



The development of more patient friendly legislation as well as new trends such as patient tourism and telemedicine will increase medical malpractice exposure

Medical Malpractice

A medical malpractice claim may arise when a hospital, doctor or other health care professional, through an error or omission in diagnosis, treatment, aftercare or health management, causes an injury to a patient. The definition of error or omission is based upon the deviation of the doctor or medical professional from a generally accepted standard of care. But, an injury that is the result of a medical treatment is not “malpractice” if the medical professional administering the treatment properly advised the patient of all potential risks and exercised due care in providing the treatment.

Medical Malpractice claims are not new. However we can observe that changes in several jurisdictions. Conditions and definitions have become more and more patient/ consumer friendly. New treatments have been used, people have a longer life expectancy, and the care costs explode. Consequently it is still not easy to evaluate this risk. Insurers/reinsurers have to consider various new developments in the different markets.

For example the number of beneficiaries has expanded and awards for the damage of pain and suffering have increased continuously. A dangerous trend could result from stressed economies. Healthcare systems depending on public funding may face an increasing number of medical malpractice claims due to cost cutting resulting in understaffing. Another interesting development is the on-going discussion to change systems to a no-fault system (strict liability).

As a general observation, medical malpractice claims are rising both in mature and emerging markets in frequency and severity. Patient expectation, awareness of both medical errors and corresponding patient rights and readiness to take action against health care suppliers is rising. Even in markets known for low litigiousness the claims mentality is changing noticeably. In line with consumer friendly tendencies in legislation and judicature, patients are increasingly backed by favourable legal developments. This is mainly the case in developed European and Anglo-American legal systems, but these factors influence the legal doctrine and approaches in emerging markets as well.

The rise in severity well above wage-rate or consumer price inflation is partly linked to these legal tendencies, especially in the case of more generous moral damage awards. Another major contributing factor is the substantial increase in costs of nursing care.

There are a number of new medical developments that may lead to future medical malpractice claims, including patient tourism and telemedicine.

In medical tourism patients are at risk to suffer from increased morbidity by long-haul flights in the pre- and post-surgical phase. Besides these individual risks there are additional malpractice risks which are specifically related to medical tourism. There are more parties involved over the full treatment process with the risk of no clear demarcation of responsibilities during different treatment phases. Language and translation problems may lead to substantial misunderstanding in communication and information processes. On the financial side malpractice covers with limited local requirements may leave patients with substantial financial gaps in their home countries. On the other hand hospitals and doctors may be at risk for out-of-pocket payments in case of claims brought against them abroad if their insurance only covers local exposure.

In case that telemedicine application involves cross border treatment we have to deal with both national law and international private law. According to traditional freedom of choice in international private law patients may choose the court of jurisdiction. In addition plaintiff lawyers may seek for forum shopping to maximise compensation payments. This leaves hospitals and doctors involved in telemedicine with many uncertainties regarding their potential liability exposure abroad. If hospitals or doctors are going to use telemedicine they have to seek definite contractual clarity regarding court of jurisdiction with all patients who may be eligible for any type of telemedicine. In addition they have to look for appropriate insurance cover which includes their possible exposure abroad.