Traditionally in Europe, in medical malpractice matter like elsewhere, liability has been based basically on fault and reckless behavior and/or contract. But during the last decades strict liabilities based on the ideas of risk, solidarity and human rights have been developing.

The first steps were in the fields of workers and consumers’ compensation. It expended to wider fields. France has been often an initiator in this matter (see compensation of road accidents, injured victims, pedestrians, cyclists and passengers). This trend affects now the medical and sanitary risks compensating process in several European countries, the liability based on fault remains nevertheless, the basic ground.

In the nineties, the European actors in this field acknowledged some failure of this traditional perception of medical malpractice matters. Victims were complaining that the concepts themselves were unclear: where is the border between medical fault and error? “State of art” is always moving! Etc. The causality link is always difficult to prove since medicine is not an exact science. The proceedings and especially the expertise are highly costly.

Professionals feared more and more proceedings and that induced them to protect themselves with a “defensive” medical practice, duplicating expensive investigations and treatments. They had to support more and more expensive insurance premiums. For the insurers the risk was not easy to assess. They complained about the costs of the proceedings also. The Courts trend to favor compensation when insurers are involved was, and still is, a reality.

As a consequence of such analyze, in 2002 France voted what we call the “KOUCHNER” law from the name of the Minister in charge. The main chapters of that
legislation are significant: Solidarity, Patients rights, Health system quality and Compensation for the consequences of sanitary risks. I will try to recap briefly the steps of the proceedings with regard to this last chapter.

At the very beginning the “users” or let’s say “customers” do have a right of information from healthcare providers who must provide them with the requested information within 15 days. The patient can then choose between proceeding before civil or criminal Courts in the traditional way (liability based on fault and reckless behavior) or introduce their case before a “Regional Commission for Conciliation and Compensation”. Such request suspends the traditional proceedings.

Let’s see the role of that Commission. Its first task is to assess the importance of the problem and determine whether the victim is severely affected with permanent partial disability equal or superior to 25%, or suffered a temporary total disability lasting at least six consecutive months or six months of a twelve months period or suffers a medical unemployability, or otherwise severe troubles in living conditions. One of the above requirements being fulfilled, the Commission will organize a medical assessment without any cost for the claimant. After that step, but within six months the Commission has to decide on circumstances and damage. If the Commission considers that the case is related to a fault, they will transfer the file to the care provider’s insurer. Otherwise, without fault a National Fund will compensate on the basis of the national solidarity.

If the file is sent to an insurer because the Commission identified a fault, this carrier must offer compensation within four months. Of course, the case will be settled if the insurer’s offer is accepted. But if the insurer’s offer is not satisfactory, the file is deferred to the Court for decision on the amount to be paid and, more, a possible 15% penalty.

No offer being proposed by the insurer or no insurer being found, the Fund indemnifies and recourses for the paid amount plus a 15% penalty against the insurer or the liable person or the organization.
The first Belgian attempt to organize a new system based on solidarity was even stricter: I’m talking about the Belgian 2007 May 15th law deciding that no claim based on fault could anymore be submitted to the Courts, with very few exceptions like voluntary damages.

The three other main components of this process were the compulsory insurance for every healthcare provider, the compensation for medical accidents and contingencies and the creation of a Healthcare Accidents Fund to control. Researching that law swiftly since it has never been implemented certainly because in fact a full social security system too “revolutionary” and heavily expensive. In fact the traditional fault based system remains solely effective despite a second Belgian attempt in 2010. A new law has been once more voted by the Parliament but not yet implemented likely for financial reasons.

The New Belgian 2010 Law organizes a Healthcare Accidents Fund with the triple more realistic missions: compensating the severe health care contingencies, intervening as mediator between claimant and insurer and compensating as substitute with recourse against the failing insurer. That law organizes proceedings close to the KOUCHNER law system.

The first step is a Fund’s preliminary advice on liability or risk contingency and the damages measure. The Fund can require all the necessary information, with possible daily penalty for delay in providing the information. It organizes expertise. Within six months it will take a decision whether this is a liability case or not. In a liability case, the Fund invites the insurer to propose compensation in the next three months. Otherwise, no liability or insufficient insurance coverage, within the next three months the Fund offers compensation to the victim. Of course, the new Belgian 2010 Law organizes recourses beside the settlements. So if the insurer does not present any offer or if the offer from the insurer is not acceptable according to the Fund, it will indemnify itself and recourse against the insurer, claiming not only its expenses but a 15% penalty as well. I remind you that Belgians are still waiting for the necessary decrees to implement this new system.
In Spain, besides the traditional liability based on fault, the sanitary risk can be compensated by a public body which can be claimed from the public administration for any defective sanitary services provided by public hospitals. It is a principle of Spanish law that the public administration must be accountable for any of its actions or omissions that cause damage (article 106.2, Spanish Constitution). This compensation can be claimed by the victim through courts specialized in administrative law matters. Please note that this compensation is in lieu of the one the victim could claim based on the general civil law. A salient point is, the liability is strict, i.e., not based on fault, since the relevant issue is not the unlawfulness of the action or omission of the Administration but the unlawfulness of the damaging result (Decision of the Supreme Court of January 24, 2007 - RJ\2007\325). Of course, there must be a cause-effect relationship between the functioning of the administration and the harmful result, absence of force majeure and the claimant must not have the legal duty to bear the damage caused by his own conduct.

In The Netherlands, and generally speaking in the German speaking countries, claims regarding malpractice are based on tort or on the contractual liability. As to this, Book 7 Title 7 of the Dutch Civil Code holds provisions regarding an agreement between a patient and a medical practitioner. It orders a medical practitioner to take good care of its patients and in general states that medical practitioners have to inform patients about their practice in general and medical assistance to be rendered to the patient. The provisions do not render specific grounds for indemnification and/or sums to be recovered. Patients who claim damages regarding malpractice have to base their claim on tort or contractual liability and have to prove that the damages are caused by the malpractice. The provisions are helpful to the patient to render evidence regarding the agreement because medical practitioners are obligated to keep their files and to confirm their advices in writing.

[Statements for Spain and The Netherlands were with the assistance of Jorge Angel Esq., of Madrid and Arnold Stendhal Esq. of Rotterdam.]