# No-fault liability system in the health-care sector

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*Abstract*
*In the article, the author discusses the issue of tort liability and compensation for malpractice in healthcare through the prism of potential solutions in Slovenia de lege ferenda. One of the possibilities offered is the implementation of the no-fault compensation system, which has been known for many years in the Scandinavian countries and in New Zealand. In the article, the author points out its fundamental advantages and disadvantages, as well as possible alternatives to the relatively revolutionary changes that the latter brings. She presents the regulations in France and Great Britain, which took the path of gradual reforms and mainly supplemented and improved the existing system of classic system of guilt liability, France partly also by adding individual elements of the no-fault compensation scheme. The author points out that in addition to the reform of compensation law, a comprehensive reform of professional responsibility in healthcare is also necessary in Slovenia, together with the modernization of the system of quality and safety. Without the aforementioned, even changes in the field of tort liability will not bring the desired results. He advocates for a well-thought-out and interest-balanced reform, with full awareness of the specifics of the Slovenian legal system. Keywords: tort liability in healthcare, no-fault compensation scheme in healthcare, systems of compensation in healthcare in comparative law, reform of the law of compensation in healthcare*

# Sistem nekrivdne odgovornosti v zdravstvu

*Povzetek*
*V prispevku avtorica obravnava problematiko odškodninske odgovornosti v zdravstvu skozi prizmo potencialnih rešitev v Sloveniji de lege ferenda. Ena od možnosti, ki se ponuja, je uveljavitev nekrivdnega odškodninskega sistema, ki ga že več let poznajo v skandinavskih državah in na Novi Zelandiji. Avtorica v prispevki izpostavi njegove temeljne prednosti in pomanjkljivosti, prav tako pa tudi možne alternative relativno revolucionarnim spremembam, ki jih slednji prinaša. Predstavi ureditvi v Franciji in Veliki Britaniji, ki sta ubrali pot postopnih reform in sta obstoječi sistem klasične, krivdne odškodninske odgovornosti, predvsem dopolnili in izboljšali, Francija deloma tudi z dodajanjem posamičnih elementov nekrivdne odškodninske sheme. Avtorica opozarja, da je v Sloveniji poleg reforme odškodninskega prava potrebna tudi celovita reforma profesionalne odgovornosti v zdravstvu, skupaj z posodobitvijo sistema kakovosti in varnosti. Brez navedenega tudi spremembe na področju odškodninske odgovornosti ne bodo prinesle želenih rezultatov. Zavzema se za premišljeno in interesno uravnoteženo reformo, ob polnem zavedanju specifik slovenskega pravnega sistema. Ključne besede: odškodninska odgovornost v zdravstvu, nekrivdna odškodninska shema, odškodninski sistemi v zdravstvu v primerjalnem pravu, reforma odškodninske odgovornosti v zdravstvu*

## INTRODUCTION

Healthcare and solving the problems within the healthcare system that have accumulated in recent decades have for quite some time been a sore point with the Slovenian society and thus also with its politicians and experts. The occasionally chaotic and (too) long neglected management of the public healthcare system has exacted its toll and the consequences arrived with a vengeance in the post-covid era. Healthcare has, or so it seems, hit an all-time low. This holds especially true for those parts of the public healthcare system, which many experts (as well as users and patients) claim are on the verge of collapse,[1] even though the amount of money being poured into healthcare is likely greater than ever before. While seemingly paradoxical, this contradiction is only superficial and the conclusion clear for all – even those unacquainted with the system's workings – to see: legislative regulation of Slovenian healthcare system requires radical and system-wide changes. Indeed, one could say that a national consensus has *de facto* already been reached on the matter in Slovenia.

What is lacking, though, is consensus on how to carry out the reform. We must keep in mind that any reform that aims to be beneficial and well-thought out, in this case meaning one that will actually improve healthcare services and protect the interests of patients, requires time and resources. The main problem is that the country does not possess an abundance of either (anymore). The public has become fed up with promises and is calling for a prompt resolution to the current situation as well as unhindered access to health services, which are to be provided in time, in an appropriate manner and to the extent required. Unfortunately, it seems that neither the government nor the experts have managed to agree on a clear and unified vision of the direction the country needs to take and disagree even more on the concrete measures that need to be undertaken to improve the situation in healthcare. Lacking a clear vision to resolve the accumulated problems will only cause the situation to worsen, despite the country's preparedness to inject additional funds into healthcare (and doctors' salaries), though the extra funds have so far largely failed to bring about the desired results.

