
On the Legalization for the Liability Insurance of Medical Treatment in P.R. China

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Abstract

The legalization for the liability insurance of medical treatment is the inevitable requirement of institutionalization for the liability insurance of medical treatment. It is necessary to commit the liability insurance of medical treatment with compulsory enforcement way. In the context of legalization, compulsory liability insurance of medical treatment still needs specific systematic design. First of all, in aspect of legal design, legislation should be perfected, with the continuously improvement of citizens' legal consciousness; Secondly, in terms of insurance expense, it is essential to strengthen the investigation, in order to determine the cost standard more scientifically and reasonably; Thirdly, in relevant supporting system, it should establish and improve a definite appraisal system of medical damages.

Keywords

Medical liability; Liability insurance; Legalization.

1. Introduction

The legalization for the liability insurance of medical treatment is the inevitable requirement of the institutionalization for the liability insurance of medical treatment, it is the inevitable approach to reduce the effect of uncertainty on the medical liability insurance, and it is also the main approach to take all advantage of its positive effect. It is undeniable that the medical liability insurance has a strong positive externality, system is bound to cause great impact on the safeguard of the interests for both doctors and patients, aggravating strained relationship between doctors and patients, and even threatening the social stability; In addition, if the process of the legalization for the liability insurance of medical treatment is suffocated, 'its deserved linkage effect will be greatly reduced in a large extent, its operability will also be drastically declined in practice, increasing the randomness of the system',[1] as a result, the institutional authority will be avianized, market subjects will be shrunked as well as the transfer of audience. Therefore, the legalization for the liability insurance of medical treatment is definitely necessary.

2. Mode selection for the legalization for the liability insurance of medical treatment

The high risk of medical activities and the positive externality of medical liability insurance determine the necessity to introduce the mechanism of liability insurance into the medical area; meanwhile, escalating medical tangle and conflict between doctors and patients also need the medical liability insurance to alleviate urgently. There are surveys illustrate that patients or their family members have ever had conflicts with medical staff in more than 75% hospitals, as a result, an increasing number of medical staffs began to have negative attitude towards the medical industry. [2] In contemporary society, traffic safety must be correspondence with medical tort, in fact, the frequency of traffic safety accidents and the extent of damage are comparatively more serious than medical accident, however, traffic accident causes less conflict between two sides. There is a very important reason, which is the

existence of 'the compulsory traffic accident liability insurance (i.e. traffic compulsory insurance)', the insurance company will get involved in the claims process once a traffic accident happened, both sides' interests will be well protected in accordance with identification of responsibility by traffic police as well as relatively perfect legal provisions. Therefore, a mechanism of compulsory liability insurance would be introduced in the area of medical liability in considerations, and it is possible to carry out the medical liability insurance with the help of national laws, decrees or regulations. [3]

In China, it is necessary to implement the compulsory medical liability insurance. Because there is no enough necessary ideological bases, it is difficult to achieve the institutional purpose of medical liability insurance, relying on commercial liability insurance characterized by voluntary alone, while the mechanism of social insurance needs a strong economic foundation as safeguard. Therefore, in accordance with the actual situation in China, to implement the compulsory mode of medical liability insurance not only conducive the realization of its intrinsic institutional value, but also beneficial to reduce the resistance of systematic implementation. Firstly, it is inevitable to implement the mode of compulsory insurance for those with greater probability of occurrence or more serious consequences, and the main body of the liability has adverse selection for insurance, in accordance with the general principles of insurance law. Medical damages are more obvious reflected in aspects above, and it becomes possible to implement compulsory medical liability insurance in theory. Secondly, to implement compulsory medical liability insurance is the requirement of efficient application of large number theorem. The main purpose of the insurance is to realize the dispersion while sharing risks, the premise is to aggregate and analyze the risks in society and markets, which requests the insurer should be attributed to the risk homogeneity as much as possible, as well as reasonably predict the occurrence probability and consequences of insurance events as the determination of insurance premium rate basis, in order to manage insurance industry scientifically. If there is insurance with comparatively lower rate of coverage, the insurer may not reasonably predict loss and risk, and the effect of medical liability insurance will be greatly reduced. Last but not least, the compulsory medical liability insurance is conducive to maximize the protection of the legitimate rights and interests of victims. The most praiseworthy feature of the medical liability insurance is to give right to the third beneficiary to claim directly, which means they can request the insurer to bear the corresponding economic compensation directly, providing victims with the channels for seeking relieves. To implement compulsory medical liability insurance incorporates all medical institutions into the mechanism of medical liability insurance, covering all patients who are looking forward medical treatment once the medical damage occurs, and victims can get relieves from the mechanism of multi-channel interest protection, which protects its legitimate rights and interests.

