

Vietnamese Tort Liability on Medical Malpractice: Analysis and Comparison

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Abstract

Liability in medical malpractice is a kind of tort. It is the responsibility to commit unlawful acts which cause damage to others regarding property, health, personality, and personal rights that previously occurred between the medical practitioner causing the damage to a patient. The unlawful acts are not described in the contract and are not scoped in the contract breaches. The actions of causing damage outside the contract infringe upon the group of persons entitled to be protected by law. Civil Code and Law on Medical Examination and Treatment are mainly applied in Vietnam. However, compared to other legal, medical malpractice systems, Vietnam's legal one has faced many challenges in determining the wrong acts from the medical practitioners. The study used the method of comparison and analysis between Vietnam and some European countries to find the differences. There are some recommendations for Vietnamese medical malpractice law in the tort system.

Keywords— duty of care, fault, medical malpractice, tort, strict liability

Background

The Civil Code 2015 and Law on Medical Examination and Treatment 2009 (LMET) are the main bases for adjusting medical malpractice (MM). In addition, criminal and administrative liabilities can be applied in case of such an occurrence. Unlike the situation in Belgium, France, and England, in Vietnam, there is neither legal literature about MM nor any jurisprudence that have been published.

In Vietnam, the Civil Code regulates local transactions under contract and tort. The Civil Code enacted in 2005 was in use in Vietnam. However, the Civil Code of 2005 was replaced by a new reformed Civil Code enacted on 24th

November 2015 and was put into practice on 1st January 2017.

According to the Civil Code, tort liability is the responsibility to commit unlawful acts which cause damage to others regarding property, health, personality, and personal rights that previously occurred between the person causing the damage and the person being caused the damage. The unlawful acts are not described in the contract and are not scoped in the contract breaches. The acts of causing damage outside the contract infringe upon the group of persons entitled to be protected by law.¹

¹ Article 548 - Civil Code.

Similarly. In Belgium, France, and England, the tort law is applied when a physician negligently causes damage. To establish MM case, the patient must prove fault and other elements: a duty of care, breach of a duty of care, and causation.

Recently, Vietnam has legalized the law on compensation without fault but in a strict scope.

Tort

• 2.1. Fault

There is no definition of fault in the Civil Code, but it classifies fault into two kinds: intentional fault and unintentional fault (negligence). A complete overview of medical fault in Vietnamese law requires the combination of various legal sources such as the Civil Code, LMET, and legal guiding documents.

The definition of fault in Vietnam seems slightly different as compared to Belgium, France, and England. The three countries have a common aspect fault definition. Generally, a fault is defined as “a person failing to obtain an acceptable standard/ behaviour when carrying out a duty.” Evidently, Belgium says that a fault is a violation of a written or unwritten rule of conduct in force in a specific society at a precise moment. It is a flexible concept whose contents may vary according to time and place. Alternatively, it can be referred to as socially unacceptable behaviour. In this case, two main subcategories of fault are distinguished. The fault can consist of negligence, a departure from the general duty of care. Subject to an invisible mistake or other causes of justification, fault also arises from a violation of statutory or regulatory provisions imposing specific conduct or a duty to abstain.² Elsewhere, in France, the

fault is described in ways: *First, a person commits fault if he violates a statutory rule. Each statutory regulation is considered to have an entire scope because it protects each person who suffers damage caused by breaking the statutory regime. Secondly, the fault can be established by breaching a pre-existing vocal duty.*³ In England, the fault is similar to Belgium and France in that the fault means that the defendant must fail to take the care expected of a reasonable person in the circumstances.⁴ While Vietnam only specifies that a fault is an act that causes unintended damage. The following is evidence to explain the fault in Vietnam and its differences with other countries.

Under the tort of negligence, the author will follow the route of unintentional fault as it has the meaning of negligence.

“Unintentional fault is in a case that a person does not foresee his act likely causes damage although he must know that the damage will occur or might be prevented.”⁵ The act, in this case, will be called an illegal act.

The definition of unintentional fault implies that to establish the liability, the person who causes damage does so without realising that the error might cause damage. In other words, the person recognises that the act is wrong, but s/he performs the act without expecting damage; instead, the person believes that damage is

² Kruithof, M., and De Bondt, W., *Introduction to Belgian Law*, Wolters Kluwer, 2017, p. 250.

³ Cees Van Dam, *European Tort Law*, Oxford University Press, 2006, p.302.

⁴ Stauch, M., *The Law of Medical Negligence in England and Germany: A Comparative Analysis*, Hart Publishing, 2008, p. 27-28.

