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*ERC Frankona*

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***Medical Professional Liability -  
an evolving market***

by Stefan Schwalb

# ***MPL - an evolving market***

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## **AGENDA**

- **Definition**
- **Case Study - Germany**
- **Risk Management**
- **ERC Frankona's approach**
- **Case Study - France**

# ***MPL Insurance - Europe***

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- **Definition:**

**Covers third party liabilities of healthcare providers.**

- **Products**

- **Hospital Professional Liability**

- **Doctors' Professional Liability**

- **Miscellaneous PL (Nursing Homes, Rehabilitation Centres, Sanatoria,...)**

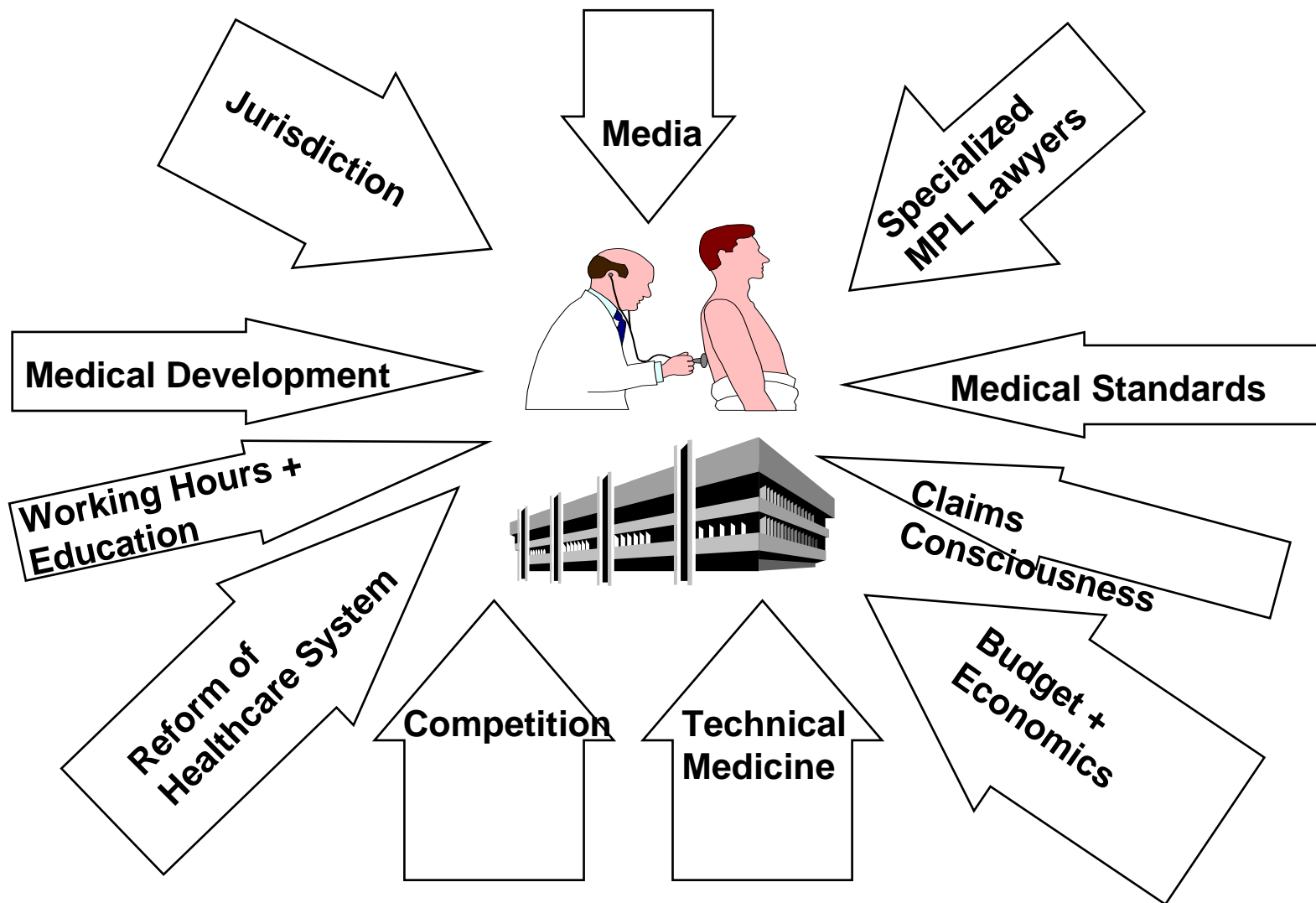
- **Medical Products**

- **Clinical Trials**

- **Cover becomes increasingly obligatory or compulsory for physicians**

# MPL Europe - Healthcare Providers and Insurers under Pressure

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# Legal Grounds for MPL

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## Contractual liability

§ 276 BGB (Civil Code):