The compulsory medical liability insurance has many practical meanings for compensation for victim's damage, risk transfer in medical institutions and proper settlement of disputes between doctors and patients; however, there are some certain realistic conditions are required to play the systematic role of compulsory medical liability insurance. Firstly, it is necessary to have perfect regulations for medical dispute settlement and perfect mechanism of medical liability recognition. The objective of medical liability insurance is to make economic compensation to the injured party, in order to balance the economic interests between doctors and patients. However, medical liability insurance itself does not involve the identification of medical damage liability; it depends on established liability of medical damages to carry out specific claim process of insurance. The identification of medical damage liability is the basis for the smooth development of medical liability insurance, that is to say, it is essential to determine the subject of liability and the amount of compensation for damages, in order to furtherly touch upon the assumption of medical liability. It does not only need for specialized laws and regulations of medical liability, but also need to have the medical damage identification system of authority and neutrality, which are important condition to define the medical liability. [4] Secondly, to implement compulsory medical liability insurance should have well-developed insurance market. The essence of compulsory medical liability insurance is to enforce policy-holder to be insured with the help of public power from the government. However, it is still necessary to play a decisive role in the allocation of resources under the mechanism of

marketing economy; compulsory implementation of medical liability insurance should not ignore the role of insurance market. Only with a stable insurance market, can insurer effectively use the large amount theorem and build-up risks in the market as much as possible as well as make probabilistic assessment, in order to accurately determine the cost of insurance. In fact, scientific management and operation is also conducive to cultivate the medical liability insurance market, leading to a virtuous cycle mechanism. Last but not the least, compulsory medical liability insurance is intimately bound up with the systematic reform of medical management in China. At present, the implementation of the systematic reform for the market-oriented medical management is a dominant part of China's market economy reform, the mechanism of medical liability insurance stands for a big module of medical management system, and they promote with each other. On one hand, deepening the reform of medical management system has provided a macro institutional background for the implementation of compulsory medical liability insurance, and it can also provide supporting institutional measures in aspects of risk management, liability delineation and compensation mechanism, which request to effectively share medical risks objectively, and the medical liability insurance is definite a response to this reform; On the other hand, compulsory medical liability insurance significantly reduced the risk of medical institutions as well as reduced the quantity and pressure of medical dispute and conflicts between doctors and patients, which is conducive to concentrate on the reform and innovation of medical technology, boosting to enter the track of market operation, it will promote the pace of the reform for the medical management system in China.

3. The concrete conception for the legalization for liability insurance of medical treatment

As mentioned above, it is necessary to implement the compulsory enforcement of medical liability insurance, however, it still needs to further clarify how to achieve this vision in specific mode, and it is an urgent problem to be solved in the process of the legalization of medical liability insurance. In addition, the compulsory medical liability insurance also needs to carry out specialized system design in context of the legalization.

3.1 The path choice for the legalization for the liability insurance of medical treatment

In recognition of medical liability insurance in the domestic and foreign research and practice, the implementation of compulsory medical liability insurance are mainly on the basis of two external forces, and they can classify the approach of compulsory medical liability insurance into different administrative division: which are administrative leading style and legislative leading type. Just as the name implies, the former refers to expand medical liability insurance with the help of the public power of the administrative organizations, medical institutions are forced to insure the medical liability insurance through the introduction of government regulatory documents, which means to undertake the implementation of medical liability insurance mainly through administrative power; The latter refers to the legislative procedure by the legislature, which defines the way how to implement the medical liability insurance, stipulating the rights and obligations of the insured person and the insurer, clarifying the mandatory obligations of medical institutions and medical staff to purchase medical liability insurance, together with a series of auxiliary provisions, such as 'disciplinary measures against breach of duty, implementing organs and supervision organs of medical liability insurance', [5] etc., in order to transform medical liability insurance into legal insurance.

In aspects of administrative leading path, its advantage lies in the immediacy of the effect. Administrative subjects that implement compulsory medical liability insurance, are generally medical administrative organs, the execution of their administrative orders has a direct and irreversible effect on the operation of medical institutions. Under the administrative leading path, department authority in charge of administrative organs could be made full use, as a result, there seems to be no way for refusal in medical institutions, they have to follow the rules for fear of violating the consequences of administrative orders, thus, the implementation of medical liability insurance will be vigorously

promoted in a short period. However, the medical liability insurance still has irreparable flaws under the administrative leading path. First of all, the subject role of market will be weakened if the government implements the medical liability insurance with administrative strength, which made the demand of medical liability insurance becoming an administrative intervention. Medical institutions participate in medical liability insurance because of fearing for the public power from the competent department rather than intrinsic motivation, which will make the medical liability insurance lack of long-term dynamic mechanism for sustainable development, once it is lack of intervention with deregulation, the stability of the medical liability insurance will be affected with significant fluctuations. Secondly, to carry out the medical liability insurance through strong force by government is on the contrary to the basic concept of the exercise of contemporary administrative power. The exercise of administrative power has followed the evolutionary logic from direct intervention to indirect regulation; the administrative organ exercises the function in a certain extent. Medical liability insurance is on the contrary with the evolutionary logic of administrative power under administrative leadership, which does not inconsistent with the basic requirement of indirectness and service for contemporary administrative power, there will be conflicts between medical institutions and competent authorities if the implementation is inappropriate.