## LIABILITY OF HEALTHCARE PROFESSIONALS

### 2.1 INTRODUCTION

By-and-large, the consequence of something having gone wrong during treatment in every society is that, if possible, someone is held responsible for the error that occurred or that legal consequences or sanctions are instituted. In case of the worst violations, medical professionals may be held criminally liable, though they are more often held liable for damages. Such liability mainly occurs due to a breach of the contract of medical treatment, but sometimes also on a tort or non-commercial basis.[2]

Liability of medical professionals plays an important role in ensuring the quality of a healthcare system due to the fact that no human activity exists that can consistently be performed error-free – the same obviously holds true for the provision of healthcare services. We should not turn a blind eye to this fact, as mistakes in healthcare can have very serious (loss or damage to health) or even fatal (death) consequences. It is therefore critical that such mistakes are openly reported instead of being swept under the rug. This is the only way to allow us to learn from them and not repeat them in the future, thus benefitting the patients as well as the national health funds. However, traditional liability systems, based on establishing the fault of a healthcare professional as the grounds for their liability, are not especially popular among healthcare professionals, as they can be sued for damages by the patients and pilloried by the society and colleagues. Slovenia, like many other countries around the world,[3] has thus been deliberating whether the time has come to replace the current system with a no-fault system of

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[1] *The Ministry of Health wrote in its January 2023 report that we are facing a collapse on several levels and areas of healthcare. See Ministry of Health (2023), p 8. See also A. Blinc, A. Ihan, R. Komadina, D. Pahor, P. Poredoš, I. Švab, B. Voljč (2023) and J. Simčič (2023).*

[2] *For example, when the contractual relationship between the patient and the healthcare facility has not been established such as cases of emergency treatment for which the patient is unable to give consent. For a more detailed treatment, see V. Žnidaršič Skubic (2018), p 81–83.*

[3] *See, for example S. Rai, V. H. Devaiah (2019), p 86–91.*

compensation, similar to the ones already existing in several other countries.[4] Apart from such a solution, which would constitute a revolutionary change, several "intermediate" solutions and approaches are listed in comparative law. Such solutions do not entail a complete about-turn in resolving liability in health care, but rather reform the existing system or add some elements of no-fault liability (thereby not replacing the existing system in its entirety).[5]

## 2.2 LEGAL REGULATION IN SLOVENIA

Apart from exceptions as, for example, found in the Communicable Diseases Act (ZNB)[6] where the no-fault liability scheme applies, making the state liable for damages resulting from unwanted effects of mandatory vaccination, liability in healthcare in Slovenia follows traditional civil law, i.e. the fault-based liability of a healthcare professional or healthcare institution in accordance with the general rules of tort law, as stipulated by the Obligations Code (OZ).[7] Liability can arise either due to a breach of a contract of medical treatment or on the basis of tort if the contractual relationship between the patient and the medical institution has not been established (for example, in cases of emergency situations where the patient is unable to give consent).[8] Under this system, the patient, in order to obtain compensation for the damage caused to their health and should there exist no agreement on such payment with the healthcare provider that caused damage to their health, must sue the healthcare provider in court, i.e. initiate litigation proceedings. Such a course of action is often extremely tiring and exhausting for the patient, both physically, mentally and, of course, financially, as they require legal aid, have to pay up in front for expert evidence and the like. The principle of a doctor's responsibility is fault: it must be established that they acted contrary to the rules of the profession, that the damage caused to the patient's health is causally related to the doctor's conduct, and the reverse burden of proof applies to guilt. The latter is presumed, with the doctor having to prove that they did not act intentionally or negligently.

