection Law, page 11 by Sen-Lin Chan, Chen-Yu Feng and Ming-Chu Lin). From the perspective of medical care

---

<sup>160</sup> *Translator's Note*: the first and second paragraphs of this section are omitted in the translation.

providers, medical care is neither related to merchandise nor for the purpose of profit. However, it is highly relevant to consumers' safety or sanitation. From the perspective of medical care receivers, medical care is an activity based on essential needs and a desire to live. It is evident that patients receive medical care for reason of consumption (with reference to Article 2, Paragraph 1 of the CPL<sup>161</sup>). Article 7, Paragraph 1 of the CPL provides that "business operators engaging in the provisions of services shall ensure that services provided by them are without danger to safety or sanitation." The CPL shows that the nature of services defined in the statute is based on the presumption that consumers may be subject to the risks of public health or safety dangers from the services provided. Medical care is within the scope of professional and technical services, not related to merchandise or business transactions. Also, there are medical uncertainties and risks involved in the diagnosis or treatment process and no assurance that the process will be "free of danger to safety or sanitation." Medical care is closely related to public life, health, and safety. The legislative purpose [of the CPL] is to protect consumer interests and promote consumer safety, as well as raise the quality of life (with reference to Article 1 of the CPL). Therefore, medical care shall be regulated under the CPL. Moreover, there are uncertainties and risks associated with every profession. It is without merit that the CPL does not apply to medical services because of the risks involved. By contrast, health care providers should bear a higher degree of liability for the particular uncertainties and risks concerned. Further, the CPL does not impose unlimited no-fault liability to service providers. There is a clear definition of "danger to safety or sanitation" stated in Article 5 of the Enforcement Rules, which limits the scope of no-fault liability under the CPL. Thus, no-fault liability would not apply to unmanageable variables in the treatment process, which are excluded from the scope of no-fault liability under the definition of the Enforcement Rules. If a physician refuses to see high-risk patients, stops trying uncertain surgeries to avoid no-fault liability, or increases the number of unnecessary check-ups, tests, treatments or surgeries, and wastes medical resources or increases health care costs, this would be the physician's personal attitude to refuse responsibility. As medical care is tightly associated with patients' life and health, how could a doctor advance his personal interests at the expense of patients' rights? In conclusion, medical services are within the scope of the CPL.

---

<sup>161</sup> *Translator's Note: see CPL, supra note 19, at art. 2, para. 1 (providing that "the term 'consumers' means those who enter into transactions, use goods or accept services for the purpose of consumption").*



Fourth, Article 7, Paragraph 1 of the CPL expressly provides that the business operator shall ensure that the service they provide is free of “danger to safety or sanitation.” The “danger to safety or sanitation” refers to the services that do not comply with reasonably expected safety standards or meet professional or technical standards under Article 5 of the Enforcement Rules. The plaintiff alleged that the defendant provided services with danger to safety or sanitation, which caused plaintiff’s shoulder dystocia. The plaintiff requested damages, which were disavowed by the defendant. The defendant argued that the services provided satisfy the standards of reasonably expected safety and are in accord with current medical knowledge, without any health or safety risks. Thus, there is no liability under the law. Under the no-fault liability rule of the CPL, the burden of proof shifts to the defendant to prove that the services comply with the standards of current technology or profession (with reference to Article 6 of the Enforcement Rules).

But the court finds:

First, Article 7 of the CPL stipulates a no-fault liability scheme with a clear legislative intent. Article 7, Paragraph 3 of the CPL states that if business operators can prove that they are not guilty of negligence, the court may reduce their liability for damages, provided that the assessment does not affect the establishment of the liability claim. Under Article 5, Paragraph 1 of the Enforcement Rules, the interpretation should not be based on whether the conduct of the relevant business operator is culpable. Otherwise, the rule merely converts the existing product liability scheme under the CPL to an assumed liability system, and would not reach the original legislative intent to allocate the risks under a no-fault liability system. Accordingly, the determining factor is not whether a particular manufacturer who complies with the typical objective group standard could recognize the risks or defects. Instead, it is whether anyone would know the risks in an objective standard. Therefore, the burden to prove they were not at fault is waived only upon a situation where no one could recognize the risks or defects. Such interpretation is consistent with the legislative intent of no-fault liability. According to Article 7, Paragraph 3 of the CPL, the court may reduce liability for damages if business operators can prove no-fault. Therefore [the law] does not impose an unreasonable burden on the business operators. The defense of risk liability in development and technology standards applies to matters related to unknown risks (with reference to

volume 1, pages 135 to 147 of “General Discussion of Risk Liability in Development” by Ming-Yang Huang).<sup>162</sup>

