

# 2023 Insurance Sector Webinar Programme

## Medical Malpractice

29 November 2023

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# Your speakers today



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# What we will cover

**01** Recent medical malpractice legal developments

**02** Medical malpractice claims trends

**03** Likely upcoming medical malpractice developments / changes in the market

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# Recent medical malpractice legal developments

# (1) Recent medical malpractice legal developments

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## UK

- McCulloch v Forth Valley Health Board [2023] USC 26 – Supreme Court held that whether a treatment is a reasonable alternative is to be determined by Bolam (the professional practice test). Obligation to discuss with patient all treatments which are “clinically appropriate”.
- Fixed Recoverable Costs (“FRC”) for Lower Value Clinical Negligence Claims – Claimants’ costs for claims with a value of £1,501 - £25,000 in England and Wales will be fixed and there will be a new streamlined process. Proposed implementation: April 2024.

# (1) Recent medical malpractice legal developments

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## France

- Case law: Civ. 1re, 14 dec. 2022, n° 21-22.037: recent illustration of the differential on the standard of liability between public and private hospitals.
- While proof by the victim of the defectiveness of the health product used will be sufficient to engage the liability of the public hospital service, the victim in the private sector will have to prove the existence of fault on the part of the establishment or private health professional, independently of the use of a health product.

# (1) Recent medical malpractice legal developments

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## Italy

- Brief overview of the Gelli-Bianco law which changed the regulation of healthcare liability
- Constitutional Court: insurance obligations of hospitals and doctors under Gelli-Bianco law
  - hospitals have to take out insurance policy to cover their own liability and that of doctors;
  - doctors (except for freelancers) are only obliged to take out a policy covering gross negligence.
- Judgment (Court of Ragusa): inadmissibility of public healthcare centre request for compensation against doctors
- Judgment (Court of Milan): nullity of indemnity agreement between hospitals and doctors
- Judgment (Court of Belluno): jurisdiction of accounting court in case of claims from public hospitals against doctors
- Supreme Court decision: liability must be shared equally between hospital and doctor except if serious inexcusability, totally unforeseeable and objectively improbable deviation by the doctor from shared programme of health protection.

# (1) Recent medical malpractice legal developments

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## Spain

- Judgment (23.11.22), Court of Appeals of Madrid: prison sentence for doctor for failure to carry out cranial CT and noting the patient fell 2 days prior. First judgment imposing criminal conviction for medical malpractice / breach of Lex Artis obligations.
- Judgment (25.01.23): First Instance Court No 71 of Madrid: EUR 6.5m compensation following medical malpractice during labour. Highest med mal compensation in Spain.
- Judgment (20.11.23), Malaga Court of Appeals: health insurer condemned for 6-day delay in granting patient authorisation for implantation of a stent, which prevented recovery so he died a few days later.
- Judgment (23.11.23), Contentious-Administrative Court of Santander: public health system and insurer to pay EUR 30,000 compensation for delay in colonoscopy



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## Medical malpractice claims trends

## (2) Medical malpractice claims trends

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### UK

- Claims inflation (e.g. care costs, general damages (pain, suffering, loss of amenity), housing)
- Criminal charges and custodial sentences following findings of fundamental dishonesty
- Vicarious liability and inclusion of multiple Defendants
- Increased use of ADR and settlements pre-action

## (2) Medical malpractice claims trends

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### France

- 2022 claims data
  - 1,2% claims are for medical malpractice
  - Same few practices with highest claims rates for surgeons: neurosurgery (70%), vascular (70%), orthopaedic (40%)
  - Amicable claims (40%), Medical Conciliation Board (CCI) claims (35%), civil claims (20%)
  - Civil claims: liability in 70% of cases
  - Criminal cases remain marginal, save for a few high profile matters
- Medical Conciliation Board (CCI)
  - Continues to be more protective of medical practitioner compared with civil courts (25% malpractice rate v 70% rate in civil courts)
  - Note: most decisions relate to lack of jurisdiction

## (2) Medical malpractice claims trends

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### Italy

- Injured parties promoting preliminary technical assessment proceedings (“ATP”) both against hospitals and doctors
- Judges authorize doctors to sue the Insurers even if there is no claim under the policy for gross negligence
- Private hospitals charge part of the compensation to doctors/insurers, whereas public hospitals usually pay the compensation and report the doctor to the Public Prosecutor of the accounting court

## (2) Medical malpractice claims trends

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### Spain

- Supreme Court stable in case law condemning private health insurers for med mal by doctors included in the health policy
- New claims arising from telemedicine
- Higher claims in public health compared to private health
- 2022: 13,611 med mal claims. 455 claims more than 2021 (71 more deaths)
- Article 20, Spanish Insurance Contract Law: insurers liability for interest

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Likely upcoming medical  
malpractice developments /  
changes in the market

