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*The Rise and Decline of the Reversal of the Burden of Proof in China's Medical Negligence Law: A Political Economy of Lawmaking Perspective**

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Abstract

An issue of central importance to the medical negligence law reforms in China over the past decade is the allocation of the burden of proof between the plaintiff patient and the defendant medical care provider in medical negligence actions. From a political economy of lawmaking

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perspective, this article examines the evolution of the burden of proof rules, with a focus on the reversal rule developed by the judiciary. Drawing extensively on firsthand legislative materials, this article argues that the successful lobbying of the medical profession in the legislative process leading to the enactment of the 2010 Tort Liability Law explains the nonadoption of a full-blown reversal of the burden of proof rule for medical negligence actions in the law.

Medical negligence laws in China have undergone a series of major reforms in the past decade, culminating in the enactment of the 2010 Tort Liability Law. Throughout the reform process, the allocation of the burden of proof between the plaintiff patient and the defendant medical care provider remained an enduring issue of debate. The pre–Tort Liability Law medical negligence law was characterized with bifurcated burden of proof rules: The State Council's administrative rules strictly followed the traditional rule that the burden of proof is on the claimant, whereas the judicial rules issued by the Supreme People's Court (SPC) reversed the burden of proof and shifted much of the burden to the defendant. The 2010 Tort Liability Law represents a "third way." Under the law, the general rule is that the burden lies with the plaintiff. Under limited circumstances, however, the medical care provider is assumed to have acted negligently, unless it can prove otherwise.

This article attempts to present an understanding of these legal changes from a political economy of lawmaking perspective. Traditionally, lawmaking in China has been seen as a "rubber-stamping" process. However, recent economic reforms have fundamentally transformed both process and substance of lawmaking.[1] The legislative process is now far more open, consultative, reactive and adaptive than it was in early post-Mao years.[2] Many legislative developments in China are now closely influenced by political economy and interest group politics. Although the party and central government agencies remain powerful policy makers, interest groups and individuals have become interested in politics when the issues under discussion relate to their interests. Direct lobbying by interest groups is becoming increasingly common.[3] Drawing extensively on firsthand legislative materials, this article argues that the successful lobbying of the medical profession in the legislative process leading to the enactment of the 2010 Tort Liability Law explains the absence of a full-blown reversal of the burden of proof rule for medical negligence actions in the law.

This article is structured as follows. Section 1 examines the emergence of the SPC's reversal of the burden of proof rule against the backdrop of the pre-2010 bifurcated medical negligence law regimes.[4] Our analysis underscores the SPC's policy considerations in devising the reversed burden of proof rule for medical negligence actions, and highlights the practical effects of the SPC rule on both the patient and the medical care provider. Section 2 focuses on the legislative controversy surrounding Article 59 of the Tort Liability Bill (Second Draft) in the enactment process. Applying an analytical framework of political economy of lawmaking, we offer an understanding of why Article 59, which in many respects resembled the features of the SPC reversal of the burden of proof, was removed. Section 3 concludes.

1. The Rise of the Reversal of Burden of Proof: In the Context of Bifurcated Medical Negligence Law Regimes

One outcome of the negligence law reforms in the past decade has been the emergence of a characteristically bifurcated medical negligence legal system in China, consisting of two distinct and separate medical liability regimes: an administrative regime and a judicial regime.[5] The administrative regime has been in existence since 1987 and underwent a major reform in 2002. The judicial regime is, on the other hand, a new creation of the activist SPC, which enacted a cluster of judicial rules on medical liability in the early 2000s. As will be shown below, the two regimes have adopted polarized positions with respect to how the burden of proof is allocated. The administrative regime strictly followed the traditional rule that the burden of proof is on the claimant. By contrast, the judicial regime reversed the burden of proof and relieved the claimant of much of his burden. It will also be demonstrated that the emergence of the reversal of burden of proof under the judicial regime has contributed to "forum shopping" on the part of the claimants and the prevalence of defensive medical practices.

1.1 The Burden of Proof under the Administrative Regime

The administrative system of health justice was first established in 1987 with the promulgation of the State Council Measures on the Handling of Medical Accidents ("1987 Measures").[6] The 1987 Measures have been widely criticized for their narrow scope of liability, unfair limitations on

compensable damages, and conflicts with other laws and regulations.[7] In February 2002, the State Council revamped the administrative regime by issuing the Regulations on the Handling of Medical Accidents ("2002 State Council Regulations"),[8] which repealed and replaced the 1987 Measures.

Under the administrative regime, health administrative agencies—more specifically, the Ministry of Health (MoH) of the central government and the Bureau of Health (BoH) at local levels—are charged with the day-to-day administration of the regime, including the resolution of medical negligence disputes and the imposition of administrative sanctions on negligent health care providers. In its handling of medical disputes, the MoH, as well as each of the BoHs at the upper provincial level and the lower prefectural level, is aided by the medical association at the corresponding level. The medical association, though nominally independent, is affiliated with its respective health administrative agency.[9] It is worth noting that, under the administrative regime, the court has an important part to play as an enforcer of administrative rules. This is when the injured patient opts to bring the dispute to the court for resolution. The court will thereby take over jurisdiction over the dispute.[10] However, the court's role is limited to mechanically applying the administrative rules on medical liability,[11] as opposed to the judicially formulated medical liability rules that will be examined below.

The fundamental principle of the burden of proof in China, as in many other jurisdictions,[12] is that the claimant must prove her or his case.[13] The official annotations of the 2007 Civil Procedure Law state that as a general provision "the party who makes a claim shall carry the burden to provide evidence and to prove his case," and that "where there is no evidence or insufficient evidence that proves the truth of the allegation, the party who carries the burden of proof shall bear the negative consequences."[14] This is also the basic rule under the administrative regime: the claimant must prove that the injury is the result of a "medical accident." This rather peculiar notion of "medical accident" is a central feature of the administrative regime. It is defined as a negligent act by the hospital or its staff members in the course of medical treatment that violates health care laws, regulations, or the professional standards of medical care and that causes personal injury to the patient.[15] Thus, the definition itself constitutes a two-pronged test for the claimant to satisfy: First, there is a negligent breach of the legal requirements or prescribed standards of care. Second, injury to the claimant is caused by the breach.

