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Comparative Study on the Principles of Ascertaining the Subject of Responsibility for Medical Malpractice between China and America

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Abstract: *As to the identification of the subject of medical malpractice liability, China adopts the "China Model" of the Principle of Substitution Liability to safeguard the rights and interests of the patients as far as possible, but some American scholars in the study of Chinese "medical noisy" phenomenon put forward the "American model" of personal responsibility can alleviate doctor-patient disputes. However, the "American Model" is not applicable in China, but the principle of affirmative plea of comparative fault based on the "Chinese Model" provides a new way of thinking for the settlement of medical malpractice disputes in America.*
Keywords: *Medical Negligence; Subject of Liability; Comparison between China and America*

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1. Overview of the identification of the main body responsible for medical malpractice in China and the United States

Medical malpractice refers to an accident in which the patient's body is damaged due to medical negligence by medical institutions and their medical staff. When an accident occurs, the identification of the responsible party becomes an issue closely related to the protection of the rights and interests of patients. In China, according to the "Civil Code" Tort Liability Regulations, medical institutions bear the responsibility for damages caused by medical accidents, and doctors are not personally liable for external parties; while in the United States, on the contrary, the focus of accountability is often the direct provision of medical services. Of doctors, whether the medical institution bears joint and several liability is a secondary consideration. Such differences in the identification of responsible subjects mostly come from the differences in the operating modes of medical institutions between countries and the huge cultural differences. Of course, the different operating modes of medical institutions are also a manifestation of cultural differences. [1]

As far as the status quo of hospital operations in China is concerned, although the government has encouraged the society to run medical services in recent years, the number of private hospitals has surpassed that of public hospitals, but in fact the main health care function is still public hospitals, and people tend to believe in the medical services of public hospitals. More comprehensive, professional and efficient. The nature of public hospitals is a typical embodiment of socialism with Chinese characteristics, that is, public institutions. The relationship between doctors and hospitals is administrative and personnel relations, and personnel management such as the appointment, resignation, and salary of doctors are all under the absolute control of the health administration department or the hospital. [2]

The United States is one of the countries with the largest private hospitals in the world. As of 2020, the number of private hospitals accounted for 81% of the total number of hospitals in the United States, and the coverage of medical services provided by people accounted for more than 60% of the population of the United States. [3] At present, the largest hospitals in the United States with the best facilities and the highest medical standards are non-profit private hospitals. From the management point of view, the employees of private hospitals in the United States, except for physicians, are employed under the contract management system. Physicians are freelancers. Compared with contract employees, they are independent contractors. They do not belong to any hospital, but they can obtain the "right to use employee resources" from different hospitals to engage in multi-point practice. Regarding the "right to use employee resources", it is for the hospital to give a doctor the right to use his own hospital's medical resources, not the right to practice medicine, nor the qualification of a practicing physician.

It can be seen from the above that whether the relationship between doctors and hospitals under different operating modes is close may become a factor in the identification of the responsible subject. However, it should be pointed out that the tort liability in my country's Civil Code is divided between medical institutions and medical personnel, between employers and workers. The choice of medical institutions and employers as the final body of responsibility is mainly based on the ability to compensate. The consideration is to protect the infringee’s right to claim damages as much as possible. In the United States, doctors and other medical staff will

purchase special medical malpractice insurance. After a medical malpractice occurs, the insurance company will be responsible for the damages to the victim. This does not require medical institutions to pay for the doctor's medical negligence. [4]

2. Discussion on the possibility of the "American model" being applied in China

(1) The "American model" is difficult to alleviate medical disputes in China

As mentioned above, the main body responsible for medical malpractice in China adopts the principle of substitution liability, and the medical institution bears the tort liability; the main body responsible for medical malpractice in the United States is the individual providing medical services, but now it has also begun to propose the principle of affirmative defense of comparative fault to encourage individuals to disclose medical institutions His negligence made him bear the corresponding tort liability. [5] It can be seen that the comparative fault affirmative defense principle is consistent with the value pursued by our country's determination principle. Both protect the rights and interests of patients as much as possible while strengthening the management and service level of medical institutions. Then the principle of identification of the subject of liability for medical malpractice in the United States is right As far as our country is concerned, whether there is learning and reference can be further explored. Regarding the applicability evaluation criteria, some scholars believe that the principle of qualified liability determination should be helpful to the settlement of doctor-patient disputes, because doctor-patient disputes are often a follow-up response to the unresolved medical malpractice disputes.