⁵Article 364 - Civil Code 2015.

preventable, then that damage occurs as a result of an illegal act.⁶

As for the meaning of an illegal act, the law does not regulate it, but the researcher as: explains it

“An illegal act is a behaviour. It can exist in the form of action or no action. Every human thought is never considered a violation of the law;

An illegal act is an act that must be contrary to the specific requirements of the law such as doing what the law prohibits or failure to do what the law requires.”⁷

Under this definition, there is a considerable difference compared to reports of fault in Belgium, France, and England. While infringing of a standard is a prerequisite in determining a fault in the three countries, causing damage is a core element in deciding according to the Civil Code in Vietnam.

Combined with the LMET, a fault is determined when a physician infringes the responsibilities for care and treatment of patients; infringes the professional and technical criteria and professional ethics (infringement the so-called standard of care which the author will discuss below), and infringes upon the rights of patients.

Based on the LMET there are three instances in which that fault may occur.

⁶ Article 5.276 - Civil Code.

⁷Le, V.S., *Discuss the Events of Force Majeure and the Principles of Speculation of Fault in Article 584 of the Civil Code 2015*, Ministry of Justice, 2017;

<http://www.moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=2103>

First, some Articles (from Article 54 to 68) must be followed when health professionals are offering health services. However, to the best of the researcher’s knowledge, it seems like a very general guideline. Failure to follow this guideline leads to a situation where fault will be established.

Secondly, the fault is also established in another case. If a health professional applies medical methods and technology that are not admitted cause damage,⁸ he commits a fault. Therefore, according to Vietnamese law, a fault is determined when someone fails to obligate the provisions approved by the Government.

Thirdly, a fault in MM law in Vietnam may also include:

“...infringing upon patients’ rights; failing to observe professional and technical regulations in medical examination and treatment; taking advantage of positions and powers in medical examination and treatment, abusing the profession to harm the honor, dignity and body of a patient, erasing and modifying case history dossiers to falsify information on medical examination and treatment.”⁹

The researcher will discuss the standard of care under Vietnamese law in the following part (breach of a duty of care).

The researcher will discuss more the second point of fault. It seems a fault in MM even if a doctor uses medical professional methods and techniques correctly according to international standards. Still, those that are not yet recognised in Vietnam and damage occurs

⁸ Article 6.6 - Law on Medical Examination and Treatment, No. 40:2009/QH12.

⁹Article 6. 10- Law on Medical Examination and Treatment.

(damage may be caused by a fault or not). For example, a Vietnamese doctor trained in France may be knowledgeable on some advanced therapies in cancer treatment that are internationally accepted in cancer treatment. Suppose he applied for the same medicines in Vietnam, where they are not recognised. Then, unfortunately, the patient dies. Consequently, it is challenging for the doctor to avoid liability in this case as it is not easy to prove that whether there is a causation between fault and damage. In practice, Vietnam has been lagging behind in learning and adapting new international standards in health care.

The MM laws of Belgium, France, and England may not have enacted the so-called “fault” as written in Vietnamese medical law. That fault is: *“taking advantage of positions and powers in medical examination and treatment, abusing the profession to harm the honour, dignity, and body of a patient, erasing and modifying case history dossiers to falsify information on medical examination and treatment.”*¹⁰ It is not difficult to answer why this regulation exists in Vietnamese MM law. The reason is that corruption is prevalent in the system, as indicated earlier.

Moreover, in cases of emergency, the physician will be exempted from the liability if technical means, equipment, and/or practitioners are not available. There is also no liability if there are no professional regulations on a disease. Other forces majeure cases result in such incidents. This regulation aims to exempt physicians from liability. However, this is the fault of the government for failing to provide adequate resources in health care services. In practice, numerous patients have suffered damage when this regulation is referenced. Physicians like to blame the lack of equipment, human resources,

¹⁰Article 6. 10 - Law on Medical Examination and Treatment.

and an incident being out of their professional knowledge to escape the liability. This point, indeed, should be considered as a no-fault compensation.

For example, a case occurred in September 2016. Truc - a woman who was expectant with twins, was taken to a general hospital in Hau Giang: a province in the South of Vietnam. The doctor said that she was fine and all she had to do was wait to deliver. Suddenly, she began bleeding, and after an ultrasound, the doctor stated that the twins had died. Truc was transferred to Can Tho Maternity Hospital in critical condition. What ensued was: stillbirth, liver failure, kidney failure, and coagulopathy. The physician did dialysis and plasmapheresis, but she died later. Explaining her death, the manager of the hospital in Hau Giang said,

“As that day was a Sunday, no obstetrician was present. There was only a general physician. When her health deteriorated, the obstetrician was called immediately to treat her, but his house is very far from the hospital, so it took time for him to come to save her and her children.”