Slovenian jurisprudence has adopted some measures to facilitate the patient's situation as a plaintiff in liability litigation.[9] The Supreme Court has, for example, ruled that informative evidence with a medical expert is admissible in order to determine whether damage to a patient's health is the result of a medical error or complication. It also allowed for the factual claims to be amended after receiving an expert opinion, since the plaintiff, as a layman, is incapable of making this assessment on his own.[10] On the other hand, the Supreme Court acted more restrictively when assessing the timeliness of claims related to the breach of the explanatory duty. It stated that the burden of adducing evidence on whether and how fully the doctor explained the procedure to the patient is not too hard for the patient.[11]

Slovenian legislation has not yet been meaningfully amended in a way that would facilitate the patient's situation as the injured party and plaintiff in litigation. Nevertheless, we must mention the amendment to the Patients' Rights Act,[12] which in 2017 added a new sixth and seventh paragraph to Article 48, stipulating that should a patient suffer serious physical injury or death during medical treatment, the court must consider the case as a matter of priority. This proves that the legislator has realized that the (too) slow resolution of such litigation in Slovenia is a pressing issue.[13] A disproportionately long duration of litigation is undoubtedly exhausting for all parties, and even less acceptable for the injured party – the patient. In addition to the provision on priority consideration of such cases before the court, the

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[4] *For example in Norway, New Zealand, Sweden, Finland, Denmark. For a more detailed treatment, see V. Žnidaršič Skubic (2018), p 92–102.*

[5] *For example France and Wales. See, E. Jackson (2022), p 187, and K. Watson, R. Kottenhagen (2018), p 10–12.*

[6] *UL RS No 33/06 in after.*

[7] *UL RS No 97/07 and after.*

[8] *For a more detailed treatment, see V. Žnidaršič Skubic (2018), p 81–83.*

[9] *See A. Božič Penko (2017), p 87.*

[10] *Decision VS RS II Ips 302/2011 from 26 April 2012.*

[11] *Special expertise is not required in this case, as all relevant facts in connection with this can be noticed by the patient him or herself.*

[12] *Act Amending the Patients' Rights Act (ZPacP-A), UL RS No 55/17.*

[13] *This was clearly pointed out by the "Šilih" project of the Government of the Republic of Slovenia, as further analysis showed that the case of Mrs Šilih, which lasted for 23 years, was not an isolated one. Of the 88 closed cases between 2012 and 2017, as many as 41 percent took more than 1,000 days. For more details, see Republika Slovenija (2017), p 4.*

amendment also added a provision authorizing the Ministry of Health to systematically monitor and supervise them, with the basic aim of trying to prevent such cases when individual irregularities are identified and thereby also eliminating professional errors or systemic deficiencies in healthcare.
Both provisions represent the first steps in the right direction, i.e., the direction of increased health and legal security for the patient, but do not amount to sufficient systemic change and are in need of thorough upgrades or amendments. The Slovenian system of quality and safety in healthcare will need to be radically overhauled, amended and modernized as numerous problems arise in practice, though only some are occasionally brought to the attention of the general public through media coverage and subsequent notoriety.[14] An important part of such a system undoubtedly includes the care to provide adequate compensation through medical interventions for unjustly affected patients. Since the existing system is (as described above) quite rigid in this regard, possible alternatives should be thoroughly examined. The announced reform of the healthcare system in general is an ideal opportunity to swallow this bitter pill as the areas and issues are intertwined with and complement each other, making a comprehensive solution not only welcome, but necessary.

## 2.3 COMPARATIVE LAW APPROACHES

### 2.3.1 REFORMING THE TRADITIONAL LIABILITY SYSTEM

Several countries have come up with their own separate approaches to solving the problems arising in connection with liability in healthcare, with all reaching a more or less the same conclusion: the existing system is not only inaccessible, expensive, time-consuming and thus unfriendly to patients, but also economically unsustainable for healthcare institutions.[15] Some countries have tackled the problem by reforming their entire healthcare system, others by introducing additional, alternative (partly also no-fault) liability schemes.[16]

