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Medical Malpractice and the Right to Trial by Jury

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DENMARK[*]

MEDICAL MALPRACTICE AND THE RIGHT TO TRIAL BY JURY

Executive Summary

Denmark's system of medical malpractice compensation, like that of other Nordic countries, is largely a no-fault, administrative scheme in which the basic standard applied is "avoidability." The main law governing medical malpractice compensation is the Act on the Right to Complain and Receive Compensation Within the Health Service. The Act covers both medical treatment injuries and pharmaceutical injuries. Hospitals, health care professionals and staff, and university dentistry schools are among the parties liable to pay compensation to patients (or their bereaved family members) injured as a result of medical examinations, treatment, or the like. Parties that are liable to pay compensation, with certain exceptions, must be covered by insurance. The Patient Insurance Association (Patientforsikringen, PIA), an independent group of insurance companies and the self-insured, administers the Compensation Act in connection with compensation claims, collects relevant materials, and in cooperation with medical experts assesses whether compensation can be awarded. The Ministry of the Interior and Health is responsible for handling and deciding pharmaceutical injury claims, but may delegate this function to the PIA. Calculation of compensation amounts are based on the Liability for Damages Act. The cap on damages per injured party is about US$890,000 (DKK5 million). Appeals may be brought, as applicable, before the Patients' Complaints Board of Appeal or before the Pharmaceutical Injury Complaints Board, which make the final administrative decisions. If the injured party is not satisfied with the appeal decision, he or she may go to court, where the case would be heard by a panel of lay assessors and a judge at the district level, but not by a jury; a system more akin to jury trials is reserved for cases involving a possible sentence of four years' imprisonment or more and for political offenses, among others. Because the medical malpractice compensation system is kept separate from the disciplinary system of healthcare professionals, the administrative decision on a medical malpractice complaint is essentially de-linked at the outset from the criminal justice system and jury trials.

[*] At present there are no Law Library of Congress research staff members versed in Danish. This report has been prepared by the author's reliance on practiced legal research methods and on the basis of relevant legal resources, chiefly in English, currently available in the Law Library and online.

I. Introduction

All of the Nordic countries have largely converted from tort-based systems of medical malpractice compensation to compensation systems based on no-fault, administrative claim procedures and specialized legislation.[1] Denmark's system, which is modeled after and similar to that of Sweden, the pioneer of the reforms, was also motivated by the view "that the general law of torts was an inexpedient compensation mechanism," and that the insurance scheme to meet injured parties' needs for compensation should cover "social policy objectives, a rational use of resources, as well as simplified, efficient and quick claims settlement, etc."[2] As in Sweden, in Denmark the basic standard for awarding malpractice compensation is "avoidability," but the Swedes evaluate avoidability retrospectively, at the time the question of compensation is decided, whereas the Danes evaluate it on the basis of "what was known at the time care decisions were made."[3] The Nordic countries' statutory patient insurance schemes are a feature specific to those countries, with few parallels to other countries apart from New Zealand "where the cover for 'medical accidents' is actually part of an even more comprehensive scheme."[4]

II. Medical Malpractice Law and Procedures

A. Relevant Laws

In Denmark, the major law governing injuries related to medical malpractice is the Act on the Right to Complain and Receive Compensation Within the Health Service[5] (Compensation

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[1] Michelle M. Mello et al., *Administrative Compensation for Medical Injuries: Lessons from Three Foreign Systems*, ISSUES IN INT'L HEALTH POL'Y 3 (The Commonwealth Fund, July 2011), http://www.commonwealthfund.org/~/media/Files/Publications/Issue Brief/2011/Jul/1517_Mello_ admin_compensation_med_injuries.pdf; Allen B. Kachalia et al., *Beyond Negligence: Avoidability and Medical Injury Compensation*, 66(2) SOCIAL SCIENCE & MEDICINE 387–402 (Jan. 2008), http://www.hsph.harvard.edu/faculty/michelle-mello/files/Avoidability_paper_-_final_Word_version.pdf.

[2] Bo von Eyben, *Alternative Compensation Schemes*, 41 SCANDINAVIAN STUDIES IN LAW 202–03 (2001), *available at* http://www.scandinavianlaw.se/pdf/41-7.pdf. Von Eyben provides a comparative chart on the systems for handling "Injuries to Patients" in the four Nordic countries, *id*. at 208–09, and on "Pharmaceutical Injuries," *id*. at 210–11. While some of the information provided may be out of date, it might serve as a useful starting point for comparisons.

[3] Mello et al., *supra* note 1, at 4–5.

[4] *Id*. at 203. Although France adopted a Patients' Rights Law in 2002 (Law 2002-303 of Mar. 4, 2002, relative aux droits des malades et à la qualité du système de santé), unifying medical malpractice liability rules and allowing for compensation of major medical accidents without regard to the notion of fault, disputes must still be handled by administrative or civil courts, depending on whether the site of the malpractice was a public hospital or a private institution or practice, and the injured party may also prosecute in criminal court a health professional who appears to have committed a criminal offense. Florence G'sell-Macrez, *Medical Malpractice and Compensation in France – Part I: The French Rules of Medical Liability Since the Patients' Rights Law of March 4, 2002*, 86(3) CHICAGO-KENT L. REV. 1095 (2011), http://www.cklawreview.com/wp-content/uploads/vol86no3/Macrez-Cut.pdf; *see also* Geneviève Helleringer, *Medical Malpractice and Compensation in France – Part II: Compensation Based on National Solidarity*, 86(3) CHICAGO-KENT L. REV. 1125–38 (2011), http://www.cklawreview.com/wp-content/uploads/vol86no3/Helleringer-Cut.pdf.

[5] BEKENDTGØRELSE AF LOV OM KLAGE- OG ERSTATNINGSADGANG INDEN FOR SUNDHEDSVÆSENET [PROCLAMATION OF THE ACT ON THE RIGHT TO COMPLAIN AND RECEIVE COMPENSATION WITHIN THE HEALTH

Act). This Act replaced the Patient Insurance Act and the Pharmaceutical Injury Compensation Act. It was issued as a Consolidated Act in 2009, incorporating the 2005 Act on the Right to Complain and Receive Compensation Within the Health Service (Act No. 547 of June 24, 2005) and amendments thereto through December 2008.[6] According to the Patient Insurance Association (*Patientforsikrigen*), however, there is no substantive difference between the two old laws and the new—for the most part, only changed paragraphing.[7] Until January 1, 2007, the Patient Insurance Act still applied to cases of patient injuries sustained in medical treatment and research, and the Pharmaceutical Injury Compensation Act still applied to patients who had sustained injuries in connection with medications they had taken before that date.[8]

B. Sites of Injury and the Right to Compensation

Part 3 of the Compensation Act is on patient injury insurance coverage. The Act stipulates that compensation will be paid to patients or the bereaved families of patients who suffer injury in connection with medical examinations, treatment, or the like carried out

1) at a hospital or on its behalf;
2) by healthcare professionals or other staff in the course of pre-hospital care under the provisions of the Danish Health Care Act;
3) by authorized health care staff employed by the regional dental care service, by an odontological regional or knowledge centre function or in connection with the supply of municipal health care services . . . ;
4) at university schools of dentistry;
5) by privately practicing, authorised health care professionals;
6) by doctors who, without being in private practice, carry out vaccinations pursuant to section 158 of the Health Care;
7) by doctors who, without being in private practice, act as emergency service doctors; or
8) by the National Board of Health in cases pursuant to . . . the Health Care Act, rules issued pursuant to that Act or rules issued pursuant to . . . the Hospitals Act . . . .[9]

SERVICE] (No. 24 of Jan. 21, 2009, *as last amended by* Law No. 593 of June 14, 2011, *fully effective* Jan. 1, 2012), RETSINFORMATION.DK, https://www.retsinformation.dk/forms/r0710.aspx?id=138893; DANISH ACT ON THE RIGHT TO COMPLAIN AND RECEIVE COMPENSATION WITHIN THE HEALTH SERVICE (Act No. 24 of Jan. 21 2009), *available at* http://www.patientforsikringen.dk/en/Love-og-Regler/Lov-om-klage-og-erstatningsadgang/Lægemiddelskader.aspx (English translation of §§ 19–60; last updated Dec. 17, 2009).

