

2012

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Recommended Citation

Benjamin L. Liebman, *Malpractice Mobs: Medical Dispute Resolution in China*, COLUMBIA LAW REVIEW, VOL. 113, P. 181, 2013; COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 12-301 (2012).

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Columbia Law School

Public Law & Legal Theory Working Paper Group

Paper Number 12-301

Forthcoming, Columbia Law Review 2013

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July 12, 2012

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Forthcoming, Columbia Law Review 2013

Draft of July 12, 2012

China has experienced a surge in medical disputes in recent years, on the streets and in the courts. Many disputes result in violence. Quantitative and qualitative empirical evidence of medical malpractice litigation and medical disputes in China reveals a dynamic in which the formal legal system operates in the shadow of protest and violence. The threat of violence leads hospitals to settle claims for more than would be available in court and also influences how judges handle cases that do wind up in court. The detailed evidence regarding medical disputes presented in this article adds depth to existing understanding of institutional development in China, showing that increased innovation and competence are not resulting in greater authority for the courts. Despite thirty-four years of legal reforms and significant strengthening of legal institutions, the shadow of the law remains weak. Medical cases highlight largely unobserved trends in both law and governance in China, in particular state over-responsiveness to individual grievances. The findings presented here suggest limitations to contemporary understanding of both the functioning of the Chinese state and of the role of law in China, and add to existing literature on the non-convergence of the Chinese system to existing models of legal and political development.

¹ Robert L. Lieff Professor of Law and Director, Center for Chinese Legal Studies, Columbia Law School. I am grateful to the outstanding team of research assistants who worked on this project and to the many people in China who graciously shared their time and insights with me. I am also grateful to the many people who provided helpful comments on drafts of this article.

MALPRACTICE MOBS: MEDICAL DISPUTE RESOLUTION IN CHINA

I. INTRODUCTION

Media accounts report a surge in medical disputes in China in recent years, on the streets and in the courts. Many disputes result in violence. In January 2011, family members of a deceased patient stabbed ten doctors in Shanghai, allegedly after a hospital denied treatment because the family could not pay the cost.² In August 2011, newspaper accounts around the world described a brawl at Nanchang No. 1 Hospital, in Jiangxi Province, in which thirty friends and relatives of a deceased patient clashed with scores of hospital staff, leaving fifteen injured.³ The incident was notable because of the decision by hospital staff to fight back, a sign of growing frustration about increasingly violent conflicts with patients and their families.

Available official data paint a grim picture. China's Ministry of Health reported 9831 "grave incidents" of medical disputes in 2006, with 5519 medical staff injured and property damage of 200 million yuan.⁴ The total number of medical disputes doubled between 2006 and 2008, to more than a million per year, with each medical institution in China on average

² Li Mao, *Shanghai Moves to Fix Medical Disputes*, GLOBAL TIMES (Aug. 24, 2011), <http://www.globaltimes.cn/NEWS/tabid/99/ID/672328/Shanghai-moves-to-fix-medical-disputes.aspx> (last visited July 12, 2012); Shengkun Sun & Wei Wang, *Violence against Chinese Health-care Workers*, 377 LANCET 9779, 1747 (May 21, 2011), available at <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2811%2960733-2/fulltext#bib1> (last visited July 12, 2012).

³ Zhao Wanlu, *Nanchang Tongbao Diyi Yiyuan Yihuan Jiufen Dou'ou Shijian* (南昌通报第一医院医患纠纷斗殴事件) [Nanchang Reports Hospital-Patient Dispute and Brawl at No.1 Hospital], DAJIANG WANG (大江网) [Dajiang Online] (Aug. 25, 2011), <http://www.jxnews.com.cn/xxrb/system/2011/08/25/011755422.shtml> (last visited July 12, 2012); Barbara Demick, *Hospital in China Fends Off Angry Mob*, L.A. TIMES (Aug. 25, 2011), <http://articles.latimes.com/2011/aug/25/world/la-fg-china-hospital-20110825> (last visited July 12, 2012).

⁴ One U.S. dollar equaled roughly 7.8 yuan in 2006. At present the exchange rate is roughly 6.3 yuan to one U.S. dollar.

The volume of injuries and incidents was roughly double that reported four years earlier; the property damage figure represented a tripling from 2002. Zeng Liming, *Zhongguo Qunian Fasheng Jin Wanqi Raoluan Yiliao Zhixu Shijian* (中国去年发生近万起扰乱医疗秩序事件伤五千人) [China Had Almost Ten Thousand Incidents Last Year Disturbing Orderly Medical Services and Leaving Five Thousand Injured], ZHONGGUO XINWEN SHE (中国新闻社) [China News Agency] (Apr. 18, 2007), available at <http://news.163.com/07/0418/20/3ccuj72d000120gu.html> (last visited Nov.15, 2011). The Ministry does not appear to have made public similar data for subsequent years.

confronting forty disputes.⁵ A report on an official website described medical disputes as “bloody conflicts concerning the accumulation of power in society” and stated that disputes increased by seventy percent at 350 surveyed hospitals over three years.⁶ Violent protest has become common in both rural and urban hospitals.⁷ In interviews, hospital officials, doctors, judges, health department officials, and lawyers all report that conflicts relating to medical care have become increasingly common and more difficult to resolve in the past decade.⁸

The volume of disputes has also increased in the courts. The Supreme People’s Court (SPC) reported that courts nationwide heard nearly seventeen thousand medical malpractice claims in 2010, an increase of 7.6 percent over 2009.⁹ Statistics from prior years are not available, but judges and commentators have noted a surge in medical disputes in the courts over the past decade and have repeatedly cited medical disputes as troublesome for Chinese courts.

⁵ *Id.*

⁶ Li Qiumeng, *Zhengxie Weiyuan: Ying Jiada Daji Yinao Weihu Shehui Wending* (政协委员：应加大打击医闹维护社会稳定) [CPPCC Member: Hospital Protests Ought to be Cracked Down on with Greater Force to Maintain Social Stability], EASTDAY (东方网) (Mar. 12, 2011), <http://news.sohu.com/20110312/n279782428.shtml> (last visited Nov. 16, 2011). Local authorities likewise report a significant increase in the volume of medical disputes, including violent conflict, and in hospital payouts in recent years. Tang Lei & Liu Gang, *Fujian Nanping Cheng Yinao Shifandi* (福建南平成医闹示范地) [Nanping of Fujian Province Becomes Model City of Hospital Protests], ZHONGGUO XINWEN SHE (中国新闻社) [China News Agency] (Jul. 7, 2009), <http://www.chinanews.com.cn/jk/jk-hyxw/news/2009/07-07/1764262.shtml> (last visited July 12, 2012). A series of studies of hospitals found that more than seventy percent of medical disputes resulted in disruptive behavior and that more than forty percent of disputes involved violence. Xu Xin & Lu Rongrong, *Baoli Yu Bu Xinren—Zhuanxing Zhongguo De Yiliao Baoli Yanjiu: 2002-2006* (暴力与不信任—转型中国的医疗暴力研究：2002-2006) [Violence and Mistrust – A Study on Medical Violence in a Transforming China: 2002-2006], 2008 FAZHI YU SHEHUI FAZHAN (法制与社会发展) [Legal System & Social Development] 1, 82 (2008), available at <http://www.usc.cuhk.edu.hk/PaperCollection/Details.aspx?id=6776> (last visited Oct. 12, 2011).

⁷ Wang Leyang, *Renda Daibiao Cheng Youde Yinao Dai Heishili Xingzhi* (人大代表称有的医闹带黑势力性质) [NPC Member Claims that Some Hospital Protests Involve Black Forces], NANJING CHENBAO (南京晨报) [Nanjing Morning News], available at <http://health.sohu.com/20070315/n248736421.shtml> (last visited Nov. 16, 2011); Wenzhi Cai et al., *Antecedents of Medical Workplace Violence in South China*, 26 J. INTERPERSONAL VIOLENCE 312, 313 (2011); Danghui Yu & Tiantian Li, *Facing Up to the Threat in China*, 276 LANCET 1823 (2010).

⁸ Interview 2009-102; see also Interview 2009-120 (judge describing increased volume of petitions and protests concerning medical disputes); *infra* (citing interviews).

⁹ Unpublished Supreme People’s Court Statistics, on file with author.

This article presents empirical evidence of medical malpractice litigation and medical disputes in China in order to develop a broader understanding of trends in institutional development, dispute resolution, and governance. My focus is in part on national trends and in part on one mid-sized municipality, which I refer to as Municipality A, in central China.¹⁰ This article is based on interviews with more than fifty doctors, hospital officials, health department officials, judges and lawyers in Shanghai, Beijing, Wuhan, and Municipality A, and a review of 152 decisions in lawsuits against hospitals or other medical providers in Municipality A from 2000 to 2009.¹¹ Medical malpractice law has generated extensive academic discussion in China, in particular in the run-up to the enactment of China's Tort Liability Law in 2009.¹² No prior literature of which I am aware, in English or Chinese, has engaged in detailed empirical study of medical litigation in China's courts or of hospital-patient conflicts more generally.¹³

¹⁰ A municipality is the primary sub-provincial authority in China. Municipalities such as Municipality A generally have under their jurisdiction both a core urban center and a wide rural area, including in Municipality A's case five counties, each with a county town. Municipality A had a population of nearly four million people as of 2009, with 350,000 in the urban center of the municipal seat. Municipality A is home to approximately 100 hospitals including two hospitals classified as "level three" hospitals, the highest level in China, seventy-one township-level hospitals, and five privately-run hospitals. Interview 2010-16.

¹¹ All of the decisions are public documents. As is frequently the case in China, however, the fact that decisions are public does not mean they are readily available. The decisions were collected by judges at the Municipality A intermediate court from their own court and from each lower court under their jurisdiction. The court shared these public decisions with a Chinese colleague and me with the request that the court not be identified in this article. Likewise all of my interviews were conducted on the condition that interviewees would not be identified by name or institutional affiliation.

¹² See, e.g., Chao Xi & Lixin Yang, *Medical Liability Laws in China: The Tale of Two Regimes*, 19 TORT L. REV. 65 (2011); Wang Liming, *Zeren Qinquan Fa De Hexin Shi Baozhang Siqian* (侵权责任法的核心是保障私权) [The Core of the Tort Law is to Protect Private Rights], GUANGMING WANG (光明网) [Guangming Daily Online] (Nov. 12, 2009), http://www.gmw.cn/01gmr/2009-11/12/content_1007147.htm (last visited July 12, 2012); Yang Lixin, "Qinquan Zeren Fa" Yiliao Sunhai Zeren Gaige De Chenggong Yu Buzu ("侵权责任法"改革医疗损害责任制度的成功与不足) [Success and Shortcomings of the Medical Malpractice Liability System Reform Through the "Tort Liability Law"], 4 ZHONGGUO RENMIN DAXUE XUEBAO (中国人民大学学报) [Journal of Renmin University of China] (2010).

¹³ Prior articles in English discussing medical malpractice law in China have focused almost entirely on the written law. Dean M. Ham & Chien-Chang Wu, *Medical Malpractice in the People's Republic of China: The 2002 Regulation on the Handling of Medical Accidents*, 33 J. L. MED. & ETHICS 456, 456 (2005); Xi & Yang, *supra* note 12; Zhu Wang & Ken Oliphant, *Yangge Dance: The Rhythm of Liability for Medical Malpractice in the People's Republic of China*, 87 CHICAGO-KENT L. REV. 21 (2012). One prior work in Chinese has examined the use of

Comparative scholarship on medical malpractice law likewise largely focuses on doctrinal developments, not on empirical study of actual disputes or the institutional dynamics of dispute resolution.¹⁴

Qualitative and quantitative empirical evidence reveals a dynamic in which the formal legal system operates in the shadow of protest and violence. The threat of protest, often including violence, leads hospitals to settle claims for more than would be available in court; the threat also influences courts' handling of claims that are brought to court. Court decisions do not provide a framework that influences negotiations outside the court. Instead, stability concerns shape outcomes in court.

The findings in this article carry implications for three interrelated debates. First, the evidence presented here adds depth to existing understanding of institutional development in China. Medical disputes highlight the growing institutional competence of the courts, but they also show that innovation in the courts does not equate to increased authority. The institutional development of China's courts challenges existing assumptions about the development trajectory of courts in authoritarian systems. Medical cases show how new uses of the courts can serve the interests of both individuals and the state and may reinforce rather than subvert state authority. Second, medical disputes show that despite thirty-three years of legal reforms and significant strengthening of legal institutions, the shadow of law remains weak. Violence and protest are now part of the cycle of dispute resolution. Routine legal issues are frequently converted into political issues, and courts lack a privileged position in setting legal norms. Third, medical

violence in medical disputes in China. Xu & Lu, *supra* note 5. Likewise, one prior English study discussed violence against medical staff generally. Cai et al., *supra* note 7.

¹⁴ Rare exceptions include work on Japan and Taiwan. See, e.g., Eric Feldman, *Law, Culture, and Conflict Dispute Resolution in Postwar Japan*, in *LAW IN JAPAN: A TURNING POINT 50* (Daniel Foote ed., 2007); ERIC FELDMAN, *THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY, AND HEALTH POLICY* (2000); Jou-juo Chu & Lin Donglong, *Yiliao Gongdao Ruhe Tao? Taiwan Yiliao Jiufen Chuli Jizhi Bibing Zhi Tantai* (醫療公道如何討? 台灣醫療糾紛處理機制弊病之探討) [How to Seek Medical Justice? A Discussion on the Problems in Taiwanese Medical Dispute Resolution Mechanisms], 11 *YISHI FAXUE* (醫事法學) [J. L. & Med.] 3, 31 (2003); You Zongxian & Yang Xiuyi, *Taiwan Yiliao Jiufen Zili Jiuji Zhi Shizheng Yanjiu—Jianbao Ziliao Fenxi* (台灣醫療糾紛自力救濟之實證研究—剪報資料分析) [Case Studies on Self-Help in Medical Disputes in Taiwan—An Analysis Based on Newspaper Clippings], 14 *YISHI FAXUE* (醫事法學) [J. L. & Med.] 1, 87 (2006).

malpractice cases highlight state over-responsiveness to some individual grievances. Prior literature has examined the use of cycles of repression and concession as a governance tool in China. Prior literature has, however, largely overlooked how concessive and repressive policies interact with efforts to construct formal legality. The findings presented here suggest limitations to contemporary understanding of both the functioning of the Chinese state and of the role of law in China, and add to existing literature on the non-convergence of the Chinese system to existing models of legal and political development.

In Part II I begin with a discussion of changes in China's healthcare system that legal and medical experts argue are to blame for the rise in disputes between patients and healthcare providers. I then survey the confused legal landscape concerning medical disputes and introduce some of the intermediaries influencing medical disputes. In Part III I analyze 152 cases collected from Municipality A. In Part IV I discuss the rise of medical protest and the impact of such conflicts on hospitals, officials, and the courts. Part V discusses the implications of my findings for understandings of institutional development, dispute resolution, and governance in China.

II. BACKGROUND

1. *China's Healthcare System*

The increase in medical disputes in China has occurred against the backdrop of dramatic changes in China's legal and healthcare systems.¹⁵ China's healthcare system has undergone dramatic changes during the reform era. Extensive literature has analyzed these complex and multi-dimensional changes.¹⁶ I thus provide only an overview of those elements most relevant to disputes between patients and healthcare providers.

¹⁵ I discuss changes in the legal system in detail elsewhere. Benjamin Liebman, *China's Courts: Restricted Reform*, 21 J. ASIAN L. 1 (2007); Benjamin Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, in MAO'S INVISIBLE HAND (Elizabeth Perry & Sebastian Heilmann eds., 2011).

¹⁶ See, e.g., CPC Central Committee & State Council, *Zhonggong Zhongyang Guowuyuan Guanyu Shenhua Yiyao Weisheng Tizhi Gaige De Yijian* (党中央国务院关于深化医药卫生体制改革的意见) [Opinion of the Central Committee of the Communist Party and the State Council on Deepening Reform of the Medical Health System], XINHUA (Apr. 6, 2009), available at http://www.gov.cn/test/2009-04/08/content_1280069.htm (last visited Oct. 14, 2011); Karen Eggleston et al., *Comparing Public and Private Hospitals in China: Evidence from Guangdong*, 10

Over the past thirty years healthcare, like much of the Chinese economy, has undergone dramatic marketization. At the beginning of the reform era most individuals in China had access to free or heavily subsidized health care. By 2001 the public's out-of pocket share of spending on health had increased to sixty percent, up from twenty percent in 1978.¹⁷ As the state retreated from funding health care in the 1980s, hospitals came under pressure to maximize revenue, in particular through the sale of medicines and carrying out of tests.¹⁸ Excessive testing, procedures, and the prescribing of unnecessary medication are widespread,¹⁹ as is low quality care.²⁰ Although most urban residents have healthcare through their work, migrant workers and rural residents do not.²¹ As a result rural residents have generally had to pay out of pocket up front for healthcare — a phenomenon referred to as “pay or die.”²² Even urban residents with health coverage are at times required to pay significant amounts up front.²³ The cost of medical care, in

BMC HEALTH SERV. RES. 76 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/pmc2858143/> (last visited Nov. 16, 2011); Richard Herd et al., *Improving China's Health Care System*, OECD ECON. DEPT. WORKING PAPERS No. 751 (2010), available at <http://dx.doi.org/10.1787/5kmlh4v2fv31-en> (last visited Oct. 14, 2011); Magnus Lindelow & Adam Wagstaff, *Health Service Delivery in China: A Literature Review*, 17 HEALTH ECON. 149 (2008); Christina S. Ho, *Health Reform and De Facto Federalism in China*, 8 CHINA INT. J. 33, 37-38 (2010); Yuanli Liu et al., *China's health system performance*, 372 LANCET 1914 (Oct. 20, 2008); Yanzhong Huang, *The Sick Man of Asia: China's Health Crisis*, FOR. AFFAIRS, Nov./Dec./ 2011, at 119; Qun Meng, *Trends in Access to Health Services and Financial Protection in China Between 2003 and 2011: A Cross-Sectional Study*, 379 LANCET 805 (2012).

¹⁷ Ho, *supra* note 13, at 39.

¹⁸ Ho, *supra* note 13, at 37-39.

¹⁹ Interview 2010-6; Interview 2010-32; Interview 2010-31.

²⁰ Interview 2009-102. See also Huifeng Wang, *A Dilemma of Chinese Healthcare Reform: How to Re-define Government Roles?* 20 CHINA ECONOMIC REVIEW 598 (2009), at 599-601 (arguing that a combination of continued state management of healthcare with marketization has resulted in abuses, and noting that only twelve percent of hospital income comes from state subsidies).

²¹ Ho, *supra* note 13; Wangchuan Lin et al., *Urban Resident Basic Medical Insurance: A Landmark Reform Toward Universal Coverage in China*, <http://www.wanchuanlin.org/papers/URBMI.pdf> (last visited Nov. 16, 2011). State spending on healthcare also shifted dramatically toward urban residents during the reform era, with more than three quarters of all spending on healthcare going to urban areas and institutions. Yanzhong Huang, *supra* note 15.

²² Jonathan Watts, *Protests in China over Suspicions of a Pay-or-die Policy*, 369 LANCET 93, 94 (Jan. 13, 2007), available at <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2807%2960050-6/fulltext>.

²³ Ho, *supra* note 13, at 37-39.

particular for major illnesses or injuries, has become a significant financial risk and burden, with healthcare unaffordable for many.²⁴ Reforms initiated in 2009 have sought to address the lack of health coverage for rural residents. Initial evidence suggests that such reforms have succeeded in extending coverage to more than ninety percent of the population.²⁵ Nevertheless, low coverage rates, in particular for catastrophic injury or illness, mean that the financial risks remain high even for those covered by the new health care plans.²⁶

Observers of and participants in China's healthcare system have argued that marketization of the healthcare system has shifted patient expectations and doctor-patient relationships in ways that increase conflicts. Four trends stand out. First, the fact that patients are paying out of pocket means that patients and their families expect positive outcomes. This makes patients more likely to complain and protest about the care they receive.²⁷ Doctors and officials also argue that patients, especially the poor, often delay treatment until serious illnesses are at an advanced stage, making disputes more likely.²⁸ Doctors complain that they are blamed when a patient has a history of illness that contributes to an adverse outcome.²⁹ Yet they also

²⁴ Ho, *supra* note 13, at 39. Despite these problems the health of the Chinese population has improved during the reform era. Martin King Whyte & Zhongxin Sun, *The Impact of China's Market Reforms on the Health of Chinese Citizens: Examining Two Puzzles*, 8 CHINA INT. J. 1, 29 (Mar. 2010). *But see* Yanzhong Huang, *supra* note 15, at 119 (arguing that increases in life expectancy in China have been low when viewed in comparative context). For a discussion of these two different accounts of trends in healthcare, see Lincoln Chen & Dong Xu, *Trends in China's Reforms: The Rashomon Effect*, 379 LANCET 782 (2012).

²⁵ Winnie Chi-Man Yip et al., *Early Appraisal of China's Huge and Complex Health-care Reforms*, 379 LANCET 833 (2012); Qun et al., *supra* note 16, at 810, 812.

²⁶ Yip et al, *supra* note 25 at 838 (noting that most studies have found "no measurable effect on reduction of financial risk"). As of 2010 out of pocket expenses for patients still exceeded fifty percent. *Id.* at 836; *see also* Qun et al., *supra* note 16, at 812 (noting continued high financial burden of healthcare).

²⁷ Liu Yi & Tian Feng, *Qian Xi Yiliao Jiufen De Chengyi Yu Fangfan* (浅析医疗纠纷的成因与防范) [Brief Analysis of the Causes and Prevention of Medical Disputes], 1 ZHONGHUA XIANDAI YIYUAN GUANLI ZAZHI (中华现代医院管理杂志) [Journal of Chinese Modern Hospital Management] (Sept. 2003), *available at* http://journal.9med.net/html/qikan/yyglyfyxwsx/zhdyyglzz/2003911/ysfg/20080903014220702_15972.html (last visited July 12, 2012) (last visited July 12, 2012); Interview 2010-24; Interview 2009-101.

²⁸ Interview 2010-17.

²⁹ Interview 2009-108.

acknowledge that failure to explain medical procedures contributes to patients' high expectations.³⁰

Second, the quality of care provided remains inconsistent.³¹ Observers have pointed to inequalities in standards of care between major urban hospitals and those in rural areas and have argued that quality care is increasingly out of reach of China's poor.³² The vast majority of hospitals, and virtually all major hospitals, are public.³³ Numerous smaller private clinics and hospitals have emerged in recent years, often offering care at lower cost than that offered in the public system.³⁴ Many doctors remain poorly trained.³⁵ Even in major urban hospitals financial incentives may lead to low-quality care. Doctors argue that many problems result from the excessive use of surgery.³⁶ Lawyers complain that doctors are incentivized to prescribe expensive medicines and treatment and consequently often fail to treat the underlying

³⁰ Interview 2009-116.

³¹ See, e.g., Xu Zhihui, *Fangfan Yiliao Shigu Yaoyou Xin Linian* (防范医疗事故要有新理念) [Prevention of Medical Accidents Needs New Ideas], *JIANGNAN LUNTAN* (江南论坛) [Jiangnan Forum], <http://www.jnforum.com/web/article/showarticle.asp?articleid=2247> (last visited Apr. 22, 2009).

³² Ho, *supra* note 13; Liu, Rao, Wu & Gakidou, *supra* note 13 (discussing increased inequality in healthcare system and growing unaffordability for many); Eggleston et al., *supra* note 13 (summarizing problems in the delivery of health services).