Liability for own fault

⇒ Limitation 30 years

Four duties arise for the medical practitioner under the treatment contract:

- Duty of care
- Information
- Documentation
- Financial Information

## Liability in tort

- § 823 BGB: Liability to pay third party damages

- § 847 BGB: Compensation for pain and suffering

⇒ Limitation three years

**NB: Damages for pain and suffering can only be claimed for by liability in tort**

# ***Possibilities for release from liability for medical practitioners***

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- **Patient was unable to give informed consent**
- **Organisational fault in hospitals**
  - Liability has increasingly been offloaded from the medical superintendent onto the medical directors as well as specialists being responsible, e.g. in the case of the drawing up of duty rosters and staff regulations. The administration/management is also held liable.**
- **Joint liability of the Private/General Practitioner**
- **Expert witnesses' report**
- **Jugdement by default**
- **Panels of experts and arbitrationboards at Regional Medical Practitioners Associations (Landesärztekammern)**

# ***Medical Professional Liability Suit***

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**In civil proceedings, the burden of proof lies with the plaintiff.**

**However, in MPL suits, the courts allow the plaintiff, who is often short of evidence, the following concessions:**

- **Prima facie evidence**
- **Shifting the burden of proof in the event of**
  - **insufficient or no informed consent**
  - **insufficient or no documentation**
  - **defective equipment**
  - **gross errors**



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# ***MPL Risk Management / Quick fixes***

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- **Informed consent**
- **Documentation**
- **Out-patient surgery**
- **Recycling of disposable items**
- **Early warning system**
- **Patient satisfaction survey**

# ***MPL Risk Management / Beyond the Quick Fix***

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- **Find weaknesses (Interviews)**
- **Communicate and co-ordinate improvements**
- **Instal risk manager**
- **Measure and control**

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# ***MPL / GE Frankona Re's approach***

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- **Choose partners**
- **Segmentation**
- **Questionnaire**
- **Quote mainly on exposure**
- **Loss run and single big loss description**
- **Distinguish yourself by services**
- **Pay 1st step of Risk Management - Quick fixes**
- **Long-term contracts**
- **Pro-active claims management**
- **Drive the market**

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# ***MPL / ERC Frankona's approach / Case Study - France***

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- **Check jurisdiction**
- **Find partner**
- **Education?**
- **Segmentation**
- **Adapt approach**
- **Distinguish between Clinics and Hospitals**

# ***MPL / ERC Frankona's approach / Case Study - France / Jurisdiction***

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- **Frequency of claims increased by 58% between 1990 and 1994**
- **Société Hospitalière d'Assurance Mutuelle (SHAM, insuring about 1,400 Hospitals) says, that total loss costs increased by 114% during the same period**
- **Sou Medicale: Every second medical practitioner gets sued in the course of his practice**
- **Cosmetic surgery: Recent decisions seem to ask for delivery of the right result**
- **Above also applies to laboratories, orthodontists, dental prostheses and dental labs**
- **Hospitals: No fault liability if risks are known and not prevented**



# ***MPL / ERC Frankona's approach / Case Study - France / Jurisdiction***

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- **L' Arret Gomez (21.12.90)**
  - **Administrative jurisdiction**
  - **(Public) Hospitals only**
  - **New surgical technique**
  - **No-fault liability if:**
    - **treatment is not vital**
    - **new technique might be risky**
    - **consequences are unknown but might be devastating**

