

THE EVOLVING LEGAL MECHANISM FOR MEDICAL MALPRACTICE DISPUTE RESOLUTION IN CHINA

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This Article investigates the evolution of the Chinese legal mechanism for medical malpractice dispute resolution (MMDR) from the establishment of the first rules for MMDR in 1955 to the promulgation of the Regulation on Preventing and Dealing with Medical Malpractice Disputes in 2018. Using historical documents and chronicled sources, it reveals the politicization of adverse events in the 1950s-70s and explores how the unique historical and political context created a different philosophical and practical foundation for the Chinese mechanism for MMDR. In contrast to the common law position that treats medical malpractice as a breach of the duty of care to patients, the Chinese mechanism treated medical malpractice as a breach of duties which a health care professional owed to the health administration system. In comparison with the common law approach that allocates medical malpractice cases to private law, the Chinese approach allocated medical malpractice cases to an administrative-led dispute resolution system. That is why, as this article explains, the Chinese MMDR mechanism focused on disciplinary and regulatory functions rather than the function of redressing damages in the early stages of its development.

This early philosophical and practical foundation was altered by the Chinese economic and health system reforms initiated in 1978 and 1985. As the reforms transformed patients into consumers of health services, pecuniary compensation became an unavoidable issue for the MMDR mechanism. The article then tracks changes in the laws and regulations governing medical malpractice disputes during 1987-2018 and takes judicial practice into account when explaining how the MMDR mechanism shifts its legitimacy from one based on health administrative rules to one based on the Chinese civil laws and shifts its function from deterring medical malpractice to compensating for medical injuries. The results of this research shed light on the social dynamics of legal reform, suggesting that the evolution of the Chinese legal mechanism may be understood as a dynamic product of an ongoing interaction between law and society.

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I. INTRODUCTION

Our discussion begins with the case *Huang Huiyu v. Puyang People's Hospital*,¹ which illustrates many significant problems encountered in the study of the Chinese mechanism for medical malpractice dispute resolution (MMDR mechanism). Some of these problems will be discussed in the social and legal context in which the problems are embedded, including the use of hospital-manufactured medications, the concealment of essential medical records, the restrictions on the admission of expert testimony, and the restrictions on the right of action. Our examination of the legislative responses to these problems may help to identify the evolution of the Chinese MMDR mechanism during the sixty-three years from 1955 to 2018.

¹ *Huang Huiyu yu Puyangshi Renmin Yiyuan Yiliao Sunhai Peichang Jiufen An* (黄绘宇与濮阳市人民医院医疗损害赔偿纠纷案) [*Huang Huiyu v. People's Hospital of Puyang—Medical Malpractice Action*], Yu Famin Tizi di 100 Hao (豫法民提字第 100 号) [Civil Appeal no. 100] (Henan High People's Ct. Sept. 14, 2010) (China), available at http://www.pkulaw.cn/Case/pfnl_a25051f3312b07f354a91c87a3a6298bdb19b16a9c71eb9abdfb.html?match=Exact [hereinafter *Huang case*].

In March 2003, Huang Huiyu, a five-year-old girl who manifested symptoms of vomiting and twitching, was admitted to the People's Hospital of Puyang, where she received intravenous therapy and had a convulsion associated with a fever higher than 40 degrees Celsius.² After being discharged from the hospital, she was diagnosed by other hospitals as having an abnormal electroencephalogram, indicative of epilepsy.³ The patient's mother, an employee of the defendant hospital, subsequently filed this lawsuit in May 2003, alleging that the hospital's failure to comply with medical practice rules and treatment protocols produced adverse reactions in the patient and thereby led to the patient's epilepsy.⁴ After the district court dismissed the case in November 2004, the plaintiff appealed to the municipal intermediate court, which ordered a retrial on the ground that "the major facts are not clear, and the evidence is insufficient."⁵ The district court commissioned two forensic institutions to assess physical injury, causation, and negligence, but both replied that it was not possible to draw a definitive conclusion based on the samples and materials sent for examination.⁶ The plaintiff had to apply for a Medical Accident Assessment.⁷ This procedure was necessary because, as will be explained in Part IV of this Article, no medical malpractice claim could be brought unless a Medical Association decided that the event be a Medical Accident.

The Medical Association of Henan Province decided in 2006 that, although the defendant hospital was negligent for having failed to make a complete examination of the patient, to make a correct diagnosis, and to keep a complete and consistent medical record, what happened to the patient did not constitute a Medical Accident.⁸ In November 2006, the district court dismissed her claim on the basis of the Medical Association's assessment, saying that the plaintiff did not prove that she had epilepsy.⁹ The plaintiff subsequently filed an appeal, arguing that she had provided sufficient evidence to prove that the adverse event was due to the illegal use of the intravenous fluids manufactured by the defendant hospital, but this was ignored by the district court.¹⁰

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

She also argued that the Medical Association's assessment had serious defects in sampling and methodology because the defendant hospital did not comply with the relevant regulations to provide a sample of medications and a complete original medical record for Medical Accident Assessment.¹¹ The intermediate court dismissed her appeal for the same reason in October 2008.¹² The plaintiff appealed to the provincial high court. Her case took a 180-degree turn in April 2010, when the high court overruled the decisions of the trial courts and rendered the judgment in favor of the patient, saying that the expert testimony evidence provided by the Medical Association was inadmissible because of procedural defects.¹³ The court admitted the plaintiff's evidence of the patient's having epilepsy, although still rejected her request for a review of the defendant's evidence admitted at the first and second trial.¹⁴

This long-drawn-out lawsuit first went to the district court in 2003, then to the municipal intermediate court in 2008, and eventually to the provincial high court in 2010, at a time when the Chinese MMDR mechanism shifted its legal foundation from an administrative justice system to the civil justice system. Accompanied by this shift, as will be illustrated in this Article, the mechanism extended the cause of action to include all medical malpractice claims, the expert testimonies to include those of forensic experts, and the right to compensation to a broader section of medical malpractice victims. These changes not only modified the landscape of the *Huang* case but also represented an evolution of the MMDR mechanism towards favoring the compensatory objective of tort law. However, we know of no studies that provide a systematic examination of such an evolution over the last sixty years, not to mention a detailed analysis of how and why the MMDR mechanism formed and evolved in the context of social interaction. Although a few articles have highlighted some problems arising in the evolution of the MMDR mechanism,¹⁵ their findings are specific to a particular context at a particular point

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Perhaps the most representative of these articles is Zhu Wang & Ken Oliphant, *Yangge Dance: The Rhythm of Liability for Medical Malpractice in the People's Republic of China*, 87 CHI.-KENT L. REV. 21, 28–40 (2012) (comparing the two parallel liability regimes—the administrative regime and the tort regime—in terms of cause of action, burden of proof, and the identification process and assessment of damages). See also He Songyue (何颂跃), *Yiliao Jiufen Minshi Anjian Chuli de Fazhan—Cong "Shigulun" Xiang "Qinquanlun" de Zhuanbian* (医疗纠纷民事案件处理的发展——从“事故论”向“侵权论”的转变) [*The Development in Dealing with Medical Malpractice Claims: From the Theory of Accident to the Theory of Tort*], *Zhengju Kexue* (证据科学) [EVIDENCE SCIENCE], no. 3, 2012 at 278, 285–91 (providing an understanding of the historical process in which the doctrine of Medical Accident has been discarded and the theory of tort has been progressively accepted in civil trials in China); Benjamin L. Liebman,

in time, providing neither a whole landscape of nor an elaborate detail on the series of changes in the evolutionary process.¹⁶ To extend previous studies, in this Article we present an investigation of the evolution of the Chinese MMDR mechanism from the establishment of the first regulation relating to medical malpractice in 1955 to the promulgation of the Regulation on Preventing and Dealing with Medical Malpractice Disputes in 2018. Our findings attempt to explain the social dynamics that have promoted the formation and transformation of the MMDR mechanism.

This Article proceeds as follows. Following this introduction, Part II presents an outline of the genealogy of Medical Accidents. Our analysis explores how the politicization of adverse events in the 1950-60s shaped the understanding of medical malpractice as an affront to the Communist regime, and how a government-defined Medical Accident laid the foundation for what became the administrative-led dispute resolution system. Part III begins with an outline of the current legal basis of the administrative-led dispute resolution system, known as the 2002 Regulation, followed by an analysis of the three main restrictions imposed by the administrative-led MMDR mechanism on bringing medical malpractice claims. This analysis shows that these restrictions undermined the unity of the legal system, and, as a result, hindered the success of dispute resolution. Part IV illustrates how the changes have been promoted by Chinese Tort Law to remove the regulatory restrictions. Finally, Part V summarizes the main changes of the MMDR mechanism by setting its evolution in the context of the interaction between law and society.

II. ADMINISTRATIVE-LED DISPUTE RESOLUTION SYSTEM

The most basic doctrine of medical malpractice in the MMDR mechanism was Medical Accident, which functioned as a cornerstone in the fifty-five years from the promulgation of the first two administrative rules for

Malpractice Mobs: Medical Dispute Resolution in China, 113 COLUM. L. REV. 181, 186–87 (2013) (arguing that violence and protest are now part of the cycle of dispute resolution in China).

¹⁶ For example, in their outstanding article, Wang & Oliphant argue that the legal development of medical malpractice has shown a basic pattern that is “three paces forwards, followed by two paces back; then a step to the right, followed by a step to the left.” Wang & Oliphant, *supra* note 15, at 21. However, setting aside the question of whether the development could be simplified as a forward and backward pattern, no explanation as to the rationale behind each step has been given; for example, readers may wonder why—as the authors state—“[f]ew claims of medical malpractice were litigated at this time [1949–1987], and little attention was given to compensation for harm caused by medical treatment”. *Id.* at 27. Nor has there been a detailed explanation of the inherent connection between what the authors called a forward step and a backward step.

MMDR in 1955 to the implementation of Chinese Tort Law in 2010. On top of this foundation, as will be discussed in this and the next parts, was an administrative-led dispute resolution system, in which the central government regulated the definition and scope of Medical Accident, local government-sponsored assessment institutions decided whether an adverse event was a Medical Accident, and local health authorities decided whether to impose disciplinary sanctions on the health care provider. The dominance of administrative agencies in the MMDR mechanism can be attributed to many factors, including the abolition of the legal system that existed before the regime shift in 1949, and the nationalization of health services in the 1950s.¹⁷ One major factor, which has not been studied so far, is the politicization of adverse events in the 1950-60s. In this Part, we focus on this issue and argue that the politicization of adverse events created the doctrine of Medical Accident, in which medical malpractice was interpreted as an issue that must be addressed by the government, and on which the MMDR mechanism was installed within an administrative-bureaucratic system that we call the administrative-led dispute resolution system.

¹⁷ See, e.g., David Blumenthal & William Hsiao, *Privatization and Its Discontents—The Evolving Chinese Health Care System*, 353 NEW ENG. J. MED. 1165, 1165 (2005) (“The government owned, funded, and ran all hospitals, from large, specialized facilities . . . in urban areas to small township clinics in the countryside.”); Gordon Liu et al., *Privatization of the Medical Market in Socialist China: A Historical Approach*, 27 HEALTH POL’Y 157, 160 (1994) (“From 1949 to 1956, all private hospitals, including 243 private mission hospitals, were transferred into public ones.”); Zhe Dong & Michael R. Phillips, *Evolution of China’s Health-care System*, 372 LANCET 1715, 1715 (2008) (“[T]he Government gradually took over all health-care services, organised a centralised three-tier delivery system, and made all health providers state employees.”). The nationalization of health services led to the intervention of government in hospital affairs. After the second round of Chinese health reform was launched in 2009, officials of health authorities were asked not to hold leadership positions within public hospitals or to interfere in the regulation and supervision of health care provisions. See Guanyu Shenhua Yiyao Weisheng Tizhi Gaige de Yijian (关于深化医药卫生体制改革的意见) [Directive on Deepening the Health System Reform] (promulgated by the Central Comm. and the St. Council, Mar. 17, 2009, effective Mar. 17, 2009) art. 8, ST. COUNCIL GAZ., Apr. 20, 2009, at 8–9 (China), available at http://www.gov.cn/gongbao/content/2009/content_1284372.htm [hereinafter Directive on Deepening the Health System Reform]; Yiyao Weisheng Tizhi Gaige Jinqi Zhongdian Shishi Fangan 2009–2011 Nain (医药卫生体制改革近期重点实施方案 2009–2011 年) [Plan for Recent Priorities in Implementing the Reform of the Pharmaceutical and Healthcare System 2009–2011] (promulgated by the St. Council, Mar. 18, 2009, effective Mar. 18, 2009) art. 17, ST. COUNCIL GAZ., Apr. 20, 2009, at 18 (China), available at http://www.gov.cn/gongbao/content/2009/content_1284376.htm [hereinafter Priorities in Implementing the Reform]; Guanyu Xianji Gongli Yiyuan Zonghe Gaige Shidian de Yijian (关于县级公立医院综合改革试点的意见) [Opinion on the Pilot Program for the Comprehensive Reform of the Public Hospitals at the County Level] (promulgated by the Gen. Office of the St. Council, June 7, 2012, effective June 7, 2012) art. 5(1), ST. COUNCIL GAZ., June 30, 2012, at 7 (China), available at http://www.gov.cn/gongbao/content/2012/content_2169155.htm; Guanyu Weisheng Xitong Lingdao Ganbu Fangzhi Liyi Chongtu de Ruogan Guiding (关于卫生系统领导干部防止利益冲突的若干规定) [The Regulation for Preventing Conflicts of Interest of Directors in the Health System] (promulgated by the Ministry of Health, Dec. 26, 2011, effective Dec. 26, 2011) arts. 5–6, 8, MINISTRY OF HEALTH GAZ., Jan. 1, 2012, at 42 (China), available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=240e41b1e2cf46edbdfb.

A. Politicization of Medical Accident in the 1950-60s

Medical Accident is translated from the Chinese compound word *yiliao shigu*: *yiliao* means medical treatment; *shigu*, similar to its English counterpart “accident,”¹⁸ refers to a suddenly occurring event which leads to property damage, injury, or loss of life. *Shigu* appeared some decades before the founding of the People’s Republic of China.¹⁹ However, the Communist regime first adopted the term *yiliao shigu* in 1950, when the official newspaper of the Central Committee of the Chinese Communist Party (CCP), *People’s Daily*, reported several cases of medication errors that took place at the Shijiazhuang Railway Hospital.²⁰ As this most authoritative newspaper reported more cases of medical injury in Communist China, *yiliao shigu* (Medical Accident) became an official term used to designate any adverse event caused by carelessness or negligence of health care professionals.²¹ Health authorities rapidly adopted this term at the time in their administration practice.²² Its usage showed that, from the very beginning, Medical Accident was used in the sense of government control of adverse events rather than in the sense of dispute resolution. The usage of Medical Accident as a governance control mechanism further gained ideological legitimacy with the intensification of political repression in the 1950-60s.

¹⁸ For a detailed explanation of the term “accident” in the context of common law, see PETER CANE & PATRICK SELIM ATIYAH, *ATTYAH’S ACCIDENTS, COMPENSATION AND THE LAW* 3–4 (2013).

¹⁹ He Songyue, *supra* note 15, at 280.

²⁰ Zhang Jingguang (张敬光), *Shishi Tielu Yiyuan Mouxie Renyuan Cuzhidaye Wanhu Renming, Lingdao Jiguan Tongling Pubian Jiancha Gongzuo* (石市铁路医院某些人员粗枝大叶玩忽人命, 领导机关通令普遍检查工作) [*Medical Staff Neglect Human Life: Work Under Inspection at Shijiazhuang Railway Hospital*], *Renmin Ribao* (人民日报) [PEOPLE’S DAILY], Apr. 5, 1950, at 6.

²¹ Zhang Jingguang (张敬光), *Shishi Tielu Yiyuan Zaidu Jinxing Gongzuo Jiancha, Jixu Faxian Yanzhong Yiliao Shigu, Cuowu Renyuan yi De Yingyou Chufen* (石市铁路医院再度进行工作检查, 继续发现严重医疗事故, 错误人员已得应有处分) [*Works Under Inspection at Shijiazhuang Railway Hospital: Uncovering Serious Accidents and Punishing Responsible Staff*], *Renmin Ribao* (人民日报) [PEOPLE’S DAILY], May 10, 1950, at 4.

²² For example, in 1953, the Xi’an Municipal Health Bureau established the Research Council on Medical Accident (西安市医疗事故研究委员会) which helps the bureau deal with Medical Accident. See XIE LIANGCAI (解良才), *Xi’anshi Weisheng Zhi* (西安市卫生志) [HEALTH CHRONICLE OF XI’AN MUNICIPALITY] 49 (1994). See also WANG WEI (汪为) ET AL., *Jilinsheng Weisheng Zhi* (吉林省卫生志) [HEALTH CHRONICLE OF JILIN PROVINCE] 475 (1992) (twenty three Medical Accidents were identified in Changchun Municipality of Jilin Province in 1954, of which eight were identified as Technical Accidents and fifteen were Negligent Accidents).

As the political atmosphere deteriorated in the early 1950s,²³ the Communist regime became more committed to making a clear distinction between “ourselves and the enemy.”²⁴ In 1955, Mao Zedong (also known as Mao Tse-tung), the supreme leader of the communist regime, warned that many counter-revolutionaries snaked into “our ranks” to organize sabotage.²⁵ “Wherever they have their men,” he said, “strange things happen.”²⁶ Mao’s claim set the tone for the politicization of adverse events that ensued. In the same year, the *People’s Daily* published an editorial calling for the elimination of Medical Accident.²⁷ The editorial defined Medical Accident as a “negligent accident” that is caused by the irresponsibility and carelessness of health care professionals and attributed this irresponsibility and carelessness to the influence of bourgeois ideology among professionals. “It is the false ideology that led to irresponsibility, carelessness, lack of revolutionary sympathy for patients, and resulted in the instability of hospital leadership and management,” said the editorial.²⁸ Medical Accident, in such a sense, should and must be eliminated. This goal could be achieved, according to the editorial, through the way that the government exercises supervision and regulation over health care providers.²⁹ The medical community quickly lent its support. Many health care institutions and professionals wrote to prove the correlation between Medical Accidents and bourgeois ideology.³⁰ The most

²³ In the half-decade following the founding of the People’s Republic of China in 1949, the communist regime intervened in the Korean War and launched a series of political movements to eliminate opposition. For example, the Chinese Communist government launched the Campaign to Suppress Counter-Revolutionaries in 1950. The then Deputy Minister of the Ministry of Public Security reported in 1954 that more than 2,620,000 were arrested, 1,290,000 were jailed, and 712,000 were executed in the first Campaign to Suppress Counter-Revolutionaries. See 1 YANG KUISONG (杨奎松), *Zhonghua Renmin Gongheguo Jianguoshi Yanjiu* (中华人民共和国建国史研究) [A STUDY ON THE STATE-BUILDING HISTORY OF THE PEOPLE’S REPUBLIC OF CHINA] 217 (2009).

²⁴ Mao Zedong stated on June 6, 1952: “The contradiction between the working class and the national bourgeoisie has become the principal contradiction in China.” He further delivered a speech on August 4, 1952, titled “Let Us Unite and Clearly Distinguish between Ourselves and the Enemy.” 5 MAO TSE-TUNG, *SELECTED WORKS OF MAO TSE-TUNG* 77, 78 (People’s Publishing House, 1977).