#### 2.3.1.1 UNITED KINGDOM

The prevailing theoretical view in the UK is that the currently existing (traditional) system of liability is unsuitable. Despite numerous studies that have been carried out in this area and intensive examination of possible alternatives, the UK has not (yet) decided to introduce a no-fault liability scheme.[17] It has, however, adopted a number of legal and other solutions to reduce the occurrence of issues at their origin. As part of stringent measures to implement a system preventing unwanted events or errors in healthcare, The UK's National Health Service (NHS)[18] produced a document entitled *An Organisation with a Memory: Report of an Expert Group on Learning from Adverse Events in the NHS*,[19] which set up a unified system of reporting not only on failures that resulted in damage, but also on those that could, but did not. The report's aim is to identify individuals, units, processes and equipment that fall short of the public's (reasonable) expectations regarding a functioning healthcare system. The document moreover strives to discover the circumstances and pressures that cause individuals to commit errors. Indeed, research has clearly shown that errors are more often related to systemic causes than to individual errors.[20]

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[14] *See, for example, the laughing gas case, https://www.dnevnik.si/1043004338 (20 August 2023), the switched identity of two patients, https://www.dnevnik.si/tag/zamenjava%20pacientov (20 August 2023).*

[15] *The risk of paying out extremely high compensations is pointed out in the literature, especially in the area of damages that affect the health of newborns during childbirth. See J. Herring (2022), p. 136. According to the data by the Ministry of Health, the highest compensation for medical malpractice in Slovenia was paid out by the maternity hospital in Postojna, in the case of the birth of a child with permanent brain damage. The compensation amount that exceeded EUR 853,000. See Delo (2017), https://old.delo.si/novice/slovenija/tozba-ki-je-pokazala-podcenjevanje-tveganj-v-zdravstvu.html (20 August 2023).*

[16] *See K. Watson, R. Kottenhagen (2018), p 10.*

[17] *Nevertheless, the government seems to be increasingly inclined towards it. In its 2021 report on the safety in maternity hospitals, the House of Commons Health and Social Care Committee recommended that the UK adopt a liability regime modelled on Sweden and New Zealand. See E. Jackson (2022), p 189.*

[18] *For a more detailed treatment, see https://www.nhs.uk/ (20 August 2023).*

[19] *For more details, see https://qi.elft.nhs.uk/wp-content/uploads/2014/08/r_02-an-organisation-with-a-memory-l-donaldson.pdf (20. 8. 2023).*

[20] *See K. Watson, R. Kottenhagen (2018), p 22.*

The UK tried to address a specific criticism of the traditional system of liability – namely the unwillingness of doctors to speak frankly with the patients due to the potential threat of lawsuits – by having adopted an amendment to the Health and Social Care Act.[21] The act now requires healthcare professionals to be open and transparent with their patients, especially as regards safety incidents that must be reported in accordance with the rules.[22] Medical professionals must explain all the circumstances of the case to the patients, instruct them on any necessary further measures, apologize to them and maintain a complete written record.[23] These procedures have to be carried out as soon as possible, or at the latest within twenty working days after the event. An explanation and apology must take the form of a discussion with the patients in person, and must then be followed by a written explanation and apology.[24] This duty is the doctor's legal obligation towards his patients regarding candour, and failure to fulfil it entails criminal liability by the doctor. A breach of this obligation can result in a fine of up to £2,500.[25]

The NHS Redress Act 2006,[26] currently in force only in Wales but not England, meanwhile mainly deals with compensation claims by the patients amounting to less that £25,000, providing them with an alternative to litigation. Funded by the Department of Health and Social Care's independent expert body (NHS Resolution),[27] the scheme aims to resolve disputes, share best practices based on experience and conserve resources for patient care. All participants in the scheme must report the cases covered by it, whereupon a special authority determines whether or not the healthcare professional in question is liable and determines the appropriate remedy for the damage. The remedy may come in the form of monetary compensation, explanation, apology or provision of appropriate medical care. Also required for every instance is a report on the measures taken in order to prevent such errors from recurring. The scheme functions as an addition to the court proceedings and does not replace them. The patients decide by themselves which legal path to pursue; however, accepting the offer under the scheme eliminates the option of launching legal proceedings.[28] The scheme has been criticized for retaining the need to establish a healthcare professional's negligence, though it did delegate this task from the courts to NHS staff. This makes the procedure less complex and cheaper from the patient's point of view, whereas the decisive factor for the state is that the amount of compensation paid is higher[29] but the costs incurred are significantly reduced. Herring believes that, at least for smaller compensation amounts, the scheme will almost entirely replace civil litigation. It is also important that it will enable those less affluent who cannot afford going to court to obtain compensation.[30]