[6] BEKENDTGØRELSE AF LOV OM KLAGE- OG ERSTATNINGSADGANG INDEN FOR SUNDHEDSVÆSENET [ACT ON COMPLAINTS AND REDRESS ACCESS IN HEALTH CARE], *available at* http://www.dagligmail.dk/laws/onelaw.asp?ri=122453 (viewed in Google translate; last visited Feb. 17, 2012).

[7] *Gamle love* [*Old Laws*], PATIENTFORSIKRINGEN, http://www.patientforsikringen.dk/da/Love-og-Regler/Gamle-love.aspx (viewed in Google translate; last updated July 21, 2010).

[8] *Id.*

[9] DANISH ACT ON THE RIGHT TO COMPLAIN AND RECEIVE COMPENSATION WITHIN THE HEALTH SERVICE § 19 ¶ 1; BEKENDTGØRELSE AF SUNDHEDSLOVEN [PROCLAMATION OF THE HEALTH ACT] (No. 45 of 2008, *as last amended by* Law No. 1338 of Dec. 28, 2011), https://www.retsinformation.dk/Forms/r0710.aspx? id=130455#K42.

Persons who participate in health science experiments (*sundhedsvidenskabelige forsög*) that do not form part of the diagnosis or treatment of their illness, as well as donors from whom tissue or other biological material is taken, have the same status as patients.[10] Patients who receive free treatment or a subsidy for treatment at hospitals, clinics, or similar institutions abroad under the Health Care Act are also eligible for compensation for injury.[11]

Compensation is to be paid if, according to a preponderance of the evidence, an injury is caused in one of the following ways:

> 1) if it may be assumed that an experienced specialist in the field in question would in the given circumstances have acted differently during examination, treatment or the like, thereby avoiding the injury;
>
> 2) if the injury is due to the malfunction or failure of technical apparatus, instruments, or other equipment used for or in connection with examination, treatment or the like;
>
> 3) if, on the basis of a subsequent evaluation, the injury might have been avoided using another available treatment technique or treatment method that would have been just as effective in treating the patient's illness from a medical point of view; or
>
> 4) if injury occurs as the result of examination, including diagnostic procedures, or treatment in the form of infections or other complications that are more extensive than the patient should reasonably have to endure. Account must be taken in this respect of the severity of the injury, the patient's illness and general state of health, the unusualness of the injury and the general possibility of taking the risk of its occurrence into consideration.[12]

In cases involving injury resulting from an incorrect diagnosis of a patient's illness, compensation will be paid only under the circumstances set forth under section 20(1), items 1 and 2.[13] For accidents not covered by these provisions, compensation will only be paid if the injured party is being treated, examined, or the like at a hospital "and the accident occurred on its premises and in such circumstances that the hospital may be assumed to have incurred liability in damages for it under the general law of damages."[14] Compensation will not be paid for injuries that result from the properties of drugs used for examination, treatment, or the like.[15] Compensation will also be paid, under specified circumstances, to injured trial subjects and donors, including, e.g., tissue and blood donors. [16]

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[10] DANISH ACT ON THE RIGHT TO COMPLAIN AND RECEIVE COMPENSATION WITHIN THE HEALTH SERVICE, § 19 ¶ 2.

[11] *Id.* § 19 ¶ 3.

[12] *Id.* § 20 ¶ 1.

[13] *Id.* § 21 ¶ 1.

[14] *Id.* § 21 ¶ 2.

[15] *Id.* § 21 ¶ 3.

[16] *Id.* § 22 ¶¶ 1, 3.

Any authorized healthcare professional who, in the course of his work, becomes aware of injuries that might entitle a patient to compensation has an obligation to inform the injured party and "to help to the necessary extent with notification of the Patient Insurance Association" or relevant private institutions.[17] This also applies in the case of pharmaceutical injuries.[18]

Those liable to pay compensation for injuries incurred by patients treated or examined under the circumstances set forth above are:

> 1) Administrators of public hospitals and pre-hospital care . . . ;
>
> 2) The patient's region of residence or, if the patient is not resident in Denmark, his region of residence with regard to injuries in connection with treatment for which a hospital etc. abroad is liable . . . ;
>
> 3) Administrators of regional dental care, odontological regional and knowledge centre ffunctions and municipal health care services . . . ;
>
> 4) Administrators of the university schools of dentistry;
>
> 5) The region where a privately practising, authorised healthcare professional has his practice or where a private hospital, clinic etc. is located or where a doctor acts as an emergency service doctor, without being in private practice, or where a doctor, without being in private practice, carries out vaccinations . . . ; or
>
> 6) The Government, as regards injuries comprised by section 19(1)(8).[19]

The Act stipulates that claims for compensation for medical treatment-related patient injuries must be covered by an insurance policy held with an insurance company.[20] The government and regional and district/city councils are exempt from the legal obligation to insure,[21] although the Minister of the Interior and Health may allow regional and district/city councils to take over the legal obligation to insure from private administrators who practice within the region's or municipality's area.[22]

C. Damages for Pharmaceutical Injuries

The matter of pharmaceutical injuries (*lægemiddelskader*) is addressed under Part 4 of the Compensation Act, on damages paid "to patients [and their dependants] who sustain physical injury as a result of properties in pharmaceuticals which are used in connection with examination, treatment or the like (pharmaceutical injury)."[23] Patients are defined as persons (including tissue and other biological material donors) "who take part in clinical tests of

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[17] *Id.* § 23.

[18] *Id.* § 45.

[19] *Id.* § 29 ¶ 1.

[20] *Id.* § 30 ¶ 1.

[21] *Id.* § 31 ¶ 1.

[22] *Id.* § 31 ¶ 2.

[23] *Id.* § 38 ¶ 1.

pharmaceuticals (biomedical trials) which do not form part of the diagnostics or treatment of the person's disease or disorder."[24] Damages will also be paid for mental injury to such trial participants and donors.[25] Pharmaceutical injury also covers injuries caused by a pharmaceutical to persons who nurse or treat persons for whom the pharmaceutical has been prescribed, but damages are only paid to the extent to which their injuries are not covered by the Danish Act on Insurance Against Consequences of Occupational Injuries.[26] A pharmaceutical is defined under the Compensation Act as "an article which is intended for human administration in order to prevent, identify, alleviate, treat or cure a disease or disorder, disease symptoms and pain or to affect body functions."[27]

The Act stipulates that damages are only paid in the case of a pharmaceutical injury "if the pharmaceutical has been dispensed commercially in Denmark for consumption or clinical tests of pharmaceuticals (biomedical trials)";[28] if the pharmaceutical was prescribed for the injured party;[29] if the injury occurred as a result of an adverse drug reaction whose nature or extent exceeds what the injured party "should reasonably accept";[30] and if there is a preponderance of evidence that the injury was caused by the use of pharmaceuticals.[31] Moreover, a pharmaceutical injury will not include any disease, disorder, or other injury that occurs as a result of (1) "the pharmaceutical not having had the intended effect on the patient in question" or (2) error or negligence in connection with prescribing or dispensing the pharmaceutical to the patient.[32] The Act also provides for cases of serial injury ("pharmaceutical injuries sustained by several persons and caused by the same property in the same substance in one or more pharmaceuticals," which are the result of adverse drug reactions or due to a defect in the pharmaceutical.[33]

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[24] *Id.* § 38 ¶ 2.

[25] *Id.*

[26] *Id.* §38 ¶ 3. BEKENDTGØRELSE AF LOV OM ARBEJDSSKADESIKRING [PROCLAMATION OF THE ACT ON OCCUPATIONAL INJURY INSURANCE] (Law No. 154 of Mar. 7, 2006, *as last amended by* Law No. 610 of June 14, 2011), https://www.retsinformation.dk/forms/r0710.aspx?id=125148.

