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# WHY CHINA'S 2010 MEDICAL MALPRACTICE REFORM FAILS TO REFORM MEDICAL MALPRACTICE

## INTRODUCTION

Violence against doctors and healthcare staff in the People's Republic of China has turned doctors and nurses into masters of self-defense. Healthcare facilities in China have become "battlegrounds of discontent."<sup>1</sup> Scenes coming out of hospitals in the People's Republic of China look more like warzones than healthcare institutions. In Guangdong Province, nurses wear steel military helmets while caring for newborns,<sup>2</sup> and hired professionals teach self-defense classes for female doctors and nurses.<sup>3</sup> Doctors and hospital staff in Nanchang were even issued long sticks and cans of mace to fight off a mob of people carrying pitchforks and clubs.<sup>4</sup>

Unfortunately, violence against doctors and healthcare employees has become commonplace in modern China. With no viable legal recourse for medical malpractice, family members "take matters into their own hands."<sup>5</sup> Some families of malpractice victims attack hospitals for revenge, while others choose to stage protests or riots in hopes that the local government will "pay to quiet the protesters . . . ."<sup>6</sup> Between January 1991 and July 2001, there were 568 attacks on healthcare facilities and workers in Hubei Province alone, including some deaths.<sup>7</sup> From 2000 to 2003, a total of ninety health care workers were either wounded or disabled in Beijing's 502 reported incidences of violence against healthcare workers in the city.<sup>8</sup> In Jiangsu Province, violence increased by thirty-five percent each year from 2000 to 2002, with an average of 177 attacks on healthcare facilities and workers per year.<sup>9</sup> In 2006,

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<sup>1</sup> Sharon LaFraniere, *Chinese Hospitals are Battlegrounds of Discontent*, N.Y. TIMES, Aug. 12, 2010, at A1.

<sup>2</sup> *Doctors, Nurses Wearing Helmets*, CHINA DAILY (Dec. 26, 2006, 10:54 AM), [http://www.chinadaily.com.cn/photo/2006-12/26/content\\_767787.htm](http://www.chinadaily.com.cn/photo/2006-12/26/content_767787.htm).

<sup>3</sup> *Doctors in Self-Defense Mode*, CHINA DAILY (April 25, 2011, 7:59 AM), [http://www.chinadaily.com.cn/opinion/2011-04/25/content\\_12384968.htm](http://www.chinadaily.com.cn/opinion/2011-04/25/content_12384968.htm).

<sup>4</sup> Barbara Demick, *In China, Sixth Stage of Grief Calls for a Club*, L.A. TIMES, Aug. 25, 2011, at A3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Dean M. Harris & Chien-Chang Wu, *Medical Malpractice in the People's Republic of China: The 2002 Regulation of the Handling of Medical Accidents*, 33 J.L. MED. & ETHICS 456, 456 (2005).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

the Chinese Health Ministry reported that attacks by patients or their relatives had injured more than 5,500 medical workers.<sup>10</sup> In 2007, after reports that an infant was denied life-saving treatment because his guardians could not afford the £50 fee, 2,000 demonstrators attacked a city hospital, leading to ten injuries and five arrests.<sup>11</sup>

The attacks on hospitals and healthcare workers are symptomatic of a widespread discontent with the Chinese healthcare system and the government that regulates it. The majority of the Chinese population does not have access to sufficient medical care, and those who do often receive substandard care.<sup>12</sup> Healthcare professionals' negligence and failure to act puts patients at risk of death or disability.<sup>13</sup> For example, in the 1990s, up to one million people were infected with HIV through transfusions of blood the public hospitals were selling for profit.<sup>14</sup> The media frequently reports on the most recent medical accident<sup>15</sup>—with reports ranging from a “stillborn” infant found alive after doctors wrapped her in a plastic bag and dumped her in a hospital bathroom<sup>16</sup> to a worker who woke up from what was supposed to be a thumb-reattachment surgery to find doctors had cut off his toe and sewed it onto his thumb.<sup>17</sup>

Patient attacks on doctors are common in China due to the lack of an alternative way for injured parties to seek justice. There is no effective remedy for injured patients because China lacks a “credible system to deal with medical accidents and related problems in quality care.”<sup>18</sup> People who fall victim to medical malpractice find that it is “difficult to sue” even in the most egregious cases.<sup>19</sup> The difficulty of suing for malpractice, coupled with the

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<sup>10</sup> LaFraniere, *supra* note 1, at A1.

<sup>11</sup> Jonathan Watts, *Chinese Hospital Staff Face Attack Amid High Prices and Dubious Care*, THE GUARDIAN (May 11, 2007), <http://www.guardian.co.uk/world/2007/may/12/china.jonathanwatts1>.

<sup>12</sup> WORLD HEALTH ORG., WORLD HEALTH REPORT 2000: HEALTH SYSTEMS: IMPROVING PERFORMANCE 36 (2000).

<sup>13</sup> Melinda Cooper, *Experimental Republic: Medical Accidents (Productive and Unproductive) in Postsocialist China*, 5 E. ASIAN SCI. TECH. & SOC'Y: INT'L J. 313 (2011).

<sup>14</sup> Demick, *supra* note 4.

<sup>15</sup> In China, a “medical accident” refers to any incident of medical malpractice. It does not imply that the incident was a pure accident or that no one was at fault. *See generally* Cooper, *supra* note 13.

<sup>16</sup> Lucy Buckland, *Doctors Dumped Baby in Plastic Bag After Telling Mother It Was a Dead Girl (Only for Her to Find It Was a Little Boy Who Was ALIVE)*, MAIL ONLINE (Nov. 5, 2011, 3:22 PM), <http://www.dailymail.co.uk/news/article-2057914>.

<sup>17</sup> *China Worker Shocked to Find Thumb Replaced by Toe*, ASIAONE (Oct. 17, 2011), <http://www.asiaone.com/Health/News/Story/A1Story20111017-305544.html>.

<sup>18</sup> Harris & Wu, *supra* note 7, at 470.

<sup>19</sup> Demick, *supra* note 4.

historical mistrust of litigation among Chinese citizens,<sup>20</sup> makes the possibility of recourse through the law an unlikely alternative to physical violence.

China's new Tort Liability Law<sup>21</sup> came into force on July 1, 2010, and includes a complete overhaul of the medical malpractice system.<sup>22</sup> The new law was highly praised as protecting "the rights of patients who suffer from damage caused by medical malpractices, but also protect[ing] the lawful rights of medical institutions and medical staff to ensure the healthy and ordered development of the health-care system."<sup>23</sup> The law was touted as the ultimate solution to the problem of hospital violence and medical malpractice.<sup>24</sup>

In theory, tort law is a logical solution to address hospital violence.<sup>25</sup> Ideally, a medical malpractice system could compensate victims, deter tortious behavior, and prevent retributive violence by providing an alternate forum for justice after an incident of malpractice. However, tort theory relies on assumptions that do not apply in the context of the legal system of China.<sup>26</sup> The effectiveness of a tort system in minimizing tortious acts and pacifying violence in response to tortious acts relies on the public's ability to get a "fair" trial and the public's perception of that ability.<sup>27</sup> Tort theory breaks down when the general population does not anticipate justice from the court or does not have access to courts.<sup>28</sup> Without a legal structure that can fairly and efficiently manage claims and to which all people have access, the Tort Liability Law will be ineffective in controlling the issues the reform was intended to address.

This Comment uses tort theory to show that the new Tort Liability Law's medical malpractice provisions will be ineffective. The Tort Liability Law does not adequately compensate victims, and it will fail to prevent tortious

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<sup>20</sup> MARGARET Y.K. WOO & MARY E. GALLAGHER, *Introduction to CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA I* (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011).

<sup>21</sup> 中华人民共和国侵权责任法 [Tort Liability Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) [hereinafter Tort Liability Law], translated at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=182630](http://www.wipo.int/wipolex/en/text.jsp?file_id=182630).

<sup>22</sup> *Id.* at ch. VII.

<sup>23</sup> Yan-Lin Cao et al., Letter to the Editor, *New Legislation in China Balancing the Rights of Both Doctors and Patients*, 52 *MED. SCI. & L.* 60, 61 (2012).

<sup>24</sup> *See, e.g., id.* at 61–62 ("Although the judicial system in China differs from those in England, the USA and other countries that adopt the *Common Law*, the principles of *Medical Tort Law* legislation established in China can also be used as references for the judges in those countries while judging lawsuits of medical malpractice.").

<sup>25</sup> *See infra* Part I.

<sup>26</sup> *See infra* Part II.

<sup>27</sup> *See infra* Part II.

<sup>28</sup> *See infra* Part II.

conduct and retributive hospital violence. Part I provides a background on tort theory, and Part II situates the new Tort Liability Law within the context of the Chinese legal system and healthcare system. Part III describes the most important features of the new Tort Liability Law and analyzes the changes it brings to the existing medical malpractice system. Part IV uses tort theory to analyze the new law and identifies the flaws in the legislation that will prevent it from bringing the desired improvements to the Chinese healthcare system.

Although, generally, China's current trend of developing the legal system reflects some progress, the medical malpractice portion of the Tort Liability Law is a reform on the books that will not translate into actual medical reform. As it is written, the unfortunate effect of the reform likely will be to further suppress an already insufficient and underfunded medical industry. The law will have to be accompanied by broader reform in the Chinese justice system to achieve its purported goals. Real changes in the medical malpractice system will not come until the government makes an investment in the administrative processes to support the law and to assure its fair administration.

## I. THE FUNCTIONS OF TORT LAW

China's new Tort Liability Law was formulated "[i]n order to protect the legitimate rights and interests of parties in civil law relationships, clarify the tort liability, prevent and punish tortious conduct, and promote the social harmony and stability . . . ."<sup>29</sup> This Comment will analyze the content of the Tort Liability Law using tort theory to determine if the law will be able to achieve its stated objectives. Traditional tort theory is an appropriate construct within which to analyze China's tort law because the goals of tort law that it recognizes are in line with the stated goals of the Tort Liability Law.

Modern scholars recognize the two primary functions of tort law to be compensation and deterrence.<sup>30</sup> However, in the context of China, a third function is also applicable: the prevention of retributive violence. This Part will introduce these functions of tort law. Understanding tort law's purposes is necessary to be able to analyze the effectiveness of the medical malpractice component of the Tort Liability Law.

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<sup>29</sup> Tort Liability Law, *supra* note 21, ch. I, art. 1.

<sup>30</sup> See Joanna M. Shepherd, *Tort Reforms' Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 910 n.8 (2008).

A. *Compensation—To “protect the legitimate rights and interests of parties in civil law relationships”*<sup>31</sup>

The first major function of tort law is to compensate the person who is injured by tortious wrongdoing.<sup>32</sup> Compensation is fair because it serves to “reimburse a victim for her losses from the tortious act, and . . . restore her to her condition before the act.”<sup>33</sup> Thus, tort law serves to “protect the legitimate rights and interests of parties in civil law relationships”<sup>34</sup> by restoring them to the condition they were in before the tort.

