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## *Medical Malpractice Liability in the United States of America in the Light of the 19<sup>th</sup> Century Origins of the American Legal System\**

### Abstract

The American model of medical malpractice liability has been the subject of lively public and scientific debate for years. This system is characterized by a large number of lawsuits against doctors and very high damages awarded in such cases. In turn, these phenomena contribute to the occurrence of so-called medical malpractice crisis. It seems that an important place in the proper understanding of the American model of physicians' liability for medical malpractice may be the historical analysis of legal norms regulating this matter. The text claims that the modern specificity of the system of liability for medical malpractice is closely related to the development of American law in its formative period in the nineteenth century. The article indicates four features of the legal system developed at that time, which today are identified as responsible for a large number of lawsuits and high compensation in malpractice trials. These include, in particular, linking medical liability to the tort law regime, domination of the civil law dimension of liability for medical errors, the role of the jury in lawsuits for medical malpractice, and the method of remuneration of attorneys in such cases.

**Keywords:** medical malpractice, medical law, American law, physicians' liability

## 1. Introduction

In a 2006 study devoted to the problem of physicians' liability for medical malpractice in the United States of America, medical law specialists from Stanford University, Michelle Mello and David Studdert, indicated that:

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Few aspects of American law provoke as impassioned public debate as medical liability. Physicians, insurers, lawyers, consumer groups and politicians frequently clash over the effectiveness, fairness and costs of medical liability system, with the din reaching a crescendo during periods of “malpractice crisis”.<sup>1</sup>

The heated debate referred to in the text is closely linked to the existence of two phenomena that characterize the American model of medical malpractice liability. Firstly, its distinguishing feature is the high frequency of lawsuits against doctors for improper treatment.<sup>2</sup> Secondly, damages in such cases are among the highest awarded in tort cases.<sup>3</sup> The existence of these characteristics generates further problems, which make up the periodically appearing so-called medical malpractice crisis.<sup>4</sup>

The frequency of lawsuits against physicians, the amount of damages awarded, and the related crisis of medical malpractice liability is an interesting phenomenon in the American legal system. A large portion of the literature on the subject has been devoted to the analysis of the issue.<sup>5</sup> However, there still exist a few studies that address the problem from a historical-legal perspective.<sup>6</sup> Meanwhile, it seems that knowing the historical dimension of the problem can play an important role in its proper understanding. The aim of this article is to demonstrate a clear link between the contemporary uniqueness of the American model of liability for medical malpractice and the process of shaping legal norms regulating this matter in the so-called “golden age” or “formative era” of the American legal system in the 19<sup>th</sup> century.<sup>7</sup> This in turn is to serve a better understanding of the principles on which this system is based on, as well as the mechanisms of its functioning.

The article points out four characteristics of the American model of physicians’ liability for medical malpractice, which were shaped during the formative period of the American legal system and which, in the long run, determined its uniqueness. These four features include: embedding physicians’ liability primarily in the tort law regime,

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<sup>1</sup> Mello, Studdert, “The Medical Malpractice System”, 11.

<sup>2</sup> See more on this in part 1 of this article, “The medical malpractice crisis in the United States of America” (below).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> It is not possible to list all the literature on the subject here. Among the important monographs devoted to this issue one should indicate, among others: Danzon, *Medical malpractice*; Weiler, *Medical malpractice*; Baker, *The Medical malpractice myth*; Sloan, Chepke, *Medical malpractice*.

<sup>6</sup> Among publications on this subject see in particular: Smith, “Medical Responsibility. I: The Legal Matrix”; Smith, “Medical Responsibility. II: Malpractice”; Smith, “Medical Responsibility. III. Forgotten Ancestors”; Smith, “Medical Responsibility. IV: Malpractice Claims”; Smith, “Medical Responsibility. V: Further Information”; Smith, “Medical Responsibility. VI: Further Information”; Sandor, “The history of professional liability suits”; Burns, “Malpractice Suits”; Burns, “Medical Malpractice Law”; Weigel, “Medical Malpractice”; Silver, “One Hundred Years”; Wood, “Historical perspectives”; Mohr, “American Medical Malpractice”; Spiegel, “America’s First Medical Malpractice Crisis”; Annas, “Doctors, patients, and lawyers”; Gordon, “The origin, basis and nature”; Costante, Puro, “Medical malpractice”; De Ville, *Medical Malpractice*.

<sup>7</sup> The term “golden age” or “formative era” of the American legal system is defined as the period from the 1780s to the 1860s. During these several decades, the process of adaptation by American courts of English common law to the conditions of the new state and society was particularly intense. This was a curial time for the formation of the legal system of the United States of America (see Pound, *The formative era*; Haar, *Golden age*; Horwitz, *The transformation*).

the domination of the civil law dimension of this liability, trial by jury and the method of remuneration of attorneys at law in such cases.

## 2. The medical malpractice crisis in the United States of America

In attempting to demonstrate the relationship between the formative period of the American legal system and the uniqueness of its medical malpractice model, the first thing to do is to indicate what determines the exceptionality of the physicians' liability regime in the United States of America. As noted above, first of all, this model is characterized by a high frequency of lawsuits against doctors. Interesting data in this regard is provided by the report on *Malpractice Risk According to Physician Specialty* published in 2011 in the *New England Journal of Medicine*.<sup>8</sup> It presents the results of the research on the risks associated with physicians practice in the United States of America regarding the likelihood of being sued for improper treatment. The report distinguishes between high-risk specialties and low-risk specialties. It was found that for doctors practicing low-risk specialties, the probability of being sued during their careers was 75%, and for those who practice high-risk specialties, it was 99%.<sup>9</sup> In other words, a large proportion of American physicians, almost with 100% certainty, will be sued for improper treatment during their professional career.<sup>10</sup>

In addition to the high frequency of lawsuits, another element determining the specifics of the American model of medical malpractice liability is the large damages awarded to injured patients. This dimension of the problem was also analysed in the above-mentioned report. The average of awarded damages in the surveyed group of physicians was \$274.887, with the lowest average among dermatologists (\$117.832) and the highest among paediatricians (\$520.923).<sup>11</sup> In sixty-six of the cases examined, the amount awarded exceeded one million dollars.<sup>12</sup>

Both circumstances, i.e., on the one hand, the high risk of being sued and, on the other hand, the considerable amounts of damages awarded in these cases have a further impact on the functioning of the entire liability system for medical malpractice. The main consequence of the accumulation of the indicated factors is the problem of the amount of the insurance premium for physicians. For example, according to data provided by the New York State Department of Health for obstetrics and gynaecology physicians practicing in the Long Island administrative district, the annual professional liability insurance premium was \$186.772.<sup>13</sup> In extreme cases it amounted to nearly 40% of the physician's

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<sup>8</sup> Jena, Seabury, Lakdawalla, Chandra, "Malpractice Risk", 629–36.

<sup>9</sup> *Ibid.*, 629, 633–5.

<sup>10</sup> On the frequency of claims, see also: Anderson, "Effective Legal Reform", 345–6.

<sup>11</sup> Jena, Seabury, Lakdawalla, Chandra, "Malpractice Risk", 629, 633–4.

