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SYMPOSIUM ON MEDICAL MALPRACTICE AND COMPENSATION IN GLOBAL PERSPECTIVE PART II

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RICHARD W. WRIGHT & KEN OLIPHANT

- A BRIDGE OVER TROUBLED WATERS:
THE DEVELOPMENT OF MEDICAL
MALPRACTICE LITIGATION IN BRAZIL *Eduardo Dantas* 3

This paper aims to demonstrate how medical malpractice litigation is developing in Brazil, and how the Brazilian legal system is dealing with the increase of demands against health care professionals. A brief overlook on the legal structure is provided, highlighting the most important issues being discussed today in Brazilian courts, regarding autonomy, consent, choice, the definition of moral damages, and the influence of the Consumer's Defense Code in litigation regarding health law.

- YANGGE DANCE: THE RHYTHM OF LIABILITY
FOR MEDICAL MALPRACTICE IN THE
PEOPLE'S REPUBLIC OF CHINA *Zhu Wang* 21
& Ken Oliphant

This paper summarises the development of liability for medical malpractice in the People's Republic of China, beginning with the establishment of a formal system of administrative liability in 1987, its refinement in 2002, and the broadly contemporaneous judicial recognition of a concurrent tortious liability under general civil law. All these developments may be said to have furthered the interests of patients. The incorporation of liability for medical malpractice into the Tort Liability Law of 2009, however, arguably marks a step backwards, subordinating the interests of patients in favor of the interests of the medical community, and further reforms in the same direction may be apprehended in the future. Yangge Dance, a traditional Chinese folk dance, provides an apt simile for this process of development, with its initial move of three steps forward followed by two steps back. The dance is concluded by two sideways steps – first to the right, then to the left – which may be taken to refer to the constant interplay between the two concurrent liability systems – one administrative, the other tortious – which is explored in its various dimensions in the article.

MEDICAL MALPRACTICE:
THE ITALIAN EXPERIENCE

Claudia DiMarzo 53

Beginning with an investigation into the problematic nature of medical liability, the Article overviews the most significant approaches taken by courts and scholars in order to establish whether the physician's position before the patient is comparable with that of either a tortfeasor or a contractor.

Having explained that the most recent approaches in this regard tend toward the recognition of the contractual nature of medical liability, the Author discusses the implications of such a solution, making specific reference to the following issues: 1) the assignment of the burden of proof (along with the distinction between obligations of means and obligations of result); 2) proof of causation (along with further reference to the difference between civil and criminal standards of proof regarding causation-in-fact); 3) the role of informed consent; 4) the prescription regime.

The final part of the Article investigates the rapid increase in medical malpractice litigation as a side-effect of the "contractualization" of medical liability, focusing on the strategies to follow in order to minimize expense claims.

THE LAW OF MEDICAL MISADVENTURE
IN JAPAN

Robert B Leflar 79

This paper offers a comprehensive overview of Japanese law and practice relating to iatrogenic (medically-caused) injury, with comparisons to other nations' medical law systems. The paper addresses criminal sanctions for Japanese physicians' negligent and illegal acts; civil law principles of substantive law and related issues of procedure, practice, and liability insurance; and administrative measures including health ministry programs aimed at expanding and improving the quality of peer review within Japanese medicine, and a recently implemented no-fault compensation system for birth-related injuries.

Among the paper's findings are these. Criminal and civil actions increased rapidly after highly publicized medical error events at the turn of the 21st century, peaked from 2004 (civil cases filed) to 2006 (cases police sent to prosecutors), and have since declined. Civil Code provisions of substantive law governing medical injury compensation differ little from rules applied in North America and Western Europe, although the burden of proof of causation is relaxed in informed consent and loss-of-chance cases. Damage awards appear to be at least as high on average as in the U.S., and are applied on a more consistent basis. Procedural reforms, including the institution of health care divisions of district courts in some metropolitan areas, have speeded up the pace of court proceedings.

The new no-fault compensation system for birth-related injuries, offering substantial profit opportunities (as well as a theoretical risk of loss) to private insurers, has achieved virtually universal buy-in by childbirth facilities hoping for protection from future litigation. Evaluation of the system's operation is still premature but worthy of scholarly attention. Should the obstetrical compensation system prove successful, it may serve as a springboard for the expansion of no-fault principles to cover a wider scope of medical injuries—a topic now under study.