Closely related to the proof of the claim is the way in which medical

accident is determined. The 2002 State Council Regulations leave the determination of whether a medical accident occurs to a designated third party, the ad hoc "authentication panel."[16] For each dispute over the occurrence of a medical accident, there is an ad hoc authentication panel consisting of qualified medical experts drawn from a database administered by the city-level medical association concerned.[17] The panel is responsible for determining, among other things, (1) whether the medical treatment has violated applicable legal requirements or prescribed medical standards, (2) whether there is a causal link between the medical care provider's negligence and the injury sustained by the patient, (3) the grade of the medical accident,[18] and (4) the percentage of injury attributable to the medical care provider's negligence.[19] The panel's ruling can be appealed, normally once, by either party and will be reviewed by an "appellant" authentication panel whose members are normally selected from a different database administered by the upper-provincial-level medical association and, only in exceptional cases, from the database administered by the national-level medical association, that is, the Chinese Medical Association.[20] The ruling of the original panel and, where there is an appeal, of the appellant panel is final and, arguably, not subject to judicial review absent procedural irregularities.[21]

To assist the authentication panel to reach a decision, both the claimant patient and the defendant medical care provider are required to submit evidential materials pertaining to the adverse event in question. As it is usually the medical care provider that retains the health and medical records, this obligation rests primarily with the medical care provider. The 2002 State Council Regulations enumerate a lengthy list of medical records to be handed over to the panel by the medical care provider, and all these records must be original.[22] A safeguard is also in place intending to deter the medical care provider from not complying with its evidential obligations: Article 28(4) of the 2002 State Council Regulations provides that the medical care provider shall "bear responsibility" where, without valid reasons, it fails to provide to the panel the required medical records in a faithful manner and as a result of which the authentication cannot be carried out.[23]

In practice, however, it was not uncommon that medical care providers, during the course of dispute resolution (inter alia, court proceedings), denied patients ready access to their own health records. Many medical care providers have reportedly submitted false or falsified medical records. In extreme cases, hospitals went as far as destroying the

original records that evidenced the medical staff's breach of standard of care and replaced them with fake ones.[24] Few medical care providers have been sanctioned, however, by the administrative authorities for these violations of the evidential requirements under the 2002 State Council Regulations.[25]

1.2 The Reversal of Burden of Proof under the Judicial Regime

At about the same time as the administrative regime underwent its major revamp in 2002, a new and separate system of medical negligence laws started to emerge. The SPC has played a key role in the formation and development of this new system. The SPC was careful not to attempt to reform the administrative regime, as the political reality in China dictates that such reform could only come from within the government itself. The strategy of the SPC was to create a regime of its own and to label it as an alternative to, as opposed to a replacement of, the administrative regime. This was achieved by following the line of the 2002 State Council Regulations and artificially dividing medical negligence into two categories: medical accidents and non–medical accident medical negligence.[26] The SPC maintained that the application of the 2002 State Council Regulations was confined to claims brought on the basis of medical accidents only. Thus, proceedings arising from alleged non–medical accident negligence fell outside the jurisdiction of the administrative regime.[27] For those proceedings, the SPC made available an alternative cause of action that derived from a statutory principle of tort liability—enshrined in a national law, the 1986 General Principles of Civil Law (GPCL)—that a person is liable on the basis of fault for damage caused to a third party.[28] Thus, non–medical accident negligence is also commonly known as "medical fault." The injured patient, by initiating a lawsuit on the basis of medical fault, as opposed to medical accident, can thus opt out of the administrative regime.

The GPCL statutory principle of tort liability is abstract, general, and lacks bright-line standards. It has been supplemented by medical liability rules contained in a number of SPC-formulated judicial interpretations, which are legally binding on all levels of courts in China. Most relevant to our discussion are the 2002 Several Regulations on Evidence in Civil Proceedings (2002 SPC Regulations),[29] which significantly modify the allocation of the burden of proof, and shift much of the burden to the defendant in medical fault claims.

Article 4(2)(8) of the 2002 SPC Regulations provided that, in medical fault claims, "the burden shall be on the medical care provider to prove that there is no casual link between the medical treatment and the injury sustained and that there is no fault on the part of the medical care provider."[30] This procedural rule relieved the claimant's burden of proof with respect to causation and burden of proof regarding fault, and allocated them to the defendant. Comparative studies show that reverting the burden of proving causation and the burden of proving fault leads to liability for assumed causation and for assumed fault, respectively,[31] unless the defendant can rebut these assumptions. Thus, the meaning of Article 4(2)(8) is essentially twofold.[32] First, the plaintiff must establish a prima facie case that there exists a physician–patient relationship between the plaintiff and the defendant medical care provider under which the plaintiff was diagnosed and treated by the defendant, and that the plaintiff sustained injury during the course of treatment. Once this is proved, the burden of proof shifts to the defendant. Second, the defendant is subsequently required to present "reasonable and convincing" evidence that she or he did not act negligently or that her or his act did not cause the damage sustained by the plaintiff. The defendant will be held liable if the defendant fails to discharge the reversed burden of proof.

As Giesen has forcefully put, the practical implication of reversing the burden is the shift of the risks of the plaintiff not being able to prove a certain fact onto the defendant. The consequence could be that the defendant loses the case whereas she or he would not have lost if the normal division had been retained. In other words, shifting the burden of proof may result in the plaintiff winning a case that would otherwise have been lost due to evidential difficulties. The implication of the reversal is so grave that it always warrants some serious policy justifications.[33]

The SPC's policy grounds for this deviation from the standard apportionment of the burden of proof are several. The first and foremost rationale was that it is in the interest of fairness and equality that the position of the plaintiffs in medical negligence actions be improved. As a matter of fact, the SPC suggested, the defendant medical care provider tends to be in a far better position than the plaintiff patient, in terms of both the means of knowledge and the ability to prove what caused the injuries or whether there was a breach of the standard of care.[34] The medical care provider has full and ready, and the patient has limited and controlled, access to medical records. The medical care provider possesses, and the patient lacks, the sophisticated and specialized

knowledge to explain the injuries. It would thus be unjust and unfair, the SPC maintained, to require the patient to prove what she or he cannot. In practice, the SPC observed, many patients were unsuccessful in their claims and hence denied compensation due to the practical difficulties in accessing and making effective use of evidential information to prove their case. Their frustration often turned into resentment and, sometimes, even violence against the medical care provider and its staff members. This in turn contributed to, and further intensified, the tension between the patient and the medical profession.[35] Hence, judicial interference by ways of shifting the burden of proving issues of causation and negligence to the medical care provider, who is more able than the patient to discharge the onus, is warranted.[36]