<sup>12</sup> *Ibid.*, 633.

<sup>13</sup> [https://www.health.ny.gov/health\\_care/medicaid/redesign/docs/2011-10-17\\_medical\\_malpractice\\_premiums.pdf](https://www.health.ny.gov/health_care/medicaid/redesign/docs/2011-10-17_medical_malpractice_premiums.pdf) (accessed 8 September 2020); see also: Anderson, "Effective Legal Reform", 345; Kessler, "Evaluating the Medical Malpractice", 94.

total remuneration.<sup>14</sup> Obviously, such a significant sum was a consequence of the high risk of a lawsuit and the tendency to award high damages in such cases.

The repeated periods of rapid increases in premiums for medical liability insurance intensify further undesirable effects on the entire system. The literature on the subject indicates that in extreme cases this situation even leads to the resignation of individual doctors from further practicing in a specific specialization.<sup>15</sup> The accumulation of these phenomena causes that the system of liability for medical malpractice in the United States of America generates very high costs. In addition to administrative expenses related to numerous court proceedings and sums constituting the awarded damages, attention is also paid to expenses related to the occurrence of the practice referred to as defensive medicine.<sup>16</sup> All of these circumstances cause the scientific community to indicate the existence of a state of crisis in the area of physicians' liability for malpractice.<sup>17</sup>

The existence of a crisis situation is not a phenomenon of the 21<sup>st</sup> century. It has been mentioned since the 1970s.<sup>18</sup> Moreover, an analysis of historical sources shows that the genesis of the phenomena that are now considered to be the causes of the crisis goes back to the 19<sup>th</sup> century. In 1847, the prominent New York physician, Alden March, wrote in the *Boston Medical and Surgical Journal*: "Legal prosecutions for malpractice in surgery occur so often, that even a respectable surgeon may well fear for the results of his surgical practice".<sup>19</sup> In the same journal, one of the authors used stronger words writing about the "mania" of suing doctors, pointing out that this "fever" is spreading at a dizzying pace in subsequent states of the Union.<sup>20</sup> In turn, in the monograph devoted to the problem of liability for medical malpractice published in 1860, the doctor and lawyer John J. Elwell pointed out: "Frequent, important and troublesome are the cases of alleged Malpractice by medical man [...]. Civil suits for damages are of a frequency, alarming, both to the profession of medicine and to the public".<sup>21</sup>

The question then arises as to what caused the symptoms of the phenomenon, which in the 20<sup>th</sup> century was identified as a medical malpractice crisis, to appear already in the

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<sup>14</sup> <http://docplayer.net/2734864-Analysis-of-the-current-medical-liability-climate-in-new-york-state.html> (accessed: 8.09.2020).

<sup>15</sup> Mannlein, "The Effects of Malpractice", 3. In the report on this problem, the American Medical Association alerted in 2004: "America's patients are losing access to care because the nation's out-of-control legal system is forcing physicians in some areas of the country to retire early, relocate or give up performing high-risk medical procedures. There are now 20 states in a full-blown medical liability crisis-up from 12 in 2002. In crisis states, patients continue to lose access to care. In some states, obstetricians and rural family physicians no longer deliver babies. Meanwhile, high-risk specialists no longer provide trauma care or perform complicated surgical procedures." quote from Anderson, "Effective Legal Reform", 343.

<sup>16</sup> Studdert, Mello, Sage, DesRoches, Peugh, Zapert, Brennan, "Defensive medicine", 2609. According to the study conducted in 2010 the annual cost of the medical malpractice system, including defensive medicine, was estimated at \$55.6 billion, representing 2.4% of total health care spending (Mello, Chandra, Gawande, Studdert, "National Costs", 1569).

<sup>17</sup> Mello, Studdert, Brennan, "The new medical malpractice crisis", 2281. There is considerable literature describing the mechanism of the crisis of the system of medical malpractice. See e.g. Weiler, *Medical malpractice*, 1–16; Sloan, Chepke, *Medical malpractice*, 27–50; Danzon, Epstein, Johnson, "The «Crisis», 55–96; Anderson, "Effective Legal Reform", 344; see also Michalak, *Kształtowanie się odpowiedzialności*, 3–7.

<sup>18</sup> Robinson, "The Medical Malpractice", 5–35; Weiler, *Medical malpractice*, 1–16.

<sup>19</sup> March, "Case of Alleged Mal-Practice in Surgery", 13.

<sup>20</sup> "Surgical Malpractice", 283–4.

<sup>21</sup> Elwell, *A medico-legal treatise*, 7.

middle of the 19<sup>th</sup> century? The problem of the frequent lawsuits against doctors and the amount of damages awarded in such cases was related to the development of the foundations of the American legal system at that time. Noticing this relationship between the formative period of the American legal system and the issue of doctors' liability allows for a better and more complete understanding of the uniqueness of the model of physicians' liability for medical malpractice in the United States of America.

### 3. A tort of negligence as the principal basis of liability for medical malpractice

The foundation on which the Americans in the late 18<sup>th</sup> and 19<sup>th</sup> centuries built their legal system was English common law. However, the social, economic and geographical differences between England and the United States did not allow for the reception of English law directly, without making it suitable for the reality of the new state. The essence of the process of adapting English law to American conditions in the first decades after independence was aptly characterized in 1813 by William Tilghman, a judge of the Supreme Court in Pennsylvania, who stated:

When our ancestors emigrated from England, they took with them such of the English principles as were convenient for the situation in which they were about to place themselves. It required time and experience to ascertain how much of the English law would be suitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants [...].<sup>22</sup>

This creative adaptation of the English common law to the American realities concerned various legal institutions, from the issue of conveyancing of property to the determination of the rules of inheritance or the problem of compensation for damages resulting from accidents related to the mechanization process. It also included norms on doctors' liability for medical malpractice. The primary source of knowledge about English law was William Blackstone's *Commentaries on the Laws of England*. In volume III of the *Commentaries*, entitled *Of Private Wrongs*, Blackstone distinguished "injuries, affecting a man's health", indicating that they occur when "by any unwholesome practices of another man sustains any apparent damage in his vigour or constitution".<sup>23</sup> As one of the causes of such injuries, Blackstone mentioned "the neglect or unskillful management of physician, surgeon, or apothecary", which he described as *mala praxis*.<sup>24</sup> Blackstone pointed out that injuries resulting from the mishandling of a physician "are wrongs or injuries unaccompanied by force", therefore, in such cases, there "is a remedy in damages by special action of trespass upon the case".<sup>25</sup>

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<sup>22</sup> *Poor v. Greene*, 5 Binn. 554, (Pa. 1813).

<sup>23</sup> Blackstone, *Commentaries (III)*, 122.

<sup>24</sup> *Ibid.*, 122.

<sup>25</sup> *Ibid.*, 122.