[27] DANISH ACT ON THE RIGHT TO COMPLAIN AND RECEIVE COMPENSATION WITHIN THE HEALTH SERVICE, § 40 ¶ 1. The definition also includes "magistrally produced pharmaceuticals" and pharmaceuticals imported for individual persons' use with prior permission form the Danish Pharmaceutical Agency, but not "[n]aturophatic [sic] pharmaceuticals, homeopathic pharmaceuticals, [and] vitamin and mineral preparations" unless they "are used in clinical tests (biomedical trials) in order to obtain a marketing licence as a pharmaceutical." *Id.* § 40 ¶¶ 3, 4.

[28] *Id.* § 39. Such pharmaceuticals "must have been dispensed through a pharmacy, hospital, physician, dentist or a sales outlet authorized to sell non-pharmacy over-the-counter drugs in pursuance of the Danish Medicinal Products Act." *Id.*

[29] *Id.* § 41.

[30] *Id.* § 43 ¶ 1. In making a decision in this connection, special consideration is to be given to such factors as the nature and degree of severity of the disease or disorder targeted by the treatment, the injured party's state of health, and the extent of the injury. *Id.* ¶ 2.

[31] *Id.* § 44.

[32] *Id.* § 42.

[33] *Id.* § 49.

D. Handling of Claims

The Minister of the Interior and Health may wholly or partly assign to a private institution the processing of claims involving patient insurance coverage of injuries suffered through medical treatment or the like.[34] The Patient Insurance Association (*Patientforsikringen*, PIA) administers the Compensation Act in connection with such claims, collects relevant journals and other materials, and in cooperation with medical experts assesses whether compensation can be awarded. It may also arrange for the district court to question witnesses in the jurisdiction where they live.[35] The PIA is an independent group formed by insurance companies and the self-insured to evaluate all patient injury claims; its board of directors chiefly comprises regional council members.[36]

The PIA reviews a claim and then sends it to the place of treatment where the injury was incurred. The recipient, which may be a hospital, a practicing physician, or a specialist, among others, must write a report and send relevant material to the PIA. If multiple locations administered treatment, the PIA collects information from all of them. This information-gathering process typically takes one to two months. The PIA provides the injured party with a copy of the report submitted by the place of treatment and gives him/her the opportunity to submit remarks on it.[37]

Lawyers affiliated with the PIA begin the legal process once the requisite materials for assessing the case have been assembled. They examine "whether an injury has occurred and whether there are grounds for awarding compensation."[38] Assessment of a case typically occurs at a "doctor meeting," where the doctor (who has been provided in advance with the journal and other materials and with questions posed by the lawyers) and the lawyers discuss the case. The average time for processing a claim, from the time of receipt until a decision is made, is eight months.[39]

Claims for damages must be filed with the PIA no later than three years after the party entitled to recover damages "has aquired or should have acquired knowledge of the injury," but

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[34] *Id.* § 19 ¶ 5. The Public Administration Act applies to the activities of the private institution assigned to process the claims. *Id.* § 19 ¶ 6. The Minister of Interior and Health may lay down rules on the rights of appeal if he assigns his powers to a private institution. *Id.* ¶ 5.

[35] THE PATIENT INSURANCE ASSOCIATION, YOUR RIGHT TO COMPENSATION FOR TREATMENT AND MEDICINE-RELATED INJURIES (Feb. 2010), http://www.patientforsikringen.dk/en/Udgivelser-og-tal/~/media/Files/Pjecer/eng ret til erstatning/eng ret til erstatning.ashx; DANISH ACT ON THE RIGHT TO COMPLAIN AND RECEIVE COMPENSATION WITHIN THE HEALTH SERVICE § 33 ¶¶ 1, 2.

[36] Mello et al., *supra* note 1; DANISH ACT ON THE RIGHT TO COMPLAIN AND RECEIVE COMPENSATION WITHIN THE HEALTH SERVICE § 32.

[37] *Processing of Your Case*, PATIENTFORSIKRINGEN, http://www.patientforsikringen.dk/en/Patienter/Behandling-af-din-sag.aspx (last visited Feb. 21, 2012).

[38] *Id.*

[39] *Id.*

they will be barred by statutory limitation ten years after the day on which the injury was caused.[40]

The Ministry of the Interior and Health handles and decides pharmaceutical injury cases, although it may authorize the PIA to perform these functions. If the PIA does so, the expenses it incurs will be paid by the state.[41] The same time limits for claims for damages that apply to medical treatment-related patient injury cases also apply to pharmaceutical injury cases.[42]

E. Calculation of Compensation and Compensation Decisions

If the PIA determines that the party who suffered a medical treatment-related injury is entitled to compensation, it initiates the process of calculating the amount.[43] That calculation is made in accordance with the Liability for Damages Act[44] for amounts that exceed DKK10,000 (about US$1,780).[45] If the patient contributed to the injury "willfully or through gross negligence," compensation "can be reduced or, depending on the circumstances, invalidated."[46] The decision of the PIA is communicated to the relevant insurance company, the government, or the self-insured regional council or district/city council, which then pays out the specified compensation.[47]

Damages and compensation for pharmaceutical injuries are also fixed in accordance with the Liability for Damages Act in most cases, but will only be paid for amounts that exceed

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[40] *Id.* § 59.

[41] *Id.* § 55 ¶¶ 1, 2.

[42] *Id.* § 60.

[43] PATIENTFORSIKRINGEN, *supra* note 37.

[44] ERSTATNINGSANSVARSLOVEN [LIABILITY FOR DAMAGES ACT], No. 885 of Sept. 20, 2005 (*as last amended by* Law No. 610 of June 14, 2011), *available at* http://www.patientforsikringen.dk/da/Love-og-Regler/Erstatningsansvarsloven.aspx; THE DANISH LIABILITY FOR DAMAGES ACT, Consolidation Act No. 885 of Sept. 20, 2005, *as amended by* Act No. 1545 of Dec. 20, 2006, *and* Act No. 523 of June 6, 2007, *available at* http://www.patientforsikringen.dk/en/Love-og-Regler/Lov-om-klage-og-erstatningsadgang/Behandlingsskader.aspx.

[45] DANISH ACT ON THE RIGHT TO COMPLAIN AND RECEIVE COMPENSATION WITHIN THE HEALTH SERVICE § 24(1), (2). The latter provision further states that the Minister of the Interior and Health may stipulate rules "to the effect that compensation for loss of earnings and pain and suffering shall only be paid if the injury resulted in incapacity for work or illness above and beyond a fixed period, which shall not exceed three months." The provision does not apply to injuries sustained by donors pursuant to section 22(1) or (3).

[46] *Id.* § 25.

[47] *Id.* § 33 ¶ 3.

DKK3,000 (about US$534).[48] Damages may be reduced or lapse completely if the patient has contributed to the injury willfully or through gross negligence.[49]

The PIA may require the district/city councils, regional councils, and other relevant parties, as well as the injured patient, to disclose any information that it considers relevant to the consideration of a medical injury claim. It will provide to the Patients' Complaints Board of Appeal and the Ministry of the Interior and Health information necessary for them to perform their duties in connection with a claim.[50] A similar requirement applies to pharmaceutical injury cases.[51]

The Compensation Act stipulates that the amount of damages for injuries covered under its provisions will be limited to DKK150 million (about US$26.7 million) per calendar year. However, the amount of damages for each individual serial injury will be limited to DKK100 million (about US$17.8 million) and for pharmaceutical injuries in connection with clinical tests of pharmaceuticals (biomedical trials) to DKK25 million (about US$4.45 million) per trial. The Act further stipulates that damages cannot exceed DKK5 million (about US$890,000) per injured person.[52] If the above amounts are insufficient to cover all the claims brought by the injured parties, a pro rata reduction of the individual claims will be made, but only in the amounts of damages not already paid out.[53]

Financing of the scheme for damages and related expenses will be paid by the state. The Minister of the Interior and Health is responsible for calculating and disbursing damages but may authorize other parties to carry out such functions.[54]

F. Appeal of PIA Decisions to Patients' Complaints Board of Appeal

An injured party has three months upon being notified of a decision to appeal it, unless there are special grounds for failure to comply with the deadline. Appeals may be brought before the Patients' Complaints Board of Appeal, which makes the final administrative

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[48] *Id.* § 46 ¶¶ 1, 2. The DKK3,000 limit does not apply, however, to pharmaceutical injuries incurred by persons who take part in clinical tests of pharmaceuticals that are not part of the diagnostics or treatment of the person's disease or disorder or to tissue/biological material donors, under section 38, paragraph 2 of the Act. *Id.* ¶ 4. Section 46 also stipulates that the Minister of the Interior and Health may issue rules that compensation for loss of earnings and for pain and suffering will only be paid if the pharmaceutical injury resulted in work incapacity or illness beyond a fixed period, which may be a maximum of three months. *Id.* ¶ 3. This provision also does not apply to section 38, paragraph 2 injuries. *Id.* ¶ 4.