³³ MINISTRY OF HEALTH OF P.R. CHINA, 2011 NIAN 3 YUE QUANGUO YILIAO FUWU QINGKUANG (2011年3月全国医疗服务情况) [Report on Nationwide Health Services in March 2011], May 9, 2011, *available at* <http://www.moh.gov.cn/publicfiles/business/htmlfiles/mohwsbwstjxxzx/s7967/201105/51588.htm> (reporting that only 7312 out of a total of 940,409 registered hospitals and medical clinics in China are private). The number of new private hospitals is growing, while the total number of public state hospitals has declined modestly in recent years. *Id.*

³⁴ Some allege that private hospitals often offer lower-quality care. One study, however, found that the type of ownership was not a significant factor in determining the level or quality of care offered. Eggleston et al., *supra* note 13.

³⁵ *Id.*

³⁶ Interview 2009-113.

condition.³⁷ Regardless of the quality of care provided, the perception of inequality also undermines trust in medical institutions.

Many hospitals are overwhelmed with patients. Because patients pay out of pocket it is common to seek treatment in major urban hospitals, even for relatively minor ailments, and even though urban hospitals charge more than those in rural areas.³⁸ Many rural residents who seek care in the cities travel accompanied by a number of family members, adding to the large number of people at major hospitals on any given day.³⁹ The volume of patients, lack of primary care facilities, and profit incentives combine to mean that doctor-patient interactions are extremely brief.⁴⁰ Follow-up is rare.⁴¹

Third, distrust in the healthcare system is widespread.⁴² Patients believe doctors are out to make money, and are skeptical of treatment decisions (in particular those that entail significant cost). Most observers interviewed for this project noted a lack of trust in the healthcare system as a source of medical disputes.⁴³ Lawyers complain that it is common for doctors to falsify medical records and to fail to disclose information to patients.⁴⁴ The fact that most hospitals are public contributes to distrust.⁴⁵ Hospitals are arms of the state, and thus when patients die family

³⁷ Interview 2010-6.

³⁸ Interview 2009-101; Interview 2010-16. Recently announced reforms are designed to encourage patients to seek treatment in rural areas first, and thus may over time alter this trend. Interview 2010-16.

³⁹ Hospital officials also describe a culture in which the average patient is accompanied by two to three family members—and many come with eight to ten family members. Interview 2009-116; 2010-19.

⁴⁰ Interview 2009-101; Interview 2009-116.

⁴¹ Interview 2010-22; *see also* Interview 2009-102 (noting the need for community-based health care).

⁴² Ho, *supra* note 13, at 38 (noting that hospitals have become “fee-for-service” providers that “survive mainly on the basis of maximizing revenue from private households”).

⁴³ For examples, see Interview 2010-4; Interview 2010-5; Interview 2009-114; Interview 2009-123.

⁴⁴ Interview 2010-5.

⁴⁵ Interview 2010-6.

members blame the hospital — and protest — believing the state will step in to provide compensation.⁴⁶

Patient trust is further undermined by the perception that corruption and questionable practices are widespread. Estimates state that more than half of doctor income comes from side payments from patients, kickbacks from drug companies, and moonlighting. Doctors often demand side payments, or “red envelopes.” The practice exacerbates patient-doctor distrust both by increasing expectations among those who make such payments and by fueling suspicion by those who do not (or cannot) make such payments. In addition, although virtually all doctors are registered with hospitals,⁴⁷ many also work on the side either at second-tier hospitals or in other cities to supplement their income.⁴⁸

Fourth, hospital officials and doctors blame widespread media coverage of medical disputes for encouraging patient protests.⁴⁹ Doctors (not surprisingly) argue that media reports are often biased toward patients and create unrealistic expectations regarding potential settlement amounts for disputes.⁵⁰ In 2009, for example, extensive media coverage described claims by parents of a five month old infant who had died at a children’s’ hospital in Nanjing. The parents alleged that the doctor on duty was playing video games and refused to come to the assistance of the child.⁵¹ The case eventually settled for 510,000 yuan, well above the amount that would have been recoverable in court.⁵² As a result, patients and families elsewhere refused to settle

⁴⁶ Interview 2010-6.

⁴⁷ Interview 2009-101.

⁴⁸ Interview 2009-116.

⁴⁹ Interview 2009-102.

⁵⁰ Interview 2009-116

⁵¹ Li Xiang, *Yisheng Wan Youxi Zhi Yinger Si* (医生玩游戏致婴儿死) [Infant Death Caused by Doctor Playing Computer Games], SINA.COM (新浪网) (Nov. 16, 2009), <http://news.sina.com.cn/c/sd/2009-11-16/223819059951.shtml> (last visited July 12, 2012).

⁵² *Id.*

pending claims, arguing that the outcome in Nanjing showed that proposed settlements were far too low.⁵³

Recent state efforts have begun to address some of the problems in the healthcare system. Official statements call for increased state funding and for restructuring the financial incentives facing healthcare providers.⁵⁴ Significant reforms are underway in some regions. But reforms will be costly and will take years to implement.

2. *The Legal Landscape: The Two Tracks of Medical Malpractice Litigation*

a. *The Medical Accident Regulations and Medical Review Boards*

Medical malpractice litigation in China is primarily governed by the 2002 Regulations on Handling Medical Accidents (the “Regulations”) issued by the State Council.⁵⁵ In order to obtain compensation it must be shown that the defendant was responsible for a “medical accident,” defined as an error causing personal injury to a patient that results from medical personnel negligently violating relevant laws, administrative regulations, rules, standards governing medical care, or ordinary practice.⁵⁶ The Regulations contemplate four categories of medical accident, ranging from medical accidents resulting in death or serious disability (level

⁵³ Interview 2009-101.

⁵⁴ For a discussion of proposed reforms, see Opinion of the CPC Central Committee and State Council, *supra* note 13; Ho, *supra* note 13, at 40-45; Herd et al., *supra* note 13; Pitman B. Potter, *Dilemmas of Access to Healthcare in China*, 8 CHINA INT. J. 164, 171 (Mar. 2010); Qian Jiwei, *Reforming Public Hospitals in China*, 3 EAST ASIAN POLICY 75, 77 (2011) (discussing proposed reforms to urban hospitals); Shanlian Hu et al., *Reform of How Health Care is Paid for in China: Challenges and Opportunities*, 372 LANCET 1846–53 (Nov. 22, 2008), available at doi:10.1016/S0140-6736(08)61368-9; James A. C. Sinclair, *China's Healthcare Reform*, 36 CHINA BUS. REV. 32 (2009).; Yip et al, *supra* note 25, at 833-840.

⁵⁵ Yiliao Shigu Chuli Tiaoli (医疗事故处理条例) [Regulations on the Handling of Medical Accidents] (promulgated by the St. Council, Apr. 4, 2002, effective Sep. 1, 2002) ST. COUNCIL ORDER No. 351, available at http://news.xinhuanet.com/zhengfu/2002-04/15/content_358058.htm (last visited July 12, 2012) [hereafter “Regulations”].

⁵⁶ Regulations, art. 2.

one) to those resulting in “obvious personal injury” but no disability (level four).⁵⁷ Cases involving a “medical accident” are governed by the Regulations; cases against medical providers that do not involve “medical accidents” are not covered by the Regulations.⁵⁸

The Regulations were designed in part to make it easier for plaintiffs to receive compensation and to channel disputes into the formal legal system.⁵⁹ The Regulations place the burden of proof in medical cases on defendants. In practice, however, the Regulations are widely viewed as favorable for defendants, for two reasons.⁶⁰ First, damages available in malpractice cases brought pursuant to the Regulations are low — significantly lower than in other tort cases. The Regulations, while providing for a range of categories of damages,⁶¹ exclude payment of compensation for death. In contrast, damage awards in other tort cases are governed by the SPC’s 2003 interpretation on damages in personal injury cases (the

⁵⁷ Regulations, art. 4. In theory patients can also seek redress through local health bureaus, but this route appears to be rarely used. Although health bureaus have the ability to sanction doctors and hospitals and can mediate disputes, they cannot order hospitals to compensate patients. Interview 2009-108.

⁵⁸ Regulations, art. 1.

⁵⁹ Prior to 2002 medical disputes were governed by the 1987 Methods on the Handling of Medical Accidents. The Methods permitted only a narrow scope of claims and stipulated that determinations regarding liability should be made by local health bureaus, which also oversee the operation of hospitals. Guowuyuan Guanyu Fabu Yiliao Shigu Chuli Banfa De Tongzhi (国务院关于发布医疗事故处理办法的通知) [Notice of the State Council Regarding the Issuance of the Methods on the Handling of Medical Accidents] (promulgated by the St. Council, Jun. 29, 1987), GUO FA (国发) [St. Council Publication] No.63 (1987), *available at* http://www.pkulaw.cn/fulltext_form.aspx?Gid=3364 (last visited Oct. 28, 2011). The Regulations were designed to increase trust in the system by expanding the range of injuries for which compensation could be received and shifting determinations of fault away from health bureaus. Ham and Wu, *supra* note 11, at 457; *see also* Yiwu Renyuan Ruhe Yingdui Xin De “Yiliao Shigu Chuli Tiaoli” (医务人员如何应对新的《医疗事故处理条例》) [How Medical Professionals Should Deal with the New “Regulations on the Handling of Medical Accidents”], ZHONGGU FALÜ WANG (中顾法律网) [Zhonggu Law Net], <http://news.9ask.cn/yljf/201101/1039324.shtml> (last visited Jan. 10, 2011) (stating that the Regulations were designed to encourage the use of the formal legal system). In practice, however, it seems clear that the Regulations were also designed to ensure the continued economic development of China’s hospitals.

⁶⁰ The national hospital association reportedly played a key role in drafting the Regulations.

⁶¹ Regulations, art. 50. These include compensation for medical expenses, compensation for missed work, compensation for disability, compensation for funeral related expenses, and compensation for emotional distress.

“Interpretation”) and by the General Principles of the Civil Law (“General Principles”).⁶² The Interpretation explicitly provides for a death compensation payment of twenty times average local income in cases in which negligent actions lead to death.⁶³ A plaintiff seeking compensation for a medical accident that results in death will thus generally receive significantly less — often hundreds of thousands of yuan less — than a plaintiff seeking compensation in an ordinary negligence action.

Second, under the Regulations determinations regarding whether or not a “medical error” has occurred are made by medical review boards established by local medical associations.⁶⁴ Courts must defer to the review boards’ determinations.⁶⁵ Academics, lawyers, and judges have pointed out a number of problems with the use of medical review boards. Review boards consist

⁶² Minfa Tongze (民法通则) [General Principles of the Civil Law] (promulgated by the National People’s Congress, Apr. 12, 1986, effective Jan. 1, 1987) PRESIDENT ORDER No. 37, *available at* <http://en.pkulaw.cn/display.aspx?id=1165&lib=law> (last visited July 12, 2012).

⁶³ Zuigao Renmin Fayuan Guanyu Shenli Renshen Sunhai Peichang Anjian Shiyong Falü Ruogan Wenti De Jieshi (最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释) [Supreme People’s Court Interpretation of Some Issues Concerning the Application of Law in the Trial of Cases on Compensation for Personal Injury] (promulgated by the Sup. People’s Ct., Dec. 26, 2003, effective May 1, 2004), FA SHI (法释) [Law Interpretation] No. 20 (2003), *available at* http://www.law-lib.com/law/law_view.asp?id=81918 (last visited July 12, 2012). Other differences also exist between the Regulations and the SPC’s Interpretation, including the calculation of disability payments (where the Regulations provide modestly higher damages). Such differences are relatively minor compared to the difference in death compensation payments.

⁶⁴ Regulations, art. 33.

⁶⁵ Zuigao Renmin Fayuan Guanyu Canzhao “Yiliao Shigu Chuli Tiaoli” Shenli Yiliao Jiufen Minshi Anjian De Tongzhi (最高人民法院关于参照《医疗事故处理条例》审理医疗纠纷民事案件的通知) [Notice of the SPC Concerning the Trial of Civil Medical Dispute Cases According to “Regulations on the Handling of Medical Accidents”] (promulgated by the Sup. People’s Ct., Jan. 6, 2003), FA (法) [SPC Publication] No.20 (2003), *available at* http://www.law-lib.com/law/law_view.asp?id=78300 (last visited July 12, 2012). Interview 2010--22. Medical review boards exist at the municipal, provincial, and national levels. Decisions of municipal review boards can be appealed to the provincial-level review board, which may be less subject to local bias, but doing so is costly and thus rare. In some provinces parties may also request an inspection by a medical association in a different municipality. Interview 2009-108; *Yiliao Shigu Jianding Ruhe Pinqing Waidi De Zhuanjia* (医疗事故鉴定如何聘请外地的专家) [How to Hire an Expert from Another Location for Review of Medical Accidents], BEIJING SHI JINDONG LÜSHI SHIWU SUO WANGZHAN (北京市金栋律师事务所网站) [Beijing Jindong Law Firm Website] (May. 24, 2011), <http://www.lvshi100.net/news.php?NewsID=45651>. A very small number of cases are eventually appealed to the medical review board under the national medical association. Interview 2009-108.

entirely of local doctors and are thus likely to protect local doctors and hospitals.⁶⁶ Local medical associations are overseen by local health departments — which also oversee hospitals and doctors.⁶⁷ Hearings are brief and decisions are often short and lack detailed reasoning.⁶⁸ Decisions are anonymous, with no dissents, and review board members never appear in court.⁶⁹ When review boards do find error, they often find minor error — thus protecting hospitals and doctors. The process can be expensive.⁷⁰

Hospital and health department officials contest many such claims, arguing that review boards frequently find against defendants.⁷¹ Rival claims regarding medical review boards are difficult to assess because review board determinations are not public. Empirical evidence is scarce. The one prior study that exists found that medical review boards found error in only 25

⁶⁶ Wo Zhongdong, *Dui Woguo Yiliao Shigu Jishu Jianding Zhidu De Ji Dian Sikao* (对我国医疗事故技术鉴定制度的几点思考) [Some Thoughts on our Nation's Rules of Reviewing Medical Accidents], 4 ZHONGHUA XIANDAI YIYUAN GUANLI ZAZHI (中华现代医院管理杂志) [Journal of Chinese Modern Hospital Management], No. 12 (2006), available at <http://www.39kf.com/cooperate/qk/xdyygl/0612/2007-04-26-349428.shtml> (last visited Oct. 28, 2011); Wang Jinfan & Wang Haiyan, *Yiliao Shigu Jishu Jianding Cunzai De Wenti He Gaijin Jianyi* (医疗事故技术鉴定存在的问题和改进建议) [Problems in Technical Reviews of Medical Accidents and Suggestions for Improvement], 20 WEISHENG RUAN KEXUE (卫生软科学) [Soft Science of Health] (2006), No. 6, available at http://so.med.wanfangdata.com.cn/ViewHTML/PeriodicalPaper_wsrkx200606024.aspx; Interview 2010-5; Interview 2010-14. The fact that adverse decisions by medical review boards can also result in administrative punishment for doctors and hospitals further decreases the likelihood that review boards will find serious error. Interview 2010-11.

⁶⁷ Wo, *supra* note 59.

⁶⁸ Interview 2010-15; Interview 2010-5.

⁶⁹ *Yiliao Shigu Jianding Yu Yiliao Guocuo Jianding Qubie* (医疗事故鉴定与医疗过错鉴定区别) [The Difference Between Medical Accident Inspection and Medical Negligence Inspection] (Nov. 5, 2002), <http://china.findlaw.cn/yiliao/hot/guocuojianding/24950.html> (last visited Oct. 28, 2011); Interview 2010-11. This may be appealing to judges, who may find it easier to defer to the review boards than to engage in review of their determinations. Interview 2010-11; Interview 2009-113.

⁷⁰ Hospitals will generally bear the cost if they request an inspection, an inspection is ordered by a court, or the plaintiff prevails. Interview 2010-16.

⁷¹ Non-public reports by the Ministry of Health found that the medical review boards find error in approximately sixty percent of cases. Interview 2010-10.

out of 110 cases over a three year period following the enactment of the Regulations.⁷² Yet actual outcomes may be less important than appearances: one doctor noted that the design of the review boards means it is virtually impossible to convince patients to trust review board decisions.⁷³

b. Avoiding the Regulations: Tort Principles and Judicial Inspections

Most medical cases are brought pursuant to the Regulations. Yet numerous plaintiffs have sought to avoid both damage limitations and medical review boards by bringing ordinary tort claims under the provisions of the General Principles of the Civil Law and the SPC's Personal Injury Interpretation. In such cases determinations regarding negligence are made by judicial inspection agencies, quasi-private entities retained by parties to the litigation.⁷⁴ Hospitals, doctors, and their lawyers have criticized this practice,⁷⁵ arguing that judicial inspection bodies lack subject matter expertise,⁷⁶ are poorly regulated, and are driven by profit

⁷² Wang Ping, *Yiliao Shigu Zhengyi 110 Li Jishu Jianding Fenxi* (医疗事故争议 110 例技术鉴定分析) [Analysis of Technical Reviews in 110 Disputed Medical Accident Cases], 16 HAINAN YIXUE (海南医学) [Hainan Medical Journal], no. 12 (2005), available at http://so.med.wanfangdata.com.cn/ViewHTML/PeriodicalPaper_hainanyx200512112.aspx.

⁷³ Interview 2009-101.

⁷⁴ Originally established under the courts, judicial inspection offices became independent of the courts in 2005. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sifa Jianding Guanli Wenti De Jueding (全国人民代表大会常务委员会关于司法鉴定管理问题的决定) [Decision on Issues Regarding Management of Judicial Inspections] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2005, effective Oct. 1, 2005), available at <http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=57068> (last visited July 12, 2012). Judicial inspection bodies are registered with the Ministry of Justice and most often are used to make determinations regarding the severity of injury in civil cases. Many judicial inspection agencies are linked to universities or other state entities. But the range of judicial inspections offices is broad. In Beijing, for example, there are twenty nine different judicial inspection entities.

⁷⁵ Interview 2010-4.

⁷⁶ Interview 2010-12; Interview 2010-8.

(and thus are likely to decide in favor of the party retaining them).⁷⁷ Judicial inspection officials describe their work as a necessary response to the unfairness of the medical review boards.⁷⁸

The “two tracks” of medical cases have generated extensive debate in China. Hospital officials and their lawyers argue that the Regulations should govern all claims involving allegations of injury resulting from medical care. They contend that the existence of the two tracks of litigation permits courts to reach any decision they desire, in particular in cases involving sympathetic plaintiffs.⁷⁹ In contrast, many lawyers, judges, and academics have argued that the Regulations govern only serious cases of medical error and that more routine and minor malpractice claims can be brought according to ordinary tort principles. In practice, some lawyers have sought to bring even cases involving major claims of medical error under ordinary tort principles in order to avoid the medical review boards and to obtain higher damages.⁸⁰

⁷⁷ Interview 2010-31; Interview 2010-2; Interview 2010-8; 2010-17; Interview 2010-11; Interview 2010-31; Lu Yuhua, *Jianding Jielun Yu Sifa Jianding Tizhi Gaige* (鉴定结论与司法鉴定体制改革) [Inspection Conclusions and Reform of the Judicial Inspection System], HUNAN XIANGJIAN LAW FIRM (湖南湘剑律师事务所), http://www.xj148.com/xj1w/lunwen_luyh01.htm (last visited Oct. 29, 2011). In contrast to medical review board procedures, judicial inspection employees do sometimes testify in court; the names of the persons making the decisions are attached to the decision; and in some cases (albeit rare) dissenting opinions may be attached. *Butong Jianding Yijian De Chuli Guize* (不同鉴定意见的处理规则) [Rules for Handling Different Inspection Opinions], ZHONGGU FALÜ WANG (中顾法律网) [Zhonggu Law Net] (Jul. 24, 2009), <http://news.9ask.cn/xsss/sfjd/sfjdcx/200907/206999.html> (last visited July 12, 2012); Interview 2010-14.

⁷⁸ Interview 2010-11. In most cases plaintiffs select judicial inspections. But in some cases courts may order a judicial inspection because of doubts about the outcome in a medical review board. Interview 2010-11; Liu Taijin et al., *Jiangxi Shouli Sifa Jianding Kangbian Yiliao Jianding An Luomu* (江西首例司法鉴定抗辩医疗鉴定案落幕) [Jiangxi's First Case with Opposing Results from Judicial Inspection and Medical Inspection Ends], DAJIANG WANG (大江网) [Dajiang Online] (May 21, 2009), <http://jiangxi.jxnews.com.cn/system/2009/05/21/011118129.shtml> (last visited Oct. 29, 2011).

⁷⁹ Interview 2010-6.

⁸⁰ Interview 2010-32; Interview 2009-101. In some cases lawyers may also sue in contract, again because damages may be greater.

The SPC has indirectly endorsed the more permissive view.⁸¹ In a 2003 Notice the SPC ordered courts to handle medical disputes “with reference” to the Regulations.⁸² The notice did little to clarify what cases fit within the Regulations, stating instead that “cases not arising as a result of medical accident” could proceed according to the provisions of the General Principles. In a 2004 press conference, an SPC official stated that in “medical accident cases” the *Regulations* apply. But, the official stated, plaintiffs may also sue under ordinary tort law for “medical injury,” in which case the personal injury interpretation and higher damage standards apply.⁸³ The official thus implied that plaintiffs may determine the path under which to bring their cases.⁸⁴

c. Court Practice

⁸¹ Zhu Jianjun & Wang Hong, *Shi Tongguo Liang Ze Anli Jiedu Yiliao Shigu Jianding De Falü Xingzhi* (试通过两则案例解读医疗事故鉴定的法律性质) [An Attempt to Interpret the Legal Nature of Medical Accident Reviews Through Two Cases], ZHONGGUO MINSHANG FALÜ WANG (中国民商法律网) [China Civil Commercial Law Online] (Oct. 8, 2003), <http://www.civillaw.com.cn/article/default.asp?id=13055> (last visited Oct. 29, 2011).

⁸² Notice of the SPC, *supra* note 58.

⁸³ Wang Lianyin, *Zuigao Renmin Fayuan Min Yi Ting Fuzeren Jiu Shenli Yiliao Jiufen Anjian De Falü Shiyong Wenti Da Jizhe Wen* (最高人民法院民一庭负责人就审理医疗纠纷案件的法律适用问题答记者问) [Head of Supreme People’s Court Civil No.1 Division Answers Reporter’s Questions Regarding the Applicable Laws in the Trial of Medical Dispute Cases], ZUIGAO RENMIN FAYUAN WANGZHAN (最高人民法院网站) [Sup. People’s Ct. Website] (Apr. 12, 2004), *available at* <http://www.law-lib.com/fzdt/newshtml/21/20050709153310.htm> (last visited Oct. 29, 2011).

⁸⁴ In addition, in a 2007 speech directed at civil court judges the chief of the SPC’s first civil division – which is responsible for medical cases – noted the paradox created by the conflict between the Regulations and the Interpretation: the most serious cases will be tried as medical accident cases and will receive lower compensation than minor cases that proceed according to the General Principles. The judge called for courts to proceed “according to actual practice,” and to avoid creating situations in which there was an imbalance between the two types of cases. He also called on courts to make sure that “interests are balanced” in medical cases. Although the judge stopped short of explicitly stating that courts could use the Interpretation in calculating damages in medical cases, the statement suggested that the court would endorse expanded damage awards in some medical cases. Ji Min, President, Civ. Trial No. 1 Ct. of Sup. People’s Ct., *Zai Quanguo Minshi Shenpan Gongzuo Zuotan Hui Shang De Zongjie Jianghua* (在全国民事审判工作座谈会上的总结讲话) [Concluding Remarks at the National Civil Trial Work Forum] (Apr. 10, 2007), *available at* http://law.baidu.com/pages/chinalawinfo/11/4/fef1f4b3a7264f73d85e6a6e92ea04ad_0.html (last visited July 12, 2012).

