



Malpractice Reform

By Sanghan Wang and
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As a growing segment of the United States population pushes for limits to the damage awards conferred in medical malpractice actions in particular, it is illuminating to look beyond the actual dollar amounts of punitive damages and examine other legal systems where the problem is approached from a different angle.

The Handling of Medical Malpractice in South Korea as a Stimulus for American Tort Reform Action

Although the negotiations leading to the final version of the Affordable Care Act—the law referred to as “Obamacare”—had contemplated malpractice tort reform, this did not manifest as a central feature of the Affordable Care Act as

enacted. Indeed, malpractice reform is barely mentioned. Section 6801 articulates the nonbinding “sense of the Senate.” This statement, while not a binding legislative enactment and a resolution of only one house of Congress, nonetheless recognized that health care reform presented an opportunity to address medical malpractice issues and “encouraged” states to develop and test alternatives to the existing civil litigation system to improve patient safety, reduce medical errors, and stimulate efficiency in resolving disputes while preserving an individual’s right to seek redress through the courts. *Patient Protec-*

tion and Affordable Care Act, Pub. Law No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. Law No. 111-152, 124 Stat. 1029 (2010).

Moreover, Section 10607 of the Affordable Care Act amended the Public Health Services Act to provide potential federal grant money to support demonstration or pilot programs to develop alternatives to tort litigation.⁴² U.S.C. §280g-15. The effect of the Affordable Care Act on malpractice claims remains to be seen. In the view of some, the number of claims will increase as the number of people using health care



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services expands. On the other hand, there are those who believe that fewer patients will need to pursue legal actions because they will now have a means for covering the expense of their injuries. But the many evolving changes implemented over time through the Affordable Care Act will make it likely that the malpractice aspect of health care will also change. And change brings opportunity.

This article will juxtapose the contours of the medical malpractice experience in South Korea with that of the United States in the exploration of alternatives for New Jersey and elsewhere in the United States. Tort reform efforts have been in play for over two decades in New Jersey, resulting in a number of changes implemented with variable impact. South Korea has a population of nearly 50 million people compared with the more than 315 million in the United States. Physicians in Korea are not highly compensated professionals compared to their American colleagues. Moreover, Korean physicians do not have insurance for malpractice tort claims. Generally there have been far fewer medical malpractice actions in Korea than in the United States; however, there has been an increase in recent years. For example, between 2003 and 2007, there was an annual rate of increase of 36 percent, but even with the increase, around 8,000 claims have been made nationally. H.W. Jung, *Practicing Neurosurgery in South Korea*, 17(3) AANS Neurosurgeon in Action 13–14 (2008). Although cultural differences play a part, a key reason stems from the significant differences between the legal systems of the two countries. These include logistical issues flowing from the potential for concurrent civil and criminal proceedings against a medical professional, damage awards, and evidence-collection methods. The Act on Malpractice-related Damage Relief and Medical Dispute Resolution that went into effect in 2012, intended to provide just, speedy, and inexpensive resolution of medical disputes and available, not only to domestic patients, but also to international visitors as “medical tourism” increases in South Korea, also has had an evolving effect. The incentives and low barriers to the initiation of a medical malpractice case in the United States are nonetheless largely absent in South Korea.

Basic Structural Distinction: Civil Law Versus Common Law

South Korea’s legal system is based on the traditions and approach of Continental European civil law rather than the British common law system that was incorporated into American court practice. The jury trial is virtually unknown in civil law systems. There are no jury trials in South Korea for civil cases. In 2008 the option of a jury trial for criminal matters became available with participation by ordinary citizens as jurors to provide an advisory opinion to the judge. The other major distinction is the absence of the principle of “stare decisis” or precedent establishing a binding effect of previous decisions of a higher court. While there may be deference to decisions of higher courts, especially the Korean Supreme Court, a lower court may choose to make its rulings without being restrained or controlled by preceding decisions. This extends to the possible concurrent pursuit of both a criminal and a civil action against a single defendant. This is unlikely to happen in practice; however, it highlights the consequence of the lack of a “res judicata” effect from preceding fact findings or other decisions. Neither has a binding effect on another court because these determinations exist in different spheres. Despite the possibility that this could lead to widely variable and even arbitrary outcomes, in experience the case outcomes do not differ significantly. The timing and the tactical decisions of would-be plaintiffs have more significant implications. Specifically, they use the criminal systems for evidence collecting in their private civil actions.