[49] *Id.* § 48.

[50] *Id.* § 37.

[51] *Id.* § 58.

[52] *Id.* § 50.

[53] *Id.* § 51.

[54] *Id.* § 54.

decision.[55] The Board's decisions may be brought before a court within six months of their communication to the complainant. The court may uphold, annul, or change such decisions.[56]

A decision made by the Minister of the Interior and Health or by the PIA in connection with pharmaceutical injury cases may be appealed to the Pharmaceutical Injury Complaints Board, which will make the final administrative decision. Complaints must be submitted within three months of the injured party's having received notification of the (original) decision, although the Board may overlook the deadline if there are special grounds for failure to comply with it. The Board's decision may be brought before a court within six months of receipt of notification of the decision by the complainant.[57]

II. Applicable Court Proceedings

Procedures on the handling of court cases in Denmark are addressed very generally by the Constitutional Act[58] and in detail by the Administration of Justice Act (Denmark's only code of law, sometimes alternatively translated as the Law on Judicial Procedure).[59] Under the Constitutional Act, "[l]aymen must participate in the administration of criminal justice. An Act [i.e., the Administration of Justice Act] establishes which cases will be involved and which forms this participation will take, and includes cases in which jurors must participate."[60]

Laymen appear in court either as lay assessors or as jurors.[61] Cases "of a less serious nature" are heard by a professional judge and two "civil" lay assessors in a district court, and by three civil lay assessors and three professional judges if heard in a High Court.[62] Cases of this

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[55] *Id.* § 35. Section 34 addresses the creation of and appointments to the Patients' Complaints Board.

[56] *Id.* § 36.

[57] *Id.* § 57.

[58] DANMARKS RIGES GRUNDLOV [CONSTITUTIONAL ACT OF DENMARK], http://www.ft.dk/Dokumenter/Publikationer/Grundloven/Danmarks%20Riges%20Grundlov.aspx; FOLKETINGET, MY CONSTITUTIONAL ACT WITH EXPLANATIONS (8th ed. Feb. 2011), http://www.ft.dk/Dokumenter/Publikationer/Engelsk/~/media/Pdf_materiale/Pdf_publikationer/English/My Constitutional Act_with_explanations pdf.ashx.

[59] BEKENDTGØRELSE AF LOV OM RETTENS PLEJE [PROCLAMATION ON THE ACT ON THE ADMINISTRATION OF JUSTICE], Consolidation Act No. 1237 of Oct. 26, 2010, *as last amended by* Law No. 614 of June 14, 2011, https://www.retsinformation.dk/Forms/R0710.aspx?id=138875. The Act has more than 1,000 articles, and only excerpts in English translation were found online.

[60] DANMARKS RIGES GRUNDLOV, ch. 6, § 65, ¶ 2, http://www.ft.dk/Dokumenter/Publikationer/Grundloven/Danmarks%20Riges%20Grundlov/Kapitel%20VI.aspx; FOLKETINGET, *supra* note 58. The Act of Succession is also a constitutional law; it was amended by referendum in 2009. BEKENDTGØRELSE AF TRONFØLGELOVEN [PROCLAMATION OF THE ACT OF SUCCESSION] (*as last amended by* Law No. 528 of June 12, 2009), https://www.retsinformation.dk/Forms/R0710.aspx?id=127085.

[61] FOLKETINGET, *supra* note 58, notes to § 65, ¶ 2, of the Constitution.

[62] *Id. See also, e.g.*, *Eastern High Court*, DANMARKS DOMSTOLE [COURTS OF DENMARK], http://www.domstol.dk/oestrelandsret/EHC/Pages/default.aspx (last visited Feb. 22, 2012). BEKENDTGØRELSE AF LOV OM RETTENS PLEJE, *supra* note 59, tit. I, ch. I, §§ 7 ¶ 3 & 12 ¶ 6 (for High Courts and district courts, respectively). Note that most of the provisions on jurors and lay assessors are found in Book I (The Judiciary), Title I (The Court System), ch. 1 (Courts), §§ 7, 8, 12; Title II (Jurors and Lay Assessor Selection) chs. 6–9 (General Provisions, The Basic List, Jurors and Lay Assessor Lists, and Selection of Jurors for Individual Cases,

nature might deal, for example, with theft, where the accused pleads not guilty and the prosecution seeks a sentence for the accused of less than four years' imprisonment.[63] Presumably, medical malpractice cases would be among the types of cases handled by courts where the bench comprises a judge or judges and lay assessors, should an injured party seek to contest decisions of the Patients' Complaints Board of Appeal or the Pharmaceutical Injury Complaints Board. The lay assessors and the professional judges decide jointly on the guilt of the accused and also jointly determine the punishment.[64] Jury trials are only used in cases of murder, robbery, and the like, and in cases involving political offenses; all such cases are instituted in the district court, and the accused is entitled to appeal the case to a High Court.[65]

Thus, while medical malpractice complaints are handled and decided mostly under an administrative system and might ultimately be taken to court if the injured patient is dissatisfied with the administrative decision, they would typically not be tried by a jury. Moreover, the compensation system is kept separate from the discipline system, and so the administrative decision on a medical malpractice complaint is delinked at the outset from the criminal justice system.

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respectively), §§ 68–87; and Book IV (Criminal Justice), Title I (General Provisions), ch. 62 (Case Competence), § 686, and Title III (Indictment and the Main Hearing in the First Instance), ch. 79 (Jury Cases), §§ 886–894.

[63] FOLKETINGET, *supra* note 58.

[64] *Id*.

[65] *Id*. For cases that are to be handled by juries as well as those that are not to be handled by juries, *see* BEKENDTGØRELSE AF LOV OM RETTENS PLEJE, § 686 ¶¶ 4 & 5.

Prepared by Wendy Zeldin
Senior Legal Research Analyst
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NEW ZEALAND

MEDICAL MALPRACTICE AND THE RIGHT TO TRIAL BY JURY

Executive Summary

New Zealand's constitution, which consists of a collection of legal sources, does not include a right to trial by jury in civil cases. Although there is an option to seek a jury trial in the High Court, the use of juries in civil proceedings is very rare. The New Zealand Bill of Rights Act 1990 sets out broader civil justice rights, including the right to natural justice and the right to judicial review of decisions made by public authorities.

New Zealand essentially abolished the common law tort system for personal injury in the 1970s, replacing it with a comprehensive public insurance system that provides accident compensation on a no-fault basis. The Accident Compensation Act 2001 therefore removes the ability to sue for compensatory damages in most medical malpractice cases. Claims for compensation (including medical costs, weekly payments for loss of earnings, and other assistance) for "treatment injuries" are instead determined by an administrative body. People can seek independent reviews of claim decisions and there is a right of appeal to a court.

