Medical Malpractice and the Goals of Tort Law

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Imagine that you have an eighteen-month old son who is suffering from severe pain in his back and legs, and after a consultation, the doctor insists that you are simply a neurotic, over-worried parent and sends you and your family to a psychiatrist. Upon getting a second opinion, you discover that your son has a tumour on his spine. Or, imagine that a family member receives a gall stone operation and ends up losing their pancreas, most of their stomach, small bowel and spleen. In addition, the doctor stitched through the mesenteric artery and failed to give a proper diagnosis before the operation. Your loved one dies shortly thereafter. As responses to these incidents, the doctors and hospital staff do not offer any apologies or explanations other than “it was just one of those things.” The experience leaves you feeling angry, bitter, betrayed, and humiliated. The sad thing here is that these scenarios and post-incident reactions are based upon actual accounts reported from either the patients who were involved or their relatives.1

If you found yourself in one of these or an analogous situation, what would be your reaction? Would your only ambition be to get compensated and nothing else, or would you want to get some answers, accountability and perhaps the added assurance that the same thing does not happen to someone else? Some would say that in order to get these latter things, medical malpractice law needs to remain based in the tort system. However, the benefit of having the tort system play a role in medical malpractice law is not a universally held proposition as is evidenced by the following remark:

A totally irresponsible legal system, driven by a small cadre of lawyers who have hit the mother lode, has produced perhaps the most dysfunctional medical-liability system in the world. Juries hand out millions of dollars not just for lost earnings but also in capricious punitive damages in which the number of zeros attached to the penalty seems to be chosen at random… This is not a hard problem to fix. Tort reform is not rocket science… The current system is crazy, ruinous and unfair. And it is easily changed. By lawyers.2

This quotation presents a stark and pessimistic view of the current medical malpractice system, as well as malpractice lawyers, and should set off alarm bells in

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2 Charles Krauthammer, “Sick, Tired and Not Taking It Anymore” Time 161:2 (13 January 2003) 53 at 53. This article is commenting on the state of the American medico-legal situation.
the ears of any medical malpractice lawyer in Canada, as talk of tort reform with respect to medical malpractice litigation inevitably leads to a dialogue about no-fault based compensation schemes for avoidable medical injuries. Such a scheme would result in a great reduction of possible files (and therefore income) for some of these lawyers. Indeed, this is not a pleasant prospect for lawyers who practice in this area. The situations described above, however, suggest that there may be other non-economic and unselfish reasons for maintaining the current tort-based medical malpractice system. Thus the question arises: are there non-economic and non-efficiency based concerns that ought to be addressed when discussing the reformation of the current medical malpractice system?

The focus of this paper will be an attempt to answer this question in the context of whether the medical malpractice system adequately addresses and achieves its torts-based goals. I will first briefly discuss the basic premises of tort, negligence and medical malpractice law to establish that medical malpractice law, in its current manifestation, fits into the category of tort law. Second, I will discuss some possible goals of tort law that are relevant to medical malpractice law and attempt to assess the level of success medical malpractice law has in achieving these goals. Third, I will develop the “moralist” view of tort law that there is an undeniable link between tort law and morality. This discussion will explore the intangible or human element that seems to be addressed in the tort law system and will involve the idea that a patient’s concern after having been subjected to negligent medical treatment go beyond the mere desire to be compensated. I will conclude that medical malpractice law, although flawed, is not in need of drastic restructuring since such changes would be premature.

The Basic Premises of Tort and Medical Malpractice Law

On a philosophical level, Peter Cane explains that tort law can be viewed as a system of ethical rules and principles of personal responsibility for conduct. In this respect, tort law is concerned with how people may, ought, or ought not to behave when they deal with other people. In the medical malpractice context morality functions to protect patient interests not by dictating how a doctor may, ought or ought not to behave, but rather by establishing principles that represent a fair and reasonable regime of personal responsibility for doctors that society adopts and enforces against its members. These issues will be discussed in more detail below.

3 Let it be known, however, that a no-fault compensation scheme is not the only other viable alternative. There are other alternatives, but for simplicity’s sake, when this paper refers to reform of the tort system, a no-fault based scheme is intended unless otherwise noted.

4 Due to the length restrictions of this paper, it will not attempt to offer detailed accounts of viable alternatives to the current system, it is only concerned with the merits of the current system. Reference to alternatives will only be made when necessary.


6 Ibid. at 26.
On a more practical level, a tort is a civil wrong, not including a breach of contract, that the law will redress by awarding the wronged party damages. Typically, there is a victim and an identifiable person who is responsible for the harm done. The law of torts is used to determine which losses or injuries suffered by whom ought to be remedied and to what extent. Possibly the largest and most important area of tort law, negligence, is encapsulated in the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation, or any conduct that falls below the legal standard established to protect others against unreasonable risk of harm. The tort of negligence is usually understood in terms of a breach of a duty that causes damages.

On this practical level, it is clear that medical malpractice is a tort when one considers that a malpractice action may be pursued when the victim, the doctor’s patient, as a result of the medical care received, sustains additional damages that may be attributable to the physician’s (negligent) conduct.

This latter conception of tort law leads us to what Cane, Osborne and others refer to as the “instrumentalist” approach to tort law. In this light, tort law is viewed as a means of achieving certain desired (social) goals. The viability and justification of tort law, then, rests on how adequately tort law and, hence medical malpractice law, achieves these goals.