To restore a victim to her pre-tort condition, she must be compensated for *all* the injuries she suffered or will suffer because of the tort.<sup>35</sup> For example, a doctor who commits malpractice and injures a patient will have to compensate her not only for her additional medical bills, but also for the wages she lost as a result of the injury, and for the pain and suffering she experienced because of the injury.<sup>36</sup> For the Tort Liability Law to achieve its goal of protecting the rights and interests of medical patients, it must provide for victims to be fully compensated.

Compensation can be too low for many reasons. Court rulings could systematically under compensate plaintiffs for the damages they suffer. Alternatively, compensation could be too low if there is no forum to sue or if people cannot afford to sue. When there is no forum to sue or people lack access to justice, people who are injured will not be compensated at all. In judging the effectiveness of a new law at achieving compensation, it is necessary to consider the people who receive a settlement that may be too low as well as the people who are prohibited from receiving their deserved settlement at all. Either situation leads to under-compensation of victims.

B. *Deterrence—To “prevent . . . tortious conduct”*<sup>37</sup>

The second major function of tort law is to deter people from engaging in inappropriately dangerous activities.<sup>38</sup> Tort law deters harmful behavior by

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<sup>31</sup> Tort Liability Law, *supra* note 21, ch. I, art. 1.

<sup>32</sup> *See generally* 1 DAN B. DOBBS ET AL., THE LAW OF TORTS § 13 (2d ed. 2011) (discussing the function of compensation in tort law).

<sup>33</sup> Shepherd, *supra* note 30, at 910.

<sup>34</sup> Tort Liability Law, *supra* note 21, ch. I, art. 1.

<sup>35</sup> Shepherd, *supra* note 30, at 910.

<sup>36</sup> *See id.*

<sup>37</sup> Tort Liability Law, *supra* note 21, ch. I, art. 1.

consistently forcing people to compensate the victims of that behavior.<sup>39</sup> Tort law seeks to force people to internalize the externalities of their own behavior, which is to say that tort law forces an actor to compensate those who suffer the consequences of the actor's behavior.<sup>40</sup> An externality is "a consequence or side effect of one's . . . activity, causing another to benefit without paying or to suffer without compensation."<sup>41</sup> A person who anticipates she will be held liable for the externalities her actions impose on others will "tend to avoid conduct that could lead to [that] tort liability."<sup>42</sup>

The Tort Liability Law seeks to prevent tortious conduct,<sup>43</sup> so the new law relies on a tort system's deterrent effect. In the medical setting, tort law theoretically means that a doctor knows she will end up paying for the consequences when her unreasonable behavior puts her patients at risk.<sup>44</sup> For example, when a doctor is negligent and causes harm to a patient, she has to go to court and pay the victim of her negligence to compensate the victim for the harm.<sup>45</sup> Knowing that she will ultimately be responsible for paying for any damages, a rational doctor will take into account the costs of her actions on other people.<sup>46</sup> By forcing her to internalize the externalities of her actions, tort law helps facilitate a situation in which people only take actions that have a net social benefit.

### *1. The Assumption of Full Compensation*

The deterrent effect of tort law relies on the assumption that people who act negligently will actually have to pay full compensation to the victims.<sup>47</sup> The higher the damages an actor expects to pay, the more she will be deterred from causing an accident.<sup>48</sup> For the actor to be sufficiently deterred, compensation

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<sup>38</sup> Shepherd, *supra* note 30, at 910; *see also*, PETER CANE, *ATYIAH'S ACCIDENTS, COMPENSATION AND THE LAW* 361–62 (William Twining & Christopher McCrudden eds., 6th ed. 1999) ("[O]ne of the most important of the suggested functions of personal injuries compensation law is deterrence.").

<sup>39</sup> 1 DOBBS ET AL., *supra* note 32, § 14.

<sup>40</sup> *See* DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 190 (2000).

<sup>41</sup> BLACK'S LAW DICTIONARY 664 (9th ed. 2009).

<sup>42</sup> 1 DOBBS ET AL., *supra* note 32, § 14.

<sup>43</sup> Tort Liability Law, *supra* note 21, ch. I, art. 1.

<sup>44</sup> *See* Shepherd, *supra* note 30, at 912.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> "[B]ecause [a person] expects to pay for the harm he imposes on others, he will consider the cost of that harm." *Id.* at 912. If people know they will not actually have to pay for the damage their negligence causes, they will not be deterred from being negligent.

<sup>48</sup> *See id.* at 912–13.

has to be sufficiently high.<sup>49</sup> Full compensation imposes perfect deterrence, which is the socially optimal level of deterrence from unreasonable behavior.<sup>50</sup> Perfect deterrence means that a person will consider the full extent of the impact of her actions on other people.<sup>51</sup>

Conversely, when compensation is too low—as it is for medical malpractice cases in China<sup>52</sup>—there is not perfect deterrence. In this case, people are under-deterred from taking unreasonable actions. They take actions that have too high of a cost to society. The result is an inefficiently large number of torts or, in this case, instances of medical malpractice.

Under-compensation leads to under-deterrence. When courts hand out settlements that are too low, actors will not be sufficiently motivated to consider the entire cost of their actions.<sup>53</sup> When there is no forum to sue or people lack access to justice, parties know that they will not be held liable for unreasonable actions and do not have to consider the externalities of their actions.<sup>54</sup> All of these situations mean that compensation is consistently too low, and the assumption that tort law will deter inappropriately dangerous behavior is unfounded. Thus, when compensation is systematically too low, people will not be adequately deterred from causing the accident.

## 2. *The Two Mechanisms of Deterrence: Effects on Level of Precaution and Level of Activity*

A person who anticipates she will face tort liability for any accident she causes will try to engage in safer activities. Two factors affect the probability that an accident will occur: level of precaution and activity level.<sup>55</sup> To avoid the accident, the actor must either increase the level of precaution or decrease the activity level.

First, an increase in precaution is the most obvious way to lower the number of accidents because an accident becomes less likely if people are

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<sup>49</sup> *Id.*

<sup>50</sup> See FRIEDMAN, *supra* note 40, at 206.

<sup>51</sup> *Id.*

<sup>52</sup> See Harris & Wu, *supra* note 7, at 470.

<sup>53</sup> See 1 DOBBS ET AL., *supra* note 32, § 14.

<sup>54</sup> See Shepherd, *supra* note 30, at 912–13.

<sup>55</sup> Shepherd, *supra* note 30, at 911; see also Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 2 (1980); William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 117 (1983).

more careful.<sup>56</sup> Ideally, tort law will impose liability on the individual who can take precautions that are socially beneficial. For example, tort law imposes liability for a car accident on the driver of the car, not on the passenger, because the driver can drive more carefully, but the passenger has no control over the safety of the car.<sup>57</sup>

The second way to affect the probability of an accident is by changing the activity level.<sup>58</sup> Naturally, an accident becomes less likely as an individual decreases participation in the activity that causes the accident. For example, one way to decrease the possibility of being in a car accident is to stop riding in cars.<sup>59</sup> This is a simple solution when the activity in and of itself is socially undesirable. In such cases, laws should simply deter people from doing socially undesirable activities altogether. For example, laws can forbid people from committing murder or other socially useless crimes. However, sometimes accidents are the by-product of socially desirable activities,<sup>60</sup> as is the case with medical malpractice.<sup>61</sup> Lawmakers do not want to discourage people from practicing medicine because society needs doctors.

Therefore, lawmakers must take care not to impose liabilities on parties who can reduce the number of accidents by decreasing the activity level of an otherwise desirable activity. Instead, laws should put the liability on someone who can increase precaution. Theoretically, when the liability is on the party that can increase precaution, the law can cause the same reduction in accidents without reducing the benefits from the activity.<sup>62</sup> Thus, when liability is imposed on the individual with the power to increase precaution, society does not have to sacrifice the benefits of a socially desirable activity to insure against the costs it imposes in the form of occasional accidents.

*C. Prevention of Self-Help—To “promote the social harmony and stability”*<sup>63</sup>

The other major function of victim compensation is to avoid the breaches of the peace that can occur when a victim takes justice into her own hands.

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<sup>56</sup> Shepherd, *supra* note 30, at 911.

<sup>57</sup> *See id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 912.

<sup>60</sup> *See* Landes & Posner, *supra* note 55, at 121.

<sup>61</sup> Shepherd, *supra* note 30, at 912.

<sup>62</sup> *See id.* at 911.

<sup>63</sup> Tort Liability Law, *supra* note 21, ch. I, art. 1.

Preservation of the peace was the earliest goal of tort law.<sup>64</sup> In the United States, tort law's function of preserving the peace has been "obviated by criminal law."<sup>65</sup> However, tort law's role in preserving the peace is still applicable in the context of medical malpractice in China. Criminal law has not been successful in preventing retributive hospital violence, despite the fact that prohibitions do exist and people are arrested for violating them.<sup>66</sup> Additionally, the Tort Liability Law specifically identifies that one of its goals is to "promote the social harmony and stability."<sup>67</sup>

Tort law promotes social harmony by seeking to avoid the possibility of violence, which can escalate and lead to even greater societal damage.<sup>68</sup> Ideally, when the public knows there is an appropriate remedy within the court system, people will not seek violent retribution but will instead litigate the issue in the courts.<sup>69</sup> In the context of medical malpractice in China, this goal is particularly attractive. When victims can seek compensation in the courts, hospital violence should decrease.

At first glance, tort laws are perfectly suited to decrease hospital violence in China. Compensating victims would be fair and would restore them to their pre-tort condition. Deterring negligent behavior would decrease the number of medical accidents in China and lead to fewer patient injuries. Compensation of victims of negligence would provide an alternative form of justice and prevent hospital violence. This Comment will analyze the actual laws China implemented to determine if the Tort Liability Law will provide these benefits.<sup>70</sup> Despite the fact that tort liability has the potential to achieve these goals, this Comment will show that the Tort Liability Law will not be able to achieve them because it fails to establish the judicial infrastructure necessary to translate the ideals listed on the page of the law into reality.<sup>71</sup>

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<sup>64</sup> Joseph H. King, *The Torts Restatement's Inchoate Definitions of Intent for Battery, and Reflections on the Province of Restatements*, 38 PEPP. L. REV. 623, 649 (2011).

<sup>65</sup> *Id.*

<sup>66</sup> See *supra* note 11 and accompanying text.

<sup>67</sup> Tort Liability Law, *supra* note 21, ch. I, art. 1.

<sup>68</sup> King, *supra* note 64, at 649.

<sup>69</sup> *Id.*

<sup>70</sup> See *infra* Part III.

<sup>71</sup> See *infra* Part IV.