Provincial and local courts have taken a range of approaches, with some all but ignoring the Regulations and others refusing to accept cases not reviewed by medical review boards. In Beijing, for example, courts have generally permitted plaintiffs to choose between medical and judicial inspections.⁸⁵ Judges state that this is because medical review boards are unfair to plaintiffs.⁸⁶ One of the highest profile cases in recent years involved a claim by the relatives of a professor and doctor at Peking University Hospital who had died during surgery at the hospital, allegedly due to the negligence of trainee doctors.⁸⁷ The plaintiffs relied on a judicial inspection. On appeal following a large award for plaintiffs, the intermediate court allowed both a judicial inspection and one by the local medical review board.⁸⁸ In some cases courts have relied on judicial inspection results that directly contradict findings of medical review panels.⁸⁹ In other decisions courts have increased damage awards in accordance with the personal injury regulations, arguing that to do otherwise would be unfair.⁹⁰

⁸⁵ Interview 2010-3; Interview 2010-4.

⁸⁶ Interview 2010-4.

⁸⁷ Wang Jianguo, Guan Huiying Su Beijing Daxue Diyi Yiyuan (王建国、管惠英诉北京大学第一医院) [Wang Jianguo & Guan Huiying v. Peking Univ. No. 1 Hosp.], 2009 GAO MIN ZHONG ZI (高民终字) [Beijing High People's Ct. Civ. Final Decision] No. 4612 (Beijing High People's Ct. 2010), available at http://www.m-lawyers.net/Article_Show.asp?ArticleID=26384 (last visited July 12, 2012); Chen Hongwei et al., *Beida Yiyuan Jiaoshou Si Yu Gongzhi Yiyuan Yin Feifa Xingyi Zhizheng* (北大医院教授死于供职医院引非法行医之争) [Death of Professor at Peking University Hospital Where She Worked Causes Dispute over Illegal Medical Practice], TAI HAI WANG (台海网) [Tai Hai Online] (Jun. 12, 2010), <http://www.taihainet.com/news/cnnews/2010-06-12/542043.html> (last visited Oct. 29, 2011).

⁸⁸ Interview 2010-4. Regulations in Guangdong likewise permit the plaintiff to choose to pursue a case as a medial fault case or as a medical injury case – with the former being subjected to judicial inspection and the later to inspection by a medical review board. Guanyu Shenli Yiliao Sunhai Peichang Jiufen Anjian Ruogan Wenti De Zhidao Yijian (关于审理医疗损害赔偿纠纷案件若干问题的指导意见) [Guidance on a Number of Issues Regarding the Trial of Medical Dispute Cases Involving Damages for Injury] (promulgated by Guangdong Province High People's Ct., Dec. 19, 2007) YUE GAO FA FA (粤高法发) [Guangdong High People's Ct. Publication] No. 29 (2007), available at <http://www.peichang.cn/1875w.html> (last visited Oct. 29, 2011).

⁸⁹ Liu Taijin et al., *supra* note 71.

⁹⁰ Guo Hongyu, *Fali Jie Jiao Hao, Yiliao Jie Jiao Qu* (法律界叫好, 医疗界叫屈) [The Legal Profession Applauds While the Medical Professional Cries Out], XINHUA (Jun. 10, 2009), http://www.gs.xinhuanet.com/bianji/2009-06/10/content_16769217.htm (last visited Oct. 29, 2011).

Other jurisdictions have taken a stricter approach, either banning cases brought according to general tort principles or severely limiting damage awards in such cases. Shanghai courts generally follow the Regulations; as a result, as of late 2009 the maximum payout in medical cases was 120,000 to 130,000 yuan — significantly below the amount available in medical cases or in other jurisdictions.⁹¹ The Shanghai High People’s Court also reportedly issued a non-public notice stating that compensation in medical cases not brought according to the Regulations cannot exceed 20,000 yuan — making clear that such cases should be restricted to those alleging only minor harm or no allegation of medical error.⁹²

China’s new Tort Liability Law,⁹³ effective as of July 1, 2010, makes significant changes to medical disputes, most notably shifting the burden of proof from defendants to plaintiffs.⁹⁴ All of the cases examined in this article preceded the new law. Some have argued that the new law means that the Regulations are no longer valid and that the two track system for medical cases

⁹¹ Interview 2009-108. Plaintiffs may receive additional compensation if courts award emotional damages or support for family members. *Id.*; *see also* Interview 2009-114 (nothing that courts will find ways to expand liability).

⁹² Interview 2009-108. Examples of such cases in Shanghai include slip and fall claims against hospitals, claims by family members of patients who commit suicide while in a hospital, or failure to inform patients of the risks of treatment decisions. Interview 2009-112.

⁹³ *Zhonghua Renmin Gonghe Guo Qinquan Zeren Fa* (中华人民共和国侵权责任法) [Tort Law of P.R. China] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 2009, effective Jul. 1, 2010) PRESIDENT OF P.R. CHINA ORDER No. 21, *available at* http://www.gov.cn/flfg/2009-12/26/content_1497435.htm (last visited Oct. 29, 2011).

⁹⁴ Huang Yingshuai et al., *Fayuan Gongbu Qinquan Anli: Nühai Diexia Dangang Shuai Shang Huopei 11 Wan* (法院公布侵权案例:女孩跌下单杠摔伤获赔 11 万) [Court Publishes Tort Case: Girl Receives 110,000 RMB in Damages for Injuries from Falling Off Horizontal Bar], *BANDAO WANG* (半岛网) [Peninsula Net] (July 7, 2011), http://news.bandao.cn/news_html/201107/20110707/news_20110707_1425918.shtml (last visited July 12, 2012); Hu Bo, *Qinquan Zeren Fa Fuyu Renmin Fayuan Zhijie Rending Tuiding Yiliao Jigou Guocuo De Quanli* (侵权责任法赋予人民法院直接认定推定医疗机构过错的权力) [Tort Liability Law Gives People’s Courts Power Directly to Find or Infer Fault in Medical Institutions], *DONGFANG FAYAN* (东方法眼) [Eastern Legal Watch] (Jun. 21, 2011), <http://www.dffy.com/faxuejieti/ms/201106/23754.html> (last visited July 12, 2012). The shift came after extensive lobbying by hospitals. Interview 2010-29. For a general discussion of the impact of the Tort Liability Law on medical malpractice law, see Zhu & Oliphant, *supra* note 13, at 40-49; Xi & Yang, *supra* note 12, at 9-11.

will be merged into one.⁹⁵ Others, however, have contended that the Regulations remain in effect.⁹⁶ In the autumn of 2011 the Supreme People’s Court circulated for comment a draft interpretation on the handling of medical disputes.⁹⁷ The draft interpretation would make clear that inspections in medical cases may be conducted by either medical inspection agencies under local medical associations or by judicial inspection organizations.⁹⁸ The interpretation would impose specific requirements on the content of inspection reports,⁹⁹ would require that court personnel be allowed to attend inspection hearings and ask questions,¹⁰⁰ and would require that at least one person who participated in the inspection attend court proceedings and answer

⁹⁵ *Qianyi Qinquan Zeren Fa Zai Yiliao Sunhai Jiufen Zhong De Shiyong* (浅议侵权责任法在医疗损害纠纷中的适用) [Brief Views on the Applicability of the Tort Law in Medical Damage Disputes], *FALÜ KUAICHE* (法律快车) [Law Express] (Jun. 18, 2011), <http://www.lawtime.cn/info/sunhai/shpclw/20110618102603.html>; *Qinquan Zeren Fa Shishi Yihou, Naxie Falü Fagui Hui Shoudao Yingxiang?* (侵权责任法实施以后, 哪些法律法规会受到影响?) [Which Laws and Regulations Will Be Affected by the Implementation of the Tort Liability Law?] (June 10, 2011), <http://www.gxmda.com/zilvweiquan/falvfagui/2011-06-10/77.html> (last visited Oct. 29, 2011).

⁹⁶ Jiao Hongyan, *Yiliao Shigu Chuli Tiaoli Miandui Cun Wang Jueze* (医疗事故处理条例面对存亡抉择) [“Regulations on the Handling of Medical Accidents” to Face Life and Death Choices], *FAZHI ZHOUMO* (法治周末) [Rule of Law Weekend], available at http://www.legaldaily.com.cn/zmbm/content/2010-07/01/content_2182865.htm?node=7573 (last visited Oct. 29, 2011).

⁹⁷ *Zuigao Renmin Fayuan Guanyu Shenli Yiliao Sunhai Zeren Jiufen Anjian Shiyong Falü Ruogan Wenti De Jieshi Zhengqiu Yijian Gao* (最高人民法院关于审理医疗损害责任纠纷案件适用法律若干问题的解释(征求意见稿)) [SPC’s Interpretation of Some Issues Concerning the Application of Law for the Trial of Medical Malpractice Liability Dispute Cases, Draft for Comment] (promulgated by the Sup. People’s Ct., Nov. 22, 2011), available at <http://www.yiliaosunhai.com/medicaltreatment/yiliaoxinwendianping/yiliaoxinwendianping3130.html> (last visited Jan. 20, 2012) [hereafter “Draft Interpretation”]. In 2010 the SPC also issued a brief notice on the eve of the effective date of the Tort Liability Law that explicitly authorized the use of judicial inspections in medical cases. The notice did not, however, rule out the use of medical review boards or set forth procedures for determining what type of inspection should be used. *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Qinquan Zeren Fa Ruogan Wenti De Tongzhi* (最高人民法院关于适用中华人民共和国侵权责任法若干问题的解释) [SPC’s Notice Regarding Some Issues Concerning the Application of the PRC Tort Liability Law] (promulgated by the Sup. People’s Ct., Jun. 30, 2010), *FA FA* (法发) [Ct. Pub.] No.23 (2010), available at http://www.law-lib.com/law/law_view.asp?id=316994 (last visited Jan. 20, 2012).

⁹⁸ Draft Interpretation, art. 14.

⁹⁹ Draft Interpretation, art. 15.

¹⁰⁰ Draft Interpretation, art. 19.

questions from the parties to the litigation.¹⁰¹ Compensation in medical disputes would be in accordance with the provisions of the new Tort Liability Law, suggesting that plaintiffs in medical disputes would be entitled to the same damages as ordinary tort claimants, including compensation for death.¹⁰²

Although the draft interpretation has engendered some online commentary,¹⁰³ the interpretation has yet to be formally adopted and its prospects thus remain unclear. In practice it appears that little has changed since the new law came into effect, with some jurisdictions continuing to follow the Regulations and others willing to handle cases according to the Interpretation.¹⁰⁴ More significant changes, if any, will likely come only after the SPC formally adopts a judicial interpretation on medical disputes.¹⁰⁵

¹⁰¹ Draft Interpretation, art. 20. If experts from the inspection organization cannot attend they may, with prior approval of the court, instead respond to written questions from the parties. If inspection organizations refuse to respond courts are instructed to disregard the inspection report. *Id.* The draft interpretation also makes clear that final determination of whether liability should be imposed will be by the court. Draft Interpretation, art. 25.

¹⁰² Draft Interpretation, art. 24.

¹⁰³ For example, see *Dui Zuigao Renmin Fayuan Guanyu Shenli Yiliao Sunhai Zeren Jiufen Anjian Shiyong Falü Ruogan Wenti De Jieshi Zhengqiu Yijian Gao De Jidian Jianyi* (对最高人民法院关于审理医疗损害责任纠纷案件适用法律若干问题的解释(征求意见稿)的几点建议) [A Few Suggestions for the SPC's Interpretation of Some Issues Concerning the Application of Law for the Trial of Medical Malpractice Liability Dispute Cases, Draft for Comment], YILIAO SUNHAI QINQUAN ZEREN WANG (医疗损害侵权责任网) [Medical Malpractice Tort Liability Online] (Jan. 11, 2012), <http://www.yiliaosunhai.com/medicaltreatment/yuanchuangwenzhan/yuanchuangwenzhan3138.html> (last visited Jan. 20, 2012).

¹⁰⁴ Chen Gang, *Beijing Shi Gaoji Renmin Fayuan Guanyu Shenli Yiliao Sunhai Peichang Jiufen Anjian Ruogan Wenti De Zhidao Yijian Shixing De Lijie Yu Shiyong* (北京市高级人民法院关于审理医疗损害赔偿纠纷案件若干问题的指导意见(试行)的理解与适用) [Understanding and Applying Beijing High People's Court's Guidance on Some Issues Concerning the Trial of Medical Injury Dispute Cases, for Trial Implementation], ZHAO FA WANG (找法网) [Find Law Online] (Aug. 16, 2010), <http://china.findlaw.cn/lawyers/article/d34931.html> (last visited July 12, 2012).

¹⁰⁵ *Yiliao Shigu Chuli Tiaoli Tiaowen Yu Qinquan Zeren Fa Chongtu, Zuigao Yuan Jiang Zhiding Xiangguan Sifa Jieshi* (《医疗事故处理条例》条文与《侵权责任法》冲突 最高院将制定相关司法解释) [Provisions of "Regulations on the Handling of Medical Accidents" Conflict with Tort Law; Sup. People's Ct. to Develop Relevant Judicial Interpretation], FAZHI RIBAO (法制日报) [Legal Daily], available at <http://www.yixuefalv.com/oneas.asp?id=2462> (last visited Oct. 29, 2011).

3. *Lawyers, Intermediaries and Insurers*

A range of intermediaries help patients and their families resolve disputes and navigate the healthcare system. These include lawyers, professional protestors, appointment touts, and “medical introducers.” All either influence the evolution of disputes or reflect problems in the healthcare system that give rise to disputes. In addition, insurers influence disputes largely through their absence from the process.

a. Lawyers

Lawyers specializing in medical cases have emerged in recent years, in particular in major cities such as Beijing and Shanghai. Most lawyers who specialize in medical cases are former doctors (the Chinese bar is open to anyone with a university degree).¹⁰⁶ Yet in less developed legal markets it is also common to find lawyers who specialize in medical cases, most often representing defendants.¹⁰⁷ Many plaintiffs pursue cases without legal representation, in particular in rural areas.¹⁰⁸ Lawyers say that patients generally do not retain lawyers until after negotiations have failed to resolve a case.¹⁰⁹

Contingent-fee arrangements are common in medical cases,¹¹⁰ but actual practice varies both based on location and on individual lawyers and cases. Many plaintiffs’ lawyers will charge a set fee up front and will then collect an additional percentage if they prevail in the

¹⁰⁶ In Shanghai, for example, lawyers estimated in 2009 that there were approximately twenty lawyers, all with medical training, who specialize in medical cases. Interview 2009-108. The group is divided into two subgroups. Most represent hospitals; only a very small number have developed a specialized practice that focuses on representing patients and their families.

¹⁰⁷ Interview 2010-6; Interview 2010-17; Interview 2010-22.

¹⁰⁸ Interview 2010-23; Interview 2010-4; Interview 2010-22.

¹⁰⁹ Interview 2009-108; Interview 2010-19. This is not necessarily an advantage for the hospitals: the absence of lawyers can make negotiation with patients and their families difficult. Interview 2009-101 (noting hospitals’ preference for discussing issues with those who have legal training).

¹¹⁰ Interview 2010-32.

case.¹¹¹ Lawyers in Municipality A say they sometimes use contingent fees, but more often collect a fixed percentage of the amount in controversy.¹¹² Some local jurisdictions have banned the use of contingent fees in medical cases, reflecting a broader crackdown by the Ministry of Justice on the use of such fees in cases that potentially influence social stability.¹¹³ The bans, however, appear to have little effect in practice.¹¹⁴

b. Professional Protestors

Professional protestors, *zhiye yinaozhe* (literally “medical chaos professionals”), operate outside many major hospitals, soliciting patients and family members who appear to be in distress with offers to obtain a favorable settlement from the hospital in exchange for a percentage of the settlement or a flat fee.¹¹⁵ Professional protestors are most common in large

¹¹¹ Interview 2010-5; Interview 2009-109.

¹¹² Interview 2010-24; Interview 2009-113.

¹¹³ *Ruhe Wanshan Lushi Fengxian Daili* (如何完善律师风险代理), available at <http://www.263law.com/Article/3525.html> (last visited Jul. 22, 2011) (on file with author); Feng Xingwu et al., *Lüshi Fengxian Daili Ruogan Wenti Tanta* (律师风险代理若干问题探讨) [Discussion of Some Issues Regarding Lawyers’ Contingency Fees] (Sept. 13, 2003), http://www.law-lib.com/lw/lw_view.asp?no=2054 (last visited July 12, 2012).

¹¹⁴ Interview 2010-5.

¹¹⁵ Cui Xia, *Yinru Renmin Tiaojie Jizhi Chuli Yihuan Jiufen* (引入人民调解机制处理医患纠纷) [Introducing People’s Mediation Mechanism to Deal with Hospital-Patient Disputes], SHENZHEN SHANGBAO (深圳商报) [Shenzhen Commerce Daily] (Jul. 14, 2009), available at <http://fzj.sz.gov.cn/work/462.asp> (last visited Oct. 29, 2011); Interview 2010-7. One report from Shenzhen reported that protestors charge on average fifty yuan a day to protest outside hospitals. Luo Qiufang et al., *Yituo Yaoshen Bian Yinao* (医托摇身变医闹) [Medical Introducers Transform into Medical Protestors], JING BAO (晶报) [Jing Daily] (Jan. 31, 2007), available at http://finance.ce.cn/law/home/wqxw/200701/31/t20070131_10267573.shtml (last visited Oct. 29, 2011); see also Li Yang, *80 Min Yinao Shougu Du Yiyuan, Gongan Juzhang Cheng Shi Tiaoxin Fazhi Shehui* (80 名医闹受雇堵医院, 公安局长称是挑衅法制社会) [80 Hospital Protestors Hired to Block Hospital; Police Chief Said It was a Provocation for a Rule of Law Society], XIN WENHUA BAO (新文化报) [New Culture Daily] (Jan. 5, 2011), available at http://news.china.com/zh_cn/social/1007/20110105/16326633.html (noting protestors were paid fifty yuan a day, and included children); Zhang Zhihong, *Fujian Wuyi Shan Yijia Yiyuan Bu Kan Yinao Ting Ye 7 Tian* (福建武夷山一家医院不堪医闹停业 7 天) [Hospital at Wuyi Mountain in Fujian Closes for 7 Days Due to Medical Protests], Dongnan Kuai Bao (东南快报) [Southeast Express] (Jul. 13, 2007), available at http://news.xinhuanet.com/health/2007-07/13/content_6369627.htm (last visited Oct. 29, 2011).

cities; in smaller cities such as Municipality A and in county towns it is harder for professionals to operate because local authorities quickly become acquainted with repeat protestors.¹¹⁶ Nevertheless, hospital officials in Municipality A note that they also encounter professional protestors, although such protestors are often friends or family members who are hired by patients and their families.¹¹⁷

c. Appointment Touts and Medical Introducers

Appointment touts, *haofanzi* (literally “numbers traffickers”), sell appointment slots with doctors. Obtaining appointments at top hospitals often requires waiting in line all night at major hospitals, and appointments with top specialists are full long in advance. In Beijing and other major cities the high demand for appointments creates ample opportunities for touts, with appointment slots with top doctors costing as much as 1,000 yuan on the street.¹¹⁸ The high price may nevertheless be worth paying for those who have travelled to major teaching hospitals in Beijing or Shanghai and who would otherwise have to wait weeks or months for an appointment.¹¹⁹

Yituo, or medical introducers, likewise congregate outside major hospitals and solicit patients on behalf of other hospitals — often second-tier hospitals — with promises of no delays and sometimes lower cost. Media reports detail periodic crackdowns on *yituo*; in 2006, for example, authorities detained 198 persons on suspicion of being *yituo*; seventeen hospitals were placed on a blacklist for relying on *yituo* to attract business.¹²⁰ The use of *yituo* may also result in disputes, in particular when patients are taken to hospitals that lack adequate facilities. Like

¹¹⁶ Interview 2010-17; Interview 2010-24.

¹¹⁷ Interview 2010-17; Interview 2010-22.

¹¹⁸ Interview 2010-4.

¹¹⁹ Interview 2010-7.

¹²⁰ Liu Mofei, *17 Jia Yiyuan Gu Yituo Bei Baoguang* (17 家医院雇医托被曝光) [17 Hospitals Exposed for Hiring Medical Introducers], SOHU (搜狐) (May 15, 2006), <http://news.sohu.com/20060515/n243228194.shtml> (last visited Nov.15, 2011).

professional protestors, *yituo* are most common in major cities, where competition is fierce and patients seeking care at major hospitals often face long delays.¹²¹

d. Insurers

Insurers, in contrast, are most notable for their absence from medical disputes. Although national and provincial authorities have encouraged (and in some cases mandated) medical liability insurance for doctors and hospitals,¹²² the insurance system remains largely ineffective. Insurance generally covers only disputes in which a medical review board has found error.¹²³ Hospital officials complain that insurers refuse to pay claims resolved outside the courts.¹²⁴

¹²¹ Interview 2010-21.

¹²² In 2007, for example, the Ministry of Health issued a notice to promote the development of medical liability insurance nationwide. Weisheng Bu, Guojia Zhongyiyao Guanli Ju, Zhongguo Baojianhui Guanyu Tuidong Yiliao Zeren Baoxian Youguan Wenti De Tongzhi (卫生部、国家中医药管理局、中国保监会关于推动医疗责任保险有关问题的通知) [Notice Regarding Issues Concerning Promoting Medical Liability Insurance] (promulgated by the Ministry of Health, State Administration of Traditional Chinese Medicine, and China Insurance Regulatory Commission, Jun. 21, 2007), MINISTRY OF HEALTH PUBLICATION (卫医发) No. 204 (2007), available at http://www.cicpa.org.cn/column/Information_regulations/Finance_insurance/200804/t20080429_10446.htm (last visited Nov. 1, 2011). The notice called on some “experimental” locations to implement insurance first, while other jurisdictions could move more slowly. In early 2011 the Ministry stated that improving medical liability insurance was one of the major goals for the Ministry for the year. Weisheng Bu Guanyu Yin Fa 2011 Nian Weisheng Gongzuo Yaodian De Tongzhi (卫生部关于印发 2011 年卫生工作要点的通知) [Notice Regarding the Issuance of Important Points in the Health Care Work in 2011] (promulgated by the Ministry of Health, Jan. 3, 2011), available at <http://www.moh.gov.cn/publicfiles/business/htmlfiles/mohbgt/s7693/201101/50509.htm> (last visited Nov. 15, 2011). Some provincial and local authorities have explicitly required public hospitals in their jurisdictions to purchase insurance. See, e.g., Zhejiang Sheng Yiliao Jiufen Yufang Yu Chuli Banfa (浙江省医疗纠纷预防与处理办法) [Zhejiang Province Methods on Preventing and Handling Medical Disputes] (promulgated by the 46th Executive Meeting of the People’s Government of Zhejiang Province, Jan. 19, 2010, effective Mar. 1, 2010), ZHEJIANG PROVINCE GOVERNMENT ORDER No. 269 (2010), available at <http://www.zhejiang.gov.cn/gb/zjnew/node3/node22/node167/node359/node365/userobject9ai112682.htm> (last visited Nov. 15, 2011).

¹²³ Zheng Xiaoqian, *Henan Yiliao Zeren Xian Zaodao Yiliao Jigou Ji Baoxian Gongsi De Lengyu* (河南医疗责任险遭到医疗机构及保险公司的冷遇) [Henan Medical Liability Insurance Runs Into Cold Reception by Medical Institutions and Insurance Companies], HENAN SHANG BAO (河南商报) [Henan Commerce Daily] (Sep. 8, 2009), available at <http://health.sohu.com/20090908/n266547802.shtml> (last visited Nov. 1, 2011).

¹²⁴ Wang Jing, *Dalian Yiliao Zeren Xian Weisha Bu Chixiang* (大连医疗责任险为啥不吃香) [Why Isn’t Medical Insurance Popular in Dalian], DALIAN WANBAO (大连晚报) [Dalian Evening News] (Feb. 22, 2006), available at <http://dl.people.com.cn/GB/channel2/18/200602/22/40427.html> (last visited Nov. 1, 2011); Interview 2009-101.