In recent years, China's rule of law has achieved remarkable results. The Tort Liability Law and the Regulations on the Handling of Medical Malpractices have also been promulgated to regulate medical malpractice, which has played a legal role in guiding the settlement of medical malpractice disputes. However, according to news reports, we can clearly understand that doctor-patient disputes have intensified in recent years, and "medical troubles" have become more frequent. Doctors and nurses are often physically assaulted by victims and their families, and the injuries caused by them are often serious and sometimes fatal. According to statistics, between 2016 and 2018, at least 7,816 people in China were prosecuted for "intentionally harming medical staff or inciting hospital crowds". [6]

When studying the phenomenon of "medical troubles" in China, American scholars took the lead in proposing the application of the "American model" to alleviate doctor-patient disputes. American scholars believe that the main reason for the prevalence of "medical trouble" is the substitute responsibility of hospitals. When doctors do not take personal responsibility for their medical negligence, they will not increase their duty of care in the course of practicing. The reason why medical troubles are rare in the United States is that doctors listen to the needs of patients as much as possible to avoid liability risks, actively communicate with them, and determine reasonable expectations. Therefore, the prescribed personal responsibilities of doctors will facilitate the settlement of doctor-patient disputes. [7]

Regarding the scholar's point of view, the author believes that what he proposed is a successful plan, but it is not entirely applicable to the current China. The reasons for the acute contradiction between doctors and patients in China are as follows:

(1) The patient's distrust of the doctor. Hospitals are public institutions in our country and belong to welfare institutions. However, in recent years, with the introduction of hospital market-oriented operation incentive policies, some doctors have adopted excessive medical treatment for patients in order to increase income, which has led to great distrust of patients with doctors and hospitals. This lack of trust has become a kind of General social attitudes. When a medical accident occurs, patients and their families will question whether the doctor's medical decision-making is profit-oriented and whether they have received the most effective treatment.

(2) Lack of communication between doctors and patients. In the doctor-patient relationship, doctors are always in a professional position, and most patients lack medical knowledge. Doctors often do not listen carefully to the opinions and needs of patients in the process of making medical decisions, and patients tend to believe what doctors make Medical decision-making. As a result, after receiving medical services, patients become dissatisfied with the medical effects and believe that their trust and interests have been cheated. In fact, this is due to the lack of effective communication, leading to differences in the expected efficacy of the two. [8]

(3) Excessive reactions of patients and their families. Some "medical troubles" cases eventually turned into "killing doctors" tragedies. In fact, it is not a problem of medical malpractice at all. There is even no fault in the treatment behavior, but the patient himself extremely does not approve the treatment result or the patient's family cannot accept the patient's death , Out of an irrational state of mind and make hurtful behavior. For example, in the Wenling murder case, the defendant always believed that he had fraudulently acted in the process of seeking a doctor.

Based on the above reasons, stipulating the personal responsibilities of doctors can help strengthen the communication between doctors and patients, but it cannot completely resolve the contradictions between doctors and patients. On the contrary, this may be due to the inability of the doctor to pay the compensation and

the patient's inadequate compensation, and the patient and his family's responsibility to the doctor, making the doctor's safety even more unprotected, because the patient does not care who bears the responsibility. It is concerned with who has made medical decisions that it considers unfavorable.

(2) The interpretive basis of the substitute responsibility of Chinese medical institutions

The "American model" is difficult to apply in China. Generally speaking, it is not rooted in China's national conditions. Although American scholars have criticized the principle of substitution responsibility of Chinese medical institutions, and believe that it is an important cause of insufficient responsibility for doctors and tension between doctors and patients, in fact, we can see that the "American model" is not conducive to the settlement of medical disputes in China. , Because the identification of the responsible subject has no direct relationship with the intensification of medical disputes. The reason why the replacement liability of medical institutions has become the legal principle of tort liability is based on its interpretation theory.