The UK has also adopted reforms in connection with the conduct of civil litigation, which facilitate admission of liability for damages, explanations and apologies to patients, providing a faster path to settlement. In case of court proceedings, pre-trial agreements[31] are encouraged whereby the parties

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[21] *See Regulation 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, https://www.cqc.org.uk/guidance-providers/regulations-enforcement/regulation-20-duty-candour (20 August 2023).*

[22] *All events that, based on the reasonable opinion of an expert, may result in death, serious or moderately serious damage to the patient's health or long-term psychological damage must be reported. See J. Herring (2022), p 145.*

[23] *A lot of research has shown that poor communication with healthcare professionals and their insensitivity, lack of understanding and lack of remorse for the event are major contributors to a patient's decision to file a claim. E. Jackson (2022), p 185.*

[24] *Some theoreticians believe that it is a relatively complex bureaucratic requirement, so various professional associations have issued concrete recommendations on how to fulfil this requirement in practice. See E. Jackson (2022), p 179. Mellor believes that the practical effect of this requirement will be an increase in compensation claims by patients. See C. Mellor (2014), p 36–46.*

[25] *The first case in practice was recorded in 2020. See S. Morris (2020), https://www.theguardian.com/society/2020/sep/23/nhs-trust-fined-lack-of-candour-first-prosecution-of-its-kind-plymouth (20 August 2023).*

[26] *See https://www.legislation.gov.uk/ukpga/2006/44/contents (20 August 2023).*

[27] *For a more detailed treatment, see https://resolution.nhs.uk/ (20 August 2023).*

[28] *See J. Herring (2022), p 147.*

[29] *Due to the high amount of compensation claimed from the healthcare system, some authors believe that compensation in healthcare should not be paid at all. These are the defenders of "no compensation scheme" and are convinced that the scheme will excessively impoverish the health fund and, as a result, those who (urgently) require health services will not be able to access them to a sufficient extent. See J. Harris (1997), p 1822.*

[30] *See J. Herring (2022), p 147.*

[31] *For a more detailed treatment, see E. Jackson (2022), p 186.*

agree on what exactly the court should decide upon. The court moreover plays a somewhat more proactive role in managing the case and engaging court experts.[32]

The fundamental reason why the UK has not yet fully embraced the no-fault liability system in healthcare is that, although the system eliminates the problem of blame allocation, the issue of proving causation remains open. As this is a fundamental obstacle to patient success in medical cases, the country's experts believe that there would still exist a difference between those who could prove causation and those who could not.[33] In addition, no-fault liability schemes are cheaper to organize and run, but are likely to result in many more claims and thus make the system more expensive.[34] Some authors, such as Quick,[35] also warn that neglecting healthcare professionals' culpability and individual responsibility is not without risks. Excessive focus only on the system and systemic errors can conceal the failures of individuals. The preventive role of tort law should not be forgotten.

#### 2.3.1.2 FRANCE

France has been using a no-fault liability scheme for certain special cases in healthcare as an exception to the otherwise traditional fault liability system since 2002.[36] These cases involve reimbursement for serious injurious effects to a patient's health, which are typical for certain medical procedures, occur through no fault of the provider, and cannot be controlled for.[37] Until 2002, patients had to resort to litigation in order to obtain compensation for damage to their health, with their success depending on the court finding the perpetrator as at fault. The system in use previously arranged administrative courts deciding on claims against public health institutions or their employees, and civil courts against private healthcare providers. This caused similar cases to be treated differently in practice, which led to a crisis in the system, resolved in 2002 with the so-called Kouchner law.[38] The law unified the existing rules of liability in healthcare, and at the same time created a complementary legal avenue for patients, allowing them to obtain compensation faster and more simply. The provisions of this law were incorporated into the Public Health Code (Code de la santé publique),[39] resulting in the French no-fault liability scheme, which has the same legal basis for liability in both the public and private health sector. At the same time, the rules of the traditional liability system have not been changed or abolished, meaning that medical institutions are still liable. All such institutions must also be insured against the risk of civil liability.