It seems, therefore, that medical malpractice law has two possible lines of defence. One is viewing tort law as a manifestation of moral and ethical principles and goals that guide human behaviour in relation to other humans, and the other is determining how effectively medical malpractice law achieves its tort-based goals.

**The Goals of Tort and Medical Malpractice Law**

Professor Klar notes that tort law serves a variety of purposes depending on, among other things, the particular area under review, the type of injury sustained and the type of conduct in question. There are, however, an identifiable set of goals that repeatedly arise when discussing tort law. Taking Klar’s advice necessitates identifying the tort law goals that are relevant to medical malpractice law. To begin, Robert E. Astroff indicates, “[a]ppeasement, justice, deterrence, and compensation are the ostensible objectives of the present tort system.” Klar would add

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11 *Supra* note 5 at 24-25.
13 *Supra* note 7 at 9.
education to these goals. This set of goals seems to be the consensus among most tort theorists and so will be the focus of this paper. Each will be dealt with in turn.

The “Instrumentalist” View

As mentioned above, the instrumentalist view of tort law asserts that tort law serves to advance or achieve a certain set of social goals. This section will be concerned with how adequately the current tort-based system achieves the goals of compensation, deterrence and education.

a. Compensation

There is no doubt that compensation is a generally accepted goal of tort law. The idea that it is desirable to pay compensation to injured persons is an uncontroversial one. As Dobbs points out, it is just that the defendant make compensation if a person has been wronged by that defendant. It is also reasonable that the amount awarded is measured by the loss suffered by the plaintiff. In the medical malpractice context, the idea of compensation is that when a patient sustains iatrogenic injuries as a result of the negligent behaviour of the health care provider in question, the victim is theoretically entitled to recover for all losses.

One commonly cited flaw in the current medical malpractice system is that it does not actually achieve its goal of compensating victims of iatrogenic injuries since only a small percentage of those injured during their stay in the hospital actually receive any form of compensation for their injuries. The reason for this is that if fault cannot be found or causation cannot be determined, then the victim will not be compensated.

Elgie, Caulfield and Christie point out that Prichard’s report, indicates that 3.7% of all hospital admissions result in iatrogenic injuries, and that one quarter of those (approximately 1%) were caused by the negligence of the health care provider. Based on these findings, it is concluded that the majority of iatrogenic

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15 Supra note 7 at 15.
17 Dobbs, ibid.
19 Supra note 14 at 9.
20 J. Robert S. Prichard, Liability and Compensation in Health Care (A Report to the Conference of Deputy Ministers of Health of the Federal/Provincial/Territorial Review on Liability and Compensation Issues in Health Care) (Toronto: University of Toronto Press, 1990) [The Prichard Report]. It is important to note at this time that in the CMPA Tort Reform conference of 1999, Prichard himself commented that not much has changed in the eight years since the report and that his report continues to be very relevant, primarily due to the absence of a crisis.
injuries are left uncompensated. Furthermore, it is noted that only one negligence claim is made out of every 7.5 negligently caused injuries, and since only half of those claims are successful, only a very small percentage of negligence claimants ever get compensated. In Canada, the authors explain that less than 10% of viable claims in Canada ever result in payment. These findings do not bode well for tort law’s claim that it is a viable means of compensation.

In addition, Astroff notes that even if a plaintiff is successful in their claim, the assessment of damages and compensation is “subjective, intuitive and unequal.” Because of this, he claims that the current system is unpredictable and tends to award disproportionate compensation to similarly situated patients. In a similar vein, Akazaki claims that “[p]hysicians in high-risk specialties live with the fear they are as likely to be sued by chance as for their conduct.” Akazaki refers to the situation as harsh and random and continues:

Once sued, more is left to fate. Having to draw the line between negligence and competence, the tort system imposes on the plaintiff a 51% onus of proof… One percent separates the ‘good doctor’ from the ‘bad doctor’… The same margin separates plaintiffs awarded millions from those who lose out entirely.

Therefore, the two primary concerns regarding the compensation issue are that an inadequate and an unacceptably low percentage of victims of iatrogenic injuries are compensated and that the assessment of damages in the current system is uncertain.

First, I will address the grave concern that too many injuries are left uncompensated under the tort system. In fact, the sixth principal finding of *The Prichard Report* is that “only a modest percentage of persons suffering avoidable health care injuries receive compensation… [The Report estimates] that the percentage receiving compensation is certainly less than 10 percent of potential viable claims.” The truly alarming aspect of this finding, according to the report, is that the small number of compensated victims leaves the door wide open for a massive increase in medical malpractice claims, which could eventually lead to a serious crisis. However, in the recent CMPA Tort Reform Conference, Prichard himself reported that there was no explosion in litigation as expected — the supposed crisis never materialized. Based on this finding, Prichard reiterated his recommendation to

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22 Ibid.
23 Supra note 14 at 11.
24 Ibid.
26 Ibid.
27 Supra note 20 at 5.
28 Ibid.
retain the current medical malpractice system, but to supplement it with alternative means of compensation for victims of serious and irreversible iatrogenic injuries.\textsuperscript{30} The absence of a crisis may indicate that the number of viable claims is not as high as once thought since the publication of the report in the early 1990s should have led to an increase in awareness of possible malpractice claims, and hence, an increase in overall claims made. Therefore, there is some doubt as to the accuracy of the number of “potential” claims referred to in \textit{The Prichard Report}.