The SPC further defended its position by adding that the shifted burden of proof that lies with the defendant is more of a procedural than a substantive nature, and that it does not, in reality, bring about the kind of chilling effect it appears to have. The real effect of the reversal, the SPC explained, is no more than requiring the defendant to do what would be the task of the plaintiff under the administrative regime, that is, to initiate an authentication process and to facilitate the process by providing evidential information. The defendant's burden is regarded to have been discharged by so doing.[37]

1.3 "Forum Shopping" and Defensive Medicine

Earlier research shows that changes in negligence liability laws can significantly influence patient decisions about whether to bring claims.[38] The reversal of the burden of proof under the judicial regime did much to relieve plaintiffs of their difficulties in proving the fault of the defendant and the causation. It, along with other proplaintiff rules contained in the 2002 SPC Regulations (inter alia, higher levels of damages recoverable),[39] helped to significantly reduce plaintiffs' costs and improve their position. Thus, some negligence claims that were previously not worth pursuing became worth pursuing, and a larger proportion of potential claims were turned into actual lawsuits against medical care providers.

This change in patient behavior was manifested by the sudden rise in the frequency of negligence claims in the early 2000s. In Beijing, the three levels of local courts handled altogether 340 medical negligence cases in 2001. The caseload increased dramatically by 55.3 percent to 528 cases in 2002.[40] The district court of the Haidian District, where

many major hospitals are located, even recorded a striking 150 percent surge in caseload over the same period.[41] A similar upward trend was observed in Shanghai. In 2003, 68 medical injury cases were appealed to the Shanghai No. 2 Intermediate Court, representing a remarkable rise of 94 percent from the caseload of only 35 in 2002.[42] The proximity between the 2002 SPC Regulations (which became effective on 1 April 2002) and the 2002 State Council Regulations (which came into force on 1 September 2002) renders it difficult to discern the "net effect" of each of the regulations on the observed sharp rise in the medical caseload. Court case statistics in Jiangsu Province was, however, suggestive of the direct link between the 2002 SPC Regulations and the increased frequency in medical negligence actions. In the three months prior to 1 April 2002, the date on which the 2002 SPC Regulations came into effect, 125 medical claims were filed with courts in the province. The caseload climbed by 26.4 percent to 158 in the quarter starting from April. In Gulou District, the older part of the provincial capital city of Nanjing, which has by far the largest concentration of major hospitals in the province, the district court received more cases in the four months after April 2002 than it did in the whole of 2001.[43]

Closely associated with the increased quantity in negligence claims was the bourgeoning practice of "forum shopping" on the part of claimants. Faced with a choice between the administrative regime and the judicial regime, patients naturally turn to the one that affords them better protection.[44] The judicial regime, which is featured with a reversed burden of proof and other proplaintiff arrangements, offers attractions to patients. As a consequence, injured patients increasingly opted to initiate negligence lawsuits on the basis of medical fault, even where the injury was evidently caused by a medical accident.[45] With patients turning away from the administrative system of health justice, there had been a gradual shift of negligence claims from the administrative regime to the judicial regime. Thus the administrative regime was gradually marginalized in terms of the volume of negligence disputes it resolves.[46]

The reversal of the burden of proof means, on the other hand, a much stricter liability regime for the medical care providers. The medical profession responded to the perceived greater risk of negligence actions with the practice of defensive medicine.[47] Though empirical evidence is lacking on the magnitude of defensive medical practices in China, the widely held belief is that Chinese physicians have taken socially excessive precautions against medical liability more often in the aftermath of

the negligence law reforms in the early 2000s.[48] Defensive medical behaviors became evidently more prevalent, ranging from ordering more diagnostic tests than are medically indicated, suggesting more invasive procedures than are clinically warranted, and prescribing more medications than are medically necessary, to simply refusing to treat particular high-risk patients and avoiding certain high-risk procedures altogether.

Medical professionals have singled out the reversal of burden of proof as one of the most significant contributing factors to excessive physician precaution.[49] Some have gone as far as arguing that the reversal rule was precisely the root cause of prevalent practice of defensive medicine in China.[50] The liability concerns induced by the reversal of burden of proof could, many practitioners warned, lead to adverse effects on medical costs and health outcomes and, in the long run, hinder advances in medical science. Thus, it would be the patients who ultimately bear the costs of the reversed burden of proof. Moreover, it was contended that the SPC's interference with the normal distribution of the burden of proof was grossly unfair, especially in circumstances where the cause of the plaintiff's injury cannot satisfactorily be proved because of the current limitations of medical science.

2. The Decline of the Reversal of Burden of Proof: Legislative Debate over Article 59 of the Medical Liability Bill (Second Draft)

The 2010 Tort Liability Law sets out to, among other things, bridge the preexisting bifurcated medical negligence law regimes, only with limited success. The law is, however, successful in enacting a rule on the burden of proof for medical negligence actions that replaces the preexisting rules. In essence, the law represents a midway point between the administrative regime that strictly followed the traditional rule that the burden of proof is on the claimant, on the one hand, and the judicial regime that reversed the burden on the other. Under the law, the general rule is that the burden lies with the plaintiff. Under limited circumstances, however, the medical care provider is assumed to have acted negligently, unless it can prove otherwise. The new burden of proof rule under the 2010 Tort Liability Law has been seen as a significant retreat from the SPC's full-blown reversal of burden of proof. In this section, we attempt to present an understanding of this perceived decline of the reversal of burden of proof. The focus of our analysis is the legislative controversy arising

from Article 59 of the Tort Liability Bill (Second Draft), which in many respects resembled the features of the SPC reversal of burden of proof rule.

2.1 Political Economy of Lawmaking: Methodological Issues

Traditionally, lawmaking in China was largely the product of a small coterie of officials and legal scholars. Recent economic reforms, however, have radically changed the political economy of lawmaking in China. On the one hand, the legislative process has become far more open, consultative, reactive, and adaptive. On the other hand, various social and interest groups have started to engage proactively in the Chinese legislative process, especially when issues involved affect their interests. Thus, the trajectory of law reforms has been shaped not only by a small number of powerful central government agencies, but also by social/interest group politics. Medical negligence law reforms, which affect the medical profession, patients, lawyers practicing medical negligence law, and judges,[51] have become ones on which relevant interest and social groups compete to exert their influence.

