

Medical Malpractice in Obstetrics— A look into the practice under South Korean law

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In the U.S., the number of medical malpractice cases generally has begun to fall each year. However, in obstetrics medicine, this decrease also corresponds to a falling number of practicing obstetricians in the United States. A 2002 USA Today article reported that the increased cases of medical malpractice and the concurrent rise in insurance premiums for doctors were causing a significant shortage of obstetricians in certain states where damage awards were akin to “lottery prizes.”¹ The American Council of Obstetricians and Gynecology (ACOG) reconfirmed this trend, reporting that disruptions to obstetrical care are now prevalent in nearly half of the states within the United States.² Politicians spear-heading an agenda of “tort reform” in Washington D.C. often reference this impact in the field of obstetrics to emphasize the need for changes in the system.

While the high insurance premiums and costs associated with malpractice cases have had a significant impact in the United States, in South Korea malpractice in obstetrics medicine has also had negative effects. A 5-year study compiled by the “Medical Citizen Consumers Association” found that medical malpractice suits in the area of obstetrics were a significant problem, ranking second highest of all malpractice cases after orthopedic surgical malpractice.³ The study looked at the number of cases from 2003 through 2007 and found that obstetrics malpractice comprised 15.6% (or 1,248 out of 7,977 cases) of the total number of medical malpractice cases.

Recently, the Korean Consumer Protection Unit (KCP) reported that the damage awards in

obstetric malpractice were a necessary side effect to protecting consumers against obstetrics malpractice.⁴ Obstetricians in Korea, however, are likely to disagree with such conclusions. Instead, like their U.S. counterparts, doctors here are more likely to point to disruptions in medical care and in particular, an exodus of doctors from the practice. In fact, in a 2006 survey of 116 hospitals, a report found that the field of obstetrics had the highest rate of attrition of any field of practice in South Korea (16%); coming far behind in second was chest/breast medicine, which had a 10.6% rate of attrition.^{*2} While this rate may be shaped by the recent dramatic decrease in birth rates in Korea,^{*3} undoubtedly the threat of civil suits and the corresponding rising insurance premiums play a role like in the U.S.

Nevertheless, there are significant differences with malpractice actions in the United States. Despite the changing face of obstetrical medicine in Korea in part resulting from malpractice suits, Korea generally has fewer malpractice actions. While other cultural differences may weigh in, a key reason stems from the significant differences between the legal systems of the two countries. Based on a tradition of civil law, South Korea’s legal system does not create the same set of incentives and low-entry barriers to raising a successful malpractice case as in the U.S. system, where pro-plaintiff evidence collecting procedures and potentially enormous damage awards have converged, turning malpractice actions into its own separate industry.

This memorandum examines some of the

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*2 Quite notably, the Korean National Statistical Office confirmed in 2006 that South Korea had the lowest birth rate in the world.

*3 The CIA World Factbook notes that the population growth in 2007 was a meager 0.394%. The UN Division on Population also notes in a 2006 survey report that the Korean population will be smaller in 2050 than the population in 2005. World Population Prospects Report by UN Division on Population.

most significant differences in the treatment of malpractice, and also looks at how the South Korean legal system has handled malpractice suits in obstetrics medicine. In particular, I will explore the consequences of Korea's civil law system and the lack of precedent, which has affected evidence-collection procedures and other logistical issues, including the possibility of concurrent civil and criminal actions. I further examine the role of South Korean criminal law, which penalizes professional negligence, on any potential civil suits including the effect on damage awards and evidence-collection.

Civil Law vs. Common Law

South Korea has adopted much of the Continental European Civil Law system, but also has mixed in some elements of Anglo-American common law. The most notable distinction from the common law is the lack of precedent. Precedent is the binding power of previous decisions of superior and/or previous courts.^{*4} As such, courts in South Korea are not required to adhere to prior decisions, even those decisions by the Korean Supreme Court. While there is deference to superior court decisions, particularly to the Korean Supreme Court, a lower court may choose to base its rulings without being restrained or controlled by prior decisions. Instead, the primary source for decisions rests upon the actual language of the legislation or statute. Consequentially, judges operating within this system have latitude in rendering their decisions, bound only to the language of the statute, and not, as in the common law, to the decisions of prior courts and any relevant statutes.^{*5}

For those in a common law jurisdiction, such a description naturally raises concerns that the decisions and awards will vary wildly. Despite these first impressions, the truth is that the outcomes of cases do not vary widely. There is a strong sense of respect and deference to the decisions of judges. Instead, and most significantly, the impli-

cations of the civil law system manifest in the timing and logistics of the proceedings. Without precedent, it is conceivable that a criminal action and civil action may occur concurrently. A single defendant could be subject to a private civil action at the same time that a criminal suit is pending. While in practice this is unlikely, it does, nevertheless, highlight an important consequence: prior fact-findings and/or decisions have no binding power on another court.^{*6} They exist in different spheres. Moreover, such a system has important tactical consequences for would-be plaintiffs, who utilize the criminal system for evidence-collecting purposes in their private civil action.