As Madame Justice Ellen Picard indicates, no-fault experiences elsewhere are inconclusive as to how effective they are in reasonably compensating medical malpractice victims.\textsuperscript{31} In the no-fault jurisdiction of New Zealand, for instance, a series of issues with respect to the implementation of no-fault have arisen, such as: patients seek special permission to pursue their claims in courts because of a desire to not be bound by the no-fault system; new no-fault legislation had to be enacted in 1992 because the cost of the system was rising 25\% per annum; failure to inform and failure to make a proper diagnosis claims were not recoverable unless negligence could be shown; causation issues remained prevalent; and, that “[c]learly the definitions that limit the applicability of the new Act are complicated and will likely provide lawyers and judges with challenges for many years.”\textsuperscript{32} The gist of the argument here is that it is a challenge to determine coverage under New Zealand’s no-fault scheme, even though its implementation was supposed to solve such problems. It seems, then, that New Zealand’s no-fault scheme may not be any more effective or cost efficient than the current tort-based system, particularly when one considers that, as Justice Picard states, “the cost became prohibitive and the system too complicated.”\textsuperscript{33}

In addressing the concern that the current system of compensation assessment is subjective and unpredictable, one may claim that the amount of compensation received is not as important as receiving any compensation at all.\textsuperscript{34} In addition, it may turn out that compensation is not as important to the plaintiff as most critics of the tort system make it out to be. Osborne considers the presence of liability insurance as dramatically enhancing the compensatory power of tort law.\textsuperscript{35} One of the primary benefits that follow from liability insurance, he claims, is that with respect to successful plaintiffs, its presence all but guarantees that judgments and

\textsuperscript{30} Ibid.
\textsuperscript{31} Madam Justice Ellen Picard, “Experience Abroad” (Paper presented for the Canadian Medical Protective Association Tort Reform Conference, November 1998) [unpublished].
\textsuperscript{32} Ibid. at 27.
\textsuperscript{33} Ibid.
\textsuperscript{34} Of course in some circumstances the amount of compensation will be extremely important to certain victims of negligent medical care, particularly in cases where the nature of the injury necessitates prolonged treatment and rehabilitation. This point may also be taken to be against no-fault systems since in such systems, the compensation amounts do not tend to be as high as that received in fault-based systems.
\textsuperscript{35} Supra note 12 at 14.
settlements will be paid. Of course this raises many different issues concerning loss distribution, the attenuation of tort’s deterrent effect and the differential pay-outs when comparing fault with no-fault based systems, but in strict compensation terms, liability insurance may be viewed as aiding tort law in achieving its compensatory goal by removing some degree of uncertainty. It does this by increasing the chances that the patient will at least receive something in the form of compensation.

Although the debate is not settled, the tort-based system may be a more reasonable mechanism for compensating victims of iatrogenic injuries than is commonly contemplated in the literature, particularly when one considers that the number of viable claims that are left uncompensated may not be as high as was once thought. It should be noted that this topic has been subject to a great deal of debate over the past few years and that this discussion has not even scratched the surface. Further research may leave us with a more satisfactory answer to the question of how effectively the current tort-based system achieves its goal of compensation.

b. Deterrence

The deterrent effect of tort liability is also commonly cited as a goal of tort law. Klar points out that imposing financial sanctions on those who fail to take reasonable care in their dealings with others should, at least in theory, encourage more careful behaviour. Osborne indicates that there are three theories of deterrence that contribute to the accident prevention role of tort law: specific deterrence, general deterrence and market deterrence.

Specific deterrence is the mechanism by which a particular defendant is encouraged to modify their conduct. The damages awarded in a successful claim are theoretically charged on the defendant’s personal wealth, and this is supposed to indicate to the defendant that their conduct was unacceptable.

It is commonly argued that liability insurance has lessened the effect of specific deterrence since insurance companies bear the brunt of the sanction. As Astroff explains, “following the expansion of liability insurance; the tort system emerges as ‘a very poor tool to achieve objectives of…deterrence,’ as it cannot create disincentives with respect to undesirable medical practice.” Osborne points

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36 Ibid.
37 Supra note 7 at 14.
38 Supra note 12 at 14-16. Market deterrence is not as directly relevant to this paper and so will not be discussed.
39 Ibid. at 14-15.
40 Ibid.
41 Supra note 14 at 12. Astroff refers to general deterrence in this particular passage, but in the context of liability insurance lessening the deterrent effect or tort law, this passage is more relevant to specific deterrence.
out, however, that even with liability insurance, there may be some residual deterrent effects that take the form of increased coverage costs, increased premiums, increased deductibles, refusal of future coverage, pressure by insurance companies on doctors to adopt better risk-management practices and sensitivity to publicized findings of liability (or fear of damage to one’s professional reputation).\textsuperscript{42} It seems unlikely, therefore, that a physician will not take the same level of care simply because they are covered by insurance.

Specific deterrence, however, although theoretically plausible, does not provide an adequate defence on its own for the tort system due to its limited applicability. Deterring one individual after having been successfully sued may be effective in encouraging that single individual to conduct themselves more carefully, but that is not the extent of the desired effect of tort liability, although it is a welcome one. As the primary goal of deterrence in the tort liability context is to achieve an overall improvement in the level of health care, specific deterrence may not be the best mechanism in reaching this goal.