Combining by Blackstone the type of injury suffered with the appropriate procedural measure to pursue claims was deeply justified. Under the English civil procedure, the claimant, demanding the exercise of his right, had to follow a strictly defined procedure (*form of action*).<sup>26</sup> The action of trespass upon the case developed in the 14<sup>th</sup> century and was used to pursue claims related to injuries caused by negligently (*negligenter*), improvidently (*improvide*) or unduly (*indebite*) performed actions.<sup>27</sup> In the 15<sup>th</sup> century the doctrine was developed, according to which one of the sources of the duty of proper conduct was the fact that a given person performed a profession requiring special skills and training, a certain artistry and dexterity. These individuals were obliged to act in a competent manner and with due diligence on account of the very nature of their profession.<sup>28</sup> This rule applied to representatives of these professions who had certain verifiable competences and at the same time their activity was of a public nature (*common calling*), i.e. they provided their services universally, declaring that they had specific qualifications.<sup>29</sup> Physicians were obviously included in this category.<sup>30</sup> Being a doctor implied having certain skills and knowledge that had to be used in the course of practice. The necessity to compensate the damage resulted from the breach of the duty of competent and careful behaviour by a person whose special status indicated that he would properly perform the task entrusted to him.

The concept developed in English law, according to which the doctor's duty to perform his tasks properly resulted from his status as a professional, did not correspond to the American reality in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries. In the spirit of egalitarianism, which, at least declaratively, was one of the core values of the new republic, it was difficult to accept the idea that one's legal liability may result from his social or professional status. Therefore, in America physicians were treated as entrepreneurs providing their services on the free market.<sup>31</sup> This prompted the doctors and patients to look at their relationship more in terms of contract between two equal parties than as the relationship between the professional and the layman. This trend led to the recognition that the source of the physician's obligation to perform his task properly lies rather in a mutually binding contract than it results from the performance of a specific profession.<sup>32</sup>

American judges, influenced by the English legal heritage, were initially conservative in trying to make doctors accountable by contract.<sup>33</sup> With time, however, this position gained approval in jurisprudence. Combining the old English legal heritage with the American tendency to perceive the doctor-patient bond in terms of a contractual relationship, the judges referred to the concept of the so-called contract implied in law.<sup>34</sup> The

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<sup>26</sup> See on this subject: Maintland, Chaytor, Whittaker, *The forms of action*, 1–9; Pollock, Maintland, *The history*, 558–73; Baker, *An introduction*, 53–70; Plucknett, *A concise history*, 353–78; Halberda, *Historia zobowiązań*, 105–7.

<sup>27</sup> Baker, *An introduction*, 406.

<sup>28</sup> Simpson, *A history*, 229.

<sup>29</sup> Winfield, "The History of Negligence", 185–9; Simpson, *A history*, 229, 233–4; Silver, "One Hundred Years", 1196.

<sup>30</sup> Ames, "The History of Assumpsit", 1–3.

<sup>31</sup> Michalak, *Kształtowanie się odpowiedzialności*, 107–11.

<sup>32</sup> *Ibid.*, 111–16; De Ville, *Medical Malpractice*, 166–81.

<sup>33</sup> Michalak, *Kształtowanie się odpowiedzialności*, 116–23.

<sup>34</sup> *Ibid.*

specificity of this legal concept, however, caused doubts as to what actually constitutes the basis of liability for improper treatment – breach of the provisions of the contract between the doctor and the patient or the very fact of the breach of the duty of due diligence by a professional.<sup>35</sup>

Arousing doubts as to the actual basis of physicians' liability for the medical malpractice were to a significant extent dispelled by the emergence of a new, independent source of liability in the American legal system in the 19<sup>th</sup> century, i.e. the tort of negligence. The emergence of the tort of negligence in American law was a response to the growing number of injuries related to the intensive development of industry and means of communication on the one hand and the erosion of the writ system on the other.<sup>36</sup> Basically to incur liability under the tort of negligence four elements were required: the existence of a legal duty that the defendant owed to the plaintiff, defendant's breach of that duty, plaintiff's sufferance of an injury and proof that defendant's breach caused the injury. This liability arose irrespective of the existence of any contract between the parties. Improper medical treatment has naturally become a special instance of liability within the general category of tort of negligence.<sup>37</sup>

Close tie between the liability for medical malpractice and tort of negligence established during the formative period of the U.S. legal system in the 19<sup>th</sup> century had a practical impact on the functioning of the doctors' liability system. While in the case of a contractual basis of action, the purpose of compensation was to restore the injured party to the state in which he would have been if the contract had been performed, in the case of tort claims, non-economic damages for pain and suffering could also be an element of compensation.<sup>38</sup> It was this component of redress that became the primary cause of the increase in damages awarded in cases of medical malpractice and consequently, in the long run, contributed significantly to the emergence of the crisis of the physicians' liability system in the United States of America.

#### 4. The domination of the civil law dimension of the physicians' liability for medical malpractice

John J. Elwell, in his 1860 study on medical malpractice, pointed out that the “alarmingly” high number of lawsuits against doctors “happily” does not refer to “criminal malpractice” which is “rarely met with in the courts of justice”.<sup>39</sup> This observation from the middle of the 19<sup>th</sup> century remained valid in the 20<sup>th</sup> and 21<sup>st</sup> centuries. The American model of liability for medical malpractice reduces the liability of doctors almost exclu-

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<sup>35</sup> The *McCandless v. McWha* 22 Pa. 261 (1853) ruling is an excellent example illustrating the difficulty that American judges had in resolving what is actually the basis of a doctor's liability for medical malpractice.

<sup>36</sup> Friedman, *A history*, 222–5; James, *Railroads and American Law*, 211.

<sup>37</sup> Silver, “One Hundred Years”, 1193–241.

<sup>38</sup> Harrison, Worth, Carlucci, “The Development”, 45.

<sup>39</sup> Elwell, *A medico-legal treatise*, 7.

sively to the domain of private law, marginalizing the importance of criminal law in this area.<sup>40</sup>

The “alarmingly high” number of lawsuits against physicians, which John J. Elwell wrote about in the middle of the 19<sup>th</sup> century, was directly related to the conditions of the medical community in the United States of America at that time, and in particular to the issue of legal regulation of the medical profession. Immediately after independence, a part of the medical community sought to implement in the newly formed American state, known from the United Kingdom, a model of organization of the profession. Among English physicians there was a clear division between physicians, surgeons and apothecaries. Each of these professions had its own organizational structure and strictly defined tasks. Physicians were a small elite group, clearly separated from surgeons, performing a kind of craft, and from apothecaries, who were involved in the trade.<sup>41</sup> Membership of the elite group of physicians was strictly rationed and involved graduation from the Royal College of Physicians in London. The hermetic nature of this environment is evidenced by the fact that between 1771 and 1833 only 168 students were admitted to the college.<sup>42</sup> In the early days of the new state, some American physicians, especially those who were educated in Europe, believed that only the adoption of the British model could guarantee a sufficiently high level of knowledge and skills for those with a medical degree. As one of the basic tools in this regard, they saw the introduction of precise legislation regulating the criteria for access to the profession.<sup>43</sup> The efforts of the medical associations that were being established in the United States at the time meant that in 1800 six states had statutes regulating access to practice. In turn, until 1825 such legislation was in force in eighteen of the twenty-four states that existed at that time.<sup>44</sup> The adopted acts provided for various detailed regulations, but all were based on similar assumptions. As a rule, obtaining the right to run a medical practice required passing an appropriate examination and obtaining a license from the state medical society.<sup>45</sup> Thus, at the beginning of the 19<sup>th</sup> century, the prospect of implementing a general licensing system for access to the medical profession seemed unchallenged.