As mentioned in the first part, the relationship between Chinese doctors and hospitals is administrative and personnel relations. Under the administrative personnel relationship, the hospital is responsible for the management of doctors. Doctors obtain salary by completing the outpatient work arranged by the hospital, and the salary is relatively fixed, which has nothing to do with the number of medical services provided. From the perspective of patients, most patients go to a hospital to receive medical services because of the hospital's reputation and professional capabilities, rather than a specific doctor, and the other party to the medical service contract with the patient is the hospital, not for A doctor who provides medical services. It can be seen from this that the personnel relationship between doctors and hospitals in China is more like an employment relationship, and doctors provide medical services to patients who have signed contracts with the hospital on behalf of the hospital. Under this kind of representative relationship, the doctor's wrongful medical behavior will cause adverse consequences to the patient. Of course, the representative hospital bears the responsibility, because the hospital is the party to the medical service contract. Obviously, on the basis of this explanation, it is reasonable for the hospital to assume substitute responsibility.

The relationship between American doctors and hospitals is an independent contractual relationship, which is more similar to a collaborative relationship. [9] Most American doctors have their own private clinics, and they also sign contracts with many hospitals to obtain the right to use the resources of these hospitals. When their own clinics cannot solve certain major diseases, they can recommend patients to these clinics. Hospitals with more complete and professional medical equipment receive medical services. Moreover, it is not hospitals that manage doctors, but industry associations. From a patient's perspective, they will choose to make an appointment with a doctor or a clinic to obtain medical services, and if necessary, go to a hospital for further diagnosis and treatment under the doctor's recommendation. Doctors directly communicate with patients in the process of seeking medical services and play an important role. It is not difficult to understand why the United States' principle of determining the subject of responsibility selects doctors to assume "personal responsibility".

(3) Summary

After the replacement responsibility of medical institutions proposed in light of China's national conditions is implemented in laws and regulations, it has greatly promoted the settlement of medical malpractice disputes and achieved its proposed values and goals. The intensification of doctor-patient disputes comes more from social factors, and the law cannot be directly adjusted. It can only indirectly avoid the phenomenon of "medical trouble" and even the tragedy of "killing doctors" by strengthening the quality and communication skills of medical staff. In addition, in the comparison of the Chinese and American models, the "American model" is temporarily not conducive to alleviating the current medical disputes in China. On the contrary, the "Chinese model" has been recognized by some American scholars, who have explored a comparison based on their research. The principle of fault affirmation and defense is to strengthen the responsibility of medical institutions, not only the personal responsibility of doctors. The following section will give a detailed introduction.

3. Discussion on the affirmative defense of American comparative fault

The comparative fault affirmation defense of a medical malpractice refers to a defense system in which the individual who is held responsible for the medical malpractice can reduce his own liability by specifying that the medical institution or other third party is also at fault for the occurrence of the medical malpractice. Comparative fault is a commonly used legal term in Anglo-American law countries. It has evolved from "contributing to fault", but it only compares the faults among multiple possible infringers. [10]

(1) The necessity of applying comparative fault affirmation defense

Although the United States has a perfect individual accountability mechanism after the occurrence of medical malpractice, some research institutions have shown that the personal responsibility of medical staff is not conducive to improving the level of medical services and avoiding the risk of medical malpractice, because

a considerable part of the medical malpractice is caused by the entire medical institution. Internal operation problems, without strengthening the investigation of medical institutions, these problems will be difficult to detect, and the safety guarantee for patients will also be difficult to implement. In addition, it is difficult for patients to find systemic problems in such medical institutions, because they directly have a doctor-patient relationship with medical staff. Even if they understand the negligence of medical institutions, they cannot find sufficient evidence to support their prosecution. This requires individuals who are held accountable for medical malpractice to take advantage of their convenient conditions for serving in medical institutions to actively identify medical institutions responsible for faults, so as to reduce their fault responsibilities and expose systemic problems within medical institutions. [11]