²⁵ *Id.* at 177. In May and June 1955, Mao wrote an editor’s note, stating: “The masses of the people are very much in need of this material. How do counter-revolutionaries employ their double-dealing tactics? How do they succeed in deceiving us by their false appearances, while furtively doing the things we least expect? All this is a blank to thousands upon thousands of well-intentioned people. . . . We revolutionaries must know their tricks and study their tactics in order to defeat them. Never be so bookish and naive as to treat complex class struggle as a simple matter.” *Id.* at 177, 180.

²⁶ *Id.* at 179.

²⁷ Editorial, Xiaomie Yiliao Shigu (消灭医疗事故) [*To Eliminate Medical Accident*], *Renmin Ribao* (人民日报) [PEOPLE’S DAILY], Nov. 30, 1955, at 1 [hereinafter *People’s Daily Editorial*].

²⁸ *Id.*

²⁹ *Id.*

³⁰ For example, an article published in 1959 criticized the “bourgeois” view of adverse event as unavoidable. “In our great motherland,” said the article, “health care practitioners are full of the spirit of communism, have a high sense of responsibility with respect to their work, treat patients as their family members, and serve patients wholeheartedly—that is why medical negligence can be avoided and eliminated in our country.” 0461 Zhidui Weishenglian (0461 支队卫生连) [0461 Division Medical Company], *Shinian Wu Yiliao Shigu de Weishenglian* (十年无医疗事故的卫生连) [*The Medical Company Without a Medical Accident for Ten Years*], *Renmin Junyi* (人民军医) [PEOPLE’S MILITARY SURGEON], no. S1, 1959 at 108, 108. See also Shenyang Junqu Houqinbu

authoritative medical journal at that time, *People's Military Surgeon*, published editorials asking hospitals to use ideological education to remold professionals' internal belief system.³¹ These assertions authoritatively established the notion of Medical Accident as an issue of governance rather than an issue regarding the rights of patients. These assertions also resulted in the MMDR mechanism function as a means of administrative control over Medical Accidents rather than a forum used to resolve medical malpractice disputes. Two main features of the MMDR mechanism in the 1950-60s are worth mentioning below.

First, the MMDR mechanism did not allow monetary damages for Medical Accident.³² The requirements for pecuniary compensation appeared as early as the 1950s;³³ however, claimant-patients might generally

Weishengbu (沈阳军区后勤部卫生部) [Health Sub-Department of Logistics Department of Shenyang Military Area Command], 1955 Nian Yiliao Shigu Fasheng Qingkuang Jiantao Baogao (1955 年医疗事故发生情况检讨报告) [*Review Report on Medical Accidents that Occurred in 1955*], *Renmin Junyi* (人民军医) [PEOPLE'S MILITARY SURGEON], no. 5, 1956 at 277, 277; Tao Zhifen (陶芷芬) & Qian Shilong (钱诗龙), Xuexi Renmin Ribao Shelun "Xiaomie Yiliao Shigu" (学习人民日报社论 "消灭医疗事故") [*Studying the People's Daily's Editorial "Eliminating Medical Accident"*], *Zhongguo Yaoxue Zazhi* (中国药学杂志) [CHINESE PHARMACEUTICAL J.], no. 1, 1956 at 9, 9-10; Jiefangjun 169 Yiyuan (解放军 169 医院) [People's Liberation Army 169 Hospital], *Yiliao Shigu Keyi Xiaomie* (医疗事故可以消灭) [*Medical Accidents Can Be Eliminated*], *Renmin Junyi* (人民军医) [PEOPLE'S MILITARY SURGEON], no. 5, 1960 at 36, 36; Jiefangjun Zongyiyuan Yiliao Shigu Diaocha Xiaozu (解放军总医院医疗事故调查小组) [People's Liberation Army General Hospital Medical Accidents Investigation Panel], *Guanyu Xiaomie Yiliao Shigu Wenti de Diaocha Baogao* (关于消灭医疗事故问题的调查报告) [*Investigation Report on the Elimination of Medical Accident*], *Renmin Junyi* (人民军医) [PEOPLE'S MILITARY SURGEON], no. 6, 1961 at 7, 7.

³¹ Editorial, *Jiaqiang Lingdao, Zhengdun Yiliao Zuofeng, Jianjue Xiaomie Yiliao Shigu* (加强领导, 整顿医疗作风, 坚决消灭医疗事故) [Consolidate Leadership, Rectify Medical Work-style, and Eliminate Medical Accident], *Renmin Junyi* (人民军医) [People's Military Surgeon], no. 12, 1955 at 721, 723 [hereinafter 1955 Editorial]. See also Editorial, *Jiaqiang Yiyuan Lingdao, Xiaomie Yiliao Shigu* (加强医院领导, 消灭医疗事故) [Consolidating Hospital Leadership and Eliminate Medical Accident], *Renmin Junyi* (人民军医) [People's Military Surgeon] no. 1, 1961 at 1, 1-2.

³² The principle of not permitting damages to patients can be understood in the context of Chinese culture, in which the question of compensatory damages is negligible compared to a clear understanding of right and wrong. Confucianism, as a crystallization of Chinese culture, believes that a superior man should be concerned with righteousness rather than gain. Focusing on monetary compensation is thought to undermine the morality both of victims and of the community. For more detailed discussion, see Nuannuan Lin, *The Restorative Role of Apology in Resolving Medical Disputes: Lessons from Chinese Legal Culture*, 12 J. BIOETHICAL INQUIRY 699, 702-05 (2015). Even up to today, there are still many patients and/or their relatives who waive their right to compensatory damages but ask for an acknowledgement of fault and an apology. See, e.g., *Xinwen Diaocha: Siliao* (新闻调查: 私了) [*News Probe: Settled in Private*] (China Central Television News (中国中央电视台新闻调查) broadcast May 26, 2012), available at <http://tv.cntv.cn/video/C10435/63a56bda3a794da1a40ff4bb7f49bfd> (the family of the deceased patient rejected a settlement offer of about 460,000 USD, but required the hospital to admit fault, make a public apology, suspend operation for rectification, and provide a plan of how to prevent the similar errors). For a discussion about patients' extra-legal aspirations in the Western world, see Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 723 (2007) (arguing that "desires for monetary compensation were never found to be a predominant litigation motivation or of primary importance to most plaintiffs").

³³ Han Shuzhi (韩述之), *Guanyu Xingshi Shangsuo Anjian Shenli Chengxu Shang de Jige Wenti* (关于刑事上诉案件审理程序上的几个问题) [*Current Issues Concerning the Criminal Appeals Procedure*], *Faxue* (法学) [L. SCI.], no. 3, 1956 at 5, 5 (from the author's observation of the appeal cases prosecuted by the People's Procuratorates and decided by the People's Courts in this period, it would appear that a proportion of patients and/or their relatives requested pecuniary compensation for injuries).

receive an allowance from their work-units,³⁴ but not compensatory damages from health care providers.³⁵ This convention had been wholly formalized since 1964 when the SPC issued a directive prohibiting the courts from awarding money damages.³⁶ The principle of not permitting damages to patients remained unchanged even after the beginning of the Chinese market-oriented reform in 1978.³⁷ Even nowadays, when the principle is no longer enforced, a claim for compensatory damages from public hospitals is still regarded as seeking damages from the Communist regime.³⁸

³⁴ On February 26, 1951, the Government Administration Council (renamed State Council in 1954) promulgated the Labour Insurance Regulation (劳动保险条例), requiring enterprises to be responsible for the lives and welfare of their disabled or ill workers. Laodong Baoxian Tiaoli (劳动保险条例) [Labor Insurance Regulation] (promulgated by the Government Administration Council (now known as the St. Council), Feb. 26, 1951, effective Feb. 26, 1951) arts. 12–13, (pkulaw) (China), available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=55d00ceb2d6f9d82bdfb. Enterprises should not only pay for medical and hospital expenses for their workers (including their immediate families) but also provide funeral expenses, pensions, and other welfare benefits to the immediate families of their deceased workers. *Id.* arts. 12–14. Moreover, on June 30, 1956, the National People's Congress promulgated The Standard Charter of Advanced Agricultural Co-operatives (高级农业生产合作社示范章程), requiring co-operatives to be responsible for the lives and welfare of their disabled, elderly, widowed, or ill members. Gaoji Nongye Shengchan Hezuoshe Shifan Zhangcheng (高级农业生产合作社示范章程) [The Standard Charter of Advanced Agricultural Co-operatives] (promulgated by the Nat'l People's Cong., June 30, 1956, effective June 30, 1956) (npc.gov.cn) (China), available at http://www.npc.gov.cn/wxzl/wxzl/2000-12/10/content_4304.htm. Co-operatives should provide pensions to the immediate families of their deceased rural workers and be responsible for the medical care of their rural worker. *Id.* arts. 51, 53. On August 30, 1952, the then Ministry of Health issued the Measures for the Implementation of Free Health Prevention Scheme for Public Sectors Employees (国家工作人员公费医疗预防实施办法), according to which free health care was extended to all government employees and employees of state enterprises. Guojia Gongzuo Renyuan Gongfei Yiliao Yufang Shishi Banfa (国家工作人员公费医疗预防实施办法) [Measures for the Implementation of Free Health Prevention Scheme for Public Sector Employees] (promulgated by the Ministry of Health, Aug. 30, 1952, effective Aug. 30, 1952, repealed Jan. 15, 2008) (chinacourt) (China) available at <https://www.chinacourt.org/law/detail/1952/08/id/73.shtml>.

³⁵ WANG WEI ET AL., *supra* note 22, at 276. See also He Songyue, *supra* note 15, at 286 (the People's Courts, according to the health policy at that time, did not award pecuniary compensation for Medical Accidents); Zhang Qinchu (张秦初), Yiliao Shigu de Peichang——Woguo Yiliao Shigu Chuli Huigu (医疗事故赔偿——我国医疗事故处理回顾) [Compensation for Medical Accidents: A Review of the Handling Medical Accidents in China], Zhongguo Linchuang Yisheng (中国临床医生) [JOURNAL OF CHINESE PHYSICIAN], no. 8, 2004 at 61, 61 (arguing that compensation for Medical Accidents did not occur until the General Principles of Civil Law was enacted in 1987). Under the common law, for comparison, “the value of publicly funded medical and hospital expenses cannot be claimed” because the victim incurred and will incur no expense. JOHN G. FLEMING, THE LAW OF TORTS 261 (9th ed. 1998). See also Minfa Tongze (民法通则) [General Principles of Civil Law] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), ST. COUNCIL GAZ., May 20, 1986, at 371 (China) [hereinafter General Civil Law]. For an English translation of the General Principles of Civil Law, see Whitmore Gray & Henry Ruiheng Zheng, *General Principles of Civil Law of the People's Republic of China*, LAW AND CONTEMPORARY PROBLEMS, Spring 1989, at 27.

³⁶ Guanyu Chuli Yiliao Shigu Anjian Buying Pangei Jingji Buchang Wenti de Pifu (关于处理医疗事故案件不应判给经济补偿问题的批复) [Official Reply Regarding Not Awarding Economic Compensation for Medical Accidents] (promulgated by the Sup. People's Ct., Jan. 18, 1964, effective Jan. 18, 1964) (pkulaw) (China), available at http://pkulaw.cn/fulltext_form.aspx?Gid=175961&Db=chl (ruling that the People's Courts shall not grant pecuniary compensation in dealing with Medical Accidents but may search for other types of remedy for claimant-patients).

³⁷ In 1978, the then Ministry of Health issued the administrative rule that was known as Interim Provision for Preventing and Dealing with Medical Accidents (关于预防和处理医疗事故的暂行规定), article 12 of which provided that health care institutions and professionals involved in Medical Accidents should not be liable for compensation to an injured patient. See Zhang Qinchu, *supra* note 35.

³⁸ There is still a prevailing opinion in China that the growth of medical malpractice damages may result in a loss of state assets. See e.g., Liu Zifeng (刘子锋) et al., 《Guangdongsheng Yiliao Jiufen Yufang yu Chuli Banfa》 Pingxi (《广东省医疗纠纷预防与处理办法》评析) [An Analysis of “The Regulation of Guangdong Province on Preventing and Dealing with Medical Malpractice Disputes”], Zhongwai Yiliao (中外医疗) [CHINA & FOREIGN MEDICAL TREATMENT], no. 22, 2013 at 25, 26 (arguing that it is

Second, the MMDR mechanism functioned to deter adverse events through punishment. In 1955, the same year the *People's Daily* published the above-mentioned editorial, the then Ministry of Health (MOH) issued the first administrative rules concerning Medical Accident.³⁹ The administrative rules, along with the so-called implementing rules issued by local health authorities,⁴⁰ conferred health authorities at all levels the ability to make binding decisions on disputes arising out of Medical Accident. Health authorities routinely sought solutions in consultation with the parties involved,⁴¹ sometimes invited medical experts to present their opinions on specific issues,⁴² and, if necessary, imposed disciplinary sanctions on health care professionals who were negligent.⁴³ Accidents involving gross negligence might be treated as a criminal offense,⁴⁴ or a counter-revolutionary offense,⁴⁵ which would be criminally investigated and prosecuted by the People's

necessary to impose restrictions on the settlement of medical malpractice disputes so as to prevent a loss of state assets); Ai Erken (艾尔肯), Lun Yiliao Jiufen Disanfang Tiaojie de Zhidu Youshi (论医疗纠纷第三方调解的制度优势) [*On the Advantages of Third-party Mediation of Medical Malpractice Disputes*], *Yixue yu Faxue* (医学与法学) [MEDICINE & JURISPRUDENCE], no. 5, 2014 at 5, 8 (arguing that the advantage of third-party mediation over litigation is that compensatory damages awarded by the courts may result in a loss of state assets).

³⁹ In 1955, the then Ministry of Health issued two health administrative rules that were known as Draft Bill for Dealing with Medical Accidents (关于处理医疗事故的草案) and Draft of Interim Measure for Dealing with Medical Accidents (医疗事故处理暂行办法草案). See NIU LIANG (牛亮) ET AL., *Shandongsheng Weisheng Zhi* (山东省卫生志) [HEALTH CHRONICLE OF SHANDONG PROVINCE] 86–87 (1992) [hereinafter 1955 RULES].

⁴⁰ For example, in June 1956, the Xi'an Municipal Health Bureau issued the Interim Measure for Identifying and Dealing with Medical Accidents and Errors (西安市医疗事故、差错、缺点区分及处理暂行办法) which became the primary legal basis for the local health authority to deal with Medical Accidents that had occurred at all health facilities in the municipality during the 1956–66 period. See XIE LIANGCAI, *supra* note 22, at 49–50. In Hubei Province, moreover, the Shashi Municipality issued the Interim Measure for Dealing with Medical Errors and Accidents (沙市市医疗差错事故管理暂行办法) in 1960, specifying the five types of Medical Accident according to the severity of injury. See LI JIXIAN (李继贤) ET AL., *Shashishi Difangzhi Weisheng Zhi* (沙市市地方志卫生志) [HEALTH CHRONICLE OF SHASHI MUNICIPALITY] 230–33 (1987).

⁴¹ ZHANG MINGDAO (张明岛) ET AL., *Shanghai Weisheng Zhi* (上海卫生志) [HEALTH CHRONICLE OF SHANGHAI] 125 (1998).

⁴² *Id.*

⁴³ According to the Draft Bill for Dealing with Medical Accidents (关于处理医疗事故的草案) and the Draft of Interim Measure for Dealing with Medical Accidents (医疗事故处理暂行办法草案) issued by the then Ministry of Health in 1955, health care professionals involved in a “negligent accident” would be subjected to disciplinary sanctions by health authorities or criminal sanctions by judiciary authorities. See He Songyue, *supra* note 15, at 286.

⁴⁴ As early as the 1950s, Medical Accidents were recognized under the criminal jurisdiction of the People's Courts and the People's Procuratorates. See ZHANG MINGDAO ET AL., *supra* note 41, at 125. For more examples, see XU HAIFENG (许海峰), ET AL., *Beijing Zhi • Jiancha Zhi* (北京志 • 检察志) [CHRONICLE OF BEIJING MUNICIPAL PROCURATORATE] 406 (2007) (a decision was made in 1955 that the People's Procuratorate of Beijing Municipality should be responsible for the investigation and prosecution of Medical Accident cases); YANG GUANG (杨光) ET AL., *Shaanxisheng Zhi • Jiancha Zhi* (陕西省志 • 检察志) [CHRONICLE OF SHAANXI PROVINCIAL PROCURATORATE] 140 (2009) (in Shaanxi province, the High People's Court, the High People's Procuratorate, and the Public Security Bureau jointly issued on June 21, 1957, the Trial Measures on the Acceptance Scope of Criminal Lawsuits (受理刑事案件管辖范围试行办法), extending the acceptance scope of criminal lawsuits to include Medical Accidents); FU QIANG (傅强) ET AL., *Haerbinshi Zhi • Zhengquan* (哈尔滨市志 • 政权) [CHRONICLE OF HARBIN MUNICIPALITY: REGIME] 527–28 (1998) (the People's Procuratorate of Harbin Municipality prosecuted twenty cases of the so-called gross negligent accidents during about eighteen months from 1956 to the first half of 1957; and in 1959, Medical Accidents were formally recognized under the criminal jurisdiction of the People's Procuratorates).

⁴⁵ For example, one of the editorials published in the *People's Military Surgeon* said, “One of the causes of the Medical Accident is counter-revolutionary destruction. These counter-revolutionaries, in disguise of health care professionals, intend to kill patients. The

Procuratorates.⁴⁶ Although the communist regime did not formally establish a criminal code until 1979,⁴⁷ it had not prevented health care professionals from being indicted either for the “crime of Medical Accident” or the “crime of counter-revolution” in the 1950-60s.⁴⁸ Judicial authorities might also make recommendations based on a case they dealt with and advise the relevant health authorities to put the recommendations into practice to improve health system performance.⁴⁹ The intervention of judicial authorities in preventing Medical Accidents can most easily be understood in the context of the concept that Medical Accident was a breach of duties owed to the health administration system rather than to individual patients.

B. Administrative-led Dispute Resolution under the 1987 Measure

most recent example of this is the counter-revolutionary group that lurked in the Shijiazhuang First People’s Hospital.” See 1955 *Editorial, supra* note 31, at 723. The politicization and criminalization of Medical Accident reached its pitch in the Cultural Revolution period, during which “political accident” was created as a new type of Medical Accident. For example, in Shanxi Province, the revolutionary committee of the People’s Hospital of Qinyuan County issued a rule in 1973, dividing Medical Accident into three types: political accident, negligent accident, and technical accident. See REN GUOHONG (任国红) ET AL., *Qinyuanxian Renmin Yiyuan Zhi* (1949-2009) (沁源县人民医院志 (1949-2009)) [CHRONICLE OF THE PEOPLE’S HOSPITAL OF QINYUAN COUNTY (1949-2009)] 393 (2009).

⁴⁶ He Songyue, *supra* note 15, at 286 (in the period 1950–66, the People’s Procuratorates had the power to conduct direct criminal investigations on the so-called “serious Medical Accidents”, entrust medical experts or an assessment panel to make assessment decisions, and file criminal prosecutions for Medical Accidents).

⁴⁷ In the 1951–79 period, the People’s Courts conducted criminal trials under the three criminal regulations: Chengzhi Fangeming Tiaoli (惩治反革命条例) [Regulation on the Punishment of Counter-Revolutionaries] (promulgated by the Cent. People’s Gov’t, Feb. 20, 1951, effective Feb. 21, 1951, repealed Jan. 1, 1980) (pkulaw) (China), available at <http://www.pkulaw.cn/CLI.1.129386>; Chengzhi Tanwu Tiaoli (惩治贪污条例) [Regulation on the Punishment of Corruption] (promulgated by the Cent. People’s Gov’t, Apr. 18, 1952, effective Apr. 18, 1952, repealed Jan. 1, 1980) (pkulaw) (China), available at <http://www.pkulaw.cn/CLI.1.129387>; Fanghai Guojia Huobi Zhizui Zanzing Tiaoli (妨害国家货币治罪暂行条例) [Interim Regulation on the Punishment of Impairment of State Currency] (promulgated by the Cent. People’s Gov’t, Apr. 19, 1951, effective Apr. 19, 1951, repealed Jan. 1, 1980) (pkulaw) (China), available at <http://www.pkulaw.cn/CLI.2.33639>.