Criminal Negligence

Article 268 of the South Korean Criminal Code punishes "professional or gross negligence" which causes death or injury.^{*7} The statute punishes such acts by either imprisonment for not more than 5 years, or by fine not exceeding 20 million won (or roughly \$20,000). Thus the crime is considered more than a minor offense. As a cause of action, criminal negligence parallels the elements of medical malpractice civil action in the United States, which is based in the common law of torts. The elements for finding guilt under Article 268 also mirror the necessary elements in a civil action by a South Korean plaintiff; the primary distinction, as would be the case under U.S. law, is that the burden of proof in a Korean civil action is a "beyond a reasonable doubt" standard.^{*8}

To prove criminal professional negligence, the prosecution must show that: 1) the professional had knowledge of the bad result; 2) the professional did not exercise good judgment, based on a comparison with other professionals who work in the same field or same circumstance; 3) the bad result was caused by the care/treatment of the professional; and 4) that there were actual damages. Distinguishably, the standard of care for all professionals, including doctors, is a national standard, and also requires consideration of the

*4 Black's Law Dictionary defines precedent as "the making of law by a court in recognizing and applying new rules while administering justice." Black's Law Dictionary, 8th Edition, Bryan A. Garner, ed.

*5 Lower courts are, however, bound to the Supreme Court's decision if the case has been remanded back to the lower court. From "The Korean Judiciary System," www.korealaw.com

*6 Under the common law, the term is titled "res judicata" or an issue already decided by the court. The term encompasses both fact-finding (or collateral estoppel) and final decisions (or issue preclusion). Black's Law Dictionary, 8th Edition, Bryan A. Garner, ed.

*7 South Korea Supreme Court webpage translated decisions, case # 2005Do3832, delivered on June 29, 2007.

*8 For a criminal action, the burden is on the prosecution to prove guilt beyond a reasonable doubt; in a civil action, the standard is generally guilt by a preponderance, or majority of the evidence.

time and place where medical treatment was provided (i.e. hospitals, clinics or private offices). This is slightly different from the U.S., where the standard of care for general practitioners is based on a local standard, while for specialists like obstetricians it is a national comparison of other similarly-practicing specialists. In essence, however, by factoring in considerations of time and place of treatment, the Korean standard becomes very similar to the U.S. standard of care.

Illustratively, the Korean Supreme Court in 2006 dealt with the issue of criminal negligence in obstetrics, delineating the necessary elements.⁵ The Court found the obstetrician not guilty, reasoning that the obstetrician did not cause the death of the fetus. In this case, the prosecution charged the obstetrician with negligence after he failed to discover that the fetus was inverted within the mother's womb, which caused the fatal complications during childbirth. The Court held on behalf of the obstetrician, finding that the fetus died not because of the doctor's negligence, but because the fetus suffered complications from being premature and because the expecting mother was already in poor health. These were the primary causes of death, not the obstetrician's care. The Court went on to say that the obstetrician had actually exercised reasonable judgment in light of the circumstances of the case and had actually provided sufficient care. His decision not to administer an ultrasound test and to disregard the mother's early labor pains were deemed reasonable decisions, and well within the bounds of his reasonable medical judgment.

Criminal Negligence and Evidence-collection

While the criminal action is, in and of itself significant, it carries even greater consequences in the Korean system, where an individual plaintiff has virtually none of the evidence-collecting powers conferred to a U.S. plaintiff in civil litigation. More specifically, Korea lacks a true discovery system, leaving would-be plaintiffs without the enforcement means to depose witnesses and parties. This includes expert witnesses, who are often critical components to a malpractice action. Also significant for medical malpractice cases, the Korean system leaves plaintiffs without the

critical power to compel production of evidence. Civil litigation, in this respect, is a "come-as-you-are" system.⁶ To compensate for these shortcomings, plaintiffs turn to, and build their cases from, the evidence collected during the criminal case by the prosecution. In the Korean system, the prosecution has significant powers, including confiscation of evidence and the ability to compel document production. These investigation records may later be used by civil courts. While under Korean civil procedure it is the judge who is empowered to collect facts and sift through evidence, it is a major advantage for a plaintiff to have such a record in existence. Thus, it is in the victim's best interests to raise malpractice issues to the Supreme Prosecutor's Office, which has the discretion to file a criminal negligence action and commence an investigation. Adding to the importance of this evidence is the high evidentiary burden in civil cases. Whereas the U.S. employs a "preponderance of the evidence" standard of proof for determinations in a civil litigation, the Korean system employs the heavier "beyond a reasonable doubt" standard normally reserved for only criminal actions in the U.S. Without the means to thoroughly gather evidence, would-be plaintiffs look instead to the evidence gathered by the prosecution during the criminal investigation. In this respect, the Korean government bears a substantial share of the costs for a plaintiff's civil action.