In the South Korean civil law system, courts draw from the actual language of legislation or statutes as the primary source for decisions. Article 750 of the South Korean Civil Code defines the scope of tort liability: “any person who causes losses to or inflicts injuries on another person by an unlawful act, willfully or negligently shall be bound to make compensation for damages arising therefrom.” Also of consequence in medical malpractice cases is Article 268 of the South Korean Criminal Code. “Occupational or gross negligence” that causes death or injury is subject to punishment by either imprisonment of not more than five years or by a fine not exceeding 20 million

Won (approximately \$20,000). Any form of occupational negligence, whether using construction tools or surgical instruments, resulting in human injury violates the mores of Korean culture and is culpable conduct. This criminal conduct is considered more than a minor offense.

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for both a criminal action and a civil lawsuit in South Korea is the same: beyond a reasonable doubt.

Korea is the same: beyond a reasonable doubt. This standard for a civil lawsuit is obviously higher than that in place in the United States where a case is established by the preponderance—that is, the greater weight—of the evidence.

The elements to be established in either a criminal or a civil action in South Korea are identical: (1) the medical professional had knowledge of the risk of the bad result; (2) the medical professional did not exercise good judgment, based on a comparison with other professionals who work in the same field or same circumstance; (3) the bad result was caused by the care or treatment by the medical professional; and (4) there were actual damages. The standard of care is a national one for all physicians.

Critical Role of Criminal Prosecutions in Korean Medical Malpractice

In the United States, criminal prosecution of clinical medical negligence has been terrifying and devastating but rare. See generally E. Monico, R. Kulkarni, A. Calise & J. Calabro, *The Criminal Prosecution of Medical Negligence*, 5 Internet J. Law Healthcare Ethics 1 (2007); K.M. McCarthy, *Doing Time for Clinical Crime: The Prosecution of Incompetent Physicians as an Additional Mechanism to Assure quality Health Care*, 28 Seton Hall L. Rev. 589 (1997); G.J. Annas, *Medicine, Death, and*



the Criminal Law, 333 N.Engl. J. Med. 527 (1995).

In South Korea, while the criminal prosecution presents its own obvious problems, it has even greater consequence in that the individual would-be plaintiff has virtually none of the power to collect evidence presented by the civil discovery system in the United States. There is no ability to depose

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witnesses or parties or experts. Plaintiffs do not even have the power to compel production of evidence by subpoena.

As a result, plaintiffs build their cases with the evidence collected during the criminal case by the prosecution. In contrast to the Korean civil system, in the Korean criminal system the prosecution has significant powers, including to confiscate evidence and to compel document production. The Korean Constitution does protect the right against self-incrimination, and Korean courts have required that police use “the Korean version of Miranda,” to advise suspects of their right to silence before an interrogation. K. Cho, *The Unfinished “Criminal Procedure Revolution” of Post-Democratization South Korea*, 30 Den. J. Intl L & Pol’y 377, 383 (2002).

Nonetheless, these investigative records may later be used in the civil courts. Lawyers do not have the same advocacy role in Korea as in the adversarial approach of the common law. Under Korean civil procedure it is the judge who is empowered to collect facts and to sift through evidence. Thus, it is a major advantage for a plaintiff to have such an investigative record in existence and in the claimant’s best interests to raise malpractice issues to the Supreme Prosecutor’s Office, which has the discretion to file a criminal negligence action and to begin an investigation. The initiation of a prosecutor’s investigation is frequently prompted by the actions of an affected private person seeking to sue a medical professional. Without the means to thoroughly gather evidence, would-be plaintiffs look instead to the evidence gathered by the prosecution during the criminal investigation. In this respect, the Korean government bears a substantial share of the costs for a plaintiff’s civil action.