⁴⁸ For example, in 1958, a health care practitioner was sentenced to five year’s imprisonment for the death of two patients. See Wang Xiushen (王修身), Yong Guoliang de Shengwutou Zhibing Zaocheng Liangren Siwang Shigu (用过量的生乌头治病造成两人死亡事故) [Two Patients Died by Excessive Medicine], *Zhongyi Zazhi* (中医杂志) [J. TRADITIONAL CHINESE MED.], no. 4, 1958 at 234, 234. In 1967, a nurse was sentenced to one year’s imprisonment, suspended for one year, for the “crime of Medical Accident” at a district court of Shanghai Municipality. See HU ZHIGUO (胡志国) & ZHANG BEI (张备), Qingpu Shenpan Zhi (青浦审判志) [CHRONICLE OF THE PEOPLE’S COURT OF QINGPU DISTRICT] 138 (2004). Moreover, two surgeons of the Shijiazhuang First People’s Hospital were charged with the crime of counter-revolution in 1955. See ZHANG XIUJUN (张秀钧) & WANG ZHAOCHENG (王兆成), Shijiazhuangshi Weisheng Zhi (石家庄市卫生志) [HEALTH CHRONICLE OF SHIJIAZHUANG MUNICIPALITY] 423 (1993).

⁴⁹ For example, Beijing Municipal Prosecutors Office (now the People’s Procuratorate of Beijing Municipality) dealt with four medical malpractice cases that occurred in the same hospital (one case of severe disability and three cases of death) and, in December 1954, made a recommendation to the relevant health authority regarding the prevention of similar adverse events. See XU HAIFENG ET AL., *supra* note 44, at 313.

A far more profound consequence of the politicization of adverse events in the 1950-60s was that the MMDR mechanism was installed within an administrative-bureaucratic system rather than a civil justice system. The development of the administrative-led dispute resolution system was initiated in 1955 as discussed above,⁵⁰ but interrupted during the Cultural Revolution when the government and legislative system were paralyzed.⁵¹ Along with the launches of the Chinese economic reform in 1978 and the first round of Chinese health reform in 1985,⁵² health authorities regained the dominant role in the MMDR mechanism.⁵³ After the strengthening of the health authorities' administrative capacity, the Central Government of China, namely the State Council,⁵⁴ issued in 1987 the first national administrative regulation on MMDR.⁵⁵ The regulation, known as the 1987 Measure, laid the legal foundation for the administrative-led dispute resolution system. A historical review of the system under the 1987 Measure is necessary here since it offers a starting point for understanding the subsequent reforms of the 2000s and present decade.

⁵⁰ We tend to regard the introduction of the first two administrative rules concerning Medical Accidents—the Draft Bill for Dealing with Medical Accidents and the Draft of Interim Measure for Dealing with Medical Accidents—as the starting point for the establishment of the administrative-led dispute resolution system. See also *supra* note 43.

⁵¹ During the Cultural Revolution from 1966 to 1976, the Revolutionary Committees arrogated themselves the power to handle the MMDR mechanism: some regional and local revolutionary committees issued rules regulating the definition and scope of Medical Accident. For example, in Yunnan Province, the provincial health bureau was controlled by a revolutionary committee, who issued the Guideline for Identifying and Dealing with Medical Accidents (关于医疗事故的区别及处理意见) in 1972 and used it as the sole rule for dealing with medical malpractice disputes. See FAN YISHAN (樊移山), *Yunnansheng Chuxiongzhou Renmin Yiyuan Zhi* (云南省楚雄州人民医院志) [CHRONICLE OF THE PEOPLE'S HOSPITAL OF CHUXIONG PREFECTURE] 174 (1993).

⁵² For a detailed narrative of the economic reform process, see GORDON WHITE, *RIDING THE TIGER: THE POLITICS OF ECONOMIC REFORM IN POST-MAO CHINA* (1993) and BARRY NAUGHTON, *GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM, 1978–1993* (1996). As for the first round of Chinese health reform launched in 1985, it was declared by the Development Research Center of the State Council, a part of China's cabinet, as “generally unsuccessful” in 2005. See Guowuyuan Fazhan Yanjiu Zhongxin Ketizu (国务院发展研究中心课题组) [Task Force of the Development Research Center of the State Council], *Dui Zhongguo Yiliao Weisheng Tizhi Gaige de Pingjia yu Jianyi: Gaiyao yu Zhongdian* (对中国医疗卫生体制改革的评价与建议: 概要与重点) [*An Examination of the Health System Reform of China: Summary and Recommendations*], *Weisheng Zhengce* (卫生政策) [HEALTH POL'Y], vol. 186, 2005 at 4, 5 (arguing that the negative effects of the market-oriented reform, especially the high rate of health care spending and the inadequate insurance coverage, fuelled the discontent of patients with the health care system).

⁵³ ZHANG XIUJUN & WANG ZHAOCHENG, *supra* note 48, at 423 (following the Interim Provision for Preventing and Dealing with Medical Accidents (关于预防和处理医疗事故的暂行规定) issued by the then Ministry of Health in 1978, Shijiazhuang Municipality established an assessment panel responsible for Medical Accident Assessment and required health care institutions and professionals involved in Medical Accidents to report to the locality health authorities).

⁵⁴ The State Council exercises the power of government legislation. Regulations issued by the State Council are called Administrative Regulations, which are inferior to the laws enacted by the National People's Congress (NPC) and its Standing Committee (NPCSC). See *Lifa Fa* (立法法) [Legislative Law] (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) art. 65, 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 7 (China) (providing that the State Council enacts administrative regulations in accordance with the Constitution and the law.)

⁵⁵ *Yiliao Shigu Chuli Banfa* (医疗事故处理办法) [Measure for Dealing with Medical Accidents] (promulgated by the St. Council, June 29, 1987, effective June 29, 1987) ST. COUNCIL GAZ., July. 31, 1987, at 614 (China) [hereinafter 1987 Measure].

First, the central government regulated the definition of Medical Accident through government legislation. The cornerstone of the administrative-led dispute resolution system was a central-government-defined concept of Medical Accident, which was essential because such a definition determined whether a malpractice claim could be brought, as will be discussed in Part III and IV. The 1987 Measure defined Medical Accident as an adverse event that directly resulted in death, disability, or impairment of organ function.⁵⁶ There were two types of Medical Accident. On the one hand, “negligent accident” referred to those caused by violation of statutes, rules, or common practice. On the other hand, “technical accident” referred to those caused by “technical negligence,” for example, as a result of professional misconduct or incompetence and inexperience as interpreted by the then MOH.⁵⁷ Professionals involved in a “technical accident” were immune from disciplinary liability and proceeding according to the 1987 Measure.⁵⁸ These provisions, as far as liability was concerned, limited Medical Accident to include only the adverse events that were caused by violation of statutes, rules, or common practice and that directly resulted in death, disability, or impairment of organ function. Such a narrow definition precluded many claimant-patients from bringing medical malpractice claims.

Second, local governments installed assessment institutions to determine whether an adverse event was a Medical Accident. The 1987 Measure provided that the assessment institutions, namely the Technical Assessment Committee for Medical Accidents (TACMAs), operate at the provincial, regional, and local levels.⁵⁹ The TACMAs were the only legitimate institution for Medical Accident assessment, and only their assessment decisions could be used as the basis for the adjudication of Medical Accidents.⁶⁰ The members of the TACMAs were nominated by locality health authorities and then approved by locality governments.⁶¹ TACMAs were commonly headed by officials from locality health authorities and composed of health care

⁵⁶ *Id.*, art. 2.

⁵⁷ *Id.*, art. 5. See also Guanyu Yiliao Shigu Chuli Banfa Ruogan Wenti de Shuoming (关于医疗事故处理办法若干问题的说明) [Interpretation of Several Issues of the Measure for Dealing with Medical Accidents] (promulgated by the Ministry of Health, May 10, 1988, effective May 10, 1988) (pkulaw) (China), available at <http://www.pkulaw.cn/CLI4.33181> [hereinafter *1988 Interpretation*].

⁵⁸ 1987 Measure, *supra* note 55, art. 21. This provision is obviously a continuation of the above-mentioned editorial’s assertion that health care professionals should be excluded from responsibility for causing “technical accident.” See *People’s Daily Editorial*, *supra* note 27, at 1 (“The people do not blame a doctor who tries his best but, because of technical limitations, fails to save the life of a patient.”)

⁵⁹ 1987 Measure, *supra* note 55, art. 12.

⁶⁰ 1988 Interpretation, *supra* note 57.

⁶¹ 1987 Measure, *supra* note 55, art. 12.

professionals from locality public hospitals.⁶² TACMAs' affinity to locality public hospitals often raised concerns about the neutrality of the TACMAs in assessing and determining malpractice liability. A large number of lawsuits were triggered by their assessment decisions that an adverse event was not a Medical Accident. Unfortunately, the SPC issued directives, respectively, in 1989 and 1992, prohibiting lower-level courts from accepting any claim against an assessment decision made by the TACMAs.⁶³ Many claimant-patients who argued that the TACMAs' assessment was false had to use the Administrative Litigation Law, which was implemented in 1990,⁶⁴ to sue locality health authorities for building their dispute resolution decisions on the "false" assessment.⁶⁵ The practice of bringing medical malpractice claims into administrative litigation recognized the right of patients for litigation on the one hand, but on the other hand, it further

⁶² For example, the member list of the TACMA of Luzhou Municipality, Sichuan Province, showed that, in 1998, the Chief of the locality Health Bureau served as the Director of the TACMA, the Deputy Chief of the locality Health Bureau served as the Deputy Director of the TACMA, and one of the section chiefs of the locality Health Bureau served as the Secretary General of the TACMA. In addition to a forensic doctor who came from the locality People's Procuratorate, the other members were health care professionals, of which five came from the Medical College Affiliated Hospital, six came from the People's Hospital, and one came from the Health and Epidemic Prevention Station. See DONG SHANPU (董善浦) ET AL., *Luzhoushi Weisheng Zhi* (泸州市卫生志) [HEALTH CHRONICLE OF LUZHOU MUNICIPALITY] 137-38 (2005). Another example can be found in LU XIQIAN (卢希谦) ET AL., *Shaanxishen Zhi: Weisheng Zhi* (陕西省志·卫生志) [HEALTH CHRONICLE OF SHAANXI PROVINCE] 601 (1996) (the TACMA of Shaanxi Province was established in 1983, in which the Deputy Director General of the Health Department of Shaanxi Province served as the Director of the TACMA. The Deputy Director of the TACMA was held by ten members, of which nine health care professionals came from the locality public hospitals and one came from the Health Department of Shaanxi Province). See also WANG WEI ET AL., *supra* note 22, at 275 (the TACMA was generally composed of the leading health care professionals under the organization of the municipal health bureau).

⁶³ See *Guanyu dui Yiliao Shigu Zhengyi Anjian Renmin Fayuan Yingfou Shouli de Fuhan* (关于对医疗事故争议案件人民法院应否受理的复函) [Official Reply Regarding Whether the People's Court Shall Accept the Cases Concerning Dispute over Medical Accident] (promulgated by the Sup. People's Ct., Oct. 10, 1989, effective Oct. 10, 1989) (pkulaw) (China), available at <https://www.pkulaw.cn/CLI.3.4452> (providing that the People's Courts shall not hear a claim that is brought against an authorized assessment institution's decision on whether an adverse event is a Medical Accident) [hereinafter 1989 Reply]; *Guanyu Shiyong 《Zhonghua Renmin Gongheguo Minshi Susong Fa》 Ruogan Wenti de Yijian* (关于适用《中华人民共和国民事诉讼法》若干问题的意见) [Directive on Certain Issues Concerning the Application of the Civil Procedure Law of China] (promulgated by the Sup. People's Ct., July 14, 1992, effective July 14, 1992) art. 149, SUP. PEOPLE'S CT. GAZ., Sept. 20, 1992 at 70 (China) (providing that if a plaintiff who had no objection to the authorized assessment institution's decision on Medical Accident merely sued for damages caused by medical injuries, the People's Courts should accept such a claim) [hereinafter Application of the Civil Procedure Law].

⁶⁴ *Xingzheng Susong Fa* (行政诉讼法) [Administrative Litigation Law] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) 1989 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 144 (China) (granting plaintiffs the right to sue government agencies and officials). See also 1989 Reply, *supra* note 63 (providing that the people's courts shall accept a claim that is brought against a health authority who has made a decision on Medical Accident).

⁶⁵ See, e.g., *Zhang Fulu deng yu Tianjinshi Weishengju deng Yiliao Wenti Xingzheng Chuli Yijian Jiufen Shangsu An* (张福禄等与天津市卫生局等医疗问题行政处理意见纠纷上诉案) [Zhang Fulu v. The Health Bureau of Tianjin Municipality], Gao Fa Xingzhongzi 10 Hao (高法行终字 10 号) [Administrative Appeal no. 10] (Tianjin High People's Ct. Dec. 22, 1998) (China), available at <http://www.pkulaw.cn/CLI.C.41260> (the plaintiff sued the locality health authority, demanding that the authority examine the locality TACMA's assessment decision.); *Shen Shuwang yu Dezhoushi Dechengqu Weishengju Jujue Shouli Yiliao Shigu Jianding Shenqing An* (申书旺与德州市德城区卫生局拒绝受理医疗事故鉴定申请案) [Shen Shuwang v. The Decheng District Health Bureau of Dezhou Municipality], Decheng Xingchuzi 3 Hao (德城行初字第 3 号) [Administrative First Trial no. 3] (Decheng District People's Ct. Apr. 10, 2001) (China), available at http://www.110.com/panli/panli_42253.html (the plaintiff sued the locality health authority for refusing to accept the plaintiff's application for a medical accident assessment).

strengthened the administrative-led dispute resolution system by handling such claims as a dispute between patients and health authorities, rather than a civil dispute between patients and health care providers.

Third, local health authorities made dispute resolution decisions, which were binding both to health care providers and claimant-patients.⁶⁶ Based on locality TACMA's assessment decisions, locality health authorities decided whether to order those who were responsible for a "technical accident" to write a self-critical account of their mistakes, or whether to impose disciplinary sanctions on those who were responsible for a "negligent accident."⁶⁷ Disciplinary sanctions included warnings, demerits, demotion, suspension, and dismissal, as listed in the 1987 Measure.⁶⁸ In some provinces, however, the scope of the sanctions was widened to include personal monetary compensation, that is to say, health care professionals had to pay a certain percentage of compensation to injured patients, as provided by the local rules implementing the 1987 Measure.⁶⁹ It is worthy of noting that the 1987 Measure did not formally recognize the right to recover damages for medical malpractice. Patients were only allowed to request a "lump sum allowance" for injury from the relevant health care providers,⁷⁰ but not a lump sum award as monetary compensation recognized under the common law.

The implementation of the 1987 Measure marked the formation of the administrative-led dispute resolution system. Compared with its predecessor that had operated intermittently in the past decades, the MMDR mechanism developed based on the national administrative regulation provided more normalized and routine procedures for claimant-patients. Health care professionals had operated under enormous political pressure as well as a threat of criminal punishment, which faded away as the national strategy was shifted from

⁶⁶ 1987 Measure, *supra* note 55, art. 11 (providing that a claimant-patient who refuses to accept a dispute resolution decision made by health authorities may apply for administrative reconsideration to higher health authority or bring administrative litigation against the health authority). According to the Administrative Reconsideration Law and the Administrative Litigation Law, making a dispute resolution decision is a concrete administrative action (具体行政行为) that is binding to parties. See Xingzheng Fuyi Fa (行政复议法) [Administrative Reconsideration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999) art. 2, 1999 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 225 (China) (providing that the Administrative Reconsideration Law is applicable to those who are infringed upon by a concrete administrative action). See also Administrative Litigation Law, *supra* note 64, art. 2 (providing that those who are infringed upon by a concrete administrative action are entitled to bring an administrative litigation).

⁶⁷ 1987 Measure, *supra* note 55, arts. 20–21.

⁶⁸ *Id.* art. 20.

⁶⁹ For example, the People's Government of Beijing Municipality issued the Detailed Rules for Implementing the Measure for Dealing with Medical Accidents (北京市《医疗事故处理办法》实施细则) in 1990, providing that those who were directly responsible for a Medical Accident could be asked to pay as much as 5 to 10 percent of allowance payments to the patient. See WANG KANGJIU (王康久) ET AL., Beijing Weisheng Zhi (北京卫生志) [HEALTH CHRONICLE OF BEIJING MUNICIPALITY] 309 (2001).

⁷⁰ 1987 Measure, *supra* note 55, art. 18.

“class struggle” to “economic construction.” Although the “crime of Medical Accident” was written into the Chinese Criminal Code in 1997,⁷¹ health care professionals involved in Medical Accidents have been treated more often through the administrative justice system rather than the criminal justice system.⁷² The 1987 Measure gave health authorities a dominant role in dealing with medical malpractice claims, which also led to the inconsistency between administrative law and civil law, as will be discussed in the Part below.

III. BIFURCATION BETWEEN ADMINISTRATIVE LAW AND CIVIL LAW

In the same year the 1987 Measure was implemented, the General Principles of the Civil Law, known as General Civil Law, came into effect, providing a consistent foundation for the practice of civil law in China.⁷³ Article 119 of the General Civil Law ensures not only that compensation is paid in every case of bodily injury or death caused by tort, but also that the compensation shall cover medical expenses, loss of earnings, disabled living allowance, funeral expenses, and, as regards to dependents, loss of maintenance.⁷⁴ This provision might

⁷¹ Xing Fa (刑法) [Criminal Code] (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) art. 335, 1997 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 138 (China) (providing that health care professionals, who grossly neglect their duties and thereby cause patients serious injury or death, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention).

⁷² He Songyue, *supra* note 15, at 295 (arguing that the medical malpractice cases that were treated as criminal cases have fallen sharply since the promulgation of the Regulation on Dealing with Medical Accidents, known as 2002 Regulation). Moreover, national statistics provided by the then Ministry of Health reveal that, in the three years of the implementation of the 2002 Regulation, health care professionals who received disciplinary sanctions for Medical Accidents rose from 51 in 2007 to 169 in 2008, and to 199 in 2009. See Weishengbu (卫生部) [Ministry of Health], 2008 Zhongguo Weisheng Tongji Nianjian (2008 中国卫生统计年鉴) [THE 2008 CHINA HEALTH STATISTICS YEARBOOK] 328-29 (2008); 2009 Zhongguo Weisheng Tongji Nianjian (2009 中国卫生统计年鉴) [THE 2009 CHINA HEALTH STATISTICS YEARBOOK] 340-41 (2009); 2010 Zhongguo Weisheng Tongji Nianjian (2010 中国卫生统计年鉴) [THE 2010 CHINA HEALTH STATISTICS YEARBOOK] 344-45 (2010). See also Yiliao Shigu Chuli Tiaoli (医疗事故处理条例) [Regulation on Dealing with Medical Accidents] (promulgated by the St. Council, Apr. 4, 2002, effective Sept. 1, 2002) ST. COUNCIL GAZ., May 30, 2002, at 6 (China) [hereinafter 2002 Regulation].

