Medical Professional Liability Insurance

1. Definition

Medical Professional Liability is sometimes also known under the rather negative term Medical Malpractice Insurance. The names of this insurance product alone show that it is strongly influenced by the Anglo-Saxon countries.

According to our definition Medical Professional Liability comprises Hospital Professional Liability, Physician's Professional Liability, Clinical Trials Liability, Liability Insurance for Medical Products, and Liability Insurance for Nursinghomes, Rehabilitation Clinics, Sanatoria, Pharmacies, etc.

Since the greatest need for action is definitely in Hospital and Physician's Professional Liability Insurance, we will be focusing on those two areas in the following.

2. Experience in the USA

In Germany we hear time and again of liability cases in the USA with exceptionally large compensation paid to claimants. One example is the family of a woman who died of cancer, who were awarded approximately $ 89 million in court because the woman's advanced breast cancer had not been treated by a bone marrow exchange.

In the light of such judgments many insurers have ceased to sell Medical Professional Liability Insurance or have modified their terms and premiums, also due to the much greater frequency of claims.

Employers Reinsurance Corporation (ERC) has taken a different approach: By introducing a strict system of quality management focusing on loss prevention and minimisation, ERC has significantly slowed down the threatening spiral of growing loss amounts and, accordingly, premiums. Applying these instruments, Employers Reinsurance Corporation was able to offer its clients in Medical Professional Liability ongoing and stable insurance coverage even during the severe liability crisis in the USA in the '80s.

3. Trends in Germany

3.1. Jurisdiction and claims awareness

A whole wave of medical malpractice cases is currently holding up German courts and increasing the workload for arbitrators. In 1996 alone some 30,000 patients demanded compensation on account of claimed medical malpractice. Within the last 10 years the funds required by medical professional liability insurers to cover their business has increased almost five-fold from approximately DM 150 million to DM 700 million p.a.

The main reasons for this trend are presumably the growing exaggeration of claims awarded by courts and an increasing awareness on the part of claimants.

Only recently a female patient was awarded DM 600,000.- in pain and suffering on account of a bone marrow injury suffered during a disc operation. This, it would appear, is the highest amount of compensation for non-economic damages ever awarded in German legal history (see *Ärztezeitung* No 162, Year 17, pp 1+4). So far the share of damages for pain and suffering, that is compensation paid for non-economic damages versus the compensation paid for economic damages such as loss of income, was relatively small. Now, however, the considerable increase in compensation paid for pain and suffering indicates that this factor is taking on greater significance, as we have already seen in the USA.

Such non-economic damages are particularly difficult to calculate. They also include punitive damages in the USA intended to sanction the perpetrator for particularly condemnable action, compensating the aggrieved party accordingly. A judgment to this effect was quite inconceivable in Germany until 1996, since in our country damages were payable up to that time only for the loss actually suffered. Then, in a judgment handed down on 28 November 1996, the Göttingen State Court justified damages of DM 420,000.- for pain and suffering by the statement that they had also considered a "specific penal aspect". This means that damages for pain and suffering now serve not only to provide compensation, but also as a form of satisfaction.

Should this attitude prevail, physicians and their insurers will be required to pay compensation not only

for economic damages open to calculation, but also - and to an increasing extent - for non-economic damages calculated quite randomly. Clearly, jurisdiction of this kind literally creates a certain "demand" on the part of claimants: It leads to a growing claims awareness among patients now exerting their claims with the help of patient protection organisations and attorneys specialising on Medical Professional Liability Insurance.

Normally the plaintiff, that is the patient, bears the onus of proof in a civil case, meaning that the patient must prove that the responsible physician failed to treat him properly and that such maltreatment was responsible for his loss of health. And providing proof of such kind is often difficult for the patient. In recent years, however, jurisdiction has significantly improved the patient's position in civil cases by giving him various options for reversing the onus of proof: Should the patient not have been informed properly on the risks involved, should his case not be properly documented, should the responsible physician have committed serious errors in treatment, should the patient involved suffer from a series of mistakes in treatment each one of which alone is not serious, and should there be a failure of medical equipment, the responsible physician treating the patient is now required to prove that the mistakes he made were not the cause for the patient's ailments. In practice, of course, it is extremely difficult to provide any proof of this kind. This makes reversal of the onus of proof one of the most significant, perhaps even the most significant factor in court cases. Experts in the insurance market estimate that defendants lose about 60 per cent of all cases due to the shortcomings just mentioned and, accordingly, due to the reversal of the onus of proof.