Premiums are high relative to the amount of coverage obtained;¹²⁵ in some cases insurance costs exceed the amount of indemnification provided by the policy.¹²⁶ Insurance companies also often cap liabilities, excluding catastrophic cases from coverage.¹²⁷ Hospital officials say that they often must pay patients and their family in excess of the amounts covered by their policies.¹²⁸ Smaller or less successful hospitals may lack the ability to pay insurance premiums; big hospitals, in contrast, are not worried about the financial risks of litigation.¹²⁹ Insurance companies have generally not been enthusiastic about marketing medical liability insurance, viewing the area as one with low yields and high risks due to the lack of transparency in China's medical system.¹³⁰

¹²⁵ Zheng, *supra* note 108.

¹²⁶ Zhongguo Yishi Xiehui (中国医师协会) [Chinese Medical Doctor Association], *Qian Tan Yiliao Zeren Baoxian* (浅谈医疗责任保险) [Brief Discussion on Medical Liability Insurance], available at <http://2009.cmda.gov.cn/yishiweiquan/weiquanzhishi/2008-12-10/2295.html> (last visited Nov. 15, 2011); Interview 2010-5; Interview 2010-18. One hospital official in Shanghai complained that the hospital pays 900,000 yuan in annual insurance premiums but can receive only 700,000 in indemnification. Interview 2009-123.

¹²⁷ In Xiamen, for example, insurers set the maximum reimbursement for medical disputes at 300,000 yuan. Chu Yan & Lin Ciwen, *Jinhou Yiliao Shigu You Baoxian Gongsi Maidan, Danli Zuigao Ke Huopei 30 Wan Yuan* (今后医疗事故由保险公司买单 单例最高可获赔 30 万元) [Future Medical Accident Bills Will be Paid by Insurance Companies; Up to 300 Thousand Yuan Collectible for a Single Case], XIAMEN RIBAO (厦门日报) (Xiamen Daily) (Jun. 4, 2011), available at http://biz.ifeng.com/city/xiamen/zaoanxiamen/xiamen_2011_06/04/37235_0.shtml (last visited Nov. 15, 2011). Similarly in Shanghai, where insurance is mandatory for most hospitals, hospital officials state that although insurers will approve payment for settlements, the maximum payable under the policies is generally limited to 30,000 in settled cases and 200,000 in cases reviewed by medical review boards. Interview 2009-123. Such amounts are often insufficient to cover major cases. Interview 2009-124.

¹²⁸ Chinese Medical Doctor Association, *supra* note 126.

¹²⁹ Interview 2010-5.

¹³⁰ Hu Xiao, *Chengbao Fengxian Gao Jichu Shuju Shao, Yiliao Zeren Xian Tuiguang Zai Lengyu* (承保风险高基础数据少; 医疗责任险推广遭冷遇) [With High Risks on Insurers and Little Basic Data, Promotion of Medical Liability Insurance Meets with a Cold Reception], GUANGZHOU RIBAO (广州日报) [Guangzhou Daily] (Feb. 26, 2010), available at http://finance.ce.cn/rolling/201002/26/t20100226_15544897.shtml (last visited Nov. 1, 2011). Insurers complain that hospitals' preference for private settlement makes insurance more difficult to administer and market. Wang, *supra* note 109. Insurance has developed particularly slowly away from major cities. In Municipality A, for example, one hospital official reported purchasing insurance in one year, in 2004. The insurance company subsequently refused to pay out on the policy, arguing that the hospital was filing too many claims. The hospital bought insurance from a second provider the following year, but the insurer refused to cover any cases that had not gone through the medical review board. The hospital eventually sued the insurance carrier and a local court

III. IN THE COURTS: FLEXIBILITY AND COMPROMISE

A colleague and I endeavored to collect every court judgment in which a hospital or medical provider was a defendant in a civil suit in one municipality, or *shi*, in a central province from 2000 to 2009. The jurisdiction, which I refer to as Municipality A, is largely rural. We collected 152 decisions, fifty-nine from the intermediate (appellate) court and ninety-three from basic level (first-instance) courts.¹³¹ The cases include twenty-seven disputes in which we obtained both first-instance and appellate decisions.¹³² Because the cases were collected by judges at the intermediate court we are confident that we obtained most of the decisions issued by that court. It is, however, possible that some of the intermediate court cases were omitted, either intentionally or unintentionally. The intermediate court obtained lower court decisions by requesting that each first-instance court under its jurisdiction provide all medical cases decided during the same period. The total number of first-instance cases tried in the period was almost certainly larger than the ninety-three collected. All but two of the lower court decisions came from 2007 or earlier, suggesting that the intermediate court did not obtain most lower court cases from 2008 or 2009. In addition, only twenty-nine percent of first-instance cases in our dataset were appealed;¹³³ this suggests that the total number of first-instance cases should be more than triple the number of appeals.¹³⁴ Nevertheless, the cases we collected constitute the largest

mediated a settlement in which the bulk of the premium was returned to the hospital. As a result, the hospital no longer buys insurance. Interview 2010-17.

¹³¹ To protect the identity of the location I coded the cases and cite here to code number. “A” cases are intermediate court cases; “B” cases are basic level (county) court cases.

¹³² Four disputes resulted in three separate court decisions; one resulted in four.

¹³³ Twenty seven of the ninety-three first-instance cases were appealed. Because all of the basic level decisions came from 2008 or earlier it is likely that most appeals would have been decided by the end of 2009.

¹³⁴ We do not have data on civil appeals rates in Municipality A. But a thirty percent rate is high compared to general trends in civil litigation. It is possible lower courts did not want to make all of their cases available to the intermediate court; it is also likely that the lower courts did not collect cases diligently. Court record systems are often imperfect, in particular in rural areas, and collecting medical cases might require a judge to read a large volume of cases in a file room one by one.

databases of medical cases from a single jurisdiction collected to date. Table 1 provides a breakdown of cases collected by year.

Table 1 – Cases Collected by Year

Year of decision	Court		Total Cases
	Intermediate	Basic Level	
2000	3	2	5
2001	1	8	9
2002	1	16	17
2003	5	13	18
2004	12	10	22
2005	6	13	19
2006	11	13	24
2007	3	16	19
2008	11	2	13
2009	6	0	6
Total	59	93	152

Court decisions in medical cases are often longer and more detailed than in other tort cases. The cases we reviewed generally ranged from four to eight pages in length; a small number of cases with complex facts were longer. Cases follow a standardized format that includes each party’s arguments, evidence submitted, and the court’s brief legal analysis. Court opinions in the dataset became more detailed over time.¹³⁵ Yet much is also missing from the

¹³⁵ For examples of early decisions with minimal analysis, see A1 (court adopted findings of medical review board with no analysis); B10 (court concluded that P failed to show causation with no analysis). For example of later cases with more detailed analysis, see B93 (detailed analysis of causal relationship of injury and burden of proof); A47 (detailed discussion of applicable law).

opinions — most notably behind the scenes discussions and considerations that may influence outcomes. Nevertheless, the decisions provide insight into the types and disposition of medical disputes that wind up in courts in rural China and the interaction among courts, medical review boards, and judicial inspection agencies.

Four insights emerge from analysis of the cases. First, the decisions reveal a high degree of flexibility, both in interpreting written law and in balancing the interests of plaintiffs and defendants. Compromise decisions are common. Courts are developing competence, but this competence does not necessarily lead to strict application of legal rules. Second, courts overwhelmingly award some damages to plaintiffs. There is some evidence that compensation is tied as much to the severity of injury to the plaintiff as to the degree of wrongdoing of the defendant. This supports arguments that courts are evolving into institutions with roles that extend well beyond application of legal standards: courts seek to mollify parties, and perhaps to provide low-level compensation in routine cases. Third, the cases suggest that the reality of day to day court decisions is more complex than it is often perceived to be. Many interviewed for this article argued that courts rarely find for plaintiffs or that the system is so biased as to render litigation useless. Yet courts are deciding many cases. Legal representation is surprisingly common compared to other types of civil cases in China's courts, and appellate courts appear to be playing a far more active role in medical cases than in other civil disputes. Fourth, the cases provide insight into problems in the healthcare system, problems that lead not only to litigation but also to unrest.

1. Outcomes

The most striking aspect of the cases was that plaintiffs received some compensation in 117 of 152 reported cases, or seventy-seven percent.¹³⁶ This does not mean that plaintiffs won: most damage awards were modest, in particular when compared to plaintiff demands. 103 decisions included information on plaintiffs' demands; plaintiffs received fifty percent or more of the amount sought in just twenty-one cases. Courts ordered plaintiffs to pay court fees or to

¹³⁶ Plaintiffs obtained compensation in 80% percent of first-instance decisions and 74% of appellate decisions. The combined figure of 77 percent includes thirty-four settled cases and five withdrawn cases.

share court fees with defendants in nearly two-thirds of the first-instance cases and just under half of appellate cases, suggesting that courts believed that plaintiffs' claims were at least partially without merit.¹³⁷ Plaintiff dissatisfaction with first-instance outcomes was also evident from the fact that more than half of the appeals of first-instance decisions awarding damages to plaintiffs were brought by plaintiffs. Nevertheless, the finding that plaintiffs do recover damages in a significant percentage of cases contrasts with claims by critics of the medical malpractice system that plaintiffs have little chance of recovery through the formal legal system.

Courts in Municipality A were most likely to impose liability in three broad categories of cases. First, in cases in which defendants violated medical practices or standards, such as giving overdoses of medication or using drugs despite the existence of contraindications. Second, in cases involving outrageous or extreme outcomes resulting from common procedures, such as incomplete removal of a placenta. Third, in cases where misdiagnosis was clear, such as failure to diagnose cancer despite cancer cells revealed in a biopsy.

County (in rural areas) or district (in urban areas) level hospitals were the most common defendants, and were named as defendants in fifty-five of the first-instance cases and thirty-two of the intermediate court cases. This is not surprising: these hospitals are by far the largest providers of inpatient care in Municipality A. Municipal-level hospitals, generally the best hospitals in Municipality A, were defendants in seven first-instance and ten intermediate court cases. Township health offices, which generally provide lower standard facilities than county or municipal hospitals, were named as defendants in seventeen first-instance cases and ten intermediate court decisions. Private clinics were named as defendants in five first-instance cases and two appellate cases; individual doctors were named only nine and six times,

¹³⁷ Regulations on court filing fees provide that the losing party to a civil law suit is responsible for paying court fees. Susong Feiyong Jiaona Banfa (诉讼费用交纳办法) [Measures on Paying Litigation Fees] (promulgated by the St. Council, Dec. 8, 2006, effective Apr. 1, 2007), ORDER OF THE ST. COUNCIL No. 481, ch 5, §29 (2006), *available at* http://www.gov.cn/zwgk/2006-12/29/content_483407.htm (last visited Nov. 15 2011). Court decisions generally state which party shall pay the court filing fees and thus provide a rough sense of which party the court viewed as prevailing. In many cases courts order the parties to split the fees. Yet in conversations judges also indicated that other factors, including parties' relative wealth, may impact the allocation of such fees.

respectively. In suits against hospitals the names of doctors who treated the patient are rarely mentioned.¹³⁸ This reflects the fact that most doctors are employees of state-run hospitals and are not subject to personal liability.

2. *Use of Regulations or SPC Interpretation*

Courts in Municipality A were flexible in their application of the Regulations and rarely relied only on the Regulations in resolving cases. Just twelve decisions were handled solely in accordance with the Regulations. Forty-two of the cases relied only on the General Principles and the SPC's Personal Injury Interpretation, while twenty-one cited to both the General Principles and to the Regulations in making liability determinations.¹³⁹

The frequency with which the courts relied on the General Principles is notable given that there were also signs that the intermediate court was encouraging lower courts to follow the Regulations. In three cases the intermediate court rejected lower court decisions that had awarded death compensation payments. In a 2008 case a lower court awarded death compensation to the family of a patient who died of a pulmonary embolism following surgery to remove a benign tumor. The medical review board had found minor responsibility on the part of the hospital, determining that the defendant failed to inform the patient of certain risks and to take necessary preventative measures. The trial court awarded death compensation of 68,380 yuan, funeral expenses of 7,586 yuan, and emotional damages of 8,196 yuan. On appeal the intermediate court rejected the award of death compensation, awarding only funeral expenses and emotional harm. Yet the court roughly doubled the emotional harm, apparently seeking partially to counterbalance the elimination of death compensation damages.¹⁴⁰

¹³⁸ In some cases brought prior to the Regulations doctors were named as defendants alongside their employers. *See, e.g.*, A1 (suit against doctor and public health center).

¹³⁹ Seventy-two of the decisions provided no citation to either the Regulations or the General Principles, three relied on contract law and one based its decision on product liability law.

¹⁴⁰ A61.

In another case, from 2008, the intermediate court rejected a plaintiff's argument on appeal that an award of roughly 50,000 yuan for the death of a family member was too low because it failed to include compensation for death. The medical review board had found that defendant hospital's failure to diagnose a bowel obstruction was the major cause of death and the trial court imposed ninety percent responsibility on the defendant. The intermediate court stated that the case fell squarely within the Regulations, and thus plaintiffs were not entitled to compensation for death.¹⁴¹

In other cases, however, the intermediate court permitted plaintiffs to recover compensation for death in line with the SPC's Interpretation. In a 2009 case the intermediate court affirmed an award of death compensation to the wife and six children of a patient who died when a doctor apparently failed to recognize signs of a heart attack. Yet the award in the case of 52,818 yuan for death compensation, living expenses, and funeral expenses was relatively modest, suggesting perhaps that the recovery had not been significantly increased by the award of death compensation.¹⁴²

Courts in Municipality A appeared most likely to ignore the Regulations in cases in which defendants had failed to produce evidence or where a defendant's conduct was particularly egregious. In two cases courts explicitly stated that they were allowing the case to proceed according to general tort principles (and thus were willing to assign higher damages) because the defendant had not produced evidence, had employed unlicensed staff or had failed to obtain consent for surgery. In one of the largest awards in the dataset,¹⁴³ the Municipality A intermediate court awarded 227,506 yuan in compensation for economic loss (including death compensation) and emotional damages to the family of a patient who died following

¹⁴¹ A45. In a third case, from 2008, the intermediate court explicitly rejected a claim for death compensation by the family of a woman who died following a postpartum hemorrhage. The court stated that the Regulations, not the General Principles, should be used to determine damages. A47. The outcome may have been influenced by the fact that the plaintiffs had already received substantial compensation through a settlement agreement.

¹⁴² A51.

¹⁴³ A52.

complications from surgery for cancer of the esophagus. The court largely affirmed a county court finding that the hospital had failed to perform necessary tests prior to the surgery; the hospital contended that such tests had been rejected by the patient's family. The court noted that the case had been referred to the local medical review board—which had found a class 1 error (the most serious)—and both sides had appealed to the provincial medical review board. The provincial medical review board never issued an opinion; it terminated the case because the hospital failed to submit key evidence, including a video image of a liquid iodine test and the autopsy report. The trial court found that the defendant should bear responsibility for failing to provide the evidence and stated that the case would therefore proceed according to the General Principles, not the Regulations. On appeal the intermediate court did not comment on the applicability of the Regulations or on the award of death compensation, instead affirming the judgment with a thirty percent reduction in damages based on a finding that the complications that arose may also occur absent negligence.¹⁴⁴

3. *Medical Review Boards*

Decisions likewise suggested that courts take a flexible approach to the use of medical review board or judicial inspection agencies. Forty-eight of the cases reported findings of medical review boards, eighteen appellate decisions and thirty trial court decisions. Sixty-eight percent of the medical review board decisions—fifteen in the appellate cases and eighteen in the trial court cases—had found some error. In a significant portion of the cases, however, the

¹⁴⁴ Similarly, in case A54 a trial court awarded death compensation to the family members of a woman who died of cancer despite the fact the medical review board found no negligence. The court said that because the review board found no error the Regulations did not apply. The family had argued that the hospital erred in failing to take adequate steps after the decedent sought treatment for a lump. The medical review board found no malpractice because the cancer was already at a late stage and the patient disregarded instructions from the hospital to obtain follow-up treatment. But the board noted certain errors on the part of the hospital, including failure to send a tissue sample for pathological examination, the fact that the doctor treating the patient was “qualified but unlicensed,” the failure to keep adequate notes, and failure to obtain consent for surgery. The trial court calculated damages to plaintiffs for such errors according to the SPC's Interpretation, including death compensation in the damages. The court then allocated 40 percent of the fault to defendants. On appeal the intermediate court reduced the damages slightly because it found the lower court had miscalculated living expense allowances for the survivors—but it did not challenge the lower court's inclusion of death compensation for the harm suffered.

review boards found only minor error.¹⁴⁵ Data from court decisions are obviously incomplete; medical review board decisions are not public, and thus we do not know how many cases were dropped by plaintiffs after adverse decisions by the review boards.¹⁴⁶

Use of judicial inspection institutions was also widespread. Twenty cases reported liability determinations by judicial inspection entities—in tension with the Regulations. This suggests that despite the widespread debate about whether judicial inspections are permissible, in practice the use of judicial inspections continued throughout the 2000s. Patients received compensation in nineteen of the twenty cases, somewhat more frequently than they did from medical review boards (thirty-nine out of forty-five cases).

In fifteen cases parties directly challenged the findings of medical review boards (11) or judicial inspection offices (4), generally unsuccessfully. Thus, for example, in a case involving the death of a patient during childbirth, the defendant health clinic argued that the trial court's award in favor of plaintiffs was invalid because an inspection had been made by a judicial inspection office, not a medical review board. The intermediate court rejected the argument, noting that the inspection had nevertheless been done by "medical experts."¹⁴⁷ Courts accepted challenges to review board or inspection decisions in just two cases.¹⁴⁸

¹⁴⁵ Only 18 of the decisions reported the level of error found by the medical review board. Of these, 5 were class 1 – the most severe; 3 were class 2; 8 were class 3; and 2 were class 4, the least severe. For a description of the categories of error, see Yiliao Shigu Fenji Biaozhun (Shixing) (医疗事故分级标准(试行)) [Grading Standards for Medical Accidents (Trial)] (promulgated by the Ministry of Health, Jul. 31, 2002, effective Sep. 1, 2002), MINISTRY OF HEALTH DECREE No. 32 (1991), available at http://www.gov.cn/banshi/2005-08/02/content_19182.htm (last visited Nov. 15, 2011); Liu Hui, *The Relationship between the Grading Standards for Medical Accidents and the Grading of Disabilities* (医疗事故分级制度与伤残等级的关系), FALÜ BOKE (法律博客) [Law Blog] (May. 21, 2008), available at <http://www.bloglegal.com/blog/cgi/shownews.jsp?id=1700012907> (last visited Nov. 1, 2011).

¹⁴⁶ In contrast, in an interview a health bureau official in Municipality A reported 111 cases referred to the local medical review board in 2009, with error being found in fifty-three cases. Interview 2010-16.

¹⁴⁷ A20; see also A21 (rejecting defendant's argument that trial court decision was invalid because it relied on findings of a judicial inspection, not a medical review board).

¹⁴⁸ A36 (plaintiffs won compensation on appeal after challenging medical review board decision); B76 (court accepted defendant's argument that review board decision was incomplete and thus should not be used, but nevertheless found for plaintiff).

As with application of death compensation, courts appeared particularly willing to rely on inspections by judicial inspection organizations in cases in which defendants were found to have failed to obtain consent to procedures or in cases of egregious harm. In a 2002 first-instance case,¹⁴⁹ for example, the court adopted a finding of a judicial inspection bureau that the defendant hospital should pay twenty-five percent of the damages to the plaintiffs because the defendant had failed to inform the decedent of the risks involved in an operation to remove a portion of the decedent's spleen. In a 2004 intermediate court case,¹⁵⁰ the plaintiff developed complications from surgery to remove his gall bladder. During subsequent surgery to correct severe abdominal adhesion the plaintiff suffered massive blood loss and entered into shock. Subsequent to the surgery plaintiff and defendant reached a settlement agreement. Six months later, however, the plaintiff's condition deteriorated and plaintiff lost sight and mental function. The plaintiff then sued. Two inspection reports were obtained. An inspection by the provincial medical review board found no error. But a judicial inspection – presumably obtained by the plaintiff — found that the original decision to operate was in error given the plaintiff's underlying condition. Although the trial court sided with the defendant, finding that the settlement agreement was enforceable, the intermediate court rejected both the trial court decision and the medical review board's findings and awarded 106,766 yuan in damages, finding that the defendants had violated the relevant medical guidelines.¹⁵¹

¹⁴⁹ B24.

¹⁵⁰ A36.

¹⁵¹ The court ordered the defendants to pay 75 percent of plaintiff's damages; the reduction from 100 percent was based on a finding that the surgery performed was "objectively difficult." Similarly, in case A37 the intermediate court affirmed a trial court verdict in favor of a plaintiff who sued two hospitals for failing to detect a tumor in the stomach. A local hospital had noted two tumors on a radiology exam but had failed to detect a third, which was clearly shown on the exam. The patient then went for surgery at a hospital in the provincial capital; the surgery successfully removed the two detected tumors but did not find and remove the third. A judicial inspection report adopted by the trial court found primary liability on the larger hospital for failure to detect the tumor during surgery. The hospital appealed, arguing that the case should have been referred to a medical review board. Yet the intermediate court found that the judicial inspection was consistent with "the spirit of" the SPC's notice on handling medical disputes in accordance with the Regulations.

4. *Equity and Compromise*

Court decisions reflected strong concerns about equity, with courts awarding compensation in numerous cases absent findings of medical error. For example, courts awarded damages in four cases that involved patients who had apparently attempted to commit or had committed suicide.¹⁵² In one of the cases,¹⁵³ the family of a patient who jumped to her death from a hospital window alleged that the hospital was negligent for failing to secure the patient after giving her a dose of atropine. The patient had originally been hospitalized for “mistakenly ingesting insecticide,” common in suicides in rural China. The court found that hospital staff had untied the patient at the family’s request but had instructed the family that four family members needed to be present at all times to secure the patient. While being watched by a single family member overnight the patient went to the bathroom alone and jumped out the window. The court found that the patient herself was primarily responsible for the injuries, but nevertheless awarded 5,000 yuan in damages to the plaintiffs, finding that the hospital ignored the potential side effects of the drug when its staff agreed to untie the patient.¹⁵⁴ In a second case involving a patient who jumped to her death from a hospital window, the court likewise found that the hospital failed to show that it had taken sufficient steps to assist the family in obtaining nursing or chaperone services once aware of the decedent’s mental condition. The hospital argued that the decedent was being treated for an unrelated problem and that the hospital should not be liable for the suicide.¹⁵⁵

Courts also imposed damages absent a finding of medical error in cases in which they found the defendants’ conduct to be particularly egregious. One court imposed liability on a hospital for delaying treatment—despite the absence of a link between the care given or the

¹⁵² A40, A34, A7, B84.

¹⁵³ A40.

¹⁵⁴ The case was affirmed on appeal.

¹⁵⁵ A34. The hospital had contended that the patient had sought treatment for gallbladder disease, not mental illness, and thus it should not be responsible for the decedent’s death.

delay and the patient's death—because the hospital had hired a medical introducer to entice patients away from a neighboring hospital.¹⁵⁶ In another case the intermediate court imposed 35,000 yuan in damages in a case in which the trial court had found no error. The intermediate court acknowledged that the care had met the required standard, but nevertheless imposed damages on the hospital because it found that the hospital had destroyed evidence and had employed an unlicensed anesthesiologist.¹⁵⁷ Similarly, a court awarded damages to a plaintiff who sued after his wife died of cervical cancer.¹⁵⁸ Both the municipal and provincial medical review board found that the hospital had erred in failing to perform a biopsy. Yet both boards also found no causation between the error and the death, because the patient already had late-term cancer. The court nevertheless awarded damages of nearly 10,000 yuan, finding that “improper management” resulted in misdiagnosis and thus economic harm to the plaintiff. Courts likewise imposed liability in cases in which defendants failed to keep adequate records or altered records.¹⁵⁹

In other cases involving catastrophic injuries courts awarded compensation despite the lack of a medical review board finding error. For example, the intermediate court awarded a patient's family 25,154 yuan in damages for “incomplete diagnosis and treatment” in a case that arose after defendant hospital had removed a bone fragment from the decedent's esophagus. Six days after the procedure the patient was readmitted and subsequently died from upper gastrointestinal tract bleeding.¹⁶⁰ In some cases the court simply split damages equally between plaintiffs and defendants. In a 2003 case¹⁶¹ the intermediate court allocated economic damages of 28,339 yuan equally between the plaintiff and defendant hospital. The court found that the

¹⁵⁶ A31.