Damages

The damages awarded for medical malpractice in South Korea are calculated to include compensation for the actual damages suffered and any consequential costs for care required as a result of the injury, as well as for mental pain and suffering. Thus, in concept this is all similar to the United States. The end figure, however, is much less than the average American verdict.

The typical civil litigation action provides compensatory damages for the injuries sustained and for any resulting treatment required as a result of the injuries. South Korea has had a universal medical insurance system that covers all of its citizens since July 1989. Koreans are required to pay their health insurance fees to the National Health Insurance Corporation (NHIC) similar to the way that they pay taxes. Under the National Health Insurance Act, South Korea’s medical insurance system administers treatment, medical checkup, treatment expenses, and hospital charges, but the treatment and services provided must be in accordance with the NHIC guidelines. Fees to the health care providers are based on a relative-value point system. The government sets a ceiling regarding drug and treatment material expenses that affects reimbursement. Patients pay approximately 20–30 percent of the total medical

expenses as their share of the cost with the rest covered by the NHIC program. Medical insurance for patients in lower income brackets is entirely funded by the government through the medical benefit system. There is no system of private medical insurance available. Korea permits a patient to recover the cost of medical treatment as damages because the equivalent of the common law collateral source rule has not changed since Korea instituted the universal medical insurance system.

Pain and suffering damages are automatically awarded to the immediate family, which includes parents and grandparents. For other relatives, such as siblings, compensation for “grief” requires some proof of suffering. Pain and suffering, however, are often minimal amounts. The low awards partially result from the use of a table of money damages, which a judge turns to in a civil proceeding for guidance. This table not only systematizes the total damage amounts but also limits them. In calculating these numbers the table factors in the nature of the job of the injured party to calculate lost wages and earnings.

For example, in a 2002 case, the Korean Supreme Court dealt with this issue of damage calculations. *South Korean Supreme Court, 2002Da3822* (January 24, 2002). The obstetrician failed to identify and to treat the mother’s gestational diabetes with a shoulder dystocia occurring during delivery of the infant. The Supreme Court found on behalf of the mother and injured infant, reasoning that the infant’s injury directly resulted from the obstetrician’s failure to provide proper medical care. The Court reasoned that any obstetrician exercising proper care would appreciate the dangerous complications resulting from the mother’s diabetes. In addition, the doctor failed to administer an ultrasound, which would have revealed the enlarged size of the fetus, further increasing the chances of complications from shoulder dystocia. However, despite finding that the obstetrician failed to take appropriate precautionary measures, the Court reduced the amount of damages awarded to half of the amount requested by the plaintiffs. Guided by the table of money damage awards, the Court examined the length of the injured child’s life to determine the amount that the infant could have potentially earned.

Instead of granting the original 85 million Won (or approximately \$85,000), the Court awarded the infant 43 million Won (or \$43,000). For the mother and father's pain and suffering, the Court awarded each 3 million Won (or \$3,000), instead of the original 5 million Won requested for each parent. In New Jersey cases, such injuries have resulted in verdicts ranging from \$300,000 to \$2 million and even higher when the delay in delivery produces profound injuries to the central nervous system including brain damage.

Since a significant portion of the damages awarded in American malpractice litigation is consumed by the attorney's contingency fee, in light of the actual damage awards in Korea it seems an equitable trade-off to have governmental resources fund a large portion of the litigation expenses. The fines and the penalties resulting from the criminal action do not go directly to the malpractice victim but only to the state. The system is unique, however, in that any civil settlement agreement reached between the victim and professional before the final verdict of the criminal action bears upon the sentencing meted out by the criminal court judge, providing an incentive to engage in such negotiations. Moreover, if there is no stipulation within the settlement agreement to the contrary, a settlement amount could be deducted from a civil action award. In Korea, if prosecutorial discretion has not been exercised to begin a criminal action, the combination of lower damage awards with the inability to gather evidence independently dissuades many who might seek civil compensation. In contrast to the United States with the potential for windfall verdicts and punitive recoveries, there are institutionalized disincentives to pursue civil lawsuits in South Korea.