In accordance with the new liability scheme, patients submit an application to the Regional Commission for Settlements and Compensation (Commission Régionale de Conciliation et d'Indemnisation, hereinafter: CRCI).[40] The claim must meet the condition of serious damage to their health (for deceased patients, the claim can be filed by their relatives). Minor health damage is not covered by the scheme and must in all cases be claimed through litigation. In addition, the damage suffered by such patients must be an abnormal consequence of the medical treatment or omission, given their previous medical status and the foreseeable development of their medical condition in the future. Only cases that meet the above conditions are thoroughly examined by medical experts. Their report is then considered by the CRCI which decides on which compensation regime to use in a specific case, but not on the amount of compensation. If the liability of the provider of medical activities is established, the damage is paid by their insurance company, whereas in cases of no-fault liability, it is covered by the National Office for

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[32] *Ibidem.*

[33] *See J. Herring, p 149.*

[34] *The number of claims in New Zealand annually is twice as large as in the UK. Scotland also slowed down the introduction of the no-fault liability scheme, mainly due to the fears of high costs. E. Jackson (2022), p 186.*

[35] *See O. Quick (2006), p 41.*

[36] *As of the adoption of a special law, Loi n° 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé (1), https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000227015/ (20. 8. 2023).*

[37] *The system was adopted by France after bitter disputes on the topic among individual stakeholders. For a more detailed treatment, see K. Watson, R. Kottenhagen (2018), p 10–11. Belgium has also adopted a similar system. See T. Vandersteegen, W. Marneffe, D. Vandijck (2015), p 481–491.*

[38] *See the above-mentioned Loi n° 2002-303. It was named after the then health minister Bernard Kouchner.*

[39] *See https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072665/ (20 August 2023).*

[40] *See K. Watson, R. Kottenhagen (2018), p 18.*

Compensation for Medical Accidents (*Office National d'Indemnisation des Accidents Médicaux*, hereinafter: ONIAM).[41] ONIAM pays compensation to the patient even if the insurance company refuses to do so or the insurance policy does not cover the specific risk. Given that the CRCI's decision is not legally binding, the insurance company, ONIAM and the patient can still decide to go to court. Considering that there are relatively numerous cases that end up in court in France, theoreticians warn that the quality and consistency of decision-making regarding the key elements of the no-fault liability scheme are rather controversial or questionable.[42] Some authors therefore believe that the French case shows the difficulty and complexity of harmonizing the no-fault liability system, which exists only for certain cases of damage in healthcare, with the coexisting, traditional system of liability.[43]

### 2.3.2. NO-FAULT LIABILITY SYSTEM

No-fault liability systems in healthcare are used by Nordic countries,[44] whose legal regulations are relatively similar to each other in general, though differ greatly in detail (Sweden, Denmark, Finland, Norway, Iceland),[45] and by New Zealand, whose system differs more substantially from that employed in the north of Europe.[46] Putting it more simply, one could say that the Nordic system bases the regulation of the patient's right to compensation on a positive answer to two fundamental questions: (1) was the result of the treatment in the specific case such that it could have been avoided, and (2) was such an outcome harmful to the patient.[47] If the answer to both questions is positive, the patient is (in principle)[48] entitled to compensation.

New Zealand[49] has meanwhile set up a no-fault liability system for such damage caused to a patient's health during treatment that cannot be defined as a necessary part of the treatment or a normal consequence of it. When deciding on the matter, decision-makers take into account all the circumstances of the specific treatment, including the individual's basic medical condition and relevant clinical knowledge at the time of treatment. This means that compensation will not be awarded in those damage cases that entail normal (anticipated) consequences of a specific treatment, such as scars after surgery, etc., but only for unexpected consequences thereof. The New Zealand system also stipulates no need to determine whether the doctor acted negligently.