Before we apply this analytical framework to the decline of the full-blown reversal of the burden of proof that the SPC devised, it is worth devoting a few words to the methodological issues arising from this exercise. The basis for the analysis that follows is primarily a comprehensive single-volume collection of legislative materials ("Legislative Collection") pertaining to the enactment of the 2010 Tort Liability Law.[52] Compiled by the Legislative Affairs Commission (LAC) of the National People's Congress Standing Committee (NPCSC), the Legislative Collection includes, among other things, the LAC reports to the NPCSC, surveys of tort law in selected foreign jurisdictions,[53] and, notably, minutes of the LAC-convened consultation meetings, symposia, and seminars in which various issues were considered, discussed, and debated. These materials offer a rare glimpse into what was usually a nontransparent process in China.

Overreliance on these materials, important as they are, can give rise to methodological issues that warrant careful consideration. Of immediate note is that the precise identities of the individuals and institutions invited by the LAC to give comments, suggest amendments, and make proposals are almost invariably kept anonymous in the Legislative Collection. Instead of attributing a particular view recorded in the Legislative Collection to any specific individuals, organizations, or government

agencies, the Legislative Collection normally refers to them as "some people," "some unit(s)," "some department(s)," "some locality(ies)," and so on. The anonymity of the consultation participants poses some challenges in attributing some views expressed to a specific interest group. It does not, however, make our analysis entirely futile. Very often the general identities of the participants either are explicitly stated or can be duly inferred from the information given. Thus, the Legislative Collection includes, for instance, a summary of opinions from an unidentified hospital's research office,[54] and a summary of views from an unnamed lawyers' association.[55]

A related issue is whether the opinions as expressed and recorded in the Legislative Collection are precisely representative of the prevailing views of the respective interest group. To be sure, it remains largely unknown as to how and why some individuals and institutions were chosen by the LAC over others to get involved in the consultation process. It may well be that an individual was invited because she or he is a leading and influential expert on the issue concerned, and an institution was involved due to its prestige and nationwide recognition. But it is also possible that geographical proximity to the legislature mattered so much so that a less-than-prestigious institution was called upon to give views simply because it is located in Beijing. At any rate, these participating individuals and institutions were granted direct access to the legislature. Presumably, their views have, to varying degrees, been taken into consideration by, and have influenced, the legislature. By the same token, we do not assume that views within the same group were homogenous. Instead, there were instances of profound divisions within the same group on various issues. Nevertheless, it is the views conveyed to the legislature during the enactment process that presumably have most directly affected lawmaking and helped to shape the outcomes of the legislative process.

Another note of caution about relying on the Legislative Collection is that it does not, nor does it intend to, fully capture the dynamics of the making of the 2010 Tort Liability Law. In its Editorial Note, the Legislative Collection clearly states that it collects only part, not all, of the materials generated in the enactment process.[56] More important, processes that tend to play vital roles in shaping legal rules in China—informal exchanges of views, behind-the-scenes lobbying, and indirect exertion of influence by senior officials, to name a few—have seldom been put on the record. Thus, the Legislative Collection will be

supplemented as needed by other primary and secondary sources of materials, including official websites of key players, media coverage, and so on.

2.2 The Debate over Article 59 of the Tort Liability Bill (Second Draft)

A milestone in the making of the 2010 Tort Liability Law is the Tort Liability Bill (Second Draft) ("2008 Bill"), submitted by the LAC for NPCSC's deliberation in December 2008.[57] The 2008 Bill derived from Part VIII of the Civil Code (Bill), which was tabled in the NPCSC in December 2002.[58] The Civil Code (Bill) was never passed in its entirety as a statute. However, its Part VIII constituted the basis for subsequent tort law legislation and was commonly referred to as Tort Liability Bill (First Draft) ("2002 Bill").[59] What is interesting about the 2002 Bill is its total silence on medical negligence. More recent developments—the significant increase in medical negligence disputes, the widespread public discontent about the outcomes of the traditional administrative medical liability regime, the medical profession's concerns about the increased exposure to liability under the judicial regime and consequently the prevalent practice of defensive medicine—all made it imperative for the Chinese legislature to intervene and to improve the unsatisfactory state of pre-2010 medical negligence laws. Thus, a major development introduced by the 2008 Bill was the insertion of an entirely new chapter on "medical injury liabilities" (Chapter 7) consisting of 14 articles (Articles 53–66).

Whereas the focus of our discussion below is on Article 59 of the 2008 Bill, it is worth saying a few words about Articles 54 and 58 of the Bill, as they are of relevance to what is to be discussed. Article 53 of the 2008 Bill—which is now Article 54 of the 2010 Tort Liability Law—provided that "a medical care institution shall be held liable for damages where patients are injured in the course of medical diagnosis and treatment and the medical care institution and its professional staff are at fault." It affirmed fault as the basis of medical liability. Thus, as a general principle the plaintiff in a medical negligence claim is required to show that her or his injury was caused by the defendant's conduct. Article 58 of the 2008 Bill—which, with some revisions, became Article 58 of the 2010 Tort Liability Law—provided for the exceptions to this general rule. Under Article 58 of the Bill, the medical care institution is

assumed to have acted negligently in certain circumstances.[60] During the legislative process leading to the enactment of the 2010 Tort Liability Law, Articles 53 and 58 of the 2008 Bill were subjects of considerable discussion.

However, at the center of the controversy was evidently Article 59 of the 2008 Bill, which reads,

> Where it is probable that the injury sustained by the patient is caused by the medical care provider's diagnosis and treatment, it shall be assumed that there is a causal link between the diagnosis and treatment and the patient's injury, unless the medical care provider can prove otherwise.

Thus, Article 59 in an important way resembled the features of the SPC's reversal of burden of proof rule, that is, the burden of proof as regards causation is on the defendant medical care provider. Yet Article 59 seemed tougher for the plaintiff than Article 4(2)(8) of the 2002 SPC Regulations: Under the latter, a causal connection between the medical treatment and the injury sustained is assumed, so long as the plaintiff can establish a prima facie case that there exists a physician–patient relationship and that the plaintiff sustained injury during the course of the treatment.[61] By contrast, it seemed that the plaintiff under Article 59 must also meet an additional standard of proof on a "probable" causal link, though the exact nature of this standard of proof was not entirely clear,[62] before the risk of not being able to prove the cause of the damage shifts to the defendant. In that sense, Article 59 was a "softer" version of the SPC's reversal rule under the 2002 SPC Regulations.[63]

The most vocal advocates for removing Article 59 were two national-level medicine professional associations, that is, the Chinese Medical Doctor Association (CMDA) and the Chinese Hospital Association (CHA). The CMDA is the statutory self-regulatory body of all practicing physicians in China.[64] The CMDA is also resourceful in terms of its government connections. Its president is a former vice minister of the MoH,[65] and many of its vice-presidents are incumbent senior officials of the MoH and local BoHs.[66] More notably, one of its two honorary presidents is a vice-chairman of the NPCSC (NPCSC VC) and influential figure in shaping the medical negligence rules in the 2010 Tort Liability Law.[67] Renamed from the China Hospital Management Association, the CHA is the self-regulatory body of medical care providers (exclusive of rural medical clinics) in China, and is affiliated to the MoH.[68] Its president is also a former MoH vice-minister.