Changing Landscape

Despite the low awards compared with jury verdicts in the United States, the creeping increase in malpractice claims in South Korea in combination with the limited reimbursement and compensation that South Korean physicians receive has led to attrition in the medical community. As in the United States, the disruptive quality of the malpractice process has led to an exodus of doctors from practice, particularly in the field of obstetrics. At the same

time, the increasingly prolonged time that it takes to resolve civil lawsuits (although a modest 26.3 months by New Jersey standards), along with the excessive cost and lack of access to expert knowledge to support medical claims was viewed as an inappropriate burden on patients. South Korean lawyers charge an initial fee plus a percentage from 10–20 percent for winning a case.

With a law taking effect in April 2012, the Korean National Assembly created the Medical Dispute Mediation and Arbitration Agency, which will resolve these "medical accident" cases within 90 to 120 days of presentation. The enactment had the support of the Korean Medical Association. Either a patient or a medical professional can request mediation or arbitration of a medical dispute. It is only when the other party agrees to participate that the proceedings begin. The process involves several steps but begins with a "validation team" composed of two doctors, dentists, and oriental medicine physicians and two law professionals with one as prosecutor and one consumer rights advocate. Following the work of the validation team, the matter is handled by the "mediation team," which consists of two law professionals, with one being a judge, one health and medical expert, one consumer advocate, and one professor. The mediation team estimates the compensation of damages and comes up with mediation decisions and arbitration verdicts.

A patient claiming injury may still access the courts. Much of the success of the program will turn on the composition of the validation teams and the perception of an objective evaluation of the medical incident. At this point the anecdotal evidence from South Korean practitioners has been that a fair forum has been available for both doctors and patient plaintiffs. The uneven field for civil litigation has the potential to elicit cynical assessment of the conclusions. But at the end of the day, the problem of medical malpractice is a problem for medicine that should be solved by medicine. In South Korea, proven instances of medical malpractice could lead to loss or withdrawal of a medical license. But until 2012, the medical professional organizations did not have the power to self-regulate. A revised Medical Act now guarantees self-regulatory powers to Korean medical organizations

so that medical professionals can control their own credibility and professional integrity. It is this self-regulation that is the hallmark of a profession. James S. Todd, M.D., the late New Jersey surgeon who was the long-serving executive vice president of the American Medical Association, understood this when he stressed issues of self-regulation along with honesty, competency,

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Implications and Applications for Change

There are important differences but also fundamental similarities in the legal systems used in South Korea and the United States for resolving medical malpractice incidents. The objectives of the Korean system, similar to many other legal systems around the world, distinguish and separate retributive justice from compensatory justice. It is a system that punishes by action in the criminal system and compensates under the civil litigation system. As with many other jurisdictions in the world, the civil courts in Korea provide compensation to victims. Meting out punishment whether through imprisonment or punitive damages should be a task confined to the state in criminal proceedings, where there are certain protections built in to protect a defendant. Victims should not be allowed to receive a windfall from punitive damages. From this perspective, criminalizing negligence seems not only reasonable but necessary. However, when someone considers the principal objectives of the criminal law—deterrence, rehabilitation, and ret-



tribution—a higher threshold for prosecution is appropriate. Since deterrence arises from the belief that an offender is making a choice with a weighing of risks and consequences, unintentional acts do not fit the paradigm. Rehabilitation through criminal sanctions easily becomes heavy-handed and more appropriately accomplished through various forms of education, mentoring, and monitoring. Retribution as the final policy reason for criminalization remains starkly alone as a justification and inappropriate except in the most egregious circumstances. It is the state of mind giving rise to the injurious conduct—whether an act or an omission—that makes the difference. In New Jersey, for example, for negligent conduct to rise to the level of criminal behavior it must involve an awareness of “a substantial and unjustifiable risk” of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of the conduct and the known circumstances, involves “a gross deviation from the standard of care that a reasonable person would observe” in the actor’s situation. *N.J.S.A. 2C:2-2.2(b)(4)*. In contrast, the negligence associated with a civil action occurs when a person breached a legal duty of care through action or a failure to act. These distinctions can at times be fuzzy at best. But even a “gross deviation” is not sufficient to constitute criminal homicide. Currently a person is guilty of criminal homicide under New Jersey law if he or she purposely, knowingly, recklessly, or under circumstances set forth in the death-by-auto statute causes the death of another. *N.J.S.A. 2C:11-2*. The American Medical Association adopted a resolution in 1995 opposing “the attempted criminalization of health care decision-making especially as represented by the current trend toward criminalization of malpractice; it interferes with appropriate decision-making and is a disservice to the American public” and has repeatedly reaffirmed this position, including as recently as 2012. See AMA Resolution H-160.946.