¹⁵⁷ A12.

¹⁵⁸ B14.

¹⁵⁹ *See, e.g.*, A2.

¹⁶⁰ A18. The trial court had likewise awarded damages based on incomplete treatment but awarded only 8,384 yuan.

¹⁶¹ A8.

plaintiff would have suffered disability regardless of whether the hospital erred, but nevertheless imposed damages because the defendant had failed to discover a fracture. In other cases courts showed flexibility regarding procedures to permit claims to proceed; the intermediate court stated that the statute of limitations had not expired on the claims of six plaintiffs who sued after they contracted hepatitis C following blood transfusions, despite a four to seven year delay from the time they learned that they had contracted the disease to the time they sued.¹⁶² The courts hearing the cases found that although the plaintiffs had not filed suit, they had “continually sought settlement with the two defendants ever since they became aware of their infection”¹⁶³ and “had not stopped making claims for their rights.”¹⁶⁴

Courts were willing to overlook plaintiff conduct that may have resulted in harm in order to ensure survivors received compensation. For example, the intermediate court affirmed an award of 39,301 yuan to the family of a patient who died of acute drug-induced hepatitis. The defendant disease control center treated the decedent for tuberculosis but neglected to test her liver function. The decedent herself was fifty percent responsible because she purchased drugs from a third-party, apparently without a prescription, in order to avoid the high cost of medicine sold by the defendant.¹⁶⁵ In another case involving a claim by survivors,¹⁶⁶ the court awarded more than 80,000 yuan in damages to the family of a woman who died during childbirth. The plaintiff had originally sought treatment from an unlicensed doctor; she was subsequently transferred to a township health center when complications developed. The health center then sought to transfer her to a larger municipal hospital, but the ambulance transferring the patient developed a flat tire, delaying treatment. The court found that the decedent should share some fault because she sought care from an unlicensed doctor. The court found no malpractice but

¹⁶² B1, A6.

¹⁶³ B1.

¹⁶⁴ A6.

¹⁶⁵ A24.

¹⁶⁶ B51. The court made no mention of a medical inspection being conducted.

nevertheless imposed liability on the two defendants, finding that the doctor should be liable because he lacked a license and the township health center should be liable for failing to conduct surgery on the patient, resulting in a fatal delay in treatment. The hospital had argued that the patient’s family refused to sign a consent agreement for the surgery; the court found there was no evidence to support the argument.

In some cases courts imposed liability on defendants without stating a reason; in one case, for example, a local court stated that although the major cause of death was a traffic accident, it was nevertheless “appropriate” to make the defendant partially liable “because of the actual circumstances of the case.”¹⁶⁷ Although the court did not say so explicitly, it appeared to be relying on Article 132 of the General Principles of the Civil Code, which permits courts to award damages based on equitable principles in cases where no negligence has been found.

5. *Settlements and Appeals*

Thirty-four of the cases we collected reported settlements. Twenty-four of these cases were first-instance decisions; ten settlements were reported on appeal. Most were for relatively modest amounts, ranging from 5,000 yuan to 20,000 yuan. Yet some were large—in some cases clearly larger than would have been awarded pursuant to the Regulations. Eight settlements were in excess of 45,000 yuan, one was a settlement for 185,000 yuan,¹⁶⁸ and another was for 206,000 yuan. The 206,000 yuan settlement came in the case of a woman who died of a postpartum hemorrhage at the defendant hospital. The medical review board had found a class one error, the most serious, and that the hospital should be liable for the bulk of the harm for failure to conduct adequate tests and for failure to diagnose the hemorrhage or treat the patient in a timely manner. The case came to court when surviving family members sued for injuries they said had not been covered in the settlement and for compensation for death pursuant to the

¹⁶⁷ B53.

¹⁶⁸ A23. Yet the amount of the settlement was significantly below the first-instance award in the case of 263,000 yuan for negligence that resulted in permanent mental disability to a newborn. B5.

General Principles. The trial court allowed only a modest damage award of 4,000 yuan. The intermediate court affirmed, noting that the plaintiffs had already received through settlement far more than they would have received had they sued pursuant to the medical review board determination.¹⁶⁹ In another case,¹⁷⁰ the plaintiff sought to challenge the settlement after learning that the doctor lacked a license. A first-instance court rejected the plaintiff's attempt to challenge a settlement, noting that the settlement was voluntary and that the amount agreed — 160,0000 yuan — was more than would have been awarded under the Regulations.

Concerns about balancing plaintiff and defendant interests were also manifest in relatively high rates of reversal or modification on appeal. Twenty-eight of the fifty-eight appeals to the intermediate court, or nearly half the cases, resulted in decisions being vacated or modified. An additional ten cases settled on appeal, meaning that roughly seventy percent of appealed cases resulted in modification or reversal. This rate appears to be much higher than is generally the case in civil litigation.¹⁷¹ National data on medical disputes are not available, but the data suggest that intermediate courts are playing a much more active role in medical disputes

¹⁶⁹ A47.

¹⁷⁰ B36.

¹⁷¹ See, for example, Liang Cong et al., Guangdong High People's Ct., *Ershen Minshi Anjian Gaipan Biaozhun De Diaoyan Baogao* (二审民事案件改判标准的调研报告) [Research Report on the Standards for Modifying Judgments of Civil Cases on Appeal], GUANGDONG FAYUAN WANG (广东法院网) [Guangdong Courts Online] (Feb. 6, 2009), http://www.gdcourts.gov.cn/sfdc/t20090206_22549.htm (showing the rate of modification decrease from 27.34% in 2000 to 19.68% in 2007 in Guangdong Province); Yang Honghui et al., *Shaoyang: Ershen Minshi Anjian Lianxu 3 Nian San Sheng Er Jiang* (邵阳: 二审民事案件连续 3 年“三升二降”) [Shaoyang Saw Three Measurements Go Up and Two Others Go Down among Civil Cases on Appeal for Three Consecutive Years], ZHONGGUO FAYUAN WANG (中国法院网) [China Courts Online] (Jul. 8, 2011), <http://www.mzyfz.com/cms/fayuanpingtai/anjianshenli/minshishenpan/html/1074/2011-07-08/content-98833.html> (last visited July 12, 2012) (showing the rate of modification at Shaoyang Intermediate People's Court of Hunan Province decreased over three years to 18.8% in 2010). The fact that the modification/reversal rate is factored into a trial judge's performance evaluation, and thus affects pay and promotion, at least in part discourages reversals or modification. See Qian Xianliang, *Falü Zhuanjia Chen Guangzhong: Falü Kaoping Jizhi Daozhi Ershen Gaipanlü Di* (法律专家陈光中: 法官考评机制导致二审改判率低) [Legal Scholar Chen Guangzhong: Judges Evaluation System Causes Low Modification Rates in Cases on Appeal], ZHENYI WANG (正义网) [Justice Online] (Jul. 12, 2008), http://www.jcrb.com/zhuantifzzt/ntydyldt/ntydydzxbd/200807/t20080712_36692.html (last visited July 12, 2012).

than in other areas. In numerous cases the intermediate court affirmed a lower court decision in favor of a plaintiff but reduced damages modestly, suggesting perhaps an effort to appease the appellant.¹⁷² Likewise in some cases in which plaintiffs appealed the intermediate court increased damage awards.¹⁷³

Plaintiffs and defendants brought roughly equal numbers of appeals: twenty-five of the appeals were filed by plaintiffs and thirty-three by defendants. The parties appeared to prevail at roughly similar rates. Plaintiffs received additional awards in sixteen of the twenty-five appeals, while defendants succeeded in having awards reversed or modified in fourteen of thirty-three appeals. Certain categories of cases appeared particularly likely to result in appeals, including cases in which a patient died,¹⁷⁴ cases involving large damage awards,¹⁷⁵ serious injuries with small damages,¹⁷⁶ and where there were disputes among multiple defendants.¹⁷⁷

For example, in a 2006 case,¹⁷⁸ plaintiff sued after her uterus was removed following extensive bleeding in childbirth. A judicial inspection center decision found that the defendant hospital had not erred and that complications resulted from plaintiff's failure to undergo pre-natal checkups and her late arrival at the hospital. The trial court rejected the inspection decision, finding that the medical records the center had used to make its decision had been modified and that the hospital had failed to direct the patient to undergo comprehensive check-ups. The intermediate court affirmed the trial court decision but nevertheless reduced the

¹⁷² See, for example, A51 (reducing defendant hospital's liability for failure to diagnose a heart attack from 100 percent to sixty percent because of the acuteness of the patient's illness); A54; A59.

¹⁷³ See, e.g., A56.

¹⁷⁴ See, e.g., A1.

¹⁷⁵ See, e.g., B1.

¹⁷⁶ A16. A patient was awarded only 9,500 yuan after a doctor's failure to send a tissue sample for pathological examination delayed discovery of a malignant tumor and led to amputation of the patient's arm.

¹⁷⁷ A29; A30.

¹⁷⁸ A26.

defendant's liability, from 111,000 yuan to 92,000 on the grounds that recognizing the plaintiff's condition was "a gradual process."¹⁷⁹

As is standard in China, cases that were vacated and remanded generally provide no explanation of the reasons for doing so.¹⁸⁰ Yet occasionally intermediate court decisions provided some insight into the types of problems that arose in the lower courts. In one 2003 case the intermediate court vacated and remanded a decision, noting that the lower court had violated procedures by issuing a decision despite the fact that the defendant had requested a medical inspection and the medical review board had yet to issue its findings.¹⁸¹

Cases from Municipality A also show another characteristic of medical disputes: parties often seek to reopen cases when new expenses are incurred. Such claims sometimes succeed. For example, in a case first brought in 2006 the trial and intermediate courts awarded damages to a child who developed cerebral palsy as a result of the umbilical cord becoming entwined around his neck prior to birth. The medical review board found minor error on the part of defendant hospital for failure to conduct a caesarian section and for failure to provide adequate resuscitation after the birth. The trial court found the defendant responsible for forty percent of the harm and awarded 118,895 yuan in economic damages plus 20,000 in emotional harm. On appeal the intermediate court found that the trial court had over-estimated the plaintiff's losses and reduced the award to 55,840 yuan, plus the additional 20,000 yuan for emotional damages.¹⁸² Yet two years later the plaintiff returned to court seeking additional damages, arguing that the defendant should pay for the expenses arising from additional hospitalizations that the plaintiff

¹⁷⁹ A26. The court reduced liability for medical costs by ten percent and also reduced emotional harm payments from 20,000 yuan to 10,000 yuan—without explanation.

¹⁸⁰ *See, e.g.*, A4; A28. Courts sometimes send a non-public letter to the lower court indicating the problems with the lower court decision that resulted in the remand. *See, e.g.*, A28.

¹⁸¹ A11.

¹⁸² A42.

underwent subsequent to the original decision. The lower court agreed, ordering the defendant to pay forty percent of such expenses, or 19,967 yuan; the intermediate court affirmed.¹⁸³

6. Damages

Median and mean awards varied significantly each year, reflecting both the small number of cases awarding damages each year and the influence of large awards. Many years included a single large award, often in cases resulting in permanent mental or physical disability at childbirth,¹⁸⁴ cases involving a patient's death,¹⁸⁵ cases in which plaintiffs contracted hepatitis C through a blood transfusion,¹⁸⁶ or in cases of egregious malpractice.¹⁸⁷ Nevertheless examination of the largest known award for each year suggests modest expansion in damage awards. The largest awards came in 2007 and 2005. The largest award, for 316,438 yuan, was awarded in 2007; it was reduced on appeal to 227,506.¹⁸⁸ The second largest was 283,698.40, in 2005.¹⁸⁹ Table 2 shows the median and mean damage awards for cases in each year in the study.

¹⁸³ A43.

¹⁸⁴ See, for example, B5 (283,698.40 yuan damages for mental disability at birth); B55 (132,490.40 yuan for cerebral palsy at birth).

¹⁸⁵ B76 (316,438.02 yuan for patient death, reduced on appeal in A52 to 227,506.61); A34 (119,549.76 yuan for patient death).

¹⁸⁶ See, e.g., B6 (190,000 yuan), B4 (155,851.22 yuan), B1 (125,521 yuan).

¹⁸⁷ For example, in case B77 the trial court awarded 127,825 yuan in damages after the defendant hospital removed plaintiff's right oviduct without the patient's permission during treatment for an extra-uterine pregnancy; because a prior surgery had removed the left oviduct, the procedure left the plaintiff infertile. The medical review board found that the defendant should have pursued a more conservative treatment strategy. The intermediate court reduced the award to 97,228, still one of the larger awards in the dataset. A59.

¹⁸⁸ B76; A52.

¹⁸⁹ B5.

Table 2 – Mean and Median Damage Awards

¥	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Count	5	8	16	16	19	17	20	18	13	6
Mean	9,602	30,889	8,505	24,480	46,473	62,720	48,039	46,180	52,826	46,233
Median	4,000	9,000	8,192	17,221	34,339	25,490	35,402	12,494	15,793	38,409

Overall: Count = 138 (including cases awarding no damages); Mean = 40,060 yuan; Median = 18,000 yuan

Courts awarded emotional damages or reported settlements that included compensation for emotional harm in thirty decisions, covering twenty-seven separate cases.¹⁹⁰ Emotional damage awards ranged from a low of 1,000 yuan¹⁹¹ to a high of 50,000 yuan,¹⁹² although in some cases with large damage awards the courts did not specify the breakdown between pecuniary and non-pecuniary damages. Courts almost never provided explanation for awards of emotional damages.¹⁹³ Courts appeared to use emotional damages to compensate plaintiffs in serious cases (often fatalities) or to make up for the fact that courts cannot award death compensation. For example, the family of a patient who died following misdiagnosis of an intestinal obstruction

¹⁹⁰ In three cases awarding emotional damages the dataset includes both first-instance and appellate decisions.

¹⁹¹ B49.

¹⁹² B6.

¹⁹³ In only one decision, A42, did the court explicitly state that the defendant had inflicted emotional harm on the plaintiff. In one case, A9, the court said it was rejecting emotional harm damages because the patient had suffered no permanent disability or organ failure.

received an award of 55,866 yuan.¹⁹⁴ The court, noting that it was not permitted to award death compensation, stated that 44,382 of the award was compensation for emotional harm.¹⁹⁵

7. *Sources for Grievances: China's Healthcare System*

The cases provide insight into problems in China's healthcare system. Numerous cases reported that patients' medical condition at least in part resulted from their ignoring instructions for further treatment or testing or from patients seeking medication from a third party at a reduced rate.¹⁹⁶ Such cases likely result at least in part from the cost of health care.¹⁹⁷ In a 2004 case, for example, the intermediate court reduced a damage award against a local hospital by nearly half, to 14,976 yuan. The hospital had been negligent in prescribing non-approved eye drops — but the plaintiff's failure to seek care in a timely manner was the primary source of the injury.¹⁹⁸ In a 2006 case the intermediate court found that a plaintiff should bear sixty percent of the loss resulting from the amputation of her arm following the discovery of a malignant lump. The patient had failed to complete radiotherapy as instructed, again likely because of the cost of the procedure.¹⁹⁹ Similarly, in a case from 2001,²⁰⁰ the court rejected claims for malpractice after the decedent died of a brain edema following a car accident. The court noted that doctors had twice suggested a CT scan, but that the family members had refused because they lacked sufficient funds.

¹⁹⁴ A45.

¹⁹⁵ A45; *see also* A42, B55, A9. In another case the intermediate court reduced a damage award on appeal noting that plaintiffs had received death compensation and thus could not also receive damages for emotional harm. A20.

¹⁹⁶ It is likely that a significant portion of such secondary market medication is either fake or of low quality.

¹⁹⁷ Fifteen decisions fit clearly into this category—covering 11 cases. A23 (reviewing B5), A31 (reviewing B8), A40 (reviewing B84), A34, A16, A24, A58, A54 (reviewing B78), B51, B56, B63.

¹⁹⁸ A13.

¹⁹⁹ Three separate clinics and hospitals that had treated the patient were also liable for failing to test the tumor or for failing to completely remove it during prior treatment. A16; *see also* A31 (stating that the decedent should bear some of the responsibility for her death because she sought treatment at a late stage).

²⁰⁰ B63.

Ten decisions covering nine disputes involved the unlicensed practice of medicine — sometimes by staff in state-run hospitals.²⁰¹ In a 2007 intermediate court case²⁰² plaintiffs sued after their husband and father died of alcohol poisoning. The medical review board found that defendant health center was liable because the decedent had been improperly treated by someone who lacked a license. The trial court accepted the finding and awarded damages of 72,000 yuan according to the Regulations. The plaintiffs appealed, arguing that the court should have awarded damages pursuant to the General Principles. They argued that because care had been performed by an unlicensed person the court should not apply the Regulations. The appeals court rejected the argument, stating that case was still one brought under the Regulations because the defendant health center had provided substandard care.²⁰³ In another case, from 2004, plaintiffs were the survivors of a patient who died of shock during surgery for pneumonia at a county traditional Chinese medicine hospital. The trial court found no liability, because the care provided by the defendant hospital met the required standard. On appeal the intermediate court vacated the decision and awarded 34,339 yuan in damages. The court found that although the care met the required standards, the defendant hospital should nevertheless be liable because it destroyed evidence and because its anesthesiologist was unlicensed.²⁰⁴

Other cases involved doctors who moonlighted, encouraging patients to obtain treatment outside of major hospitals, or patients who sought medical assistance from a friend or neighbor. Thus, for example, a court found plaintiffs had sought assistance from a neighbor who was an

²⁰¹ A12, A41, A58, A54 (reviewing B78), A46, B36, B51, B64, B75.

²⁰² A41.

²⁰³ Case B36 likewise involved a claim of practice without a license. The plaintiffs' family member died from anaphylactic shock following the administration of intravenous antibiotics. The plaintiffs had sought to reopen a settled case after they learned that the defendant staff member of a local health office lacked a license; the court rejected the claim, finding that the amount agreed exceeded the amount payable under the Regulations.

²⁰⁴ A12. In another case, B75, against a family planning office, the court found the decedent's death was the result of an underlying liver condition and was not, as plaintiffs alleged, the result of herbal medicine given by a doctor at the family planning bureau. The court nevertheless awarded 75,390 yuan in damages because it found that the defendant family planning services office was providing services beyond those it was authorized to provide.

employee (apparently not a doctor) of a local hospital after the plaintiffs' daughter was bitten by a dog.²⁰⁵ The defendant administered the rabies vaccine but did not administer both serum and immunoglobulin. The family obtained the first two shots from the neighbor and a third shot from a retired doctor — all it would appear in an effort to avoid paying for the shots. Their daughter subsequently died of rabies. The court rejected the plaintiffs' claims. Although it found that the neighbor had broken the law by administering the vaccine without the monitoring and instruction of a disease control organization, the court nevertheless found that the neighbor had no duty to the plaintiffs because she administered the shot as a favor, and that the actions of the retired doctor did not cause the girl's death. Claims against two hospitals that subsequently treated the decedent failed because there was no causal link to the death.

Likewise, in an intermediate court case²⁰⁶ plaintiffs took their daughter to the local county hospital for treatment of tonsillitis. Following two days of treatment at the hospital they then took their daughter to an unlicensed doctor to continue treatment. The unlicensed doctor apparently aimed to continue the infusion the girl had received in hospital, but administered two separate infusions at the same time, instead of on different days; the patient died of anaphylactic shock. The family settled with the unlicensed doctor; a claim against the pharmacy that sold the infusion solution failed because no problems were found with the quality of the medication. The court noted that the decedent's mother had taken the victim to an unlicensed doctor and that there had been no showing of a quality problem with the fluid that was used.

8. *Lawyers and other Representatives*

Most litigants in medical cases in Municipality A were represented in court, although not always by a lawyer. Plaintiffs in forty-nine of ninety-three first-instance cases were represented

²⁰⁵ B32.

²⁰⁶ A58.

by a lawyer; an additional twenty-six were represented by a basic level legal worker.²⁰⁷ An additional five were represented by individuals identified as “cadres” — justice department or public security department officials.²⁰⁸ Defendants were represented by lawyers at a higher rate: seventy-eight cases reported that defendants were represented by lawyers.²⁰⁹ These rates of representation appear high compared to other recent studies on civil cases, suggesting that litigants are more likely to retain lawyers in medical disputes than in more routine civil cases.²¹⁰

Taken together, the 152 decisions from Municipality A provide insight into the evolution of China’s courts as they confront increasingly complex and contentious issues. Innovation and flexibility are common, but such innovation serves to pacify parties, not break new legal ground or assert court autonomy. Courts emphasize achieving equity in adjudication and largely reject winner-take-all outcomes. Data on enforcement rates were not available, but interviewees did not raise enforcement of judgments as a major issue in medical cases. The cases suggest that arguments that courts are largely irrelevant in medical cases are overstated. Some cases are being resolved in the courts, with courts largely seeking to balance competing interests. Yet such decisions appear to do little to shape how disputes are resolved outside the courtroom.

²⁰⁷ Basic level legal workers are paraprofessionals who operate largely in rural areas. They generally have some legal training and are licensed to provide representation in civil cases.

²⁰⁸ In ten cases plaintiffs were represented by individuals whose employment status was not identified—seven of whom were family members. Only three plaintiffs lacked representation. On appeal plaintiffs likewise largely had representation: of the 59 appellate cases, 26 reported plaintiffs being represented by lawyers, 15 by basic level legal workers, one each by a professor and by a cadre, and seven by unidentified individuals. Nine appellate cases stated that plaintiffs lacked legal representation.

²⁰⁹ In addition, two cases involved representation by a basic level legal worker, two by a “legal consultant,” one by an official, and nine by hospital management. On appeal rates were similar, with hospitals being represented by a lawyer in 44 of 59 appeals.

²¹⁰ See, for example, Wang Yaxin & Wang Ying, *Nongcun Falü Fuwu Shizheng Yanjiu* (农村法律服务实证研究) [An Empirical Study of Legal Services in Rural Areas], 2 *TSINGHUA L. REV.* 5, 59 (2008), available at <http://doc.baidu.com/view/8ab0c44efe4733687e21aab5.html> (last visited Nov. 15, 2011) (finding that in two rural counties in Guizhou Province only 24.3% and 19.8% of civil case litigants had legal representation); *Bacheng Beijingren Da Guansi Bu Qing Zhen Lüshi* (八成北京人打官司不请真律师) [Eighty Percent of Beijing Residents Do Not Hire Real Lawyers for Litigation], available at http://www.365u.com.cn/wenzhang/detail/article_58734.html (last visited Nov. 15, 2011) (reporting that, according to the Beijing Municipal Justice Bureau, in 2003 only 16% of civil case litigants in Beijing hired lawyers).

IV. ON THE STREETS: PROTEST AND SETTLEMENT

The cases from Municipality A provide insight into how courts resolve disputes once they reach the courtroom. Hospital and public health officials say they are far more concerned with how disputes are resolved outside the courtroom, in particular in the face of protests. Only one case from Municipality A explicitly mentioned violence by a patient's family member.²¹¹ Yet violence and protest cast a strong shadow over medical disputes in Municipality A and elsewhere.