A positive point is that judges in Germany have tried to define how one has to behave to avoid deficiencies and shortcomings of the kind mentioned. Information for getting an informed consent from the patient, for example, must be given verbal, individual, up-to-date, in line with the patient's specific conditions in life, and technically and professionally correct in accordance with the risk involved. And such informed consent must naturally be documented.

There is no need at this point, however, to consider any further details of this process of informed consent and other possible deficiencies and shortcomings.

We cannot conclude this chapter, however, without referring to conceivable hazards which might present themselves in the harmonisation of legal systems in Europe.

3.2. Medical progress

From the side of the insurance industry, we should not comment in great detail ourselves on the remarkable medical progress achieved in recent years and decades. One obvious point, however, is the imbalance between medical progress, on the one hand, and the standard of the medical profession required in jurisdiction, on the other.

A further point is that we now face new liability risks resulting, say, from worldwide links in tele-medicine and from biotechnology.

3.3. Public awareness

Here again, there is not that much to be said. Daily reports in the mass media on "doctors making terrible mistakes" and their economic effects on the medical profession and enterprises speak for themselves.

4. What can we do together?

4.1. Using international experience

GE Frankona Rückversicherungs-AG is the German subsidiary of Employers Reinsurance Corporation (ERC), a global player in the reinsurance market. ERC is one of the most outstanding, oldest and largest reinsurers of Medical Professional Liability in the USA. Through its recent acquisition of Medical Protective Corporation, a specialist insurer concentrating exclusively on this line of business, GEFRe has been able to acquire additional know-how in this area. While the experience gained by these companies in the extremely difficult US Medical Malpractice market over the years and decades cannot be applied directly to Germany, there are some findings most certainly applicable to our country, too. One example is that claims statistics in the USA showed a couple of years back that more and more claims were being asserted for burns suffered by patients during an operation. Risk managers trying to find and eliminate the reasons for such claims soon established that during laser surgery

laser beams were reflected by operating tables and caused burns on the patients. The solution, therefore, was to use a non-reflecting cover on top of the tables. This example alone shows how meaningful statitics can be used by international groups of insurers in order to avoid losses affecting patients and, accordingly, physicians and insurers.

4.2. Determination and assessment of risks

Hardly anybody enjoys the tedious job of filling in questionnaires. But once you apply our philosophy this is certainly worthwhile. Weak points in a company or plant we determine when evaluating such questionnaires do not immediately influence the premium charged. On the contrary, we first consider whether and how such weak points can be eliminated. In some cases such an examination will also present losses already sustained in a different light.

4.3. Risk management

Risk management has really become the key issue these days. The concept of risk management comes mainly from the USA, where it has been applied so successfully in the interest of both patients and physicians that there is hardly any hospital left today without a full-time risk manager.

While we have not yet reached this status in Germany, that does not mean we do not pursue risk management at all. Indeed, the concept of risk management we apply together with *Alte Leipziger Versicherung AG, Gradmann & Holler GmbH* and *Acta Medica GmbH* is extremely practice-oriented. We do not start with comprehensive and complicated analyses of weak points, but rather use the know-how we already have. As already mentioned, this means our international experience and statistical knowledge which we simply pass on to our clients. We also apply and use the standards defined by judges in their decisions.

Naturally, we do not see ourselves as medical consultants in this area, since it goes without saying that physicians are much more knowledgeable in these matters than we are. But we do have a better understanding of judge-made law and we have our statistics. So proceeding from carefully structured claims and court judgments showing a certain pattern or line of action, we can explain how to prevent liability claims. I hasten to add that this first step in the

risk management process is of course merely a "quick fix" able to provide very meaningful results with only a minor effort. In particular, "quick fixes" of this kind focus on the process of getting informed consent from patients, keeping records and organising matters properly.

The next step possibly required is the analysis of weak points particularly in high risk areas. The results obtained in this way are then used in order to optimise processes.

Risk management can however only work if our customers show a cooperative, communicative and openminded attitude in our interaction.

4.4. Claims management

Claims in Medical Professional Liability are managed by specialists. The objective is to find a solution acceptable to all parties together with the claimant as quickly and unbureaucratically as possible.

Summary

Simply hiking insurance premiums and/or changing terms and conditions of policy wordings cannot be the only answer to growing payments of copensation in Medical Professional Liability Insurance. Rather, pro-active risk and claims management is essential also in order to avoid a loss of reputation for the healthcare providers and legal cases under criminal law.