## II. THE DEVELOPMENT OF MEDICAL MALPRACTICE LAW

China has been in a period of increasing privatization since it entered the international stage in the 1970s.<sup>72</sup> Because of this general trend of privatization, it is difficult to find an industry in China that is not fundamentally different than it was in 1970.<sup>73</sup> Accordingly, the medical malpractice system is developing at the same time as the court and hospital systems.<sup>74</sup> To understand the potential for the new law to be effective in China, it is necessary to first understand the state of the healthcare and court systems. This Section will describe the modern history of the healthcare and judicial systems to put the medical malpractice portion of the new Tort Liability Law into context. Armed with the necessary analytical tools from Part I and background information from Part II, the Comment will explain why the new law will not fit into Chinese society.

### A. *The Chinese Healthcare System*

Although the Chinese Constitution provides a right to healthcare,<sup>75</sup> a significant portion of the Chinese population remains without adequate care.<sup>76</sup> The central government traditionally ran hospitals in China, but beginning in 1978 the central government greatly reduced funding for healthcare and shifted the responsibility to provincial and local authorities.<sup>77</sup> During the 1990s, “unaffordable access to care became a major area of public discontent.”<sup>78</sup> Hospitals were underfunded, and doctors were not paid well.<sup>79</sup>

Another problem in the Chinese healthcare system during the 1990s and early 2000s was the decline in the level of health insurance.<sup>80</sup> There was no

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<sup>72</sup> Fu Hualing, *Access to Justice in China: Potentials, Limits, and Alternatives*, in *LEGAL REFORMS IN CHINA AND VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES* 163, 165 (John Gillespie & Albert H.Y. Chen eds., 2010).

<sup>73</sup> See The Long and Winding Road to Privatization in China, KNOWLEDGE@WHARTON (May 10, 2006), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1472>.

<sup>74</sup> See generally Tort Liability Law, *supra* note 21.

<sup>75</sup> XIANFA art. 45 (2004) (China), translated at [http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content\\_1372964.htm](http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372964.htm) (“Citizens of the People’s Republic of China have the right to material assistance from the State and society when they are old, ill or disabled. The State develops the social insurance, social relief and medical and health services that are required for citizens to enjoy this right.”).

<sup>76</sup> WORLD HEALTH ORG., *supra* note 12, at 36.

<sup>77</sup> Cooper, *supra* note 13, at 316.

<sup>78</sup> Qi Cao et al., *Report from China: Health Insurance in China—Evolution, Current Status, and Challenges*, 42 INT’L J. HEALTH SERVICES 177, 182 (2012).

<sup>79</sup> *Id.*

<sup>80</sup> Cooper, *supra* note 13, at 317.

help for the uninsured.<sup>81</sup> The result was that most medical services in China were paid for out-of-pocket, and most of China's poor could not afford adequate care.<sup>82</sup> In 2000, the World Health Organization ranked China 188 out of the 191 member states for fairness of financial contributions to the healthcare systems,<sup>83</sup> noting that "great inequality characterizes a few countries in which nearly all health spending is out-of-pocket, notably China . . . ."<sup>84</sup> The disparity is particularly pronounced in rural areas, where "[n]early 90 percent of farm households now pay out of pocket for almost all their health services."<sup>85</sup>

China instituted a major health reform in 2009 that ignited notable progress toward increasing insurance availability, but "it is still too early to judge whether the political willingness to appease social unrest can be translated into concrete health care protection for the population."<sup>86</sup> The Ministry of Health reported near universal coverage by 2010.<sup>87</sup> However, "coverage . . . does not necessarily mean enjoying health care benefits," and "[e]mpirical evidence . . . has consistently shown less optimistic results."<sup>88</sup> Expanded coverage increases the demand for services, and the Chinese health system likely will take time to respond to increased demand. Thus, despite improvements, it is safe to say that China still faces difficulties in ensuring its population has access to adequate health services.

The government retains significant control of hospital operation.<sup>89</sup> For example, local government agencies control physician hiring and firing.<sup>90</sup> Additionally, regulations set prices doctors can charge, and only pharmaceuticals and technology (such as x-rays, etc.) are above market value.<sup>91</sup> Therefore, doctors have the incentive to overprescribe and overcharge for pharmaceuticals and perform too many tests.<sup>92</sup> Hospitals are not in a

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<sup>81</sup> See Harris & Wu, *supra* note 7, at 458.

<sup>82</sup> WORLD HEALTH ORG., *supra* note 12, at 191.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 36.

<sup>85</sup> WORLD BANK, CHINA 2020: FINANCING HEALTH CARE: ISSUES AND OPTIONS FOR CHINA 56 (1997).

<sup>86</sup> Cao et al., *supra* note 78, at 183–84.

<sup>87</sup> *Id.* at 184.

<sup>88</sup> *Id.*

<sup>89</sup> See Harris & Wu, *supra* note 7, at 466.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 458–59.

<sup>92</sup> *Id.*

position to prevent this physician behavior because they do not have the power to fire doctors.<sup>93</sup>

Finally, the end of the welfare state means that the consequences of disability due to lack of healthcare or medical malpractice are becoming increasingly severe. Today, disability welfare is very low. With the exception of people who become disabled due to a work-related injury and receive fairly high welfare benefits,<sup>94</sup> permanent disability welfare benefits are equal to forty percent of the insured's wage.<sup>95</sup> For the average person in China, this is not a livable wage.<sup>96</sup> Even in the case of egregious medical malpractice, without tort law the victim faces the possibility of no compensation, a permanent loss of her ability to earn income, and a significant decrease in her available funds.<sup>97</sup>

### *B. The Changing Structure of Chinese Courts*

The concept of civil litigation is new to China, and it is uncomfortable to many in the Chinese culture. Communist China punished what would be today's torts with criminal sentences and resolved disputes between individuals with mediation.<sup>98</sup> The mediated agreements were "legally binding in the same way as a court judgment."<sup>99</sup> However, the goal of mediation in China was for individuals to voluntarily reach a mutually acceptable agreement.<sup>100</sup> In practice, though, mediation was generally not as voluntary as it was purported to be.<sup>101</sup> In the event that mediation failed, the mediation judge became the

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<sup>93</sup> *Id.* at 466 ("[T]he managers of hospitals in China currently do not have the authority to fire staff physicians who provide poor quality of care, because hiring and firing of staff is controlled by government authorities.").

<sup>94</sup> SOC. SEC. ADMIN., SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: ASIA AND THE PACIFIC, 2010, at 63 (2011), available at <http://www.ssa.gov/policy/docs/progdsc/ssptw/2010-2011/asia/ssptw10asia.pdf>.

<sup>95</sup> *Id.* at 61.

<sup>96</sup> In 2003, the average annual dispensable income was 8,472 renminbi ("RMB") (about U.S. \$1,050 in 2003), and the average annual net income in rural areas was about 2,622 RMB (about U.S. \$320). Harris & Wu, *supra* note 7, at 464.

<sup>97</sup> *Id.*

<sup>98</sup> Fu Hualing & Richard Cullen, *From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 25, 29 (Margaret Y.K. Woo & Mary E. Gallagher ed., 2011).

<sup>99</sup> Michael J. Moser, *People's Republic of China*, in DISPUTE RESOLUTION IN ASIA 73, 82 (Michael Pryles ed., 1997).

<sup>100</sup> *Id.*

<sup>101</sup> Hualing & Cullen, *supra* note 98, at 33.

adjudication judge, so judges had the incentive to push parties to settle.<sup>102</sup> The weaker party, usually the plaintiff, often gave in to the pressure to settle.<sup>103</sup>

Additionally, mediation was more time-consuming than adjudication, making it inefficient and too costly to meet the increasing demand for dispute resolution.<sup>104</sup> As more and more of China's economy became privatized, the need for dispute resolution also increased.<sup>105</sup> The number of civil cases surged because of China's increasing privatization, industrialization, and the need to meet foreign businesses' demands for China to provide a forum for civil litigation.<sup>106</sup> In 1990, Chinese courts heard a total of 2.9 million cases, and by 2007, courts heard 4,383,080 civil cases alone.<sup>107</sup> Overworked city courts began to abandon mediation for adjudication.<sup>108</sup> However, mediation had left its mark on the Chinese conscience, as potential plaintiffs knew they would not have a fair shot at getting the compensation they deserved.<sup>109</sup>

Today, Chinese courts enjoy much less power than courts in the United States for three reasons, each of which has important implications for medical malpractice. First, individual judges are not independent, and China's highest court, the Supreme People's Court ("SPC"), issues instructions to all of the lower courts for how to handle different types of cases.<sup>110</sup> Accordingly, cases are non-precedential, and usually the courts do not give much explanation for their decisions.<sup>111</sup>

Because judges are not independent and because cases are not precedential, it is often difficult to anticipate how a court will rule in a particular civil claim before the SPC has issued its judicial interpretations,<sup>112</sup> especially in undeveloped fields such as medical malpractice. Even when the judicial interpretations have been issued, they are usually unpublished or difficult to

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*, at 35.

<sup>105</sup> DANIEL C.K. CHOW, *Courts and Procuratorates, in THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 195, 205 (2d ed. 2009).

<sup>106</sup> Hualing & Cullen, *supra* note 98, at 33.

<sup>107</sup> CHOW, *supra* note 105, at 205.

<sup>108</sup> Hualing & Cullen, *supra* note 98, at 33.

<sup>109</sup> *Id.*

<sup>110</sup> CHOW, *supra* note 105, at 211–12.

<sup>111</sup> *Id.* at 214–15.

<sup>112</sup> *See id.*

find.<sup>113</sup> Legal research is difficult in China because of “the scarcity of legal information, the high difficulty of information access, the quality of legal publishing (which is below standard), the lack of a uniform system of subject classification, underdeveloped library facilities and services, and the shortage of information specialists.”<sup>114</sup> Impoverished plaintiffs usually do not have the means to risk losing their money to a trial and are unlikely to sue if they cannot predict a victory.<sup>115</sup> Therefore, the lack of accessible legal information and the unpredictability of court decisions make it less likely that the injured poor will file a lawsuit.

Second, the Communist Party of China (the “CCP”) is against protracted litigation and views it as a sign that SPC is failing.<sup>116</sup> The CCP views the increase of civil cases as a result of judicial ineffectiveness and failure to immediately squash (or prevent) disputes.<sup>117</sup> The CCP expects judges to both mediate and persuade parties into a compromise.<sup>118</sup> Although it is impossible to determine how much of a role the CCP plays in individual cases, it is suspected that the CCP influences high-stakes cases.<sup>119</sup> If the CCP does influence cases, it makes it less likely that plaintiffs in malpractice litigation will get a fair hearing without getting quickly thrown out of court.<sup>120</sup> This is especially true when the defendant is a prominent hospital, an asset that the CCP likely would seek to protect.