This promising trend, aimed at professionalizing the practice of medicine and thus creating a basic protective barrier against the risks that unqualified “healers” could pose to society, collapsed suddenly in the 1820s. From 1820 until the 1870s, all forms of regulation of access to medical practice in the United States almost completely disappeared. In subsequent states, the existing license legislation was repealed.<sup>46</sup> Consequently, in 1849, only New Jersey and the District of Columbia maintained some form of control over the medical practice. In all other states, such regulations were completely abolished.<sup>47</sup> The literature on the subject points to a number of reasons for this state of affairs,<sup>48</sup> but the fundamental role is attributed to the growing importance of movements

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<sup>40</sup> See on this topic: Filkins, “With no evil intent”, 467–99.

<sup>41</sup> Starr, *The social transformation*, 37–8.

<sup>42</sup> *Ibid.*, 38.

<sup>43</sup> Rothstein, *American physicians*, 74.

<sup>44</sup> *Ibid.*, 332–9.

<sup>45</sup> *Ibid.*; Shryock, *Medical licensing*, 27.

<sup>46</sup> Johnson, Chaudhry, *Medical licensing*, 18.

<sup>47</sup> Shryock, *Medical licensing*, 30.

<sup>48</sup> *Ibid.*, 27–31.



grouping representatives practicing alternative to traditional medicine methods of treatment.<sup>49</sup> Increasingly popular in the first half of the 19<sup>th</sup> century in the United States of America, healers using non-standard methods of treatment undertook an effective struggle for the complete abolition of all existing regulations on the practice of medicine.<sup>50</sup> The success of this movement was possible thanks to the popular approval of its demands. Requesting the abolition of the existing regulations, they referred to the values that lay at the foundation of the United States of America. American society, in the spirit of Republican ideas, egalitarianism, freedom and opposition to all kinds of monopolistic practices, with a particularly favourable political climate of the Jacksonian Democracy era, fully endorsed the call for the “release” of the medical profession.<sup>51</sup> As a result, in the 1840s, subsequent states repealed the existing statutes in this area, opening the doors of the profession to anyone who was able to find people interested in his service.

The complete opening of the profession had its consequences in terms of liability for medical malpractice. In English law, where the practice of the medical profession was strictly regulated, there was a rule according to which a qualified physician, if he acted with the intention of curing a patient, would not be criminally responsible for damage caused during treatment, even if there were grounds for civil liability based on an allegation of negligence.<sup>52</sup> However, the person who caused an injury to the patient by undertaking the treatment without licence was criminally liable.<sup>53</sup> In this respect, the criminal law protected patients from unqualified physicians. This function could not be fulfilled in the United States of America in the middle of the 19<sup>th</sup> century, because there were no norms to determine who could legally perform the practice. This problem was pointed out in the doctrine and jurisprudence.<sup>54</sup> John Elwell made it clear that criminal law could become a tool for combating medical malpractice, at least to the extent that it was the result of individuals who were not competent to treat patients, if the legislation specified who was allowed to practise the medical profession. In the absence of such legislation, there were no grounds for anyone undertaking to treat a patient with the honest intention of curing him to be criminally responsible for the negative consequences of their actions.<sup>55</sup>

In this light, one should look at the problem of the sudden proliferation of civil lawsuits related to medical malpractice in the 19<sup>th</sup> century. The complete abandonment of public law tools for regulating the doctor-patient relationship meant that those dissatisfied with the results of treatment reached for the only measure at their disposal, which was a civil action for damages.<sup>56</sup> In the 19<sup>th</sup> century, various commentators drew attention to the relationship between these phenomena. William Wood pointed out in 1849 that what led to the “perversions of justice” in the form of a large number of lawsuits for medical malpractice was the failure of “all efforts to limit the exercise of the profes-

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<sup>49</sup> Johnson, Chaudhry, *Medical licensing*, 14–7; Shryock, *Medical licensing*, 28–9.

<sup>50</sup> Grossman, “The origins of American health libertarianism”, 102–27.

<sup>51</sup> *Ibid.*, 123–7.

<sup>52</sup> Blackstone, *Commentaries... (IV)*, 197.

<sup>53</sup> *Ibid.*

<sup>54</sup> See *Commonwealth v. Thompson*, 6 Mass. 134 (1809); *Rice v. State*, 8 Mo. 561 (1844).

<sup>55</sup> Elwell, *A medico-legal treatise*, 238.

<sup>56</sup> See Michalak, *Kształtowanie się odpowiedzialności*, 74–87.

sion of medicine to those who have the abilities and acquirements essential to its proper understanding”.<sup>57</sup> Another doctor stressed in the 1860 that:

Among the most modern nations the civil responsibilities of physicians are defined by statutory provisions [...]. In France, Great Britain, and the Germanic States, especially, are the laws relating to the medical profession stringent, yet liberal in their provisions, tending, in most respects, while they check and punish abuses, to develop, foster, and advance true scientific medicine [...]. We shall not pause here to consider the status of medicine in our own country; it will suffice to add that, while it receives from government no protection or support, it is held more directly amendable to courts of law for its errors, whether real or alleged, than in any other country.<sup>58</sup>

Similarly, doctor Alfred Stille, wrote in 1847:

The federal government possesses no power under the constitution to regulate the business pursuits of the citizens of the States [...]. Every state in the union, then, possesses exclusive power over this subject within its limits. But most of the states have refused, absolutely, to restrict the practice of medicine, or to prescribe any qualifications whatever for those practising it, *leaving to the common law the task of guarding their citizens by suits for malpractice*.<sup>59</sup>

The radical and sudden increase in lawsuits against doctors in the 1840s was therefore a result of the state’s resignation from any interference in the doctor-patient relationship and giving patients full initiative in enforcing liability related to inappropriate treatment. The Americans, while advocating the free choice of the doctor and the methods of treatment, also assumed full responsibility for the independent enforcement of claims in cases where the physician’s service was improperly performed in their opinion.

Although, in the face of intense medical development in the late 19<sup>th</sup> century, the licensing of the medical profession was resumed in the United States of America, a model developed in the first half of the century, in which the enforcement of liability for improper treatment was almost exclusively the decision of the injured patient, was not compromised. The civil lawsuit remained the primary tool to hold the physicians liable for improper treatment.

## 5. The trial by jury

The decision to implement English law in the newly created American state entailed the need to shape the legal system around one of the basic features of common law, which was the existence of a jury. This task was not particularly difficult, as the Americans had a special regard for the trial by jury. Already during the colonial period, the jury was an important safety net in the justice system of the Crown’s majesty.<sup>60</sup> All of the most important declarations and legal acts of the American Revolutionary Day emphasized the fundamental importance of the jury for the effective protection of the rights of the colo-

<sup>57</sup> Wood, „Thoughts on Suits”, 395.

<sup>58</sup> Smith, “Review of John Elwell’s Treatise”, 154.