In contrast, under the legitimate leading mode, the medical liability insurance is more in line with the nature of liability insurance of medical treatment. Firstly, in aspects of systematic nature, the medical liability insurance always plays positive role in terms of protecting patients' interests, dispersing medical risks, alleviating the relationship between doctors and patients as well as promoting the development of medical services, which is conducive to maintain social stability with a certain extent of social public welfare attribute. Although it cannot be included in the category of the basic social insurance and social security, it is undeniable that 'the medical liability insurance plays the role of social security indeed'. [6] Therefore, to a certain extent, the medical liability insurance has the nature of social security. In respect of legislation practice in major countries of the world, social system with the nature of social security will usually be determined in the form of national legislation as well as implemented with the help of the legal authority, in order to establish a long-term mechanism for the implementation of such system. Secondly, from the perspective of implementation, the medical liability insurance has been given the authority of law under the legislative path, for medical institutions, to participate in medical liability insurance became a sacred legal obligation, rather than a fear of competent authorities, and then gradually transformed into the internal drive of medical institutions. The legalization of implementation mode supplies natural rationality for the compulsory implementation of medical liability insurance, overcoming the disadvantages of administrative pattern, which is conducive to reduce the resistance in the implementation. Last but not the least, from the perspective of national governance capacity, the legislative path embodies that the government regards the law as an important measure for social governance, making social governance tend to be rational. The medical liability insurance is an important way for social governance indeed, the elimination and dispersion of medical risks has reduced the risk coefficient of the whole society, which is conducive to improve the social governance situation. The legalization of medical liability insurance means that medical liability insurance is also included in the track of 'managing state affairs according to law'.

3.2 The systematic design for the legalization of compulsory medical liability insurance

Medical and health undertakings is an important dimension of concept of equal access to basic public services in china, it has certain extent nature of social public welfare, and on the basis of this nature, relevant medical risk should be shared by the society. To carry out medical liability insurance is an effective way to share the increasing medical risks, as well as an important guarantee to play the public service function of medical and health undertakings, and it is also helpful to maintain a stable medical order. Even though medical liability insurance has many important functions, the realization of its value also needs to use the specific systematic design, specifically, the following aspects are included.

Firstly, in aspect of legal design, the legislation should be perfected, improving the legal consciousness of citizens. About the path for the implementation of mandatory medical liability insurance, previous argument has been proved; the legislation leading path has advantages that are incomparable to administrative leading path, which is more suitable for actual national conditions in China. To select the implementation of compulsory medical liability insurance under the guidance of legislation must improve legislation initially, as well as formulate 'specific law that specialized for medical damage liability and medical liability insurance'.^[7] To pay attention and improve the relevant provisions of the Constitution on citizens' right of life and health is the fundamental basis for systematic protection, revolving around the right of life and health, which should strengthen the protection of citizens' right from the constitutional level. In respect of basic law, it is essential to establish medical damage liability law, stipulating the liability of medical damages in unification, defining the scope of compensation for liability of medical damage, and establishing a scientific and reasonable responsibility mechanism; to adopt the principle of presumption of fault can lighten its burden of proof for the purpose of balancing the interests of victims of tilt protection; To clarify the range and scope of medical damage economic compensation, which sets boundaries for compensation according to actual losses, in order to prevent some patients from negotiating excessively with medical institutions for obtaining compensation. Besides the perfection of legislation, we should also pay attention to the cultivation of citizen's legal consciousness and right consciousness. First, we should strengthen the propaganda of medical liability insurance, making medical institutions and medical staff to form a correct understanding, strengthen its risk awareness, form a rational judgment on the value function of medical liability insurance, and realize the insured medical liability insurance is the inescapable legal obligation; Second, it is necessary to popularize legal knowledge, strengthen legal advocacy, improve citizen's rights concept and awareness of rights, which will be conducive to urge medical institutions to raise risk awareness as well as make medical staff diligent and responsible, in order to form a driving force for medical institutions and medical staff to insure.