Finally, and most importantly, Chinese courts are vulnerable to the influence of local governments. Unlike federal courts in the United States, which constitute one of three co-equal branches of government, Chinese courts are responsible to the people’s congresses at each of the central, provincial, and local levels.<sup>121</sup> There is no tenure for judges, and judges rely on people’s

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<sup>113</sup> See Joan Liu, *Finding Chinese Law on the Internet*, NYU-HAUSER GLOBAL LAW SCHOOL PROGRAM—GLOBALEX (Feb. 2005), <http://www.nyulawglobal.org/globalex/China.htm>.

<sup>114</sup> *Id.*

<sup>115</sup> See Matthew Rabin, *Risk Aversion and Expected-Utility Theory: A Calibration Theorem*, 68 *ECONOMETRICA*, 1281, 1281 (2000) (“We dislike vast uncertainty in lifetime wealth because a dollar that helps us avoid poverty is more valuable than a dollar that helps us become very rich.”).

<sup>116</sup> See Hualing & Cullen, *supra* note 98, at 47–48.

<sup>117</sup> *See id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 33 (discussing the political pressure on judges and, in turn, on parties).

<sup>120</sup> See Mahmud Yesuf & Randall A. Bluffstone, *Poverty, Risk Aversion, and Path Dependence in Low-Income Countries: Experimental Evidence from Ethiopia*, 91 *AMER. J. AGR. ECON.*, 1022, 1023 (2009) (“We find very high levels of risk aversion . . . and strong evidence that household circumstances have important impacts on risk-averting behavior, with potentially significant implications for long-term poverty.”).

<sup>121</sup> CHOW, *supra* note 105, at 199.

congresses for funding, staffing, and appointments.<sup>122</sup> The fact that courts are subordinate to their legislative counterparts significantly disadvantages plaintiffs because the legislature in China consistently favors economic growth over individual rights or compensation.<sup>123</sup> In addition, court decisions feature pervasive local protectionism.<sup>124</sup> Local governments put pressure on courts to protect local economic interests.<sup>125</sup> Local governments refuse to enforce judgments within their jurisdiction from outside their jurisdiction, with up to thirty-five percent non-enforcement.<sup>126</sup> As a result, when state-owned enterprises or businesses that are very important to the local economy are involved in lawsuits, the courts will favor the economically important “defendant at the expense of the law.”<sup>127</sup> Additionally, bribes are common, which leads to even greater influence for economically important enterprises.<sup>128</sup> Finally, there is typically no recourse against the local government.<sup>129</sup> Local governments refuse to comply with court orders because they have authority over the court.<sup>130</sup>

Even if a victim of malpractice could secure a fair trial, he likely would have difficulty finding a lawyer to manage his case. There are not enough lawyers in China to cover the demand for legal aid, especially in rural areas.<sup>131</sup> China is attempting to address this issue through laws that make pro bono work mandatory and by authorizing “barefoot” lawyers, or legal workers who did not attend law school, to do some transactions.<sup>132</sup> Additionally, the government sponsors legal aid for the poorest of the poor, but these services are only available to people with incomes far below the poverty line, and “[m]ost quite genuinely impoverished people in China do not qualify.”<sup>133</sup> Thus, the majority of the population would not be able to secure a lawyer to go to court.<sup>134</sup>

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<sup>122</sup> *Id.* at 199–200.

<sup>123</sup> *Id.* at 224.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 226.

<sup>127</sup> *Id.* at 224. Hospitals, which were traditionally state-run and are an important part of a community’s infrastructure, likely would fall into this privileged category.

<sup>128</sup> *Id.* at 225.

<sup>129</sup> *Id.* at 226.

<sup>130</sup> *Id.* (“The author has been told by some government organs that they are of equal or greater bureaucratic rank to courts and see no reason to obey court orders.”).

<sup>131</sup> Hualing, *supra* note 72, at 173.

<sup>132</sup> *Id.* at 170–71.

<sup>133</sup> *Id.* at 172–73.

<sup>134</sup> *See id.*

In sum, litigation is fairly new to Chinese society, and for cultural and historical reasons, the public has responded to it with a generalized mistrust.<sup>135</sup> The old system of mediation disfavored plaintiffs by pushing them to settle, so the entry of adjudication into Chinese society was met by the assumption of a unfairness.<sup>136</sup> Years of preferential treatment for economically important industries and for the local government added to this public distrust of the court system.<sup>137</sup> Even when people have faced serious harm at the hands of someone else, they are unlikely to be able to afford the necessary fees to take the case to court for the possibility of compensation.<sup>138</sup> As it is, the Chinese court system does not provide a fair and balanced forum for the litigation of civil disputes. As this Comment will show later, any medical malpractice system that does not address these greater social and structural issues with the court system would face serious challenges during implementation and could likely only be marginally effective.<sup>139</sup>

### *C. The History of Medical Malpractice in China*

Medical malpractice litigation is new to China, having developed in response to China's privatization in the 1970s.<sup>140</sup> The medical malpractice portion of the Tort Liability Law<sup>141</sup> is the third set of regulations to comprehensively reform the medical malpractice system, with previous reforms in 1987 and 2002.<sup>142</sup> This Section highlights how the successes and failures of the 1987 and 2002 regulations molded and motivated the Tort Liability Law in 2010.

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<sup>135</sup> See *supra* text accompanying notes 98–109.

<sup>136</sup> See *supra* text accompanying notes 98–109.

<sup>137</sup> See *supra* text accompanying notes 124–29.

<sup>138</sup> See *infra* text accompanying notes 175–78.

<sup>139</sup> See *infra* Part IV.

<sup>140</sup> See *infra* Part II.C.1.

<sup>141</sup> Tort Liability Law, *supra* note 21, ch. VII.

<sup>142</sup> [Regulations on the Handling of Medical Accidents] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 20, 2002, effective Sept. 1, 2002) (China) [hereinafter 2002 Regulation], *translated at* [http://english.gov.cn/laws/2005-07/25/content\\_16885.htm](http://english.gov.cn/laws/2005-07/25/content_16885.htm); [Regulation on Dealing with Medical Incidents] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 1987 (China) [hereinafter 1987 Regulation]).

1. *The “Administrative” Doctor–Patient Relationship and the 1987 Regulation on Dealing with Medical Incidents*

At the time of the Cultural Revolution,<sup>143</sup> all medical facilities in China were part of the public welfare system and were owned and operated by the central government.<sup>144</sup> As a result, the relationship between hospitals and patients was administrative or quasi-administrative.<sup>145</sup> At this time, local administrative agencies were expected to sufficiently regulate their administrators (i.e. doctors) and manage malpractice disputes.<sup>146</sup> The result was haphazard regulation that varied greatly across China and was unsuccessful in controlling medical negligence.<sup>147</sup> The government attempted to stabilize and establish uniformity to healthcare regulation<sup>148</sup> in 1987 with the Regulation on Dealing with Medical Incidents (“1987 Regulation”).<sup>149</sup>

The 1987 Regulation made doctors and hospitals formally liable for instances of medical negligence.<sup>150</sup> It set up a system through which patients injured by medical malpractice could get a limited, one-time reimbursement for the cost of the additional healthcare required by the injury and other economic expenses.<sup>151</sup> Under the 1987 Regulation it was assumed that injured patients would not need living expenses because they would “receive economic support and care from their government, local collective enterprise, or business employer.”<sup>152</sup> The 1987 Regulation is “historically notable for initiating a shift in the political understanding and management of risk, from an administrative notion of collective accident insurance to a legal framework of private contractual relationships between doctor and patient.”<sup>153</sup> Nonetheless, as written, the regulation was vague in its definitions of what constituted

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<sup>143</sup> The Great Proletarian Cultural Revolution was a period of social upheaval in China from 1966–1976 under Mao Zedong, Chairman of the Chinese Communist Party (CCP), in which Mao attempted to combat the capitalist developments in China and return to the values of communism and revolution. *See generally* JONATHAN SPENCE, *THE SEARCH FOR MODERN CHINA* 602–26 (1990). The Cultural Revolution resulted in mass social upheaval and markedly corroded the CCP’s legitimacy. *Id.* at 624–25. This corrosion was the precursor to China’s turn toward capitalism and more openness to the outside world in the 1980s. *Id.* at 623–24.

<sup>144</sup> Harris & Wu, *supra* note 7, at 458.

<sup>145</sup> *Id.* at 460.

<sup>146</sup> *Id.* at 459–60.

<sup>147</sup> *Id.* at 460.

<sup>148</sup> *Id.*

<sup>149</sup> 1987 Regulation, *supra* note 142.

<sup>150</sup> Cooper, *supra* note 13, at 319.

<sup>151</sup> Harris & Wu, *supra* note 7, at 461.

<sup>152</sup> *Id.*

<sup>153</sup> Cooper, *supra* note 13, at 319.

malpractice and was easily manipulated to protect government interests in hospitals.<sup>154</sup> Also, under the 1987 Regulation, the available financial remedies did not fully compensate victims for their injuries.<sup>155</sup>

Increasing healthcare costs made it more difficult for the government to continue funding healthcare. The economic reform and the reduction of the welfare state in China brought less government funding for hospitals.<sup>156</sup> Today, most funding for healthcare comes from out-of-pocket fees for services and very little comes from the central government or from private health insurance.<sup>157</sup> Nonetheless, the majority of Chinese hospitals are owned by some level of government.<sup>158</sup> As the central government pulled out of the healthcare system, the administrative relationship between doctors and patients was no longer appropriate, and there was an increasing need for medical malpractice cases to be heard under civil law.<sup>159</sup> The 1987 Regulation's limited compensation scheme had previously been justified as a type of administrative insurance policy for negligence of administrative agents (doctors), but it was not relevant for litigation between two private parties.<sup>160</sup> The limited compensation scheme "became an unfair shield for hospitals and clinics," both of which would be required to pay lower compensation for injuries caused by their negligence.<sup>161</sup> China needed a new regulation to modernize medical malpractice litigation.

## 2. *The 2002 Regulation on the Handling of Medical Accidents and Its Subsequent Interpretations*

By the turn of the twenty-first century, the 1987 Regulation was insufficient to control medical accidents. Frequent incidences of violence and rioting at hospitals reflected public discontent with the quality of care at medical institutions.<sup>162</sup> In response to the public outcry, the State Council adopted and implemented the 2002 Regulation on the Handling of Medical Accidents ("2002 Regulation").<sup>163</sup> The 2002 Regulation cited four goals: to (1)

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<sup>154</sup> Harris & Wu, *supra* note 7, at 461.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 458.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 461.

<sup>160</sup> Cooper, *supra* note 13, at 319.

<sup>161</sup> Harris & Wu, *supra* note 7, at 461.

<sup>162</sup> *Id.* at 456.