<sup>59</sup> “Medical Instructions”, 28 (underlined by the author of the article).

<sup>60</sup> Landsman, “The civil Jury”, 592–7.

nies.<sup>61</sup> The Sixth Amendment to the Constitution of the United States of America guaranteed the right to a jury in criminal cases, while the Seventh introduced the jurisdiction of the jury in all civil cases where the value of the object of dispute exceeded twenty dollars.

The adoption of the Seventh Amendment, which guarantees a jury trial in all disputes where the value in controversy exceed twenty dollars, has placed jurors in the United States in particularly strong position compared to other legal systems.<sup>62</sup> Securing such a strong position for the jury was associated with the common belief that it is a natural barrier and constraint against abuses of state power, counterbalancing “legal experts” and trusting “ordinary people”.<sup>63</sup> This conviction reflected the dominant philosophy of the formative period of the American statehood: social control on the one hand and the citizen participation in the exercise of power on the other.

The rule according to which civil disputes were generally resolved by jurors, obviously applied to cases for damages against doctors too. Typically, the trial initiated by the aggrieved patient was subject to a decision by a local jury court.<sup>64</sup> As in other cases, in proceedings related to improper treatment, the burden of proof was on the claimant, which had to prove the occurrence of negligence or lack of proper skills on the part of the defendant, based on the principle of preponderance of the evidence.<sup>65</sup> The primary evidence were the opinions of expert witnesses called by the claimant to certify that the complained treatment was inconsistent with the accepted standard.<sup>66</sup> It was up to the jury to evaluate the presented pieces of evidence. Instructions as to the law applicable in a given case were given by the judge presiding over the trial. Finally, the verdict, based on the presented evidence and the judge’s instructions, was issued by the jury.

With the proliferation of court proceedings related to medical malpractice in the late 1830s and early 1840s, the medical community began to draw attention to a number of significant shortcomings of the model in which the verdict on the physician’s liability lay in the hands of a jury.<sup>67</sup> The fundamental problems that were perceived in connection with the participation of the jury in the malpractice trials were accurately collected in an editorial text that appeared in 1866 in the *Buffalo Medical and Surgical Journal*.<sup>68</sup> First of all, the intellectual capacity of the jury to properly evaluate the evidence presented during the trial was questioned. It was emphasized that jurors, due to lack of basic medical knowledge, are repeatedly unable to understand certain obvious facts related to the process of diagnosis or therapy. It was pointed out that the jury lacks medical knowledge to see the difference between the injury caused by medical error and that which was an inevitable consequence of treatment.

In addition to the allegation of lack of competence in the proper evaluation of evidence, attention was also paid to cases where the jurors were not guided by an objective evaluation of evidence, but their decisions were determined by a sense of empathy or compassion towards the injured patients. It was argued that “the sympathy of a jury of

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<sup>61</sup> *Ibid.*, 595–600.

<sup>62</sup> Hans, “Jury Systems”, 282.

<sup>63</sup> “The Changing Role of the Jury”, 172.

<sup>64</sup> DeVille, *Medical Malpractice*, 47.

<sup>65</sup> Wade, *A selection of cases*, v.

<sup>66</sup> *Ibid.*, iv.

<sup>67</sup> See Michalak, *Kształtowanie się odpowiedzialności*, 179–88.

<sup>68</sup> “Legal liabilities”, 353–6.

citizens is not generally with the doctor, but rather on the side of the poor, ill-advised, unfortunate victim of incurable injury [...]”.<sup>69</sup> This, in turn, was supposed to influence the amount of damages awarded in cases of medical malpractice. In the text, it was pointed out in blunt terms that:

Men uneducated to the distinction, are often unable to see the value of a principle, and are ready to compromise what they see clearly to be right, to the prejudice or caprice of an associate who thinks, perhaps innocently, that a few dollars are of no great account in comparison with the loss and pain sustained by serious injury, added to litigation, even though it be ill-advised and unjustifiable.<sup>70</sup>

It is noteworthy that the arguments raised in the mid-19<sup>th</sup> century and those raised in the context of the medical malpractice crisis at the end of the 20<sup>th</sup> century and at the threshold of the 21<sup>st</sup> century are very similar. In 1988, the American Medical Association pointed out that:

[...] problems with medical malpractice juries include decisions that are not based on a thorough understanding of the medical facts and awards that increase at an alarming rate and in a fashion that seems uniquely to disadvantage physicians as compared with other individuals who have acted negligently.<sup>71</sup>

In 1997, Neil Vidmar in his publication *Medical Malpractice and the American Jury*, among the main allegations raised against the jury in malpractice trials, indicates:

the lack of appropriate competences of jurors to resolve complex medical issues, awarding higher damages than in other cases of negligence or bias in favour of injured patients.<sup>72</sup>

Similarly, in 2003, the AMA claimed that “[t]he primary cause of the growing liability crisis is the unrestrained escalation in jury awards that are apart of a legal system that in many states is simply out of control.”<sup>73</sup>

In light of the above, it seems reasonable to argue that one of the elements determining the specifics of the U.S. model of liability for medical malpractice, particularly as far as the amount of damages awarded is concerned, is the role of the jury in resolving such cases. The sheer prevalence of the participation of jurors in medical trials is a consequence of the place that it obtained in the American legal system during its formative period.

## 6. The system of remuneration of attorneys at law and the medical malpractice crisis

In 1878, Eugene Sanger’s report on liability for medical malpractice in Main was published.<sup>74</sup> At that time, this document was one of the most systematic articles on this

<sup>69</sup> *Ibid.*, 353.

<sup>70</sup> *Ibid.*, 353–4.

<sup>71</sup> Quoted from Vidmar, “Juries and Medical Malpractice Claims”, 367.

<sup>72</sup> Vidmar, *Medical Malpractice*, 7.

<sup>73</sup> Quoted from Vidmar, “Juries and Medical Malpractice Claims”, 367.

<sup>74</sup> Sanger, “Report of the Committee”, 360–82.

issue.<sup>75</sup> Doctor Sanger asked physicians practicing in Main to report briefly on their personal experiences with claims malpractice. 114 of the approximately 600 physicians in the state responded to the request.<sup>76</sup> Referring to a report before the local medical association, Sanger pointed out that many doctors did not respond to the request for a report due to “disinclination to advertise their contributions to the patients and attorneys” who, as the author put it, “follow us as the shark does the emigrant ship”.<sup>77</sup>

This thought-provoking metaphor used by Eugen Sanger in a suggestive way pointed to another important element determining the specificity of liability for medical malpractice in the United States of America. The problem of the high frequency of lawsuits against doctors, which was already visible in the middle of the 19<sup>th</sup> century, was also related to the role of lawyers in cases for improper treatment. The principle, recognized in the first half of the 19<sup>th</sup> century, according to which the attorney’s remuneration could depend on the outcome of the case and constitute a certain percentage of the awarded damages, had a significant impact on the proliferation of improper treatment cases in the 19<sup>th</sup> century and contributed to maintaining this trend also in the following centuries.<sup>78</sup>

In the first half of the 19<sup>th</sup> century, the U.S. courts rejected the principle known to English common law according to which a third party could not finance or co-finance court proceedings pending between other parties.<sup>79</sup> Blackstone pointed out in a commentary that the practice of a third party financing a court proceeding in exchange for participation in what may be awarded was an offence against public justice known as champerty.<sup>80</sup> Blackstone emphasized that such activity was punishable by fines and imprisonment.<sup>81</sup> Contrary to this rule, the American courts legalized the practice of contingent fee contracts in the first half of the 19<sup>th</sup> century.<sup>82</sup> The construction of these agreements allowed attorneys to assume the burden of costs associated with conducting proceedings in exchange for participation in any damages awarded. The basic argument raised by judges for the recognition of such agreements was based on the conviction that everyone, regardless of their material status, should have an effective opportunity to assert their rights in court. Contingent fee contracts gave such an opportunity to the poorest people who did not have sufficient funds to protect their right in court.