Third, Chang-Lan Tan received her first ultrasound examination on September 22, 1994. Cheng-Chieh Cheng corrected the estimation of Ms. Tan’s full-term pregnancy from the originally assessed thirty-two weeks to twenty-nine weeks, and re-assessed the estimated date for delivery to be December 10, 1994. Tan received a second ultrasound examination on November 21, 1994 when she was in her 38th week of pregnancy. Cheng estimated the fetal weight to be 3,500 grams, which is equivalent to the weight of a 40-week fetus. Tan originally weighed 80 kilograms and gained up to 90.8 kilograms on December 1, 1994 at the last prenatal check-up; she was considered an overweight mother. The plaintiff weighed 4,198 grams at birth and was considered a macrosomic infant. Maternal overweight, fetal macrosomia and the use of midpelvic vacuum extraction are three risk factors for shoulder dystocia. These facts were supported by the report of Medical Review Committee on December 14, 1995 and the testimony of Cheng (see the argument record on November 5, 1997). Neither party disputes the facts, so they are considered valid. Cheng estimated the fetal weight at week 38 as equivalent to that of a 40-week-old fetus at the second prenatal check-up. Tan’s overweight was also evident at the last prenatal visit. Based on the facts stated above, it was objectively foreseeable that there was a risk of shoulder dystocia. Although there is an allowable error rate of 15% with ultrasonography, given that the estimated birth weight is 3,500 grams, the range of plaintiff’s estimated birth weight was 3,230 grams to 4,370 grams. Why did Cheng state that the plaintiff was 3,230 grams rather than 4,370 grams of weight? The defendant and Cheng repeatedly stressed that the data provided by the NTU Hospital is the average growth weight. However, knowing that the data was an average value, objectively speaking, there is a possibility that the plaintiff weighed more than the average. Absent any reliable method of prenatal diagnosis of shoulder dystocia, the defendant should not have neglected the fact that the plaintiff’s estimated weight was higher than the average at the second prenatal checkup.

Fourth, in summary, according to prenatal check-up data, objectively speaking, the incidence of shoulder dystocia in this case is neither a situation where “no one could have recognized the risks,” nor a situation where the risk is unknown and no one is able to be aware of it. Therefore, the defendant is not entitled to use the defense of technology standards in the

---

<sup>162</sup> *Translator’s Note:* the second paragraph of this section is omitted in the translation.

present case. Furthermore, the business operator who failed to ensure that the services provided were free of danger to safety or sanitation and thus injured the consumers is jointly liable for damages. However, the court may reduce the liability for damages if the business operator can demonstrate that he was not at fault. This is set forth in Article 7, Paragraph 3 of the CPL.

The court finds:

First, the defendant failed to correctly predict the shoulder dystocia and provided services with danger to safety or sanitation, causing permanent injuries and dysfunctions to the plaintiff's right forearm. As mentioned previously, the plaintiff has the legal basis to request damages under the law stated above. The defendant argued that the cause of the plaintiff's plexus injury is unclear in the present case. Shoulder dystocia treated with the McRoberts maneuver may cause brachial plexus injuries in newborns. In addition, the incidence of brachial plexus injuries associated with shoulder dystocia is 15.2%. These facts are stated in the report of the Medical Review Committee, Department of Health, the Executive Yuan on December 14, 1995, and are attached to page 55 of the criminal case file. The plaintiff had his first check-up at Chang Gung Memorial Hospital on December 12, 1994 and was diagnosed as having plexus sprain and palsy in the right forearm. The medical condition is generally caused by fetal overweight (overweight is commonly defined as over 4,000 grams. The plaintiff was 4,198 grams at birth) or by broad scapula. The plaintiff had both conditions, which was stated in the report of 84 Docket No. Chang Gung Yuan Fa 0116 (May 5, 1995) from Chang Gung Memorial Hospital attached to page 52 of the criminal case file. The facts that the plaintiff had shoulder dystocia and that Cheng used the McRoberts maneuver and performed a midpelvic vacuum extraction are described above. Accordingly, there is a clear causal relationship between the shoulder dystocia and the plexus sprain. The court cannot accept the defendant's argument that the cause of plaintiff's injury was unclear.

