

Table of Contents

List of Contributors	XXIX
---------------------------------------	------

Questionnaire	XXXI
--------------------------------	------

Bernhard A Koch

Medical Liability in Austria	1
General Questions	1
A. The Health Care System Framework	1
I. General Introduction	1
1. The health care system in overview	1
II. Social Welfare Provision	4
2. The role of public healthcare	4
3. Differences in treating patient's claims	6
4. Right of recourse	6
III. Private Insurance	6
5. The role of private health insurance	6
6. Liability insurance	7
IV. Professional Standards	8
7. Applicable professional standards	8
8. Quality and/or risk management systems	9
B. Tort Liability	10
9. Fundamentals of tort liability	10
10. Burden of proof	11
11. Uncertain causation	13
12. Loss of a chance	15
13. Multiple persons involved	16
14. Strict liability	20
C. Contractual Liability	21
15. Basics of contracts in the healthcare sector	21
16. Differences to tort law	24
17. Contractual claims in the absence of direct contracts?	25
18. Informed consent	25
D. Public Liability	30
19. Key differences from cases involving private hospitals or doctors	30

E. Alternative Compensation Regimes	30
20. Funds and/or other alternative compensation regimes	30
F. Extent of Liability/Remedies	32
I. Pecuniary Loss	32
21. Introduction to indemnifying pecuniary loss	32
22. Loss of earnings vs loss of earning capacity	34
23. Periodic payments or lump sum?	35
24. Caps and thresholds	35
II. Non-Pecuniary Loss	35
25. Introduction to indemnifying non-pecuniary loss	35
26. Who can claim compensation for non-pecuniary loss?	37
G. Procedural Matters	37
27. Specific rules of jurisdiction or procedure	37
28. Special institutions handling malpractice claims	37
H. Outlook	39
29. Reform plans	39
Cases	39
Case 1	39
Case 2	43
Case 3	45
Case 4	50
Case 5	53
Case 6	57
 Herman Nys	
Medical Liability in Belgium	61
General Questions	61
A. The Health Care System Framework	61
I. General Introduction	61
1. The health care system in overview	61
II. Social Welfare Provision	64
2. The role of public health care	64
3. Differences in treating patient's claims	65
4. Right of recourse	66
III. Private Insurance	67
5. The role of private health insurance	67
6. Liability insurance	68
IV. Professional Standards	68
7. Applicable professional standards	68
8. Quality and/or risk management systems	70
B. Tort Liability	72
9. Fundamentals of tort liability	72
10. Burden of proof	73
11. Uncertain causation	73

Table of Contents

12. Loss of a chance	74
13. Multiple persons involved	75
14. Strict liability	76
C. Contractual Liability	77
15. Basics of contracts in the health care sector	77
16. Differences to tort law	78
17. Contractual claims in the absence of direct contracts?	79
18. Informed consent	79
D. Public Liability	81
19. Key differences from cases involving private hospitals or doctors	81
E. Alternative Compensation Regimes	81
20. Funds and/or other alternative compensation regimes . . .	81
F. Extent of Liability/Remedies	81
I. Pecuniary Loss	81
21. Introduction to indemnifying pecuniary loss	81
22. Loss of earnings vs loss of earning capacity	82
23. Periodic payments or lump sum?	82
24. Caps and thresholds	83
II. Non-Pecuniary Loss	83
25. Introduction to indemnifying non-pecuniary loss	83
26. Who can claim compensation for non-pecuniary loss?	83
G. Procedural Matters	84
27. Specific rules of jurisdiction or procedure	84
28. Special institutions handling malpractice claims	84
H. Outlook	84
29. Reform plans	84
Cases	85
Case 1	85
Case 2	86
Case 3	88
Case 4	89
Case 5	91
Case 6	94

Ondřej Dostál

Medical Liability in the Czech Republic	97
General Questions	97
A. The Health Care System Framework	97
I. General Introduction	97
1. The health care system in overview	97
II. Social Welfare Provision	101
2. The role of public health care	101