<sup>163</sup> 2002 Regulation, *supra* note 142.

correctly handle medical accidents; (2) protect the lawful rights and interests of patients and medical institutions as well as their medical workers; (3) maintain order in healthcare facilities, ensuring the safety of healthcare employees; and (4) promote the development of medical science.<sup>164</sup> The 2002 Regulation replaces the 1987 Regulation and was celebrated for improving on the previous version's deficiencies.<sup>165</sup> The 2002 Regulation increased the "amount of compensation, clarified procedures for resolving medical disputes, and, for the first time, introduced reforms for improving the overall quality of care."<sup>166</sup>

However, the 2002 Regulation suffered from serious weaknesses. These weaknesses included: (a) under-compensation for victims of negligence and of negligent failure to act; (b) failure to adequately deter inappropriately dangerous behavior by creating barriers to prevent injured parties from filing suit; and (c) failure to control retributive violence in the hospital setting. Each problem will be discussed in turn.

*a. The 2002 Regulation Under Compensated Victims of Negligence.*

One major shortcoming of the 2002 Regulation is that it did not provide sufficient compensation for victims of negligence. The 2002 Regulation did increase compensation for victims of medical malpractice, but the amount was still unavailable to many people. For example, the 2002 Regulation provided no compensation for people who were injured by physician inaction.<sup>167</sup> The 2002 Regulation defined "medical accident" as "an accident *caused* by a medical institution or its medical workers resulting in personal injuries to a patient due to faults in medical activities as a result of violation of the laws, administrative regulations or departmental rules on medical and health administration, or of standards or procedures for diagnosis, cure and nursing."<sup>168</sup> To impose liability on someone under the 2002 Regulation, the person had to affirmatively cause the action, and there was no liability for failure to act.<sup>169</sup> The families of patients who died because of physician inaction were not compensated for their losses.

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<sup>164</sup> *Id.* art. 1.

<sup>165</sup> See Cooper, *supra* note 13, at 319..

<sup>166</sup> *Id.*

<sup>167</sup> See 2002 Regulation, *supra* note 142.

<sup>168</sup> *Id.* art. 2 (emphasis added).

<sup>169</sup> *Id.* But see *Zhiye Yishi Fa* (执业医师法) [Law on Medical Practitioners] (promulgated by the Standing Comm. Nat'l People's Cong., June 26, 1998, effective May 1, 1999), art. 24 (China), translated at <http://www.nmec.org.cn/English/08081201.htm> ("Doctors should adopt emergency measures to examine and

Additionally, the 2002 Regulation was “unfair to the worst-situated people in society.”<sup>170</sup> For example, the regulation allowed economic damage awards to cover only twenty years of living expenses of the injured party’s disabled dependents if the dependents were over the age of sixteen.<sup>171</sup> This was problematic because it was unfair to the victim who would not be fully compensated for her lost ability to provide for her family.<sup>172</sup>

Perhaps the largest contributor to the under-compensation of victims under the 2002 Regulation was the high cost of the required authentication process, which served to bar many plaintiffs from ever filing a lawsuit. For a claim to be heard, the regulation specified that the basis for the claim had to be authenticated by a medical expert to prove that it was valid.<sup>173</sup> The government set the fees for authentication.<sup>174</sup> In 2005, fees for authentication ranged from 1,500-3,000 renminbi (“RMB”) (about U.S. \$180-\$360) at the city level and from 2,000-4,000 RMB (about U.S. \$240-\$480) at the province level.<sup>175</sup> In a population where the average annual dispensable income was 8,472 RMB (about U.S. \$1,050) and the average annual net income in rural areas was about 2,622 RMB (about U.S. \$320),<sup>176</sup> most people were precluded from seeking compensation by the cost of mandatory authentication.

The SPC added another layer of complexity that made it more difficult for plaintiffs to sue when it created a two-track medical liability system.<sup>177</sup> This system distinguished medical torts caused by medical malpractice from other medical torts.<sup>178</sup> Medical malpractice torts were governed by the 2002 Regulation, while other medical torts were governed by the General Provisions of Civil Law.<sup>179</sup> The damages available under the 2002 Regulation were significantly lower than the damages available under the General Provisions of

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treat patients who are suffering from acute diseases or dangerously ill and shall not refuse to give emergency treatment.”).

<sup>170</sup> Harris & Wu, *supra* note 7, at 467.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Harris & Wu, *supra* note 7, at 464.

<sup>174</sup> *Id.* at 467.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Mo Zhang, *Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon*, 10 RICH. J. GLOBAL L. & BUS. 415, 490–91 (2011).

<sup>178</sup> *Liabilities for Medical Tort under PRC Tort Liability Law*, MWE CHINA LAW OFFICES, [www.mwechinalaw.com/news/2010/chinalawalert0310b.htm](http://www.mwechinalaw.com/news/2010/chinalawalert0310b.htm) (last visited Oct. 3, 2012).

<sup>179</sup> *Id.*

Civil Law.<sup>180</sup> To further the confusion, medical malpractice torts had to seek authentication from a semi-governmental organization called the National Association of Medical Science, while other medical torts were authenticated by a judicial agency.<sup>181</sup> Because the lines between the two types of torts were blurred,<sup>182</sup> people who did not know which institution to go to risked paying the fees to both. If a claim involved both types of tort, each agency had to authenticate its respective aspects of the claim.<sup>183</sup> This “dualization” for the application of law created another barrier for plaintiffs seeking retribution for a medical injury,<sup>184</sup> making it even less likely that victims would ever actually receive compensation.

Thus, under the 2002 Regulation, compensation was too low for several reasons. High fees and systemic disorganization precluded most injured people from filing a claim. People injured by physician inaction could not seek compensation at all. Finally, plaintiffs who won lawsuits were systematically under compensated. Combined, these problems led to gross under-compensation of victims.

*b. The 2002 Regulation Failed to Adequately Deter Inappropriately Dangerous Behavior Because It Created Barriers to Prevent Injured Parties from Filing Suit.*

By providing inadequate compensation for victims of negligence and no compensation for victims of physician inaction, the 2002 Regulation led to insufficient deterrence. Because the healthcare workers or healthcare facilities would not have to pay for the total damages caused by their negligence,<sup>185</sup> they would not be sufficiently deterred from committing negligent acts.<sup>186</sup> Additionally, physicians knew most tort liability would not be enforced because victims could not afford to sue their injurers,<sup>187</sup> so physicians did not have the incentive to avoid risky activities that would lead to tort liability.<sup>188</sup> The cumulative result of under-compensation and very low probability of tort

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<sup>180</sup> Zhang, *supra* note 177, at 491.

<sup>181</sup> *Id.* at 491.

<sup>182</sup> Cao et al., *supra* note 23, at 60.

<sup>183</sup> Zhang, *supra* note 177, at 491.

<sup>184</sup> Cao et al., *supra* note 23, at 60.

<sup>185</sup> *See supra* Part I.B.

<sup>186</sup> *See supra* Part I.B.

<sup>187</sup> *See supra* Part I.B.

<sup>188</sup> *See supra* Part II.B.

liability enforcement created inefficiently low deterrence and too many incidences of medical malpractice.

*c. The 2002 Regulation Failed to Control Retributive Violence in the Hospital Setting.*

Finally, despite the fact that both the 1987 Regulation and the 2002 Regulation sought to lower retributive violence in hospitals, high levels of violence remained.<sup>189</sup> Unfortunately, the high rate of retributive violence against hospital staff indicates that the established system under the 2002 Regulation has not yet accomplished this goal and the public does not view the court system as an adequate forum for resolving disputes.

Ideally, the shortcomings of the 2002 Regulation would have been addressed in the next regulation. Looking toward the 2010 Tort Liability Law, there are several gaps that it should have filled. First, the next generation of regulations should have increased the compensation for victims of medical malpractice so that it fully compensated for the injury. It should have provided compensation for people injured by physician inaction to encourage doctors to actively intervene with the critically ill and elderly. Next, the new law should have reduced the cost of authentication or provided some method by which injured parties would not be precluded from filing suit because they could not afford it. The law should have simplified the two-track medical liability system to make it more manageable or, at the very least, clarified the boundaries between medical malpractice torts and other medical torts. Finally, as previously discussed, the new regulation should have addressed the widespread problem of retributive violence in hospitals by providing a reliable, alternate forum for disputes and by decreasing the number of medical accidents.

### III. THE NEW LAW

On December 26, 2009, the Standing Committee of the National People's Congress promulgated the Tort Liability Law after more than seven years of drafting.<sup>190</sup> The Tort Liability Law, which came into force on July 1, 2010, is the first single piece of legislation on torts since 1949, and it is "acclaimed in China as a significant modern legislative achievement in civil rights protection."<sup>191</sup> The passage of the law was widely celebrated as a breakthrough

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<sup>189</sup> See *supra* notes 1–20 and accompanying text.

<sup>190</sup> Zhang, *supra* note 177, at 417.

<sup>191</sup> *Id.* at 417–18.

for the tort liability system. Wu Bangguo, chairman of the Standing Committee of the National People's Congress, claimed the law was a significant development in "protecting civil rights and people's interests, preventing and punishing infringement acts, reducing conflicts and promoting social harmony and stability."<sup>192</sup>

The Tort Liability Law is comprehensive. Its twelve chapters and ninety-two articles set up the general regulations for tort liability as well as the specific regulations for product liability, vehicle traffic accident liability, medical malpractice liability, environmental pollution liability, highly dangerous activity liability, animal breeding damage liability, and object damage liability.<sup>193</sup> The fact that the medical malpractice law came into effect along with a comprehensive overhaul of the tort system is important because it means that it is unclear where medical malpractice will fit into the new legal structure.

Chapter VII of the Tort Liability Law sets up liability for medical malpractice. Chapter VII composes eleven of the ninety-two articles in the Tort Liability Law, which is more than any other chapter. Chinese analysts say that its length relative to the other provisions indicates "the discretion and highly conscientious attitude of legislators while legislating regulations on the medical malpractice liability."<sup>194</sup> However, at just over 700 words, Chapter VII is brief relative to the prolific medical malpractice legislation in other countries.<sup>195</sup> Chapter VII is also simple and brief relative to the 2002 Regulation, which laid out specific procedures by which institutions were to handle medical accidents and experts were to assess those accidents.<sup>196</sup> The SPC has not clarified how the Tort Liability Law will interact with previous regulations. On June 30, 2010, the SPC issued a decree that stated that tort cases should apply relevant regulations, but did not specify what those regulations are.<sup>197</sup> Many procedural and substantive questions remain, and significant judicial interpretation from the SPC will be necessary to define the limits of the new medical malpractice standards.

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<sup>192</sup> Jiang Aitao, *Top Legislature Adopts Tort Law*, CRJENGLISH.COM (Dec. 26, 2009, 1:05 PM), <http://english.cri.cn/6909/2009/12/26/189s538175.htm>.

<sup>193</sup> Cao et al., *supra* note 23, at 60.

<sup>194</sup> *Id.*

<sup>195</sup> Tort Liability Law, *supra* note 21, ch. VII.

<sup>196</sup> 2002 Regulation, *supra* note 142, ch. II-III.