The active involvement of the CMDA and the CHA in the debate

over Article 59 seems to have been related closely with NPCSC VC. In addition to his vice-chairmanship of the NPCSC, NPCSC VC is also a prominent cardiovascular specialist and director of the highly prestigious Peking University Health Science Centre.[69] NPCSC VC was reportedly opposing the adoption of Article 59 at one of the NPCSC first meetings considering the 2008 Bill. Despite rapid scientific advances, NPCSC VC maintained, the nature of medical science is such that it is often difficult to ascertain whether the cause of a medical injury is the medical treatment the patient received or the disease itself. The solution to China's medical malpractice crisis lies, NPCSC VC suggested, not in the reversal of burden of proof, but in the creation of a more effective authentication system.[70] Subsequently, NPCSC VC reportedly gave an instruction addressed to the China Medical Association, the CMDA, and the CHA, suggesting a close examination of relevant provisions in the 2008 Bill. Remarkably, Article 59 was singled out by NPCSC VC as meriting special attention.[71]

In response to NPCSC VC's instruction, the CDMA held a seminar in January 2009. A prevailing view emerged that the SPC's reversed burden of proof rule, though well intended, was based on a misconception of the nature of medical care and had created more problems than it solved. Thus, save exceptional circumstances, liability in medical negligence actions must be fault based and the burden of proof should be on the claimant.[72] A report based on the discussions of the seminar was then submitted on behalf of the CDMA to NPCSC VC and the NPCSC.[73]

The influence of the CHA's involvement appeared to be more direct and visible. The CHA proactively gathered views from attendants of its seminar regarding the 2008 Bill and, more broadly, from its members. These views were then communicated in person by a senior member of the Peking University People's Hospital, on behalf of the CHA to NPCSC VC. In addition, a formal submission was made in the name of the CHA to NPCSC VC, and was subsequently passed on by NPCSC VC to the LAC to draw its attention.[74] It is very likely that the CHA's submission has been reprinted in the Legislative Collection as "Opinions of a Hospital Association on Medical Injury Liabilities" ("HA Submission").[75] The HA Submission criticized Article 59 as "non-objective and unfair," as it purported to indiscriminately allocate the risk of the patient not being able to prove the causation to the medical care provider. The HA Submission boldly proposed that Article 59 be removed altogether.[76]

Similar concerns about Article 59 were also channeled to the LAC

during its consultation sessions at the local levels. In the LAC's February 2009 consultation trips to Jiangxi Province and Anhui Province, Article 59 became one of the focal points of discussion.[77] The dominant view appeared to be in favor of deleting Article 59 in its entirety from the 2008 Bill. The majority of the medical professionals with whom the LAC met advocated the removal of Article 59. It was suggested that Article 59 had the effect of superseding the burden of proof principle (which is on the plaintiff) enshrined in Article 53 of the 2008 Bill and replacing Article 53 with a full-blown reversal of burden of proof. This would, it was alleged, lead to only more prevalent practice of defensive medicine, and further exacerbate the perceived medical crisis.[78]

In a separate consultation trip the LAC made to Gansu Province in April 2009, the LAC met with local government agencies, deputies of local people's congresses, medical care institutions, patients, and experts.[79] The views were more mixed as to whether the SPC's reversal of burden of proof should be retained.[80] Surprisingly, when it comes to the fate of Article 59, the views, as they are recorded in the Legislative Collection, were homogeneous. It was suggested that medical care providers would be placed in an unfairly disadvantageous position should Article 59 be adopted as part of tort law. The proposal was, again, to remove Article 59.[81]

On the other side of this debate was predominantly the judiciary. In an attempt to seek input from the judiciary in relation to the 2008 Bill, the LAC held in August 2009 a three-day seminar, where provisions of the 2008 Bill were placed under close scrutiny by the attending judges.[82] With respect to Article 59, judges were generally positive and supportive. Some judges, however, saw Article 59 as a disappointing step backward from the SPC's reversed burden of proof rule as it placed a higher burden of proof on the plaintiff. They reasoned that under the SPC rule the plaintiff was required only to establish a prima facie case, whereas that Article 59 tipped in favor of the defendant by requiring the plaintiff to prove that the probability of causation is over 50 percent.[83] Notwithstanding these concerns, no concrete suggestion was put forward at this seminar as to how Article 59 could be improved.

This was subsequently done in a formal submission made by the research office of an unidentified court, which may well be the SPC, to the LAC ("Court Submission").[84] The Court Submission started with a few lines of defense for the much criticized SPC's reversal of burden of proof rule. It proceeded to float a proposal that the SPC rule, in a revised

and improved form, be codified and, consequently, that Article 59 be removed. This proposal to replace Article 59 with the SPC reversal of burden of proof was, according to the Court Submission, backed by interesting findings of a survey of experienced judges: The notion of "probability of causation" was perceived by participants as an alien one, and the widely voiced concern was how Article 59 could be properly interpreted and applied in medical negligence proceedings, if it were to be adopted.