⁷³ See Wang Liming (王利明), Qinli Minfa Tongze de Zhiding (亲历民法通则的制定) [Witnessing the Development of the General Principles of the Civil Law], Zhongguo Renda (中国人大) [THE PEOPLE'S CONGRESS OF CHINA], no. 7, 2011 at 26, 26 (arguing that the General Civil Law is the first basic law in China that regulates civil law relationships in general and provides the basic legislative basis for civil trials); Liu Shiguo (刘士国), Lun Minfa Zongze zhi Minshi Zeren Guiding (论民法总则之民事责任规定) [Review on 'Civil Liability' (Chapter 8) of General Principles of Civil Law], Faxuejia (法学家) [THE JURIST], no. 5, 2016 at 139, 140 (arguing that the civil liability regulations established by the General Civil Law highlight the distinctive characteristics of Chinese civil law); Yang Lixin (杨立新), Cong Minfa Tongze dao Minfa Zongze: Zhongguo Dangdai Minfa de Lishixing Kuayue (从民法通则到民法总则: 中国当代民法的历史性跨越) [From the General Principles of Civil Law to the General Rules of Civil Law: A Historic Leap in Contemporary Chinese Civil Law], Zhongguo Shehui Kexue (中国社会科学) [SOCIAL SCIENCES IN CHINA], no. 2, 2018 at 72, 74 (arguing that the General Civil Law enjoys a central position in the Chinese civil law system because of its importance as the soul of the legislation, such as the Property Law (物权法), the Contract Law (合同法), the Guarantee Law (担保法), the Marriage Law (婚姻法), the Law of Succession (继承法), and the Tort Law (侵权责任法)).

⁷⁴ The Chinese civil law system is developed based on the General Principles of Civil Law. See General Principles of Civil Law, *supra* note 35.

be understood as opening the door to monetary remedies for claimant-patients, whereby victims would be awarded a higher amount of compensation than that of “a lump sum allowance” under the 1987 Measure.

However, as a result of the politicization of adverse events discussed in the Part above, it was accepted that medical malpractice was a breach of duties owed to the health administration system and the resolution of such claims was an issue of governance that should be handled by the administrative-bureaucratic system. Consequently, in the first few years after the General Civil Law was enacted, there were cases where the courts refused to accept medical malpractice as a claim for damages under the civil laws;⁷⁵ and there were cases where the defendant hospitals questioned the court’s jurisdiction over medical malpractice disputes.⁷⁶ The SPC strived to apply the General Civil Law to medical malpractice cases and, at the same time, had to affirm the traditional dominance of the administrative-led dispute resolution system.⁷⁷ The MMDR mechanism was, therefore, separated into two parts: first, the adjudication of compensation for Medical Accident, which was handled by courts under the civil laws;⁷⁸ and second, the decision of whether an adverse event was a Medical Accident, which was handled by the health administration system as discussed above. In this Part, we focus on the bifurcation of the MMDR mechanism and argue that the bifurcation of the legal system into two sets of laws

⁷⁵ See, e.g., PEI ZHEN (裴缜), *Yichang Fayuan Zhi* (宜昌法院志) [CHRONICLE OF THE PEOPLE’S COURT OF YICHANG MUNICIPALITY] 237 (2010).

⁷⁶ See, e.g., Yang Mou yu Luzhoushi Naxiqu Renmin Yiyuan (杨某与泸州市纳溪区人民医院) [Yang v. Naxi District People’s Hospital] (1997) (China), available at http://www.lawyee.org/Case/Case_Display.asp?ChannelID=2010100&RID=23691 (the defendant hospital claimed, “The court does not have jurisdiction over medical malpractice disputes.”).

⁷⁷ 1989 Reply, *supra* note 63 (providing that the People’s Courts shall, in accordance with the civil procedure law, hear a case in which the plaintiff claims for damages caused by medical injuries). See also Guanyu Dangshiren dui Yiliao Shigu Jianding Jielun You Yiyi you Bu Shenqing Chongxin Jianding er yi Yaoqiu Yiliao Danwei Peichang Jingji Sunshi Weiyou Xiang Renmin Fayuan Qisu de Anjian Yingfou Shouli de Fuhan (关于当事人对医疗事故鉴定结论有异议又不申请重新鉴定而以要求医疗单位赔偿经济损失为由向人民法院起诉的案件应否受理的复函) [Official Reply Regarding Whether the People’s Court Shall Accept the Claims for Damages in Which the Plaintiff Has Objected to an Assessment Institution’s Decision but Does Not Apply for Re-assessment] (promulgated by the Sup. People’s Ct., Nov. 7, 1990) (pkulaw) (China), available at <http://www.pkulaw.cn/CLI.3.4866> (providing that if a plaintiff who refuses to accept the authorized assessment institution’s decision on Medical Accident sues for damages caused by medical injuries, the People’s Courts shall hear such a claim in accordance with the civil procedure law) [hereinafter 1990 Reply]. For a comparison, see Guanyu Canzhao 《Yiliao Shigu Chuli Tiaoli》 Shenli Yiliao Jiufen Minshi Anjian de Tongzhi (关于参照《医疗事故处理条例》审理医疗纠纷民事案件的通知) [Directive on Trying Civil Cases on Medical Disputes by Referring to the Regulation on Dealing with Medical Accidents] (promulgated by the Sup. People’s Ct., Jan. 6, 2003, effective Jan. 6, 2003, repealed Apr. 8, 2013) SUP. PEOPLE’S CT. GAZ., Jan. 1, 2003, at 19 (China) [hereinafter Directive on Trying Civil Cases on Medical Disputes] (requiring the People’s Courts to apply the 2002 Regulation to the claims for damages resulting from Medical Accident).

⁷⁸ See, e.g., 1989 Reply, *supra* note 63; 1990 Reply, *supra* note 77; Guanyu Zhongguo Renmin Jiefangjun he Wujing Budui Xiang Difang Kaifang de Yiliao Danwei Fasheng de Yiliao Peichang Jiufen you You Guanxiaquan de Renmin Fayuan Shouli de Fuhan (关于中国人民解放军和武警部队向地方开放的医疗单位发生的医疗赔偿纠纷由有管辖权的人民法院受理的复函) [Official Reply Regarding Whether the People’s Court Shall Accept the Claims for Damages Against an Army or Armed Police Hospital] (promulgated by the Sup. People’s Ct., June 4, 1990) (pkulaw) (China), available at <http://www.pkulaw.cn/CLI.3.4710> (providing that the People’s Courts have jurisdiction over the claims for damages against an army or armed police hospital).

has hindered the success of dispute resolution. Our further discussion begins with a brief look at the 2002 Regulation, which made a series of restrictions deepening the inconsistency between administrative law and civil law.

A. *The 2002 Regulation*

After being in effect for fifteen years, the 1987 Measure was repealed and a new regulation, known as 2002 Regulation,⁷⁹ was enacted. A welcomed change made by the new Regulation was the adoption of the term “compensation” (*pei chang*), instead of the term “allowance” (*bu chang*) as used by the 1987 Measure, to signify a transition to acknowledge the right of patients to recover damages for medical malpractice.⁸⁰ This change may perhaps best be understood as a legislative response to the social pressures arising from the first round of Chinese health reform, in which, as will be discussed below, patients were transformed from welfare beneficiaries into consumers of health services.⁸¹

As a continuation of the Chinese economic reform that disintegrated not only the Soviet-style command economic system but also the Maoist work-unit based welfare system,⁸² the first round of Chinese health system reform was launched in 1985, with initial efforts aimed at encouraging public hospitals to become financially self-supporting.⁸³ The market-oriented reform implemented in the 1985-2005 period led to the continuing cuts in government financial support for the health care sector.⁸⁴ As a result, the share of government health spending

⁷⁹ 2002 Regulation, *supra* note 72.

⁸⁰ *See id.* ch. 5. The Chinese word *pei chang* is commonly translated as the English word “compensation,” although *pei chang* used in the contemporary Chinese legal system refers only to money damages.

⁸¹ *See, e.g.,* Xingzhu Liu & Anne Mills, *Financing Reforms of Public Health Services in China: Lessons for Other Nations*, 54 SOC. SCI. & MED. 1691, 1691–92 (2002) (arguing that, beginning in the early 1980s, public health institutions were regarded no longer as welfare entities financed entirely by the government but as economic bodies).

⁸² For a detailed discussion about the work-unit based welfare system and its reform, see, Edward Gu, *Beyond the Property Rights Approach: Welfare Policy and the Reform of State-Owned Enterprises in China*, 32 DEV. & CHANGE 129, 129 (2001). The Chinese economic reform also brought about the collapse of the Maoist welfare-oriented health system. For a detailed discussion, see, S. Tang et al., *Tackling the Challenges to Health Equity in China*, 372 LANCET 1493, 1493 (2008) (arguing that the Chinese economic reform has ushered in “a vicious cycle of three reinforcing forces: imbalances in role of the market and government in health care, inequities in the social determinants of health, and growing public perceptions of unfairness of the overall health system.” These forces, the authors argue, have ravaged health care in China).

⁸³ The State Council approved the MOH’s health reform program in April 1985, which marked the official beginning of the Chinese health system reform. *See* Guanyu Weisheng Gongzuo Gaige Ruogan Zhengce Wenti de Baogao (关于卫生工作改革若干政策问题的报告) [On Several Policy Issues Concerning Health Reform] (promulgated by the Ministry of Health, Apr. 25, 1985, effective Apr. 25, 1985) ST. COUNCIL GAZ., May 20, 1985, 377 (China).

⁸⁴ ZOU DONGTAO (邹东涛) ET AL., *Zhongguo Jingji Fazhan he Tizhi Gaige Baogao: Zhongguo Gaige Kaifang 30 Nian (1978-2008)* (中国经济发展和体制改革报告：中国改革开放 30 年 (1978–2008)) [REPORT ON CHINA’S ECONOMIC DEVELOPMENT AND INSTITUTIONAL REFORM: CHINA, 30 YEARS OF REFORM AND OPENING-UP (1978-2008)] (2008), *available at*

in overall health spending decreased from 25.06 percent to 15.69 percent during the twelve years from 1990 to 2002.⁸⁵ Public hospitals were encouraged to participate in the market competition. The most popular strategy adopted by public hospitals was to generate revenue through sales of medications and services,⁸⁶ which, in turn, substantially increased the burden of out-of-pocket payments for patients. The individual out-of-pocket expense as the share of total health expenditures sharply increased from 20 percent in 1980 to 60 percent in 2001.⁸⁷ Some hospitals even made profits through the manufacture of medications and devices.⁸⁸ The hospital-manufactured medications, as shown in the *Huang* case discussed in our introduction, fueled the patients' concerns about the quality of care and became a source of medical malpractice disputes. The continued high rate of health care spending growth,⁸⁹ compounding the inadequate health insurance coverage,⁹⁰ led to increased discontent with the health delivery system.⁹¹ Medical malpractice disputes apparently increased and patients' identity as a

<http://theory.people.com.cn/GB/49154/49156/8138804.html> (arguing that the centrepiece of the government's philosophy for the 1985 health reform is the so-called "policy support instead of money giving", which led to a gradual reduction in government spending on health care).

⁸⁵ See Guojia Weisheng he Jihua Shengyu Weiyuanhui (国家卫生和计划生育委员会) [National Health and Family Planning Commission], 2016 Zhongguo Weisheng he Jihua Shengyu Tongji Nianjian (2016 中国卫生和计划生育统计年鉴) [THE 2016 YEARBOOK OF HEALTH AND FAMILY PLANNING STATISTICS IN CHINA] 108 (2016).

⁸⁶ Karen Eggleston et al., *Health Service Delivery in China: A Literature Review*, 17 HEALTHCON. 149, 151 (2008) (arguing that, since public hospitals were given increasing autonomy to generate and manage surpluses in the early 1980s, health providers gained strong incentives to favor profitable diagnostics and skimp on unprofitable services). See also Qun Meng et al., *Trends in Access to Health Services and Financial Protection in China between 2003 and 2011: A Cross-sectional Study*, 379 LANCET 805, 805 (2012).

⁸⁷ See Shanlian Hu et al., *Reform of How Health Care is Paid for in China: Challenges and Opportunities*, 372 LANCET 1846, 1846 (2008). See also Qun Meng et al., *supra* note 86, at 805.

⁸⁸ See, e.g., Aitefu Gongsi Su Beijing Ditan Yiyuan Deng Buzhengdang Jingzheng Jiufen Shangsu An (爱特福公司诉北京地坛医院等不正当竞争纠纷上诉案) [Aitefu v. Beijing Ditan Hospital—Unfair Competition Action], Min Sanzhongzi 1 Hao (民三终字 1 号) [Civil Appeal no. 1] (Sup. People's Ct. July 10, 2003) (the defendant hospital developed a disinfectant product in 1984 and attempted to protect its monopoly profits from the manufacturer) [hereinafter Aitefu case].

⁸⁹ The then MOH conducted the Third National Health Services Survey in 2004, indicating that the average medical expenses per outpatient visit in general hospital increased 57.5 percent, and the average medical expenses per inpatient spell increased 76.1 percent, between 1998 and 2003. See Weishengbu Tongji Xinxi Zhongxin (卫生部统计信息中心) [Center for Health Statistics and Information of the Ministry of Health], Disanci Guojia Weisheng Fuwu Diaocha Fenxi Baogao (第三次国家卫生服务调查分析报告) [Report on the Third National Health Services Survey] (nhfpc), at 179 (Apr. 9, 2004), available at <http://www.nhfpc.gov.cn/cmsresources/mohwsbwstjxxzx/cmsrsdocument/doc9908.pdf>. See also Shanlian Hu et al., *supra* note 87, at 1846 (arguing that the average cost of single hospital admission in 2008 was almost equivalent to China's annual income per head, and was more than twice the average annual income of the lowest 20 percent of the population).

⁹⁰ The Third National Health Services Survey also indicated that 76 percent of the lowest-income urban residents lacked any form of health insurance in 2003 and that 70 percent of the patients who had refused to be hospitalized cited an inability to pay as the reason. See Report on the Third National Health Services Survey, *supra* note 89, at 46, 86. See also Winnie Yip & William C. Hsiao, *The Chinese Health System At A Crossroads*, 27 HEALTH AFF (MILLWOOD) 460, 460–61 (2008) (arguing that, in less than two decades, China's health care system was transformed from one that provided affordable basic health care to all people to one in which people cannot afford basic care).

⁹¹ The Third National Health Services Survey reported health services costs, equipment and facilities, and health services quality as the most unsatisfactory aspects of care. See Report on the Third National Health Services Survey, *supra* note 89, at 58. The Fourth National Health Services Survey presented a similar result in 2008. See Weishengbu Tongji Xinxi Zhongxin (卫生部统计信息中心) [Center for Health Statistics and Information of the Ministry of Health], Zhongguo Weisheng Fuwu Diaocha Yanjiu: Disici Jiating Jiankang Xunwen Diaocha Fenxi Baogao (中国卫生服务调查研究: 第四次家庭健康询问调查分析报告) [Report on the

consumer of health services was strengthened. Some of the legislation enacted in this period further heightened patients' awareness of their right to pecuniary compensation. In 1993, the National People's Congress Standing Committee (NPCSC) passed the legislation on consumer protection,⁹² which was subsequently applied by the courts in some localities to medical malpractice cases.⁹³ In 1994, the State Compensation Law was enacted to provide monetary redress to individuals and organizations harmed by government action or omission.⁹⁴ Pecuniary compensation increasingly became an unavoidable issue for the Chinese MMDR mechanism.

In response to the social discontent with the health care system, the 2002 Regulation officially abolished the principle of not permitting damages to patients as discussed above. This Regulation also lowered the threshold for medical malpractice compensation through a series of changes, such as relaxation of the injury threshold for recovery to include "obvious bodily injuries" and classifying the injuries that result in severe disability to be at the same level as fatal injuries.⁹⁵ The 2002 regulation also abolished the division between "negligent accident" and "technical accident," and expanded Medical Accident to include the liability of health care institutions for patient injury.⁹⁶ As a response to the power imbalance between Chinese state-owned

Fourth National Health Services Survey] (moh.gov.cn), at 79 (Sept. 8, 2009) *available at* <http://www.moh.gov.cn/cmsresources/mohwsbwstjxxzx/cmsrsdocument/doc9911.pdf>.

⁹² See Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on the Protection of Consumer Rights and Interests (2013 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994, amended Aug. 27, 2009, amended Oct. 25, 2013) 2013 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 789 (China).

⁹³ See, e.g., Guanyu Shenli Yiliao Sunhai Peichang Anjian de Ruogan Yijian (Shixing) (关于审理医疗损害赔偿案件的若干意见 (试行)) [Directive on Trial of Medical Malpractice Cases (for Trial Implementation)] (promulgated by the Luzhou Intermediate People's Court, Nov. 5, 1999) (fae.cn) (China), *available at* <http://www.fae.cn/fg/detail526579.html>; Zhejiangsheng Shishi 《Zhonghua Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa》 Banfa (浙江省实施《中华人民共和国消费者权益保护法》办法) [The Detailed Rules of Zhejiang Province for the Implementation of the Law on the Protection of Consumer Rights and Interests] (promulgated by the Zhejiang Provincial Cong., Oct. 29, 2000, effective Oct. 29, 2000). (saic.gov.cn) (China), *available at* http://home.saic.gov.cn/fgs/zcfg/201707/t20170712_267517.html.

⁹⁴ See Guojia Peichang Fa (国家赔偿法) [State Compensation Law] (promulgated by the Standing Comm. Nat'l People's Cong., May 12, 1994, effective Jan. 1, 1995, amended Apr. 29, 2010, amended Oct. 26, 2012) 2012 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 707 (China).

⁹⁵ 2002 Regulation, *supra* note 72, arts. 2, 4. Medical accident is classified according to the severity of bodily injury into the following grades: Grade I (death or severe disability); Grade II (disability or serious dysfunction of bodily organs); Grade III (mild disability or organ dysfunction); Grade IV (other obvious bodily injuries). The then MOH enumerated sixteen "other obvious bodily injuries," ranging from soft-tissue foreign bodies to fetal injury associated with caesarean delivery. See Yiliao Shigu Fenji Biaozhun (Shixing) (医疗事故分级标准 (试行)) [Classification Criteria for Medical Accidents (for Trial Implementation)] (promulgated by the Ministry of Health, Jul. 31, 2002, effective Sept. 1, 2002) ST. COUNCIL GAZ., May 30, 2003, at 33 (China). The grade of Medical Accident has a direct impact on the amount of damages. See 2002 Regulation, *supra* note 72, art. 49 (providing that the grades of Medical Accident shall be taken into account in the determination of the amount of damages).

⁹⁶ The 1987 Measure defines Medical Accident as an adverse event that is directly caused by the negligent conduct of health care professionals. This definition excluded the liability of health care institution for medical malpractice. See 1987 Measure, *supra* note 55, art. 2. The 2002 Regulation redefines Medical Accident as an adverse event that is caused by negligence of a health care institution and/or by a professional's malpractice. See 2002 Regulation, *supra* note 72, art. 2.

hospitals and patients, the SPC established the principle, shifting the burden of production of evidence to health care institutions in medical malpractice cases.⁹⁷ Despite these changes, the administrative-led dispute resolution system remained unchanged: at the core of the MMDR mechanism was still the determination of whether an adverse event was a Medical Accident, and medical malpractice claims were still predominantly handled under the administrative law. Furthermore, along with the implementation of the 2002 Regulation were the restrictions imposed to maintain the dominance of the administrative-led dispute resolution system. These restrictions led to a collision between administrative law and civil law, as will be discussed below.