#### 2.3.2.1 ADVANTAGES AND DISADVANTAGES OF A NO-FAULT LIABILITY SYSTEM

As already suggested by the name of the alternative to the traditional liability system discussed herein, the idea of establishing a liability regime that will compensate the injured patient even in cases where the fault of the healthcare professional (for various reasons) cannot be established, and the injured party would incur (major) medical damages is incorporated into its essence. This relatively radical innovation is defended by the authors on the basis of two specific cases, where two patients remained paraplegics after undergoing hospital surgery: in the first case, the patient's compensation lawsuit succeeded, with the court finding that the damage was caused by the doctor's negligent and unprofessional behaviour and they were therefore awarded a (relatively high) compensation amount, while the ruling in the second case stated the damage to the patient's health was due to an accident or a complication during treatment, leaving the patient without compensation.[50] Countries that thought it

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[41] *See https://www.oniam.fr/ (20 August 2023).*
[42] *K. Watson, R. Kottenhagen (2018), p 20.*
[43] *Ibidem.*
[44] *For a more detailed treatment, see V. Žnidaršič Skubic (2018), p 93–102.*
[45] *Ibidem.*
[46] *For a more detailed treatment, see E. Debevec, M. Esih, N. Logar, E. Milošič, B. Murko, L. Tönig, K. Vraničar, M. Vraničar (2019), p 69–82.*
[47] *E. Jackson (2022), p 187.*
[48] *Some forms of compensation are excluded in certain countries. For a more detailed treatment, see E. Debevec, M. Esih, N. Logar, E. Milošič, B. Murko, L. Tönig, K. Vraničar, M. Vraničar (2019), p 17–82.*
[49] *Pursuant to the 2005 (Injury Prevention, Rehabilitation and Compensation Amandment Act (no. 2) 2005), See https://www.legislation.govt.nz/act/public/2005/0045/latest/DLM347081.html (20 August 2023).*
[50] *J. Herring (2022), p 147.*

fairer that both patients get compensation in such cases changed the law and adopted a no-fault liability system.

A reason cited in favour of implementing the no-fault liability system is the rising number of claims filed by injured parties against healthcare providers, which could result in liquidity issues to these providers as well as to the national healthcare systems.[51] The traditional liability system is complex, the procedures formal and slow, create a large financial burden for the patient and simultaneously negatively effect the relationship between the patient and the doctor (healthcare professional). Due to fear of lawsuits, doctors increasingly practice defensive medicine[52] and are not ready to openly and frankly report on their own and/or systemic errors. This has a negative impact on preventing such errors in the future and impedes the necessary improvement of the healthcare system, which would constitute a more productive course of action than finding someone to blame at any cost.[53]

The simplicity and informality of the no-fault compensation system procedures also fosters social justice with a larger number of injured parties deciding to report the damage, and with more of them awarded the compensation. Another point in favour of the no-fault compensation system is that it is undoubtedly a better legal solution for modern healthcare systems, in which artificial intelligence is increasingly used in practice. This means that the number of cases of damage to people's health, where the allocation of blame will be very difficult or almost impossible, will only increase in the future.[54]

However, we must also note some pitfalls of no-fault compensation schemes. One is the fact that in some cases it is difficult to determine whether the damage caused to the patient resulted from the course of the disease or an inadequate medical intervention. Since determining the correct cause in such cases is a very complex task, some authors claim that such decisions would be best left to a competent court and not to administrative law or other types of (simplified) decision-making.[55] Another drawback of the no-fault compensation system, is the fear that its implementation might cause a increase in irresponsible behaviour of doctors and healthcare professionals, since they would no longer operate under a system that would actively discourage them from such behaviour. This would nullify the preventive role of tort law, which encourages individuals to act more responsibly in the future.[56] Another argument against the no-fault compensation system is that it does not fully compensate the injured party. Different legal regulations implement different restrictions in the form of deductions and limits, as well as providing no compensation to the patient at all (in principle) in some cases. Denmark, for example, does not cover non-property damage or damage due to mental pain, which also includes damage caused by a breach of the duty of explanation.[57] The disadvantage of the no-fault liability system, most often mentioned in the literature, is the fact that it is expensive.[58]

