

TORT LAW REVIEW

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ARTICLES

Medical liability laws in China: The tale of two regimes – Chao Xi and Lixin Yang

Medical liability laws in China have undergone a series of major reforms in the last decade, culminating in the enactment in 2009 of the *Tort Liability Law*. One outcome of these reforms has been the emergence of a bifurcated medical negligence legal system in China, consisting of two distinct and separate medical liability regimes: an administrative regime and a judicial regime. The more traditional administrative regime strongly favours medical care providers, whereas the judicial regime takes a more pro-plaintiff stance. The rise of the judicial regime has led to an increase in the frequency and severity of medical negligence claims, “forum shopping” by plaintiff patients, and the prevalent practice of defensive medicine. The *Tort Liability Law* sets out, among other things, to bridge this bifurcation, but only with limited success. Many of the new statutory provisions, which are characterised by vagueness and generality, may be subject to flexible and varied interpretations; and much of the pre-existing medical liability rules remain intact and still applicable to the extent that they are not inconsistent with the new Law. 65

Tabet v Gett: The High Court’s own lost chance of a better outcome – David Birch

In *Tabet v Gett* (2010) 240 CLR 537 and *Gregg v Scott* [2005] 2 AC 176, the High Court and House of Lords respectively dismissed medical negligence claims by patients seeking damages for their lost chances of better medical outcomes as a result of inadequate treatment by their doctors. This article explores the doctrine of loss of chance and its history in Australia and the United Kingdom and then considers the core arguments offered for and against the doctrine of lost chance in the cases of *Tabet* and *Gregg*. It argues that the High Court’s analysis in *Tabet* was inadequate and that the court should not have so comprehensively rejected the doctrine without completely evaluating the arguments surrounding it. 76

Causation, contribution and Clements: Revisiting the material contribution test in Canadian tort law – Lynda M Collins

In 2007 the Supreme Court of Canada articulated a test of material contribution to risk as an alternative to sine qua non in the Canadian law of causation. The test elucidated in *Resurfice Corp v Hanke* [2007] 1 SCR 333 was designed to address situations in which application of the “but for” standard would produce injustice because of the existence of intractable uncertainty unconnected to the merits of the plaintiff’s case. In scenarios involving poorly understood technologies, the quest for proof of cause on a balance of probabilities may be a Quixotic one. In such cases, it makes sense to impose liability on defendants who have negligently created a risk of the kind that ultimately materialised. The 2010 decision of the British Columbia Court of Appeal in *Clements (Litigation Guardian of) v Clements* 2010 BCCA 581 drastically narrowed the scope of the material contribution exception set out in *Hanke*, and replaced a principled test with an arbitrary,

categorical approach. The author argues that the *Hanke* test strikes an appropriate balance between the interests of plaintiffs (compensation) and the public (deterrence) on the one hand, and fairness to defendants on the other. 86

Continental European approaches to causation and intervening causation issues in civil proceedings – Douglas Hodgson

Both Anglo-American-Australasian and continental European legal systems recognise and apply the concepts of factual causation and legal causation. While the resolution of causation issues in the former legal systems is primarily judicially-based, the latter legal systems draw more heavily upon the doctrinal writings of jurists and legal philosophers. This comparative law piece analyses the similarities and differences between the systems, including the continental European reliance upon individualising and generalising theories. The article concludes by identifying the central role which judicial policy plays in resolving both legal causation and intervening causation issues and the increasing convergence of approach across these legal systems concerning the application of the scope of the normative rule approach in the causal context. 94

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