B. *Restrictions on the MMDR Mechanism*

We focus here on the three main restrictions that came with the implementation of the 2002 Regulation. The first restriction set violation of statutes, rules, or common practices as an element of negligence. The 2002 Regulation defined a Medical Accident as an adverse event that was caused by a violation of statutes, rules, or common practice and resulted in bodily injury to patients.⁹⁸ This provision states different elements of negligence in comparison with the common law.⁹⁹ Unlike the common law, under which one basis of medical malpractice is failure to exercise the due care expected of physicians and under which courts may use some principles or tests (e.g., the tests of reasonable foreseeability and proximity) to determine the duty of care,¹⁰⁰ the

⁹⁷ Guanyu Minshi Susong Zhengju de Ruogan Guiding (关于民事诉讼证据的若干规定) [Provisions on Evidence in Civil Procedure] (promulgated by the Sup. People's Ct., Dec. 21, 2001, effective Apr. 1, 2002) art. 4, SUP. PEOPLE'S CT. GAZ., Jan. 1, 2001, at 19 (China) (despite the general provision that the burden of proof lies upon those who bring a claim or action, article 4 requires the defendants to bear the burden of proof in certain circumstances such as liability for medical injury, liability for environmental pollution, liability for abnormally dangerous activity, liability for injuries by domestic animals, and so on).

⁹⁸ 2002 Regulation, *supra* note 72, art. 2.

⁹⁹ See FLEMING, *supra* note 35, at 115–16 (the elements of the cause of action for negligence are itemized as follows: duty issue; breach of that duty; causation; proximate cause; and defences). See also Panel for the Review of the Law of Negligence, Review of the Law of Negligence: Final Report (Canberra: 2002), art. 7.2 (the elements of the tort of negligence include duty of care, breach of duty (i.e. standard of care), causation and remoteness of damage). David G Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1674 (2006) (negligence is most usefully stated as comprised of five elements: duty, breach, cause in fact, proximate cause, and harm). The concept of “standard of care” was not officially introduced in the Chinese legal system until the enactment of the Chinese Tort Law in 2009, which will be discussed in Part IV of this Article.

¹⁰⁰ BARRY FURROW ET AL., HEALTH LAW 76–77 (3rd ed. 2015) (“Malpractice is usually defined as unskillful practice resulting in injury to the patient, a failure to exercise the ‘required degree of care, skill and diligence’ under the circumstances.” “The duty of care . . . takes two forms: (a) a duty to render a quality of care consonant with the level of medical and practical knowledge the physician may reasonably be expected to possess and the medical judgment he may be expected to exercise, and (b) a duty based upon the adept use of such medical facilities, services, equipment and options as are reasonably available.”). See also *Donoghue v Stevenson* [1932] AC 562, at 618–19 (“The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence.”); *Caparo Industries Plc v Dickman* [1990] 2 AC 605, at 617–18 (“What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or

2002 Regulation narrowed the duty of care to encompass only the statutory duty, which only existed when a specific statute expressly specified it.¹⁰¹ In other words, any event caused by factors other than the “violation of the laws, administrative regulations, or administrative rules on health care, or of customary medical and nursing practice” could not be identified as a Medical Accident. As for violation of common practice, although it was also an element of negligence under the 2002 Regulation, the decision as to whether such a violation had occurred depended solely upon peer professional opinion.¹⁰² As will be shown below, the negligence issue was exclusively determined by the local medical community under the 2002 Regulation.

The second restriction was to require the People’s Courts to be bound by the expert testimonies provided by the Medical Associations.¹⁰³ Probably to avoid health authorities being too involved in medical malpractice lawsuits, the 2002 Regulation incorporated the government-run TACMAs into the Medical Associations (MAs), a non-profit professional society as stated on its website.¹⁰⁴ Almost all medical malpractice claims were routinely required to be assessed by an ad hoc panel of the MAs to decide whether the adverse event in question was a Medical Accident.¹⁰⁵ The MAs’ assessment decisions served as evidence for determining whether liability should be assigned.¹⁰⁶ However, unlike the common law, where plaintiffs may use their own experts to

‘neighbourhood’ and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”)

¹⁰¹ 2002 Regulation, *supra* note 72, arts. 2, 31.

¹⁰² There is a dominant view in China that it is not competent for judges to determine the standard of care for health care professionals. The rationale is similar to that offered by the English court in *Bolam*, where the court held that a doctor who had acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence. *See Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582 [hereinafter *Bolam* case]. However, the approach of allowing medical opinion to determine the standard of care was rejected by the High Court of Australia in *Rogers v. Whitaker* in 1992. *Rogers v. Whitaker* [1991] 23 NSWLR 600. Section 50 of the Civil Liability Act 2002 (NSW) provides that “peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.” *See JANINE MCILWRAITH & BILL MADDEN, HEALTH CARE AND THE LAW 209–14 (2010)*. For a detailed discussion of the case, see Barbara McDonald, *Legislative Intervention in the Law of Negligence: the Common Law, Statutory Interpretation and Tort Reform in Australia*, 27 SYDNEY L. REV. 458, 458 (2005).

¹⁰³ Under the common law, by contrast, the Court is not automatically bound by evidence of medical practice. *See, e.g., F. v. R.* (1983) 33 SASR 189 at 194, 201 (Australia) (ruling that practices may develop in professions, but the court has an obligation to scrutinize professional practices to ensure that they accord with the standard of reasonableness imposed by the law. “Expert evidence will assist the Court. But in the end it is the court which must say whether there was a duty owed and a breach of it.”)

¹⁰⁴ *See CHINESE MEDICAL ASSOCIATION*, <http://en.cma.org.cn/attachment/2017222/1487750490796.pdf> (last visited Nov. 22, 2018) (stating that one of the major functions of the Medical Association is to organize “technical appraisal on medical malpractice”). We do not adopt the translated term “technical appraisal on medical malpractice,” but instead use the translated terms “assessment for Medical Accident” (before the Tort Law) and “assessment for medical malpractice” (after the Tort Law) in this Article.

¹⁰⁵ An ad hoc panel of the MAs is normally composed of health care professionals appointed by a locality MA. The panel is under the supervision of the locality health authority, and its assessment operates under the 2002 Regulation and the Yiliao Shigu Jishu Jianding Zanxing Banfa (医疗事故技术鉴定暂行办法) [Interim Measure for Medical Accidents Assessment] (promulgated by the Ministry of Health, July 31, 2002, effective Sept. 1, 2002) ST. COUNCIL GAZ., May 30, 2003, at 26 (China).

¹⁰⁶ 2002 Regulation, *supra* note 72, arts. 27, 31. *See also* Directive on Trying Civil Cases on Medical Disputes, *supra* note 77.

prove negligence,¹⁰⁷ the People's Courts did not accept any expert testimony other than the MAs' assessment decisions. The case of Chen Zijing is a notable example in this respect, where the trial court refused to admit the testimonies provided by the plaintiff's experts.¹⁰⁸ More controversial was the provision that lower-level courts must rely on the MAs' assessment decisions.¹⁰⁹ An assessment decision must include the assessments of violation of statutory requirements or common practice, obvious bodily injury, causation, and negligence,¹¹⁰ all of which were shielded from judicial review.¹¹¹ As shown in the *Huang* case, for example, the plaintiff's request for reviewing the MA's assessment was successively rejected by the district court, by the intermediate court, and then by the high court.¹¹²

The third restriction was to require all medical malpractice claims to be regulated under the "cause of action for damages for Medical Accident." The Chinese legal system did not recognize medical malpractice as a civil cause of action in the 1950-90s period.¹¹³ Although courts began to accept medical malpractice cases as civil

¹⁰⁷ In the United States, negligence can also be established by other methods, including examination of defendant's expert witnesses, drug company warnings, common knowledge in situations where a layperson could understand the negligence without the assistance of experts, negligence *per se*, substantive use of a learned treatise, an admission by the defendant that he or she was negligent, and testimony by the plaintiff. See FURROW ET AL., *supra* note 100, at 91-93.

¹⁰⁸ Feng Min (冯敏), *Zuigaojian Kangsu Naotianer Chen Zijing Huopei Liushi Wanyuan* (最高检抗诉, 脑瘫儿陈子菁获赔60万元) [*Supreme Procuratorate's Counter-appeal: Cerebral Palsy Infant Awarded 600,000 Yuan Damages*], *Minzhu yu Fazhi Shibao* (民主与法制时报) [DEMOCRACY & L. TIMES], Nov. 26, 2007, at A04, available at <http://www.chinanews.com/jk/kong/news/2007/11-26/1087520.shtml> (reporting that the plaintiff had not only eight witnesses from the ward but also experts from more than a dozen authoritative medical institutions). This case was widely reported in national media, see also Fu Changbo (傅昌波), *Naotian Huaner Weihe Nantao Gongdao* (脑瘫患儿为何难讨公道) [*Cerebral Palsy Infant Finds it Difficult to Access Justice*], *Renmin Ribao* (人民日报) [PEOPLE'S DAILY], Aug. 18, 2002, at 6 (reporting that thirteen representatives of the NPC recommended the SPC considering a retrial of the lawsuit).

¹⁰⁹ Directive on Trying Civil Cases on Medical Disputes, *supra* note 77, art. 2 (when, in the hearing of a medical malpractice case, the People's Courts needs to decide whether an adverse event is a Medical Accident, the assessment shall be carried out by the MA).

¹¹⁰ 2002 Regulation, *supra* note 72, arts. 20, 31 (particularly worth mentioning is that the MA's decision shall include an assessment of "whether there is a causation between the negligence and the bodily injury," and an assessment of negligence).

¹¹¹ Those who disagree an MA's decision can only apply to a higher-level MA for re-assessment. See 2002 Regulation, *supra* note 72, art. 42 (health authorities may order a re-assessment when an assessment decision has been found not to comply with the 2002 Regulation).

¹¹² *Huang* case, *supra* note 1. For a similar case, see Wu Guizhen yu Shundeshi Diyi Renmin Yiyuan Yiliao Sunhai Peichang Jiufen Shangsuo An (吴桂珍与顺德市第一人民医院医疗损害赔偿纠纷上诉案) [*Wu Guizhen v. The First People's Hospital of Shunde Municipality—Medical Malpractice Action*], *Fozhong Famin Yizhongzi 837 Hao* (佛中法民一终字 837 号) [Civil Appeal no. 837] (Intermediate People's Ct. of Foshan Mun. June 25, 2003), available at <http://www.66law.cn/lawwrit/2711.aspx> (both the first trial court and the appeal court refused to permit cross-examination, saying that the courts should admit the locality MA's decision although the testimonies were contradictory).

¹¹³ Following the drafting of the General Rules on the Procedures for Litigation (诉讼程序试行通则 (草案)) in 1950, the then Supreme People's Court drafted the directive that was known as Summary of the Trial Procedures for Civil Actions in People's Courts at All Levels (关于各级人民法院民事案件审判程序总结) in 1956 and the Draft Bill for Civil Trial Procedure (民事案件审判程序 (草案)) in 1957. All these draft regulations on civil procedures were either not approved or not implemented. See Chang Yi (常怡) et al., *Xinzhongguo Minshi Susongfa Xue Wushi Nian Huigu yu Zhanwang* (新中国民事诉讼法学五十年回顾与展望) [*Retrospect and Prospect of China's Civil Procedure Law in the Past 50 Years*], *Xiandai Faxue* (现代法学) [MODERN LAW SCIENCE], no. 6, 1999 at 12, 13. During the 1950-70s period, as discussed in Part II of this Article, claimant-patients might complain

disputes after the implementation of the General Civil Law in 1987, they merely adjudicated the claims for damages but, as discussed above,¹¹⁴ left the decision of whether an adverse event was a Medical Accident to the MAs. No recognition of a cause of action for medical malpractice increased patients' difficulties in bringing claims to courts.¹¹⁵ In 2000, the SPC formulated the "cause of action for damages for Medical Accidents" as a subcategory of the "cause of action for personal injury,"¹¹⁶ and, in 2003, required lower-level courts to apply the 2002 Regulation to the claims for damages resulting from Medical Accident and apply the civil laws to the claims for damages resulting from non-medical-accidents.¹¹⁷ Therefore, no medical malpractice claims could be brought to the courts before being assessed by the MAs, nor could damages be awarded if the MAs decided an event was not a Medical Accident.¹¹⁸ The narrow cause of action was criticized as making it more difficult for claimant-patients to initiate litigation.¹¹⁹ For the claimant-patients whose injuries resulted from an adverse

to health authorities or report their cases to the People's Procuratorates as a criminal offense. See ZHANG MINGDAO ET AL., *supra* note 41, at 125.

¹¹⁴ See also 1989 Reply, *supra* note 63.

¹¹⁵ For a detailed discussion of the process whereby lawsuits can be initiated in China, see Andrea Cheuk, *The Li'an (Docketing) Process: Barriers to Initiating Lawsuits in China and Possible Reforms*, 26 PACIFIC BASIN L. J. 72, 74 (2008) (Chinese courts decide whether or not to accept and docket a lawsuit, and thereby create a high threshold for litigants to enter the court system). The difficulty to bring a lawsuit before the People's Court is still with litigants. See Zhou Qiang (周强), *Zuigao Renmin Fayuan Gongzuo Baogao 2017* (最高人民法院工作报告 2017) [2017 Report on the Work of the Supreme People's Court] (delivered at the Fifth Session of the 12th Nat'l People's Cong. Mar. 12, 2017), (npc.gov.cn) (China), available at http://www.npc.gov.cn/npc/xinwen/201703/15/content_2018938.htm (the SPC required lower-level courts not to impose restrictions arbitrarily on accepting lawsuits and announced that the docketing process should be reformed to enable all lawsuits to be brought).

¹¹⁶ *Minshi Anjian Anyou Guiding (Shixing)* (民事案件案由规定 (试行)) [Regulation on Causes of Action in Civil Cases (for Trial Implementation)] (promulgated by the Sup. People's Ct., Oct. 30, 2000, effective Jan. 1, 2001, repealed Apr. 1, 2008) art. 214(6), SUP. PEOPLE'S CT. GAZ., Jan. 1, 2001, at 4 (China); *Id.* art. 134(1) (defining the "damages resulting from breach of health service contract" as a subclass under the causes of action for contract breach). See also Wang Zhiping (汪治平), *Minshi Anjian Anyou Guiding (Shixing) de Lijie yu Shiyong* (《民事案件案由规定 (试行)》的理解与适用) [Theory and Application of the Regulation on Causes of Action in Civil Cases], *Renmin Sifa* (人民司法) [PEOPLE'S JUDICATURE], no. 1, 2001 at 12, 12 (arguing that the implementation of the regulation may help to alleviate the difficulties in initiating lawsuits. The author was a Judge of the SPC at the time the article was published).

¹¹⁷ Directive on Trying Civil Cases on Medical Disputes, *supra* note 77.

¹¹⁸ In practice, medical experts were very reluctant to decide that an adverse event was a Medical Accident because such a decision would be served as a basis both for a court's decision to award damages and for a health authority's decision to discipline professionals. See WANG SHENGMING (王胜明), *Zhonghua Renmin Gongheguo Qinquan Zeren Fa Shiyi* (中华人民共和国侵权责任法释义) [COMMENTARIES ON THE TORT LAW OF CHINA] 276 (2010) (the editor was the Vice Chair of the Legislative Affairs Commission of the NPCSC at the time the book was published. The book is generally considered as an authoritative interpretation of the Chinese Tort Law).

¹¹⁹ See, e.g., Zhou Dongying (周冬英), *Minshi Anjian Anyou Shiyong de Diaocha yu Sikao* (民事案件案由适用的调查与思考) [A Study on the Application of the Regulation on Causes of Action in Civil Cases], *Renmin Sifa* (人民司法) [PEOPLE'S JUDICATURE], no. 7, 2006 at 25, 26 (the author was a Judge of the Qingpu District People's Court of Shanghai Municipality at the time the report was published). See also Sheng Jian (盛建) & Gao Wei (高伟), *Minshi Anjian Anyou Guiding (Shixing) de Zairenshi* (《民事案件案由规定 (试行)》的再认识) [Reflection on the Regulation on Causes of Action in Civil Cases], *Shandong Shenpan* (山东审判) [SHANDONG JUSTICE], no. 2, 2007 at 90, 90 (arguing that the People's Courts were given more authority to refuse to accept a lawsuit. One of the authors was a Judge of the Intermediate People's Court of Qingdao Municipality at the time the report was published).

event that was decided by the MAs as not a Medical Accident, they were not only shut out of the civil justice system but also excluded from bringing disciplinary action and mediation.¹²⁰ Many claimant-patients thus had to resort to violence to resolve their disputes as will be discussed below.

C. *Legal Bifurcation and Violence against Doctors*

The restrictions imposed along with the implementation of the 2002 Regulation reinforced the dominance of the administrative-led dispute resolution system, but at the cost of dividing the legal system into two parallel parts: one was based on the 2002 Regulation and a series of administrative rules issued by the central health authority, which applied to medical malpractice claims; and the other was based on the civil laws, which applied to personal injury claims. The inconsistency between the administrative justice system and the civil justice system was therefore highlighted to be a significant hindrance to the success of the MMDR in the 2002-10 period.

One manifestation of the inconsistency was a lower compensation rate for Medical Accident under the 2002 Regulation than that for personal injury under the civil laws. For example, under the civil laws, if death results and the deceased have dependents to support, damages also include, among others,¹²¹ living expenses of dependents, which is calculated based on per capita consumption expenditure.¹²² Under the 2002 Regulation, in contrast, living expenses of dependents is calculated based on the minimum living subsistence level of the locality.¹²³ The disparity between the two sets of rates can be illustrated by a lawsuit that was heard by a district court of Beijing municipality in 2008. The case showed that if the court applied the 2002 Regulation, the amount of damages would be 60,000 Chinese yuan (about 9,322 US dollars), and if the civil laws were applied, the

¹²⁰ 2002 Regulation, *supra* note 72, art. 42 (providing that the MAs' assessment decisions shall be admissible in the mediation and disciplinary hearings); *Id.* art. 48 (alluding that a health authority can initiate a mediation process only when the MAs decide an adverse event is a Medical Accident).

¹²¹ In addition to living expenses of dependents, damages under the civil laws include medical expenses, nursing expenses, hospital expenses, loss of earnings, transportation and accommodation expenses, funeral expenses, damages for death, transportation and accommodation expenses of the relatives of the deceased for funeral, the relatives' loss of earnings due to funeral arrangements, and awards for pain and suffering. *See* Guanyu Shenli Renshen Sunhai Peichang Anjian Shiyong Falü Ruogan Wenti de Jieshi (关于审理人身损害赔偿案件适用法律若干问题的解释) [Interpretation of Some Issues Concerning the Application of Laws for the Trial of Cases on Compensation for Personal Injury] (promulgated by the Sup. People's Ct., Dec. 26, 2003, effective May 1, 2004) arts. 17-18, SUP. PEOPLE'S CT. GAZ., Feb. 10, 2004, at 3 (China) [hereinafter Trial of Cases on Compensation for Personal Injury].

¹²² *Id.* art. 28.

¹²³ 2002 Regulation, *supra* note 72, art. 50(8).

amount of damages would reach 320,000 Chinese yuan (about 49,721 US dollars).¹²⁴ Another example of such a disparity is the *Huang* case, where the plaintiff changed her cause of action from an action founded on the 2002 Regulation, under which she claimed for damages in the amount of 6,265 Chinese yuan (about 973 US dollars in value), to one founded on the civil laws, under which she claimed for 36,375 Chinese yuan (about 5,652 US dollars).¹²⁵ Moreover, recovery under the 2002 Regulation does not include compensating the damage for death.¹²⁶ Considering that the damages for death under the civil laws may reach 100,000 Chinese yuan (about 15,538 US dollars) in rural areas, 200,000 Chinese yuan (about 31,076 US dollars) in urban areas, and 400,000 Chinese yuan (about 62,152 US dollars) in metropolises,¹²⁷ it is not surprising that the 2002 Regulation's exclusion of the damages for death often intensified conflicts between both sides of medical disputes.

