

# THE HISTORY OF MEDICAL LIABILITY: WHERE DID IT COME FROM, AND WHERE IS IT HEADING?

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**IFSO – 2023**

**\*No Conflicts of Interest**

# MEDICAL LIABILITY

**Medical liability originates in law.**

**Law is based on the laws of communities, religions, nations, empires.**

**Unwritten laws, tribal customs, over time cannot be scrutinized objectively.**

**Written laws can be examined for historical context and current relevance.**

# MEDICAL LIABILITY

## **Criminal Liability:**

Initiated by federal, state, local law enforcement; conviction subject to monetary fine and/or incarceration, loss of citizen rights.

## **Civil Liability:**

A tort initiated by any citizen subject to rules of court acceptance; conviction subject to monetary fine.

**Historically, corporal punishment could be, and often was, ordered on conviction for criminal and civil liability.**

**Today, most medical liability suits start out as torts but can be converted to criminal.**

# ANCIENT MEDICAL LIABILITY HISTORY



## 2100BC: Law of Ur-Nammu of the Sumerian Kingdom of Ur

**\*Rule 13:** If a man is accused of sorcery, he must undergo ordeal by water; if he is proven innocent (sinks), his accuser must pay him three shekels.

## 1994BC: Law of Lipid-Ishear of Isin

A Sumerian addendum to the Law of Ur-Nammu: no medical references.



# ANCIENT MEDICAL LIABILITY HISTORY



## 1794BC: Law of Hammurabi

282 Laws of which nine (215-223) pertain to medical malpractice.

**\*Rule 218:** If a physician performs an operation and kills someone or cuts out his eye, the doctor's hands shall be cut off.

**There was no trial; no presumption of innocence.**

# ANCIENT MEDICAL LIABILITY HISTORY

## 2700<sub>BC</sub> onward: Cumulative Egyptian Hieroglyphics

Physicians only liable for adverse outcome if their therapy was contrary to standard practice, which was prescribed by the royal physician priesthood.

## 1500<sub>BC</sub>: Indian Laws of Punishment

Various misadventures punished by specific various harsh remedies, but modified by caste system



# ANCIENT MEDICAL LIABILITY HISTORY



## 1200BC – 195BC: Law of Moses (Old Testament Bible)

There is no admonition against a tort for medical negligence or harm, but no specific reference thereto.

## 283BC – 476AD: Roman Lex Aquila:

The model for many Western laws; no specific liabilities for medical negligence. Clearly distinguished between “wilful harm” and “negligence.”



# ANCIENT MEDICAL LIABILITY HISTORY



## **515 – 476BC: Chinese Confucianism Precepts**

A doctor must follow the “Tau,” the right way, otherwise they cannot be doctors for others.

## **1206 – 1227AD: Reign of Genghis Khan**

Transgressions against “right doing” (“The Tau”) were prosecuted by trial; if the defendant was found guilty of a crime, any crime (e.g., stealing a horse, etc.), they were a “wrongdoer,” for which there was only one punishment – death.





# MEDICAL LIABILITY IN GERMANY

## 1532: Reign of Charles V:

*Umkunst* term introduced for medical misconduct. In the Carolina Code strict and specific rules for torts to distinguish not meeting medical standards from carelessness and neglect.

## 1811: Louise Thiele Plaintiff vs. Ernst Horn for a patient death, opposed by fellow physician, Heinrich Kohlrausch:

The civil tort was converted to a criminal case. Horn was acquitted.



# MEDICAL LIABILITY IN NAZI GERMANY

## 1932-1945:

German doctors violated all precepts of malpractice, liability, and decency. This period and these doctors brought eternal shame and infamy on the 5,000 year history of the medical profession.

The Nuremberg Trials prosecuted 23 leading German physicians

16 were found guilty

7 sentenced to death.



# MEDICAL LIABILITY IN JAPAN WORLD WAR II

**1937-1945:** Japanese Unit #731, Harbin, Manchuria, China:

Japanese doctors experimented on prisoners of war and civilians, inoculating them with diseases, as well as studying rape induced pregnancy by vivisection. Again these violations of medical liability brought eternal shame and infamy on the medical profession.

General Douglas MacArthur pardoned the Japanese doctors of Unit #731 in exchange for their derived data.



# MEDICAL LIABILITY IN THE UNITED KINGDOM

## 1767: Slater vs. Baker and Stapleton:

Established rule of medical expert witnesses for medical liability suits under contractual law.



## 1932: Donahue vs. Stevenson:

Decided by the House of Laws for Plaintiff Donahue, who filed a tort against the purveyors of a bottle of ginger beer that contained a decomposed snail. The verdict established the principle of torts for harm apart from contractual relationships.