## CONCLUSION

I believe that the primary focus of any healthcare reform, including the one that can potentially address liability in healthcare, should be patients' rights, their safety and protection. The current system contains too many anomalies to be still considered adequate. Apart from lacking an effective

[51] *In Europe, the largest number of liability claims against doctors and healthcare professionals are filed in Germany. Similar issues have been encountered in Italy, Poland, the Netherlands and the UK. For a more detailed treatment, see K. Watson, R. Kottenhagen (2018), p 12–13.*

[52] *Defensive medicine is not necessarily conceived in exclusively negative terms as it can lead to positive effects, such as, for example, double checking of data, greater friendliness towards patients, etc. It is also almost impossible to determine when such responses by doctors were in fact unjustified. Some believe that it may not be about defensive medicine, but about a new safety culture in our society. See M. J. Saks, S. Landsman (2020), p 65–66.*

[53] *The EU has also recognized the importance of working towards open reporting and learning systems as the crucial tools for improving the culture of patient safety. See Council conclusions on patient safety and quality of care, including the prevention and control of healthcare-associated infections and antimicrobial resistance (2014/C 438/05).*

[54] *For a more detailed treatment, see S. Holm, C. Stanton, B. Bartlett (2021), p 175–185.*

[55] *For a more detailed treatment, see V. Žnidaršič Skubic (2021), p 64.*

[56] *See K. Watson, R. Kottenhagen (2018), p 14.*

[57] *See E. Debevec, M. Esih, N. Logar, E. Milošič, B. Murko, L. Tönig, K. Vraničar, M. Vraničar (2019), p 52.*

[58] *K. Watson, R. Kottenhagen (2018), p 14.*

compensation scheme for patients, current regulation is also ineffective in deterring doctors and health professionals from engaging in malpractice. Slovenian tort law is expensive, ineffective and greatly contributes to a culture of covering up mistakes, which prevents us from learning from them and stopping them from recurring in the future. In this sense, we should agree with Donaldson: "*To err is human, to cover up is unforgivable, and to fail to learn is inexcusable."*[59] The situation could continue to worsen in the future as the pandemic aggravated the already poor condition of the public healthcare system and increased waiting times. This could result in a vicious circle: delays will cause an increased number of cases of damage to the health of patients, resulting in a growing number of reimbursement claims, which will in turn increase the pressure on limited public health resources. The reduction in funds for carrying out of the activities will cause the standard of health services to deteriorate and thus start a new round of reimbursement claims against the healthcare system.

All of the above clearly indicates that thoughts regarding the creation of an alternative compensation system (no matter the kind, including a no-fault scheme) is certainly a step in the right direction. It should be noted, however, that changes must be approached deliberately, be adjusted to the requirements and characteristics of the Slovenian legal system and forgo attempts to directly transfer solutions from comparative law, which in some cases would be difficult to "embed" into Slovenian law. In other words and as an attempt to address the issue in the title of this paper, one could say that the medicine in the form of a no-fault compensation system may be appropriate, but in order to actually cure the "patient" it must be delivered in the correct dosage, without abuse and including a consistent monitoring of possible side effects.

Alongside the reform of the liability system in healthcare, it is necessary to undertake the reform of the safety and quality of the implementation of healthcare activities and establish an effective regulation regarding professional responsibility of healthcare professionals. Thusly regulated healthcare system will initially cause a drop in compensation cases, which could, despite a higher proportion of compensated patients, result in a long-term decrease in the total amount of compensation payments. The bill on no-fault liability of the state in case of treatment, which was drafted by the Medical Chamber, places the burden of financing compensation entirely on the state. This is not the best possible solution as it unilaterally relieves doctors of responsibility while placing it squarely on the state. Experience from comparative law shows that it is more appropriate for health service providers to contribute at least a certain share to the compensation fund (most often through the insurance system), as this will also (indirectly) encourage them to act with due care. Such an arrangement is known in most countries with no-fault compensation schemes in healthcare (the exception being Norway).

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[59] *"To err is human, to cover up is unforgivable, and to fail to learn is inexcusable." See E. Jackson (2022), p 185.*

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