



# Medical Responsibility in Western Europe

Research Study of the  
European Science Foundation

Edited by E. Deutsch and H.-L. Schreiber

With Contributions by

J. Blackie J. Santos Briz F. Busnelli R. O. Dalcq  
E. Deutsch J. de Figueiredo Dias N. S. Fotakis  
H. Hausheer J. Hellner I. Kennedy H. J. J. Leenen  
P. Lødrup J. Sinde Monteiro J. Penneau J. Radišić  
H.-L. Schreiber J. W. Steiner M. Zana

Springer-Verlag  
Berlin Heidelberg New York Tokyo

Professor Dr. jur. Erwin Deutsch  
Professor Dr. jur. Hans-Ludwig Schreiber

Direktoren der Forschungsstelle  
für Arzt- und Arzneimittelrecht  
des juristischen Seminars  
der Universität Göttingen  
Nikolausberger Weg 9a  
D-3400 Göttingen (West Germany)

ISBN-13: 978-3-642-70451-2      e-ISBN-13: 978-3-642-70449-9  
DOI: 10.1007/978-3-642-70449-9

Library of Congress Cataloging in Publication Data. Main entry under title:  
Medical responsibility in Western Europe. 1. Medical personnel - Malpractice - Europe. 2. Insurance,  
Physicians' liability - Europe. I. Deutsch, E. (Erwin) II. Schreiber, Hans-Ludwig. III. Blackie, J. (John)  
IV. European Science Foundation. [DNLM. 1. Insurance, Liability - Europe - legislation. 2. Legislation,  
Medical - Europe. 3. Malpractice - Europe - legislation. W 33 GA1 M4] LAW

This work is subject of copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically those of translation, reprinting, re-use of illustrations, broadcasting, reproduction by photocopying machine or similar means, and storage in data banks. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to 'Verwertungsgesellschaft Wort', Munich.

© by Springer-Verlag Berlin Heidelberg 1985

Softcover reprint of the hardcover 1st edition 1985

The use of registered names, trademarks, etc. in the publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

2119/3140-543210

# Foreword

This volume presents to the international world of learning the first fruits of a project launched by the European Science Foundation (ESF) in 1977. Tribute should be paid to the late Professor Aleck Chloros, Judge in the Court of the European Community, whose belief in the European ideal and enthusiasm for European cooperation and the comparative study of legal problems made him an eloquent advocate of a large-scale ESF venture into the field of comparative law. Judge Chloros had envisaged the creation of a permanent, sizable and well-equipped European institute for comparative legal studies. The successive working parties convoked by the Executive Council of the ESF, which I had the honour of heading from the beginning, came to the conclusion that this ambitious vision could not be realized immediately; the financial situation of the member organizations of the ESF also deteriorated, making a cautious approach a necessary virtue. The solution ultimately adopted by the last of the working parties – the Ad Hoc Committee for Comparative Law – and submitted to the General Assembly of the ESF in 1979 called for the launching of four pilot projects. In November 1980, the Assembly approved detailed plans for two of these projects, the first of which concerned medical responsibility – the subject of this volume.

A Steering Committee was set up to monitor the projects. The organisation of the study was entrusted to Professor Dr. Erwin Deutsch, head of the Institute of Pharmaceutical and Medical Law of the University of Göttingen, and to Professor Dr. Hans-Ludwig Schreiber of the same university.

The present volume, which compares and analyzes in depth the legal positions on medical responsibility of 16 Western European countries, is a highly encouraging achievement in the true spirit of European cooperation.

Medical responsibility, in the broadest sense of the term, was put forward early in the discussion of topics suitable for comparative legal studies. It is hardly necessary to explain why: as the Western world undergoes an unparalleled *pénétration médicale* (to quote without irony Jules Romains' visionary Dr. Knock), the rapidly growing array of legal problems raised by modern medicine and pharmaceuticals seems at times not only to jeopardize further progress in medicine, but also to create almost insurmountable obstacles to the rational use of the medical and pharmaceutical knowledge and skill that mankind already commands. Moreover, developments outside Europe have made it particularly important to consider various solutions which have already been adopted or are still *in statu nascendi* in our part of the world, to compare them and – the last phase of the work – to propose, if possible, a harmonization or unification based on a consensus of the most rational, equitable and practicable solutions.