<sup>197</sup> [Notice on the People's Republic of China Tort Liability Law], (promulgated by the Standing Comm. Nat'l People's Cong., effective July 1, 2010) SUP. PEOPLE'S CT. GAZ. (July 1, 2010) 1, 1 (China), *available at* [http://rmfyb.chinacourt.org/paper/html/2010-07/01/content\\_11608.htm](http://rmfyb.chinacourt.org/paper/html/2010-07/01/content_11608.htm).

Chapter VII separates medical malpractice law into three categories: general medical malpractice, malpractice caused by defective medical products, and malpractice caused by medical ethics violations.<sup>198</sup> Additionally, Chapter VII creates new laws to address directly the problem of retributive violence on medical facilities.<sup>199</sup> This Section will introduce each category of medical malpractice under the new law and identify the liable party for each type of incident.

#### A. *General Medical Malpractice*

General medical malpractice damage occurs when there is an injury during the course of diagnosis or treatment. The new law imposes liability and a presumption of fault on the medical institutions when there is any harm that results from the violation of a law, administrative regulation, or the procedures for correct diagnosis or treatment.<sup>200</sup> Additionally, Chapter VII imposes liability for harming patients as a result of failure to “fulfill the obligations of diagnosis and treatment up to the standard.”<sup>201</sup> The statute does not define this “standard,” and it does not provide insight as to where to find clarification.

#### B. *Malpractice Caused by Defective Medical Products*

Following the widespread problems with contamination of the blood supply,<sup>202</sup> the new legislation imposes liability for defective medical products, including drugs, medical disinfectant, medical instruments, or substandard blood transfusions.<sup>203</sup> The patient has the option of seeking compensation from the medical institution or the manufacturer of the product.<sup>204</sup> Hospitals that pay out a lawsuit for defective medical products are “entitled to be reimbursed by the liable manufacturer or institution providing blood.”<sup>205</sup>

#### C. *Malpractice caused by Medical Ethics Violations*

Chapter VII also includes a list of medical ethics violations. First, Article 58 creates a presumption of fault on the part of the medical institution for any

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<sup>198</sup> See Tort Liability Law, *supra* note 21, ch. VII.

<sup>199</sup> *Id.* art. 64.

<sup>200</sup> *Id.* art. 58.

<sup>201</sup> *Id.* art. 57.

<sup>202</sup> See *supra* note 14 and accompanying text.

<sup>203</sup> Tort Liability Law, *supra* note 21, ch. VII, art. 59.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

harm that comes from refusing to provide medical history data related to a dispute or tampering with any medical history data.<sup>206</sup> Medical institutions assume tort liability for Article 58 violations.<sup>207</sup>

The other listed medical ethics violations do not impose liability on anyone. Article 63 attempts to address the problem of the over-use of testing<sup>208</sup> by forbidding “unnecessary examinations in violation of the procedures and standards for diagnosis and treatment.”<sup>209</sup> Article 61 requires medical institutions to keep copies of hospital admission logs, test reports, nurse care records, expense sheets, and other medical history data and to provide it to patients who request their medical records.<sup>210</sup> Neither Article 63 nor Article 61 mentions any potential liability for their violation.

#### *D. Prohibition of Retributive Violence*

Finally, Chapter VII directly addresses hospital violence and protects the “legitimate rights and interests of a medical institution and its medical staff.”<sup>211</sup> It provides that “[a]nyone who interrupts the order of the medical system or obstructs the work or life of medical staff shall be subject to legal liability.”<sup>212</sup>

### IV. ANALYSIS

The Tort Liability Law will not achieve its objectives to compensate victims, deter negligence, and decrease hospital violence. To achieve its goals, tort law requires a basic legal structure through which the people trust that compensation will restore them to their pre-accident condition. China does not have this structure. Additionally, the Tort Liability Law suffers from major flaws that prevent it from being effective in regulating the tort system. This Part analyzes the Tort Liability Law’s ability to achieve the full potential of a tort system. Without substantial improvements to the overall justice system, the law will be ineffective in compensating victims, deterring negligence, and controlling retributory hospital violence.

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<sup>206</sup> *Id.* art. 58.

<sup>207</sup> *Id.*

<sup>208</sup> *See* Cao et al., *supra* note 23, at 61.

<sup>209</sup> Tort Liability Law, *supra* note 21, ch. VII, art. 63.

<sup>210</sup> *Id.* art. 61.

<sup>211</sup> *Id.* art. 64.

<sup>212</sup> *Id.*

A. *Compensation—To “protect the legitimate rights and interests of parties in civil law relationships”*,<sup>213</sup>

The first function of a tort system is to compensate victims of negligence. The Tort Liability Law fails to ensure adequate compensation to victims of medical malpractice. Overall, plaintiffs who successfully sue for malpractice do not receive full compensation.<sup>214</sup> Additionally, high authentication fees, lack of attorneys, and generalized distrust with the court system mean that many deserving plaintiffs will never see the inside of a courtroom and will not receive any compensation whatsoever.<sup>215</sup> Finally, the Tort Liability Law recognizes medical ethics violations but provides for no practical possibility for victims of these violations to receive compensation.<sup>216</sup> As a whole, the Tort Liability Law does not make any significant improvement to the amount of compensation that victims of medical malpractice will receive.

1. *Despite Improvements, Compensation Levels are Set Too Low*

One improvement in the new law is that it includes a provision that allows for compensation for harm caused by physician inaction. Article 57 states that medical facilities will be liable when failure to fulfill the obligations of diagnosis and treatment leads to harm.<sup>217</sup> People injured by physician inaction who were not previously compensated will now have the opportunity for compensation.

However, the statute is silent about what a physician's obligation will be in the event that a person is harmed by physician inaction when the person cannot pay for treatment. It is likely that physicians will continue to refuse treatment to patients who cannot pay. Hospitals are overrun with patients they simply do not have the capacity to treat,<sup>218</sup> and hospitals need to treat the ones who pay in order to stay open. Additionally, even in the event that this law does mean to impose liability on doctors for refusing treatment to non-paying patients, the possibility of being held liable for failing to treat a patient who cannot afford treatment is very slim because the patient or her family is unlikely to be able to

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<sup>213</sup> *Id.* ch. I, art. 1.

<sup>214</sup> *See* Part IV.A.1.

<sup>215</sup> *See* Part IV.A.2.

<sup>216</sup> *See* Part IV.A.2.b.

<sup>217</sup> Tort Liability Law, *supra* note 21, ch. VII, art. 57.

<sup>218</sup> *See* Part II.A.

afford to pursue the lawsuit.<sup>219</sup> Thus, any effect this law will have in providing compensation to victims of medical malpractice likely will only be observed in insured patients or patients who can afford to pay out of pocket.

People injured by physician inaction can now (at least in theory) seek compensation along with victims of negligence, but will the compensation they receive be high enough to restore them to their pre-tort condition? The Tort Liability Law is also silent as to whether it affects the value of the compensation the courts will hand out. However, there is no reason to believe the new law will increase compensation to victims of medical malpractice. The 2002 Regulation highlighted the importance of increased compensation by creating it made a specific provision to do so.<sup>220</sup> The compensation chapter of the 2002 Regulation by itself is longer than the entire medical malpractice portion of the Tort Liability Law. Had increasing compensation been a goal of this regulation, the Tort Liability Law would have made a point to mention it. The Tort Liability Law is unlikely to bring about an increase in compensation for medical malpractice victims. Therefore, victims who win lawsuits will continue to be under compensated.

## *2. Under-Enforcement Means Most Victims Will Not Be Compensated*

On its face, then, the Tort Liability Law earns a mixed review for getting victims closer to full compensation. While the new law grants compensation to victims of physician failure to act, it fails to improve their levels of compensation. However, this mixed review assumes that the law will be enforced as written, and this is not a fair assumption. Tort relies on the public's ability to "self-police" and seek due compensation.<sup>221</sup>

Currently, the Chinese people will not self-police to enforce the Tort Liability Law and therefore will not be compensated for their injuries. Many victims in China will not sue either (a) because of the barriers to the lawsuit, or (b) because the potential gain is so low that it is not worth it to sue. This Subpart will analyze each possibility.

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<sup>219</sup> Expenses for filing a lawsuit include the authentication fee and attorney's fee. *See supra* Part II.B. & Part II.C.2.a. and accompanying text.

<sup>220</sup> 2002 Regulation, *supra* note 142, ch. V, art. 50.

<sup>221</sup> *See supra* Part I.B.

a. *Barriers to Lawsuits Prohibit Plaintiffs from Filing Suit.*

Although the Tort Liability Law aimed to more firmly establish victims' rights, it did very little to address the significant and often insurmountable hurdles victims must overcome to bring a lawsuit. This Subpart identifies the hurdles that the Tort Liability Law removed and the other hurdles that remain. The Tort Liability Law did not do enough to eliminate barriers that deter plaintiffs from seeking the compensation they deserve. Because deserving plaintiffs will be prevented from being compensated, the public cannot effectively self-police and the Tort Liability Law will be under-enforced.

The most significant hurdle to bringing suit that the Tort Liability Law eliminates is the "dualization" of the handling of medical accidents.<sup>222</sup> The SPC interpretation of the 2002 Regulation draws a distinction between medical malpractice and other medical torts.<sup>223</sup> The line between the two was blurry so it was difficult to place an incident in one category or the other.<sup>224</sup> However, the procedures for each were very different, and incorrect placement meant a plaintiff would not be compensated.<sup>225</sup> The Tort Liability Law terminates this distinction. Eliminating the dualization of medical accident torts will streamline the process of filing a medical accident lawsuit, and it will avoid the unnecessary expenses stemming from debating which set of rules applies. Although eliminating the unnecessary distinction between medical torts removes one hurdle to bringing a lawsuit, it in itself is not enough to ensure effective enforcement of the Tort Liability Law.

The most direct barrier that the new law fails to eliminate is the prohibitively high cost of authentication. The new law is silent as to whether medical tort claims under the Tort Liability Law must continue to go through the authentication process and whether the victims must continue to pay the authentication fees. The law is not likely the procedure of filing a claim will change in a fundamental way.

This Comment does not seek to argue that the existence of an authentication fee is universally without value. In fact, an authentication fee can be efficient when it serves to protect against opening the floodgates of litigation. This role of the fees would prevent cases from coming to court that

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<sup>222</sup> See *supra* text accompanying notes 178–85.

<sup>223</sup> See *supra* text accompanying notes 178–85.

<sup>224</sup> See *supra* text accompanying notes 178–85.

<sup>225</sup> See *supra* text accompanying notes 178–85.

would cost more to litigate than the victim would receive in compensation. From society's perspective, it is wasteful and unfavorable to spend more money transferring assets than the value of the assets being transferred. Therefore, in this capacity, the authentication fee can be a useful tool to prevent the net social loss that would occur if court systems spent days litigating valueless or meritless claims.