This case is still being investigated. Investigators are trying to find out the cause of the deaths of the twins and the woman. While waiting for the conclusion, a representative of the hospital in Hau Giang visited and gave some money to her family.¹¹

Clearly, in this case, to avoid or reduce liability, lack of human resource was referenced. However, it sounds incredibly unreasonable that

¹¹ T., Luy, *The Hospital Negligently Caused Deaths of the Mother and Child was Sued*, Tuoi Tre, 2016;

<http://tuoitre.vn/tin/chinh-tri-xa-hoi/20160912/gia-dinh-to-benh-vien-tac-trach-lam-chet-ca-me-lan-con/1170258.html>.

a hospital could run with obstetric functions but without enough obstetric professionals.

As such, Vietnam does not have a complete fault definition, and it is understood differently from other countries. Having an acceptable rule on a fault in the medical sector, it is necessary to combine different legal sources. The main difference is that the fault of law in Vietnam does not mention acceptable standard/behaviour. This difference makes the application of the law misleading since the fault only focuses on the damage caused by an unintentional act. It ignores an essential factor in determining the fault. The fault is a failure to obtain the acceptable standard/behaviour which causes the damage.

- **2.2. Duty of care**

Article 274 of the Civil Code defines duty as:

“Duty is a task under which a person or more than one person (from now on referred collectively to as the obligator) must transfer an object, transfer rights, pay money or return valuable papers, perform tasks or refrain from doing tasks in the interests of one person or several persons (hereinafter referred collectively to as the obligee).”

Besides, Article 275 of the Civil Code states that several bases arise from liability to a duty of care. Among these bases, exists one related to MM, which is referred to as *“illegal act of causing damage.”* The concept of an illegal act in the context of MM is discussed below.

Also, Article 276 of the Civil Code outlines the objects of the duty:

“Objects of duty may be a property or a task which must be performed or not be performed; an object of duty must be determined”;

Synthesizing the Articles 274, 275, and 276, duty in the context of MM is a task that must be or not is performed by a medical practitioner in the interests of a patient. A medical practitioner must perform or not perform the duty of care by the statutory medical regulations. That duty must be regulated by law (determined duty).

Also, the LMET requires the definitions of examination, treatment, and patients to explain the duties of medical practitioners. It is a way to establish the relationship between medical practitioners and patients via duty of care:

“Medical examination means the inquiry into diseases and medical history, physical examination, and instruction for paraclinical testing or functional probe, when necessary, diagnosis and education of recognised appreciate treatment methods;

Medical treatment means the use of recognised professional and technical methods and drugs licensed for circulation for first aid, cure, care, and functional rehabilitation of patients;

Patients are the users of medical examination and treatment services.”¹²

Under the definitions, a patient can contact a medical practitioner (in private or through public agencies) to use the described health services, and the practitioner provides certain health care services. The context means that the duty of care of a medical practitioner is established. Linking to the Civil Code, a health practitioner must perform or not to perform in the patient's interest. For example, diagnosing and treating the patient or not applying new treatment methods that are not yet recognised to treat the patient.

¹² Article 2 - Law on Medical Examination and Treatment, No.40/2009/QH12.

Similarly, in Belgium and France, in Vietnam, a duty of care originates from the Civil Code, a contract or tort. Nevertheless, the patients claim only compensation under the tort of negligence although they establish a contract when using health services.¹³ It seems that the private physicians do not assure the outcome but carry the duty most reasonably.

- **2.3. Breach of a duty of care**
 - 2.3.1. In general

In the Civil Code of Vietnam, the breach of duty means the obligator fails to follow the regulations stated below:¹⁴

“Perform a duty under which a person owing a duty is obliged to perform that exact duty;

Or not to perform a duty under which a person owing a duty is obliged to, or not to perform that specific duty.”

However, a breach of a duty of care is not defined in the LMET. The Civil Code seems concerned with establishing a breach of a duty of care in the case of MM.

One of the most difficult challenges in Vietnam is to answer the question: what are the criteria to determine a breach of duty? In Belgium, France, and England, *the standard of care* is taken into consideration when deciding whether an act is a breach of a duty of care.

The Belgian and French laws state that a doctor must give patients *“conscientious, attentive care in conformity with the current medical professional care.”* England also has a similar notion of a standard of care. It is described that *“A doctor is not guilty of negligence if he has acted by a practice accepted as proper by a*

¹³ Article 584 - Civil Code.

¹⁴Article 281- Civil Code.

responsible body of medical men skilled in that particular art....merely because there is a body of opinion which would take a contrary view.”¹⁵

The notion of a standard of care in the three countries shows a common idea that a doctor is under a duty to use reasonable care and skills to offer a patient medical help conscientiously and attentively. In other words, it should conform to the data and advances in medical science, so the current level of scientific progress should be considered.¹⁶

Below, the author will present the standard of care in Vietnam.

