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SYMPATHON ON MEDICAL MALPRACTICE AND COMPENSATION IN GLOBAL PERSPECTIVE: PART I

Symposium Editors
Ken Oliphant and Richard W. Wright

Introduction
Ken Oliphant
and Richard W. Wright

Medical Malpractice in Austria
Bernhard A. Koch

This article presents the Austrian law governing compensation for medical malpractice in an overview. After a glimpse at the healthcare and social insurance system, the regulatory framework is outlined, with an obvious particular focus on tort and contract law. Apart from the special case where informed consent is lacking, the various elements of a claim that patients may have mirror the general requirements of tort and contract liability in Austria, which is why the brief sketch may also serve to give at least some basic insight into that part of the legal system in general. Furthermore, peculiar approaches in handling patients' claims will also be shown.

Canadian Medical Malpractice Law in 2011: Missing the Mark on Patient Safety
Colleen M. Flood
and Bryan Thomas

This paper surveys the current state of medical malpractice law in Canada, along with current evidence on adverse events in Canadian hospitals, medical clinics, and long-term care facilities. Though there is currently no "burning platform" to reform Canadian medical malpractice law, the authors raise concerns about the law's failure to deter medical malpractice, as well as concerns about access to justice issues facing victims of medical malpractice. Federal and provincial governments have tried to promote patient safety through various prevention strategies—for example, through the creation of Health Quality Councils, the dissemination of information on best practices, and tighter regulation of private clinics. Although patient safety advocates often contend that the threat of medical malpractice claims may exacerbate problems in patient safety, there is no evidence to support this in the Canadian context. The authors contend that medical malpractice law could be made a more effective component in this drive to promote patient safety.
While the French Law of medical malpractice had been mainly based on the Civil Code provisions related to contract law, the Patients Rights' Law of March 4, 2002 set forth general principles regarding the responsibility of health professionals and health institutions which are now in the Code of Public Health. The relatively new Law has modified the legal basis for medical liability, which is now regarded as a “legal regime” that is neither contractual nor tortious. The Patients' Rights Law of March 4, 2002 not only has reaffirmed the principle of fault-based liability in medical malpractice cases, but also allows for the physician's strict liability in specific circumstances, such as nosocomial infections, therapeutic hazards, or defective products. In summary, the Law provides for a new procedure that promotes simple and quick compensation for the benefit of the victims.

In France, distinctively from the compensation process by insurers of liable professionals, compensation of the victim will in certain cases such as medical hazards, hospital-acquired infections, blood-transfusion infections, result from a compensation scheme similar to that available for victims of terrorism and crimes. It is based on national solidarity and dispensed by the National Fund for Compensation of Medical Accidents (ONIAM). The growing importance of such a compensation scheme may appear to be a double-edged evolution. On one hand, it has improved the status of victims of medical harms; they are increasingly integrally compensated more quickly and under more flexible conditions thanks in particular to the legally established presumptions. On the other hand, however, compensation by ONIAM, like any other national solidarity fund, may deprive victims of certain procedural safeguards provided by civil liability principles. On a more systemic level, the articulation between national solidarity and civil liability principles raises questions.

This paper offers an overview of the rules under German law for securing accountability and redress in cases of medical injury. It is divided into three main parts. Part I looks at the various legal consequences that may apply in such circumstances, including criminal and professional liability of the doctor, the bases for a private law claim by the patient, and the existence of pockets of non-fault based liability for injury from medical products. Part II then considers in greater detail the elements to be satisfied in respect to the two key forms of private law malpractice claim, namely faulty treatment and faulty information disclosure. Also examined is the underlying system of medical liability insurance, as well as the workings of medical arbitration boards that facilitate settlements in appropriate cases. Finally, in Part III, there is an evaluation of the current compensation rules, including their continued viability, in the light of available empirical data. The emergent patient safety movement in Germany is also discussed.

The New Zealand accident compensation scheme makes provision for the payment of compensation to the victims of personal injury that is caused by medical treatment, but at the same time it bars actions for damages based upon such injury. This article gives a brief overview of the scheme as a whole and its relation-
ship with the common law, and then focuses on the particular provisions governing medical injury. It includes discussion of the extent of the statutory cover, problems of causation, the operation of the medical scheme in practice, costs and funding, and issues of accountability. It ends with a broad evaluation of accident compensation as it functions in medical cases.

**Medical Malpractice and Compensation in Poland**

*Dr. Kinga Bączyk-Rozwadowska*

Civil liability for medical malpractice in Poland can be either contractual or tortious. In practice, provisions of ex delicto liability are applied. Since June 2010, liability insurance is obligatory for all health care providers that render medical services in Poland. Tortious liability may be attributed to a doctor or a hospital when either's faulty acts or omissions result in the damage. A hospital may also have vicarious liability for injuries caused by its doctors and other medical staff. Fault usually consists of negligence, which is defined as failure to work with due care and diligence while treating a patient. Burden of proof and causation requirements have been modified by case law.