3. Differences in treating patient's claims	106
4. Right of recourse	106
III. Private Insurance	107
5. The role of private health insurance	107
6. Liability insurance	108
IV. Professional Standards	109
7. Applicable professional standards	109
8. Quality and/or risk management systems	112
B. Tort Liability	113
9. Fundamentals of tort liability	113
10. Burden of proof	115
11. Uncertain causation	116
12. Loss of a chance	117
13. Multiple persons involved	118
14. Strict liability	120
C. Contractual Liability	121
15. Basics of contracts in the health care sector	121
16. Differences to tort law	122
17. Contractual claims in the absence of direct contracts?	123
18. Informed consent	124
D. Public Liability	127
19. Key differences from cases involving private hospitals or doctors	127
E. Alternative Compensation Regimes	128
20. Funds and/or other alternative compensation regimes	128
F. Extent of Liability/Remedies	129
I. Pecuniary Loss	129
21. Introduction to indemnifying pecuniary loss	129
22. Loss of earnings vs loss of earning capacity	130
23. Periodic payments or lump sum?	132
24. Caps and thresholds	132
II. Non-pecuniary Loss	133
25. Introduction to indemnifying non-pecuniary loss	133
26. Who can claim compensation for non-pecuniary loss?	135
G. Procedural Matters	136
27. Specific rules of jurisdiction or procedure	136
28. Special institutions handling malpractice claims	138
H. Outlook	138
29. Reform plans	138
Cases	139
Case 1	140
Case 2	146
Case 3	148
Case 4	151

Table of Contents

Case 5 156
Case 6 159

WV Horton Rogers

Medical Liability in England 165
 General Questions 165
 A. The Health Care System Framework 165
 I. General Introduction 165
 1. The health care system in overview 165
 II. Social Welfare Provision 167
 2. The role of public health care 167
 3. Differences in treating patient's claims 167
 4. Right of recourse 168
 III. Private Insurance 169
 5. The role of private health insurance 169
 6. Liability insurance 170
 IV. Professional Standards 171
 7. Applicable professional standards 171
 8. Quality and/or risk management systems 172
 B. Tort Liability 172
 9. Fundamentals of tort liability 172
 10. Burden of proof 174
 11. Uncertain causation 177
 12. Loss of a chance 180
 13. Multiple persons involved 184
 14. Strict liability 186
 C. Contractual Liability 186
 15. Basics of contracts in the health care sector 186
 16. Differences to tort law 187
 17. Contractual claims in the absence of direct contracts? 187
 18. Informed consent 187
 D. Public Liability 189
 19. Key differences from cases involving private hospitals or
 doctors 189
 E. Alternative Compensation Regimes 189
 20. Funds and/or other alternative compensation regimes 189
 F. Extent of Liability/Remedies 190
 I. Pecuniary Loss 190
 21. Introduction to indemnifying pecuniary loss 190
 22. Loss of earnings vs loss of earning capacity 190
 23. Periodic payments or lump sum? 191
 24. Caps and thresholds 192
 II. Non-Pecuniary Loss 192
 25. Introduction to indemnifying non-pecuniary loss 192

26. Who can claim compensation for non-pecuniary loss?	193
G. Procedural Matters	194
27. Specific rules of jurisdiction or procedure	194
28. Special institutions handling malpractice claims	194
H. Outlook	194
29. Reform plans	194
Cases	195
Case 1	195
Case 2	198
Case 3	199
Case 4	201
Case 5	202
Case 6	204
 Suzanne Carval/Ruth Sefton-Green	
Medical Liability in France	207
General Questions	207
A. The Health Care System Framework	207
I. General Introduction	207
1. The health care system in overview	207
II. Social Welfare Provision	208
2. The role of public health care	208
3. Differences in treating patient's claims	208
4. Right of recourse	208
III. Private Insurance	208
5. The role of private health insurance	208
6. Liability insurance	209
IV. Professional Standards	209
7. Applicable professional standards	209
8. Quality and/or risk management systems	210
B. Tort Liability	210
9. Principles of tort liability	210
10. Burden of proof	211
11. Uncertain causation	211
12. Loss of a chance.	211
13. Multiple persons involved	212
14. Strict liability	212
C. Contractual Liability	212
15. Basics of contracts in the health care sector	212
16. Differences from tort law	212
17. Contractual claims in the absence of direct contracts?	212
18. Informed consent	213