The authentication fee, however, does not serve this beneficial purpose. Because the authentication fee is exorbitantly high as compared to the average income in China,<sup>226</sup> the fee serves as a bar to litigation for the majority of China's population. It therefore discriminates against all but the wealthiest Chinese citizens. People with legitimate claims will not be heard because much of the population does not have access to justice. In this context, the fee prevents people from filing a lawsuit and getting their due compensation. People cannot effectively self-police when they do not have the money required to assert their rights. As a result, many people will not be adequately compensated.

In addition to the authentication fee, the new law fails to address many of the other barriers to lawsuits. Societally, the people of China are accustomed to a system in which they do not expect to receive a fair trial.<sup>227</sup> Because of the cultural distrust of litigation,<sup>228</sup> individuals are unlikely to try to sue if they are injured. When they try to sue, they are unlikely to be able to afford the authentication fees.<sup>229</sup> They may not be able to find a lawyer at all, and if they do find a lawyer, they probably cannot afford to pay her.<sup>230</sup> If they find a way to manage the fees, they are unlikely to receive a fair trial in a court system that is systematically biased against plaintiffs because of local protectionism, the potential influence of the CCP, and bribes.<sup>231</sup> The Tort Liability Law does nothing to address these issues. All these remaining hurdles serve to preclude the majority of victims from ever seeing the money they deserve. Victims can only receive compensation if they can successfully bring a claim against the party that harmed them. The new law does not do enough to give victims the opportunity to make that claim.

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<sup>226</sup> See *supra* note 96.

<sup>227</sup> See *supra* Part II.B.

<sup>228</sup> See *supra* Part II.B.

<sup>229</sup> See Harris & Wu, *supra* note 7, at 467

<sup>230</sup> See *supra* notes 130–34 and accompanying text.

<sup>231</sup> See *supra* Part II.B.

The Tort Liability Law is one isolated piece of legislation within a system that lacks in the infrastructure to support it. China will need to make fundamental changes before the Tort Liability Law will be able to “protect the legitimate rights and interests of parties in civil law relationships” by providing full compensation to people when their rights are violated.<sup>232</sup> First, the current method of charging the authentication fee needs to change. If authentication and the associated fee are to retain their role in the court system, China should tailor them so that they do not serve as a permanent bar to a group of people. There must be some way to provide access to justice for those who cannot afford the fees. For example, the authentication fees could be assigned on a sliding scale based on income. Second, China needs to continue looking for creative ways to increase the number of legal workers, especially public service lawyers. Current plans to increase the number of lawyers do not cover the need, and the need is especially great in rural areas.<sup>233</sup> Finally, Chinese courts need to be fair and they need to establish a reputation for fairness.

Extensive and exceedingly complex changes are required for the Tort Liability Law to actually compensate the people to whom it grants the right of compensation. The obvious naivety of requesting such colossal changes parallels the obvious naivety of expecting this law to be effective in a country that lacks any rudimentary structure for access to justice.

*b. Tort Liability Law Created Torts Where Regulations Would Have Been More Appropriate.*

The new Tort Liability Law addresses many harms that instead should have been regulated by the government because they have such low damages that a plaintiff would lose money if she sued. The medical ethics provisions of the tort law make the hospital liable for violating them in tort.<sup>234</sup> These include provisions that make medical institutions liable to patients for the use of excessive medical testing, insufficient record-keeping, and forgery of hospital documents in the context of a medical malpractice lawsuit.<sup>235</sup> These offenses have relatively small damages to an individual plaintiff, and it is very unlikely that people will actually bring a lawsuit against a hospital for violating them. Because people cannot be expected self-police, this law will be under-enforced. It is difficult to imagine that the most desperately poor people in

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<sup>232</sup> Tort Liability Law, *supra* note 21, ch. I, art. 1.

<sup>233</sup> See *supra* text accompanying notes 130–34.

<sup>234</sup> Tort Liability Law, *supra* note 21, ch. VII, art. 58, 61, 63.

<sup>235</sup> *Id.*

China are going to be able to put up a lawsuit for these types of violations, especially considering the public mistrust of the judicial system. As written, these laws will not have much effect on maintaining the quality they strive to protect, and people who are harmed by them will receive no compensation.

To add insult to injury, most violations of the medical ethics provisions do not give rise to any tort liability at all. Article 63 forbids “unnecessary examinations in violation of the procedures and standards for diagnosis and treatment.”<sup>236</sup> Article 61 requires medical institutions to keep copies of medical history data and to provide it to patients who request their medical records.<sup>237</sup> However, neither provision mentions financial liability for the violation. Even if a hospital violates either of these “rights” and the patient successfully sues, the patient still may not be compensated. The patient is, therefore, without any recourse under this law. People will be unlikely to sue for these violations, and because tort law relies on self-policing through lawsuits, these rules are unlikely to be enforced.

The current structure for medical ethics violations provides limited compensation to victims and fails to protect the rights the Tort Liability Law promises. The medical ethics provisions are the epitome of what is wrong with the Tort Liability Law. The legislature has put the words on the page and made promises of new rights, but no party is empowered to enforce those words or rights and no party can anticipate compensation when those rights are violated.

The medical ethics provisions would be better protected by regulations.<sup>238</sup> When self-policing is ineffective, the government’s role is to police to protect the rights it established.<sup>239</sup> Unlike torts, which require private individuals to enforce rights, regulations are “public in character and modify behavior in an immediate way through requirements that are imposed before, or at least independently of, the actual occurrence of harm.”<sup>240</sup> Instead, China should fund a policing agency that regularly checks to ensure hospitals are following these procedures and fines them when they do not.

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<sup>236</sup> *Id.* art. 63.

<sup>237</sup> *Id.* art. 61.

<sup>238</sup> See Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 357 (1984).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

### 3. *To Summarize—The Tort Liability Law Fails to Compensate Victims*

The Tort Liability Law fails to fully compensate victims of medical malpractice. Compensation granted by courts will continue to be systematically too low. Additionally, most victims of medical malpractice will not be compensated at all because they will never get into the courtroom. Because it took seven years for the National People's Congress to implement the Tort Liability Law,<sup>241</sup> legislative intervention is not a likely solution to addressing the issues of compensation. Instead, the SPC could influence compensation by issuing interpretations of the laws that increase compensation. It could rule that the Tort Liability Law overrules the 2002 Regulation's compensation scheme and encourage courts to provide more adequate compensation. Additionally, the judicial system should work toward increasing access to courts for injured parties. Without these changes, victims of medical malpractice will be under compensated. The Tort Liability Law will not "protect the legitimate rights and interests" of medical patients because it fails to restore victims to their pre-tort condition.<sup>242</sup>

#### *B. Deterrence—To "prevent . . . tortious conduct"*<sup>243</sup>

The Tort Liability Law specifically recognizes that one of its objectives is to prevent tortious conduct.<sup>244</sup> However, the law will not achieve this objective because it under deters tortious behavior for several reasons. First, widespread under-compensation will lead to widespread under-deterrence. Second, the new law did not allocate liability to physicians, and the physicians are the party in the best position to increase precaution. This law gives no incentive to doctors to be more careful,<sup>245</sup> so it is unlikely that it will improve the quality of care or the probability that a physician will commit malpractice. Finally, the law places all the liability on hospitals,<sup>246</sup> which can only control this new cost by decreasing their activity level. The law incentivizes hospitals to practice less medicine, which threatens an already insufficient Chinese healthcare system.<sup>247</sup> This Subpart explains how these problems lead to widespread

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<sup>241</sup> Zhang, *supra* note 177, at 417.

<sup>242</sup> Tort Liability Law, *supra* note 21, ch. I, art. 1.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *See infra* Part IV.B.2.

<sup>246</sup> *See infra* Part IV.B.2.

<sup>247</sup> *See supra* Part II.A; *see infra* Part IV.B.2.

under-deterrence and presents possible ideal and practical solutions to managing the flaws in the law as written.

*1. The Tort Liability Law Under Deters Because It Under Compensates.*

The level of compensation has important effects on the level of deterrence. For physicians and medical staff to be sufficiently deterred from taking unreasonable risks, there must be full compensation. As discussed, systematic under-compensation leads to systematic under-deterrence. The Tort Liability Law does not provide victims who win a lawsuit with full compensation. Additionally, because people do not have access to justice and will not get their cases heard,<sup>248</sup> most people will not be compensated at all. Doctors and hospitals know that, despite the new regulations, the likelihood that they will ultimately be held accountable for their medical errors is slim. Because compensation is too low and too infrequent, medical staff does not have the incentive to take more precaution. It follows that negligent medical practices will continue at inefficiently high rates.

*2. The Tort Liability Law Places Liability on Hospitals Instead of on Doctors.*

Medical accidents are the by-product of a socially valuable activity—the practice of medicine—that should not be discouraged. Ideally, the law would put liability on the person who can increase precaution. The Tort Liability Law places all the liability for medical malpractice on the medical institution. Articles 54, 55, 57, 58, 59, and 62 place responsibility on the medical facility and not a single article mentions direct liability for the doctors or any type of indemnity by which the doctors would ultimately be held liable for their negligence.<sup>249</sup> This Subpart first argues that physicians are in the best position to increase precaution and should not have been shielded from liability. Then, the Subpart shows that hospitals are not in the position to increase precaution and the new law will have the unwanted effect of decreasing the amount of medical care in China.

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<sup>248</sup> See *supra* Part IV.A.2.

<sup>249</sup> Tort Liability Law, *supra* note 21, ch. VII, art. 54, 55, 57, 58, 59, 62.

a. *The New Tort Liability Law Did Not Allocate Liability to the Party that Can Increase Precaution.*

The goal of medical malpractice legislation is to encourage doctors to be more careful.<sup>250</sup> To meet this goal, liability for negligence must force doctors to internalize the externalities caused by their actions such that they have the appropriate incentive to avoid accidents. For this theory to produce the desired result, the person causing the externality—here, the doctor—must have the ability to increase precaution. However, the new law does not incentivize doctors to take increased precaution because it did not allocate any of the liability to the doctors.<sup>251</sup>

The new Tort Liability Law should have placed liability for negligence directly on healthcare workers instead of on medical facilities. Doctors and healthcare employees are in a position to internalize the externality of their carelessness by increasing their own precaution, instead of simply by decreasing their activity level. If the liability were on doctors, they would be more likely to take the externalities into account when deciding how much caution to exercise. Because the costs of not being cautious would increase for the doctors, they would exercise more caution. Not only would liability on healthcare professionals increase precaution, but more cautious doctors would also increase the quality of care.

One reason people riot in hospitals in China is because of a “pervasive sense of structural overexposure to risk.”<sup>252</sup> To address this concern, the new law sought to prevent tortious conduct.<sup>253</sup> When the liability for accidents is not placed on the party that can increase precaution, the law cannot prevent tortious conduct, and the people remain over-exposed to risk. Placing liability on doctors has the potential to increase precaution and prevent many instances of medical malpractice. By shielding doctors from this liability, Chapter VII decreases doctors’ incentives to take precautions and increases the likelihood of accidents. Thus, the misplaced liability threatens to undermine the purposes of tort law by shielding doctors from liability, decreasing precaution, and increasing accidents. The people will still be over-exposed to risk.