### (3) Likely upcoming medical malpractice developments / changes in the market

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#### UK

- Supreme Court decision awaited on secondary victim claims (*Paul and another v Royal NHS Trust*)
- A Wolverhamptonrtificial intelligence in healthcare
- Licensing regime for non-surgical cosmetic treatments
- Personal injury discount rate for future losses
- Greater use of private healthcare (NHS backlogs and generally)
- Covid claims issued against government and care homes

### (3) Likely upcoming medical malpractice developments / changes in the market

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#### France

- The “Rist” law n° 2023-379: medical acts can be performed by non-physicians (e.g. licensed nurses, pharmacy technicians). Impact on claims? Impact on premiums?
- Possible Bill on assisted suicide/euthanasia.
  - Increase in medical malpractice claims?
  - Will practitioners continue to dismiss patient’s wishes in cases of emergency?

### (3) Likely upcoming medical malpractice developments / changes in the market

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#### Italy

- Gelli law not being fully implemented.
- Expecting ministerial decrees required by Gelli-White law to be issued: parties can directly bring legal action against insurers of hospitals & freelance doctors.
- Expecting publication of Single National Table (Art 138, Insurance Code): more certain assessment of serious damage due to medical liability.

### (3) Likely upcoming medical malpractice developments / changes in the market

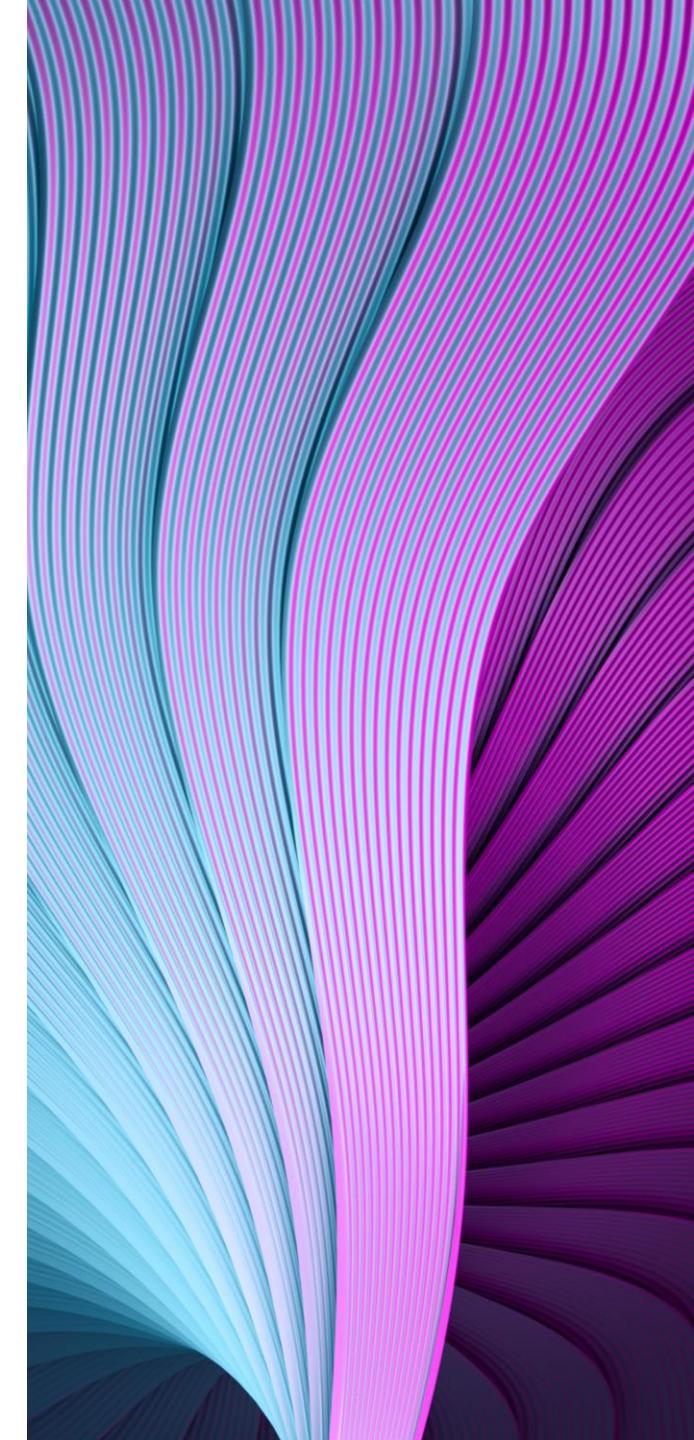
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#### Spain

- Publication of table for medical malpractice economic compensation.
- Aesthetic surgery laws: common criteria to be established for health centres to comply with certain regulations (e.g. qualifications, patient information).

# Questions?

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