The papers in this volume describe the present position of the law on medical responsibility in most member states of the ESF; the wealth of ideas and practical solutions faithfully reflects the intellectual, social and ethical variety of Western Eu-

## VI Foreword

rope. At the same time, the book illustrates the practical advantages of achieving unity in many respects. The national reporters, lawyers or members of the medical profession, have all worked according to the same model, making meaningful comparison possible. The reader will be richly rewarded, but also surprised, for this is a field where, in spite of obvious and increasing economic and social similarities, the European legal systems have not developed in the same direction.

This broad description of the law as actually enforced represents the first and fundamental phase of the pilot project. A forthcoming volume will contain discussions and proposals *de lege ferenda*, i. e. on legislative policies. This second volume will include the project leaders' suggestions for harmonization or unification – if deemed desirable and possible.

On behalf of the ESF and the Steering Committee, it is with joy and pride that I congratulate Professor Deutsch, Professor Schreiber and their collaborators: they have served the European cause well.

Uppsala, January 1985

S. Strömholm

# Preface

One of the three research projects on comparative law supported by the Committee for Social Sciences of the European Science Foundation deals with medical responsibility in Western Europe. This topic was proposed by Prof. André Tunc of the University of Paris to explore the limits of the fault system in professional liability, to discuss ways of ensuring compensation for victims of medical mishaps and to propose solutions for freeing doctors and hospitals from burdensome litigation.

We were entrusted by the European Science Foundation with the organisation of the study. After much deliberation, we selected 15 national reporters, one of whom, Professor Radišić of Yugoslavia, agreed to do a report on the system of the Soviet Union as well. The national reporters and the project coordinators met for an initial workshop in Göttingen in the autumn of 1981. There, every national reporter gave a short preliminary survey of the legal situation in his country. The participants then agreed on an agenda (see p. XI) and named the points of interest the national reporters should cover in their final surveys. These included such topics as the basis of the system of medical care and claims and court cases, with special emphasis on insurance schemes and liability for negligence by clinics and medical personnel and in the use of medical equipment. Special situations were to be covered at the discretion of the national reporter.

The national reporters are lawyers and/or doctors and carried out most of their work *de lege lata* in 1982. In the spring of 1983, the reporters reconvened at the old university town of Coimbra, Portugal, to discuss the national reports and a number of special problems, e. g. additional insurance schemes or the superseding of liability by insurance. At that workshop, it was agreed that a second national report concerning policy questions should be initiated. It is hoped that all *de lege ferenda* reports will have been submitted by the time the reporters meet for the last time in Baden near Vienna in the spring of 1985.

In this first volume, all the national reports on the existing law are published in English, French or German. To compose a national report in one's own language is a relatively easy task for an expert, but becomes a much more difficult one if he has to write the report in a language other than his mother tongue or if his report has to be translated into another language. All the national reporters who wrote their reports in languages other than their native tongue or who agreed to have them translated faced the risk of a *sacrificium intellectus*. Transferring a meaning from one language into another is a problem in itself. Here, it was compounded by the fact that medical law is a restricted field with very specialised terminology.

A comparison of the national reports reveals some of the features distinguishing the concept of medical responsibility in European law. The liability of physicians and hospitals is an universal part of the professional liability. In Sweden, however, it is reinforced by accident insurance granted by private companies. In the field of liability for negligence, several different tendencies in the judicial practice of the var-

## VIII Preface

ious countries are discernible. One group of mostly Central European countries had experienced a huge increase in civil liability litigation against doctors and hospitals. Another group, especially in Northern Europe and the United Kingdom, reported a remarkable reluctance on the part of the courts to hold doctors or hospitals liable for alleged malpractice. The third group of countries, Latin European ones, has up to now had a fairly underdeveloped system of medical liability, at least as far as court cases are concerned. Here, medical responsibility rests mostly with the criminal courts, who intervene only in the most blatant cases of gross negligence. Still another group includes the socialist countries, where liability can also mean liability of the state or its agency.