- **2.3.2. Standard of Care**

The standard of care in Vietnam does not have the same features as in Belgium, France, and England. To determine the so-called standard of care in Vietnam must contain two elements:

1. A physician must be licensed to practice instead of being considered a skilled person. It means having a physician license is a one of the condition to meet a standard of care.
2. Then, the licensed practitioner has to obligate these regulations in medical examination and treatment. These regulations can be seen in Vietnam as the obligation to use reasonable care and skills as other countries. It is presented as the following:

- (a) *A medical examination is an inquiry into diseases and medical history, physical examination, and instruction for paraclinical testing or functional probe,*

¹⁵McHale, J., *Medical Malpractice in England - Current Trends*, *European Journal of Health Law*, 2003, p.136.

¹⁶ Nys, H., *Report on Medical Liability in Council of Europe Member States*, Council of Europe, 2005, p. 2.

when necessary, for diagnosis and instruction of recognised appreciated treatment methods;

(b) Medical treatment means the use of recognised professional and technical methods and drugs licensed for circulation for first aid, cure, care and functional rehabilitation of patients;”

Based on the above regulations, Vietnam does not use the notion of “reasonable person” or “skilled doctor” to indicate a person who is qualified to carry a duty of care under the evaluation of his peer(s). Instead of calling the physician is “a skilled person,” Vietnam names that one is a “licensed person.”¹⁷ Understanding, the licensed person may be skilled or not according to the LMET when s/he is never evaluated by peer(s).¹⁸

If a medical practitioner would like to get the license, he/she has to satisfy the following conditions:

1. *Professional diplomas in health granted or recognised in Vietnam;*
2. *Certificates of owners of herbal remedies or treatment methods;*
3. *Certificates of the practice duration, except for herbalists and owners of herbal remedies or treatment methods.*
4. *Certificates for practising medical examination and treatment.*¹⁹

The licensed medical practitioner does not need to be skilled under peer’s evaluation but qualified under the administrative procedure.

¹⁷ From Article 17 to Article 25 - Law on Medical Examination and Treatment.

¹⁸ Article 2.6 - Law on Medical Examination and Treatment.

¹⁹ Article 18 - Law on Medical Examination and Treatment.

The licensed person (a licensed health practitioner) has to obligate to the regulations in examination and treatment as the so-called standard of care. Neither the Civil Code nor the LMET defines the standard of care. However, the LMET regulates: (1) the *professional and technical requirements for medical examination and treatment*, (2) *the application of new techniques and methods for medical examination and treatment*”.²⁰ According to Vietnam’s laws, this could be called the standard of care.

Nevertheless, this regulation does not mean “*standard of care*” directly but requires health practitioners to obligate the requirements of medical examination and treatment. The requirements in the medical context would be national and international standards which must be recognised according to Law on Promulgation of a Legal Document.²¹ Even if some standard of care has been widely applied internationally, it should be approved for it to be applied in Vietnam. The Ministry of Health is responsible for promulgating and supporting the standard of care for medical examination and treatment in each case.²²

As Vietnam applies the statutory law, the requirements for medical examination and treatment will be applied if the national legislature enacts them. The liability of medical practitioners will arise if they fail to obligate to the written requirements. Therefore, the standard of care in Vietnam is not considered based on ordinary skilled professional persons but depends on written, enacted law and

²⁰ Article 1 - Law on Medical Examination and Treatment.

²¹ Law on Promulgation of Legal Documents 2017 No. 80/2015 / QH13.

²² Decree on Providing Regulations on the Functions, Tasks, Authorities and Organizational Structure of Ministry of Health - 75/2017/NĐ-CP.

allowed for use by the Legislature. However, this can take a long time to act and might be weak and outdated. Consequently, this would limit medical advances in Vietnamese medical law.

The issue mentioned above has been raised not only in legislation but also in practice. There are two main reasons why Vietnam does not apply “standard of care” through a skilled person but written documents.