1. *Protest, Violence, and Responsiveness*

The rise in protests and in violence concerning medical disputes has been widely reported in the Chinese media over the past decade, with the term *yinao*, or “medical chaos,” used to refer to incidents of violence or protest arising from medical disputes. Media reports and interviews portray protest as a common tool for patients and family members seeking compensation from hospitals.²¹²

²¹¹ After the death of a newborn baby, the family refused to pay medical expenses; family members also physically attacked the hospital. The hospital sued for the unpaid medical expenses and for damages caused in the attack. The family countersued for medical malpractice. The court ordered the family to pay seventy percent of the cost of treatment, but also ordered the hospital to pay thirty percent of the loss to the family resulting from the malpractice. The result was a judgment in the hospital's favor of roughly 17,000 yuan. B68. The court stated that the claim for property damages should be brought in a separate case.

²¹² Deng Xinjian, *Yiliao Jiu fen Yinfa Xingan Zengduo, Xianxing Falü Buli Jiejue Maodun* (医疗纠纷引发刑案增多 现行法律不利解决矛盾) [Medical Disputes Lead to Increase in Criminal Cases; Existing Laws Not Good for Conflict Resolution], FAZHI RIBAO (法制日报) [Legal Daily] (Jul. 24, 2007), available at http://news.xinhuanet.com/politics/2007-07/24/content_6421115.htm (last visited Nov. 1, 2011); Wang Leyang, *supra* note 6. Reports note that most protests concentrate on level two hospitals – because smaller hospitals have no resources to pay protest demands and larger hospitals tend to have closer ties with local authorities. Shen Kui *Zhuanjia Tan: 2008 Nian Guangdong Sheng Yinao Shijian De Tedian* (沈奎专家: 谈 2008 年广东省医闹事件的特点) [Expert Shen Kui: Discussing the Characteristics of Hospital Protests in Guangdong Province in 2008], NANGUO LÜSHI SHALONG (南国律师沙龙) [South China Lawyer Salon], <http://www.nglssl.com/article/articleshow.asp?articleid=6323> (last visited Jun. 8, 2011). But hospitals of all sizes appear to be targets, and officials at major public hospitals in Shanghai, Wuhan, and in Municipality A all cited violence as common.

Media accounts from across China describe protests by family members of injured or deceased patients. Following the death of a 71-year old man in Heyuan, Guangdong, seventy friends of relatives forcibly removed the body from the hospital morgue and placed it at the entrance of the hospital.²¹³ In Taizhou, Jiangsu, more than 100 villagers blocked hospital entrances and staged a protest following the death of a fellow villager, allegedly following the administration of incorrect medicine resulting in multiple organ failures.²¹⁴ In Fujian, protestors forced a maternity hospital to close for seven days in 2007 after alleged mishandling of a stillbirth resulted in a woman becoming infertile; family members blocked the hospital entrance and placed the remains of the infant in a freezer in the hospital lobby.²¹⁵ In Zhangjiagang, in Jiangsu, more than a thousand people protested after multiple deaths at a hospital.²¹⁶ A report from Sichuan described how a family left a newborn baby at the hospital for two months and

²¹³ Huang Dan & Huang Guangming, *Zhiyi Yiyuan Qiangjiu Budang Zhi Shangzhe Siwang, Jiashu Kangshi Gao Yinao* (质疑医院抢救不当致伤者死亡 家属扛尸搞医闹) [Suspicion that Hospital's Improper Emergency Treatment Caused Injured Patient's Death Prompted Family to Engage in Medical Protest by Carrying the Body], HEYUAN WANBAO (河源晚报) [Heyuan Evening News] (Mar. 25 2010), available at <http://news.hyorg.com/2010/0325/29617.shtml> (last visited Nov. 15, 2011).

²¹⁴ Feng Changhua, *Taizhou Kaifa Qu Jingfang Chenggong Chuzhi Yi Qi Raoluan Yiyuan Yiliao Zhixu Shijian* (台州开发区警方成功处置一起扰乱医院医疗秩序事件) [Police of Taizhou Development Zone Successfully Handled an Incident Disturbing the Order of Medical Services at a Hospital], ZHONGGUO TAIZHOU WANG (中国台州网) [China Taizhou Online] (May 5, 2010), http://news.taizhou.com.cn/news/2010-05/05/content_247613.htm (last visited Nov. 1, 2011).

²¹⁵ *Fujian Yi Jia Yiyuan Bu Kan Yinao Ting Ye 7 Tian* (福建一家医院不堪医闹停业7天) [Unable to Deal With Hospital Protests, a Hospital in Fujian Closed for 7 days], FEIHUA JIANKANG WANG (飞华健康网) [Feihua Health Online] (Aug. 8, 2007), <http://doctor.fh21.com.cn/zhuanti/ynzt/20070717/1508185.shtml> (last visited Nov. 1, 2011).

²¹⁶ *Jiangsu Zhangjiagang Shi Yin Yihuan Jiufen Yinfa Qian Yu Minzhong Jiju Shijian* (江苏张家港市因医患纠纷引发千余民众集聚事件) [More Than One Thousand People Gathered to Protest a Hospital-Patient Dispute in Zhangjiagang City of Jiangsu Province], XINHUA (Dec. 6, 2010), available at <http://news.boxun.com/news/gb/china/2010/12/201012060643.shtml> (last visited Nov. 1, 2011); 11.28 *Zhangjiagang Diyi Renmin Yiyuan Xiaohai Siwang Shijian* (11.28 张家港第一人民医院小孩死亡事件) [Nov. 28 Incident of a Child's Death at Zhangjiagang No.1 People's Hospital], BOXUN (博讯) [Boxun News] (Dec. 1, 2010), <http://news.boxun.com/news/gb/china/2010/12/201012012301.shtml> (last visited Nov. 1, 2011); *Zhangjiagang Diyi Renmin Yiyuan 12 Yue 5 Ri You Guangda Shimin Zizu De Xianhua Huodong* (张家港第一人民医院 12月5日由广大市民自组的献花活动) [A Group of the General Public Gathered on their own for a Ceremony to Present Flowers at Zhangjiagang No.1 People's Hospital on Dec. 5], SINA BLOG (新浪博客) (Dec. 5, 2010), http://blog.sina.com.cn/s/blog_6ec77c980100n2fu.html (last visited Nov. 1, 2011).

regularly organized dozens of protesters to demand compensation after the baby's mother died during childbirth.²¹⁷

Violence is common. Officials in Guangdong reported in 2006 that on average there was one violent incident at a hospital in the province each day.²¹⁸ A report from Jiangsu said that that ninety percent of the approximately 100 “major medical dispute incidents” in Nanjing each year turned violent.²¹⁹ One posting to a Wuhan newspaper web site by a person self-identifying as a hospital employee described a protest in Shiyan, in Hubei Province, in which fifty protestors attacked hospital staff, beating and pouring boiling water on them, pulling hair, spitting, and forcing the doctors to kiss the body of the deceased patient. The protestors demanded that the hospital establish a funeral shrine for the deceased in the hospital lobby and threatened to bury the doctors along with the deceased. Police initially called to the scene subsequently fled out of concern for their own safety.²²⁰ In Guangdong a hospital director had to be rescued by local police after he was detained for 26 hours by a group of 100 protestors.²²¹ Reports on family

²¹⁷ Ma Limin, *Zhengfu Zhudao Bumen Liandong Jian Duli Disan Fang Tiaojie He Baoxian Peifu Jizhi, Suining Pojie Yinao Jiufen Tiaojie “Liang Da Zhangai”* (政府主导部门联动建独立第三方调解和保险赔付机制, 遂宁破解医患纠纷调解“两大障碍”) [Lead Government Agencies Jointly Create Independent Third-Party Mediation and Insurance Payment Mechanisms, Cracking Two Major Obstacles to Hospital-Patient Dispute Resolution in Suining], FAZHI RIBAO (法制日报) [Legal Daily] (Jan. 6, 2011), available at <http://finance.ifeng.com/roll/20110106/3161057.shtml> (last visited Nov. 1, 2011).

²¹⁸ Liao Huailing et al., *Heishili Jieru “Yinao” Geng Changkuang, Zuigao Suopei 1500 Wan* (黑恶势力介入医闹更猖狂 最高索赔 1500 万) [Black Forces Get Involved in “Medical Chaos,” Making Incidents More Rampant and Pushing Compensation to a New High of 15 Million Yuan], YANG CHENG WANBAO (羊城晚报) [Yang Cheng Evening News] (Oct. 6, 2008), available at <http://www.chinanews.com/jk/kong/news/2008/10-06/1401884.shtml> (last visited Nov. 1, 2011).

²¹⁹ Deng, *supra* note 197.

²²⁰ *Shiyan Shi Yun Xian Anyang Zhen Weisheng Yuan Fashengle Yiqi Ling Ren Zhenjing De “Yinao” Shijian, Duo Ming Yiwu Gongzuozhe Zaodao Weigong* (十堰市郧县安阳市镇卫生院发生了一起令人震惊的“医闹”事件, 多名医务工作者遭到围攻) [A Shocking Hospital Protest Occurred at Anyang Town Health Center of Shiyan City, Yun County, Where Numerous Medical Staff Were Besieged], <http://baoliao.cnhubei.com/board-8-thread-12405-detail> (last visited Nov. 15, 2011).

members beating doctors and other hospital staff are common.²²² A hospital director in Shanghai described a protest in which twenty family members stormed into an operating room, throwing water at doctors and nurses; in another case patients protested in the intensive care unit, disrupting doctors' ability to care for other patients.²²³ Facing rising threats from protestors, one hospital issued doctors with helmets; other doctors reportedly wore bullet proof vests.²²⁴ One

²²¹ *Guangzhou Bai Ren Weidu Yiyuan, Yuanzhang 26 Xiaoshi Bei Ruanjin* (广州百人围堵医院 院长 26 小时被软禁) [Over a Hundred People Blocked Hospital in Guangzhou; Hospital President Confined for 26 Hours], FEIHUA JIANKANG WANG (飞华健康网) [Feihua Health Online], <http://doctor.fh21.com.cn/zhuanti/ynzt/20081217/08321611.shtml> (last visited Nov. 1, 2011).

²²² Li Yuan, *Jiejue Yihuan Jiufen Lu Zai Hefang* (解决医患纠纷路在何方) [Where is the Way for Resolving Hospital-Patient Disputes], DAZHONG RIBAO (大众日报) [Dazhong Daily] (Jan. 12, 2011), available at <http://news.sina.com.cn/o/2011-01-12/040521800444.shtml> (last visited July 12, 2012) (family attacked doctors and security guards, leading to four arrests); Li Yang, *80 Ming Yinuo Shougu Du Yiyuan, Gongan Juzhang Cheng Shi Tiaoxin Fazhi Shehui* (80 名医闹受雇堵医院, 公安局长称是挑衅法制社会) [80 Hospital Protestors Hired to Block Hospital; Police Chief Calls it a Provocation to a Rule of Law Society], SICHUAN XINWEN WANG (四川新闻网) [Sichuan News Online] (Jan. 5, 2011), available at http://news.china.com/zh_cn/social/1007/20110105/16326633.html (last visited July 12, 2012) (sixty-one persons detained following violent protest at hospital in Jilin); Liu Shaolong, *Baiyu Ren Yin Chanfu Siwang Daza Yiyuan Xu: Jinfang Zhua 17 Ming Weishou Zhe* (百余人因产妇死亡打砸医院续: 警方抓 17 名为首者) [More Than a Hundred People Attacked Hospital in Response to a Pregnant Woman's Death Continued: Police Arrested 17 Who Led the Action], XIAO XIANG CHENBAO (潇湘晨报) [Xiao Xiang Morning News] (Jul. 24, 2010), available at <http://news.sina.com.cn/s/2010-07-24/023620746481.shtml> (last visited July 12, 2012); *Xinhua Xian Renmin Yiyuan Daza Shijian Neimu* (新化县人民医院打砸事件内幕) [Inside Story of the Violent Incident at Xinhua County People's Hospital], <http://www.tianya.cn/publicforum/content/no110/1/102583.shtml> (last visited Nov. 1, 2011); Hong Qiwan, *200 Min Sizhe Jiashu Danao Xian Renmin Yiyuan, Xian Zhengfu Chu Qian Peichang* (200 名死者家属大闹县人民医院, 县政府出钱赔偿) [200 Family Members of the Deceased Attacked County People's Hospital; County Government Pays for Damages], YANG CHENG WANBAO (羊城晚报) [Yang Cheng Evening News] (May 19, 2010), available at <http://news.sina.com.cn/s/2010-05-19/150420304817.shtml> (protestors destroyed obstetrics unit at hospital following death during delivery).

²²³ Interview 2009-116.

²²⁴ Deng, *supra* note 197; *Shanghai Xinhua Yiyuan Yihuan Jiufen Xu, Jinfang Cheng Jiashu "Ruoshi Qunti"* (上海新华医院医患纠纷续, 警方称家属"弱势群体") [Continued Coverage of Hospital-Patient Dispute at Shanghai Xinhua Hospital; Police Call Patient's Family "Weak Group"], LIAOWANG XINWEN ZHOUKAN (瞭望新闻周刊) [Outlook News Weekly] (Feb. 11, 2011), available at <http://news.iqilu.com/shehui/fazhizongheng/20110211/411460.html> (last visited Nov. 1, 2011).

hospital announced that it was installing locking devices on windows to prevent protestors from threatening to jump from windows.²²⁵

Bodies of the deceased are central to many protests. Lawyers report that families will often refuse to move the body out of the hospital until a settlement has been agreed.²²⁶ Often families will refuse to permit an autopsy,²²⁷ instead insisting on compensation up front. The use of bodies in protest draws directly on historical traditions of using bodies of the deceased as a last, but often effective, resort for those seeking compensation from more powerful figures.²²⁸

Doctors and nurses have also taken to the streets to protest violence. In Luoyang, nurses protested after a local Party official illegally imprisoned four nurses following the death of a family member in a local hospital, allegedly due to the nurses' inattention to the patient while

²²⁵ *Yiyuan Feng Chuang Fang Bingren Tiao Lou* (医院封窗防病人跳楼) [Hospital Seals Windows to Prevent Patients from Jumping], YANG CHENG WANBAO (羊城晚报) [Yang Cheng Evening News] (Apr. 22, 2010), available at http://www.ycwb.com/ePaper/ycwbdfb/html/2010-04/22/content_807416.htm (last visited Nov. 1, 2011).

²²⁶ Interview 2009-106.

²²⁷ Interview 2010-24.

²²⁸ Makoto Ueda, *The Corpse on Display* (被展示的尸体), in *EVENTS, MEMORY, NARRATIVE* (事件、记忆、叙述), 114 (Wang Xiaokui (王晓葵) trans., Sun Jiang (孙江) ed., 2004).

changing bed linen.²²⁹ In Nanping, in Fujian, more than 100 medical workers protested after a violent clash between hospital staff and protestors following the death of a patient.²³⁰

Interviews confirm that violence is routine in medical disputes in Municipality A. In one 2010 case the husband of a deceased cancer patient threatened to kill the responsible doctor and brought twenty people to protest. The protestors broke the hospital's windows but were chased away by hospital bodyguards who themselves called in friends with metal bars to repel the protestors. The police, lacking sufficient resources to intervene, stood and watched. In the end the hospital agreed to pay 15,000 to the family, despite the fact that the patient had come to the hospital with late-term cancer.²³¹ In another case a local village leader ordered each family member in the village to send one male to protest against the hospital. And in a separate case the head of a local hospital was beaten following the death of a child at a small hospital. A county court judge in Municipality A estimated that there are ten to twenty major medical protests a year in the county in which patients or their families cause significant disruption, block access to a hospital, or place dead bodies inside hospital lobbies.²³²

²²⁹ Shan Chungang, *Henan Luoyang Xiang Ganbu Feifa Juliu 4 Ming Hushi Bei Tingzhi Juliu* (河南洛阳乡干部非法拘禁 4 名护士被停职拘留) [Village Cadres in Luoyang, Henan, Were Removed from Office and Detained for Illegally Detaining 4 Nurses], XINHUA (Nov. 21, 2007), available at <http://news.163.com/07/1122/00/3TS6NC4N0001124J.html> (last visited Nov. 1, 2011); Wang Shouzheng, *Zhongquan Chuji Da Yinao* (重拳出击打医闹) [Heavy Fists Strike Hospital Protests], <http://www.qxzc.net/gr/wsz1/sb/5.htm> (last visited Nov. 1, 2011). Similarly, in Hunan, local medical staff protested after they were allegedly beaten by protestors organized by local officials; the protestors were seeking compensation after a family member of a local official allegedly died following an allergic reaction to a tetanus shot. *Gongpu Cheng Exing Yinao, Zhuzhou Shi Er Yiyuan Shijian Baodao* (公仆成恶性医闹, 株洲市二医院事件报道) [Public Servants Become Malicious Medical Protestors: Report on Incidents at Two Hospitals in Zhuzhou City], <http://www.xcar.com.cn/bbs/viewthread.php?tid=9886474> (last visited Nov. 15, 2011).

²³⁰ Qiu Shuo, *Nanping Shi Diyi Yiyuan Guanyu 6.21 Yihuan Jiufen Yinfa Bufen Yiwu Renyuan Shangfang Jinggao De Baogao* (南平市第一医院关于“6.21”医患纠纷引发部分医务人员上访经过的报告) [Nanping City No.1 Hospital's Report on the Protest of Some Medical Workers Following the Jun. 21 Hospital-Patient Dispute], available at <http://www.tianya.cn/publicforum/content/free/1/1603956.shtml> (last visited Nov. 15, 2011).

²³¹ Interview 2010-17.

²³² Interview 2010-24.

A county health department official in Municipality A stated that when a patient dies in a hospital family members are likely to protest: “if a living person goes in and a dead person comes out then the family will protest.”²³³ The official estimated that as many as ninety-five percent of cases in the county are settled through protest and negotiation, with hospitals often paying compensation absent evidence of wrongdoing.²³⁴

Numerous provincial and municipal governments have issued rules designed to curb medical protests. Such regulations provide insight into protest strategies and official sensitivities.²³⁵ In Chengdu local regulations prohibit the use of banners and posters or creating mourning shrines outside hospitals, forcibly taking medical records, forcibly removing bodies, blocking the transfer of bodies from hospitals to funeral homes, or threatening or insulting hospital staff.²³⁶ Chengdu authorities also announced that on-duty police would be stationed at hospitals to prevent protests. In Shenzhen, regulations ban family members of patients from assembling outside of hospitals.²³⁷ Heilongjiang regulations ban not only shrines and publicly displaying or marching with the body of the deceased, but also kidnapping or detaining hospital

²³³ Interview 2010-23.

²³⁴ Interview 2010-23.

²³⁵ Many such strategies resonate with tactics used in protests more generally in China. Xi Chen, *The Power of “Troublemaking”: Protest Tactics and Their Efficacy in China*, *COMPARATIVE POL.*, July 2009, at 451, 458-459.

²³⁶ Liu Chunmei, *Exing Yinao Jian Cheng Zhuanmen Shichang, Qiangduo Shiti Deng Xingwei Weifa* (恶性医闹渐成专门市场, 抢夺尸体等行为违法) [Specialized Market Takes Shape for Violent Hospital Protests; Acts Such As Snatching Corpse Are Illegal], *Hua Xi Dushi Bao* (华西都市报) [West China Municipal Daily] (Apr. 1, 2010), available at <http://society.nen.com.cn/society/353/3475353.shtml> (last visited Nov. 1, 2011). The text of the regulation is available at Chengdu Shi Guanyu Yifa Weihu Yiyuan Zhengchang Yiliao Zhixu De Tonggao (成都市关于依法维护医院正常医疗秩序的通告) [Notice Regarding Maintaining Hospitals’ Orderly Medical Services According to Law] (promulgated by Chengdu Municipal Bureaus of Health and of Public Safety, Mar. 25, 2010, effective Mar. 25, 2010), available at http://www.cmda.org.cn/news/content_x31988_c050201__.html (last visited Nov. 1, 2011).

²³⁷ Gao Jian, *Xicheng Fayuan Qing Yixue Xiehui Tiaojie Yiliao Jiufen* (西城法院请医学协会调解医疗纠纷) [West District Court Asks Medical Association to Mediate Medical Disputes], *BEIJING RIBAO* (北京日报) (Beijing Daily) (Nov. 6, 2009), available at <http://news.163.com/09/1106/07/5NDUFJ43000120GR.html> (last visited Nov. 1, 2011).

staff.²³⁸ Regulations in Zhejiang encourage rapid resolution of disputes, requiring hospitals to notify authorities of all disputes.²³⁹ In Shenyang, twenty-seven hospitals installed local public security officers as deputy directors of the hospital to assist in managing disputes.²⁴⁰ In Hunan, local Party officials are explicitly evaluated in part based on their ability to resolve medical disputes; one report noted that the number of incidents declined from 857 in 2009 to 317 in 2010 as a result of the evaluation system.²⁴¹ In 2012 the Ministry of Health and Ministry of Public Security issued a joint notice that reflected many similar concerns.²⁴² Yet not all hospitals have taken a hard line: a report on the Chengdu Military Hospital, in Sichuan, noted that in order to

²³⁸ Deng, *supra* note 197.

²³⁹ Zhejiang Sheng Yiliao Jiufen Yufang Yu Chuli Banfa, *supra* note 109. In Xuchang, Henan, regulations state that the police shall take over the body of the deceased in major medical disputes. Xuchang Shi Renmin Zhengfu Guanyu Yinfa Xuchang Shi Zhongda Yihuan Jiufen Yingji Chuzhi Yuan De Tongzhi (许昌市人民政府关于印发许昌市重大医患纠纷应急处置预案的通知) [Notice Regarding the Issuance of Emergency Response Plans for Major Hospital-Patient Disputes in Xuchang City] (promulgated by Hunan Province Xuchang Municipal People's Government, Jun. 10, 2008), XU ZHEN (许政) [Xuchang Gov't Pub.] No. 39 (2008), available at http://www.law-lib.com/law/law_view.asp?id=264668 (last visited Nov. 1, 2011).

²⁴⁰ Cao Si & Chen Feng, *Shenyang 27 Jia Yiyuan Wei Fang Yinao Pin Jingcha Dang Fu Yuanzhang Yin Zhengyi* (沈阳 27 家医院为防医闹聘警察当副院长引争议) [27 Hospitals in Shenyang Hired Policemen as Vice Presidents to Prevent Hospital Protests, Drawing Controversy], NANFANG RIBAO (南方日报) [Southern Daily] (Jul. 5, 2010), available at http://china.nfdaily.cn/content/2010-07/05/content_13451799.htm (last visited Nov. 1, 2011). Reports from Henan similarly state that police stations are being established in hospitals, in order to "hit hard" against protesters. Qiao Weihui et al., *Zhengzhou Jingfang Qidong "Lijian" Xingdong, Yiyuan Baojieyuan Meizhun Jiu Shi Qianfu Minjing* (郑州警方启动“利剑”行动 医院保洁员没准就是潜伏民警) [Zhengzhou Police Start "Sword" Action; Cleaner at Hospital Could Be Undercover Police], DAHE BAO (大河报) [Dahe Daily] (Jan. 19, 2011), available at http://news.shangdu.com/101/20110119/7_186709.shtml (last visited Nov. 1, 2011).

²⁴¹ Tang Jiangpeng, *Hunan Shouci Jiang Chuzhi Yihuan Jiufen Naru Zongzhi Gongzuo Jixiao Kaohe* (湖南首次将处置医患纠纷纳入综治工作绩效考核) [Hunan Will For the First Time Factor Handling of Hospital-Patient Disputes into Comprehensive Performance Review], CHANGWAN JITUAN GUNDONG XINWEN (长晚集团滚动新闻) [Changwan Group Rolling News] (Jan. 19, 2011), available at http://roll.changsha.cn/1/201101/t20110121_1215593.htm.