The reports submitted here do not claim to cover medical law in its entirety or to be an easy guide to problems in this field. Rather, our aim is to present a general survey of medical care, medical institutions and medical responsibility in the different countries of Western Europe and, for comparison, Yugoslavia and the Soviet Union. Not surprisingly, the areas of concentration differ widely from report to report. Some countries offer a great wealth of court cases, while in others, judicial practice has not developed as extensively. To have many claims and court cases is not necessarily an advantage. It could show that some aspect of the law has not been formulated adequately. Nevertheless, the reader will find in each report a wealth of material and a reliable guide into legal aspects of medical responsibility in the respective country.

To publish the scientific work of others is to some degree a task easily undertaken and full of rewards. The national reports published in this volume afforded us many insights into the field of medical law.

We express our gratitude to the members of the Steering Committee for the Additional Activity in Comparative Law for their kind support of this research project:

Prof. S. Strömholm (Chairman)  
Prof. A. L. Diamond (United Kingdom)  
Prof. W. Ganshof van der Meersch (Belgium)  
Prof. Dr. h. c. H.-H. Jescheck (Federal Republic of Germany)  
Prof. G. Pugliese (Italy)  
Prof. S. Simitis (Standing Committee for Social Sciences)  
Prof. K. Spiro (Switzerland)  
Prof. A. Tunc (France)  
Secretary: Dr. Jostein Mykletun  
Mrs. Monique Flasaquier

January 1985

Erwin Deutsch  
Hans-Ludwig Schreiber

# List of Contributors

- John W. G. Blackie** Senior Lecturer, Department of Scots Law,  
University of Edinburgh
- Jaime Santos Briz** Magistrado del Tribunal Supremo, Madrid
- Francesco Busnelli** Professore Ordinario di Istituzioni di Diritto  
Privato, Università di Pisa; Direttore della Sezione  
di Giurisprudenza e Scienze Politiche della Scuola  
Superiore di Studi Universitari e Perfezionamento -  
Pisa
- Roger O. Dalq** Professeur à la Faculté de Droit à l'Université  
Catholique de Louvain, Bruxelles
- Erwin Deutsch** Ordentlicher Professor an der juristischen Fakultät  
der Universität Göttingen, Abteilung für  
internationales und ausländisches Privatrecht;  
Direktor der Forschungsstelle für Arzt- und  
Arzneimittelrecht des juristischen Seminars der  
Universität Göttingen; Mitglied der  
Enquete-Kommission des Deutschen Bundestages  
zur Gentechnologie
- Jorge de Figueiredo Dias** Conselheiro de Estado; Catedrático de Faculdade de  
Direito de Universidade de Coimbra
- Nikolaos S. Fotakis** Ordinarius für Forensische Psychologie und  
Psychiatrie an der Universität zu Thrazien;  
Nervenarzt
- Heinz Hausheer** Bundesrichter am Schweizerischen Bundesgericht,  
Lausanne; Honorarprofessor an der Universität  
Bern



X List of Contributors

- Jan Hellner** Professor an der juristischen Fakultät der Universität Stockholm
- Ian Kennedy** Professor of Medical Law and Ethics, Faculty of Law, King's College, London
- H. J. J. Leenen** Professor of Social Medicine and Health Law, University of Amsterdam
- Peter Lødrup** Dekan der juristischen Fakultät der Universität Oslo; Leiter des Instituts für Privatrecht
- Jorge Sinde Monteiro** Dozent an der juristischen Fakultät der Universität Coimbra, Portugal
- Jean Penneau** Docteur en droit, docteur en médecine; Chargé d'enseignement à l'Université de Droit, d'Economie et de Sciences Sociales de Paris
- Jakov Radišić** Professor an der juristischen Fakultät der Universität in Kragujevac; Wissenschaftlicher Berater des Instituts für Sozialwissenschaften in Beograd
- Hans-Ludwig Schreiber** Ordentlicher Professor an der juristischen Fakultät der Universität Göttingen; Vizepräsident des Niedersächsischen Landesjustizprüfungsamtes; Direktor der Forschungsstelle für Arzt- und Arzneimittelrecht des juristischen Seminars der Universität Göttingen
- Johannes Wolfgang Steiner** Richter des Handelsgerichtes Wien; Disziplinaranwalt der Österr. Ärztekammer; Universitäts-Lektor an der Universität Wien und der Wirtschaftsuniversität Wien
- Mario Zana** Professore Associato di Istituzioni di Diritto Private, Università di Pisa; Docente presso la Scuola di Specializzazione in Medicina Legale e delle Assicurazioni, Università di Pisa

# General Outline of Topics and Problems Treated

The following outline represents a general list of topics and problems discussed by each of the authors. The actual form of the individual national reports diverges from this outline to some extent, depending on the legal system and the judicial practice of each country.