# ***MPL / ERC Frankona's approach / Case Study - France / Jurisdiction***

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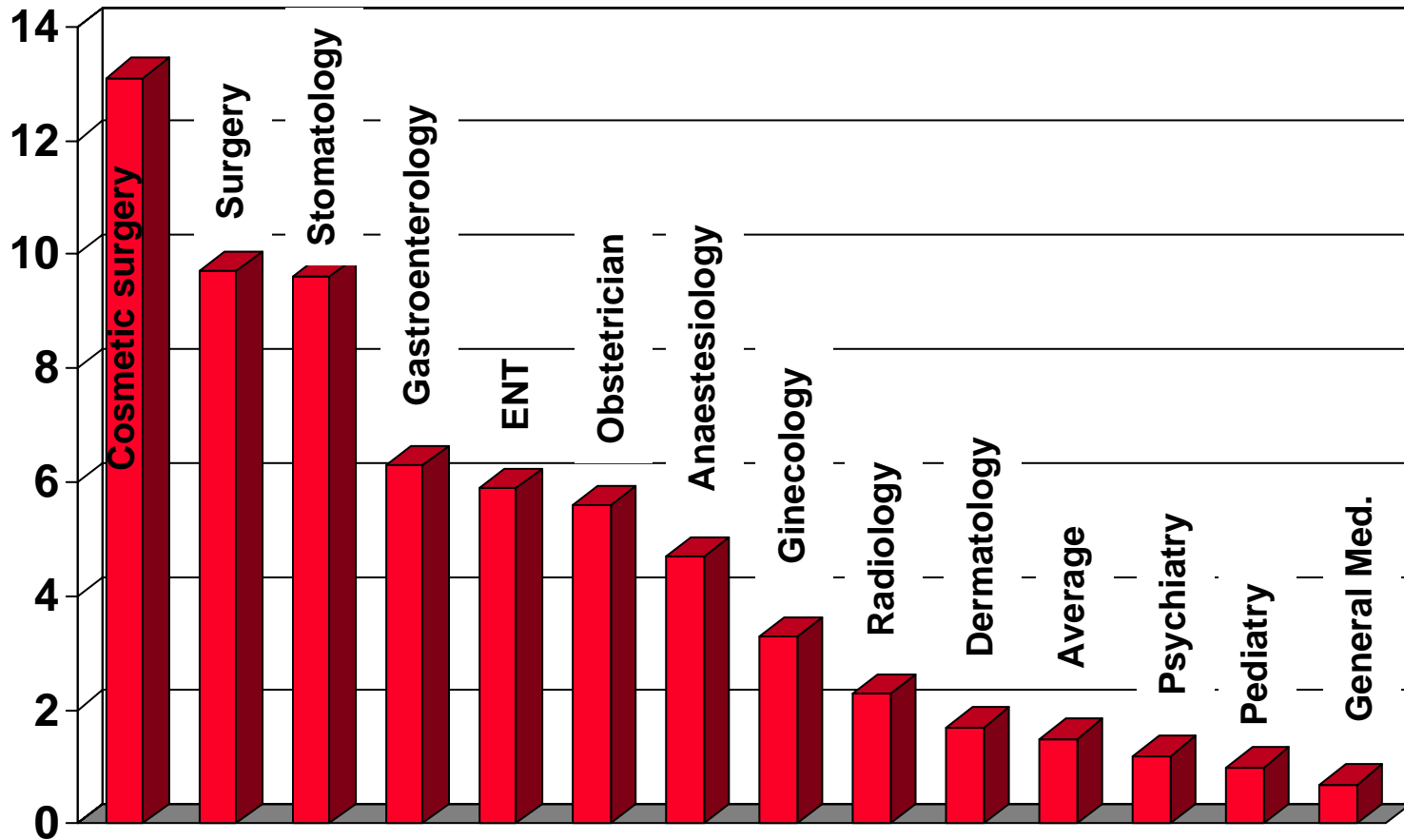
- **L' Arret Bianchi (09.04.98)**
  - **Administrative jurisdiction**
  - **Vertebral arteriography**
  - **Tetraplegic**
  - **No-fault liability only if:**
    - **treatment is necessary**
    - **treatment must be direct cause of damage**
    - **no predisposition of the patient to the damage**
    - **devastating results**
    - **most be special (small number of victims)**
    - **risks are known but unlikely**

# ***MPL / ERC Frankona's approach / Case Study - France / Jurisdiction***

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- Decision of Cour de Cassation of 22nd of February 1997: Informed consent explaining alternatives and giving the patient the opportunity to decide - documentation
- Decision of Cour de Cassation of 27th of February 1997: Informed consent has to be proven by medical practitioners

# MPL / ERC Frankona's approach / Case Study - France



France - Specialties: claims per 100 treatments as per 1996  
(Source: Le Sou Medicale)