

NO-FAULT COMPENSATION IN MEDICAL MALPRACTICE VIETNAM

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ABSTRACT

In Vietnam, the legal regulations related to compensation for medical malpractice without proving fault do not seem to be as widely known as in other countries in the world. A no-fault compensation system allows patients to be compensated without proof of a provider's fault or negligence. Acknowledging and applying no-fault compensation rules are very important in medical malpractice to protect the legitimate rights and interests of victims. Studying, comparing, and analyzing the regulations of Vietnamese no-fault compensation with the progressive ones in the world. Based on the results, the author will indicate the weakness in the legal of Vietnamese no-fault compensation rules and present appropriate recommendations.

Keywords: Alternative Compensation, Damage, Medical Malpractice No-Fault.

INTRODUCTION

In legal practice today, the majority of tort claims are for negligence (Harpwood, 2009). Negligence is a cause of action in the offense, whereby a person who has suffered damage to his/her loved one, goods, or financial wealth alone, may sue to recover damages from the person who caused the damage (Patten & Saunders, 2018).

The conceptual structure of negligence is highly flexible and capable of general application. These features have allowed courts to utilize the tort in the context of different compensation claims. Duty, breach, causation, and damage are the elements that together make up any successful negligence claim. Their requirements may be rephrased as a series of questions, each of which must be answered affirmatively if the plaintiff is to win:

Does the law recognize a liability in this type of situation (duty)?

1. Was the defendant careless in the sense of failing to conform to the standard of care set by law (breach)?
2. Has the plaintiff suffered a loss (damage) for which the law regards the defendant as responsible either in whole or part (causation)? (Deakin & Adams, 1999; Kreutzer et al., 2011).

To satisfy these elements, “*fault*” must be proved by the patients. The functions of tort law are those purposes that people seek to achieve through tort law (Cane, 1997). The primary functions of tort are compensation (Lunney et al., 2008), deterrence (Birmingham & Brennan, 2016) and justice (Owen, 1995).

Medical malpractice (MM) is a form of professional negligence, and such negligence forms part of the law of tort (Deakin et al., 2003). MM occurs when a negligent act, the omission by a doctor or other medical professional results in damage and harm to a patient. MM is behavior that deviates from the generally accepted standard of care, that causes harm to the patient. Negligence by a medical professional can include an error in diagnosis, treatment, or illness management. If such negligence results in injury to a patient, a legal case for MM can arise against the doctor, the hospital, local state or federal agencies that operate the medical facility.

One side, both the Civil Code and the Law on Medical Examination and Treatment (LMET) that the victims should not seek compensation without fault. On another side, the Civil Code admits no-fault compensation in the case of tort. Besides, the LMET also slightly mentions no-fault compensation. Also, there is an additional regulation allowing the victim to seek compensation without fault happens only in vaccination incidents.

As we know about MM, it begins with an injury or an adverse outcome to a patient occurring during medical care. Patients and families suffer from emotional and financial burdens arising from these adverse outcomes or injuries and seek compensation for the loss.

Most injuries in medicine, however, are due to either system errors or non-negligent reasons (Sohn, 2012). As an alternative to the tort or fault-based system, a no-fault compensation system has been viewed as having the potential to overcome problems inherent in the tort system. This is through the provision of fair, speedy, and adequate compensation for medically injured victims (Kassim, 2014). The form of the no-fault system that is most likely to be adopted would provide automatic compensation and not for all iatrogenic injuries (Tancredi, 1986).

The implementation of a no-fault compensation system involves the shifting of responsibilities from the fault-bearer's responsibility to a wider collective responsibility through a "*social insurance scheme*," built upon the principle of distributive justice (Kassim, 2014). The social insurance scheme places the responsibility to compensate the injured on the shoulders of the community at large or a group of people with a common interest (Kassim, 2014).