I. Right to Trial by Jury Under New Zealand's Constitution

New Zealand's constitutional arrangements are not set out in a single document. Instead, similar to the United Kingdom, New Zealand's constitution is found in a range of sources, including statutes, court decisions, and unwritten "constitutional conventions."[1]

In terms of the right to a trial by jury, the New Zealand Bill of Rights Act 1990 (part of the constitutional arrangements) states that anyone charged with an offense where the penalty is or includes imprisonment for more than three months has the right to a trial by jury.[2] However, there is no equivalent right to a jury trial in civil proceedings. Broader rights to justice are set out in section 27 of the Bill of Rights Act, which states as follows:

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[1] *See* Rt. Hon. Sir Kenneth Keith, *An Introduction to the Foundations of the Current Form of Government*, THE GOVERNOR-GENERAL, http://gg.govt.nz/role/constofnz/intro (last visited Feb. 10, 2012).

[2] New Zealand Bill of Rights Act 1990, s 24(e), http://www.legislation.govt.nz/act/public/1990/0109/latest/whole.html.

> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
>
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
>
> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.[3]

Under section 19A of the Judicature Act 1908, and in accordance with the Juries Act 1981, a jury trial is theoretically available in civil trials at the High Court (but not District Courts, which hear civil claims for amounts up to NZ$200,000[4]) at the request of either party and with the approval of the judge.[5] However, the authors of a 1999 paper on the history of jury trials in New Zealand state that, "[a]s with many common law jurisdictions that still retain trial by jury, the civil jury in New Zealand is seldom used."[6] They go on to state that, "in practice, it is so rare that the Department for Courts [now part of the Ministry of Justice] no longer even keeps statistics on it."[7]

The Supreme Court (New Zealand's highest court) has clearly ruled that there is no constitutional right to a jury trial in civil cases in New Zealand. A plaintiff had applied for a jury trial in the High Court, which was refused by the judge under section 19A(2) of the Judicature Act 1908. In seeking leave to appeal to the Supreme Court, the plaintiff asserted that the Magna Carta 1297 (British imperial legislation that may partially be included in New Zealand's constitutional arrangements) provided a right to a jury trial. Rejecting this argument, the Supreme Court stated,

> [E]ven if it were accepted that c29 of Magna Carta extended to jury trials in civil proceedings, the matter is now covered by New Zealand legislation which makes it clear that proceedings are to be tried by Judge alone unless the Court exercises its discretion to

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[3] *Id.* s 27.

[4] District Courts Act 1947, ss 29, 58, http://www.legislation.govt.nz/act/public/1947/0016/latest/DLM242776.html.

[5] Judicature Act 1908, http://www.legislation.govt.nz/act/public/1908/0089/latest/whole.html; Juries Act 1981, http://www.legislation.govt.nz/act/public/1981/0023/latest/whole.html.

[6] Neil Cameron, Susan Potter & Warren Young, *The New Zealand Jury*, 62 LAW & CONTEMP. PROBS. 103, 103 (Spring 1999), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1127&context=lcp.

[7] *Id.* at 109. *See generally*, *Vote Courts*, MINISTRY OF JUSTICE, ANNUAL REPORT, 1 JULY 2010 – 30 JUNE 2011 at 46 (2011), http://www.courts.govt.nz/publications/global-publications/m/ministry-of-justice-annual-report-1-July-2010-30-June-2011/vote-courts-and-public-correspondence-and-access-to-information.

> order trial by jury. Any operation Magna Carta may once have had in relation to civil proceedings has now been plainly displaced by s 19A.[8]

II. Medical Malpractice and the No-Fault Accident Compensation System

The article referred to above identifies a link between the reduction in civil jury trials in the 1970s and the introduction of the no-fault accident compensation system:

> The effective abolition of the vast majority of personal injury actions in 1972 (and their replacement with a comprehensive "no-fault" state administered compensation scheme) has now relegated the civil jury to only one or two cases per year.[9]

A. Overview of the No-Fault Accident Compensation System

New Zealand has in place a national public insurance system that provides coverage for personal injuries. Funding for the system is provided through levies (on employers, salary and wage earners, and motor vehicle owners) and from general taxation. Coverage is provided on a "no-fault" basis—compensation for the costs associated with an injury is available regardless of whether the injured person or another party was at fault. Claims arising from a personal injury, including injuries resulting from medical treatment, are assessed and determined by the Accident Compensation Corporation (ACC), a government company that administers the system. Independent reviews of its decisions and court appeals are possible. The ability to sue another party, including a health care provider, for costs or damages with regard to their part in causing an injury is considerably restricted.

B. History

New Zealand's no-fault personal injury compensation system was established by the Accident Compensation Act 1972, which took effect on April 1, 1974. The legislation has been amended a number of times over the years and the system is now governed by the Accident Compensation Act 2001.[10] The system was developed in response to various factors and developments in New Zealand's legislation since the early 1900s, eventually leading to the 1967 report of the Royal Commission on Workers' Compensation (commonly called the Woodhouse

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[8] *Michael Gregory v Thomas Patrick Joseph Gollan & Ors*. [2009] NZSC 29, *available at* http://www.courtsofnz.govt.nz/from/decisions/judgments-supreme/judgments-supreme-2009 (scroll down the page to open the decision in PDF).

[9] Cameron et. al, *supra* note 6, at 112. The footnote for this sentence states that "In 1960, civil jury trials accounted for 35.75% of the total civil actions heard in the Supreme Court [equivalent to what is now the High Court]. By 1976, after three years of operation of the accident compensation scheme, see Accident Compensation Act, 1972, §§ 4-5 (N.Z.), the number had fallen to 12.65%." *Id*. n.73 (referring to Report of the Royal Commission on the Courts, pt. 1 (AJHR Paper H2, 1978)).

[10] Accident Compensation Act 2001, http://www.legislation.govt.nz/act/public/2001/0049/latest/whole.html.

Report), which recommended the substantial reform of tort law with respect to personal injury and the introduction of a completely new system.[11]

C. Coverage of 'Treatment Injuries'

Under the current legislation, a "treatment injury" is deemed to be a personal injury covered by the Act.[12] Prior to 2005, the equivalent term used in the legislation was "medical misadventure" but reforms passed in that year removed the requirement for ACC to determine that a health professional had made an error that led to the injury, consistent with the no-fault approach of the rest of the system.[13]

Treatment injury is defined in section 32 of the Act and specifically relates to injuries resulting from treatment by a "registered health professional." If a person's treatment injury is covered by the Act, they can submit a claim to ACC for compensation and coverage of costs associated with that injury.[14]

ACC may contribute to a wide range of medical costs arising from a personal injury, including treatment injuries, as well as for a number of other costs depending on the severity of the impairment and the needs of the claimant. Assistance may include coverage for home help and childcare, compensation for loss of earnings, rehabilitation, transport assistance, and home modification.[15]

ACC claims are completed with the assistance of the health professional from whom the injured person seeks treatment for their injury (who must be an "approved treatment provider"). The health professional attaches any clinical notes related to the claim, which it submits to ACC on behalf of the patient. As indicated above, decisions on claims are made on an administrative

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[11] *See generally*, *History of ACC*, ACCIDENT COMPENSATION CORPORATION (ACC), http://www.acc.co.nz/about-acc/overview-of-acc/introduction-to-acc/ABA00004 (last visited Feb. 13, 2012). The Woodhouse Report is available on the website of the Auckland University Library, http://www.library.auckland.ac.nz/data/woodhouse/.

[12] Accident Compensation Act 2001, s 20(2).

[13] *See* Injury Prevention, Rehabilitation, and Compensation Amendment Act (No. 2) 2005, http://www.legislation.govt.nz/act/public/2005/0045/latest/whole.html. *See also*, *History of ACC in New Zealand*, *supra* note 9, under the heading "2005: IPRC Amendment Act 2005." For further discussion of the amendments, *see* page relating to Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No. 3) (as the original bill was known) on the New Zealand Parliament website, http://www.parliament.nz/en-NZ/PB/Legislation/Bills/0/6/0/00DBHOH_BILL6234_1-Injury-Prevention-Rehabilitation-and-Compensation.htm. The bill was assessed by the Ministry of Justice and found to be consistent with the New Zealand Bill of Rights Act 1990 (Ministry of Justice, Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No. 3), July 23, 2004, http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/injury-prevention-rehabilitation-and-compensation-amendment-bill-no.3.