²⁴² Ministry of Health & Ministry of Public Security, *Guanyu Weihi Yiliao Jigou Chixu De Tonggao* (关于维护医疗机构秩序的通告) [Notice Regarding Maintaining the Order of Medical Institutions], May 1, 2012, available at <http://www.moh.gov.cn/publicfiles/business/htmlfiles/zwgkzt/s9968/201205/54607.htm> (last visited July 12, 2012). The regulations restrict the movement of the bodies of deceased patients and ban activities such as burning of paper money, creating memorials, or generally causing disturbances at hospitals.

“diffuse the tense environment” the hospital installed flat screens with “sexy photos” of the hospital’s nursing staff.²⁴³

A number of jurisdictions, including at least one county in Municipality A, have created new mediation institutions under local health departments designed to resolve medical disputes quickly and thus reduce conflict.²⁴⁴ The creation of these institutions reflects national efforts to emphasize mediation as a tool for maintaining social stability. Official accounts have extolled the creation of such institutions, but they appear to be of only limited effectiveness on the ground. Few of the interviewees for this project mentioned resolving cases through specialized mediation institutions.²⁴⁵ Instead, direct negotiation between the parties remains common.²⁴⁶

²⁴³ *Xinggan Hushi Jiu Yihuan Guanxi? Hen Sha Hen Tianzhen* (性感护士救医患关系? 很傻很天真) [Sexy Nurses to Save Hospital-Patient Relationship? Very Stupid and Very Naïve], ZHONGGUO XINWEN WANG (中国新闻网) [China News Online] (Jan. 19, 2011), available at <http://women.sohu.com/20110119/n278948925.shtml> (last visited Nov. 1, 2011).

²⁴⁴ Cao Wenyi & Shen Haiseng, *Di San Fang Tiaojie Rang Yinao Anjing De Zoukai* (第三方调解让医闹安静地走开) [Third-Party Mediation Quietly Drives Away Hospital Protests], FUJIAN RIBAO (福建日报) [Fujian Daily] (May 27, 2010), available at http://www.fj.xinhuanet.com/nmts/2010-05/27/content_19899305.htm (last visited Nov. 1, 2011); *Chuxian Yihuan Jiufen, Qu Yiyuan Zhengzhi De Shao* (出现医患纠纷, 去医院争执的少) [Few Choose to Protest at Hospitals in Hospital-Patient Disputes], XINHUA WANG (新华网) [Xinhua Online], <http://js.xhby.net/system/2010/05/11/010747857.shtml> (last visited Nov. 15, 2011); Xu Yang, *Tianjin Yinao Xianzhu Jianshao, Shang Wan Yuan Jiufen Zhuanjia Ding Zeren* (天津医闹显著减少, 上万元纠纷专家定责任) [Hospital Protests in Tianjin Dramatically Decrease; Experts Decide Responsibility in Disputes Involving Ten Thousand Yuan or More], RENMIN WANG (人民网) [People’s Daily Online], <http://medicine.people.com.cn/GB/11521343.html> (last visited Nov. 15, 2011); Zhang Wei & Miao Xingxiang, *Fujian Yihuan Jiufen Di San Fang Tiaojie Yinao Guanzhu Le Ma* (福建医患纠纷第三方调解医闹管住了吗) [Did Third-Party Mediation Resolve Hospital-Patient Disputes and Control Hospital Protests in Fujian], SINA FUJIAN (新浪福建), <http://fj.sina.com.cn/news/m/2010-07-24/090355125.html> (last visited Nov. 15, 2011).

²⁴⁵ In Yingtan, in Anhui, local authorities established a specialized mediation board in 2006 that combines officials from the health bureau, police, justice bureau, courts, supervision, propaganda and letters and visits departments. The committee maintains its own bank of medical experts whose goal appears to be to intervene in cases so as “to explain medical facts” to aggrieved patients and their families. Yet the committee has also been used to send a strong message that protestors will be dealt with harshly. One official report stated that the police had forcibly removed 82 protestors from near hospitals; 42 were detained administratively and 12 were formally arrested. Of those seven were eventually convicted of crimes. Perhaps not surprisingly, local hospitals reported that their payouts decreased as a result of aggressive local government intervention. *Yingtan Shi Dangzheng Zhongshi Bumen Xiezu Tuoshan Huajie Yihuan Jiufen* (鹰潭市党政重视部门协作妥善化解医患纠纷) [Yingtan City Party Officials Place Emphasis on Coordination Between Departments to Properly Resolve Hospital-Patient Disputes], FUYANG PINGAN

Hospital and government officials and media accounts blame the rise in and escalation of protests on the emergence in recent years of professional protestors.²⁴⁷ Such claims are difficult to evaluate; many protestors are friends or neighbors of patients. Numerous reports detail efforts to combat professional protestors.²⁴⁸ In Guangdong, police intervened to break up a protest by seventy protestors seeking compensation after an eleven month old child died of brain cancer while in the hospital and the child's mother subsequently committed suicide by jumping out of a hospital window.²⁴⁹ Local authorities alleged that most of the protestors had been hired by the family to coerce compensation from the hospital.²⁵⁰ In Nanchang, in Jiangxi, protestors seeking five million yuan in compensation blocked a local hospital for several hours and destroyed hospital facilities; the protest only dissipated after the police interviewed and arrested protest leaders. According to reporters, participants claimed to have come to protest because the patient's family has promised them compensation.²⁵¹

WANG (阜阳平安网) [Fuyang Pingan Online], <http://fypaw.org.cn/article/showinfo.asp?inford=1124> (last visited Nov. 15, 2011). Critics of such efforts note that mediation entities are often tied to insurance companies and health departments and are thus biased in favor of defendants. For example, in Zhejiang regulations bar public hospitals from settling disputes for more than 10,000 yuan, apparently an effort to streamline the resolution of claims through newly-established mediation entities. Zhejiang Sheng Yiliao Jiufen Yufang Yu Chuli Banfa, *supra* note 107. The regulations also state that no settlements shall be paid for more than 10,000 yuan without first obtaining a medical inspection decision—a clear effort to reduce pressure on hospitals to pay settlements.

²⁴⁶ Interview 2010-16; Interview 2010-23.

²⁴⁷ Liu, *supra* note 221; Gao, *supra* note 222. Judges also complain that some lawyers encourage their clients to protest. Interview 2009-126.

²⁴⁸ See, e.g., Qin Lei & Lin Xiaolei, *Shehui Xiansan Renyuan “Yinao” Jianjue Daji* (社会闲散人员“医闹”坚决打击) [Firmly Attack Idlers in Society Who Engage in “Medical Chaos”], SOHU (搜狐) (Dec. 27, 2010), <http://roll.sohu.com/20101227/n301446551.shtml> (last visited Nov. 15, 2011).

²⁴⁹ According to the subsequent police report, the infant died of manual asphyxiation, suggesting that the mother had strangled the baby before committing suicide.

²⁵⁰ Liao et al., *supra* note 203.

²⁵¹ *Nanchang: Sizhe Jiashu Du Yiyuan Suo 500 Wan* (南昌: 死者家属堵医院索 500 万) [Nanchang: Family of Deceased Patient Blocked Hospital Seeking 5 Million Yuan in Damages], DAJIANG WANG (大江网) [Dajiang Online], available at <http://doctor.fh21.com.cn/zhuanti/ynzt/20061008/10345694.shtml> (last visited Nov. 15, 2011).

Despite media accounts describing local police as working with hospitals to manage protests,²⁵² there is also evidence of police avoiding involvement, reflecting both concessive policies toward protestors and a reluctance to assume responsibility. Hospital officials and their lawyers complain that the police are often slow or unwilling to respond.²⁵³ Police avoid involvement because they fear they will become the targets of the protestors if they intervene. As one doctor said, “The Police don’t dare to touch [protestors].”²⁵⁴ In Municipality A hospital officials and lawyers describe local police as largely cooperative.²⁵⁵ Yet they complain of light punishments, even for protestors who cause significant disruption or who block or physically attack hospitals and staff.²⁵⁶

2. *Effects: Settlement and Flexibility*

Protest works: faced with protests, “most hospitals just pay.”²⁵⁷ Hospital officials say that protests force them to pay compensation even in cases where they were not liable or to pay more compensation than they believe was warranted.²⁵⁸ Hospitals are reluctant to share data on settlements. Nevertheless, interviews with lawyers and hospital and government officials make clear that hospitals settle the overwhelming majority of cases, generally more than ninety percent.²⁵⁹ This is not surprising: most civil cases (in China and elsewhere) are resolved outside

²⁵² Li Guo et al., *Jingcha Jinzhu Yiyuan Zhenshe Yituo Yinao* (警察进驻医院震慑医托医闹) [Police Stationed in Hospital Deter Medical Introducers and Medical Protestors], SOHU (搜狐), <http://news.sohu.com/20070202/n247994130.shtml> (last visited Nov. 16, 2011).

²⁵³ Interview 2010-6.

²⁵⁴ Interview 2009-116.

²⁵⁵ Interview 2010-24.

²⁵⁶ Interview 2010-24; Interview 2010-23.

²⁵⁷ Liu, *supra* note 221.

²⁵⁸ Luo et al., *supra* note 100; Interview 2010-17.

²⁵⁹ Interview 2009-116; Interview 2010-23; Interview 2009-101. Often both parties seek a rapid resolution of cases. Lawyers and officials for hospitals say that in cases in which they uncover genuine errors they will seek a rapid settlement. Interview 2010-6. Patients and their families often seek negotiated settlements to avoid an inspection by the medical review board and because litigants are aware that they will receive less money if they pursue their

the courts. What is unusual is the degree to which concerns about protests influence settlement practice.

Settlements are often made with little regard to legal provisions and often exceed the amounts that would be payable in court. Hospitals say they often settle when they believe they face no risk of liability in court and agree to pay more than they would have to pay if the dispute went to court.²⁶⁰ Hospital officials describe themselves as playing a social insurance role in medical cases, and note they are responsible for maintaining social stability.²⁶¹

The financial risk of litigation is a minor concern in most disputes. An official at a county-level hospital in Municipality A stated that the economic impact of litigation remains small even for a county hospital: hospitals pay on average one percent of revenue a year in compensation, with a modest increase in recent years. The hospital, a major public hospital, paid out 280,000 yuan in compensation for medical disputes in 2009, against income of approximately 96 million yuan.²⁶² Hospital officials in Shanghai likewise describe the total payments made in medical cases as modest — with major cases reaching approximately 200,000 yuan.²⁶³ An official at a major Shanghai teaching hospital estimated that the hospital pays out approximately five million yuan a year in compensation for medical disputes, against more than a billion yuan in revenue.²⁶⁴ Hospital officials appear unconcerned that pushing more disputes

claims through court. Interview 2009-101; Interview 2010-3; Interview 2009-102; *see also* Interview 2009-116 (noting that parties are mainly concerned with money – not with the outcome of medical inspections).

²⁶⁰ Interview 2009-116.

²⁶¹ Interview 2009-124; Interview 2009-103. Some hospital officials say they are also increasingly letting cases wind up in court, because they do not want to make it too easy for plaintiffs to recover. Interview 2009-114. Others argue that they are facing a rise in malicious cases—those brought by patients who fake injury in order to obtain settlements from hospitals. Interview 2010-22

²⁶² Interview 2010-22. The largest single judgment to date in the county was a judgment of 280,000 for a patient who had become permanently disabled. The hospital official said that the judgment was not a major financial burden for the defendant hospital, which has 480 beds, 150 doctors, and 130,000 outpatient visits a year. *Id.*

²⁶³ Interview 2009-101.

²⁶⁴ Interview 2009-101. The financial risk of litigation is more significant for small hospitals or clinics, where a large judgment could exceed the defendant's ability to pay. In A, however, no clinics have been forced to close in

into the formal legal system will encourage copycat lawsuits, likely because damage awards in the courts are low.

Protests, in contrast, impose significant costs.²⁶⁵ Protests often disrupt hospitals' ability to operate. The reputational consequences for individual doctors and hospitals of an adverse finding from a medical review board can be extremely damaging.²⁶⁶ Adverse outcomes may affect the career development of doctors.²⁶⁷ For big hospitals protests can also affect their relationships with their administrative supervisors,²⁶⁸ hospitals thus seek to avoid health bureaus becoming aware of their problems.²⁶⁹ In rare cases medical disputes can result in the local health bureau sanctioning or revoking the license of a hospital or doctor.²⁷⁰ In general, however, health

response to adverse judgments or large settlements. This is largely because the clinics only see routine minor illnesses, and are not allowed to provide care in high risk cases. Interview 2010-18; 2010-24..

²⁶⁵ Interview 2009-101; Interview 2010-17; Interview 2009-11; Interview 2009-7.

²⁶⁶ Interview 2009-110. For discussion of how reputational sanctions may compensate for a weak legal regime in other contexts in China, see Benjamin L. Liebman & Curtis J. Milhaupt, *Reputational Sanctions in China's Securities Market*, 108 COLUM. L. REV 929 (2008).

²⁶⁷ Interview 2009-116. Liability in medical disputes is virtually always put on the defendant hospital, not individual doctors. Nevertheless hospitals generally require doctors to pay a share of any damage award. The system varies from hospital to hospital, but generally medical staff will be asked to contribute a small percentage of any damage award or settlement; in some cases the supervising doctor or department head will also be required to pay a share. Interview 2009-103. In general the amount will be capped at 10,000 yuan, or about two months average salary for a doctor. But individual departments within a hospital may also be asked to cover up to half of any compensation paid to patients or their families. Interview 2010-17. In some cases individual departments within the hospital may settle cases on their own, in order to minimize problems and to maintain their ability to claim they have had no complaints in a given year. Interview 2010-17. Although it is rare for doctors to lose their licenses, errors may affect promotion decisions or can lead to a demotion for doctors who are responsible for errors. Interview 2010-17; Interview 2009-103.

²⁶⁸ Interview 2010-5.

²⁶⁹ Interview 2010-22; Interview 2010-22; Interview 2010-23. Nevertheless, in Municipality A the local health bureau reported mediating 111 disputes in 2009. Interview 2010-16. Reflecting concerns about the risk of protest, the health department official in Municipality A said that the health bureau will request that the patient's family bring no more than three people to the negotiations. In reality patients and their families will often bring more people. Interview 2010-17.

²⁷⁰ Interview 2010-5; Interview 2010-10.

departments avoid becoming involved in cases because they are concerned they will themselves become the targets of protestors.²⁷¹

Although health departments may seek to avoid becoming directly involved in disputes, many disputes become conflicts between protesters and the state. Hospitals sometimes welcome intervention by local authorities because it shifts pressure onto the shoulders of local officials. Yet intervention by Party officials often results in pressure on the hospital to settle²⁷² and leads hospitals to pay more than they believe they should.²⁷³ In one case in Municipality A, 100 protestors surrounded a hospital following the death of a local resident from head injuries resulting from a fall. Family members argued that the hospital was responsible because an initial CT scan had found no sign of bleeding in the brain. Faced with the large protest the hospital entered into negotiations with the family — which took place over a week in a local hotel. Local police and government officials also participated, with government officials pressuring the hospital to settle for 50,000, despite the hospital’s view that it had not committed error.²⁷⁴ Likewise, in a case that arose in a county town in Municipality A, protestors made the hospital “into a funeral zone.” In the end, the local party secretary ordered the hospital to compensate the protestors.²⁷⁵ In some cases local governments provide funds to assist hospitals in settling cases.²⁷⁶

²⁷¹ Interview 2010-8; Interview 2009-116.

²⁷² Interview 2010-17.

²⁷³ Interview 2009-103.

²⁷⁴ Interview 2010-17.

²⁷⁵ Interview 2010-24.

²⁷⁶ Interview 2010-17. Another case against a hospital in Municipality A arose as the result of patient dying from cancer in 1999. The family did not initially complain and the local health bureau found no medical error. But the family sued and the local court ordered 30,000 yuan in compensation as a result of numerous changes in the medical records; on appeal the award was increased to 60,000. Following the appellate decision the wife of the decedent began protesting to Beijing demanding more compensation. After more than ten years of petitioning local authorities organized a “hearing” at her house where the case was discussed and local authorities attempted to negotiate a settlement. The case was unresolved as of late 2010, but hospital officials predicted that local authorities would step forward and pay significant compensation to the petitioner. Interview 2010-17.

The threat of protest also shapes courts' handling of malpractice lawsuits. Numerous judges noted that in cases involving protests or the threat thereof they adjust outcomes to mollify plaintiffs. Sometimes judges do this on their own; other times they do so in consultation with or at the instruction of local Party-state officials.²⁷⁷ Judges say they sometimes order hospitals to pay damages in cases in which there are no errors to appease protestors.²⁷⁸ A judge in Municipality A noted that cases potentially involving unrest are not resolved according to law; law, reason, and sympathy are mixed together and cases are resolved by local officials rather than by the courts.²⁷⁹ Another judge expressed frustration with the pressure courts face to mollify protestors, arguing that in China today “police do not carry guns, and judges do not decide cases.”²⁸⁰ Hospital officials also complain that courts make them compensate plaintiffs to prevent escalation of protests.²⁸¹ For example, a hospital official in Municipality A reported that court officials told the hospital to accept a judicial inspection in one case because “the family will not be happy” if the hospital insisted on an inspection by a medical review board. The judicial inspection found that the hospital was ten percent liable for failure to discover the injury on time. Yet the court refused to follow the recommended apportionment of liability. Instead, the court assigned thirty percent of the blame to the hospital and ordered the hospital to pay 111,000 yuan in compensation.²⁸²

Judges justify their flexibility in medical disputes by noting that hospitals are generally the strong party in malpractice cases.²⁸³ Courts must “maintain a harmonious society, especially

²⁷⁷ Hospital officials likewise argue courts pressure them to agree to payments to patients in order to avoid unrest. Interview 2010-22; Interview 2010-17.

²⁷⁸ Interview 2009-114.

²⁷⁹ Interview 2010-18.

²⁸⁰ Interview 2009-114.

²⁸¹ Interview 2009-116.

²⁸² Interview 2010-17.

²⁸³ Interview 2010-24.

when [patients] bang at the door.”²⁸⁴ Judges say they will consider plaintiffs’ situations, and admit that they may grant compensation to plaintiffs facing extremely difficult circumstances, such as the loss of a child, even when the defendant committed no error.²⁸⁵ Judges also note that they avoid medical review board determinations by awarding emotional damages or compensation for changes to medical records or for hospitals’ failure to provide adequate information to patients.²⁸⁶

Judges describe themselves as caught between patients’ demands and legal requirements. As one judge in Shanghai described the situation, courts have been told not to pay out in excess of the amounts allowable under the Regulations. At the same time, however, they have been told to resolve cases involving protests. As a result, courts “find ways to expand liability” against hospitals. The goal in doing so, said the judge, is to increase compensation so that amounts recoverable in medical cases do not vary from ordinary torts cases. Judges say they will sometimes tell hospitals to pay plaintiffs more than is specified in a decision to ensure that the case is resolved. Courts themselves may sometimes contribute funds to help resolve particularly troublesome cases.²⁸⁷

The threat of protest also affects treatment decisions of doctors. Doctors report avoiding difficult cases out of concern that adverse outcomes might result in protest.²⁸⁸ Doctors argue that law is of little use when patients and their families resort to disruptive protests.²⁸⁹ Doctors allege that many disputes involve people who simply died at the hospital, with no other basis for

²⁸⁴ *Id.*

²⁸⁵ Interview 2009-122.

²⁸⁶ *Id.* Judges say that they sometimes will award emotional damages to compensate plaintiffs in cases in which there was error but no causation between the error and the patient’s injury or death. Interview 2009-120.

²⁸⁷ Interview 2009-114.

²⁸⁸ Wang Leyang, *supra* note 6.

²⁸⁹ Interview 2009-101; Interview 2009-102.

complaint.²⁹⁰ As a result, some doctors in Municipality A now avoid taking on certain complex cases, instead sending the patients to the provincial capital for treatment.²⁹¹

Despite the emphasis on settlement, hospital officials and judges report a steady increase in the volume of cases winding up in court.²⁹² This may reflect an increase in the total number of medical disputes. The increase may, however, also reflect escalating patient demands and greater legal consciousness among patients.²⁹³ Hospital officials say that in some cases they prefer court judgments; a court decision may also make it easier for the hospital to assign blame internally to doctors who have committed an error.²⁹⁴

V. IMPLICATIONS: AN OVER-RESPONSIVE STATE?

Evidence from court decisions and from the informal resolution of medical disputes yields insights into trends in institutional evolution, dispute resolution, and governance in China. In this section I discuss the implications for these three interrelated areas and for legal development in China more generally.

1. *Institutional Evolution*

Medical malpractice litigation appears to be in part a story of institutional failure. A system designed to protect hospitals has encouraged patients and their families to engage in disruptive behavior.²⁹⁵ Informal mechanisms have developed in significant part because the

²⁹⁰ Interview 2009-102; Interview 2009-116.

²⁹¹ Interview 2010-24.

²⁹² One judge in Shanghai estimated that his district court hears more than 100 medical disputes a year, with the court granting awards to plaintiffs in the large majority of cases. Interview 2009-122.

²⁹³ Interview 2009-101.

²⁹⁴ Interview 2010-17.

²⁹⁵ The fact that hospital officials have resisted changing the current system when it would seem in their interest to do so may suggest that the combination of defendant-friendly legal provisions and a system of *ad hoc* informal dispute resolution and protest serves hospital interests. Although protests cause disruption, the current system

formal system either cannot resolve patients' claims or is not allowed to do so. The creation of new institutions has had little stabilizing effect. Faced with formal institutions widely perceived as unfair, patients and their families take matters into their own hands.

Medical disputes show how lack of trust in formal institutions -- in health care, in the legal system, and in local authorities — is an important source of unrest. Medical disputes combine widespread distrust of the healthcare and legal systems with often severe harm. Others have engaged in empirical study of trust in China; those findings largely support the observations in this paper regarding popular distrust of medical and legal institutions.²⁹⁶ As Elizabeth Perry has noted, trust in the state — in particular the central Party-state — is common and widespread in China.²⁹⁷ Trust in institutions and individual state actors, however, is weak. State response to this distrust has been a combination of concessive and repressive policies: yielding to protestors but also taking steps to ban certain acts and prevent escalation. Reform to institutional structures has been slow.

The problem is not just that institutions are weak; it is that reforms to these institutions have failed to keep up with popular expectations regarding both the courts and the healthcare system. Medical disputes show that trust can cycle downward even as institutions improve. Despite widespread problems in both the healthcare system and the courts, both have improved markedly since the early years of the reform period.²⁹⁸ The decrease in institutional trust is the

imposes no significant financial cost on most defendants and allows hospitals to prevent external review of most serious cases.

²⁹⁶ For discussion of distrust in the context of medical disputes, see Xu & Lu, *supra* note 11, at 83, 90 (describing a cycle in which distrust in the healthcare system leads to violence, and violence further exacerbates distrust).

²⁹⁷ Elizabeth J. Perry, *Chinese Conceptions of "Rights": From Mencius to Mao – and Now*, PERSPECTIVE ON POLITICS, vol. 6, no. 1, at 37, 39 (2008).

²⁹⁸ See *supra* note 24 (discussing overall improvements in health); Liebman, *A Return to Populist Legality*, *supra* note 15 (discussing changes in the courts).

product of continuing problems and increased expectations. In the courts, enhanced capacity and competence have failed to yield greater public acceptance of court decisions.²⁹⁹

One lesson of medical disputes is that failure to permit the evolution of autonomous institutions, be they courts, medical review boards, or the legal profession, may breed even more instability.³⁰⁰ Lawmakers, courts, and academics have failed to create or even propose institutions for evaluating medical error that balance patient rights with the need for experts to assist in evaluating whether or not medical error has occurred. The problem is not just that the decision on medical error is made by doctors answerable to the local health bureau; it is that there is no way to conceptualize including patient voices in the process. Even if authorities wanted to make the medical review boards fairer, for example by including patient advocates, they would find it hard to find such people because of the restrictions that exist on the development of NGOs and other autonomous institutions.