Scheme of No-Fault Compensation

A no-fault compensation system allows patients to be compensated without proof of a provider's fault or negligence. The deterrence objective is done differently in the system. Thus, instead of deterring physicians from substandard care, the system encourages physicians to collaborate with the system in detecting what causes the injuries. Although the application of a no-fault system differs slightly in each country, the basic idea is to eliminate fault or blame from the system of compensation to increase fairness by making the claim process simple. Therefore, the patients with meritorious cases can access the system easily and be awarded for compensable injuries incurred during the medical treatment.

Successful claims are paid in a uniform manner using a fixed benefits schedule and include compensation for both economic and non-economic (Pain and Suffering Losses) without the necessity of proving negligence through a tort claim (David & Troyen, 2001).

A comprehensive no-fault system liability could use a wide range of recovery schemes. The most liberal models allow for recovery for all kinds of injuries with no regard for causation, but this would be expensive and impractical. Therefore, a no-fault system should only allow compensation for limited injuries. Furthermore, any possible no-fault system would also offer compensation based on the level of causation (Tappan, 2005).

No-fault systems share the same goal which is to compensate victims of injuries and deter substandard care. They apply different methods to increase effectiveness, the fairness of the system in compensating victims, and deterring substandard medical care. They also control direct and indirect health care costs of the malpractice system. In addition, they seek to improve upon the injury resolution of tort liability by replacing the existing fault remedy and liability insurance with a new no-fault alternative in whole or in part. Different reforms emphasize a different mix of the goals, reflecting reformers' perception of liability problems in the area addressed (Tancredi, 1986; Bovbjerg & Sloan, 1988).

The Prospects of a No-Fault System

A no-fault can be seen as an alternative for a long-term prospect to the existing tort system of medical injury compensation. It looks optimistic for several reasons (Williams, 1984). A no-fault compensation mechanism would be far more effective than the much maligned-fault compensation in achieving the twin goals that the tort system is supposed to serve with fair compensation and deterrence. A no-fault system would effectively and fairly compensate those whose injuries fall within this scope. The tort system is arguably inequitable in that its decision-making processes do not always yield consistent results in similar situations (Barry, 1981). A no-fault system would also be more successful than the tort in preventing injuries through deterrence. Evidence showing iatrogenic illness is frighteningly common and frequently serious, especially in the hospital context, (Tancredi, 1986) which indicates that the tort system in its present form leaves many avoidable injuries uncompensated. Without fairly systematic compensation, likely, injuries are sub-optimally deterred confirming the fears of many that the tort system fails to deter even those injuries that would be compensable under its own restrictive rule (Jacobi & Huberfeld, 2001).

With the no-fault compensation system, claims are settled relatively fast with the result that patients know where they stand in a relatively short period. A second objection that is raised against the no-fault compensation system is that the system would reduce the damage preventive effect of liability law. In this view, the goal of liability law is not only to compensate for damage but also to prevent damage. However, this objection is not convincing because the damage-preventive effect of liability law in health care is of minor importance (Dute, 2003) and will at most play a role in certain sectors like high-tech surgery. A third objection raised against the no-fault compensation system is that such a scheme does not provide for full compensation of the damage. It is correct, but that difficulty can be

overcome when a no-fault compensation system is introduced while at the same time, the access to the courts is not blocked (Kassim, 2014).

Most no-fault schemes formulate some eligibility criteria within which compensation would be provided to victims. Victims are compensated only if the injury falls within the designed parameter. The following analysis of the four countries Belgium, France, England, and Vietnam are the frameworks of no-fault compensation schemes.

No-Fault System in Medical Malpractice in Vietnam

The no-fault system in Vietnam is strictly applied, mostly in a defective product. To win the claim, the claimant has to prove fault under the Civil Code. However, the Civil Code admits that the defendant has to pay a part of compensation in case of no-fault or compensation goes beyond the defendant's financial ability. This recognition of Vietnam brings the difference to other countries. Evidently, the Civil Code states that "*The person is liable for damage may be entitled to a reduction of the compensation if there is no fault or unintentional fault and the compensation is excessive about his or her economic ability.*" This rule only appears in the tort liability. Thus, the remaining cases need to prove fault or set an agreement in the contract.