Although the idea underlying the recognition of contingent fee contracts as legally permissible was commendable, the concept was not without its drawbacks. The flaws of such a system of remuneration of lawyers quickly began to be pointed out in the context of medical malpractice cases. In particular, the medical community highlighted a number of risks that contingent fee contracts entailed. The crowning argument raised against it was their impact on the growth of cases against doctors. A patient dissatisfied

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<sup>75</sup> Mohr, *Doctors and the law*, 116.

<sup>76</sup> Sanger, “Report of the Committee”, 367.

<sup>77</sup> This remark did not appear in the version of the Report published in the *Transactions of the Main Medical Association*, but was included in the transcription of Eugen Snager’s speech in the *Boston of Medical and Surgical Journal* (“Medical Notes”, 91).

<sup>78</sup> Mohr, “American Medical Malpractice”, 1735.

<sup>79</sup> Langbein, Lerner, Smith, *History of the common law*, 1055; Karsten, “Enabling the Poor”, 239; *Major’s Executor v. Gibson*, 1 Pat. & H. 48 (1855).

<sup>80</sup> Blackstone, *Commentaries (IV)*, 134–135.

<sup>81</sup> *Ibid.*, 135.

<sup>82</sup> See note 78.

with the results of the treatment, regardless of whether the undesirable effect was caused by improper conduct of the physician, could sue the doctor without taking any risk. The burden of financing the proceedings was borne by the attorney. Nothing prevented the patient from “trying” to sue the doctor. Whatever the final outcome of the case was, there were no negative consequences for him. This threat was pointed out, among other things, in the high-profile trial against Samuel David Gross, Professor of Surgery at Jefferson Medical College in Philadelphia.<sup>83</sup> The doctor performed a complicated operation to remove the aneurysm from the stump of a limb amputated earlier. Before the surgery, he informed the patient about the significant risks associated with such surgery. Although the surgery itself was successful, after a few days, the patient suffered a haemorrhage and died as a result. The wife of the deceased filed a suit against Professor Gross. She claimed compensation for her husband’s death caused by the improper performance of the operation.<sup>84</sup> The lawsuit against a well-known surgeon became a cause of discussion in the medical press about the reasons for increasingly frequent claims against doctors. A recurring theme in the articles was the attitude of the plaintiff’s attorney. The accounts showed that the family of the deceased was not originally intended to take legal action against the doctor.<sup>85</sup> The texts suggested that in view of the conservative attitude of the family, the plaintiff’s attorney should rather be regarded as the “real plaintiff” in the case.<sup>86</sup> The account showed that the lawyer was supposed to encourage the deceased’s wife to bring an action and “had agreed to sustain all the expense of the prosecution, in consideration of receiving a percentage of the damages.”<sup>87</sup> The articles were very critical of this attitude of the attorney. It was alleged that he took up the case in the knowledge of the lack of a substantive basis for the action and counted on a settlement, followed by part of the compensation granted.<sup>88</sup>

Representatives of the medical community also stressed that contingent fee contracts provoked lawyers to behave highly unethically. First of all, they urged the injured patients to sue the doctors even if they did not show initiative in this regard. Second, often aware of the lack of grounds for bringing a lawsuit, the lawyers encouraged those dissatisfied with the results of their treatment to seek redress, hoping that the doctor would agree to pay a certain amount of money as part of the settlement, for fear of a costly and lengthy trial. A significant part of the agreed compensation could go into the lawyer’s pocket.

The sheer amount of participation in any damages awarded was also controversial. The doctors pointed out that the attorneys, taking advantage of the difficult economic situation of their clients, guaranteed themselves unacceptably high remuneration, often amounting to half of the total sum awarded.

The recognition of contingent fee contracts as legal under the U.S. legal system in the first half of the nineteenth century had a lasting impact on the issue of physicians’ liabil-

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<sup>83</sup> “The suit against professor Gross”, 281; see also “Fisher vs. Gross”, 133–134. Information on the proceedings against prof. Gross survived only in the form of press releases. There are no official case files as the judge dismissed the claim and the proceedings were never appealed.

<sup>84</sup> “Fisher vs. Gross”, 133; “The suit against professor Gross”, 281.

<sup>85</sup> “The suit against professor Gross”, 281.

<sup>86</sup> “Fisher vs. Gross”, 133; “The suit against professor Gross”, 281.

<sup>87</sup> “The suit against professor Gros”, 281.

<sup>88</sup> *Ibid.*, 281.

ity for medical malpractice in the United States of America. These consequences were visible at the beginning of the 21<sup>st</sup> century. In 2000, James Mohr identified contingent fee contracts as one of the three fundamental elements of the American legal system that has contributed to a sustained increase in malpractice cases in the United States of America since the 19<sup>th</sup> century.<sup>89</sup> In 2009, Sonny Bal thus characterized the essential features of the US model of liability for medical malpractice:

In the United States, lawyers for aggrieved patients are hired by the patient, usually on a contingency-fee basis, where the lawyer collects money only if a monetary damage is awarded. This system has been criticized as encouraging medical malpractice lawsuits [and] unscrupulous advocacy on behalf of the patient [...].<sup>90</sup>

Similarly Sloan and Chepke, in the publication *Medical Malpractice* from 2010, indicated: “There is a widespread perception in other countries that the high rates of litigation in the United States are largely attributable to the contingent fee system.”<sup>91</sup> In the same vein popular science publications emphasised that “Unfortunately, the liability system [in the US] has failed patients, but it is extremely lucrative for trial lawyers, who receive the lion’s share of jury awards.”<sup>92</sup>

Therefore, there is no doubt that one of the elements determining the specificity of the American model of liability for medical malpractice is a specific system of remuneration of lawyers based on contingent fee contracts. At the same time, the genesis of such contracts is in the formative period of the American legal system in the first half of the 19<sup>th</sup> century.

## 7. Conclusions

An eminent American lawyer, U.S. Supreme Court Judge Oliver Wendell Holmes Jr. said that

the law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.<sup>93</sup>

Although this statement seems to express the obvious truth, it is not always properly appreciated. The way physicians’ liability for medical malpractice developed under the American legal system is a perfect example of how important the historical-legal analysis can be in the proper understanding of legal institutions. The relationship of physicians’ liability with the tort law regime, its reduction to the private law dimension as a result of minimizing state interference in the doctor-patient relationship, the participation of the jury in the trials for malpractice or the way of financing court proceedings in such

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<sup>89</sup> Mohr, *American Medical Malpractice*, 1731, 1735.