Second, the trial court asked Chang Gung Memorial Hospital in the criminal file: what is the cause of the plaintiff's injury? The Hospital replied: "Bo-Li Li had his first visit to our hospital on December 12, 1994. He was diagnosed as having plexus sprain and palsy in the right forearm. The medical condition is generally caused by fetal overweight (overweight is commonly defined as over 4,000 grams. The plaintiff was 4,198 grams at birth) or by broad shoulders. The plaintiff had both conditions." [The facts were] stated in the report of 84 Docket No. Chang Gung Yuan Fa 0116 (May 5, 1995) from Chang Gung Memorial Hospital attached to page 52 of the

case file. The court then inquired to the NTU Hospital whether it was possible to discover the condition of fetal overweight or broad shoulders at the prenatal check-up, how a gynecologist should handle the situation upon discovering the facts over the course of pregnancy, and how a doctor should deal with the situation upon discovering the facts at labor.

The NTU Hospital responded:

First, the current evaluation of fetal size depends on the symphyseal-fundal height and the abdominal circumference. Ultrasonography is more accurate in predicting fetal weight. However, there is an associated error rate of 15%. Second, if there is a possibility of fetal overweight (in general, more than 4,000 grams), [the physician has to] assess the maternal pelvis size. If the assessment of the maternal pelvis size is not commensurate with the fetal head size, a Caesarean section is recommended. Third, sometimes shoulder dystocia is unpredictable in obstetrics. Upon discovering the medical condition stated above, the doctor could apply the McRoberts or the Woods maneuver to facilitate with childbirth. This statement is supported by the report 84 Docket No. Hsiao Fu I Mi 8496 (June 15, 1995) from the NTU Hospital attached to page 59 of the criminal case file. The report of the Medical Review Committee, Department of Health, Executive Yuan provides that: (A) Shoulder dystocia is an emergency situation where the fetal head has been delivered but the shoulders cannot be delivered naturally or with a steady labor induction. Prenatal factors of shoulder dystocia [are described below. First,] maternal obesity. According to the report by Johnson and other [medical experts] in 1987, the incidence of shoulder dystocia in newborns from mothers weighing above 250 pounds is 5.1%. The incidence in newborns from mothers weighing below 200 pounds is 0.1%. [The second prenatal factor is] fetal macrosomia. In 1985, Spellacy etc. reported that the incidence of shoulder dystocia is 8.2% in newborns weighing between 2,500 and 3,500 grams from mothers weighing above 90 kilograms; 33% in newborns weighing between 4,500 and 5,000 grams; and 50% in newborns weighing above 5,000 grams. [The third prenatal factor is] maternal diabetes. As the chance of fetal macrosomia increases with maternal diabetes, the incidence of brachial plexus injury associated with shoulder

dystocia is 15.2% in case of maternal diabetes. (B) Factors causing shoulder dystocia at labor [are described below. First,] prolonged labor. In 1985, Acker etc. reported that among newborns weighing above 4,000 grams, the incidence of shoulder dystocia increases if there is a prolonged labor. [The second factor is] use of oxytocin. Excessive labor induction and fetal macrosomia would increase the use of oxytocin. These factors combined would cause shoulder dystocia. [The third factor is] use of midpelvic forceps and vacuum extraction. Fetal macrosomia would increase the use of forcep delivery and vacuum extraction. The rate of injury is high if shoulder dystocia is not properly dealt with. According to Bendetti and Gabbe's report in 1978, out of nineteen shoulder dystocia cases, there were five incidents of clavicle or forearm fractures, three incidents of brachial plexus palsy and one incident of abnormal neurological exam result. Literature also reported incidents of death caused by serious hypoxia. (C) Shoulder dystocia is considered to be an unpredictable and totally unpreventable emergency in current medical practice. The American Society of Obstetrics and Gynecology (ACOG) in 1991 recommended the approach of episiotomy, adequate anesthesia, and suprapubic pressure with downward traction on the fetal head. The approach of the McRoberts maneuver (the position of raising the legs up and pushing them back against the abdomen), Woods Corkscrew maneuver (rotation of the anterior shoulder 180 degrees in a progressive manner), or prioritizing posterior arm delivery may cause fetal brachial plexus injuries. The last resort is to push the fetal head back into the vagina and use Caesarean section, perform clavicle fracture or symphysiotomy. This method would cause most serious fetal injuries. Therefore the adoption of Caesarean section after shoulder dystocia has occurred is not an ideal delivery method. (D) The plaintiff's mother weighed 90.8 kilograms and was considered overweight. The newborn weighed 4,198 grams and was considered a macrosomic infant. Maternal overweight, fetal macrosomia, and the use of midpelvic vacuum extraction are the risk factors of shoulder dystocia.<sup>163</sup> In the instant case, the doctor performed procedures that conform to the current