The other manifestation of the inconsistency was the exclusion of forensic experts from Medical Accident Assessments. Forensic experts are registered with but independent from judicial authorities;¹²⁸ they are required to conduct forensic assessment according to the civil and criminal laws,¹²⁹ assume individual responsibility for their expert testimonies,¹³⁰ and satisfy stricter procedural requirements to ensure accountability. The experts of the MAs, in contrast, are de facto appointed by a locality MA and under the supervision of locality health

¹²⁴ Yang Lixin (杨立新), *Jiejue Yiliao Shigu Peichang Biaozhun Buzu Maichu de Guanjian Yibu* (解决医疗事故赔偿标准不足迈出的关键一步) [*A Key Step Forward for Resolving Compensation Issues for Victims of Medical Accident*], *Panjie Yanjiu* (判解研究) [RENMIN U. L. REV.], no. 2, 2008 at 12, 12–13.

¹²⁵ *Huang* case, *supra* note 1.

¹²⁶ 2002 Regulation, *supra* note 72, art. 50 (the items of compensation for Medical Accident include medical and hospital expenses, nursing expenses, transportation and accommodation costs, expenses flowing from disablement, funeral expenses, living expenses of dependents of the deceased, loss of earnings, and mental distress).

¹²⁷ See WANG SHENGMING, *supra* note 118, at 275. See also *Trial of Cases on Compensation for Personal Injury*, *supra* note 121, art. 29 (the damages for death shall be calculated to be equivalent to twenty times the annual income in accordance with the average value of per capita disposable income of urban residents or per capita net income of rural villagers).

¹²⁸ *Guanyu Sifa Jianding Guanli Wenti de Jueding* (关于司法鉴定管理问题的决定) [Decision on the Administration of Forensic Assessment] (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 28, 2005, effective Oct. 1, 2005, amended Apr. 24, 2015) art. 7, MINISTRY OF PUBLIC SECURITY GAZ., Aug. 15, 2015, at 30 (China) (forensic assessment institutions shall neither be installed within the People's Courts nor within the Justice Departments and any forensic assessment institution that is affiliated either to the People's Procuratorates or the police departments shall not accept a request from the public to conduct a forensic assessment) [hereinafter *Decision on the Administration of Forensic Assessment*].

¹²⁹ See, e.g., *Renmin Fayuan Sifa Jianding Gongzuo Zanxing Guiding* (人民法院司法鉴定工作暂行规定) [Interim Provisions on Forensic Assessment] (promulgated by the Sup. People's Ct., Nov. 16, 2001, effective Nov. 16, 2001) art. 1, SUP. PEOPLE'S CT. GAZ., Jan. 1, 2002, at 13 (China) (forensic assessment shall follow the Interim Provisions that is grounded on the Civil Procedure Law, the Criminal Procedure Law, the Administrative Litigation Law, and the Organic Law of the People's Courts).

¹³⁰ See, e.g., *Sifa Jianding Chengxu Tongze* (司法鉴定程序通则) [General Rules on the Procedures for Forensic Assessment] (promulgated by the Ministry of Justice, Aug. 7, 2007, effective Oct. 1, 2007, amended Dec. 24, 2015, effective May 1, 2016) arts. 5, 43, ST. COUNCIL GAZ., June 10, 2016, at 26 (China).

authorities.¹³¹ What is particularly worth mentioning is that the MAs' assessment decisions will not be effective unless locality health authority approves.¹³² The 2002 Regulation gives the MAs the exclusive power of assessing Medical Accidents, whereas the MAs' experts and their decisions lack transparency¹³³ and are shielded from judicial review.¹³⁴ They are neither required by the 2002 Regulation to sign their assessment reports nor to appear in court to explain their assessments.¹³⁵ There is also no opportunity for direct examination of their assessments by claimant-patient's lawyers, let alone cross-examination in the courts.¹³⁶ Many claims

¹³¹ Article 23 of the 2002 Regulation provides that the MAs shall select medical and forensic specialists and organize them into an expert pool, from which experts are selected randomly for Medical Accident Assessment. *See* 2002 Regulation, *supra* note 72. Although the 2002 Regulation has changed the provision of the 1987 Measure that the members of the TACMAS should be nominated by locality health authorities and approved by locality governments, it has been argued that MAs are not independent of governments in that many leaders of MAs are also leaders of locality health authorities. *See* Wang Yuanhe (汪元河) & Wang Jie (王杰), Qinquan Zeren Fa Chutai Qianhou Guizhou Diqu Yiliao Jiufen Jianding Moshi Duibi (侵权责任法出台前后贵州地区医疗纠纷鉴定模式对比) [*A Comparison of the Assessment for Medical Malpractice Disputes in Guizhou Province: Before and After the Promulgation of the Tort Law of China*], in Quanguo Fayi Linchuangxue Di Shiliu Jie Xueshu Yantaohui Lunwenji (全国法医临床学第十六届学术研讨会论文集) [PROCEEDINGS OF THE 16TH NATIONAL SYMPOSIUM ON FORENSIC CLINICAL SCIENCES] at 432, 432 (2013) (arguing that health authorities control the allocation of staffing and financial resources of MAs, which makes MAs operate under the supervision of governments). *See also* Guangdongsheng Yixuehui Zhangcheng (广东省医学会章程) [The Charter of Guangdong Medical Association] (Sept. 5, 2013) art. 5, *available at* <http://www.gdma.cc/masite.do?method=getitempage&pageno=0&code=childAbout> (providing that the Association is affiliated to the Department of Health of Guangdong Province (DHGP) and work under the guidance and supervision of the DHGP).

¹³² 2002 Regulation, *supra* note 72, art. 42. *See also* Interim Measure for Medical Accidents Assessment, *supra* note 105, art. 34.

¹³³ The MAs are required to inform the parties of the names, specialties, professional titles, and work units of the experts who may be selected by random to serve on an assessment panel. *See* Interim Measure for Medical Accidents Assessment, *supra* note 105, art. 19. It is argued that such an extremely limited information makes it very difficult for claimant-patients to exercise the right to challenge a potential expert. *See* Lai Zhiguang (赖志光) & Chen Xiaochang (陈小嫦), Yixuehui Zhuchi xia Yiliao Sunhai Jianding Chengxu Cunzai Wenti Fenxi ji Duice (医学会主持下医疗损害鉴定程序存在问题分析及对策) [*The Medical Association's Assessment Procedure for Medical Malpractice: Problems and Countermeasures*], *Zhongguo Weisheng Fazhi* (中国卫生法制) [CHINA HEALTH LAW], no. 5, 2015 at 80, 82 (also, arguing that the MAs' assessment is operated under a closed mode, lacking any supervision from third-party agencies).

¹³⁴ The 1989 Reply provides that the People's Courts shall not hear a claim that is brought against an authorized assessment institution's decision, *supra* note 63.

¹³⁵ Contrary to the 2002 Regulation, the Interim Measures for Medical Accidents Assessment requires experts to sign their assessment reports. *See* Interim Measure for Medical Accidents Assessment, *supra* note 105, art. 33. However, in practice, the signature record is neither publicly available nor presented in court. *See* Chen Zhihua (陈志华), Yixuehui Congshi Yiliao Sunhai Jianding zhi Hefaxing Yanjiu (医学会从事医疗损害鉴定之合法性研究) [*A Research on the Legality of Medical Association's Assessment for Medical Malpractice*], *Zhengju Kexue* (证据科学) [EVIDENCE SCIENCE], no. 3, 2011 at 275, 283–84 (also arguing that the MAs' experts are always reluctant to sign their assessment reports and refuse to appear in court). *See also* Beijingshi Gaoji Renmin Fayuan Ketizu (北京市高级人民法院课题组) [Task Force of the High People's Ct. of Beijing Mun.], Xin Xingshi xia Yiliao Sunhai Peichang Jiufen Anjian de Shenli Qingkuang Wenti yu Duice (新形势下医疗损害赔偿纠纷案件的审理情况、问题与对策) [*Situation, Problems, and Strategies in the Trial of Medical Injury Compensation Cases Under the New Trend*], *Falu Shiyong* (法律适用) [JOURNAL OF LAW APPLICATION], no. 6, 2011 at 84, 87 (a survey conducted by the Supreme People's Court revealed that it was considered as a problem that the MAs' experts neither signed their assessment reports nor appeared in court).

¹³⁶ In addition to the 2002 regulation, which has no requirement for the MAs' experts to appear and face cross examination in court, some local courts have issued directives that do not support the parties' request for the MAs' experts to appear in court. *See, e.g.*, Guanyu Shenli Yiliao Jiufen Anjian Zhidao Yijian (Shixing) (关于审理医疗纠纷案件指导意见 (试行)) [Directive on Trying Medical Malpractice Cases (for Trial Implementation)] (promulgated by the Intermediate People's Ct. of Shenzhen Mun. July 1, 2006, effective July 1, 2006) (China), *available at* <http://www.wqyfw.com/lushi/67/853.htm> (article 14 not allowing the parties to apply to the court for an order requiring the experts who have made an assessment decision to appear in court). For related reports, *see* Liu Jingfeng (刘景峰), Yiliao Shigu Jianding: Zhuanjia Daibiao Shui? (医疗事故鉴定: 专家代表谁) [*Medical Accident Assessment: Experts on*

were decided by the MAs as “not a Medical Accident” even though there had been sufficient evidence to show a failure to obtain consent,¹³⁷ to make a correct diagnosis,¹³⁸ to maintain competence,¹³⁹ or to keep medical records properly.¹⁴⁰ In some cases where injuries were caused by unlicensed practitioners,¹⁴¹ the MAs ignored

Behalf of Whom], Yiyao Jingji Bao (医药经济报) [MEDICAL ECONOMIC REPORTER], Dec. 3, 2009, at 3 (reporting that the assessment panels of the MAs always refused to offer their experts to court); Zhu Xiaolu (朱晓露) et al., Yiliao Jianding Zhuanjia Bu Chuting, Youhe Yinqing? (医疗鉴定专家不出庭, 有何隐情?) [*Experts Do Not Appear in Court, What is Hidden?*], Nanjing Ribao (南京日报) [NANJING DAILY], Oct. 26, 2004; Chai Huiqun (柴会群), Yiliao Jianding Zhuanjia Jubu Chuting Zaban——Yige Jiceng Faguan de Fannao (医疗鉴定专家拒不出庭咋办——一个基层法官的烦恼) [*How Should I Do When Experts Refuse to Appear in Court: Trouble Encountered by A Judge*], SINA (Dec. 18, 2015), available at http://blog.sina.com.cn/s/blog_49b3cb2c0102vz27.html (reporting that a judge of the Jianggan District Court of Hangzhou municipality asked the MAs' experts to testify in court, but all five experts refused to appear in court).

¹³⁷ See, e.g., Ma Moumou yu Shanghai Moumou Yiyuan, Shanghai Moumou Yiyuan Yiliao Sunhai Peichang Jiufen An (马某某与上海某某医院、上海某某医院医疗损害赔偿纠纷案) [Ma v. Shanghai X Hospital—Medical Malpractice Action], Pumin Yiminchuzi di 16208 Hao (浦民一民初字第 16208 号) [Civil First Trial no. 16208] (Pudong New Dist. People's Ct. of Shanghai Municipality July 5, 2011) (China), available at <http://openlaw.cn/judgement/9c8296432dad4d99a2788c7bcf96e5c7?keyword=16208> (the court and the locality MA acknowledged that the surgery on the patient's consent form was inconsistent with the surgery actually performed); Yang Rongfa yu Shanghai Jiaotong Daxue Yixueyuan Fushu Renji Yiyuan Yiliao Sunhai Peichang Jiufen An (杨荣发与上海交通大学医学院附属仁济医院医疗损害赔偿纠纷案) [Yang Rongfa v. Renji Hospital Affiliated to Shanghai Jiao Tong University School of Medicine—Medical Malpractice Action], Pumin Yiminchuzi di 13355 Hao (浦民一民初字第 13355 号) [Civil First Trial no. 13355] (Pudong New Dist. People's Ct. of Shanghai Mun. June 30, 2010) (China), available at <http://openlaw.cn/judgement/2652e641c9204053b21736ee016102ee?keyword=13355> (the defendant hospital abandoned the amputated mental health patient in the street without informing his guardian).

¹³⁸ See, e.g., Shi Xuekuai, Shi Xiao, Shi Li, Wang Yanfang yu Foshanshi Nanhaiqu Songgangzhen Yiyuan Yiliao Shigu Sunhai Peichang Jiufen Shangsu An (史学快、史啸、史立、王艳芳与佛山市南海区松岗镇医院医疗事故损害赔偿纠纷上诉案) [Shi Xuekuai v. The Hospital of Songgang Town—Medical Accident Action], Fozhong Famin Yizhongzi 2610 Hao (佛中法民一终字 2610 号) [Civil Appeal no. 2610] (Intermediate People's Ct. of Foshan Mun. Dec. 3, 2003), available at http://0-www.pkulaw.cn.pegasus.law.columbia.edu/case/pfnl_a25051f3312b07f3ee822c9194e991012acb21ba9ca3c76abdfb.html (the locality MA acknowledged that the patient had been misdiagnosed, misused with oxytocin infusion, and delayed for rescue before she died from amniotic-fluid embolism).

¹³⁹ See, e.g., Liang Guisen, He Genrong, He Fengying, He Fengbing yu Shundeshi Diyi Renmin Yiyuan Yiliao Guocuo Sunhai Peichang Jiufen Shangsu An (梁桂森、何根荣、何凤英、何凤冰与顺德市第一人民医院医疗过错损害赔偿纠纷上诉案) [Liang Guisen v. The First People's Hospital of Shunde Municipality—Medical Malpractice Action], Fozhong Famin Yizhongzi 729 Hao (佛中法民一终字 729 号) [Civil Appeal no. 729] (Foshan Mun. Intermediate People's Ct. Apr. 17, 2003) (China) (acknowledging in the case where the craniotomy patient died of infection that the defendant forgot to remove several stitches and did not clean necrotic tissues before dressing).

¹⁴⁰ See, e.g., Lang Mou deng yu Shanghai Mou Yiyuan Yiliao Sunhai Peichang Jiufen An (郎某等与上海某医院医疗损害赔偿纠纷案) [Lang v. Shanghai X Hospital—Medical Malpractice Action], Lumin Yiminchuzi di 2716 Hao (卢民一民初字第 2716 号) [Civil First Trial no. 2716] (Shanghai Mun. Luwan Dist. People's Ct. May 23, 2008) (China) (acknowledging that the defendant prescribed the wrong dose for the deceased patient and did not record complete information in the patient's medical record); Huang Mou yu Shanghai Mou Yiyuan, Shanghai Moumou Yiyuan Yiliao Sunhai Peichang Jiufen An (黄某与上海市某医院、上海市某医院医疗损害赔偿纠纷案) [Huang v. Shanghai X Hospital—Medical Malpractice Action], Lumin Yiminchuzi di 2283 Hao (卢民一民初字第 2283 号) [Civil First Trial no. 2283] (Shanghai Mun. Luwan Dist. People's Ct. Dec. 18, 2008) (China) (acknowledging that the patient's test card provided by the defendant as evidence bore a wrong name and wrong bed number). In some jurisdictions of the United States, an absence of essential medical records in a malpractice case creates a rebuttable presumption that the defendant was negligent. See FURROW ET AL., *supra* note 100, at 199.

¹⁴¹ See, e.g., Shangsuren Guangzhou Yixueyuan Li Wan Yiyuan yu Beishangsuren Fan Lichang Yiliao Sunhai Peichang Jiufen An (上诉人广州医学院荔湾医院与被上诉人范丽端医疗损害赔偿纠纷案) [Liwang Hospital of Guangzhou Medical College v. Fan Lichang—Medical Malpractice Action], Suizhong Famin Yizhongzi 2436 Hao (穗中法民一终字 2436 号) [Civil Appeal no. 2436] (Guangzhou Mun. Intermediate People's Ct. 2008) (China) (deciding that the event was “not violating statutory requirements or common practice”, although acknowledging that the staff member who performed the ultrasound examination for the patient did not hold a valid medical license and made a wrong diagnosis); Zhong Jinping, Chen Yiqun yu Zhongshan Nanhua Yiyuan Yiliao Sunhai Peichang Jiufen An (钟锦萍、陈奕群与中山南华医院医疗损害赔偿纠纷案) [Zhong Jinping & Chen Yiqun v. Zhongshan

the law prohibiting unlicensed practice of medicine,¹⁴² and made the decisions of “not a Medical Accident.” It was also not uncommon for the MAs’ assessment decisions to be inconsistent with those made by forensic experts. As shown in the *Huang* case where the locality MA assessed the event as not a Medical Accident, the forensic experts came from Shanghai and Beijing reported that the evidence provided by the defendant hospital was insufficient to make an assessment.¹⁴³ These widely reported cases reflected a common perception of the MAs as an unfair process that is biased towards hospitals.¹⁴⁴

The perception was not without foundation. According to the official newspaper of the SPC, *People’s Court Daily*, of the total 63 medical malpractice lawsuits that were heard by the Gulou District Court of Nanjing municipality during the first ten months of 2004, 80 percent were decided by the MAs as “not a Medical Accident.”¹⁴⁵ Consequently, claimant-patients won far less frequently than defendant hospitals. After the implementation of the 2002 Regulation, the overall win rate for patients at the Gulou District Court dropped from 90 percent in 2002 to 20 percent in 2004, and 63 percent of the 70 medical malpractice claims presented to the Intermediate Court of Weihai Municipality in the 2002-05 period were dismissed.¹⁴⁶ Under the restrictions imposed by the 2002 Regulation as discussed above, claimant-patients would not have access to legal remedies if the MAs decided that an event was “not a Medical Accident.” Some desperate claimant-patients had to resort to violence to resolve grievances. The incidence of violence against health care providers has increased dramatically since the early 2000s.¹⁴⁷ It was reported that 5,093 vicious incidents occurred in 2002 (in which 2,604 professionals were seriously injured), 8,095 in 2004 (in which 3,735 were seriously injured), and 9,831 in

Nanhua Hospital—Medical Malpractice Action], Suiminzai 211 Hao (穗民再 211 号) [Civil Appeal no. 211] (Guangdong Province High People’s Ct. Dec. 28, 2016) (China) (deciding that the surgeon, who exceeded the scope of his license to admit the pediatric patient, violated statutory requirements, but “no causation was found between the injury and the medical treatment given”).

¹⁴² See, e.g., *Zhiye Yishi Fa* (执业医师法) [Law on Practicing Doctors] (promulgated by the Standing Comm. Nat’l People’s Cong., Jun. 26, 1998, effective May 1, 1999) art. 14, 1998 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 255–62 (China), available at http://www.gov.cn/banshi/2005-08/01/content_18970.htm (providing that those who have not been registered and obtained the practicing certificate shall not engage in medical practice).

¹⁴³ *Huang* case, *supra* note 1.

¹⁴⁴ See WANG SHENGMING, *supra* note 118, at 276 (arguing that claimant-patients do not trust the MAs and their assessment decisions, and that claimant-patients often apply for forensic experts’ assessment even if the MAs have made an assessment decision).