[14] *See generally*, *Am I Covered?*, ACC, http://www.acc.co.nz/making-a-claim/am-i-covered/index.htm (last visited Feb. 13, 2012). *See also*, *Injury from Medical Treatment*, ACC, http://www.acc.co.nz/making-a-claim/how-do-i-make-a-claim/ECI0014 (last visited Feb. 13, 2012).

[15] *See*, *What Support Can I Get*, ACC, http://www.acc.co.nz/making-a-claim/what-support-can-i-get/index.htm (last visited Feb. 13, 2012).

basis by ACC.[16] ACC states that "the majority of claims are assessed at the registration centre within 21 days of being lodged."[17]

Funding for payments arising from covered treatment injuries is managed through a Treatment Injury Account.[18] Funds in this account may be derived from levies on health professionals or any organization that provides treatment under the Act, but may also be funded by levies on earners and non-earners.[19] According to ACC, "[t]he cost of treatment injury and non-work related injuries are predominantly funded by wage earners either directly through a levy or via general taxation."[20]

In each of the last two years, ACC has received more than 5,000 new claims that were registered against the Treatment Injury Account. Of these, about 500 were for weekly compensation for loss of earnings.[21]

D. Reviews and Appeals Processes

Part 5 of the Accident Compensation Act 2001 relates to dispute resolution, including reviews and appeals. The available steps for challenging a decision on a claim include mediation, review by an independent reviewer, then, if the dispute is still not resolved, a claimant may appeal a review decision to the District Court.[22] The New Zealand Bill of Rights Act 1990, including the provisions on natural justice and the right to judicial review, apply to both ACC's processes and any subsequent reviews or appeals.

E. Limits on Litigation Relating to Treatment Injuries

Under section 317 of the Accident Compensation Act 2001, "no person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of personal injury covered by this Act." However, section 319 provides that no person is prevented from bringing proceedings for "exemplary damages" (i.e., punitive damages) for conduct by the defendant that

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[16] *See*, *How Does ACC Decide If I Am Covered?*, http://www.acc.co.nz/making-a-claim/how-do-i-make-a-claim/ECI0006#P42_3786 (last visited Feb. 13, 2012).

[17] *Id.*

[18] *See* Accident Compensation Act 2001, ss 228–230.

[19] *Id. See also*, *How We're Funded*, ACC, http://www.acc.co.nz/about-acc/overview-of-acc/how-were-funded/index.htm (last visited Feb. 13, 2012).

[20] ACC, FINANCIAL CONDITION REPORT 2011, at 28, http://www.acc.co.nz/PRD_EXT_CSMP/groups/external_communications/documents/reports_results/wpc097190.pdf.

[21] ACC, ANNUAL REPORT 2011, at 14–16, http://www.acc.co.nz/PRD_EXT_CSMP/groups/external_communications/documents/reports_results/wpc096354.pdf.

[22] *See*, *Unhappy with a Decision ACC Has Made?*, ACC, http://www.acc.co.nz/making-a-claim/what-if-i-have-problems-with-a-claim/ECI0044; *Dispute Resolution Services Limited*, ACC, http://www.acc.co.nz/making-a-claim/what-if-i-have-problems-with-a-claim/ABA00017; *Want to Appeal a Review Decision?*, ACC, http://www.acc.co.nz/making-a-claim/what-if-i-have-problems-with-a-claim/ECI0045 (all last visited Feb. 13, 2012).

has resulted in a personal injury that is covered by the Act. The section also provides some guidance to the court regarding the award of exemplary damages. In addition, ACC, as the insurer, has the right to recover the entitlement provided to the person who receives money as a result of an award of damages or a settlement.[23]

F. Further Reading

There are a large number of resources available that examine and discuss New Zealand's no-fault accident compensation system and approach to medical malpractice from a variety of perspectives, including comments on the limitations on the right to sue for personal injury. The Law Library of Congress holds a range of reports and books related to the system and tort law in New Zealand. In addition, the following is a nonexhaustive list of articles that are available online:

- Stephen Todd, *Treatment Injury in New Zealand*, 86(3) CHICAGO-KENT L.R. 1169 (2011), http://www.cklawreview.com/wp-content/uploads/vol86no3/Todd-Cut.pdf. Professor Todd is a leading academic in the area of New Zealand's tort law and accident compensation system. A list of his publications can be found on the University of Canterbury website, *at* http://www.canterbury.ac.nz/spark/Researcher.aspx?researcherid=88655 (last visited Feb. 13, 2012).
- Geoffrey Palmer, *New Zealand's Accident Compensation Scheme: Twenty Years On*, 44(3) U. TORONTO L.J. 223 (1994), http://www.jstor.org/stable/825757.
- Thomas Douglas, *Medical Injury Compensation: Beyond 'No Fault'*, 17 MED. L. REV. 30 (2009), http://medlaw.oxfordjournals.org/content/17/1/30.full.pdf.
- Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73(3) CAL. L.R. 976 (1985), http://www.jstor.org/stable/3480348.
- Colleen M. Flood, *New Zealand's No-Fault Accident Compensation Scheme: Paradise or Panacea*, 8(3) HEALTH L.R. 3 (2000), http://www.law.ualberta.ca/centres/hli/userfiles/floodfrm.pdf.
- James C. Johnston, *Tort Reform System: Medical Negligence in New Zealand*, *in* AMERICAN COLLEGE OF LEGAL MEDICINE, THE MEDICAL MALPRACTICE SURVIVAL HANDBOOK (2007), *available at* http://www.ablminc.org/Model_Curriculum_LMME_2010/BOOK_MedMal%20Survival%20Handbook_2007/Ch27-A04438.pdf.
- Marie Bismark & Ron Paterson, *No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety*, 25(1) HEALTH AFF. 278 (2006), http://content.healthaffairs.org/ content/25/1/278.full.
- Bronwyn Howell, *Medical Misadventure and Accident Compensation in New Zealand: An Incentives-Based Analysis*, 35(4) VIC. U. L. REV. 857 (2004),

[23] Accident Compensation Act 2001, s 321(4).

http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-35-2004/issue-4/howell.pdf.

- Petra Butler, *A Brief Introduction to Medical Misadventure*, 35(4) VIC. U. L. REV. 811 (2004), http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-35-2004/issue-4/butler.pdf.

- Brian Easton, *Ending Fault in Accident Compensation: Issues and Lessons from Medical Misadventure*, 35(4) VIC. U. L. REV. 821 (2004), http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-35-2004/issue-4/easton.pdf.

- Peter H. Schuck, *Tort Reform, Kiwi-Style*, Paper 1679, *Yale Faculty Scholarship Series* (2008), http://digitalcommons.law.yale.edu/fss_papers/1679.

- Peter Davis, et. al, *Compensation for Medical Injury in New Zealand: Does "No-Fault" Increase the Level of Claims Making and Reduce Social and Clinical Sensitivity?*, 27(5) J. HEALTH POL., POL'Y & L. 833 (October 2002), http://jhppl.dukejournals.org/content/27/5/833.abstract [abstract only, full article available to purchase].

- Michelle M. Mello et. al, *'Health Courts' and Accountability for Patient Safety*, 84(3) MILBANK Q. (2006), http://www.milbank.org/quarterly/8403feat.html.

- Michelle M. Mello, Allen Kachalia, & David M. Studdert, *Administrative Compensation for Medical Injuries: Lessons from Three Foreign Systems*, ISSUES IN INT'L HEALTH POL'Y (The Commonwealth Fund, July 2011), http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/Jul/1517_Mello_admin_compensation_med_injuries.pdf.

Prepared by Kelly Buchanan
Foreign Law Specialist
February 2012

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SWEDEN

MEDICAL MALPRACTICE AND THE RIGHT TO TRIAL BY JURY[*]

Executive Summary

Medical malpractice cases in Sweden are handled chiefly by an administrative system whereby insurers of health care providers pay compensation for avoidable injuries to the injured patient within stipulated limits, and there is no fault for the doctors. However, the applicable law, the Patient Injury Act, also allows for suits for damages, which are handled in conformity with the country's Tort Liability Act. Sweden's judicial system relies on panels of judges or mixed panels of judges and lay judges to hear cases; only in cases involving freedom of the press are juries used.