The clearer principle of medical institution liability was proposed in the case of Darling v. Charleston Community Memorial Hospital by the Supreme Court of Illinois. The court that heard the case stated that the hospital should be directly responsible for the patient's care, and the corporate negligence principle was born. . [12] The scope of application of this principle is generally limited to behaviors involving administrative or management decisions, not decisions involving medical behaviors. The courts and legislatures of various countries have explained the scope of application of the principle to varying degrees, and concluded that the main contents of the principle include selecting and retaining qualified doctors, configuring appropriate facilities and equipment, training and supervising employees, and implementing appropriate procedures, etc. [13]

Although these contents do not directly determine what kind of medical services the patient receives, because the core is the management and supervision of medical staff, it actually affects the main body that makes medical decisions. For example, the doctor who visits does not meet the conditions for practicing medicine. The health effects of patients are more obvious, because medical accidents are not just cases at this time. If the individual found to be responsible can prove that the medical institution has the above-mentioned negligence, then the designated medical institution will share the responsibility for the corresponding malpractice.

At the same time, it can be seen from the above that the content of the adjustment of the corporate negligence principle is mainly the operation and management of medical institutions, which has a strong system and organization. In general, this level of negligence lacks access to patients, and only individual medical personnel who are the subject of management can provide evidence to ensure that medical institutions' infringements are investigated.

(2) Obstacles to the application of affirmative defense of comparative fault

At present, the application of the comparative fault affirmation defense faces both practical and theoretical obstacles, but the reasons for this obstacle are mostly caused by the incompatibility of the existing legal system, but it can also be resolved through legislation and judicial precedents.

1. Difficulties in practice

The first difficulty in practice is the statute of limitations. After the individual responsible for medical malpractice specifies the fault of the medical institution, based on the procedural provisions of the civil litigation, the medical institution will eventually be held liable, and the plaintiff needs to be added as the defendant. Under normal circumstances, the plaintiff will not directly sue the medical institution, because the plaintiff is not capable of obtaining evidence of the negligence of the medical institution, and there is a greater risk of losing the case. Therefore, the plaintiff needs to wait for the individual defendant to specify the responsibility of the medical institution, but it is very likely that the statute of limitations of the new party will be added after the individual defendant has specified it. The current legislation does not solve this problem. In order to avoid the possible inadequate compensation, the plaintiff still needs to bear a certain risk of losing the case and list the medical institution as a co-defendant at the time of the initial prosecution.

The second difficulty in practice is the confidentiality of peer review regulations. The task of peer review regulations is to conduct a rigorous analysis of adverse medical events to avoid medical malpractice lawsuits. The existing peer review regulations require protection of the information obtained by the review committee and research discussions to avoid leakage of patient privacy, but at the same time, some evidence of hospital negligence discovered in the process has also been included in the scope of confidentiality, and the victimized patients have not Channels to obtain these evidence. [14]

In addition, employment and insurance issues have become an obstacle to the affirmative defense of individual defendants. According to the operating model of private hospitals in the United States, doctors often act as independent contractors to establish personnel relationships with hospitals, which are different from the general contractual appointment relationship. When a doctor becomes an individual defendant, he is not inclined to make an affirmative defense that appears to be "selling", because this may have negative consequences for his subsequent employment. Especially when the medical institution also buys insurance for medical malpractice,

the insurance company needs to appoint defense lawyers for both at the same time, and the internal conflicts will become more acute. [15]

2. Theoretical complexity

First of all, causality is a constituent element of traditional tort liability, especially when there may be more than two wrongful acts or more than two responsible parties, there is a causal relationship between whose behavior and the damage result, which is often the dispute between the parties and the court. The focus of the trial. In a medical malpractice tort case, if the medical institution can prove that the consequences of the individual defendant's negligent behavior have replaced the consequences of his negligent behavior, the causal relationship caused by his behavior will be interrupted. Therefore, when the individual defendant indicates the negligence liability of the medical institution to the court, then whether there is a causal relationship between the negligence of the medical institution and the patient's damage consequences becomes a difficult problem for the parties and the court.