Another potential problem with the theory of specific deterrence is that it may in fact operate in the opposite manner as expected. This is evidenced by one physician’s emotional reaction to being sued (who was subsequently found not liable):

> The part which was very difficult to take was that I felt very badly about myself and my fitness to act as a physician. I lost faith in my judgment. I became anxious and unsure in my dealings with patients, mistrusting what they were saying to me,…over-utilizing investigations, and being hesitant in arriving at a working diagnosis… I felt reprehensible and lost further faith in my judgment.\textsuperscript{43}

There is indeed, therefore, some evidence to suggest that, in terms of specific deterrence, tort liability may induce negligent conduct rather than deter against it. Sadly, in addition to these findings, there is also evidence to suggest that personal involvement in the litigation process may encourage some physicians to restrict or cease their practice altogether (although this reaction is not pervasive).\textsuperscript{44} Certainly this is not a desired effect. Thus, given the above discussion, the role of specific deterrence is currently ambiguous and unresolved at best.

General deterrence, on the other hand, theoretically operates by way of a general threat of tort liability that encourages citizens to adopt safe conduct and

\textsuperscript{42} Supra note 12 at 15.
\textsuperscript{44} Dickens, \textit{ibid.} at 7. He claims that “[t]he stress of litigation to individual defendants and their related loss of morale are also recognized…sometimes as leading to…partial or total withdrawal from practice, for instance through early retirements or adoptions of non-practicing medical careers.”
conversely to avoid conduct that is likely to cause damage to others.\textsuperscript{45} Dobbs claims that the “idea of deterrence is not so much that an individual, having been held liable for a tort, would thereafter conduct himself better. It is rather the idea that all persons, recognizing potential tort liability, would tend to avoid conduct that could lead to tort liability.”\textsuperscript{46}

Dobbs makes an important point since, in order to be effective, general deterrence requires that the defendant in question be aware of the consequences and reality of tort liability, meaning that it works hand in hand with the educative aspect of tort law that will be discussed below. Thus, if there was evidence indicating that medical professionals do in fact have an understanding of the tort system, and it does in some way or another positively affect the manner in which they conduct their daily working lives, it may be safe to say that the general deterrent effect of tort law plays an important role in the health care context.

On a theoretical level, however, Osborne points out that in general, peoples’ conduct and concern for others is more likely a reflection of human psychological traits, attitudes, habits and personal codes of conduct than a general concern to avoid tort liability.\textsuperscript{47} It is agreed that it is difficult to deny that a “human psychological” element influences people in their dealings with others. It should be noted, however, that this point loses some of its impact when referring to the deterrent effect of possible tort liability in contexts where this possibility is an everyday concern. That is, in situations where a potential defendant finds him or herself within the reach of possible tort liability on a daily basis, it may be the case that avoidance of tort liability plays at least as much of a role in inducing health care professionals to conduct themselves with increased levels of care as does the human element to which Osborne refers. As Klar claims, “[o]ne need not be a social scientist to suggest that ordinary people, businesses, and professionals do take into consideration the...potential for adverse court judgments, in conducting themselves”.\textsuperscript{48} Osborne indicates that general deterrence may be powerful in certain exceptional circumstances, and in particular, where “[defendants]...are hypersensitive to a finding of liability, such as health-care professionals”.\textsuperscript{49}

The possibility of tort liability certainly seems to be an everyday concern in the medical world. This is evidenced by the fact that in a survey conducted regarding physician’s perceptions of the issues relating to the medical legal climate, 74.1\% of the respondents agreed or strongly agreed that the “hassles/stress associated with possible litigation by patients play a greater part than liability coverage costs in physicians decisions to change the pattern of their practice”.\textsuperscript{50} The same survey

\textsuperscript{45} Supra note 12 at 15.
\textsuperscript{46} Dobbs, supra note 16 at 19.
\textsuperscript{47} Supra note 12 at 15.
\textsuperscript{48} Supra note 7 at 15.
\textsuperscript{49} Supra note 12 at 15.
indicates that there is a high concern about possible tort liability in the medical community: “[c]oncern about medical/legal liability is seen to change physician practice behaviour in several ways.” In addition, concerns regarding possible litigation was cited as the largest reason for physicians having increased documentation of what was done or discussed with a patient, and increasing the amount of time spent with patients discussing the risks and benefits of treatment.

Anecdotally, I conducted a brief interview with an emergency room physician who has practiced in British Columbia for 24 years. When asked about the frequency he and other doctors think about the possibility of tort liability when treating patients, he answered that he only thinks about such issues “occasionally”. He quantified this by saying that considerations about liability occurred to him in approximately one out of every fifty patients. However, he was quick to point out that he knows “many physicians who think about it with every patient they treat.” To say that the threat of liability is an everyday concern for these physicians would be an understatement. In addition, upon being questioned about his general feelings concerning the role that the current tort law system plays in deterrence and quality control, he emphatically replied that there is “a deterrent and quality control factor” of tort law, and that this is extremely important because “accountability” is not likely to be achieved with other systems. If this doctor’s comments are representative of the medical profession, then it seems safe to conclude that potential liability is a daily concern for practicing physicians and that the tort law system does indeed provide a degree of general deterrence by inducing physicians to modify their practice to accord with such concerns. This result gives rise to the issue of defensive medicine that will be discussed below.