Secondly, in terms of insurance expenses, we should strengthen the investigation about how to determine the cost standard scientifically and reasonably. At present, one of the most important obstacles to the implementation of medical liability insurance is the unreasonable setting of insurance costs, because the cost of insurance directly affects the implementation effect of medical liability insurance. There are multiple factors should be taken into account for the settlement of premium rate, including the probability of occurrence of the risk, the degree of damage caused by the loss consequence, the length of the insurance period, the cost of the operation, etc.. Thus, whether it is the operation of the insurer or the economic strength of the insured party will have a direct impact on the determination of insurance costs. However, to reflect on the actual situation in China, medical liability insurance has a short history of development, and it is lack of industry experience, actuarial technology is comparatively backward, it is also lack of research and understanding of medical liability insurance, and it is not ideal in the business philosophy and operating cost; Meanwhile, the majority of medical institutions rely on national financial support with lower operating efficiency, if there is no formulation for scientific and reasonable premium rate, the economic burden of medical institutions will be increased, and even block its enthusiasm for insurance. In this regard, the cost of insurance should be set multi-level, flexible mechanism.^[8] More precisely, the determination of medical liability insurance premium rate should refer to the probability of medical damage in the medical institutions in the past, and it is essential to set up higher cost standards for those medical institutions with more medical damage accidents; In consideration of the nature and level of medical institutions at the same time, for those higher level public hospitals, which have advanced medical equipment and experienced medical staff with a large number of patient, they should be set up a higher premium rate because the occurrence of medical damage probability higher than other hospitals; In addition, it is reasonable to consider the economic development level and per capita income level in different regions. Only in this way can we meet the diverse needs of medical institutions and medical staff at different levels, to determine insurance costs in accordance with its

actual bearing capacity is also helpful to mobilize the enthusiasm of participating in medical liability insurance, promoting the process of legalization.

Third, in aspects of matching system, it should establish a sound and clear medical damage identification system. The medical damage appraisal system is the basic system of medical malpractice liability undertaking, the core and key link of the whole medical damage liability system, it is essential to define responsibilities of both doctors and patients only through scientific and reasonable identification of medical damage, to provide the basis for further application of law, constituting the basis for operation of medical liability insurance system. Therefore, the legalization of medical liability insurance system can go nowhere fast without the perfection of medical damage identification system. Firstly, to improve the medical damage identification system should adhere to the principle of unification. Specifically, on one hand, the identification of medical damage must be carried out in a unified legal framework, and it is significant to adhere to the unified provisions of tort liability law on medical damage liability, to overcome the two dimensional tendency, existing in the medical malpractice liability for a long period of time; On the other hand, China should formulate an unified standards and access threshold, stipulating provisions of medical damage identification of the subject must possess the professional qualifications and professional personnel, and 'establishing special permission for medical damage identification system'. [9] Secondly, medical damage identification should adhere professional principle, subjects of medical damage identification should have certain medical resources and technology, selecting the industry with rich experience of staff appraisal experts, to ensure that the scientificity and professionalism of medical damage identification. Last but not least, medical injury appraisal should adhere to the principle of standardization. On one hand, medical damage identification must be based on a clear and uniform standard, including fault and degree, damage consequence, causality and so on, which are intimately bound up with medical behaviors, because the identification of medical damage institutions (including Medical Association and social judicial appraisal institution) in China can ensure the persuasiveness of expert conclusions only by the determination of specific and clear standard identification; [10] On the other hand, it also needs to adhere to the standardization of identification procedures, which not only includes the specific medical damage identification, but also the unified and standardized procedure, and it also refers to provide relief to the parties who are not satisfied with the appraisal conclusion.

4. Conclusion

It is universally acknowledged that it should establish and improve a definite appraisal system of medical damages, and it is necessary to commit the liability insurance of medical treatment with compulsory enforcement way. To implement compulsory medical liability insurance incorporates all medical institutions into the mechanism of medical liability insurance, covering all patients who are looking forward medical treatment once the medical damage occurs, and victims can get relieves from the mechanism of multi-channel interest protection, which protects its legitimate rights and interests. On the other hand, compulsory medical liability insurance significantly reduced the risk of medical institutions as well as reduced the quantity and pressure of medical dispute and conflicts between doctors and patients, which is conducive to concentrate on the reform and innovation of medical technology, boosting to enter the track of market operation, it will promote the pace of the reform for the medical management system in China. It is undeniable that a well-designed mechanism for compulsory implementation to the liability insurance of medical treatment is required urgently towards the development of health-care reform in China. More precisely, in aspect of legal design, the legislation should be perfected, improving the legal consciousness of citizens; in terms of insurance expenses, we should strengthen the investigation about how to determine the cost standard scientifically and reasonably; in aspects of matching system, it should establish a sound and clear medical damage identification system. To sum up, the compulsory implementation of the liability insurance of medical treatment is supposed to play a dominant role in alleviating the contradiction between doctors and patients as well as promoting mutual understanding between each other. As far

as the author concerned, the advantages of the legalization for the liability insurance of medical treatment definitely outweigh its related demerits.

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