<sup>90</sup> Bal, “An Introduction”, 344.

<sup>91</sup> Sloan, Chepke, *Medical malpractice*, 135.

<sup>92</sup> Wilson, *Our ailing medical malpractice system*, quoted from Field, “The Malpractice Crisis”, 8.

<sup>93</sup> Holmes Jr., *The common law*, 1.

cases have their origin in the formative period of the American legal system, i.e. from the establishment of the United States of America to the 1860s. These features, in turn, have a major impact on the contemporary challenges of the system, such as the large number of lawsuits against doctors and the relatively high damages awarded in such cases. It seems that the historical-legal perspective allows not only to better understand the functioning of the American model of liability for medical malpractice, but also to think more effectively about the desired direction of its reforms in the future.

## Bibliography

### Table of cases

- Poor v. Greene*, 5 Binn. 554, (Pa. 1813).  
*Commonwealth v. Thompson*, 6 Mass. 134 (1809).  
*Rice v. State*, 8 Mo. 561 (1844).  
*McCandless v. McWha*, 22 Pa. 261 (1853).  
*Major's Executor v. Gibson*, 1 Pat. & H. 48 (1855).

### Primary sources

- Blackstone, William. *Commentaries on the laws of England: In four books*. Philadelphia: Printed for the subscribers. By Robert Bell, at the late Union Library, in Third-Street, 1771–2.
- Elwell, John J. *A medico-legal treatise on malpractice and medical evidence: Comprising the elements of medical jurisprudence*. New York: J.S. Voorhies, 1860.
- “Legal liabilities of Physicians and Surgeons”. *Boston Medical and Surgical Journal* 5 (1866): 353–6.
- March, Alden. “Case of Alleged Mal-Practice in Surgery”. *Boston Medical and Surgical Journal* 37 (1847): 9–14.
- Sanger, Eugen F. “Medical Notes”. *The Boston Medical and Surgical Journal* 99 (1878), 91.
- Sanger, Eugen F. “Report of the Committee on Suits for Malpractice”. *Transactions of the Main Medical Association* 6 (1877–1879): 360–82.
- “Surgical Malpractice”. *Boston Medical and Surgical Journal* 36 (1847): 283–4.
- Smith, Stephen. “Review of John Elwell’s Treatise on Malpractice”. *American Journal of Medical Science* 40 (1860): 154.
- Stille, Alfred. “Medical Instructions in the United States: An address delivered to the students of the Philadelphia Association for Medical Instruction, at the close of a Session of 1846”. *The Medical Examiner, and Record of Medical Science* 3 (1847): 26–32.
- “The suit against professor Gross”. *Medical Times and Register* 1 (1871): 280–1.
- Wood, William W. “Thoughts on Suits for Malpractice, Suggested by Certain Judicial Proceedings in Erie County, Pennsylvania”. *American Journal of Medical Science* 18 (1849): 395–400.



## Secondary sources

- Ames, James B. "The History of Assumpsit. I. Express Assumpsit". *Harvard Law Review* 2, no. 1 (1888): 1–19.
- Anderson, Richard E. "Effective Legal Reform and the Malpractice Insurance Crisis". *Yale Journal of Health Policy, Law, and Ethics* 5, no. 1 (2005): 343–55.
- Annas, George J. "Doctors, patients, and lawyers – two centuries of health law". *The New England Journal of Medicine* 367, no. 5 (2012): 445–50.
- Baker, John H. *An introduction to English legal history*. New York: Oxford University Press, 2007.
- Baker, Tom. *The Medical malpractice myth*. Chicago: University of Chicago Press, 2005.
- Bal, Sonny. "An Introduction to Medical Malpractice in the United States". *Clinical Orthopaedics and Related Research* 467, no. 2 (2009): 339–47.
- Burns, Chester R. "Malpractice Suits in American Medicine Before the Civil War". *Bulletin of the History of Medicine* 43 (1969): 41–56.
- Burns, Chester R. "Medical Malpractice Law and the Public's Health in the United States During the Nineteenth Century". *Historie des Sciences Medicales* 17, special number/1 (1982): 75–7.
- Costante, Patricia A. and Puro, Janet S. "Medical malpractice: An historical perspective". *New Jersey Medicine* 100, no. 7–8 (2003): 21–5.
- Danzon, Patricia. *Medical malpractice: Theory, evidence, and public policy*. Cambridge, Mass.: Harvard University Press, 1985.
- Danzon, Patricia and Epstein, Andrew J. and Johnson, Scott J. „The «Crisis» in Medical Malpractice Insurance”. In *Brookings-Wharton Papers on Financial Services: 2004*, eds. Robert E. Litan, Richard J. Herring, 55–96. Washington: Brookings Institution Press, 2004.
- De Ville, Kenneth Allen. *Medical Malpractice in Nineteenth-Century America: Origins and Legacy*. New York: New York University Press, 1990.
- Field, Robert I. „The Malpractice Crisis Turns 175: What Lessons Does History Hold For Reform?”. *Drexel Law Review* 4 (2010): 7–39.
- Filkins, James A. "«With no evil intent»: The criminal prosecution of physicians for medical negligence". *Journal of Legal Medicine* 22, no. 4 (2001): 467–99.
- Friedman, Lawrence M. *A history of American law*. New York: Simon and Schuster, 2005.
- Garner, Bryan A. ed. *Black's Law Dictionary*, 9<sup>th</sup> ed. St. Paul: West, 2009.
- Gordon, Victor M. "The origin, basis and nature of medical malpractice liability". *Connecticut Medicine* 35, no. 2 (1971): 73–7.
- Grossman, Lewis A. "The origins of American health libertarianism". *Yale Journal of Health Policy, Law and Ethics* 13, no. 1 (2013): 76–134.
- Haar, Charles M. *The Golden Age of American Law*. New York: G. Braziller, 1965.
- Halberda, Jan. *Historia zobowiązań quasi-kontraktowych w common law*. Kraków: Księgarnia Akademicka, 2012.
- Hans, Valerie P. "Jury Systems Around the World". *Cornell Law Faculty Publications*, article 305 (2008): 276–97.
- Harrison, Louis B. and Worth Melvin H., Jr. and Carlucci, Michael A. "The Development of the Principles of Medical Malpractice in the United States". *Perspectives in Biology and Medicine* 29, no. 1 (1985): 41–72.
- Holmes, Jr. Oliver W. *The common law*. Boston, Mass.: Little, Brown & Co. 1881.
- Horwitz, Morton J. *The transformation of American law, 1780–1860*. Cambridge, Mass.: Harvard University Press, 1977.
- Jena, Anupam B. and Seabury, Seth and Lakdawalla, Darius. „Malpractice Risk According to Physician Specialty". *New England Journal of Medicine* 365, no. 7 (2011): 29–636.