The problem with the “everyday concern” counter-argument is that by removing the tort system and replacing it with some form of a no-fault alternative, it would lose much of its impact since the effect of this might be that the “human element” to which Osborne refers above takes a more prevalent role in dictating careful behaviour. That is, if possible tort liability was not a concern to the doctor, perhaps the human element would play a stronger part in ensuring that doctors conduct themselves with increased care since, at least theoretically, the doctor-patient relationship would improve. Arguably, then, removing the possible source

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51 Ibid. at 1. It is granted that this article is relatively old, but there is no substantial reason to presume that the findings would be any different today.
53 Although this interview cannot be taken to be representative of the general physician population and its scientific reliability is low, it provides one interesting and direct perspective regarding these issues. It may be important to note for reliability reasons that the interviewee was not informed as to the contents or the arguments being put forward in this paper before he took part in the interview.
54 As Astroff, supra note 14 indicates at 12, one side-effect of the current tort-based fault system is that “the threat of litigation…creates an atmosphere of suspicion between doctors and patients; this may lead to a deterioration in their relations… Compensation without fault would arguably improve the patient-doctor relationship since it would reduce the tension which seems to come with the traditional tort system.”
of the tension would result in an increased level of compassion the doctor feels for
the patient, which would in turn result in the physician taking more care because
conduct towards and concern for other people (in this case, patients) may largely
be a reflection of human psychological traits, attitudes, habits and personal codes
of conduct, and not based on a general concern of avoiding liability. The fact of the
matter seems to be, however, that more research needs to be conducted in the area
of whether the human element plays a sufficiently strong role in inducing careful
behaviour so as to render the deterrent effect of the tort or fault-based system
obsolete, as well as the significance of the role that the human element would play
in a no-fault setting.

As mentioned above, discussions about deterrence necessitate taking note of
the phenomenon of defensive medicine. As Astroff explains:

…due to the fear of accusations and the accompanying stigmatization,
litigation induces health care providers to practice inefficient ‘defen-
sive medicine,’ that is, the unnecessary use of medical resources to
protect against lawsuits and the refusal to provide care or adopt new
methods of treatment for fear of increased liability exposure… [P]re-
sent tort law pressures physicians into practicing techniques that are
more likely to protect the physician in malpractice actions than to
benefit the patient.55

As Dickens indicates, defensive medicine is invariably referred to in a derogatory
manner, particularly since it is primarily viewed as a waste of valuable medical
resources and liable to distract health care professionals from their objective of
serving patients by over-emphasizing the necessity of self-protective acts. It should
be noted at this time that factual evidence concerning the prevalence of defensive
medicine is intrinsically suspect since, as Dickens claims, “[t]he problem of making
assessments [about defensive medicine] is compounded by the uncertainty about
where good medicine stops and purely defensive medicine begins”.56 In other
words, one physician’s defensive medicine may be another’s protocol.

Notwithstanding these apparent negative side-effects of and uncertainties
surrounding defensive medicine there is some evidence to show that defensive
medicine is beneficial to the patient and therefore does indeed indicate that the
liability system acts as an effective deterrent to sub-standard medical care. If defen-
sive medicine can be accurately described as situations where doctors are being more
careful and meticulous in their dealings with patients, despite the cost it has on the
medical system, then it seems to follow that fewer cases of negligence and failure
to inform will arise. If this is true, then tort law may effectively achieve its goal of

55 Ibid. at 12. See also Timothy A. Caulfield, “How Do Current Common Law Principles Impede or
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56 Dickens, supra note 43 at 9.
deterrence. Elgie, Caulfield and Christie indicate that “it has been argued that many of the changes in medical procedures which get classified as defensive medicine are in fact beneficial to patients and/or increase the efficiency of the health care system.”\(^{57}\) In that article, the authors mention that The Prichard Report concluded that “the ‘crisis’ in litigation had ‘contributed significant momentum to the introduction of quality assurance, risk management and peer review programs.’”\(^{58}\) Therefore, the phenomenon of defensive medicine may not be such a bad thing after all.

It may be helpful at this point to make the distinction between positive and negative defensive medicine. Positive defensive medicine is when a physician orders increased testing, increased record keeping and increased consultation — some of which may be viewed as unnecessary and frivolous by other physicians. The main concern about this type of defensive medicine, as mentioned, is the added burden it places on the medical system. Despite this, however, the benefit to the patient seems obvious: more testing and consultation should theoretically translate into increased diagnostic accuracy and increased information for consent purposes.

Negative defensive medicine refers to “procedures or activities that a physician refuses to undertake because of fear of a later malpractice suit when a patient may benefit from the procedures or activity.”\(^{59}\) The practical effects of this type of defensive medicine such as a physician leaving or reducing certain areas of their practice may not be negative at all since it can conceivably result in increased referrals to and uses of specialists. Of course this will result in increased medical costs, but if it is likely to result in a benefit to the patient, the patient is unlikely to complain.\(^{60}\)

Elgie, Caulfield and Christie also mention that T.G. Ison’s list of eight factors that predict the degree to which liability may deter a particular behaviour, highlight the complexity of the deterrent issue.\(^{61}\) The authors conclude that “[t]he best estimate is that tort law has only a tangential effect on the quality of health care. [And that] Prichard might have been correct in stating that ‘on balance, the good effects of litigation outweigh the bad,’ but such a mediocre assessment is hardly a strong argument for the status quo.”\(^{62}\)

In the CMPA Tort Reform Conference of 1999, Prichard reiterated that despite some perverse effects such as defensive medicine, which, as it turns out may not be as pervasive as commonly thought, the threat of civil liability and the prospect of