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<sup>250</sup> See *supra* notes 56–57 and accompanying text.

<sup>251</sup> Tort Liability Law, *supra* note 21, ch. VII.

<sup>252</sup> Cooper, *supra* note 13, at 314.

<sup>253</sup> Tort Liability Law, *supra* note 21, ch. I, art. 1.

*b. The New Tort Liability Law Incentivizes Hospitals to Lower Their Activity Level, Which Could Decrease the Supply of Medical Care in China.*

The new Tort Liability Law imposes liability for medical malpractice entirely on healthcare institutions and none on individual physicians or healthcare employees.<sup>254</sup> Placing the liability on the institutions instead of on the individual employees could potentially decrease the number of torts by increasing hospitals' accountability for quality of care and to incentivize the hospitals to create and implement standards to prevent medical malpractice. In other words, the goal of putting liability for medical accidents on hospitals is to increase precaution at the institutional level.

However, the assumption of the ability of Chinese hospitals to implement new programs for quality assurance is mislaid. Hospitals are underfunded and overcrowded, and it would be very difficult for them to invest in the development of new quality management techniques. More importantly, most hospital managers do not have the authority to hire or fire physicians because government authorities decide whether to hire or fire hospital staff.<sup>255</sup> Therefore, hospitals have no authority to remove physicians who are negligent. Without the authority to take action if a policy is violated, hospitals cannot effectively implement policies to increase precaution.

Tort liability is an added expense to a hospital system that is already underfunded and insufficient to deal with the recent increase in demand for services.<sup>256</sup> Funds usually diverted to treatment will be diverted to managing lawsuits based on negligence of physicians that the hospitals cannot control.<sup>257</sup> Hit with the liability of medical accidents but virtually unable to increase precaution among staff, hospitals will have the incentive to—or in many cases, be forced to—decrease their activity level. This is problematic because as it is, medical facilities are insufficient.<sup>258</sup> Practicing medicine is a socially valuable activity that tort law should not discourage.

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<sup>254</sup> *Id.* ch. VII, art. 54, 55, 57, 58, 59, 62.

<sup>255</sup> Harris & Wu, *supra* note 7, at 466.

<sup>256</sup> See *supra* Part II.A.

<sup>257</sup> Increasing the price of services is also not an option for Chinese hospitals because the central government sets prices for services. See Cooper, *supra* note 13, at 316.

<sup>258</sup> See *supra* Part II.A.

Additionally, because one of the express goals of the 2002 Regulation was to improve the general quality of care in hospitals,<sup>259</sup> China presumably aspires to improve the quality of care with the 2010 Tort Liability Law as well. However, even if the new regulations succeed in decreasing medical malpractice, this will not trigger any increase in the quality of care. Less medical care necessarily means less malpractice, but it does not indicate any improvement in the quality of care that patients receive.

Therefore, the new Tort Liability Law is inefficient because it places liability for the incidental costs of medicine on a party that cannot increase precaution and instead must resort to decreasing the activity level of a socially valuable activity. The misplaced liability could potentially have big consequences in terms of requiring hospitals to redirect income to defending themselves in court, and it does nothing to improve the quality of care. Even the occasionally negligent hospital arguably does more good than harm with its services, and China is not in a position to be discouraging medical care. China's Tort Liability Law should have allocated liability to doctors instead of hospitals.

*c. Potential Solutions for the Misplaced Liability*

To address this issue, there must be a mechanism to hold doctors consistently responsible for their negligence. There are several options for how to reestablish liability for doctors. New laws could put liability for negligence on the doctors either directly or by allowing hospitals to seek indemnification when they are sued due to a doctor's negligence. The most straightforward way to pass these laws would be through new legislation from the National People's Congress. Alternatively, the SPC could issue rules for indemnification or direct liability on physicians through its judicial interpretations of the new law. Because the goal is for the doctors to have some "skin in the game," another approach would be to give hospitals more authority in the hiring and firing of their doctors. Were they able to meaningfully punish doctors for medical negligence, hospitals could institute quality assurance programs to ensure physicians take more precautions. Finally, in the event that none of these changes are implemented, hospitals and other medical institutions could effectively do the same thing by entering into contracts with doctors that require indemnification in the event that the hospital is sued for the doctor's negligence. Legal practitioners representing hospitals should consider the

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<sup>259</sup> 2002 Regulation, *supra* note 142, ch. 1, art. 1.

possibility of indemnification to safeguard hospitals from medical malpractice suits.

3. *To Summarize—The Tort Liability Law Will Not Sufficiently Deter Physicians from Being Negligent*

The Tort Liability Law will be ineffective in deterring negligent behavior and will not significantly lower the probability of medical accidents. Physicians do not expect to fully compensate victims for the physicians' negligence, so they do not take into account the full social impact of their lack of care. Additionally, the Tort Liability Law placed no liability directly on the physicians, so they have no incentive to take precaution to avoid accidents. Hospitals bear all the burden of malpractice litigation, but they are not in a position to increase precautions. To avoid lawsuits, they will have to decrease their activity level despite the fact that China has a shortage of medical services. The unfortunate consequence of the new law is that it will lead to less medical care in a country where people desperately need it.

C. *Prevention of Self-Help—To “promote the social harmony and stability”*<sup>260</sup>

The third goal of the Tort Liability Law is to prevent retributive hospital violence.<sup>261</sup> Article 64 of the Tort Liability Law directly prohibits interrupting “the order of the medical system” and promises that disrupters will be “subject to legal liability.”<sup>262</sup> It is unclear to what kind of legal liability this provision refers. Presumably, because the phrase appears in the Tort Liability Law that is supposed to form the basis of China's new civil law code, this provision is tort liability. However, tort liability is unlikely to have any effect on retributive violence in hospitals. Attacking doctors and rioting in hospitals already constitute criminal offenses in China, and people are frequently arrested for violating the peace in hospitals.<sup>263</sup>

Because it is unclear what type of liability this section seeks to impose and because this section seeks to regulate behavior that occurs despite punishment in the criminal system, it is unlikely that Article 64 will have any effect on retributive hospital violence. It does not seek to actually control hospital violence, but instead seeks to appease the medical community that argued

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<sup>260</sup> Tort Liability Law, *supra* note 21, ch. I, art. 1.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* ch. VII, art. 64.

<sup>263</sup> Watts, *supra* note 11.

patients' and hospitals' rights needed to be more balanced in the new Tort Liability Law.<sup>264</sup> It may have been successful in appeasing these doctors, but it will not be successful in curbing hospital violence.

Although the direct prohibition of attacking hospitals will not be effective, theoretically, the Tort Liability Law could still serve to prevent retributive violence if it provided a viable alternative for accomplishing justice through the court system.<sup>265</sup> However, the new law will not be successful because the people will not be convinced that it provides a legitimate method for seeking justice for several reasons. First, plaintiffs who successfully sue for medical malpractice receive compensation that is too low and does not restore them to their pre-tort condition.<sup>266</sup> Second, significant barriers to lawsuits discourage or bar victims from filing suit.<sup>267</sup> Potential plaintiffs are unlikely to be able to afford the authentication fees and do not have access to a lawyer.<sup>268</sup> Additionally, the law has done nothing to ensure access to a fair trial, and Chinese citizens remain untrusting of litigation in general.<sup>269</sup> In total, the Tort Liability Law has not done enough to establish a legitimate legal process for hearing medical malpractice disputes or to ensure that people have access to those hearings.

The lofty promises<sup>270</sup> that the law created new rights and liberties may have a temporary effect of pacifying the hospital riots. However, the government has only placed a Band-Aid on a much deeper and more pervasive problem. It is a matter of time before the citizenry realizes that the Tort Liability Law is ineffective, that they have been given empty promises, and that they have gained no meaningful new civil liberties. Hospital violence is a symptom of the fundamental problems in the Chinese legal system. Because the Chinese government has not addressed the greater systemic problems before adopting tort law, the Tort Liability Law will not eliminate the symptom of hospital violence.

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<sup>264</sup> See Cao et al., *supra* note 23, at 60.

<sup>265</sup> See *supra* Part I.C.

<sup>266</sup> See *supra* Part IV.A.1.

<sup>267</sup> See *supra* Part IV.A.2.

<sup>268</sup> See *supra* Part IV.A.2.

<sup>269</sup> See *supra* note 233 and accompanying text.

<sup>270</sup> See *supra* notes 23–24 and accompanying text.

## CONCLUSION

China's new law is unlikely to cause any substantial decrease in the level of malpractice in the country. The Tort Liability Law is an inefficient model, the burden of which will be borne by underfunded hospitals and patients who are already underserved. Though tort systems can theoretically decrease medical malpractice and prevent tort victims from taking vengeance into their own hands, the objectives of tort law cannot be achieved when the public does not have access to or trust the court system. Because it lacks the foundation of a fair trial, China will not be able to deter medical negligence or hospital violence with the new system.

This Comment made several recommendations for improving the effectiveness of the Tort Liability Law. For example, the SPC should interpret the Tort Liability Law as overruling the compensation scheme of the 2002 Regulation and encourage courts to provide full compensation to victims. Additionally, because liability for malpractice now falls solely on medical institutions that cannot increase precautions, there needs to be some method to encourage physicians to do so. This could come through new legislation, SPC interpretations that allow for indemnification of hospitals by negligent physicians, increased hospital control over physician hiring and firing, or indemnification contracts between hospitals and physicians. Ultimately, though, the Tort Liability Law, like any law that seeks to grant rights that people demand, cannot be effective in isolation. To be effective, the Tort Liability Law must exist within a framework in which human rights are valued and people have reliable, fair access to justice when those rights are violated. China has a long way to go before it can legitimately make the claim that it possesses the necessary structure to protect its citizens' rights.

China has spent many decades ignoring its people in favor of economic development.<sup>271</sup> A by-product of the economic development is that Chinese citizens are introduced to ideas from outside China and start demanding more rights. China is starting to grant those rights in name despite the fact that they do not translate into rights in form. The Tort Liability Law is one example of this phenomenon. The Tort Liability Law is a step toward a safer and more just society because it shows that the government is at least cognizant of the

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<sup>271</sup> See WORLD BANK, *China Overview*, <http://www.worldbank.org/en/country/china/overview> (noting China's shift in policy from a focus on economic growth to "a 'people centered' strategy aiming to achieve a 'harmonious society' that balances economic growth with distributional and ecological concerns.") (last visited Oct. 12, 2012).

people's demand for more rights. Nonetheless, the program's successes will be limited by the insufficiency of justice from its court system and the people's resistance to litigation. There will be no widely successful medical malpractice reform in China until the government becomes willing to provide forums and opportunities for people to actually experience the benefits of the rights the legislations promise.

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