MALPRACTICE IN SCANDINAVIA

Vibe Ulfbeck, 111
Mette Hartlev
& *Mårten Schultz*

The article describes the special Scandinavian patient insurance system which secures compensation for patients in malpractice cases. For all practical purposes, the insurance based systems have replaced ordinary tort law rules in malpractice cases in Scandinavia. Thus, the basic feature of these systems is that proof of fault is not a requirement for obtaining compensation. Other criteria which are more favourable to the patient are applicable. The article concludes that in general the compensations systems have been successful in making it easier for the patients to obtain compensation. However, the systems also face challenges, some of which stem from the ongoing European harmonization process.

MEDICAL MALPRACTICE AND
COMPENSATION IN THE UK

Dr. Richard Goldberg 131

In the first part of this paper, Dr Goldberg examines the context in which medical malpractice liability is operating in the UK. The fact that the state-run National Health Service (NHS) is the major healthcare provider in the UK has several implications, since funding for medical malpractice compensation in the NHS comes from the taxpayer. The most recent empirical evidence on the incidence and funding of claims in England and Scotland is assessed, to show a trend of expenditure on clinical negligence increasing, particularly in England. This is followed by an examination of the statutory framework for the empowerment of some of the Chief Medical Officer's recommendations in his report, *Making Amends in the NHS Redress Act 2006*. In Scotland, while medical negligence remains the primary route to bringing a claim for compensation for medical injury, no-fault compensation is now the favoured way forward of the Scottish Government for the NHS. A No Fault Compensation Review Group has recently been reported and Dr Goldberg explores its recommendations, which provide a radical development in the field of compensation for medical malpractice.

The heart of the paper examines the existing basis of medical liability, with particular emphasis on the problems in establishing negligence and factual causation. The paper concludes with a review, in the context of clinical negligence claims, of both the recommendations for reforming the costs of civil litigation in England and Wales and the dramatic changes being introduced to the Legal Aid system, in particular the abolition of legal aid for clinical negligence cases.

MEDICAL MALPRACTICE AND COMPENSATION
IN GLOBAL PERSPECTIVE: HOW DOES THE
U.S. DO IT?

David A. Hyman 163
& *Charles Silver*

This article describes the problem of health care error in the United States of America and the various regulatory, liability, and compensation systems that deal with medical mistakes. In terms of frequency, direct costs, and aggregate social costs, the problem of medical errors is staggering. Millions of patients are killed or injured every year. A large percentage of adverse events could be avoided by the use of reasonable care. Regulators have not dealt with these problems effectively. Regulators specifically appointed to police the medical profession are often lax, whether because of capture, or from a sense of "there but for the grace of God go I." When it comes to health care, the primary focus of federal and state authorities has been how to pay for it, rather than how best to elevate its quality or protect patients from harm. Against this backdrop, the liability system does better than most people believe. It sorts claims with reasonable accuracy and doles out compensation in proportion to the severity of patients' injuries. But the liability system deals with the tip of the iceberg, because only a minority of injured patients sue. The liability system is also stingy: Injured patients with valid claims often receive little or no compensation.

This article also summarizes the findings of empirical studies our research group has done of Texas medical malpractice litigation, using an enormous database of closed claims.

STUDENT NOTES

DEFINED (YET UNCERTAIN) BENEFIT
PENSION PLANS IN AMERICA

Travis Bayer 201

Despite playing a central role in many public and private employees' retirements, defined benefit pension plans are woefully underfunded. Moreover, the combination of a Baby Boomer retirement bulge and a struggling economy are putting even more pressure on defined benefit plans. This Note examines relevant background information regarding defined benefit pension plans and demographic

data of the Baby Boomer generation. This Note then explores how and to what extent states and private employers have created contractual obligations through defined benefit plans and addresses what happens when those contractual obligations are breached. Finally, this Note suggests that litigation cannot provide a complete solution to pension under-funding and instead discusses and evaluates some of the options public and private pension systems have to combat potential disaster. This Note recommends linking retirement ages to average life expectancies and enforcing actuarial reductions based on early retirements as especially effective measures in combating the financial burden of Baby Boomer retirements.

