
TABLE OF CONTENTS

<i>Preface</i>	v
<i>Table of Cases</i>	xi
<i>Table of Statutes</i>	xix
<i>Table of Abbreviations</i>	xxiii
1. The Social and Legal Background	1
I. Introduction	1
1. The Treatment Context	2
2. The Regulation of Medical Practice	4
II. The Framework of Private Law	6
1. Comparative Background	6
2. Medical Malpractice in Tort and Contract	9
(a) England: The Primacy of Tort	9
(b) Germany: The Primacy of Contract	11
III. The Scope of the Patient's Protected Interests	12
1. The Position in England	13
(a) Bodily Integrity and Health	13
(b) Other Interests	15
2. The Position in Germany	17
(a) Bodily Integrity and Health	17
(b) Other Interests	18
IV. Preliminary Conclusions and Following Structure	22
2. Treatment Malpractice—The Substantive Law	25
I. Introduction	25
II. Establishing Malpractice	26
1. A Fault-Based Approach to Liability	26
(a) England: Negligence Liability	27
(b) Germany: Negligent Breach of Contract	28
2. The Standard of Care Expected of the Doctor	30
(a) England: The Reasonably Skilled Practitioner	30
(b) Germany: Required Care Under § 276 II BGB	35
3. Establishing Lack of Care: The Role of Accepted Practice	39
(a) England: The <i>Bolam</i> Test	39
(b) Germany: A Stricter Approach	43

Table of Contents

III. Causation of Damage	46
1. Factual Causation	46
(a) England: The 'But For' Test	47
(b) Germany: The <i>Conditio Sine Qua Non</i> formula	49
2. Legal Causation/Remoteness of Damage	51
(a) England: The Reasonable Foreseeability Test	52
(b) Germany: <i>Adäquater Kausalzusammenhang</i> and <i>Schutzzweck</i>	54
IV. Comparative Assessment	57
3. Treatment Malpractice—Proof Issues	61
I. Introduction	61
II. The General Approach to Proof	62
1. England: An Adversarial System	63
2. Germany: An Inquisitorial System	64
III. Modifying the Normal Proof Rules to Assist the Patient?	67
1. Establishing the Primary Facts	67
(a) England: Inferences from the Information Available	68
(b) Germany: Presumptions in Cases of Missing Records	68
2. Inferring Malpractice from the Occurrence of Injury	70
(a) England: <i>Res Ipsa Loquitur</i>	70
(b) The Position in Germany	73
(i) <i>Anscheinsbeweis</i>	73
(ii) Fully Masterable Risks	74
3. Dealing with Problems of Causal Uncertainty	76
(a) The Position in England	77
(i) Keeping the Burden on the Patient	77
(ii) The Rejection of Claims for 'Loss of Chance'	79
(b) The Position in Germany	84
(i) Proof Relaxations in Cases of 'Secondary Harm'	84
(ii) Proof Relaxations in Misdiagnosis Cases	86
(iii) Reversals of Proof in Cases of 'Gross' Treatment Errors	87
IV. Comparative Assessment	92
4. Disclosure Malpractice	95
I. Introduction	95
II. Consent and the Disclosure of Treatment Information	96
1. England: Battery vs. Negligence	97
2. Germany: A Unitary Approach	100
III. The Required Standard of Disclosure	102
1. England: From Accepted Practice to Informed Consent	102
2. Germany: Beyond Informed Consent	107
IV. Causation of Damage	113
1. The Position in England	113

Table of Contents

(a) Factual causation	113
(b) Legal Causation	115
2. The Position in Germany	117
(a) Legal Causation (<i>Schutzzweck der Norm</i>)	118
(b) The Defence of Hypothetical Consent	120
V. Proof Issues	122
1. England: Parallels with Treatment Malpractice	122
2. Germany: A Distinct Framework	124
VI. Comparative Assessment	126
5. Reforming Medical Negligence Law	129
I. Introduction	129
II. Dissatisfaction with Private Law in Medical Injury Claims	130
1. Criticisms of the Fault-Based Approach	130
2. The No-Fault Option—the New Zealand and Swedish Models	133
III. Reform Initiatives in England and Germany	136
1. Developments in England	136
(a) Pearson and the General Rejection of No-Fault	136
(b) Developments in the 1980s and 90s	139
(c) <i>Making Amends</i> and the NHS Redress Act 2006	141
2. Developments in Germany	144
(a) The General Rejection of No-Fault	144
(b) The System of Medical Arbitration Boards	146
(c) Current Initiatives	148
IV. Comparative Assessment	150
6. Conclusions	155
<i>Deutsche Zusammenfassung</i> (German Summary)	165
<i>Bibliography</i>	171
<i>Index</i>	179