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While punitive damages and generally large damage awards are likely a mainstay to the American system, it is important to examine the underlying purpose and theories involved when considering reform programs. By comparing and learning from the differences in the Korean approach to malpractice, there may be a better understanding of how to improve the approach, either in New Jersey in particular or the United States more generally, in the future.

The recent institution of the Mediation and Arbitration Program in South Korea is worth further consideration in the setting of American tort law. Constitutional guarantees of a trial by jury and equal protection, whether in the federal Constitution or the New Jersey Constitution of 1947, are manifest obstacles to a mandatory binding requirement for use of a panel to either screen or adjudicate medical malpractice cases. See generally E.F. Seaver, *Medical Malpractice Mediation Panels: A Constitutional Analysis*. 46 *Fordham L. Rev.* 322 (1977).

Based on the experience of the experiment undertaken between 1978 and 1988 with a mandatory but nonbinding pre-trial review panel pursuant to the New Jersey Rules of Court, N.J. Civ. Proc. R. 4:21 (adopted July 24, 1978 to be effective Sept. 11, 1978, and deleted Nov. 7, 1988, to be effective Jan. 2, 1989), the constitutional challenges could be overcome with a voluntary program as the one in effect in South Korea. Compare *Perna v. Pirrozzini*, 92 N.J. 446, 450, 457 A.2d 431 (1983), with *Suchit v. Baxt*, 176 N.J. Super. 407, 413–23, 423 A.2d 670 (Law Div. 1980).

This voluntary system was tried and found ineffective for a number of reasons. It had failed to meet the objective of reducing costs and expediting the disposition of cases. A trend of intransigence in the settlement demands of the party prevailing during the panel hearing developed. The New Jersey Rule of Court entitled a party to use the panel’s conclusion if unanimous as a supporting item even if not dispositive evidence for its position before a jury. The prevailing party—whether the plaintiff or the defendant—too frequently would seek capitulation from the other party, rather than agree to a fair compromise as the resolution of the controversy. But this perversion of the screening panel rule’s objective

to conclude a case with a negotiated resolution could be avoided, or at least ameliorated, if the use of a panel conclusion was linked to an award of attorney’s fees in the event that an offer of settlement was rejected and the prevailing or offering party did not achieve at least as favorable an outcome at trial. This could be modeled on the offer of judgment concept found in both the state and the federal rules. However, such a provision should make an allowance for a finding of no liability and no award in favor of the plaintiff with an award of fees for the defense of the matter.

Credible participation in the screening panels by medical practitioners is essential. It is indeed consistent with the professional responsibility of physicians to provide evaluations and opinions regarding areas of medical practice. In light of the specialized knowledge of physicians that may be needed in a judicial proceeding, the American College of Physicians has stated:

Often, expert testimony is necessary for a court or administrative agency to understand the patient’s condition, treatment, and prognosis. Physicians may be reluctant to become involved in legal proceedings because the process is unfamiliar and time-consuming. Their absence may mean, however, that legal decisions are made without the benefit of all medical facts or opinions. Without the participation of physicians, the mechanisms for dispute resolution may be unsuccessful, patients may suffer, and the public at large may be affected.

Am. College of Physicians Ethics Manual (6th ed. 2012), 156 *Ann. Intern. Med.* 73–104 (2012).

There is general societal agreement that everyone who received health care services should be entitled to services that are at least equal to an accepted community standard of care. Similarly, it is difficult to argue against the proposition that a patient injured by substandard care should be compensated for his or her losses, completely but not excessively. There is room for legitimate disagreement over what is fair compensation, but the proactive involvement of organized medicine in the resolution of disputes can reduce excessive costs and delays. This, in turn, can affect the overall delivery of health care and the practice of medicine favorably. 