---

<sup>163</sup> *Translator's Note:* the quoted information in this sentence is omitted in the translation.

medical practice. In terms of preventive measures at prenatal check-ups, fetal macrosomia is assessed by the symphyseal-fundal height or by the more accurate ultrasonography. According to the medical record, Tan's symphyseal-fundal height was 34 centimeters, which is within the safety range. The error rate with ultrasound assessments of fetal weight is 15% or more if the fetal head has been fixed. Thus, the defendant was not at fault for failing to predict the plaintiff's weight. Based on the records of Tan and the prenatal check-ups, it was reasonable to choose vaginal birth. (E) The plaintiff alleged that the defendant's doctor adopted the inappropriate birth method, which may be referred to as the first approach in the third paragraph. This approach is used to deal with shoulder dystocia and thus is not improper.

A Medical Review Committee's report, Department of Health Docket No. I 84072466 on January 12, 1996 supports this conclusion. A witness—Dr. Fang-I Hong—present at the plaintiff's birth, testified:

[W]hen we discovered the shoulder dystocia, we raised Tan's legs and had the assistant apply suprapubic pressure to help with the plaintiff's birth. We helped Tan raise her legs and push them back. We were obligated to perform these procedures. We have the medical record with notes written by the interns, residents, the attending physicians, and myself.

According to the rule of negligence, the actor is at fault if he fails to exercise duty of care under the circumstances, though not intentional; or if he has foreseen the facts that would constitute crimes, but believed that the facts would not occur. The evidence provided by Chang Gung Memorial Hospital, the NTU Hospital, the Medical Review Committee and Dr. Hong's testimony does not prove whether Cheng failed to exercise the duty of care over the course of Tan's pregnancy, during her labor or upon discovering shoulder dystocia, or had foreseen the facts that would constitute crimes, but believed that the facts would not occur. The court found that Cheng was not at fault. According to the criminal files from the Taiwan Taipei District Court 84 Docket No. TZU 427 and the Taiwan High Court 85 Docket No. SHANG-I 2132, Cheng is not found guilty for occupational negligence.<sup>164</sup>

---

<sup>164</sup> *Translator's Note: see Criminal Code, supra note 3, at arts. 276, 284 (providing that a person who in the performance of his occupation causes bodily harm to another by neglecting the degree of care required by such occupation shall be punished with imprisonment).*

Cheng is the agent of the defendant which provided medical services to the plaintiff. As Cheng was not at fault, under Article 224 of the Civil Code,<sup>165</sup> the defendant should likewise be found not at fault. Considering the business operator's risk and the plaintiff's injuries, the court reduces one-tenth of the original damage award under Article 7 of the CPL.<sup>166</sup>

Based on the foregoing conclusions, the plaintiff has demonstrated reasons in his claims. The judgment is entered as in this opinion according to Article 78 of the Code of Civil Procedure.<sup>167</sup>

The Civil Sixth Division Presiding Judge: Hui-Rou Tsai

January 2, 1998

---

<sup>165</sup> *Translator's Note:* see Civil Code, *supra* note 4, at art. 224 (providing that a debtor shall be responsible for the intentional or negligent acts of his agent and of the person performing the obligation for him to the same extent as he is responsible for his own intentional or negligent acts, unless otherwise agreed upon by the parties).

<sup>166</sup> *Translator's Note:* the third paragraph of this section is omitted in the translation.

<sup>167</sup> *Translator's Note:* see Code of Civil Procedure, *supra* note 74, at art. 78 (providing that the costs of an action shall be borne by the party defeated).