¹⁴⁵ Zhang Xianming (张先明) & Zhao Fang (赵芳), Shenli: Fayuan You ‘Si Nan’ (审理: 法院有 “四难”) [*Four Kinds of Difficulties in Trial*], Renmin Fayuan Bao (人民法院报) [PEOPLE’S CT. DAILY], Jan. 24, 2006, at 4.

¹⁴⁶ *Id.* at 4.

¹⁴⁷ See, e.g., Bai Jianfeng (白剑峰), Yisheng Chengwei Gaowei Zhiye (医生成为高危职业) [*Health Care Professionals Become a High-risk Group*], Renmin Ribao (人民日报) [PEOPLE’S DAILY], Oct. 13, 2011, at 19 (reporting that the violence against doctors had increased dramatically in the 2000–10 period).

the first ten months of 2006 (in which 5,519 were seriously injured).¹⁴⁸ The number of doctors who experienced physical violence by patients or their families was estimated to be 10,000 in each year of the 2000-10 period.¹⁴⁹ The central health authority acknowledged eleven vicious incidents in 2012, killing seven and seriously injuring seventeen hospital staff members.¹⁵⁰ Of the 2,638 doctors responding to the fifth survey conducted by the Chinese Medical Doctor Association in 2014, 59.79 percent had experienced verbal abuse, and 13.07 percent experienced physical violence in the surveyed year; 69.60 percent said that they live in fear of being victimized by claimant-patients.¹⁵¹ The violence also received increased attention from the international medical community.¹⁵² It highlighted an urgent need to remove the restrictions imposed by the 2002 Regulation and configure the MMDR mechanism to provide multiple ways for claimant-patients. The Chinese Tort Law was enacted against the background of public apprehension about the continuing increase of medical malpractice disputes, which will be discussed in the Part below.

IV. TORT LAW: BUILDING A CIVIL LAW-BASED MMDR MECHANISM

In 2009, the Chinese central government launched the second round of health system reform in hope to maintain the public provision of health care. In addition to increasing public financial support for public hospitals, expanding public health care supply, and strengthening the regulation and supervision of health care providers, this round of reform also emphasized the importance of improving the dispute resolution mechanism for

¹⁴⁸ Cao Ronggui (曹荣桂), *Youhua Yiliao Zhiye Huanjing Gongjian Hexie Yihuan Guanxi* (优化医疗执业环境, 构建和谐医患关系) [*Optimizing Medical Practice Environment to Build Harmonious Doctor-Patient Relationship*], *Zhongguo Yiyuan* (中国医院) [CHINESE HOSPITALS], no. 8, 2007 at 1, 2 (the author was President of the Chinese Hospital Association at the time the article was published).

¹⁴⁹ Chen Junyu (陈俊宇), "Yisheng Fangbao Zhinan" Chulu Ji ("医生防暴指南" 出炉记) [*The Release of the Doctor's Handbook Against Violence*], *Zhongguo Zhoukan* (中国周刊) [CHINA WEEKLY], no. 12, 2011 at 55, 57.

¹⁵⁰ Guanyu Jiaqiang Yiyuan Anquan Fangfan Xitong Jianshe Zhidao Yijian (关于加强医院安全防范系统建设指导意见) [Directive on Increasing Hospital Security Precautions] (promulgated by the Nat'l Health and Family Planning Comm'n, Oct. 22, 2013) (nhfpc.gov.cn) (China), available at <http://www.nhfpc.gov.cn/yzygj/s3590/201310/e0a558aeb9d34700ba6dd1cfdfe93164.shtml>.

¹⁵¹ CHINESE MEDICAL DOCTOR ASSOCIATION (中国医师协会), *Zhongguo Yishi Zhiye Zhuangkuang Baipishu* (中国医师执业状况白皮书) [WHITE PAPER ON THE STATE OF MEDICAL PRACTICE IN CHINA] (cmda.net) (May 28, 2015) available at <http://www.cmda.net/xiehuixiangmu/falvshiwubu/tongzhigonggao/2015-05-28/14587.html>.

¹⁵² See, e.g., Editorial, *Violence Against Doctors: Why China? Why Now? What Next?*, 383 LANCET 1013, 1013 (2014); Editorial, *Chinese Doctors Are Under Threat*, 376 LANCET 657, 657 (2010); Editorial, *Ending Violence Against Doctors in China*, 379 LANCET 1764, 1764 (2012); Yi Yang et al., *Facing Up to the Threat in China*, 376 LANCET 1823, 1823 (2010); Sheng-Li Huang & Xiao-Yan Ding, *Violence Against Chinese Health-care Workers*, 377 LANCET 1747, 1747 (2011); Xue-Qiang Wang et al., *How to End Violence Against Doctors in China*, 380 LANCET 647, 647 (2012); Jie Zeng et al., *A Gloomy Future for Medical Students in China*, 382 LANCET 1878, 1878 (2013); Therese Hesketh et al., *Violence Against Doctors in China*, 345 BMJ 25, 25 (2012).

medical malpractice.¹⁵³ In the same year, the NPCSC approved Chinese Tort Law,¹⁵⁴ with the purpose of “ensuring the proper resolution of medical malpractice disputes, safeguarding the legitimate rights and interests of both patients and health care professionals, and promoting the development of medical and health services.”¹⁵⁵ The People’s Courts are required to apply Chinese Tort Law to all medical malpractice claims without exception.¹⁵⁶ The MMDR mechanism has, therefore, shifted its legitimacy from one based on the administrative justice system to one based on the civil justice system.

A. *Liability for Medical Injury*

Many changes have been driven by the legislation of Chinese Tort Law towards loosening restrictions for medical malpractice actions.¹⁵⁷ The most significant of these changes is the establishment of the “liability for medical injury” to cover all medical malpractice claims.¹⁵⁸ After being dominated for more than half a century by the doctrine of Medical Accident, the Chinese MMDR mechanism has shifted its focus away from whether an adverse event is a Medical Accident to whether liability for medical injury is established. The shift of the cornerstone of the MMDR mechanism from the “Medical Accident” to the “liability for medical injury” paves the way for resolving the following problems that arise from the administrative-led dispute resolution system.

First, the application of Chinese Tort Law to all medical malpractice claims without exception helps to eliminate the inconsistency between administrative law and civil law on the MMDR mechanism. Following the

¹⁵³ Directive on Deepening the Health System Reform, *supra* note 17.

¹⁵⁴ Qinquan Zeren Fa (侵权责任法) [Tort Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 4 (China) [hereinafter Tort Law].

¹⁵⁵ Li Shishi (李适时), Quanguo Renmin Daibiao Dahui Falü Weiyuanhui Guanyu 《Zhonghua Renmin Gongheguo Qinquan Zeren Fa (Caoan)》 Zhuyao Wenti de Huibao (全国人民代表大会法律委员会关于《中华人民共和国侵权责任法（草案）》主要问题的汇报) [Report of the Law Committee of the National People's Congress Concerning the Main Issues of the Draft of Tort Law of China] (Delivered at the Sixth Session of the 11th Nat'l People's Cong., Dec. 22, 2008) 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 11 (China) (the author was the Chair of the Legislative Affairs Commission of the NPCSC at the time the report was released).

¹⁵⁶ Guanyu Shiyong 《Zhonghua Renmin Gongheguo Qinquan Zeren Fa》 Ruogan Wenti de Tongzhi (关于适用《中华人民共和国侵权责任法》若干问题的通知) [Directive on Certain Issues Concerning the Application of the Tort Law of China] (promulgated by the Sup. People's Ct., June 30, 2010, effective June 30, 2010) § 1, SUP. PEOPLE'S CT. GAZ., June 30, 2010 at 10, 15 (China), available at http://rmfyb.chinacourt.org/paper/html/2010-07/01/content_11608.htm [hereinafter Application of Tort Law].

¹⁵⁷ As will be discussed later, these changes include article 58 of the Tort Law recognizing medical records as civil evidence, article 59 allowing patients to sue manufacturers or health care institutions for defective medical products, drugs, and transfusing contaminated blood, article 61 protecting patient's right to access to medical records, article 62 establishing tort liability for violation of patient's privacy, and article 63 permitting compensation for unnecessary medical examination. See Tort Law, *supra* note 154.

¹⁵⁸ Tort Law, *supra* note 154, chap. VII.

promulgation of Chinese Tort Law, the SPC issued a directive, requiring the People's Courts to apply the civil laws to medical malpractice damages and, as a concrete measure of the unified application of the civil laws, to include dependents' living expenses in the damages for disability or the damages for death.¹⁵⁹ This provision eliminates the clash, as discussed in Part III, between the set of compensation rate for Medical Accident under the 2002 Regulation and that for personal injury under the civil laws. Not only does it reconfirm the right of claimant-patients to claim for damages for death, but it also remedies the uncertainty arising from the bifurcation of the legal system.

Second, the decline in the dominance of Medical Accident helps to extend the cause of action beyond the narrow scope of Medical Accident and thereby extend the right of action to all injured patients who suffer from medical malpractice. Along with the legislation of Chinese Tort Law, the SPC promulgated new regulations on cause of action: the regulation issued in 2008 extended the statutory cause of action for medical malpractice from the "cause of action for damages for Medical Accident" to the "cause of action for damages for medical injury;"¹⁶⁰ the regulation issued in 2011 extended the statutory cause of action to the "cause of action for liability for medical injury."¹⁶¹ The Medical Accident assessment is then no longer a procedural obstacle to initiating litigation.

Third, the shift of focus towards the "liability for medical injury" helps to extend expert testimonies to include not only those provided by the MAs but also those by forensic experts. Many cases have shown that the courts in some provinces or provincial-level municipalities have begun to admit forensic experts' testimony,¹⁶²

¹⁵⁹ Application of Tort Law, *supra* note 156, § 4 (requiring the People's Courts to apply the Trial of Cases on Compensation for Personal Injury to medical malpractice damages). *See also* Trial of Cases on Compensation for Personal Injury, *supra* note 121.

¹⁶⁰ Minshi Anjian Anyou Guiding (民事案件案由规定) [Regulation on Causes of Action in Civil Cases] (promulgated by the Sup. People's Ct., Feb. 4, 2008, effective Apr. 1, 2008, repealed Apr. 8, 2013) art. 1(2), SUP. PEOPLE'S CT. GAZ., Apr. 1, 2008 at 24 (China), *available at* <http://gongbao.court.gov.cn/Details/588cabc241151dc7ade75d9c60b152.html>.

¹⁶¹ Guanyu Yinfa Xiugai Hou de 《Minshi Anjian Anyou Guiding》 de Tongzhi (关于印发修改后的《民事案件案由规定》的通知) [Directive on Issuing the Revised Regulation on Causes of Action in Civil Cases] (promulgated by the Sup. People's Ct., Feb. 18, 2011, effective Apr. 1, 2011) art. 351, SUP. PEOPLE'S CT. GAZ., July 1, 2011 at 15 (China), *available at* <http://gongbao.court.gov.cn/Details/190a4468cd45916c09e1a211e5dfa0.html> (providing the "liability for medical injury" as a statutory cause of action along with its subclass, namely, the "informed consent liability" and the "medical products liability") [hereinafter 2011 Regulation on Causes of Action].

¹⁶² *See, e.g.*, Guanyu Yifa Shenli Yiliao Jiufen Anjian Cujin Hexie Yihuan Guanxi de Yijian (关于依法审理医疗纠纷案件促进和谐医患关系的意见) [Directive on Dealing with Medical Malpractice Litigation for Harmonizing Doctor-Patient Relationship] (promulgated by the High People's Ct. of Zhejiang Province, Jan. 7, 2014, effective Jan. 7, 2014) (pkulaw) (China), *available at* https://pkulaw.cn/fulltext_form.aspx?Db=lar&Gid=fe26d8787c72000bdc340e036d7918a7bdfb.

or both forensic and the MAs' experts' testimonies.¹⁶³ A more significant change is that some courts use their own judgment, rather than be automatically bound by the MAs' decisions, in deciding whether there is a duty of care owed by health care providers to their patients and whether the breach of duty has caused the harm.¹⁶⁴

Fourth, the establishment of the "liability for medical injury" helps to expand the scope of the liability for medical malpractice. Claimant-patients who has hitherto been denied access to the administrative-led dispute resolution system now could recover their losses under the MMDR mechanism. The Tort Law, for the first time, adopts the term "duty of care" which, in contrast to the 2002 Regulation, extends the duty of care to include other non-statutory duties.¹⁶⁵ That duty not only covers the examination, diagnosis, and treatment but also expressively extends to the provision of information.¹⁶⁶ This is similar to the common law approach where the duty of care is interpreted as a "single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment."¹⁶⁷ This change opens the door for the People's Courts to apply

¹⁶³ See, e.g., Guanyu Shenli Yiliao Sunhai Peichang Jiufen Anjian Ruogan Wenti de Zhidao Yijian (Shixing) (关于审理医疗损害赔偿纠纷案件若干问题的指导意见 (试行)) [Directive on Several Issues Concerning the Trial of Medical Malpractice Cases (for Trial Implementation)] (promulgated by the High People's Ct. of Beijing Mun. Nov. 18, 2010, effective Nov. 18, 2010) (pkulaw) (China), available at http://pkulaw.cn/fulltext_form.aspx?Gid=17241603&Db=lar; Guanyu Renmin Fayuan Weituo Yiliao Sunhai Peichang Jianding Ruogan Wenti de Yijian (Shixing) (关于人民法院委托医疗损害鉴定若干问题的意见 (试行)) [Directive on Several Issues Concerning the Forensic Assessment for Medical Injury (for Trial Implementation)] (promulgated by the High People's Ct. of Guangdong Province Nov. 17, 2011, effective Nov. 17, 2011) (pkulaw) (China), available at http://pkulaw.cn/fulltext_form.aspx?Gid=17386312&Db=lar.

¹⁶⁴ See, e.g., Xie Jiqun, Lin Qirong, Lin Jirong, Lin Yongrong, Lin Xinrong yu Yulinshi Zhongyiyuan Yiliao Sunhai Zeren Jiufen An (谢继群、林启荣、林继荣、林永荣、林新荣与玉林市中医院医疗损害责任纠纷案) [Xie Jiqun v. Yulin Hospital of Traditional Chinese Medicine—Medical Malpractice Action], Yuqu Famin Chuizi di 48 Hao (玉区法民初字第 48 号) [Civil First Trial no. 48] (Yulin Mun. Yuzhou Dist. People's Ct. June 1, 2012) (China), available at <http://ylyzfy.chinacourt.org/public/paperview.php?id=998726> (holding that the defendant hospital was liable for not obtaining the patient's consent for hormone therapy); Chen Guiying yu Shanghai Jiaotong Daxue Yixueyuan Fushu Xinhua Yiyuan Yiliao Sunhai Zeren Jiufen An (陈桂英与上海交通大学医学院附属新华医院医疗损害责任纠纷案) [Chen Guiying v. Xin Hua Hospital Affiliated to Shanghai Jiao Tong University School of Medicine—Medical Malpractice Action], Yangmin Yiminchuzi di 7030 Hao (杨民一民初字第 7030 号) [Civil First Trial no. 7030] (Shanghai Mun. Yangpu Dist. People's Ct. Dec. 20, 2013) (China), available at <http://wenshu.court.gov.cn/content/content?DocID=b82bd873-290f-4a6a-9d1f-46a911781098> (holding that, on the ground that the surgery on the patient's consent form was inconsistent with the surgery actually performed, the defendant hospital was liable for the violation of the patient's right of informed consent despite the locality MA deciding that the adverse event was not a Medical Accident); Feng Hui yu Huanghe Sanmenxia Yiyuan Yiliao Sunhai Peichang Jiufen An (冯卉与黄河三门峡医院医疗损害赔偿纠纷案) [Feng Hui v. Huanghe Sanmenxia Hospital—Medical Malpractice Action], Sanmin Zaizi di 00043 Hao (三民再字第 00043 号) [Civil Appeal no. 00043] (Sanmenxia Mun. Intermediate People's Ct. Aug. 12, 2013) (China), available at http://www.pkulaw.cn/Case/pfnl_119402803.html?match=Exact (deciding in favour of the plaintiff and holding that the defendant hospital was liable because of the negligence in permitting an unlicensed staff member to perform the surgery and failing to provide a complete and consistent medical record, although the plaintiff refused to apply for an assessment for injury).

¹⁶⁵ See, e.g., Tort Law, *supra* note 154, art. 57 (providing that health care institutions shall be liable for damages for the injuries caused by the failure to satisfy the duty of care that was accepted at the time).

¹⁶⁶ See, e.g., Tort Law, *supra* note 154, art. 55.

¹⁶⁷ In the landmark Australian case *Rogers v. Whitaker*, when deciding on breach of duty, the court stated that, "The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a 'single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment'; it extends to the

negligence test of foreseeability for determining liability. Moreover, for those whose injuries are caused by defective medical products, drugs, and transfusing contaminated blood, the Tort Law allows them to assert a claim for strict liability against manufacturers, sellers, or health care institutions.¹⁶⁸ The rationale underlying this provision is the fact that, as highlighted in the *Huang* case and the *Aitefu* case as mentioned earlier,¹⁶⁹ health care providers have been pushed by the market-oriented reform to perform a role having similar attributes to that of manufacturers and sellers. This fact also leads to the writing of the prohibition of unnecessary medical examination in the Tort Law.¹⁷⁰

In addition to extending the right to access the MMDR mechanism to areas besides Medical Accident, there are also legislative responses that have been made in an attempt to increase fairness in the dispute resolution process. In response to the absence of judicial review over the MAs' assessment decisions, the Civil Procedure Law was amended for the second time in 2012 (hereinafter 2012 CPL), among other things, to use "assessment opinion", instead of "assessment conclusion" as adopted by the 2002 Regulation, to refer to the assessment decisions.¹⁷¹ The change in word usage alludes to the ultimate power of the People's Courts in deciding whether to admit an assessment institution's testimony. The 2012 CPL also requires experts who make assessment decisions to sign their assessment reports and, if necessary, testify at trial,¹⁷² which was not required under the 2002 Regulation. As a measure towards cross-examination in litigation, the 2012 CPL allows claimant-patients to apply to the People's Courts for the appointment of a professional assistant who reviews the assessment

examination, diagnosis and treatment of the patient and the provision of information in an appropriate case." *Rogers v. Whitaker*, *supra* note 102, at 628 (internal citations omitted).

¹⁶⁸ Tort Law, *supra* note 154, art. 59. The doctrine of strict liability is generally not applicable to health care providers in common law jurisdictions. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 20 cmt. d (AM. LAW INST. 1998) (most jurisdictions hold that hospitals and doctors are not sellers of products used in medical treatment and immunize them from strict liability for harm from defective products). However, action in strict liability may lie against provider if distributing products is part of health care provider's business. *See, e.g.*, *Porter v. Rosenberg*, 650 So.2d 79 (Fla. Dist. Ct. App. 1995); *Barnes v. Bayside Orthopaedics, Inc.*, No. 8:11-CV-2827-T-30EAJ, 2012 WL 162368, at *2 (M.D. Fla. 2012) ("Entities that play an active role in promoting a particular product within the chain of distribution to the general public are strictly liable for any defect in the product."). The court in *Skelton v. Druid City Hospital Board* noted, "We cannot ignore the fact that hospitals, whether profitable or not, are businesses." Laura Pleicones, *Passing the Essence Test: Health Care Providers Escape Strict Liability for Medical Devices*, 50 S.C.L. REV. 463, 480 (1999).

¹⁶⁹ *Huang* case, *supra* note 1. *Aitefu* case, *supra* note 88.