\(^{57}\) Supra note 21 at 107.
\(^{58}\) Supra note 20, cited in Elgie, Caulfield & Christie, ibid.
\(^{59}\) Dickens, supra note 43 at 8.
\(^{60}\) Clearly the discussion concerning defensive medicine here is incomplete. However, I think I have shown that there are many issues involved when discussing the existence and effects of defensive medicine and that the debate is in no way settled either way.
\(^{61}\) Supra note 21 at 110-111.
\(^{62}\) Ibid. at 111.
being held accountable through litigation improves the quality of health care.\textsuperscript{63} In comparing the deterrent effect of the current tort-based compensation system with jurisdictions who have abolished tort in the automobile accident context, Klar indicates abolishing the tort system increases expected accident costs, which is evidenced by Quebec’s experience with no-fault, and increases injury-causing and fatal accidents.\textsuperscript{64} One can only suppose that the same is likely to occur if Canada was to adopt a medical no-fault system. But, of course, this is mere conjecture.

It is obvious that much more research needs to be conducted in this area, so the debate continues. But as the doctor interviewed above commented, “physicians are going to try and practice good quality medicine — that is a given — but the tort system’s presence just enhances the reason to do so.” It seems that in conjunction with the arguments mounted in favor of the status quo, Prichard’s claim that the positive effects of litigation outweigh the bad may actually be a compelling reason to resist reform.

\textbf{c. Education}

Klar points out that activities regulated by tort law tend to arise through \textit{ignorance} more than intentional departures from accepted norms and standards of behaviour.\textsuperscript{65} He continues:

\begin{quote}
Automobile drivers, engineers, lawyers and doctors do not set out deliberately to injure others, but on occasion they do fail to live up to required standards or to keep themselves informed of current developments. One of tort law’s purposes is to remind us of these safety requirements…\textsuperscript{66}
\end{quote}

This is a particularly critical point in the medical malpractice context since standards of care seem to be becoming increasingly onerous\textsuperscript{67} and the duty to inform increasingly inclusive (for example \textit{Chasney v. Anderson}, [1950] 4 D.L.R. 233, \textit{Reibl v. Hughes}, [1980] 2 S.C.R. 880, \textit{ter Neuzen v. Korn}, [1995] 3 S.C.R. 674 and others). The issues surrounding medical malpractice law are also particularly complex as compared to other areas of negligence considering that there may be some residual (economic) locality rule issues, generally approved practice and “two schools of thought” issues, as well as the “error in clinical judgment” as opposed to “negligent conduct” distinction. It is important, therefore, that doctors remain abreast of these issues in order to ensure that they are aware of the standards of the day.

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\item \textsuperscript{63} Supra note 29. He adds that this is still the most contentious issue in the report. He also mentions that the report was still as applicable and relevant in 1999 as it was when the report was written.
\item \textsuperscript{64} Supra note 7 at 22.
\item \textsuperscript{65} Ibid. at 15.
\item \textsuperscript{66} Ibid.
\end{itemize}
Osborne explains that tort law has both a specific and general educative function. Generally speaking, tort law teaches citizens about “the importance of compliance with reasonable standards of conduct in the interests of the safety of others.”68 This educative role, he says, can operate directly on those involved in tort litigation and indirectly on those who have some knowledge about the tort system or are informed about it through the media.

Also, tort’s specific educational role, according to Osborne, emerges when litigation arises that is of particular interest to a particular segment of society. He says:

[the] court may be called upon to address a particularly contentious issue affecting a small group, [or] to rule on the current practices of a profession… In these cases, the educational function of tort law may not extend to the public at large but it does extend beyond the litigants and may profoundly affect conduct that has an impact on the public’s well-being and safety. The coverage in professional journals, trade publications, and the popular media given to the Supreme Court cases dealing with the need for physicians to secure an informed consent to medical treatment…was informative and educational for all persons involved…69

It becomes important, then, to assess the importance or effectiveness of the educative aspect of tort law.

In the majority of cases, tort litigation works as a mechanism by which current standards of care are reviewed, tested and advanced, thereby setting the boundaries of what is considered to be adequate medical care.70 By implication, it seems that without tort law, practice standards would remain relatively static. With that said, there seems to be a link between the function of tort law as a means of enhancing practice standards and the educative aspect of keeping doctors informed about the current minimum standards of care and other legal issues through the publication (and sometime publicity) of important or precedent setting court decisions.71 The current system seems to be an effective mechanism by which this goal is achieved given that major developments in malpractice law are reported in CMPA Newsletters, which are overwhelmingly the most commonly used sources of information by practicing physicians. Woodward and Rosser72 indicate that 88% of the physicians polled use the CMPA’s Newsletter as a source of information regarding liability issues, and 62.4% said that it was by far the most influential.73 Klar explicitly states

68 Supra note 12 at 16.
69 Ibid. at 17.
70 Supra note 7 at 16.
71 Ibid.
72 Supra note 50 at 17.
73 In the same survey, however, only 51.3% of the respondents felt that they were getting “enough
that tort judgments have an obvious educative effect on certain activities: “[p]rofessionals [such as physicians] and others who are specifically affected by tort judgments are kept abreast of important developments through university courses, seminars, conferences, newsletters, periodical literature and so on.” Klar uses a quotation from Prichard that is enlightening on this issue: “In the apparent absence of a superior alternative mechanism, civil liability...is a relatively attractive and effective tool for achieving minimum levels of continuing competence.”