## **A. Bases of the System of Medical Care**

- I. Ethical basis of medical care
- II. Private or state organized systems of medical care
- III. Number of doctors in private practice, clinics or state agencies
- IV. Number of treatments in private practice, clinics, etc.

## **B. Claims and Court Cases**

- I. Claims of patients against doctors, clinics and state agencies, kind of claims, cause of injury, average number of claims, number of settlements
- II. Court proceedings, etc.

## **C. Responsibility for Negligence**

- I. Criminal responsibility
- II. Criminal procedure
- III. Civil responsibility
- IV. Informed consent
- V. Causation
- VI. Burden of proof
- VII. Experts
- VIII. Access to records
- IX. Damages; pain and suffering

## **D. Clinics, Medical Equipment and Personnel**

- I. Need for guidelines
- II. Responsibility of the clinic for doctors
- III. Group liability

## **XII General Outline of Topics and Problems Treated**

- IV. Responsibility for medical equipment
- V. Vicarious liability

### **E. Insurance schemes**

- I. Social insurance obligation
- II. Additional private insurance
- III. Preemptive insurance schemes

### **F. Special situations (optional)**

- I. Emergency
- II. Intensive care
- III. Transplants and transplantation
- IV. Death, living will, assisted death
- V. Experimentation and drug testing

# How to Use the Volume

- The national reports are arranged in alphabetical order according to the name of the country reported upon.
- The abbreviations of the country names are those used in international traffic, e. g. A = Austria, YU = Yugoslavia. The abbreviation "GB" refers to the report on England, while "Sc" stands for Scotland.
- We have added marginal numbers to facilitate locating special sections.
- An index at the end of the volume shows the main topics treated in the three languages of the national reports, English, French and German.

## **Quelques remarques au sujet de l'utilisation de ce volume**

- Les différents rapports nationaux paraissent dans l'ordre alphabétique d'après les noms anglais de leurs pays d'origine.
- Pour les abréviations des noms de pays on s'est basé sur les plaques d'immatriculation internationales, p. ex. *A* pour l'Autriche, *YU* pour la Yougoslavie. *GB* désigne le rapport national d'Angleterre, *Sc* celui d'Écosse.
- Un index des sujets en fin de volume dans les langues allemande, anglaise et française recueille les termes les plus importants traités dans les différents rapports. Les chiffres correspondent aux numéros se trouvant en marge tout au long du texte.

## **Hinweise für die Benutzung des Buches**

- Die Länderberichte sind alphabetisch, den (englischsprachigen) Ländernamen entsprechend, angeordnet.
- Als Abkürzungen der Ländernamen werden (auch in den Sachverzeichnissen) die internationalen Autokennzeichen verwendet, z. B. A = Österreich, YU = Jugoslawien. GB bezeichnet den Länderbericht aus England, Sc den aus Schottland.
- Je ein deutsches, englisches und französisches Sachverzeichnis am Buchende enthält die wichtigsten, in den Länderberichten behandelten Begriffe. Die angegebenen Zahlen beziehen sich auf die Randnummern im laufenden Text.

# Survey of National Reports with Abbreviations of the Country Names

(A)	Austria . . . . .	1	Subject Index . . . . .	845
(B)	Belgium . . . . .	65	Index des sujets . . . . .	857
(GB)	England . . . . .	113	Sachverzeichnis . . . . .	861
(F)	France . . . . .	163		
(D)	Germany . . . . .	211		
(GR)	Greece . . . . .	285		
(I)	Italy . . . . .	361		
(NL)	Netherlands . . . . .	413		
(N)	Norway . . . . .	453		
(P)	Portugal . . . . .	513		
(Sc)	Scotland . . . . .	555		
(SU)	Soviet Union . . . . .	601		
(E)	Spain . . . . .	627		
(S)	Sweden . . . . .	683		
(CH)	Switzerland . . . . .	729		
(YU)	Yugoslavia . . . . .	793		