Korean System of Damages

It is perhaps an equitable trade-off to have government resources fund a large portion of the litigation expenses in light of the actual damage awards. The fines and penalties resulting from the criminal action go directly to the state and not to the victim. While Korea has a system of deposit money that is used in criminal actions as an indemnity for the victim, the victim never collects directly from the fines issued by a criminal court. The system is unique, however, in that any settlement agreement reached between the victim and professional prior to the final verdict of the criminal action bears upon the sentencing meted out by the criminal court judge.^{*9} Moreover, if there is no stipulation within the settlement agreement to the contrary, a settlement amount could be

*9 This creates an incentive for the criminal defendant to reach an agreeable settlement with the victim in order to mitigate criminal penalties.

deducted from any civil action awards.

As a recent New York Times article reported, the U.S. has one of the most unique damage award systems in the world, with punitive damages conferring substantial windfalls to plaintiffs.⁷ In the U.S. system, the potential profit of a civil suit counterbalances the equally burdensome litigation expenses borne by a plaintiff. In contrast, under Korea's system, the inability to independently gather evidence coupled with the lower damage awards institutionalizes certain disincentives, dissuading many who would normally seek civil compensation.

Despite the discrepancy in the amounts awarded for malpractice, like damage awards in the United States, in South Korea damages are calculated to include both compensation for the actual damages suffered, any consequential costs for care required as a result of the injury, as well as mental pain and suffering. The end figure, however, is much less than the average in the U.S. The typical civil litigation actions award plaintiffs with actual compensatory damages for the injuries sustained and for any resulting treatment required as a result of the injury. Damages also include pain and suffering automatically awarded to the immediate family, which includes parents and grandparents. For other relatives, such as siblings, compensation for "grief" requires some proof of suffering. Pain and suffering, however, are often minimal amounts. Moreover, general award amounts are low. This is in part results from the use of a table of money damages, which a judge turns to in a civil proceeding for guidance. This table not only systematizes but also limits the total damage amounts. In calculating these numbers, the table factors in the nature of the job of the injured party, which serves to calculate lost wages/earnings. For obstetric malpractice actions in particular, where an infant is often the injured plaintiff, the damage awards are calculated to consider not only how long the infant has been living, but how much the infant could have potentially earned. Accordingly, these numbers are small.

In a 2002 case heard by the Korean Supreme Court, the court dealt with this issue of damage calculations.⁸ There, the infant suffered shoulder dystocia, which resulted from the obstetrician's failure to identify and treat the mother's sugar diabetes. The Supreme Court found on behalf of the mother and injured infant, reasoning that the

infant's injury directly resulted from the obstetrician's failure to provide proper medical care. The Court reasoned that any obstetrician exercising proper care would appreciate the dangerous complications resulting from the mother's diabetes. In addition, the doctor failed to administer an ultrasound, which would have revealed the enlarged size of the fetus, further increasing the chances of complications from shoulder dystocia. In this case, the obstetrician failed to take appropriate precautionary measures to prevent this dangerous and likely complication. However, despite finding on behalf of the plaintiffs, the Court reduced the amount of damages awarded to half the amount asked by the plaintiffs. Guided by the table of money damage awards, the Court examined the length of the injured child's life in order to determine the amount that the infant could have potentially earned. Instead of the granting the original 85 million W (or \$85,000), the Court awarded the infant 43 million W (or \$43,000). For the mother and father's pain and suffering, the Court awarded each 3 million W (or \$3,000) instead of the original 5 million W asked for each parent.

Conclusion

An examination into obstetric malpractice laws in Korea not only highlights important differences and fundamental similarities in the two legal systems, but perhaps is also a helpful guide for U.S. tort reform measures, especially in the area of malpractice. The objectives of the Korean system, similar to many other legal systems around the world, distinguish and separate retributive justice from compensatory justice. It is a system that punishes through action by the criminal system and compensates under the civil litigation system. Like many other jurisdictions in the world, the civil courts in Korea provide compensation to victims, and generally are not used to mete punishment (*vis-à-vis* punitive damages); that is a job for the state in criminal proceedings, where there are certain protections are built in to protect the defendant. Victims should not be allowed to receive a windfall from punitive damages. From this perspective, criminalizing negligence seems not only reasonable but necessary.

As a growing segment of the U.S. population push for limits to the damage awards conferred in medical malpractice actions in particular, it is

illuminating to look beyond the actual dollar amounts of punitive damages, and examine other legal systems where the problem is approached from a different angle. While punitive damages and generally large damage awards are likely a mainstay to the U.S. system, it is important to

examine the underlying purpose and theories involved when considering reform programs. By comparing and learning from the differences with the Korean approach to malpractice, there may be a better understanding of how to improve the U.S. approach in the future.

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