- Johnson, David A. and Chaudhry, Humayun J. *Medical licensing and discipline in America: A history of the federation of State Medical Boards*. Lanham: Lexington Books, 2012.
- Johnson, Kirk B. and Phillips, Carter G. and Orentlicher, David and Hatlie, Martin S. "A fault-based administrative system for resolving medical malpractice claims". *Vanderbilt Law Review* 32 (1989): 1365–406.
- Karsten, Peter. "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940". *DePaul Law Review* 47, no. 2 (1998): 231–60.
- Kessler, Daniel P. "Evaluating the Medical Malpractice System and Options for Reform". *Journal of Economic Perspectives* 25, no. 2 (2011), 93–110.
- Landsman, Stephen. "The civil Jury in America: Scenes from and unappreciated History". *Hastings Law Journal* 44 (1993): 579–619.
- Langbein, John H. and Lerner, Renée L. and Smith, Bruce P. *History of the common law: The development of Anglo-American legal institutions*. New York: Aspen Publishers, 2009.
- Maitland, Frederic W. and Chaytor, Alfred H. and Whittaker, William J. *The forms of action at common law: A course of lectures*. Cambridge: University Press, 1936.
- Mannlein, Melinda. "The Effects of Malpractice on Medical Specialties". *Honors Projects* paper 38 (2002): 1–24.
- Mello, Michelle M. and Studdert, David M. "The Medical Malpractice System – Structure and Performance". In *Medical malpractice and the U.S. health care system*, eds. William M. Sage and Rogan Kersh, 11–29. Cambridge: Cambridge University Press, 2006.
- Mello, Michelle M. and Chandra, Amitabh and Gawande Atul A. and Studdert, David M. "National Costs of the Medical Liability System". *Health Affairs* 29, no. 8 (2010), 1569–77.
- Mello, Michelle M. and Studdert, David M. and Brennan, Troyen A. "The New Medical Malpractice Crisis". *New England Journal of Medicine* 348, no. 10 (2003), 2281–4.
- Michalak, Marcin. *Kształtowanie się odpowiedzialności za niewłaściwe leczenie na gruncie amerykańskiego systemu prawnego w latach 1794–1860: Studium historyczno-prawne*. Warszawa: Wydawnictwo C.H. Beck, 2018.
- Mohr, James C. "American Medical Malpractice Litigation in Historical Perspective". *Journal of American Medical Association* 283, no. 13 (2000): 1731–7.
- Mohr, James C. *Doctors and the law: Medical jurisprudence in nineteenth-century America*. Baltimore: Johns Hopkins University Press, 1996.
- Plucknett, Theodore F.T. *A concise history of the common law*. Boston, Mass.: Little, Brown and Co., 1956.
- Pollock, Frederick and Maitland, Frederic W. *The history of English law before the time of Edward I*. Cambridge: University Press, 1898.
- Robinson, Glen O. "The Medical Malpractice Crisis of the 1970's: A Retrospective". *Law and Contemporary Problems* 49, no. 2 (1986): 5–35.
- Roscoe, Pound. *The Formative Era of American Law*, Boston, Mass.: Little, Brown and Co., 1938.
- Rothstein, William G. *American physicians in the nineteenth century: From sects to science*. Baltimore: Johns Hopkins University Press, 1972.
- Sandor, Andrew A. "The history of professional liability suits in the United States". *Journal of American Medical Association* 163, no. 6 (1957): 459–66.
- Shryock, Richard H. *Medical licensing in America, 1650–1965*. Baltimore: Johns Hopkins University Press, 1967.
- Silver, Theodore. "One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice". *Wisconsin Law Review* (1992): 1193–241.
- Simpson Alfred W.B. *A history of the common law of contract: The rise of the action of assumpsit*. Oxford: Clarendon Press, 1975.
- Sloan, Frank A. and Chepke, Lindsey M. *Medical malpractice*. Cambridge: MIT Press, 2008.
- Smith, Hubert W. "Medical Responsibility for Medical Malpractice, VI.: Further Information

- about Direct Causation and Damage". *Journal of American Medical Association* 117, no. 1 (1941): 23–33.
- Smith, Hubert W. "Medical Responsibility for Medical Malpractice, I: The Legal Matrix of Medical Malpractice". *Journal of American Medical Association* 116, no. 10 (1941): 942–7.
- Smith, Hubert W. "Medical Responsibility for Medical Malpractice, II: Malpractice: Something of the Anatomy of Law". *Journal of American Medical Association* 16, no. 19 (1941): 2149–59.
- Smith, Hubert W. "Medical Responsibility for Medical Malpractice, III: Forgotten Ancestors of the American Law of Medical Malpractice". *Journal of American Medical Association* 116, no. 24 (1941): 2490–4.
- Smith, Hubert W. "Medical Responsibility for Medical Malpractice, IV: Malpractice Claims in the United States and the Proposed Formula for Testing Their Legal Sufficiency". *Journal of American Medical Association* 116, no. 24 (1941): 2670–9.
- Smith, Hubert W. "Medical Responsibility for Medical Malpractice' V. Further Information about Duty and Dereliction". *Journal of American Medical Association* 116, no. 25 (1941): 2755–68.
- Spiegel, Allen D. "America's First Medical Malpractice Crisis, 1835–1865". *Journal of Community Health* 22, no. 4 (1997): 283–308.
- Starr, Paul. *The social transformation of American medicine*. New York: Basic Books, 1982.
- Studdert, David M. and Mello, Michelle and Sage, William M. and DesRoches, Catherine M. and Jordon, Peugh and Zapert, Kinga and Brennan, Troyen A. "Defensive medicine among high-risk specialist physicians in a volatile malpractice environment". *Journal of American Medical Association* 293, no. 21 (2005): 2609–17.
- "The Changing Role of the Jury in the Nineteenth Century". *Yale Law Journal* 74, no. 1 (1964): 170–92.
- Vidmar, Neil. "Juries and Medical Malpractice Claims: Empirical Facts versus Myths". *Clinical Orthopaedics and Related Research* 467, no. 2 (2009): 367–75.
- Vidmar, Neil. *Medical Malpractice and the American Jury. Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards*. Ann Arbor, Mich.: University of Michigan Press, 1997.
- Weigel, Charles J. "Medical Malpractice in America's Middle Years". *Texas Reports on Biology and Medicine* 32, no. 1 (1974): 191–205.
- Weiler, Paul C. *Medical malpractice on trial*. Cambridge, Mass.: Harvard University Press, 1991.
- Wilson, Cecil B. *Our ailing medical malpractice system*. *Washington Post*, 7.09.2010.
- Wood, Cece L. "Historical perspectives on law, medical malpractice, and the concept of negligence". *Emergency Medicine Clinics of North America* 11, no. 4 (1993): 819–32.

## Internet sources

- <http://docplayer.net/2734864-Analysis-of-the-current-medical-liability-climate-in-new-york-state.html> (accessed: 8.09.2020).
- [https://www.health.ny.gov/health\\_care/medicaid/redesign/docs/2011-10-17\\_medical\\_malpractice\\_premiums.pdf](https://www.health.ny.gov/health_care/medicaid/redesign/docs/2011-10-17_medical_malpractice_premiums.pdf) (accessed: 8.09.2020).