Secondly, according to the theory of joint and several liability, the tortfeasors who bear joint and several liability independently bear all the liability for compensation externally, and then seek compensation internally. This means that the individual defendant still needs to bear full compensation liability to the patient under certain circumstances, which is obviously disadvantageous for the individual defendant. [16]

(3) Summary

When personal medical service providers step onto the dock and become individual defendants, they should encourage the application of comparative fault affirmation defenses and guide them to expose the faulty behavior of medical institutions in the operation process. The systematic negligence of such institutions leads to the occurrence of medical accidents. What the patient himself cannot know, and if no one specifies it, the continued occurrence of medical accidents is inevitable. Of course, there are still certain difficulties in the application of the affirmative defense of comparative fault, but it is clear that the legislative and judicial fields are not negative towards it, and it has a positive effect on the supervision of systemic errors in medical institutions and the protection of patients' rights and interests.

Conclusion

Although there are big differences in the identification principles of the subjects responsible for medical malpractice between China and the United States, this difference is caused by the economic, social and cultural differences between the two. Both are rooted in the actual conditions of the country and are reasonable. At the same time, we can realize that the intensification of medical disputes in China is largely irrelevant to the determination of tort liability, and a diversified resolution mechanism should be sought for its mitigation. In the comparison between China and the United States, the United States has also begun to clarify the necessary fault responsibilities of medical institutions and proposed the principle of affirmative defense of comparative faults. This emerging principle is different from the previous principle of personal responsibility of doctors in the United States, although it still regards doctors as the primary subject of responsibility. But began to advocate for doctors as individual defendants to actively disclose systematic and organizational faults in the hospital's operations, pointing out that such faults also have a causal relationship with the occurrence of medical accidents. This principle aims to strengthen the supervision of the operation of medical institutions and ensure that all infringers are held accountable, so as to effectively protect the legitimate rights and interests of victims of medical malpractice.

NOTES:

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[5]. [9] *See* Natasha Boyadzieva, *The False Claims Act and the Escobar Decision: What Is on the Horizon for the Healthcare Industry*, 16 IND. HEALTH L. REV. 1 (2018).

[6]. The Work Report of the Supreme People's Procuratorate in 2018: Since 2016, a total of 7,816 people has been prosecuted for crimes such as deliberately hurting medical staff and gathering crowds in hospitals. The prosecutors in Tianjin, Jiangsu, Heilongjiang and other places have arrested and prosecuted Su Yingming, Zhao Liansheng, Qi Hongsheng, etc. Violent injuries and medical cases.

[7]. *See* Vincent R. Johnson, *The Importance of Doctor Liability in Medical Malpractice Law: China versus the United States*, 10 St. MARY's J. on LEGAL MALPRACTICE & Ethics 2 (2019).

[8]. *See* Hu Nan. *Research on the current situation, causes and countermeasures of medical disputes in the new era* [J]. Chinese Health Standard Management, 2020, 11(21): 20-21.

[9]. *See* Dong Chunhua. On the application of comparative fault system in intentional tort[J]. Modern Law Science, 2017, 39(06): 61. [11] *See* Kohn L T, Corrigan J M, Donaldson M S. Institute of Medicine, *To err is human: building a safer health system*[J]. Annales Francaises D Anesthesie Et De Reanimation, 2000, 7(Dec):245-246.
[10]. *See* Wiet M J., *Darling v. Charleston Community Memorial Hospital and Its Legacy*[J]. Annals, 2005(2):399.
[11]. *See* KA Kearney, EL Mccord. *Hospital Management Faces New Liabilities*[J]. Health Law.
[12]. *See* Mt. Diablo Hosp. Med. Ctr. v. Super. Ct., 204 Cal. Rptr. 626 (Ct. App. 1984); *also See* Brown v. Super. Ct., 214 Cal. Rptr. 266 (Ct. App. 1985).
[13]. *See* Brown v. Peninsula Hosp. Ctr., 407 N.Y.S.2d 586, 587 (App. Div. 1978).
[14]. *See* Keith A. Braswell et al., 18A MICH. Cry. JUR. NEGLIGENCE § 112 (2018).

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