To be fair, the judiciary was not alone in its attempt to write the reversal of burden of proof into the 2010 Tort Liability Law. Also on its side was the lawyers' association.[85] In its submission to the LAC ("LA Submission"), an unnamed lawyers' association unambiguously voiced its support for codifying the SPC reversal of the burden of proof, calling it the only means by which to balance the interests between the vulnerable patients and the powerful medical profession. The medical profession's accusation that the reversal of the burden led to defensive medicine and raised medical costs was, the LA Submission added, simply misplaced and wrong. To the contrary, the LA Submission bluntly put, it was the medical care providers' distorted incentives and self-interests that were the root cause of the problem.[86]

2.3 Removal of Article 59

The above analysis comes to a startling finding: Despite their polarized positions with regard to the apportionment of burden of proof in medical negligence claims, both sides of the debate viewed Article 59 as undesirable, though for entirely opposite reasons. This sealed the fate of Article 59. In fact, Article 59 was eventually removed in its entirety, when the 2008 Bill was amended and submitted to the NPCSC for deliberation in October 2009 as the Tort Liability Bill (Third Draft) ("2009 Bill").[87]

The removal of Article 59 did not, however, put a complete end to the controversy. To the contrary, it sparked another round of intense debate within the NPCSC, culminating in a heated exchange between two NPC deputies at one of the NPCSC panel meetings that considered the 2009 Bill. Deputy Qin Xiyan 秦希燕 , a prominent practicing lawyer, called for insertion of a clause to effect the reversal of burden of proof in medical negligence actions. To this, Deputy Liu Shenlin 劉瀋林 , the president of a major local hospital in Jiangsu Province, responded by remarking that the deletion of Article 59 was entirely appropriate, as the

allocation of burden of proof is a matter of civil procedure law, not one of tort law.[88] Falling short of a consensus, Article 59 was not reinstated at the October 2009 NPCSC meetings.

In November 2009, the NPCSC took the initiative to hold a one-month public consultation on a revised version of the 2009 Bill.[89] The consultation evoked enthusiastic response from the general public. The NPCSC received altogether 3,468 comments and suggestions online, as well as 21 letters from "departments and individuals."[90] Among them was a suggestion that Article 59 of the 2008 Bill be restored.[91] Again this suggestion was not taken up by the legislature. And with some minor revisions, the 2009 Bill was passed in December 2009 as the 2010 Tort Liability Law.

3. Conclusion

In the past decade, the issue of how to optimally allocate the burden of proof between the plaintiff patient and the defendant medical care provider in medical negligence actions has been at the center of the debate about medical negligence law in China. The traditional administrative regime, which has widely been perceived to strongly favor medical care providers, required that the claimant prove her or his own case. This has in practice led to insurmountable evidential difficulties on the part of the patient. The activist SPC, however, devised a proplaintiff rule that reversed the burden of proof and shifted much of the burden to the defendant. This rule has on the one hand improved the patients' position in negligence actions by reducing their costs of proving negligence and causation and, on the other hand, arguably produced stronger incentives for Chinese physicians and health care institutions to take more socially excessive precautions against medical liability. The 2010 Tort Liability Law represents a midway point between the two preexisting regimes. Under the law, the general rule is that the burden lies with the plaintiff. Under limited circumstances, however, the medical care provider is assumed to have acted negligently, unless it can prove otherwise.

Sharply contrasting views have regularly been expressed for and against each of the above arrangements. Our objective in this article is not to take a stand in favor of one position over another in this policy debate. Instead, we attempt to offer an understanding of these medical negligence law changes, in particular, the decline of the SPC's full-blown reversal of the burden of proof, from a political economy of

lawmaking perspective. The 2008 Bill contained a provision (Article 59) that resembled in important ways the SPC reversal rule. In the subsequent legislative process leading to the enactment of the 2010 Tort Liability Law, Article 59 met stiff opposition from the medical profession. The associations representing medical practitioners and medical care institutions exhibited remarkable ability to mobilize and lobby the national legislature. There were other groups, among others, judges and lawyers, that favored the spirit, but not the letter, of Article 59. In an attempt that ultimately failed, judges lobbied the NPCSC to replace Article 59 with their own version of full-blown reversal of burden of proof rule. The outcome of the legislative process was thus unsurprisingly the removal of Article 59, a rule that the medical profession strongly disfavored.

Notes

1. Kevin J. O'Brien, *Reform without Liberalization: China's National People's Congress and the Politics of Institutional Change* (Cambridge: Cambridge University Press, 1990); Murray Scot Tanner, *The Politics of Lawmaking in China: Institutions, Processes, and Democratic Prospects* (Oxford: Clarendon, 1999); Young Nam Cho, "The Politics of Lawmaking in Chinese Local People's Congresses," *China Quarterly*, Vol. 187 (2006), pp. 592–609.
2. Kellee S. Tsai, *Capitalism with Democracy: The Private Sector in Contemporary China* (Ithaca, NY: Cornell University Press, 2007).
3. Scott Kennedy, *The Business of Lobbying in China* (Cambridge, MA: Harvard University Press, 2005).
4. This section draws from and expands on findings of our earlier article, Chao Xi and Lixin Yang, "Medical Liability Laws in China: The Tale of Two Regimes," *Tort Law Review*, Vol. 19, No. 1 (2011), pp. 65–75.
5. Yang Lixin, *Qinquan Zeren Fa* 侵權責任法 (Tort Law) (Beijing: China Law Press, 2010), pp. 407–409. As argued elsewhere (ibid.), much of the prereform bifurcated medical negligence legal system has so far survived the 2010 legislative reform. The prereform burden of proof rules have, however, been replaced by the provisions in the 2010 Tort Liability Law, to be discussed in the next section.
6. Promulgated on 29 June 1987.
7. Dean M. Harris and Chien-Chang Wu, "Medical Malpractice in the People's Republic of China: The 2002 Regulation on the Handling of Medical Accidents," *Journal of Law, Medicine & Ethics*, Vol. 33 (2005), pp. 456–477; Lijia MacLeod, "Doctor Leads First Crusade Against Medical Negligence in China," *The Independent*, 4 November 2000.