First, the qualifications and distributions of health practitioners are not standardised. The following evidence proves this point:

1. There are a few highly qualified health practitioners with the disproportionate distribution. The bulk of public workers with post-graduate degrees (doctorate, masters) is low (2.2 %) and are concentrated in high-level facilities. Health workers with university qualifications (mainly doctors) account for 29% of the total health workforce and are mostly focused at provincial hospitals. However, there is no data on the proportion of health workers trained as specialists or resident doctors to analyse the qualifications of the health workforce.
2. Qualifications of preventive health workers remain poor. The number of universities trained health staff in the preventive system remains low at 11.2 %, and only 2% hold professional preventive medicine degrees/certificates (e.g., public health, occupational, etc.);
3. The low number of lower-level health workers could be responsible for the poor delivery of health services and the widespread medical errors in diagnosis and treatment. Research statistics indicate that only 64% of patients referred from provincial or district to central services

were given an accurate diagnosis at the lower levels.²³

The second reason is the difference in the quality of medical equipment in Vietnam and other countries such as Belgium, France, and England. Directly applying excellent international medical standards in Vietnam is not tenable because most medical equipment operators and professionals are not trained well (not techno-savvy) enough to match the international standards. To avoid these problems, the government has opted to control the standard of care of practitioners through the current statutory regulations. Even though they are out of date, evidently, district hospitals' medical equipment only meets 30-50% of the official requirements. In some facilities, the equipment only meets 20% of the requirements. Hospitals still lack necessary equipment for diagnosis, emergency response, and treatment such as X-rays, ultrasound, biochemical tests, hematology, ventilators, patient monitors, surgical instruments, and surgical lights. The medical staff lacks adequate training and experience to explore all the features of the existing equipment. The technical team is inadequately equipped to keep up with the rapid innovations in medical technology.

Moreover, the number of domestic medical equipment manufacturers is limited, and they produce just a few types of instruments and equipment, which are of relatively low quality. The medical equipment manufactured in Vietnam tends to be mechanical or electronic but not high-tech products such as digital ones. The commercial system for distribution, importation, and exportation of medical equipment is incomplete; it lacks capital, information, qualified staff with financial

²³ Health Partnership Group, *Joint Annual Health Review 2009: Human Resources for Health in Vietnam*, Vietnam Ministry of Health, 2009, p. 80-81.

knowledge, and technical qualifications on medical equipment. Moreover, medical equipment investment in hospitals is considered a strategic competition tool. However, it has led to high dependency on medical equipment and waste due to lack of knowledge or overprovision of services. Equipment investments are not linked to the capacity for utilisation, nonselective adoption of technologies and lack of state orientation on medical equipment.²⁴

Although the Vietnamese health sector does not meet the world's standard of care, the government has tried to set the standard of care by prescribing standards and quality assurance for medical equipment. The health ministry has developed and issued documents to regulate medical equipment standards at different levels. The Ministry of Health has also teamed up with the Center for Standards and Quality (Ministry of Science and Technology) and Vietnam Standards for medical equipment to raise standards. Standards for medical equipment have been developed and promulgated to meet the requirements of production, business, investment, exploitation, use, and management. The Ministry of Health has also developed technical standards as required and implemented inspection on a wide range of equipment such as X-ray machines, CT-scanners, electrocardiograms, ventilators, and anaesthesia equipment. The Project developed a list of essential medical equipment was developed for use by the Project on construction investment to renovate and upgrade district hospitals, regional hospitals, and regional

polyclinics funded through government bonds and other legal sources of funds.²⁵

In short, to improve the standard of care in Vietnam, the issues of skilled personnel and facilities should be addressed equally. This amelioration can utilise all the ability of the skilled physician and facilities' functions. For example, in a situation where a skilled physician could treat a cancer patient, but due to outdated medical facilities, the patient died. On the contrary, also in this example, the physician could have been not skilled enough (as mentioned, the qualifications of health workforce are different from level to level) so s/he could not explore the modern equipment in cancer treatment. Consequently, the cancer patient was not saved. The patient lost the chance to live because the health sector lacks skilled physicians and modern equipment. Under Vietnamese regulations, these events would be called "*incidents in medical examination and treatment.*"²⁶ Consequently, the physician may be exempted from taking liability.

Optimistically, along with the development of medical equipment, standards of the medical workforce will also improve. Hence, in a few years, Vietnam will have wholly defined standards of care.

• 2.3.4. Damage

According to the Civil Code, *those who infringe upon the life, health, honour, dignity, prestige, property, rights or other legitimate interests of individuals and thereby cause damage shall*

²⁴ Health Partnership Group, *Joint Annual Health Review 2012: Improving Quality of Medical Services*, Vietnam Ministry of Health, 2012, p. 102-103.

²⁵ Health Partnership Group, *Joint Annual Health Review 2012: Improving Quality of Medical Services*, Vietnam Ministry of Health, 2012, p. 102-103.

²⁶ Article 2. 13 - Law on Medical Examination and Treatment.

have to compensate.”²⁷ The LMET does not have any regulation for damage compensation. Hence, the Civil Code is applied in the case of medical payment.

Naturally, the patient can only ask for compensation when the fault has been proven. Otherwise, one cannot be compensated under a legal procedure.