Table of Contents

D. Public Liability	213
19. Key differences from cases involving private hospitals or doctors	213
E. Alternative Compensation Regimes	214
20. Funds and/or other alternative compensation regimes	214
F. Extent of Liability/Remedies	216
I. Pecuniary Loss	216
21. Introduction to indemnifying pecuniary loss	216
22. Loss of earnings vs loss of earning capacity	216
23. Periodic payments or lump sum?	216
24. Caps and thresholds	216
II. Non-Pecuniary Loss	216
25. Introduction to indemnifying non-pecuniary loss	216
26. Who can claim compensation for non-pecuniary loss?	217
G. Procedural Matters	217
27. Specific rules of jurisdiction or procedure	217
28. Special institutions handling negligence claims	217
H. Outlook	219
29. Reform plans	219
Cases	219
Case 1	219
Case 2	221
Case 3	222
Case 4	224
Case 5	227
Case 6	230

Franz Michael Petry

Medical Liability in Germany	233
General Questions	233
A. The Health Care System Framework	233
I. General Introduction	233
1. The health care system in overview	233
II. Social Welfare Provision	237
2. The role of public health care.	237
3. Differences in treating patient's claims	239
4. Right of recourse	240
III. Private Insurance	241
5. The role of private health insurance	241
6. Liability insurance	241
IV. Professional Standards	243
7. Applicable professional standards	243
8. Quality and/or risk management systems	245

B. Tort Liability	247
9. Fundamentals of tort liability	247
10. Burden of proof	249
11. Uncertain causation	250
12. Loss of a chance	252
13. Multiple persons involved	252
14. Strict liability	261
C. Contractual Liability	262
15. Basics of contracts in the healthcare sector	262
16. Differences to tort law	262
17. Contractual claims in the absence of direct contracts?	263
18. Informed consent	263
D. Public Liability	266
19. Key differences from cases involving private hospitals or doctors	266
E. Alternative Compensation Regimes	266
20. Funds and/or other alternative compensation regimes	266
F. Extent of Liability/Remedies	266
I. Pecuniary Loss	266
21. Introduction to indemnifying pecuniary loss	266
22. Loss of earnings vs loss of earning capacity	269
23. Periodic payments or lump sum?	270
24. Caps and thresholds	270
II. Non-Pecuniary Loss	270
25. Introduction to indemnifying non-pecuniary loss	270
26. Who can claim compensation for non-pecuniary loss?	272
G. Procedural Matters	273
27. Specific rules of jurisdiction or procedure	273
28. Special institutions handling malpractice claims	273
H. Outlook	274
29. Reform plans	274
Cases	274
Case 1	275
Case 2	278
Case 3	281
Case 4	283
Case 5	284
Case 6	286
 Attila Menyhárd	
Medical Liability in Hungary	291
General Questions	291
A. The Health Care System Framework	291
I. General Introduction	291

Table of Contents

1. The health care system in overview	291
II. Social Welfare Provision	293
2. The role of public health care	293
3. Differences in treating patient's claims	294
4. Right of recourse	295
III. Private Insurance	296
5. The role of private health insurance	296
6. Liability insurance	296
IV. Professional Standards	297
7. Applicable professional standards	297
8. Quality and/or risk management systems	298
B. Tort Liability	299
9. Fundamentals of tort liability	299
10. Burden of proof	299
11. Uncertain causation	300
12. Loss of a chance	302
13. Multiple persons involved	303
14. Strict liability	305
C. Contractual Liability	308
15. Basics of contracts in the health care sector	308
16. Differences to tort law	309
17. Contractual claims in the absence of direct contracts?	310
18. Informed consent	311
D. Public Liability	312
19. Key differences from cases involving private hospitals or doctors	312
E. Alternative Compensation Regimes	313
20. Funds and/or other alternative compensation regimes	313
F. Extent of Liability/Remedies	313
I. Pecuniary Loss	313
21. Introduction to indemnifying pecuniary loss	313
22. Loss of earnings vs loss of earning capacity	315
23. Periodic payments or lump sum?	316
24. Caps and thresholds	318
II. Non-pecuniary Loss	318
25. Introduction to indemnifying non-pecuniary loss	318
26. Who can claim compensation for non-pecuniary loss?	320
G. Procedural Matters	321
27. Specific rules of jurisdiction or procedure	321
28. Special institutions handling malpractice claims	321
H. Outlook	321
29. Reform plans	321
Cases	321
Case 1	321