I. Overview

Most malpractice claims in Sweden are settled through an administrative system whereby insurers of health care providers, by means of a consortium, pay out compensation to injured patients.[1] This voluntary scheme was established in 1975 by public and private health care providers, based on the view that obtaining compensation through the tort system had proved to be too difficult for patients.[2] That system "required plaintiffs to meet a higher standard of proof than the 'preponderance of evidence' standard used in personal injury litigation in the U.S.," making the process "protracted and expensive," so that few claims were brought and few were successful.[3] In 1995, the voluntary system was restructured and regional hospital authorities, through a mutual insurance company owned by them (LÖF, *Landstinges Ömsesidiga Försäkringsbolag*), began to insure all public hospitals and physicians and those private providers who had a government contract. In 1997, under the newly in force Patient Injury Act, it became mandatory for all health care providers to have liability insurance. Furthermore, to

[*] At present there are no Law Library of Congress research staff members versed in Swedish. This report has been prepared by the author's reliance on practiced legal research methods and on the basis of relevant legal resources, chiefly in English, currently available in the Law Library and online.

[1] Jocelyn Bogdan, *White Paper: Medical Malpractice in Sweden and New Zealand: Should Their Systems Be Replicated Here?*, 21 CENTER FOR JUSTICE & DEMOCRACY [NYU Law School] 3 (July 2011), http://centerjd.org/content/white-paper-medical-malpractice-sweden-and-new-zealand-should-their-systems-be-replicated-0; Michelle M. Mello, Allen Kachalia & David M. Studdert, *Administrative Compensation for Medical Injuries: Lessons from Three Foreign Systems*, ISSUES IN INT'L HEALTH POL'Y 3 (The Commonwealth Fund, July 2011), http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/Jul/1517_Mello_admin_compensation_med_injuries.pdf.

[2] Mello et al., *supra* note 1, at 3.

[3] *Id.*

make compensation available to patients injured by those providers who remained uninsured, insurance companies formed the Patient Insurance Association (*Patientförsäkringsföreningen*).[4]

Under Sweden's "vast general welfare and public healthcare systems," a large portion of a victim's costs are already covered before medical malpractice compensation system kicks in—the general welfare system covers 80% of a victim's sick leave and the healthcare system all medical costs.[5] As a result, the malpractice compensation system is viewed as being " 'on top of' the general welfare system, not in place of it . . . ."[6]

II. Court Proceedings in Sweden

In Sweden, court cases at the district court level are handled by a single judge or a three-judge panel for civil cases, and by a judge and three lay judges (*nämndemän*) or by one or more judges (in less serious cases) for criminal cases.[7] At the appellate level, in cases appealed from district courts, in general at least four judges (but no more than five) will adjudicate the case; in criminal cases, at least three judges and two lay judges (but not more than four judges and three lay judges) will constitute the bench.[8] The lay judges are elected by Sweden's political parties.[9]

Juries are not used to try cases in Sweden, unless a case involves freedom of the press.[10]

> In freedom of the press cases in which there is a question of liability under penal law, the question of whether an offence has been committed shall be tried by a jury of nine members, unless both parties have declared themselves willing to refer the case for decision by the court, without trial by jury. The question of whether the defendant is liable for the printed matter under Chapter 8 [of the Freedom of the Press Act] is however always tried by the court sitting alone. When the question of whether an offence has been committed is tried by a jury, the answer shall be deemed to be in the affirmative if at least six members of the jury concur in that opinion.[11]

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[4] *Id*.

[5] Bogdan, *supra* note 1, at 3.

[6] *Id*.

[7] RÄTTEGÅNGSBALK [RB] [CODE OF CIVIL PROCEDURE] 1:3–3d, *updated through* SFS 2011:861, http://www.notisum.se/rnp/sls/ lag/19420740.htm, *in English translation at* http://www.regeringen.se/content/1/c4/15/40/472970fc.pdf. It appears that chapter 1, sections 3–3d have not been amended since 1998.

[8] *Id*. 1:4, ¶¶ 1–2.

[9] Christian Diesen, *The Advantages and Disadvantages of Lay Judges from a Swedish Perspective*, 72 REVUE INTERNATIONALE DE DROIT PENAL 356 (2001/1), *available at* http://www.cairn.info/revue-internationale-de-droit-penal-2001-1-page-355.htm.

[10] Per Henrik Lindblom, *ch. 4. Procedure*, *in* AN INTRODUCTION TO SWEDISH LAW 107–09, 112 (Stig Strögholm ed., 2d ed. 1988).

[11] 12 ch. 1 ¶ TRYCKFRIHETSFÖRORDNING [THE FREEDOM OF THE PRESS ACT] (Svensk författningssamling [SFS] 1949:105, *as last amended* 2010), *available at* NOTISUM, http://www.notisum.se/rnp/sls/lag/19490105.htm, *in English translation at* http://www.wipo.int/wipolex/en/text.jsp?file_id=238605.

The Freedom of the Press Act is one of four fundamental laws comprising Sweden's Constitution. The other three are the Instrument of Government, the Act of Succession, and the Fundamental Law on Freedom of Expression.[12]

III. Medical Malpractice Compensation Under Swedish Law

Sweden is one of the countries in the world that has a "no-fault" system for avoidable medical care injuries, handled through administrative claims without court involvement, in conformity with special legislation. Under this system, the patient has a right to receive compensation and no blame is attributed to doctors (the system is separate from the disciplinary action system). This is in contrast to "fault" systems, where the patient must prove negligence on the part of the doctor in conformity with regular tort law.[13] Nevertheless, the tort system may still be used in Sweden: "[t]he patient has always the right to go to court. But the procedure at the insurance company is free . . . [as is] also the appeal to the Patients Claims Panel."[14]

A. Compensation Under the Patient Injury Act

The Patient Injury Act[15] is the major law governing compensation for injuries suffered in the Swedish health care system. The Act obligates health care providers to have insurance to cover patient compensation.[16] Insurers who issue patient insurance must be affiliated with the Patient Insurance Association.[17]

Patient injury compensation is to be paid by the insurer; if more than one patient insurer covers the same loss, the insurers are jointly and severally liable for payment, and will assume among themselves an equal share of liability.[18] The right to compensation may be limited only on the basis of circumstances that occurred after the event of the injury, which, according to the Insurance Contracts Act, may entail a limitation of the insurer's obligation to pay the amount insured.[19]

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[12] *See*, *The Swedish Constitution*, GOVERNMENT OFFICES OF SWEDEN, http://www.sweden.gov.se/sb/d/2707/a/15187 (last updated Feb. 1, 2010).

[13] KAJ ESSINGER, SWEDISH SYSTEM: RIGHT TO COMPENSATION FOR DAMAGE CAUSED BY HEALTH CARE (2008), http://www.patientforsakring.se/resurser/dokument/engelska_artiklar/swedish_system_right_to_compensation.pdf.

[14] KAJ ESSINGER, THE SWEDISH MEDICAL INJURY INSURANCE (Feb. 20, 2009), http://www.patientforsakring.se/resurser/dokument/engelska_artiklar/Report_on_the_Swedsih_Medical_Injury_Insurance.pdf.

[15] PATIENTSKADELAG [THE PATIENT INJURY ACT] (SFS 1996:799, *updated through* SFS 2010:1265), *available at* NOTISUM, http://www.notisum.se/rnp/sls/lag/19960799.htm, *in English translation at* http://www.patientforsakring.se/resurser/dokument/engelska_artiklar/The_Patient_Injury_Act.pdf.

[16] *Id.* 1 § & 12 §.

[17] *Id.* 15 §.