The question that can now be raised is whether a no-fault based compensation scheme would adequately educate the medical profession about these issues. Of course this question cannot be fully answered without an evaluation of all the various configurations of no-fault schemes, which is not possible here. However, Klar argues that the tort goal of education can only “be achieved outside the no-fault compensation objective.” The gist of this claim is that the ability to observe the realities of a court’s reaction to certain conduct and see the effects on actual people are more effective lessons than simply being taught the lesson on paper.

Upon sifting through the various reports and comments on no-fault compensation schemes it soon becomes clear that the topic of education is not high on the priority list of research topics. It is unclear whether this is because the advancement of medical standards does not occur to any significant extent under the no-fault system and there is, therefore, a lack of information that physicians need to be educated about, whether it is becauseponents of no-fault concede the point that these systems are not effective educational tools, or whether they do not question tort law’s ability to educate. It seems, therefore, in the absence of compelling evidence to the contrary, it is safe to conclude that the current fault-based medical malpractice system has an important educative function. This, combined with tort law’s possible general deterrent effect provides the system with a valuable defence.

The Moralist or Justice-based View

Professor Osborne writes:

[t]ort law’s capacity for fairness and justice should not...be ignored. The public’s sense of justice, of what is fair and reasonable, must be taken into account.... The concept of some individual responsibility for individual actions...is central to what reasonable people regard as just.

information on the legal issues in professional liability in medical journals, continuing education events and CMPA notes and annual reports.” It is unclear whether the list of sources under this question includes the CMPA Newsletter and what “enough” means.

74 Supra note 7 at 16.
76 Klar, ibid. at 19.
Osborne explains that tort law may be regarded as a system of corrective justice based on the ethical principle of personal responsibility for damages caused by wrongful conduct. Dobbs would agree with Osborne in saying that this conception of tort law is grounded in the moral imperative that there ought to be personal accountability for the consequences of one’s wrongful actions. This argument is essentially claiming that the moral imperative of taking personal responsibility for one’s wrongful actions is so deeply ingrained in our society that this alone justifies tort law’s continued existence since tort law is the mechanism by which accountability is assessed and, hence, how this imperative is realized. Expanding on this, Dobbs explains that tort law is consistent with ideals of corrective justice in that it imposes liability for conduct that the law considers to be wrong or morally faulty on the basis that it was either intentional misconduct or unreasonably risky conduct that was likely to cause harm to others. In the medical malpractice context, the morally faulty conduct in question will invariably fall under the “unreasonably risky” category.

While focussing on another dimension of this argument, Klar emphasizes the importance of “punishment of the wrongdoer and the consequent appeasement of the victim...[and]...the ability to control one’s own destiny and make one’s own choices.” As Klar concisely states, “[i]t is impossible to believe that these are not values widely held in society...” It should now be clear that physician accountability and responsibility are prevalent themes in the moralist view of medical malpractice law.

A common response to this view is that liability insurance subverts the moralist perspective of tort law’s goal of holding wrongdoers accountable for their negligent actions since the wrongdoer, after having been found liable, is able to compensate the victim through the use of their liability insurance coverage. The view is that in these cases, the physician is not being held accountable at all since his or her insurance company bears the actual financial burden for the defendant’s wrongful conduct.

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78 **Supra** note 12 at 12.
79 Dobbs, **supra** note 16 at 13.
80 Ibid. at 14.
81 Ibid.
82 It should be noted at this time that the moralist defence of the tort system is particularly applicable to situations where a doctor’s negligent conduct caused the injury. These are cases where fault can be assessed to the doctor, not cases of accidental, uncontrollable or unforeseeable iatrogenic injuries. It is important to keep in mind, then, that this defence has special application when coming from the point of view of the victim. The underlying premise here is that since the patient is the one who sustained the injury, it is their interests that should be given special attention. If one of their primary interests is to be able to blame someone, and the tort-based system is the best means by which to achieve that end, then perhaps this ought to be another consideration when discussing tort-reform.
83 **Supra** note 7 at 12.
84 Ibid.
There are two responses to this argument, both of which refer to physician accountability. First, as was mentioned above, even with the implementation of liability insurance, there remains an accountability factor in form of increased premiums, negative publicity and increased deductibles. The physician interviewed above also agreed that despite the presence of liability insurance, the tort system is important because it ensures that doctors are held accountable for their actions. It is a good indication of the importance of accountability when a physician himself feels that it is necessary.

Second, for the victim who was injured by the negligent conduct of the doctor, the source of compensation (or, for that matter, receiving any compensation at all) may not be as important as the ability to place fault and accountability. The situation was shown to be just that by Vincent, Young and Phillips. In their article they examined the reasons why patients and their families decide to take legal action against their doctors and found that they fall under following four main categories: (1) concern for the standard of care; (2) desire for an explanation; (3) compensation; and (4) accountability. Of the thirteen reasons for litigation that were commented upon in one of the survey questions, the desire for financial compensation was seventh on the list. Coming before it were “not wanting it to happen to anyone else”, “wanting an explanation”, “wanting the doctors to realize what they had done”, “getting an admission of negligence”, “so that the doctor would know how the patient felt” and “because the patient’s feelings were ignored”, respectively. Another issue addressed in the study was what post-incident actions might have prevented litigation. “Explanation and apology” and “correction of mistake” were cited as the first two factors while “pay compensation” was third. The authors of this article made two primary observations. The first is that the impetus for victims of medical malpractice to take legal action often arises from their desire for honesty, an appreciation of the severity of the trauma through which they have suffered and assurances that lessons have been learned through their experiences. Somewhat related to this is the second observation, which is concerned with the effectiveness of no-fault compensation systems. The authors concluded that such systems:

however well intended, would not address all patients’ concerns. If litigation and injury to patients is discussed solely in terms of legal processes and financial management, the fundamental problems will neither be understood nor resolved.