Case 2	323
Case 3	323
Case 4	325
Case 5	326
Case 6	327
 Alessandro P Scarso/Massimo Foglia	
Medical Liability in Italy	329
General Questions	329
A. The Health Care System Framework	329
I. General Introduction	329
1. The health care system in overview	329
II. Social Welfare Provision	330
2. The role of public health care	330
3. Differences in treating patient's claims	332
4. Right of recourse	332
III. Private Insurance	332
5. The role of private health insurance	332
6. Liability insurance	333
IV. Professional Standards	333
7. Applicable professional standards	333
8. Quality and/or risk management systems	335
B. Tort Liability	335
9. Fundamentals of tort liability	335
10. Burden of proof	337
11. Uncertain causation	337
12. Loss of a chance	339
13. Multiple persons involved	340
14. Strict liability	340
C. Contractual Liability	341
15. Basics of contracts in the health care sector	341
16. Differences to tort law	343
17. Contractual claims in the absence of direct contracts?	344
18. Informed consent	345
D. Public Liability	347
19. Key differences from cases involving private hospitals or doctors	347
E. Alternative Compensation Regimes	347
20. Funds and/or other alternative compensation regimes	347
F. Extent of Liability/Remedies	348
I. Pecuniary Loss	348
21. Introduction to indemnifying pecuniary loss	348
22. Loss of earnings vs loss of earning capacity	349

Table of Contents

23. Periodic payments or lump sum?	350
24. Caps and thresholds	350
II. Non-Pecuniary Loss	350
25. Introduction to indemnifying non-pecuniary loss	350
26. Who can claim compensation for non-pecuniary loss?	353
G. Procedural Matters	354
27. Specific rules of jurisdiction or procedure	354
28. Special institutions handling malpractice claims	354
H. Outlook	354
29. Reform plans	354
Cases	354
Case 1	354
Case 2	356
Case 3	357
Case 4	357
Case 5	358
Case 6	358
 <i>Ivo Giesen/Esther Engelhard</i>	
Medical Liability in the Netherlands	361
General Questions	361
A. The Healthcare System Framework	361
I. General Introduction	361
1. The health care system in overview	361
II. Social Welfare Provision	363
2. The role of public healthcare	363
3. Differences in treating patient's claims	364
4. Right of recourse	364
III. Private Insurance	365
5. The role of private health insurance	365
6. Liability insurance	366
IV. Professional Standards	367
7. Applicable professional standards	367
8. Quality and/or risk management systems	368
B. Tort Liability	369
9. Fundamentals of tort liability	369
10. Burden of proof	371
11. Uncertain causation	375
12. Loss of a chance	380
13. Multiple persons involved	384
14. Strict liability	385
C. Contractual Liability	386
15. Basics of contracts in the healthcare sector	386
16. Differences to tort law	387

17. Contractual claims in the absence of direct contracts?	388
18. Informed consent	389
D. Public Liability	390
19. Key differences from cases involving private hospitals or doctors	390
E. Alternative Compensation Regimes	390
20. Funds and/or other alternative compensation regimes	390
F. Extent of Liability/Remedies	391
I. Pecuniary Loss	391
21. Introduction to indemnifying pecuniary loss	391
22. Loss of earnings vs loss of earning capacity	393
23. Periodic payments or lump sum?	393
24. Caps and thresholds	393
II. Non-pecuniary Loss	394
25. Introduction to indemnifying non-pecuniary loss	394
26. Who can claim compensation for non-pecuniary loss?	396
G. Procedural Matters	397
27. Specific rules of jurisdiction or procedure	397
28. Special institutions handling malpractice claims	397
H. Outlook	398
29. Reform plans	398
Cases	398
Case 1	398
Case 2	401
Case 3	404
Case 4	407
Case 5	408
Case 6	409
 Ewa Bagińska	
Medical Liability in Poland	411
General Questions	411
A. The Health Care System Framework	411
I. General Introduction	411
1. The health care system in overview	411
II. Social Welfare Provision	412
2. The role of public health care	412
3. Differences in treating patient's claims	413
4. Right of recourse	413
III. Private Insurance	414
5. The role of private health insurance	414
6. Liability insurance	414