Yet focusing on the failure to develop autonomous institutions risks overlooking two more subtle implications for institutional development in China. First, medical disputes suggest that much of the institutional weakness, or flexibility in practice, is by design. The Chinese Party-state appears committed to improving formal institutions at the same time that it continues to be ambivalent about how much autonomy such institutions should be permitted to develop. Party officials who intervene in medical disputes, like judges who adapt or ignore formal legal rules because of stability concerns, are acting just as they are supposed to act. Arguments that the formal legal system is being undermined by courts and officials who yield to protest miss the fact that flexible interpretation (or ignoring) of formal legal rules has long been central to the Chinese political-legal system. Courts that rigidly apply the law place themselves in a far more

²⁹⁹ Writing on labor disputes, Mary Gallagher notes a similar dynamic of “informed disenchantment” – litigants who have greater knowledge of law and willingness to sue but whose frustration with problems with the legal system deepens as a result of use of law. Mary E. Gallagher, *Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness*, 40 L. & SOC. REV. 783, 785-86 (2006).

³⁰⁰ For example, some local jurisdictions have sought to curtail the ability of lawyers to use contingent fees in a clear attempt to discourage lawyers from taking on medical disputes. But others have stepped into the void left by the lack of legal services—most notably professional protestors.

precarious position than those who take account of stability concerns. Courts that innovatively adapt or ignore formal legal rules because of stability concerns are doing their jobs.

Similarly, the expanding role of professional protestors may reflect state ambiguity about the role of formal institutions. Although widely criticized in the official media, such actors serve important functions.³⁰¹ The role of non-legal intermediaries is of course not unique to China.³⁰² Yet in China the expanding roles of such intermediaries may reflect the emergence of new institutional arrangements in response to weaknesses in the formal legal system as well as state concerns about permitting further development of legal institutions.³⁰³

Second, medical cases demonstrate that innovation in the Chinese legal system does not equate to increased autonomy for legal institutions. Evidence from medical disputes reveals the adaptive and innovative capabilities of China's courts. Courts have adopted flexible interpretations of existing regulations in order to appease plaintiffs and defendants and have resisted legal standards many view as unfair. Yet such innovation is not aimed at increasing court autonomy; instead, it is designed to insulate courts from direct protest and from being blamed for allowing disputes to escalate.

These two observations add depth to existing understandings of the development trajectory of courts in authoritarian systems and of institutional evolution in China. Most recent literature on courts in authoritarian systems has focused on ways in which courts begin to challenge existing institutional arrangements and political authority, in particular as courts

³⁰¹ In his study of informal debt collectors Xu Xin argues that the existence of intermediaries strengthens state control by resolving grievances that formal legal institutions fail to resolve. Xu Xin, *Falü Shifou Zhongyao—Laizi Huanan De Yige Minjian Shouzhai Anli* (法律是否重要—来自华南的一个民间收债案例) [Is Law Important—A Case Study on Informal Debt Collection in Southern China], 2004 Sociological Stud. (社会学研究) 1, 53–63; XU XIN, LUN SILI JIUJI (论私力救济) [On Self-Help] (China University of Political Science and Law Press (中国政法大学出版社) 2005).

³⁰² See, e.g., Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 CHIC. L. REV. 41 (2000).

³⁰³ As one lawyer commented in response to a presentation of this paper in China, the state may actually prefer professional protestors to lawyers, because the actions of the former are more predictable.

develop new competence.³⁰⁴ Similarly, literature on China’s legal development has focused overwhelmingly on formal legal institutions and processes and has generally assumed that the end goal of legal reforms is to create robust legal institutions. Medical disputes in China show that court innovation may be designed to insulate courts from external pressure and criticism, not to expand court autonomy.

Analysis of medical disputes in China also contributes to literature on institutional development in China. Prior scholarship has examined how “institutional conversion,” the use of existing institutions for new purposes, plays out in China.³⁰⁵ Medical cases highlight ways in which China’s courts are taking on new roles and how such roles may reinforce rather than challenge state authority. Litigants are bringing a widening range of claims into the courts, forcing courts to confront new issues. Courts are developing strategies to deal with these new uses of the courts. Yet institutional conversion in the courts is not only coming from litigants; it is also coming from the state’s use of the courts to help maintain stability by providing largely low-value remedies to those with grievances. Courts are serving as strategic resources for both litigants and for the state.³⁰⁶

Understanding the processes courts use — innovative legal reasoning combined with attempts to place such decisions in line with Party-state concerns regarding stability — suggests that courts are able to channel new claims in ways that provide litigants redress without challenging the political status quo. Courts are able to use their growing competence selectively. The coping strategies courts are employing are consistent with those recognized in existing literature on endogenous institutional evolution in China.³⁰⁷ Over time, this increased capacity

³⁰⁴ See, e.g., TOM GINSBURG & TAMIR MOUSTAFA, *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (2008).

³⁰⁵ Xi Chen, *Collective Petitioning and Institutional Conversion*, in *POPULAR PROTEST IN CHINA* (Kevin O’Brien, ed. 2008), at 65; Kellee Tsai, *Adaptive Informal Institutions and Endogenous Institutional Change in China*, 59 *WORLD POL.* 1, at 116 (Oct. 2006); see generally Wolfgang Streeck and Kathleen Thelen, eds., *BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES* (2005).

³⁰⁶ Cf. THELEN & STREECK, *supra* (describing institutions as strategic resources, not just constraints).

³⁰⁷ Tsai, *supra* note 305, at 119

for innovation combined with a willingness to engage in subtle pushback may provide a base for continued evolution in the roles courts play.

Evidence from medical disputes reinforces the observation that increased institutional competence and sophistication will not necessarily lead to rapid change or political challenges. Medical cases suggest that continued endogenous institutional evolution in the courts is possible but that such evolution is most likely to come from courts continuing to expand their adaptive capacities in routine disputes, not from cases that directly challenge political norms. Such a process also carries risk: as Xi Chen has noted, the inability of institutions sufficiently to adapt to popular uses may also give rise to unrest.³⁰⁸ In the courts the potential for instability stems not only from the failure to adapt to new uses or to meet new demands. The use of the courts for new purposes — by litigants to pursue a broader range of claims and by the state to ensure stability -- is also in tension with avowed state goals of developing a rule-based system of governance. A central insight from medical cases is that some litigants are able to use the legal system to obtain compensation, but that what appear to be normatively desirable outcomes (aggrieved individuals winning redress) are often achieved through flexible application of legal rules.

2. *Law in the Shadow of Protest*

Despite three decades of emphasis on constructing a comprehensive legal framework, medical cases show that in many disputes in China the “shadow of the law”³⁰⁹ is weak or non-existent. In medical disputes law operates in the shadow of protest. The threat of protest keeps many cases out of court and also casts a shadow over how courts handle cases that do wind up in the formal legal system. Hospital officials, judges, and health department officials acknowledge that whether or not they face a protest or threat thereof is generally the most important factor influencing resolution of medical disputes. Most disputes are resolved with little, if any,

³⁰⁸ Chen, *supra* note 305.

³⁰⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA I*, 140 (PHILLIPS BRADLEY ED. 1946).

reference to potential legal liability, evidenced by the fact that negotiated outcomes in medical disputes frequently exceed the amounts awardable in court.

Much existing literature on China has assumed and argued that the primary goals of legal reforms include the creation of rules that facilitate economic development and the state's retreat from micro-management of individuals' lives.³¹⁰ Conventional understandings of China's legal development have assumed that China is transitioning to a rule-based system, albeit one with many weaknesses, with a gradual expansion of the binding power of law and formal legal institutions. Recognizing the shadow that the threat of instability casts on legal proceedings challenges many existing assumptions about the trajectories of China's legal reforms. Medical disputes show there remain significant limitations on the impact of legal rules on contentious social issues even in areas in which the state has devoted resources to creating rules, institutions, and procedures.

Scholars have long recognized that many disputes, in China and elsewhere, are resolved primarily with reference to informal social norms, not formal law.³¹¹ Medical disputes highlight two ways in which contemporary Chinese practice appears to be diverging from existing models. First, in medical disputes in China law is of limited relevance in disputes even among arms-length actors. Claims are not being resolved within closed communities or among repeat players.³¹² Instead, disputes often escalate into moral claims against the state, in which law plays little role in ordering outcomes.

Second, the most important determinant of outcome is the threat of unrest and violence. Evidence from medical cases suggests that law-related protests are not merely serving as pressure valves and that the risk of violence is not a minor external annoyance for China's courts.

³¹⁰ For a summary of such literature, see Liebman, *A Return to Populist Legality*, *supra* note 15.

³¹¹ ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Hanli Guo & Bradley Klein, *Bargaining in the Shadow of the Community: Neighborly Dispute Resolution in Beijing Hutongs*, 20 OHIO ST. J ON DISP. RESOL. 825, 299 (2005).

³¹² Some hospitals are beginning to develop internal norms governing how they respond to cases; over time informal norms may thus come to govern the resolution of hospital-patient disputes. Yet there is little evidence of such norms playing a role thus far.

Violence and protest are now key aspects of how the system functions, part the cycle of dispute resolution. The risk of instability is a key determinant of the resolution of disputes both inside and outside the courtroom. The process is dynamic and claimants often pursue multiple strategies. The influence runs in only one direction, however: protest impacts law; law plays little role influencing or limiting the resolution of protests.

Medical disputes are particularly likely to result in escalation and violence, reflecting their high stakes and problems in the healthcare system. Yet the phenomenon is not unique to medical disputes. Similar dynamics exist in other contentious social spheres, most notably land, labor, and mass torts,³¹³ where despite extensive attention to the construction of formal legal standards much of the action in resolving disputes remains outside the courtroom. Literature on China has, with few exceptions,³¹⁴ focused on how courts function inside the courtroom. Doing so, however, risks failing to see the important roles that protest and violence play in influencing court outcomes.

Recognizing that law operates in the shadow of protest in China raises questions about the commitment and capacity of the Chinese state to strengthen the legal system. The state encourages (and at times compels³¹⁵) settlement, often closing the courtroom doors to contentious claims. Courts' institutional weakness means that they find it difficult to resolve high-profile cases, even where existing laws provide clear standards for adjudication. Within China the frequency with which litigants either eschew litigation entirely or use protest as a strategy alongside protest is often explained as resulting from lack of public confidence in the courts and from a tradition in which litigation is rarely the default mechanism for resolving

³¹³ I have written separately on the impact of petitioning and protesting on the legal system. Benjamin Liebman, *A Populist Threat to China's Courts?*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN POST-REFORM CHINA (Mary Gallagher & Margaret Woo, eds., 2011).

³¹⁴ *Id.*; Yang Su & Xin He, *Street as Courtroom: State Accommodation of Labor Protest in South China*, L. & SOC. REV., 157 (2010), available at http://www.cityu.edu.hk/slwlw/lib/doc/Frank_pub/1.pdf.

³¹⁵ The most notable examples involve mass torts: claims by the Wenzhou high speed rail crash, the victims of melamine contaminated milk, and by victims of the 2008 Wenchuan earthquake.

disputes. Medical cases highlight another factor: litigants accurately understand that the most effective route to compensation is often outside the formal legal system.

It would be an overstatement to describe China as a society in which every legal issue is transformed into a non-legal issue, the reverse of Toqueville’s famous observation about the U.S.³¹⁶ Yet the description of China would not be far off, at least with regard to significant social issues or cases that pose a threat of even mild protest. There is a lot of ordinary law in China, cases that are resolved routinely through the formal legal system. Popular practice and discourse regarding law are shaping the evolution of how the legal system functions. But there is also a strong tendency for a wide range of cases to be taken out of the system, or within the courts to be resolved without reference to law on the books.³¹⁷ Courts are limited in their authority to impact formal law and actual practice on contentious or high profile issues.

In China, as in other countries, a range of factors shape the formation of legal norms and of popular understanding of law. Writing about the United States, Michael Grossman noted that law consists not only of formal law and court practices but also “social currents, political developments, economic changes, and other forces in larger society.”³¹⁸ China appears striking for the limited impact of formal law and court practice in shaping public understandings of law. Court cases may result in media coverage and shape official and popular practices and understandings, but such impact rarely stems from court decisions. Many such cases are notable for the fact that they are resolved without a formal court decision or with a decision dictated by Party officials.³¹⁹ Feedback on legal norms in China comes from negotiated outcomes and state responses to protest and popular attention; feedback from court decisions is much less influential. Recent high-profile cases in which court decisions are said to impact popular behavior and

³¹⁶ TOCQUEVILLE, *supra* note , at 280((“Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”).

³¹⁷ For examples, see Benjamin L. Liebman, *Professionals and Populists: The Paradoxes of China’s Legal Reforms*, in CHINA IN AND BEYOND THE HEADLINES (Timothy Weston & Lionel Jensen eds. Forthcoming 2012).

³¹⁸ MICHAEL GROSSMAN, A JUDGMENT FOR SOLOMON 3 (1996).

³¹⁹ Benjamin L. Liebman, *Changing Media, Changing Courts?*, in CHANGING MEDIA, CHANGING CHINA (Susan Shirk ed., 2010).

understanding of law have often been cases in which popular behavior has been shaped by courts' misapplication of law.³²⁰ Legal institutions have become important spaces of contestation in China, but they remain one of many such spaces and lack a privileged role in resolving disputes or in shaping the resolution of disputes outside the courts.

3. *Protest and Responsiveness: Nationalizing Private Litigation*

Medical disputes show how claims that begin as private law disputes become claims against the state. Rather than facilitating the development of legal institutions to resolve private disputes, official responsiveness sends the message that a range of private law disputes are in fact claims against the state. This is not an observation unique to medical disputes: similar dynamics exist in other areas that also frequently give rise to unrest, including land and labor disputes.³²¹ Hospitals are not purely private actors: most are state-owned and remain overseen by local health bureaus. Nevertheless, official responsiveness to protest reinforces popular views that hospitals are representatives of the state.

Medical disputes represent an increasingly common phenomenon in contemporary China: the nationalization of private litigation. Many disputes on contentious issues are resolved outside the legal system. Protest and petitioning can transform even routine claims by individuals into direct negotiations with the state. The result may be “order without law,” but such disputes are not resolved via private ordering.³²² Resolution takes place through direct bargaining with the state. Obsession with stability means that in a wide range of cases authorities rush to resolve

³²⁰ In what is probably the most well known example, in the 2006 Peng Yu case a court in Nanjing imposed liability on a self-proclaimed good Samaritan who had taken an elderly woman to the hospital and then had been sued by the woman. The court held that common sense suggested that the defendant only helped the woman because he was responsible for her injuries. The case received extensive attention in China, and was widely blamed as being one of the causes of the 2011 “Yueyue” incident, in which a video showed eighteen passers-by ignoring a two-year-old girl who had been run over by two separate vehicles. Karson Yiu, “‘Nanjing Judge’ Blamed for Apathy in Toddler’s Hit and Run,” ABC NEWS, Oct. 11, 2011, available at <http://abcnews.go.com/blogs/headlines/2011/10/nanjing-judge-blamed-for-apathy-in-toddlers-hit-and-run/> (last visited July 12, 2012).

³²¹ On labor, see Su & He, *supra* note 280.

³²² Cf. Ellickson, *supra* note 311.

cases before they reach court by paying off aggrieved individuals. Concerns about stability also trump legal rules when cases do reach court.

Leading explanations of state responsiveness to protest in China focus on two central factors: incentives facing local officials to prevent unrest and the ability of protestors to escalate their demands.³²³ Medical cases suggest that incentives to maintain stability are only part of the story. Grievances and resulting protests, in medical cases as in other spheres, are effective not just because they threaten escalation or unrest, but also because they challenge the legitimacy narrative that the Party-state has sought so hard to create.³²⁴ Implicit in claims against the state are both threats of escalation and appeals to the state's responsibility to care for those with grievances. Despite three decades of legal reform, officials continue to view themselves as universal ordering agents. Officials are responsive to claims that the state should care for those who have suffered misfortune.

Medical disputes highlight the over- and under-responsiveness of the Chinese Party-state. There is widespread shirking by state institutions. Hospital officials complain that they are left to resolve disputes on their own because other state institutions, including the police and health bureaus, refuse to get involved out of fear that they will become targets of protest. At the same time, medical disputes show how state intervention can transform disputes between largely private actors into the concern of local authorities and thus implicitly into disputes that test the legitimacy of the state.

State over- and under-responsiveness reflects uncertainty about the role of the state and the role of the legal system. Conventional arguments regarding why the Party-state remains wary of allowing courts and the legal system to expand their authority focus on state concerns

³²³ For example, see Xi Chen, *The Power of "Troublemaking": Protest Tactics and Their Efficacy in China*, *COMPARATIVE POL.*, July 2009, at 451, 464. KEVIN J. O'BRIEN AND LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* 67 (2006). On incentives facing officials, see Carl Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, 31 *U. PENN. J. INT. L.* 53 (2009).

³²⁴ As Elizabeth Perry has written, "The idea that good governance rests upon guaranteeing the livelihood of ordinary people has been a hallmark of Chinese political philosophy and practice from Mencius to Mao – and beyond." Perry, *supra* note 297, at 39.

that even modest steps toward independent courts would pose a political risk to the Communist Party. Official sensitivities regarding western-funded rule of law efforts have clearly been heightened in the wake of revolutions in the Arab world and there are signs of increased state distrust of the legal profession. Such concerns explain crackdowns on rights lawyers and restrictions on courts' abilities to hear constitutional claims and other major public law disputes.³²⁵ Yet focusing on a hypothetical political threat from the development of stronger courts is barely credible in a system in which court appointments are largely controlled by the Party Organization Department and in which there is little history or evidence of courts challenging political authority. Such concerns also cannot explain the tendency to transform even routine cases into claims against the state.

A more likely explanation is that unease regarding the role of law and courts and unwillingness to allow courts more autonomy to resolve private disputes reflects broader uncertainty about the role of state. Litigants and officials continue to expect the state to play a strong role in resolving a wide range of disputes; the idea of an all-powerful, or “*quanneng*” state remains strong. Party-state officials appear unwilling to let go of this role, in particular in a time of rapid change.

As Anthony Saich noted nearly a decade ago, the post-reform Chinese state lacks a clear vision of its role. As a result the state engages in micro-management and flexible resolution of problems, what Saich referred to as “the politics of muddling through.”³²⁶ Medical disputes show how this flexibility interfaces with the legal system. Rather than stepping back and allowing the legal system to resolve disputes, the Party-state continues to micro-manage individual disputes and to encourage and at times require local officials to intervene. At the same time, however, the Party-state continues to devote extensive resources to developing China's legal infrastructure.

³²⁵ For an insightful discussion of China's recent “turn against law” see Carl Minzner, *China's Turn Against Law*, AM. J. COMP. L. (forthcoming 2012).

³²⁶ Tony Saich, *China's New Leadership: The Challenges to the Politics of Muddling Through*, 101 CURRENT HISTORY 250 (Sep. 2002).

The cycle of protest, responsiveness, and ignoring of legal rules and procedures appears unstable. The fact that protest works incentivizes others to do the same. Literature on protest in China, however, offers another possible interpretation for the rise and tolerance of protest: allowing such protest may have a stabilizing effect.³²⁷ Permitting protest may prevent escalation, play a useful oversight function, and provide the regime with information. Evidence from medical-related protests largely fit into this stability-enhancing model. Protests are mostly atomized and protestors voice their complaints in terms of demands for redress in individual cases, not regime challenges.³²⁸ Many such claims resonate with a tradition of claims for a “fundamental right to subsistence.”³²⁹ A process that encourages claims to morph from protest into settlement also dovetails with official distrust of the formal legal sphere.

Medical cases highlight another possible benefit to a system that rewards protest: doing so may help to screen for those with the most serious grievances and may be cheaper than providing a robust social welfare system. As Xi Chen and Peter Lorentzen have noted, the state takes protest as evidence of the credibility of grievances.³³⁰ In a system in which the state is unable or unwilling to provide the resources necessary to transform the healthcare system radically, allowing protest may serve both to highlight problems in the system and to identify those most aggrieved. Focusing on those with the strongest grievances helps not only to maintain stability but also reduces costs, to hospitals and to the state. The same may be true for

³²⁷ Peter Lorentzen, *Regularized Rioting: Permitting Protest in an Authoritarian Regime*, June 9, 2010, at 3 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995330 (“regular protest in an authoritarian regime can actually enhance its stability rather than detract from it”); Peter Lorentzen and Suzanne Scoggins, *Rising Rights Consciousness: Undermining or Undergirding China’s Stability*, 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722352. Elizabeth Perry has similarly noted that the “right to rebel” in China “may prove more system-supportive than system subversive.” Perry notes that protest has long been viewed as a legitimate response to the state’s failure to provide for the livelihood of its people, and has characterized protest in China as reflecting “rules consciousness,” not “rights consciousness.” Perry, *supra* note 297. This argument is controversial; for a counter-argument that recent protests also reflect a rise in rights consciousness, see Lianjiang Li, *Rights Consciousness and Rules Consciousness in Contemporary China*, CHINA J., no. 64, at 48 (July 2010).

³²⁸ Lorentzen, *supra* note 327, at 4.

³²⁹ Perry, *supra* note 297, at 43.

³³⁰ Lorentzen, *supra* note 327, at 3; Chen, *supra* note 235.

the legal system more generally, which may be ill-equipped to confront the full range and quantity of claims resulting from China's rapid social transformation and proliferation of new laws.

Despite the potential for protest to reinforce stability, however, medical disputes also reflect tensions at the heart of legal reforms. Protest may reinforce regime stability, but relying on protest remains in tension with state efforts to improve the legal system. The Chinese system continues to be one in which outcomes, not procedure, provide the primary external metric for evaluation of the courts and other institutions. In the short term such an approach may enhance stability by focusing on compensation for those with the strongest grievances. In the long term, however, whether stability will be enhanced by state emphasis on responsiveness to grievances, not the embrace of rules and procedures, is less clear. Recognizing the dynamic of over-responsiveness challenges not only the state's avowed commitment to law, but also basic understandings regarding the importance of rule-based governance to the sustainability of China's model of authoritarian governance.

VI. CONCLUSION

The level of violence and unrest in medical disputes is in some respects unsurprising: the combination of high stakes, a healthcare system widely perceived as focused on profit rather than patient care, lack of a social safety net, and biased dispute resolution institutions might well produce instability in any system. The trend toward resolution of claims through protest and violence appears likely to become more widespread absent significant reforms.

Some recent reforms appear designed to reduce unrest. Efforts by the Supreme People's Court to streamline the handling of medical cases and reduce reliance on doctor-controlled medical review boards may help to lessen tension and encourage litigants to pursue their claims in court, as would allowing larger damage awards. Modest steps toward fairness can be taken by making review board determination reviewable in court and through providing for non-local review of medical cases. Proposed reforms to address inequality in the healthcare system can likewise be understood as in part an attempt to begin to address the destabilizing effects of China's healthcare crisis. Such efforts may, over time, reduce conflict over medical cases; the

transformation of Taiwan's healthcare system over the past twenty years may provide a useful example, albeit on a much smaller scale. Yet changes to the healthcare system will take time and will come at enormous cost. The grim reality is that conflict appears likely to get worse absent radical state action to address problems in the healthcare system.

The rise in medical disputes is a story of evolution of formal law in China and also the limits to such evolution. Medical disputes show how the state has invested in formal law in an effort to reduce conflict and how state concerns about instability are often in tension with commitment to strengthening the legal system. In medical disputes, as in healthcare and law more generally, the Party-state is both over and under responsive. Disputes are resolved not in the shadow of the law, but through micro-management by the state in the shadow of protest. Medical cases show how increased institutional competence does not necessarily lead to challenges to the political status quo. The cycle of distrust, protest, and concession that characterizes medical disputes in China reflects uncertainties about how the Chinese state is ordered and how it manages and resolves conflict.