[18] *Id.* 13 §. If there is no patient insurance available, the insurers affiliated with the Patient Insurance Association are jointly liable for the compensation that would have been paid had the patient insurance existed. *Id.* 14 § 1 ¶.

[19] *Id.* 4 §. FÖRSÄKRINGSAVTALSLAG [INSURANCE CONTRACTS ACT] (2005:104, *updated through* SFS 2011:12), *available at* NOTISUM, http://www.notisum.se/rnp/sls/lag/20050104.htm.

The Patient Injury Act provides for compensation in cases of

- avoidable injuries;
- injuries caused by defective medical equipment or the incorrect use of such equipment;
- injuries caused by an incorrect/delayed diagnosis;
- the transmission of an infectious agent during treatment;
- certain injuries caused by accidents during patient transport or in a fire or other damage to health facilities or equipment; and
- injuries caused by the administration of the wrong medication.[20]

In determining the right to compensation under the first and third circumstances set forth above, the applicable standard is that of experienced specialists or practitioners in the given field.[21]

Compensation will not be provided if

- the injury results from a necessary procedure for the diagnosis or treatment of an illness or injury which, without treatment, is immediately life-threatening or could entail severe disability;[22]
- the injury is caused by pharmaceuticals in circumstances other than those involved in the administration of the wrong medication (e.g., one suffers side effects from a correctly prescribed drug);[23]
- the injury falls under the rubric of unavoidable injuries or complications;[24]
- an infection is caused by one's own bacteria or if the condition for which one is being treated is more serious than the infection;[25] or
- the time limit for bringing a compensation claim is not met.[26]

According to the Act, an injury must be reported within three years of the time that one becomes aware that a claim can be made and, in any event, within ten years from the time that the injury

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[20] *Id.* 6 § 1 ¶; PATIENTFÖRSÄKRINGEN LÖF, IF YOU ARE INJURED IN THE HEALTH CARE SYSTEM, http://www.patientforsakring.se/resurser/dokument/andra_sprak/English_If-you-are-injured-in-the-health-care-system.pdf (last visited Feb. 15, 2012).

[21] PATIENTSKADELAG 6 § 2 ¶.

[22] *Id.* 7 §.

[23] *Id.*; PATIENTFÖRSÄKRINGEN LÖF, *supra* note 20.

[24] PATIENTFÖRSÄKRINGEN LÖF, *supra* note 20.

[25] *Id.*; PATIENTSKADELAG 6 § 3 ¶.

[26] *Id.*

was caused. If the person seeking compensation reported the injury to the health care provider or the insurer within that time limit, he or she has six months within which to bring an action after having received the insurer's final position on the matter.[27]

B. Determination of the Amount of Compensation

Under the current compensation process, an insurance adjuster has a year to confer with doctors and medical experts in the relevant fields and decide whether to pay the victim compensation, which, as was indicated in the "Overview," above, is an amount in addition to that which the government already pays under the general welfare and healthcare systems. Compensation is based on the specific injury, and there is a cap on noneconomic damages, based on age and the injury.[28]

More specifically, patient injury compensation is determined in accordance with Chapter 5 (on determining damages), sections 1–5, and Chapter 6 (on common provisions), sections 1 and 3, of the Tort Liability Act (*Skadeståndslagen*, SFS 1972:207) with the limitations stated in sections 9–11 (of Chapter 3) of that Act.[29] The patient injury compensation is limited per each injury event to a maximum of 1,000 times the price base amount, applicable when the compensation is determined, but for each injury event in which multiple victims are involved the compensation for each injured patient may not exceed 200 times that price base amount. Interest and compensation for litigation costs are not included in these amounts.[30] In calculating the amount of compensation, a sum equal to one-twentieth (i.e., 5%) of the price base amount—set in accordance with Chapter 2, sections 6 and 7 of the Social Insurance Code (*Socialförsäkringsbalk*)—applicable when the compensation is determined, will be deducted as excess.[31]

According to the CEO of LÖF, "[e]very year 10,000 patients make a claim and 4,300 get compensation. The reason for not compensating claims is usually that the injury was not

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[27] PATIENTSKADELAG 23 §. In the summary provided in PATIENTFÖRSÄKRINGEN LÖF, *supra* note 20, the three-year limit applies to the time one became aware "that the injury is objectively noticeable," "that the injury may be linked to a treatment and that patient injury compensation is possible," and "which insurance provider [one's] claim should be addressed to."

[28] Bogdan, *supra* note 1, at 3.

[29] PATIENTSKADELAG 8 §; SKADESTÅNDSLAGEN [TORT LIABILITY ACT] (SFS 1972:207, *updated through* SFS 2010:1458), *available at* NOTISUM, http://www.notisum.se/rnp/sls/lag/19720207.HTM.

[30] PATIENTSKADELAG 10 §. The Act provides that if the liability sum applicable under the per claim amount of up to 1,000 times the base amount (set forth in 10 § 1 ¶) is not sufficient to satisfy those entitled to compensation, their compensation is to be reduced by the same quotient portion for each of them. *Id*. 11 § 1 ¶.

[31] PATIENTSKADELAG, *supra* note 15, 9 §; SOCIALFÖRSÄKRINGSBALK [SOCIAL INSURANCE CODE] (SFS 2010:110, *updated through* SFS 2011:1520), *available at* NOTISUM, http://www.notisum.se/rnp/sls/lag/20100110.htm. The price base amount is set annually by the government to keep up with inflation; in 2011, the price base amount was SEK42,800 (about US$6,402), and in 2012 it is set at SEK44,000 (about US$6,581). Thus, the deduction from the price base amount used for purposes of calculating compensation was set at SEK2,140 (about US$320) in 2011 and SEK2,200 for 2012 (about US$329). PATIENTFÖRSÄKRINGEN LÖF, *supra* note 20; *Social Insurance in Sweden*, GOVERNMENT OFFICES OF SWEDEN, http://www.regeringen.se/sb/d/15473/a/183495 (last updated Jan. 31, 2012).

avoidable."[32] An injured patient who is not satisfied with the compensation decision can appeal to the Patient Claims Panel (*Patientskadenämnd*), an independent body described as "a kind of special appeal [sic] court for medical injuries," to deliver an opinion on the claim.[33] The government-appointed Panel members, who are judges and consultant doctors, must include representatives of the patient's interests.[34] Requests for a Panel opinion may be submitted by a patient or other person suffering loss, a health care provider, an insurer, or a court.[35] The members of the Patient Insurance Association are obliged under the Patient Injury Act to maintain and finance the Panel.[36] The Panel hears about 1,000 claims a year, and only approves about 10% of them.[37]

C. Tort Damages

The Patient Injury Act provides that even though patient injury compensation may be paid under its provisions, the injured party may instead demand tort damages "in accordance with the rules applicable thereto,"[38] i.e., the Tort Liability Act. A person who has paid tort damages by reason of an injury referred to in the Patient Injury Act assumes, up to the sum paid, the rights of the injured person to patient injury compensation, but this does not apply if the patient injury compensation can be reclaimed by the party liable for tort damages in accordance with section 20, paragraph 1, of the Act.[39] The latter covers recovery or reclaiming of compensation, whereby the insurer assumes, up to the sum paid, the compensation paid by the party liable for tort damages for losses caused intentionally or through gross negligence, for an injury covered by the Product Liability Act, or for an injury covered by traffic insurance in accordance with the Traffic Damages Act.[40]

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[32] ESSINGER, *supra* note 14, at 5.

[33] *Id.*

[34] *Id.*; PATIENTSKADELAG 17 §, 1 ¶.

[35] PATIENTSKADELAG 17 §, 2 ¶.

[36] *Id.* 17 §, 1 ¶.

[37] ESSINGER, *supra* note 14, at 5. For a copy of a patient Claims Report in English, *see* http://www.patientforsakring.se/resurser/dokument/blanketter/claims_report.pdf (last visited Feb. 21, 2012).

[38] PATIENTSKADELAG 18 §.

[39] *Id.* 19 §.

[40] *Id.* 20 §.

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Prepared by Wendy Zeldin
Senior Legal Research Analyst
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