Table of Contents

IV. Professional Standards	416
7. Applicable professional standards	416
8. Quality and/or risk management systems	417
B. Tort Liability	420
9. Fundamentals of tort liability	420
10. Burden of proof	421
11. Uncertain causation	423
12. Loss of a chance	424
13. Multiple persons involved	425
14. Strict liability	427
C. Contractual Liability	427
15. Basics of contracts in the health care sector	427
16. Differences to tort law	428
17. Contractual claims in the absence of direct contracts?	429
18. Informed consent	429
D. Public Liability	431
19. Key differences from cases involving private hospitals or doctors	431
E. Alternative Compensation Regimes	432
20. Funds and/or other alternative compensation regimes	432
F. Extent of Liability/Remedies	432
I. Pecuniary Loss	432
21. Introduction to indemnifying pecuniary loss	432
22. Loss of earnings vs loss of earning capacity	434
23. Periodic payments or lump sum?	435
24. Caps and thresholds	435
II. Non-pecuniary Loss	435
25. Introduction to indemnifying non-pecuniary loss	435
26. Who can claim compensation for non-pecuniary loss?	437
G. Procedural Matters	438
27. Specific rules of jurisdiction or procedure	438
28. Special institutions handling malpractice claims	439
H. Outlook	439
29. Reform plans	439
Cases	441
Case 1	441
Case 2	442
Case 3	442
Case 4	443
Case 5	445
Case 6	447

Miquel Martín-Casals/Josep Solé

Medical Liability in Spain	451
General Questions	451
A. The Health Care System Framework	451
I. General Introduction	451
1. The health care system in overview	451
II. Welfare Provision	455
2. The role of public health care	455
3. Differences in treating patient's claims	456
4. Right of recourse	457
III. Private Insurance	458
5. The role of private health insurance	458
6. Liability insurance	460
IV. Professional Standards	462
7. Applicable professional standards	462
8. Quality and/or risk management systems	465
B. Tort Liability	466
9. Fundamentals of tort liability	466
10. Burden of proof	470
11. Uncertain causation	474
12. Loss of a chance	478
13. Multiple persons involved	481
14. Strict liability	483
C. Contractual Liability	485
15. Basics of contracts in the health care sector	485
16. Differences to tort law	488
17. Contractual claims in the absence of direct contracts?	490
18. Informed consent	490
D. Public Liability	494
19. Key differences from cases involving private hospitals or doctors	494
E. Alternative Compensation Regimes	497
20. Funds and/or other alternative compensation regimes	497
F. Extent of Liability/Remedies	500
I. Pecuniary Loss	500
21. Introduction to indemnifying pecuniary loss	500
22. Loss of earnings vs loss of earning capacity	501
23. Periodic payments or lump sums?	502
24. Caps and thresholds	503
II. Non-Pecuniary Loss	504
25. Introduction to indemnifying non-pecuniary loss	504
26. Who can claim compensation for non-pecuniary loss?	506

Table of Contents

G. Procedural Matters	507
27. Specific rules of jurisdiction or procedure	507
28. Special institutions handling malpractice claims	508
H. Outlook	509
29. Reform plans	509
Cases	509
Case 1	509
Case 2	512
Case 3	514
Case 4	516
Case 5	518
Case 6	521

Philip Mielnicki/Mårten Schultz

Medical Liability in Sweden 525

General Questions	525
A. The Health Care System Framework	525
I. General Introduction	525
1. The health care system in overview	525
II. Social Security	527
2. The role of public health care	527
3. Differences in treating patient's claims	527
4. Right of recourse	528
III. Private Insurance	528
5. The role of private health insurance	528
6. Liability insurance	529
IV. Professional Standards	529
7. Applicable professional standards	529
8. Quality and/or risk management systems	529
B. Tort Liability	530
9. Fundamentals of tort liability	530
10. Burden of proof	531
11. Uncertain causation	531
12. Loss of a chance	532
13. Multiple persons involved	532
14. Strict liability	532
C. Contractual Liability	534
15. Basics of contracts in the health care sector	534
16. Differences to tort law	534
17. Contractual claims in the absence of direct contracts?	534
18. Informed consent	534
D. Public Liability	536
19. Key differences from cases involving private hospitals or doctors	536