Different from Belgium, France, and England, Vietnam does not classify damage to include economic and non-economic damage, but it defines the subjects who suffer from damage such as health, life, and dignity under the following rules:

• **Article 590. Damage caused by harm to health**

1. *Damage caused by harm to health shall comprise of:*
 - a. *Reasonable costs for treating, nursing and rehabilitating health, functional losses, and impairment of the aggrieved person;*
 - b. *Loss of or reduction in the actual income of the aggrieved person. If the real income of the aggrieved person is irregular and cannot be determined, the average income level for the type of work performed by the aggrieved person shall be applied;*
 - c. *Reasonable costs and actual income losses of the aggrieved person's careers during the treatment period. If the aggrieved person loses their ability to work and requires permanent care, the damage shall also include reasonable costs for taking care of the aggrieved person.*
 - d. *Other damage as prescribed by law.*

2. *A person causing harm to another person's health must pay an amount of money as compensation for the mental suffering of the aggrieved person. The amount of compensation for mental suffering shall be as agreed on by the parties. If the parties cannot agree, the maximum sum shall not exceed the fifty-month base salary prescribed by the State.*

• **Article 591: Damage caused by harm to life**

1. *Damage caused by harm to life shall comprise:*
 - a. *Damage caused by harm to life prescribed in Article 590 of this Code;*
 - b. *Reasonable funeral costs;*
 - c. *Support for the dependents of the aggrieved person;*
 - d. *Other damage as prescribed by law.*
2. *A person causing death to another person must pay some amount of money in compensation for the mental suffering of the closest relatives in the first line of succession (husband/wife and children) to the deceased. If there are no such relatives, this sum shall be paid to the persons who were directly reared by the deceased or to the persons who directly reared the deceased (parent, partner, etc.). The amount of compensation for mental suffering shall be as agreed by the parties; if the parties cannot agree, the maximum sum shall not exceed 100 months of the basic salary prescribed in by the State.*

• **Article 592: Damage caused by harm to honour, dignity or reputation**

1. *Damage caused by harm to the honour, dignity or reputation shall comprise:*
 - a. *Reasonable costs for mitigating and remedying the damage;*
 - b. *Loss of or reduction in actual income;*

²⁷ Article 584 - Civil Code.

- c. *Other damage as prescribed by law.*
2. *A person causing harm to the honour, dignity or reputation of another person must pay compensation for damage for mental suffering of the aggrieved person. The amount of compensation for mental suffering shall be as agreed by the parties; if the parties are not able to agree, the maximum sum shall not exceed ten months of basic salary prescribed by the State.*

Although Vietnam does clarify the damage based on the damage's objects, there are also two kinds of damage from the rules: economic damage and non-economic damage just like in Belgium, France, and England's laws. The above regulations serve the same purpose: tort compensation for restoring the patients to the same position they were before the damage.

For economic damage, the concept that needs to be stressed in these regulations is "reasonable expenses." Nevertheless, there is no definition of the phrase "reasonable expenses" both in the Civil Code and the LMET.

Another significant point for reasonable expenses that the Vietnamese MM law does grant is the patient's right to be compensated with a free choice of a doctor and the hospital in which to be treated.²⁸ As such, the patient is not given the best health services as expected. The standard that is usually applied is the "social health care cost." In other words, the patient goes back to the government health system which has maintained a lot of unreasonable issues. If a patient wishes to use health care services out of the budget covered by SHI, the expenses would not be seen as reasonable

²⁸ Article 8: Circular on Primary Medical Examination and Treatment covered by Health Insurance and Transfer to other Levels for Health Examination and Treatment Covered by Health Insurance, No. 40/2015/TT-BYT, Health Ministry of Vietnam.

expenses. As a result, the patient would have to use his/her own money.²⁹ The deficiency in this rule diverts the Vietnamese MM law from its purpose, thereby placing the patient in the same financial problem.

Belgian, French, and English laws require that if the doctor and patient fail to agree upon the amount to be compensated, the court should decide the amount based on actual losses and expenses resulting from the injury, including expenses for medicine and nursing or the loss of life.³⁰ However, while Belgian³¹ and French laws³² consider losses of future earnings, or a chance to get a promotion, Vietnam law does not recognise the same.

Besides economic damage, the non-economic damage is also considered when compensating a patient. Same as economic damage, the non-economic damage is only regulated in the Civil Code but not in the LMET. The regulations of non-economic damage (to health and life) are conditional provisions in the same rules that regulate economic damage. In other words, the non-economic damage is only considered if economic damage takes place. It means that the patients must prove the causation between economic loss and non-economic loss. They

²⁹ Article 22. 3 - Law on Amending and Supplementing Some Articles of Law on Health Insurance, No. 46/2014/QH13, Parliament of Vietnam.

