



somewhat  
different

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

## Medical Malpractice

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

Medical Malpractice claims are not new. However, we can observe that law is changing in several jurisdictions. Conditions and definitions have become more and more patient and consumer friendly. New treatments are being used, people have a longer life expectancy, and the care costs are exploding. Consequently, it is still not easy to evaluate this risk. (Re-)Insurers have to consider various new developments in the different markets.

For example, the number of beneficiaries has expanded and awards for the damage of pain and suffering have increased continuously. A dangerous trend could result from stressed economies. Healthcare systems depending on public funding may face an increasing number of medical malpractice claims due to cost cutting resulting in understaffing. However, medical doctors and nursing staff are also leaving the sector for other reasons (e.g. work overload during the Covid-19 pandemic), which will have significant impact in quality of patient care.

Drastic changes due to regulatory interventions in several countries make the calculation of premiums and the determination of reserves increasingly difficult and sometimes unpredictable. Another interesting development is the ongoing discussion about a system change towards a strict liability system. The observations made under the heading “social inflation” also apply in particular to the area of medical malpractice. The developments mainly affect the amount of claims. Finally, it remains to be seen what impact the Covid-19 pandemic will have on medical liability.

As a general observation, medical malpractice claims are rising both in mature and emerging markets in frequency and severity. Patient expectation, awareness of both medical errors and corresponding patient rights and readiness to take action against health care suppliers is rising. Even in markets known for low litigiousness the claims mentality is changing noticeably. In line with consumer friendly tendencies in legislation and judicature, patients are increasingly backed by favourable legal developments. This is mainly the case in developed European and Anglo-American legal systems, but these factors influence the legal doctrine and approaches in emerging markets as well. The rise in severity well above wage-role or consumer price inflation is partly linked to these legal tendencies, especially in the case of more generous moral damage awards. Another major contributing factor is the substantial increase in costs of nursing care.

There are a number of developments that may lead to medical malpractice claims in the future, including the use of new technologies. Application of new technologies is day-to-day business in modern medicine. In many cases, patients have a substantial benefit from medical progress but in some areas, they may be at risk. In spite of research and preclinical studies there is no long-term experience with new technologies and the risk-benefit analysis is often based on very few cases used for approval processes. There have been cases in the past where promising new technologies showed negative long-term results and disappeared from daily practice after some years.

Hospitals and doctors may be held liable in the future for damages related to the use of new technologies due to improper risk-benefit-analysis and improper informed consent process. Special attention is necessary where new technology applications remain within the patient’s body (e.g. implants). (Re-)Insurers may face class actions or serial losses with substantial financial burden. Therefore, it is crucial to implement appropriate risk management strategies and proper serial loss clauses if insured’s are going to use new technologies in medicine.