E. Fund and other alternative compensation regimes	536
20. Funds and/or other alternative compensation regimes	536
F. Extent of Liability/Remedy	536
I. Pecuniary loss	536
21. Introduction to indemnifying pecuniary loss	536
22. Loss of earnings vs loss of earning capacity	537
23. Periodic payments or lump sum?	537
24. Caps and thresholds	537
II. Non-pecuniary loss	538
25. Introduction to indemnifying non-pecuniary loss	538
26. Who can claim compensation for non-pecuniary loss?	540
G. Procedural Matters	540
27. Specific rules of jurisdiction or procedure	540
28. Special institutions handling malpractice claims	541
H. Outlook	541
29. Reform plans	541
Cases	541
Case 1	541
Case 2	543
Case 3	543
Case 4	544
Case 5	545
Case 6	546
 Corinne Widmer Lüchinger	
Medical Liability in Switzerland	547
General Questions	547
A. The Health Care System Framework	547
I. General Introduction	547
1. The health care system in overview	547
II. Social Welfare Provision	550
2. The role of public health care	550
3. Differences in treating patient's claims	555
4. Right of recourse	556
III. Private Insurance	557
5. The role of private health insurance	557
6. Liability insurance	558
IV. Professional Standards	560
7. Applicable professional standards	560
8. Quality and/or risk management systems	561
B. Tort Liability	562
9. Fundamentals of tort liability	562
10. Burden of proof	565
11. Uncertain causation	567

Table of Contents

12. Loss of a chance	569
13. Multiple persons involved	569
14. Strict liability	572
C. Contractual Liability	573
15. Basics of contracts in the health care sector	573
16. Differences to tort law	575
17. Contractual claims in the absence of direct contracts?	578
18. Informed consent	578
D. Public Liability	581
19. Key differences from cases involving private hospitals or doctors	581
E. Alternative compensation regimes	583
20. Funds and/or other alternative compensation regimes . . .	583
F. Extent of Liability/Remedies	584
I. Pecuniary loss	584
21. Introduction to indemnifying pecuniary loss	584
22. Loss of earnings vs loss of earning capacity	586
23. Periodic payments or lump sum?	587
24. Caps and thresholds	587
II. Non-pecuniary loss	588
25. Introduction to indemnifying non-pecuniary loss	588
26. Who can claim compensation for non-pecuniary loss?	590
G. Procedural Matters	591
27. Specific rules of jurisdiction or procedure	591
28. Special institutions handling malpractice claims	592
H. Outlook	593
29. Reform plans	593
Cases	595
Case 1	595
Case 2	598
Case 3	599
Case 4	602
Case 5	604
Case 6	607

Bernhard A Koch

Medical Liability in Europe: Comparative Analysis

Introduction	611
General Questions	614
A. The Health Care System Framework	614
I. General Introduction	614
1. The health care system in overview	614
II. Social Welfare Provision	617
2. The role of public health care.	617

3. Differences in treating patient's claims	619
4. Right of recourse	620
III. Private Insurance	621
5. The role of private health insurance	621
6. Liability insurance	623
IV. Professional Standards	624
7. Applicable professional standards	624
8. Quality and/or risk management systems	625
B. Tort Liability	626
9. Fundamentals of tort liability	626
10. Burden of proof	630
11. Uncertain causation	634
12. Loss of a chance	636
13. Multiple persons involved	637
14. Strict liability	640
C. Contractual Liability	640
15. Basics of contracts in the health care sector	640
16. Differences to tort law	642
17. Contractual claims in the absence of direct contracts?	643
18. Informed consent	644
D. Public Liability	648
19. Key differences from cases involving private hospitals or doctors	648
E. Alternative compensation regimes	650
20. Funds and/or other alternative compensation regimes	650
F. Extent of Liability/Remedies	654
I. Pecuniary loss	654
21. Introduction to indemnifying pecuniary loss	654
22. Loss of earnings vs loss of earning capacity	655
23. Periodic payments or lump sum?	655
24. Caps and thresholds	656
II. Non-pecuniary loss	657
25. Introduction to indemnifying non-pecuniary loss	657
26. Who can claim compensation for non-pecuniary loss?	659
G. Procedural Matters	660
27. Specific rules of jurisdiction or procedure	660
28. Special institutions handling malpractice claims	661
H. Outlook	663
29. Reform plans	663
Cases	664
Preliminary remarks	664
Case 1	665
Case 2	671
Case 3	674

Table of Contents

Case 4 679

Case 5 682

Case 6 686

Conclusions 689

Index 693