¹⁷⁰ Tort Law, *supra* note 154, art. 63 (providing that health care providers shall not conduct unnecessary medical examinations on patients). *See also* WANG SHENGMING, *supra* note 118, at 319 (unnecessary medical examinations led to an increase in medical costs, which increased from 28% in 1990 to 36.7% in 2002).

¹⁷¹ Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, amended Oct. 28, 2007, amended Aug. 31, 2012, effective Jan. 1, 2013) art. 63(7), 2012 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 533 (China). The Civil Procedure Law was amended for the third time in 2017.

¹⁷² *Id.* arts. 77–78.

opinion presented at court.¹⁷³ These provisions were further specified in the SPC's Interpretation on Several Issues Concerning the Application of Laws for the Trial of Medical Malpractice Cases, known as 2017 Interpretation, which provides not only that "assessment opinion" shall be examined by parties but also that parties may apply to notify one or two persons with medical expertise to appear in court to comment on the "assessment opinion" or other particular factual issues in the case.¹⁷⁴ Their comment, contrary to the custom under which only the MAs' expert testimony would be admissible,¹⁷⁵ may be admitted at trial. Moreover, in response to the public concern about concealment, fabrication, and falsification of medical records, the Tort Law recognizes medical records as civil evidence by providing that health care institutions are presumed to be negligent if they conceal, fabricate, destroy, or refuse to provide medical records.¹⁷⁶ The 2017 Interpretation further specifies that a health care institution is presumed to be negligent if the institution fails to submit the medical records within the time limit prescribed by the people's court.¹⁷⁷ These changes are not only a legislative response to the problems posed by the administrative-led dispute resolution system but also an attempt to build a civil law-based MMDR mechanism to facilitate, instead of to hamper, the solution of the disputes.

B. *The Challenges Ahead*

However, there are still significant challenges facing the MMDR mechanism in building a civil law-based forum for dispute resolution. The most extraordinary challenge still stems from the administrative-led dispute resolution system, which continues to run as the 2002 Regulation remains in force. There is a push to keep the administrative-led system working in parallel with the civil justice system. For example, two days before the enforcement of the Tort Law, the then MOH issued a directive requiring the MAs to continue its role as an

¹⁷³ *Id.* art. 79.

¹⁷⁴ Guanyu Shenli Yiliao Sunhai Zeren Jiufen Anjian Shiyong Falü Ruogan Wenti de Jieshi (关于审理医疗损害责任纠纷案件适用法律若干问题的解释) [Interpretation of Several Issues Concerning the Application of Laws for the Trial of Medical Malpractice Cases] (promulgated by the Sup. People's Ct., Dec. 13, 2017, effective Dec. 14, 2017) art. 13–14, (court.gov.cn) (China), available at <http://www.court.gov.cn/fabu-xiangqing-73512.html> [hereinafter 2017 Interpretation].

¹⁷⁵ See, e.g., the case of Chen Zijing, *supra* note 108.

¹⁷⁶ Tort Law, *supra* note 154, art. 58. Moreover, article 61 provides that health care institutions shall properly file and keep medical records, including hospital admission logs, test reports, operation and anesthesia records, pathology records, nurse care records, and medical expenses sheets, and that the institutions shall satisfy the requests of patients who ask to inspect or obtain a copy of their own medical records. *Id.* art. 61.

¹⁷⁷ 2017 Interpretation, *supra* note 174, art. 6.

authorized assessment institution for Medical Accident Assessment;¹⁷⁸ in some provinces or provincial-level municipalities, their courts continue to admit the MAs' assessment decisions exclusively.¹⁷⁹ The most recent example is the revision of the 2002 Regulation,¹⁸⁰ which continues to follow the current definition and classification of Medical Accident,¹⁸¹ and continues to authorize the MAs to make the assessment decisions about the violation of the statutory requirements or common practice, bodily injury, and causation.¹⁸² At times when the revised version was under examination in the State Council, some provincial congresses issued and enforced their local regulations that followed the Draft Regulation.¹⁸³ The re-strengthening of the administrative-bureaucratic system may cause the persistence of the inconsistency between the administrative justice system and the civil justice system.

Another aftermath of the re-strengthening of the administrative-bureaucratic system may be that it is becoming more difficult for the provisions of the Tort Law regarding the protection of the rights of patients to be applied through litigation. The administrative-led system still plays a dominant role in determining the

¹⁷⁸ Guanyu Zuohao 《Qinquan Zeren Fa》 Guanche Shishi Gongzuo de Tongzhi (关于做好《侵权责任法》贯彻实施工作的通知) [Directive on Effectively Implementing the Tort Law] (promulgated by the Ministry of Health, June 28, 2010, effective June 28, 2010) MINISTRY OF HEALTH GAZ., Aug. 1, 2010 at 8, 11 (China).

¹⁷⁹ See, e.g., Guanyu Weituo Yiliao Sunhai Sifa Jianding Ruogan Wenti de Zanxing Guiding (关于委托医疗损害司法鉴定若干问题的暂行规定) [Interim Provisions on Several Issues Concerning Forensic Assessment for Medical Injury] (promulgated by the High People's Ct. of Shanghai Mun. Jan. 1, 2010, effective Jan. 1, 2011) art. 2, (pkulaw) (China), available at pkulaw.cn/CLI.13.834704 (the People's Courts shall appoint a locality MA for the medical injury assessment except when both parties reach an agreement on alternative solutions).

¹⁸⁰ Yiliao Jiufen Yufang yu Chuli Tiaoli (Songshengao) (医疗纠纷预防与处理条例 (送审稿)) [Draft Regulation on Preventing and Dealing with Medical Malpractice Disputes (Draft for Public Comment)] (revised by the Nat'l Health and Family Planning Comm'n, Nov. 2, 2015) (nhfpc.gov.cn) (China), available at <http://www.nhfpc.gov.cn/zhuz/zqyj/201511/3f61fb6c076645738d961a152024b7e8.shtml>. [hereinafter Draft Regulation]. The Draft Regulation was approved by the State Council and came into effect on October 1, 2018. Yiliao Jiufen Yufang he Chuli Tiaoli (医疗纠纷预防和处理条例) [Regulation on Preventing and Dealing with Medical Malpractice Disputes] (promulgated by the St. Council, July 31, 2018, effective Oct. 1, 2018) ST. COUNCIL GAZ., Sept. 20, 2018 at 10 (China), available at http://www.gov.cn/zhengce/content/2018-08/31/content_5318057.htm [hereinafter 2018 Regulation].

¹⁸¹ Draft Regulation, *supra* note 180, art. 2 (defining Medical Accident as an adverse event caused by medical malpractice that occurs during a patient's diagnosis and treatment as a result of the health care provider's violation of the statutory requirements or common practice and results in bodily injury to the patient). *Id.* art. 53 (classifying Medical Accident as Grade I (death), Grade II (disability), and Grade III (impermanent injuries)). Cf. 2002 Regulation, *supra* note 72, art. 4. The 2018 Regulation replaces "Medical Accident" with "Medical Malpractice Dispute", but neither abolishes "Medical Accident" nor repeals the 2002 Regulation. See 2018 Regulation, art. 55 (providing that the administrative investigation and handling of Medical Accidents shall be conducted in accordance with the 2002 Regulation).

¹⁸² Draft Regulation, *supra* note 180, art. 61. Cf. 2002 Regulation, *supra* note 72, arts. 2, 31.

¹⁸³ See, e.g., Jiangsusheng Yiliao Jiufen Yufang yu Chuli Tiaoli (江苏省医疗纠纷预防与处理条例) [Regulation of Jiangsu Province on Preventing and Dealing with Medical Malpractice Disputes] (promulgated by the Standing Comm. People's Cong. Jiangsu Province, Mar. 30, 2017, effective July 1, 2017) art. 38, (jsrd.gov.cn) (China) available at http://www.jsrd.gov.cn/zyfb/sjfg/201704/t20170406_458148.shtml (authorizing the municipal Medical Association to conduct Medical Accident assessments and the provincial Medical Association to conduct re-assessments).

standard of care in the defendant doctor's specialty or area of practice. For example, although the Tort Law affirms the right of patients to informed consent,¹⁸⁴ followed by the SPC's recognition of the action for informed consent liability,¹⁸⁵ it is still the MAs' medical experts, not the People's Courts, that finally determine whether sufficient information has been given to a patient.¹⁸⁶ The dominance of the MAs' medical experts in setting the standard for disclosure has led to the reduction of the standard for disclosure of material information to equivalent the standard of care applicable to the treatment of patients. The limited role of courts may not help in broadening the scope of disclosure to include information relating to prognosis with or without treatment and provider's financial interests in treating a particular patient. Nor may it help patients to be allowed to access to the so-called "subjective medical records" such as physicians' clinical notes and consultation notes. The future evolution of the MMDR mechanism depends on subsequent changes in the position and functions of courts in China's political system.

V. CONCLUSION

The promotion of the rights of patients might be seen as a glacier process consisting of a series of changes;¹⁸⁷ these changes not only mirror but also stem from changes in the more extensive political, economic,

¹⁸⁴ The Tort Law requires health care professionals to disclose information relating to diagnoses, proposed treatments, risks, and alternatives. Medical records that shall be disclosed include admission logs, medical order sheets, test and pathology reports, operation and anesthesia records, pathological materials, nurse care records, and records of expenses. See Tort Law, *supra* note 154, arts. 55, 61.

¹⁸⁵ 2011 Regulation on Causes of Action, *supra* note 161. See also, e.g., Yuangao Chen Moumou, Xiao Moumou Su Beigao Wuxishi Renmin Yiyuan Qin Hai Huanzhe Zhiqing Tongyiquan Zeren Jiufen An (原告陈某某、萧某某诉被告无锡市人民医院侵害患者知情同意权责任纠纷案) [Chen v. People's Hospital of Wuxi Municipality—Informed Consent Action], Nan Minchuzi di 1358 Hao (南民初字第 1358 号) [Civil First Trial no. 1358] (Nanchang Dist. People's Ct. of Wuxi Mun. Dec. 20, 2012) (China) (the locality MA decided that the defendant hospital was negligent in not informing the plaintiff sufficiently of the patient's condition and alternative treatments); Yuangao Ming Xin, Peng Shanbo, Peng Yuyu Su Beigao Sangzhixian Fuyou Baojianyuan Qin Hai Huanzhe Zhiqing Tongyiquan Zeren Jiufen An (原告明鑫、彭汕波、彭昱煜诉被告桑植县妇幼保健院侵害患者知情同意权责任纠纷案) [Ming Xin v. Maternal and Child Health Hospital of Sangzhi County—Informed Consent Action], Sang Famin Sanchuzi di 19 Hao (桑法民三初字第 19 号) [Civil First Trial no. 19] (Sangzhi County People's Ct. of Hunan Province Sept. 5, 2013) (China) (the trial court dismissed the medical malpractice claim but held that the defendant hospital was liable for not informing the plaintiff of the risk of fetal malformation. This risk was imaged by the B-mode ultrasound and color Doppler ultrasound examination that the pregnant woman underwent at the hospital).

¹⁸⁶ Under the common law, by contrast, the court is the ultimate arbiter of the standard of care in regard to the giving of information by health care practitioners. See *Review of the Law of Negligence: Final Report*, *supra* note 99, at 3.37. See also I.G. COHEN ET AL., THE OXFORD HANDBOOK OF U.S. HEALTH LAW xxvii (2017) (two competing standards for determining the scope of disclosure: the professional or 'reasonable physician' standard and the patient-centered or 'reasonable patient' standard"). Cf. *Bolam* case, *supra* note 102; *F. v. R.*, *supra* note 103.

¹⁸⁷ GEORGE J. ANNAS, THE RIGHTS OF PATIENTS: THE AUTHORITATIVE ACLU GUIDE TO THE RIGHTS OF PATIENTS 2 (3rd ed. 2004) (describing the promotion of the right of patients in the United States as a glacial movement that has slowly but relentlessly changed the landscape of medical and health care: the idea that patients have rights was quixotic in the early 1970s, but it is no longer questioned today).

and social system.¹⁸⁸ This Article describes such a process, in which the MMDR mechanism has evolved from the administrative-led to the civil law-based dispute resolution system. Our analysis of the evolution of Chinese MMDR mechanism also reveals the interaction between law and society, in which the MMDR mechanism's response to social transformation has promoted the development from no compensation entitlement under the Maoist regime, to the lump-sum allowance under the 1987 Measure, to the enumeration of items of damages under the 2002 Regulation, and to the extension of the right of action for damages under the Tort Law.

Our analysis shows that the establishment of the administrative-led dispute resolution system in the 1950-60s was based on the Soviet-style political, economic and social system that prevailed at that time. After seizing power in 1949, the Chinese Communist regime abolished the legal system enforced by the Nationalist Government during its rule over the mainland of China in the period of 1925-1948. The inexperienced Communists, therefore, faced a tremendously heavy legislative burden, which resulted in the growing prevalence of government legislation and adjudication, domination of executive power over legislative and judiciary branches, and increases in administrative control over the society. In terms of the health care system, the nationalization of health services in the 1950s transformed all health facilities into state-owned and state-managed ones through which the government, on the one hand, entirely funded hospitals to provide free basic health care to all the so-called socialist labors who were employed by work units, and, on the other hand, directly managed hospitals and intervened in hospital affairs. The politicization of Medical Accident in the 1950-60s further legitimized the government control not only over adverse events but also over medical malpractice dispute resolution. The health authorities acted both as a regulator and as an arbiter, whereas the administrative-led MMDR system that operated during this period functioned more as a disciplinary mechanism for health care professionals than as a dispute resolution mechanism for claimant-patients.

The Chinese economic reform that began in 1978 eroded much of the infrastructure on which the administrative-led MMDR system had previously depended. The ideological reform shifted the government's political orientation from class struggle to economic development, which led to the de-politicization of adverse

¹⁸⁸ *Id.* at 11. (arguing that fundamental change in the doctor-patient relationship is possible “only after basic change occurs in our social structure.”)

events. Medical malpractice was, therefore, redefined in the context of the relationship, not between health authorities and medical institutions, but between health care providers and patients. The market-oriented economic reform disintegrated the Maoist work-unit based welfare system by making enterprises responsible for their profits and losses. Work-units could no longer afford to act as patriarchy to provide the injured with redress, provide the disabled with lifelong guaranteed employment, and provide the aged with welfare protection. The first round of health reform that took place in the 1985-2005 period significantly reconfigured the role of public hospitals, and reduced government financial support for health care. Along with the dramatic increase in patients' out-of-pocket spending, there was growing public concern over the quality of care. Pecuniary compensation became an unavoidable issue for the administrative-led MMDR mechanism.

Following the implementation of the 2002 Regulation, the MMDR mechanism altered its function to meet the social challenge of protecting the right to compensation. However, the administrative-led dispute resolution system designed to deter medical malpractice has been unable to provide a structural basis for achieving the new function. The most prominent controversy caused by the administrative-bureaucratic structure may be the affinity among local governments, assessment institutions, and public hospitals,¹⁸⁹ which led to the question of the authenticity of the assessment as well as the impartiality expected of the health authorities in the exercise of their role as an arbiter. The effort to reconcile the old structure with the expected new function also led to the inconsistency of the legal system in governing medical malpractice claims. The bifurcation between the administrative justice system and the civil justice system reflected the dilemma of legitimacy that the MMDR mechanism faced as it increasingly favored the compensatory objective of tort law. Fueled by the combined

¹⁸⁹ The first round of health reform implemented between 1985 and 2005 also led to a patron-client relationship in which local governments relied on the profits achieved from locality public hospitals to cover recurrent government expenditures. *See, e.g.*, Liao Huailing (廖怀凌), *Guangdong Mouxie Difang Zhengfu Jing Yao Yiyuan Fanbu* (广东某些地方政府竟要医院反哺) [*Local Governments Feed on Hospitals in Guangdong Province*], *Yangcheng Wanbao* (羊城晚报) [YANGCHENG EVENING NEWS], Jan. 4, 2006, at A1. *See also* Liao Xinbo (廖新波), *Lun "Yiyuan Fanbu Zhengfu Xianxiang"* (论“医院反哺政府现象”) [*A Comment on "Government's Feeding on Hospitals"*] SINA (Apr. 3, 2006), available at http://blog.sina.com.cn/s/blog_4940b3f60100035n.html (the author was Deputy Director General of the Health Department of Guangdong Province at the time the blog was posted). Chen Qihua (陈淇铨) et al., 5–10 *Nian Shixian Chengxiang Yiliao Jundeng* (5–10 年实现城乡医疗均等) [*To Achieve Health Care Equality between Urban and Rural Areas in Five to Ten Years*], *Xin Kuaibao* (新快报) [NEW EXPRESS], Feb. 15, 2009, at A6 (the president of a locality hospital said in the meeting of the People's Political Consultative Conference of Guangdong Province that the local government had borrowed three million Chinese Yuan from the hospital but never returned it). The second round of health system reform launched in 2009 pledged to reduce the patron-client relations through “removing politics from public affairs and separating regulation from operation.” *Directive on Deepening the Health System Reform*, *supra* note 17, and the *Priorities in Implementing the Reform*, *supra* note 17.

impetus of civil society and the development of the civil law system,¹⁹⁰ the Tort Law established the liability for medical injury to cover all medical malpractice claims, laying the legal groundwork for building a civil law-based MMDR mechanism.

The future evolution of the MMDR mechanism depends on the development of the following three relationships: (1) the balance among legislative, executive, and juridical powers; (2) the balance between the rights and obligations of health care professionals; and (3) the balance between the courts and administrative-led dispute resolution system. Strong institutional arrangements are required to ensure that the national legislature play “a leading role in legislation” as provided by the new amended Legislative Law,¹⁹¹ that the People’s Courts be the final authority in determining negligence and liability, and that medical liability insurance be expanded to cover staff members of public hospitals and individual practitioners. Our future researches will explore the development of a comprehensive multi-door assessment system in which the MAs assessment and the forensic assessment are available under a uniform rule. The system will be suggested to allow claimant-patients to apply for the assessment without government approval,¹⁹² to remove restrictions on the access to the mediation conducted by the health authorities, and to increase the role of court-based ADR in settling medical disputes.

¹⁹⁰ The NPC and its Standing Committee enacted a series of legislation that established the rights to compensation for infringement of their rights. *See, e.g.*, General Civil Law, *supra* note 35; Administrative Litigation Law, *supra* note 64; Law on the Protection of Consumer Rights and Interests, *supra* note 92; State Compensation Law, *supra* note 94.

¹⁹¹ *See* article 51 of the Legislative Law amended in 2015. Lifa Fa (立法法) [Legislative Law] (promulgated by the Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000, amended Mar. 15, 2015) art. 51, 2015 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 163 (China) (Article 7 provides that the NPC excises the legislative power to enact and amend the Basic Laws, and that its Standing Committee has the legislative power to enact and amend the Laws other than the Basic Laws).

¹⁹² Patients are not entitled to apply for the assessment unless through the locality health authority, police authority, or the locality People’s Court or People’s Procuratorate. *See, e.g.*, Zhonghua Yixuehui Zhangcheng (中华医学会章程) [The Charter of Chinese Medical Association] (approved by the Ministry of Civ. Aff., Nov. 14, 2016) art. 7(6), (cma.org.cn) (China), *available at* <http://www.cma.org.cn/col1102/index.html> (providing that the MA is entrusted by the government to conduct assessments for Medical Accidents). For a similar provision, *see* General Rules on the Procedures for Forensic Assessment, *supra* note 130, art. 11. In the *Huang* case, it was a locality police department that accepted the plaintiff’s application and, therefore, commissioned the locality MA to conduct a Medical Accident assessment. *Huang* case, *supra* note 1.

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