# MEDICAL LIABILITY IN THE UNITED KINGDOM

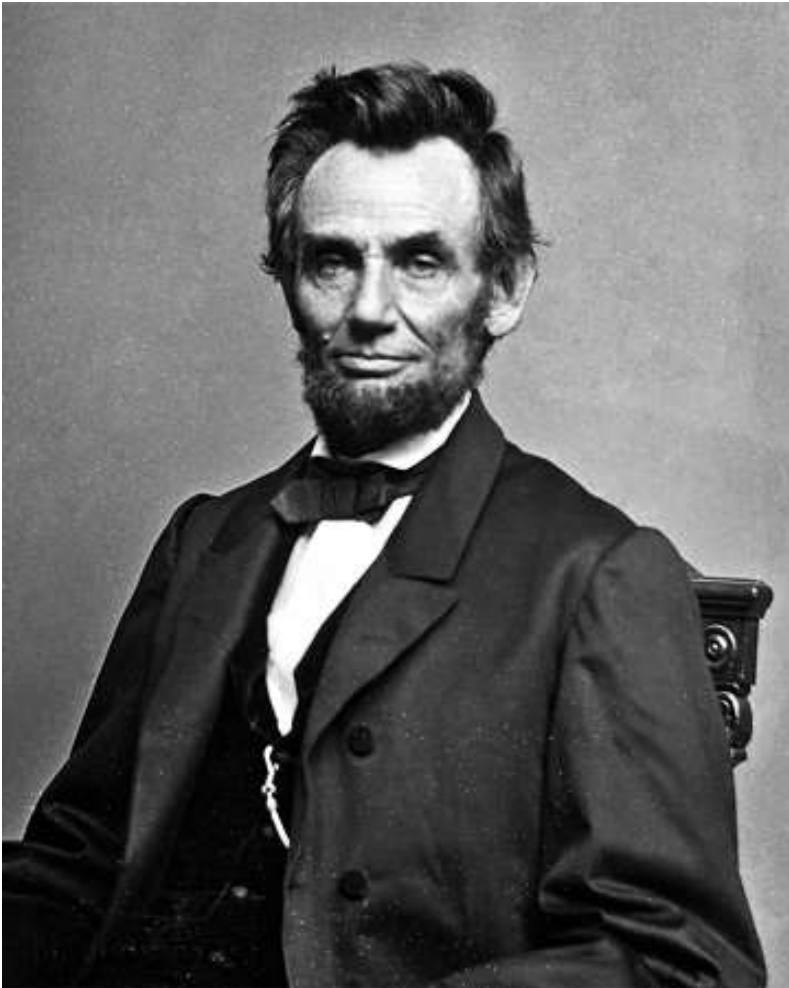
## **1957: The Bolam Test:**

Ruled in favour of the doctor in a hip fracture suffered during electroshock therapy. The Bolam Test established the rule that the doctor did not have to warn the patient of specific risks before a procedure.

## **2015: Montgomery vs. Lanarkshire Health Board:**

Reversed the Bolam Law, and established that doctors had a duty to advise patients beforehand of the possible risks of a procedure.

# MEDICAL LIABILITY IN THE UNITED STATES



**1794:** Plaintiff sued a surgeon for his wife's death for not fulfilling his contractual promise to perform a skilful and safe operation; he was awarded £40 English Pounds.

**1835 – 1865:** Malpractice crisis due to suits for limb amputations rather than repair.

**1836 - 1846:** Abraham Lincoln was a prominent malpractice lawyer for plaintiffs.

# MEDICAL LIABILITY IN THE UNITED STATES

**1847:** AMA founded and set standards for the standard of care.

**1960:** Upswing in liability suits due to introduction of new technology and proliferation of malpractice insurance.

**1984:** Libby Zion's death at New York Hospital under the care of two tired residents lead to national resident hour work laws of 24 continuous and 80 weekly hours.

# MEDICAL LIABILITY IN THE UNITED STATES

Medical liability as part of accidents is the third leading cause of death in the USA, next to heart disease and cancer (pre-COVID).

In 2019, 59,813 malpractice suits were filed in the USA, exceeding the average number filed each year between 1990 and 2020.

Basis for a malpractice suit in the law: (1) legal duty of doctor to provide care or treatment, (2) breach of that duty by violation of standard of care, (3) causal relationship of breach and injury to the patient, and (4) damage emerging from the injury sustained.



# MEDICAL LIABILITY IN THE UNITED STATES

## THREE SENSATIONAL CASES

**1997:** Julie Andrews vs. New York Mount Sinai Hospital: Ms. Andrews lost her singing voice after improper vocal cord surgery for benign nodules; terms not disclosed.

**2000:** Dr. Allan Zarkin carved his initials, three inches high, onto the patient's abdomen after a successful "C" section; settled for \$1.75M.

**2005:** Allan Navaro vs. Michael P. Austin and Tampa University Community Hospital: Patient was misdiagnosed for an evolving stroke, and permanently disabled. The largest settlement in malpractice history was recommended by the jury of \$216.8M (\$116.7M compensatory and \$100.1 punitive).

# MEDICAL LIABILITY IN THE UNITED STATES: WHERE IS IT HEADING?

## TORT REFORM I:

**Purpose: Limit healthcare costs and increase healthcare benefits for the majority of the nation's citizens.**

- ❖ Movement started in the 1970s; it is a state function and over 30 states have enacted tort reform laws.
- ❖ Advocates: physicians, other healthcare workers, hospitals, and malpractice insurance companies.
- ❖ Opponents: most lawyers, specifically malpractice litigators; most legislators, the makers of law, are lawyers.

# MEDICAL LIABILITY IN THE UNITED STATES: WHERE IS IT HEADING?

## TORT REFORM II:

### Tort Reform Laws:

- ❖ Capping claims for economic and punitive damages, in particular for emotional pain and suffering.
- ❖ Capping total plaintiff awards.
- ❖ Shortening statutes of limitations.
- ❖ Limiting attorney contingency fees.
- ❖ Protecting malpractice insurance limits from disclosure.
- ❖ Limiting forum shopping.

# MEDICAL LIABILITY IN THE UNITED STATES: WHERE IS IT HEADING?

## TORT REFORM III:

### Achieved Benefits:

- ❖ Decreases in malpractice litigation in many states.
- ❖ Decreases in medical malpractice insurance rates in many states.
- ❖ Decreases in costs and procedures in defensive medical practice.
- ❖ Decreases in court and jury time and expenses.
- ❖ Potentially reversing the decrease in physicians and healthcare workers by increasing profession attraction and preventing early retirement.



**Gauguin:**

Where Do We Come From?  
What Are We? Where Are We Going?