Under Vietnamese law, in the health sector, a physician can be exempted from the liability as to the following rule. It says "*A practitioner may not take responsibility when a professional council determines that s/she was at the lack of technical means and was not specialized in examination and treatment that case.*" According to this regulation, a patient cannot claim damages if the incidents fall into the situation described in this article. For other incidents out of the regulation, the patient cannot seek compensation without fault. In this case, the only sources of compensation without fault are from the insurers (if the individuals or agents have been insured) or the pockets of health care practitioners under Article 76 of the LMET. Vietnam does not have Fund of the State for all kinds of no-fault compensation as Belgium and France. Currently, Vietnam has organized to pay for only the victim of vaccination incidents without proving fault.

However, in practice, most hospitals (private and public) have their fund which is used to compensate the victims. The hospitals' income saves this kind of fund but not from the Government. The author would like to emphasize that the amount of payment, in this case, is definitely different from the tort compensation. Tort aims to place the victim in the same condition as before the incident while the purpose of this fund is to partially "*support and comfort*" the victim without fully restoring them to the original condition. It is worth noting that the amount paid to support and comfort is always less than the required compensation amount. This work has not been guided by the state and has existed for years in Vietnam. Admittedly, this approach, although it is not a perfect way to protect the victims in the case of no-fault, can temporarily cover some losses when waiting for a better solution.

In the author's point of view, no-fault registration under the LMET is a "*polite*" way to admit "*fault.*" "*Fault*" here refers to a lack of equipment, facilities, practitioners, and professional regulations. In fact, these faults cannot occur in these cases because negligence

causes the damage. In other words, that is the shortcoming that should be admitted to by the State and medical agents.

Exceptionally, to face the crisis of vaccine-related incidents, the Vietnamese Government enacted the Decree on Regulations on Vaccine Activity. According to the Decree, if severe complications occur and they severely affect health or cause damage to the lives of the people vaccinated, the State is responsible for the compensation of the victims. The State compensation occurs when the vaccination leads to disability or death. Regarding “*serious complications*,” the Government has not had any extra explanation or standard to guide it.

It should be remembered that compensation is only made when the patient uses the suffer damage from the “the national vaccination program, vaccination against the epidemic seriously affect the health and life of the people vaccinated.” Therefore, in all remaining cases, to be compensated, the patient must prove the fault of the person causing the damage. The Decree also indicates the damage, scope, and level of compensation as follows:

1. *The damage caused by the sequelae resulting in the disability shall be compensated for 30 months of base salary and the expenses;*
2. *Damage to life is supported as follows:*
 1. *Expenses specified before death;*
 2. *The funeral expenses shall be equal to 10 months of base salary prescribed by the State; (equal to 1000 Euro - 1500 Euro)*
 3. *Expenses for making up for mental suffering of VND 100,000,000 (equal to 4000 euro) for relatives of the affected/harmed persons;*
 4. *Expenses due to lost or reduced incomes.*

The compensation is calculated to fit. It is quite contrary to the regulation in compensation of the Civil Code. It says that “*how much a patient suffers from damage, how much compensation is made.*” The spirit of Vietnamese law regarding no-fault compensation differs from Belgium, France, and England. If the three countries apply this system to restore the patient's condition before suffering damage, Vietnam only aims to recover some of the damage partly.

The victim or relatives who think that they are eligible for state compensation must prepare and submit a dossier to the Department of Health Records. Understandably, compensation under this Regulation appears to be a unilateral imposition of power on the part of the State. Victims are not dealt with as well as not protected by any specialized organization when they suffer damage. In cases where the compensation is not satisfactory, the victim also has no right to make a complaint when this Regulation does not contain the provisions relating to the complainant's rights. The regional Department of Health will be liable for compensation without enforcement. There is no intermediary agency for a fair and objective assessment of damage for victims. Moreover, while the three countries, Belgium, France, and England have courts as an alternative way to support the victims if they are not satisfied with the compensation, Vietnam's courts are isolated from these cases. Patients

cannot find other support, regardless of the decision made by the regional Department of Health.