³⁰ Koch, B, *Medical Liability in Europe: A Comparison of Selected Jurisdictions*, De Gruyter, 2011, p. 81-82.

³¹ Vansweevelt, T. and Weyts, B., *Handboek Buitencontractueel Aansprakelijkheidsrecht (Extra-contractual Liability Law Handbook)*, Intersentia, 2009, p. 720.

³² Tourneau, P., *Droit de la responsabilité et des contrats (Law of Liability and Contracts)*, Dalloz, 2004, p. 364-365;

Bell, J., *Governmental Liability: Some Comparative Reflections*, 2006, InDret, p. 15.

cannot separately claim for non-economic damage. French courts allow patients to be compensated after liability for a tortious act has been established and do not consider physical or psychological impact as being relevant.³³ In the opinion of the author, this omission in Vietnamese law does not provide enough protection to the patient when he/she is harmed. In practice, some patients are mentally infringed upon despite having no physical pain. For example, Mr. A had some stomach pain.³⁴ He went for a check-up and was informed that he has stomach cancer, after which he immediately went home. After being checked into another hospital, he was found to have chronic gastritis. He was profoundly shocked and was inclined to commit suicide. He could not ask for moral compensation because he could not prove that his moral pain was a result of physical pain. In his case, his moral pain was a result of misdiagnosis, not physical damage.

The author does not find any basis to clarify the kinds of non-economic damage (such as distress, loss of amenity, enjoyment and aesthetic damage, etc.). In practice, the lack of basis most of the time makes the parties fail to agree on compensation as the rule of law states.

If they fail to agree, the compensation will be calculated based on the basic income.³⁵ For example, a person (an accountant or a teacher) who suffers mental damage when his health is

³³ Lambert-Faivre, Y., *Droit du Dommage Corporel (Right of Personal Injury)*, Dalloz, 2015, p. 39.

³³ Bell, J., *Governmental Liability: Some Comparative Reflections*, InDret, 2006, p. 19.

³⁴ Minh Nhat, *Extra- contract Liability*, Ministry of Justice, 2015;

<http://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=1806>

³⁵ Article 590. 2 - Civil Code.

harmed, may get maximum 150 euro x 50 months=7500 euro.³⁶ This application restricts the right to commensurate mental damage compensation. Evidently, the law imposes the full compensation based on income calculation regardless of how dangerous the patient suffers from mental damage. In Belgium, France, and England amount of compensation is not limited, and the count is to be based on actual losses.

- 2.3.5. Causation

- + In general

Similar to Belgian, French, and English laws, in Vietnam, when one has proof of causation between fault and damage, he/she is obligated to seek compensation. According to Article 584 of the Civil Code, the damage must occur as a result of the unlawful. Damage will inevitably result from behaviour if it contains a real reason causing damage.³⁷ Similarly, in Belgium and France, the theory of “*equivalence of conditions*”³⁸ is considered to establish liability. Also, when making a decision in England, the courts always argue that the injury would not have occurred “but for”³⁹ the defendant's

³⁶ Decree on Regional Minimum Wage Regulation - No. 153/2016. ND-CP.

³⁷ Phi, L, *Grounds for Liability Arising out of Contract Compensation in the Civil Code 2015*, Journal of Democracy and Law;

<http://tcdcp.l.moj.gov.vn/qt/tintuc/Pages/thi-hanh-phap-luat.aspx?ItemID=288>

³⁸ The theory of the equivalence of the conditions entails that every condition of an injury is a cause. Since it is impossible to specify the exact share of each condition in the production of the result, every factor should be considered as a cause. It is also believed that all conditions are necessary to produce the result and are, therefore, inevitably equivalent. In other words, all the conditions without which the effect would not have occurred are necessarily equivalent. (Richard Goldberg, *Perspective on Causation*, Hart Publishing Ltd, 2011).

³⁹ *Barnett v Chelsea & Kensington Hospital [1969] 1 QB 428.*

negligence. However, Vietnam has never officially recognised the test theory “*but for.*”

- **+ Burden of proof**

The patient has a duty to prove the causation. Besides, under the Code of Civil Procedure, Article 85.2⁴⁰ notes that “*in the cases stipulated by this Code, the judge may conduct one or some measures to collect documents and evidence*” to supply more evidence or make the evidence sufficient. By doing this, neutrally, the Court can protect the right interests of the plaintiff and claimant.