8. Promulgated on 4 April 2002, and in effect on 1 September 2002.
9. For instance, the Articles of Association (Article 2) of the Beijing Medical Association provides that the competent authority of the association is the Beijing Municipal Health Bureau, a component department of the Beijing Municipal Government.
10. 2002 State Council Regulations, Article 40, which contemplates two circumstances: (1) where the dispute over a medical accident is brought simultaneously to both the court and the health administrative agency, it is the court that has the jurisdiction; (2) where the dispute is first brought to the health administrative agency and subsequently to the court, the health administrative agency shall cease to handle the dispute and leave the matters to the court.
11. Article 1, *Guanyu Canzhao Yiliao Shigu Chuli Tiaoli Shenli Yiliao Jiufen Minshi Anjian de Tongzhi* 關於參照《醫療事故處理條例》審理醫療糾紛民事案件的通知 (The Circular Concerning the Adjudication of Civil Cases on Medical Disputes by Referring to the Regulations on the Handling of Medical Accidents), issued by the SPC on 6 January 2003 (hereinafter 2003 SPC Circular).
12. Vibe Ulfbeck and Marie-Louise Holle, "Tort Law and Burden of Proof—Comparative Aspects. A Special Case for Enterprise Liability?" in *European Tort Law 2008*, edited by Helmut Koziol and Barbara C. Steininger (Vienna: Springer-Verlag/Wien, 2009), pp. 26–48.
13. 2007 Civil Procedure Law, Article 64(1). This is also the position of the 2002 SPC Regulations, see note 29. Mo Zhang and Paul Zwier, "Burden of Proof: Developments in Modern Chinese Evidence Rules," *Tulsa Journal of Comparative & International Law*, Vol. 10 (2003), pp. 419–471, pp. 435–436.
14. Yao Hong, ed., *Zhonghua Renmin Gongheguo Minshi Susongfa Shiyi* 中華人民共和國民事訴訟法釋義 (Official Annotations of the PRC Civil Procedure Law) (Beijing: China Law Press, 2007), pp. 93–94.
15. 2002 State Council Regulations, Article 2.
16. Ibid., Chap. 3; 2003 SPC Circular, Article 2; Yang Lixin, *Yiliao Qinquan Falv yu Shiyong* 醫療侵權法律與適用 (Medical Tort Law and Practice) (Beijing: China Law Press, 2008), p. 4.
17. 2002 State Council Regulations, Article 24.
18. Each medical accident is assigned a grade ranging from 1 to 4 depending on the severity of injury, with grade 1 being the most severe and grade 4 being the least severe. 2002 State Council Regulations, Article 4.
19. Ibid., Article 31.
20. Ibid., Article 21.
21. Liang Huixing, "Yiliao Sunhai Peichang Anjian de Falv Shiyong Wenti" 醫療損害賠償案件的法律適用問題 (Issues Regarding Application of Laws to Cases Involving Medical Injury Compensation), *Renmin Fayuan Bao*

(People's Court Daily), 13 July 2005; Yang Lixin, *Yiliao Qinquan*, p. 259.

22. 2002 State Council Regulations, Article 28(2).
23. The Ministry of Health (MoH) has issued a series of ministerial rules defining the responsibilities of the medical service provider for failing to comply with evidentiary obligations. These include, notably, *Guanyu Yiliao Jigou bu Peihe Yiliao Shigu Jishu Jianding Suoying Chengdan de Zeren de Pifu* (The Reply on Responsibilities to Be Borne by the Medical Care Institution Failing to Cooperate in Medical Accident Authentication), issued by the MoH on 21 January 2005.
24. Cai Huiqun, "Bingli Zaojia: Weihe Chengwei Qianguize" 病歷造假：為何成為潛規則 (Falsifying Medical Records: Why Has It Become an Unwritten Norm), *Nanfang Zhoumo* (Southern Weekend), 21 March 2007.
25. Ibid.
26. "Zuigao Renmin Fayuan Minyiting Fuzeren jiu Shenli Yiliao Jiufen Anjian Ruogan Wenti Da Jizhe Wen" 最高人民法院民一庭負責人就審理醫療糾紛案件若干問題答記者問 (Interview with the Chief Justice of the First Civil Division of the Supreme People's Court on Issues Concerning the Application of Law in Adjudicating Medical Dispute Cases), in *Minshi Shenpan Zhidao yu Cankao (di shiba juan)* 民事審判指導與參考（第 18 卷）(Guide on Civil Trial [vol. 18]), edited by the First Civil Division of the Supreme People's Court (Beijing: China Law Press, 2004), pp. 3–7,.
27. Ibid., pp. 4–5.
28. 1986 GPCL, Article 106(2).
29. Promulgated on 6 December 2001, effective as of 1 April 2002.
30. The notion of reversal of the burden of proof is not entirely alien to Chinese law. Article 74 of the 2002 SPC Opinions on Several Issues Concerning the Application of the PRC Civil Procedure Law has provided for six circumstances under which the burden of proof can be reversed. Thus, Article 4(2)(8) is all but an extension of the 2002 SPC Opinions. See Song Chunyu, "Zuigao Renmin Fayuan Guanyu Minshi Susong Zhengju de Ruogan Guiding de Lijie yu Shiyong" 《最高人民法院關於民事訴訟證據的若干規定》的理解與適用 (Understanding and Application of "Several Regulations on Evidence in Civil Proceedings"), in *Minshi Shenpan Zhidao yu Cankao (di jiu juan)* (Guide on Civil Trial [vol. 9]), edited by the First Civil Division of the Supreme People's Court (Beijing: China Law Press, 2003), pp. 96–118.
31. Ernst Karner, "The Function of the Burden of Proof in Tort Law," in Koziol and Steininger, *European Tort Law 2008*, pp. 68–78
32. Huang Songyou, "Zai Quanguo Minshi Shenpan Gongzuo Zuotanhui shang de Jianghua" 在全國民事審判工作座談會上的講話 (Keynote Speech at the National Conference on Civil Trial), in *Minshi Shenpan Zhidao yu Cankao (di shisi juan)* 民事審判與參考（第十四卷） (Guide on Civil Trial [vol. 14]),

edited by the First Civil Division of the Supreme People's Court (Beijing: China Law Press, 2003), pp. 1–24; "Zuigao Renmin Fayuan Minyiting Fuzeren" 最高人民法院民一庭負責人 , p. 6.