WORTHY OF THEIR NAME? ADDRESSING
AQUATIC NUISANCE SPECIES WITH COMMON
LAW PUBLIC NUISANCE CLAIMS

Christopher Grubb 237

Aquatic invasive species like the Asian carp and zebra mussel have caused grave ecological and economic harm across the United States, and frequently harm rights common to the public such as boating, fishing, and bathing. Yet, Congress' efforts to address the problem through legislation have been piecemeal and unsuccessful. Historically, the common law of public nuisance served as an important tool to remedy transboundary pollution. More recently, courts have established that such public nuisance claims will be displaced where Congress has comprehensively regulated in a field. This Note explores whether public nuisance claims involving aquatic invasive species should be displaced by analyzing a recent public nuisance case involving Asian carp. The Note argues that the court correctly found no displacement. However, the Note questions the court's application of a Restatement (Second) of Torts rule that conduct fully authorized by law is not a nuisance. Further, the Note argues that public nuisance claims involving aquatic invasive species should generally not be displaced because the current ineffective patchwork of federal laws and regulations are not analogous to more comprehensive pollution control statutes such as the Clean Air and Clean Water Acts, both of which courts have construed to preempt federal common law remedies.

PUBLIC CORRUPTION CONCERNS AND
COUNTER-MAJORITARIAN DEMOCRACY
DEFINITION IN *CITIZENS UNITED*
V. *FEDERAL ELECTION COMMISSION*

Daaron Kimmel 265

In determining the shape of the free speech rights and anti-corruption concerns that courts must balance in campaign finance cases, judges are influenced by their own underlying understandings of what an ideal democracy should look like. For judges to decide whether the government is appropriately regulating the political process, the rules that allow all citizens to interact with and shape their democracy, judges must first decide what that democracy ought to look like. This affords judges a great deal of discretion in campaign finance cases. *Citizens United v. Federal Election Commission* is a particularly bold judicial attempt to reshape the processes of American democracy. The Supreme Court's constitutional analysis stems not from clear, externally-established meanings for the concepts of free speech and corruption, but from the majority Justices' underlying vision of democracy. Such decisions should properly be left to Congress. The Court's sweeping language in *Citizens United* has already created problems for lower courts attempting to follow it as precedent, and if interpreted broadly could lead to even more laws being struck down. And polls show that the decision seems to be extremely unpopular with much of the public, many of whom also appear to disagree with the Court's understanding of corruption and democracy. If these feelings persist in the long term, the Court's direction may prove to be unsustainable.

AN INDUSTRY MISSING MINORITIES: THE
DISPARATE IMPACT OF THE SECURITIES
AND EXCHANGE COMMISSION'S
FINGERPRINTING RULE

Kelly Noonan 299

The Equal Employment Opportunity Commission ("EEOC") recently asserted that the use of criminal background checks as an employment screening tool may have a disparate impact on African Americans and Hispanics, in violation of Title VII of the Civil Rights Act of 1964. The EEOC and some private claimants have even filed lawsuits against employers claiming disparate impact violations based on statistics that show African Americans and Hispanics are considerably more likely to have criminal records than other racial groups. Yet, certain federal regulatory agencies require participants in their industries to subject employees to criminal background checks as a condition of employment. The Securities and Exchange Commission ("SEC") is one such agency. The SEC has promulgated a rule requiring industry employers to fingerprint employees and disqualify those that have been convicted of certain types of crimes. This Note discusses the requirements of a disparate impact claim and the EEOC's position that criminal background check policies have a disparate impact on minorities. This Note further examines how technological changes in the securities industry have led to an unnecessarily broad application of the SEC's fingerprint rule, resulting in potential Title VII liability for employers and contributing to the low number of African American and Hispanics in the securities industry. Finally, this Note proposes that the SEC could alleviate the potential Title VII liability created by the fingerprinting requirement by narrowing the scope of the fingerprint rule to bring it within the business necessity defense to Title VII.

SYMPOSIUM ON
MEDICAL MALPRACTICE AND
COMPENSATION IN GLOBAL
PERSPECTIVE
PART II

Richard W. Wright & Ken Oliphant
Symposium Editors

This issue of the Law Review contains papers discussing the existing schemes in Brazil, China, Italy, Japan, Scandinavia, the United Kingdom, and the United States. The previous issue contained papers discussing the existing schemes in Austria, Canada, France, Germany, New Zealand, Poland, and South Africa. The comparative analysis by the symposium editors of the issues and the range of possible approaches will appear, along with all of the papers in both issues, in a volume in the series Tort and Insurance Law, published by DeGruyter (Berlin/Boston) on behalf of the Institute for European Tort Law of the Austrian Academy of Sciences and the European Centre of Tort and Insurance Law.