The ex delicto regime provides the injured with a wide scope of compensation including indemnity for both a pecuniary and a non-pecuniary loss. The Civil Code does not assign any statutory limits for the amount of damages that should be paid for personal injury. Generally, pecuniary loss, compensated in full, comprises a single-payment indemnity (for medical care costs and loss of income). When disability is permanent, compensation may be comprised of periodic payments in the form of annuity (pension). Compensation for a non-pecuniary loss is at the court’s discretion. The general rule is that its scope should depend, first of all, on the degree of pain and suffering. Further relevant criteria include the victim’s age, the degree of the tortfeasor’s fault, and the duration of the disease. In view of the most recent case law, damages for a non-pecuniary loss predominantly serve the purpose of compensation. Since 2009, there are additional grounds for moral damages claims under the new Act of Patients’ Rights and Patients’ Ombudsman.

A draft bill of the amended Act of Patients’ Rights and Patients’ Ombudsman (of March 2011) proposes an introduction of a no-fault compensation scheme for injuries resulting from medical misfortune, inflicted on patients in the course of hospital treatment. The scheme is to come into force in January 2012.

**Medical Malpractice and Compensation in South Africa**

*L.C. Coetzee and Pieter Carstens*

This article gives an overview of current medical malpractice law in South Africa. The following aspects are covered: The overall scheme for preventing and redressing medical errors and adverse events, including regulation, criminal and civil liability, and social and private insurance, and the relationships among these various systems; the details of the applicable liability and compensation systems, including criteria defining qualification for compensation, causation and “loss of chance,” liability for failure to obtain informed consent, as well as matters of proof and gathering of evidence. The authors note the difficulty they had in obtaining empirical data on medical errors and adverse events. Finally, certain attitudes and concerns about the liability and compensation systems are highlighted.
STUDENT NOTES

THE STORY OF A CHARACTER:
ESTABLISHING THE LIMITS OF
INDEPENDENT COPYRIGHT PROTECTION
FOR LITERARY CHARACTERS

Copyright law provides writers with a way to protect their original works of authorship, but courts often disagree over the scope of this protection and how far it can be extended for the fictional characters appearing within literary works. Characters like Holden Caulfield and James Bond have become extremely valuable forms of intellectual property, but even for such iconic figures it can be difficult to separate the character from the story to determine where one work ends and the other begins. To address this issue, the Second Circuit follows the “distinctly delineated” test, which asks whether a character has been sufficiently developed within the author's expression to merit independent copyright, while the Ninth Circuit has crafted the more exclusive “story being told” test, which only grants copyright protection to those characters embodying the story in which they appear. These inconsistent standards have resulted in unreliable protection that overly restricts the public domain and inhibits the creation of new works. This note examines the inherent goals of intellectual property protection and the historical treatment of literary characters, concluding that the “story being told” test is the better standard for the promotion of copyright interests.

THE SPIRIT OF NAGPRA: THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT AND THE REGULATION OF CULTURALLY UNIDENTIFIABLE REMAINS

In March 2010, the U.S. Department of the Interior issued a final rule regarding the disposition of culturally unidentifiable human remains under the Native American Graves Protection and Repatriation Act (NAGPRA). The rule is controversial, as some commentators argue that the Secretary of the Interior lacks the authority under the statute to regulate these remains. This Note analyzes the legitimacy of the final rule in light of federal administrative law precedent as well as the origin and purpose of NAGPRA. It also discusses two well-known cases arising under the statute and the effect that the final rule will have on similar cases arising in the future. Ultimately, this Note concludes that culturally unidentifiable human remains are within the Secretary's power to regulate and that the rule furthers Congress's purpose in passing NAGPRA—to right past wrongs against Native Americans and return Native American remains to Native American tribes.

WHO AM I AND WHO DO YOU WANT ME TO BE?
EFFICIENTLY DEFINING A LESBIAN, GAY, BISEXUAL, AND TRANSGENDER SOCIAL GROUP IN ASYLUM APPLICATIONS

Asylum law provides an area within immigration law that is unexpectedly friendly to lesbians, gay men, bisexuals, and transgender persons. Persons who suffer persecution on account of “membership in a particular social group” are eligible to live and work in the United States. This encompasses lesbians, gay men, bisexuals, and transgender persons who suffer persecution. However, United States law does not clearly define applicable standards in this area. As a result, different adjudicators in the asylum process focus on different methodological approaches and sometimes inject bias into the process. In addition, because the terms “lesbian,” “gay,” “bisexual,” and “transgender” are tied to U.S. culture, asylum seekers from other countries often do not fit within these categories. This
Note proposes that practitioners craft their asylum applications with an eye to these considerations. Specifically, this Note proposes that practitioners file asylum applications which use both status and conduct descriptors and which highlight relevant cultural differences.

MARKEDLY LOW: AN ARGUMENT TO RAISE THE BURDEN OF PROOF FOR PATENT FALSE MARKING

Caroline Ayres Teichner

The Federal Circuit's liberal treatment of the patent false-marking statute, 35 U.S.C. § 292, has created a climate in which opportunistic qui tam plaintiffs facing a low burden of proof can recover potentially enormous sums of money under the statute with no showing of competitive injury. This note argues that the Federal Circuit erred by ruling that plaintiffs must prove the key element of false-marking claims—namely, intent to deceive the public—by a mere preponderance of the evidence, and further contends that the court should have adopted the clear and convincing standard instead. Support for this elevated burden of proof can be found in courts' historical treatment of the false-marking statute, the legislative history and policy rationales underlying § 292, and analogous legal contexts. More crucially, the Due Process Clause of the Fifth Amendment mandates a higher burden of proof to protect the important interests at stake for false-marking defendants.
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