- **+ Loss of a chance**

In its purest form, loss of a chance is a doctrine permitting recovery of damages for the destruction or reduction of prospect for achieving a more favourable outcome. It most often arises from a failure to diagnose cases, but it also has been recognised and applied in various similar instances. The application happens when a patient who is already ill or stricken claims MM that results in the loss of chance of a better outcome. Save for lack of timely diagnosis or another alleged failure, the patient’s chances for cure or a more favourable outcome would have been more significant with the result a palpable loss deserving of compensation.⁴¹

Belgium, France, and England have applied the doctrine. However, in Vietnam, this theory has never been implemented in legislation as well

⁴⁰ Code of Civil Procedure, Article 85.2 of the Law amending and supplementing some articles of the Civil Procedure Code (CPC) (effective from 01/01/2012) noted: In the cases stipulated by this Code, the judge may conduct one or a number of measures to collect documents and evidence.

⁴¹ Weigand, A., *Loss of Chance in Medical Malpractice: A Look at Recent Developments*, Defense Council Journal, 2003, p. 301.

as in practice. Practically, although there are no statistics, uncountable patients have lost chances to be diagnosed and treated with better outcomes. As presented, only 64% of patients referred from provincial or district to central services were given an accurate diagnosis at the lower levels. Indeed, among them, 36 % of the patients who got the wrong diagnosis would lose a chance of a better outcome. Such patients have not had any legal protection to sue for damages.

Conclusion

MM called professional negligence as a type of tort of negligence. The principles of MM law mostly directly apply to the tort of negligence.

MM laws in Belgium, France, England, and Vietnam apply the theory of tort of negligence based on a fault to adjust the wrong actions of health providers, with common vital factors as described. To establish fault, the duty of care, breach of a duty of care, damage and causal link between fault and damage are the required elements to succeed in a MM claim if based on fault system. Although the countries impose these elements as compulsory, the content of each is not the same among countries. In particular, Vietnam has many different points compared to Belgium, France, and England. For instance, in Belgium, France, and England, a fault is a person’s failure to obtain an acceptable standard/ behaviour when carrying a duty, while in Vietnam, the fault is defined as an act that causes unintended damage. Another difference is that Vietnam does not recognise the standard of care and loss of a chance in determining the responsibility of physicians when they caused damage.

The four countries Belgium, France, England, and Vietnam establishes the duty of care based on contract and tort laws. However, England seems to be in favour of establishing a duty of

care based on tort law because it has a health care system, in which patients use national health services funded by the government. Hence, the relationship between doctors and patients is non-contractual. While, Belgium, France, and Vietnam can apply contract or tort law because their health care systems are a mix of public and private partnership. Therefore, the relationship between doctors and patients is based on contract or tort law (for example, tort liability can be an omission out of the contract which injured a third party or failed to inform.)

While Belgium and France apply traditional *Mercier*, England uses *Bolam v Frien Hospital Management Company* to explain why they apply the theory of standard of care in MM cases. However, they have a universal perspective in defining the concept of the standard of care. That is the proper treatment generally accepted by the medical profession for a given medical condition in similar situations.⁴² In Vietnam, a standard of care is taken differently based on a licensed person's written regulations in examination and treatment.

Strict liability in the four countries has existed but is somewhat limited in MM cases. In Belgium, there may not be specific MM cases applying the strict liability under the Act of 25th February 1991. The limit may conclude that strict liability can be applied in all matters under the Act. It is not the same in France. Strict liability in MM has been applied, for example, from the use of defective products by physicians and hospital-acquired infections. In England, strict liability in MM is also regulated

under the Product Liability Directive, for instance, in supplying of blood products infected with hepatitis C. Also, the absence of consent to treatment is considered a strict liability. In contrast, the strict liability law is only applied in vaccination activity in Vietnam.

Entirely different from the three countries, Vietnam has an additional medical liability system called MM administrative liability. Admittedly, this liability can play its role by partly preventing health professional's errors if it is applied accurately. Nevertheless, administrative liability in some cases is the buoy of physicians to evade their liabilities which they should be responsible for if the Civil Code and the Criminal Code are applied.

Although criminal punishment is not an aim of the tort of negligence, it still exists in the four countries. While Belgium and France, more attention is given to doctor's acts (recklessness or negligence) and the consequences (patient's injury or death) could be responsible for the criminal law. On the other hand, England requires a 'guilty mind' on the part of the doctor and death consequence to apply criminal law. Different from England but similar to Belgium and France, under the Vietnamese Criminal Code, if an act has done unintentionally but negligently caused death or severe injury, the health care provider may be taken to criminal court.

As a result of this study's findings, the MM law in Vietnam should be amended when it has some problems. For example, in the crucial parts such as standard of care, loss of a chance and damage compensation. Moreover, the scope of no-fault compensation should be broadened.

⁴² Franklin, C., Marutzky, E. and Sanberg, C., *Medical Professional Liability: Physician's Guide to Understanding Professional Negligence Claims*, Residence & Staff Physician, Vol. 53, 2007, p. 23.

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