Indemnity for damage without fault is very limited in Vietnam. There are separate terms in Civil Code and LMET. Notably, the no-fault system is regulated to compensate only the incidents of “the national vaccination programs, vaccination against the epidemic seriously affect people’s health and life.

DISCUSSION

As discussed, as an alternative to the tort or fault-based system, a no-fault compensation system has been viewed as having the potential to overcome problems inherent in the tort system by providing fair, speedy, and adequate compensation for MM victims (Kassim, 2014). Vietnam, at the moment, accepts to compensate without proving fault for patients in cases of incidents that emanate from vaccination. The author would suggest that learning from other countries. The State should extend the compensation in other areas such as contraception and contaminated transfusions (HIV and hepatitis). Hence, no-fault compensation should be applied in more cases. However, it is necessary to issue legal provisions for the application of this system. Moreover, the State should establish a no-fault compensation fund by combining it with the Fund of fault compensation. The State could budget this fund and it will be managed by the Department of Social Health Insurance.

A no-fault compensation system has been viewed as having the potential to overcome problems inherent in the tort system by providing fair, speedy, and adequate compensation for medically harmed victims. Proponents of the suggested no-fault compensation system have argued that this system is more efficient regarding time and money as well as in making the circumstances in which compensation is paid much clearer. However, the arguments against no-fault compensation systems are mainly on issues of funding difficulties, accountability, and deterrence, particularly, once a fault is taken out of the equation. When establishing the no-fault compensation in Vietnam, the State should also take into account the factors mentioned above. The following recommendations should be included in Vietnam’s no-fault compensation system:

Firstly, the concept of a no-fault compensation system should be redefined. Although it is not easy to give a complete concept, it should contain the main factors: (1) a no-fault medical accident occurring during medical or health care activities, (2) must be physical, does not result from the patient's health condition, (3) and gives rise to abnormal damage. Damage is deemed abnormal if it should not have occurred due to the present state of science, the patient's health condition, and the objective and foreseeable evolution of his/her condition.

According to the findings of this research, a no-fault medical accident occurring during medical or healthcare activities should include the activity of diagnosis. This idea is derived from French law. When the injury results from acts of prevention, diagnosis, or treatment, and when such injury is abnormal concerning the patient's previous health and its likely evolution, the victim's claim may be brought before the National Fund for Compensation of Medical Accidents (Hellinger, 2011). Elsewhere, in Belgium, a wrong

diagnosis cannot constitute a medical accident without liability even though it would entail abnormal damage to the patient (Muylaert, 2010).

CONCLUSION

Getting the right diagnosis is a crucial aspect of healthcare - it explains a patient's health problem and informs subsequent health care decisions. The diagnostic process is a complex collaborative activity that involves clinical reasoning and information gathering to determine a patient's health problem. According to *Improving Diagnosis in Health Care*, diagnostic errors-inaccurate or delayed diagnoses-persist throughout all settings of care and continue to harm an unacceptable number of patients. Most people will likely experience at least one diagnostic error in their lifetime, sometimes with devastating consequences. Diagnostic errors may cause harm to patients by preventing or delaying appropriate treatment, providing unnecessary or harmful treatment, or resulting in psychological or financial repercussions.

It is also necessary to specify what is meant by harm which should not have occurred in the light of the present state of science, the condition of the patient, and its objectively predictable evolution. Notably, in the context of Vietnam, the development of medical science has lagged compared to developed countries and specifically the countries in this comparative study. It is necessary to identify the ordinary standard of medical science to whether it is abnormal or not based on the presence of science.

Secondly, the state should use experts' evidence/opinion to investigate some questions: the duty of the physician, the causation link between the omission and damage, the patient's damage (invalidity), and the procedure to seek compensation, etc. The reasons which support these recommendations are relevant for the agent to evaluate health care provider's malpractice liability.

Last but not least, Vietnam should apply for the no-fault compensation in several incidents, such as vaccination, blood transfusion (HIV, hepatitis B, C), and contraception, and blood transfusion. After that, the scope of application can be extended.

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