As discussed in Justice Picard’s CMPA Tort Reform Conference paper, Sweden’s recognition of the importance of accountability of doctors has led to a

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85 supra note 1.
86 Ibid.
87 Ibid. at 1611, Table 4, “Reasons for litigation”.
88 Ibid. at 1612, Table 5, “Actions after the incident that might have prevented litigation”.
89 Ibid. at 1613.
no-fault scheme (which is supplemented by remnants of a tort system) that is
divided into the two systems of compensation and physician accountability. Swe-
den’s hybrid fault/no-fault system has incorporated a system through which patients
are able to pursue explanations or apologies without the physician necessarily being
disciplined since suing physicians is not an option.90 It is said that there is a high
degree of contentment with these “medical responsibility boards”. One should
hope, however, that the perspective of the patient is taken into serious consideration
in determining the effectiveness of this system.

Perhaps a reason for the effectiveness of Sweden’s system arises from the
fact that there may be a possible link between the perception of blame and the
recovery of patients. For instance, DeGood and Kiernan concluded that “[f]eelings
of anger, that can grow from the belief that someone has caused and, furthermore,
may be indifferent about accepting responsibility for causing [their] pain…can
decrease motivation to become invested in treatment…”91 This is an important
finding for two reasons. First, Vincent, Young and Phillips found that 90% of the
respondents in their study (the highest rate of all the cited “reactions to incidents”)
reported feelings of anger, and second, in the same article, lack of sympathy on
behalf of the health care providers in question is commonly cited as an important
reason for pursuing litigation.92 These findings, in conjunction with the DeGood
and Kiernan’s conclusion that “[r]ecognition and addressing [the perception or
attribution of blame] may be an important step in redirecting the patients’ focus
towards enhanced coping and recovery”93, provide a strong economic argument
demonstrating that physician accountability is an important step in the recovery
process and therefore will lead to reduced rehabilitation and medical costs.

Merry and McCall Smith however, condemn the search for scapegoats,
which, they feel, has begun to define the response to medical mishaps.94 While
citing Everett C. Hughes, they claim that “whilst believing absolutely in the
perfection of our doctors, we are generally quick to accuse them for their mistakes,
whether real or supposed.”95 The authors’ conclusion is that since our reactions to
errors are often morally and scientifically unsophisticated, forgiveness has been
forgotten in our blame-oriented society and that the advances in our understanding
of error have not been reflected in subsequent legal responses.96

90 Supra note 31.
153 at 153.
92 Supra note 1 at 1611.
93 Supra note 91 at 159.
94 Oliver Quick, Book Review of Errors, Medicine and the Law by Alan Merry & Alexander McCall
95 Ibid. at 232.
96 Ibid. at 237.
A scientific approach to understanding human reactions to errors was undertaken by Alicke.\footnote{M.D. Alicke, “Culpable control and the psychology of blame” (2000) 126:4 Psychological Bulletin 556.} Although it was written earlier, his article may be seen as a response to Merry and McCall Smith since it actually studies “blame” as a scientific phenomenon and concludes that a society in which wrongdoers are not blamed and forewarned of the potential for punitive sanctions would be difficult to imagine.\footnote{Ibid.}

To recapitulate what has been discussed, Alicke shows that as long as there are medical mishaps, blaming physicians will be inevitable. Vincent, Young and Phillips show that such blaming is widespread in our society. DeGood and Kiernan claim that the ability to assess blame and receive recognition of their injuries can enhance recovery from such incidents. Thus, these three articles seem to show that a strong economic argument can be mounted for a system that allows patients to pursue physician accountability and responsibility — to locate the sources and answers to their feelings of fault, anger and confusion.\footnote{Such an argument can be mounted despite the fact that it was mentioned earlier that issues surrounding the viability of the current medical malpractice system should go beyond mere economic concerns.} In comparing the tort based system with other no-fault systems it is important to take note of the fact that the true costs of medical injuries cannot solely be quantified in terms of litigation expenses and the need for compensation. Such injuries often seriously affect the patients emotionally as well. A compensation system that does not address the patient’s emotions, therefore, may not only be economically expensive, but morally expensive as well.

**Conclusion**

Although it was necessary for the purpose of defending the current medical malpractice system in this paper to explore the issues of the compensatory, deterrent and educative functions of tort law, this paper shows that the most fertile ground upon which a defence of tort law can be placed is the moralist view. This has as much to do with the uncertainty of the tort law’s compensatory, deterrent and educative functions (or the lack thereof) as it does with the validity of the claim that the tort system addresses important patient concerns that may be lost in a no-fault compensation scheme. Thus, perhaps economics should not be the only consideration when discussing the reformation of the current medical malpractice system. It seems that an ideal system will address the concerns of differential and uncertain damage awards, address the concern that not everyone who is injured in the hospital gets compensated, it will educate and deter, and will most importantly give the plaintiff or the victim’s family the opportunity to seek answers and accountability when they have been injured.