33. Ivo Giesen, "The Burden of Proof and other Procedural Devices in Tort Law," in Koziol and Steininger, *European Tort Law 2008*, p. 49.
34. "Zuigao Renmin Fayuan Minyiting Fuzeren," pp. 6–7.
35. Ji Ming, "Zai Quanguo Minshi Shenpan Gongzuo Zuotanhui shang de Jianghua" 在全國民事審判工作座談會上的講話 (Keynote Speech at the National Conference on Civil Trial), in *Minshi Shenpan Zhidao yu Cankao (di sanshi juan)* 民事審判與參考（第三十卷）(Guide on Civil Trial [vol. 30]), edited by the First Civil Division of the Supreme People's Court (Beijing: China Law Press, 2007), pp. 62–74,.
36. Ibid.
37. "Zuigao Renmin Fayuan Minyiting Fuzeren," p. 7.
38. See, e.g., Patricia M. Danzon, *Medical Malpractice: Theory, Evidence and Public Policy* (Cambridge, MA: Harvard University Press, 1985); Daniel P. Kessler and Mark B. McClellan, "How Liability Law Affects Medical Productivity," *Journal of Health Economics*, Vol. 21 (2002), pp. 931–955.
39. Ji Ming, "Zai Quanguo Minshi Shenpan," p. 67 (noting the "relatively" higher levels of damages recoverable under the judicial regime); Intermediate People's Court of Guangzhou, "Hexie Yihuan Guanxi Goujian Falv Wenti Yanjiu" 和諧醫患關係構建法律問題研究 (A Study on Legal Issues Concerning the Construction of a Harmonious Physician–Patient Relationship), in *Yiliao Sunhai Peichang Jiufen* 醫療損害賠償糾紛 (Disputes over Medical Injury Compensation), edited by Yu Yongming (Beijing: China Law Press, 2009), pp. 264–297, p. 276 (noting that the levels of damages under the 2002 State Council Regulations are "substantially lower" than those under the judicial regime); also First Civil Division, Higher People's Court of Beijing Municipality, "Guanyu Yiliao Sunhai Peichang Jiufen Anjian de Shenli Qingkuang" 關於醫療賠償糾紛案件的審理情況 (Adjudication of Medical Injury Compensation Dispute Cases: Status Quo, Issues, and Suggestions), in *Panjie Yanjiu (di sanshi yi juan)* 判解研究 (Study of Cases and Judicial Interpretations [vol. 31]), edited by Wang Liming (Beijing: People's Court Press, 2006), p. 46.
40. First Civil Division, Higher People's Court of Beijing Municipality, "Guanyu Yiliao Sunhai Peichang," pp. 41–53, p. 42.
41. People's Court of the Haidian District, Beijing, "Guanyu Yiliao Jiufen Anjian Falv Shiyong Qingkuang de Diaocha Baogao" 關於醫療糾紛案件法律適用情況的調查報告 (Survey Report of the Application of Law in Medical Dispute Cases), *Falv Shiyong* (Journal of Law Application), No. 7 (2008), pp. 62–67.
42. Zhang Zheng and Wu Zhige, "Yiliao Jiufen Renshen Sunhai Peichang

Anjian Ershen Zhuanxiang Fenxi ji Yiliao Shigu Chuli Tiaoli Shishi hou Chuxian de Zhuyao Chayi" 醫療糾紛人身損害賠償案件二審專項分析及醫療事故處理條例實施後出現的主要差異 (An Analysis of Appellant Cases on Medical Personal Injury Compensation and of Major Changes after the Implementation of the Regulations on the Handling of Medical Accidents), *Shanghai Yixue* (Shanghai Medicine), No. 2 (2006), pp. 132–136.

43. First Civil Division, Higher People's Court of Jiangsu Province, "Guanyu Yilao Sunhai Peichang Jiufen Anjian de Diaocha Baogao" 關於醫療損害賠償糾紛案件的調查報告 (Survey Report on Cases Involving Medical Injury Compensation Disputes), *Renmin Ssifa* (People's Judicature), No. 10 (2002), pp. 21–25.
44. Yang Lixin, *Yiliao Sunhai Zeren Yanjiu* 醫療損害責任研究 (A Study on Medical Injury Liability) (Beijing: China Law Press, Beijing, 2009), pp. 11–13.
45. First Civil Division, Higher People's Court of Beijing Municipality, "Guanyu Yiliao Sunhai Peichang," p. 45.
46. Wang Lianggang, "Yiliao Shigu Chuli Tiaoli zai Yiliao Jiufen Minshi Susong Guocheng zhong de Bianyuanhua"《醫療事故處理條例》在醫療糾紛民事訴訟過程中的邊緣化 (Marginalization in Medical Civil Proceedings of the *Regulations on the Handling of Medical Accidents*), *Dangdai Yixue* (Modern Medicine), No. 10 (2005), pp. 26–30; Liu Hong, "Yliao Shigu Chuli Tiaoli Shishi Sanian: Yuanhe bei Lengluo" 醫療事故處理條例實施三年：緣何被冷落 (Three-Year Implementation of the Regulations on the Handling of Medical Accidents: Why Are They Left in the Cold?), *Yiyuna Lingdao Juece Cankao* (Hospital Decision-Making), No. 9 (2006), pp. 39–41.
47. Yang Lixin, *Qinquan Zeren Fa*, p. 411.
48. Xiao Xiaohui and Qiao Ning, "Cong Juzheng Zeren Daozhi Tan Fangyuxing Yiliao" 從舉證責任倒置談防禦性醫療 (Defensive Medicine: From the Perspective of the Reversal of Burden of Proof), *Dangdai Yixue* (Contemporary Medicine), No. 11 (2003), pp. 33–34.
49. See, e.g., Wang Qiongshu and Wang Fang, "Cong 'Yiliao Juzheng Zeren Daozhi' Kan Fangyuxing Yiliao" 從「醫療舉證責任倒置」看防禦性醫療 (Defensive Medicine: From the Perspective of "Reversed Burden of Proof in Medical Negligence Actions"), *Nanjing Yike Daxue Xuebao (Shehui Kexue Ban)* (Acta Universitatis Medicinalis Nanjing [Social Science]), No. 9 (2004), pp. 189–192.
50. Wang Qiongshu and Liu Youying, "Fangyuxing Yiliao jiqi Lunli Sikao" 防禦性醫療及其倫理思考 (Defensive Medicine: An Ethical Perspective), *Huanan Guofang Yixue Zazhi* (Military Medicine Journal of South China), No. 4 (2004), pp. 53–55.
51. In the political economy analysis of lawmaking, judges do not always appear on the radar as they are perceived to be neutral and reactive. In our

context, however, judges are not disinterested. Medical negligence cases tend to be perplexing and time-consuming, and the mishandling of them can erode the legitimacy of the judiciary. Thus, Chinese judges have an interest in the enactment of legal rules that are, in their view, best able to effectively and efficiently handle medical negligence cases.

52. Civil Law Section, Legislative Affairs Commission of the NPCSC, ed., *Qinquan Zeren Fa Lifa Beijing he Guandian Quanji* 侵權責任法立法背景和觀點全集 (Tort Liability Law: A Comprehensive Collection of Legislative Background and Views) (Beijing: China Law Press, 2010).
53. These include Austria, France, Germany, Japan, the Netherlands, Poland, and the United States.
54. Legislative Collection, pp. 831–834.
55. Ibid., pp. 820–826.
56. Ibid., p. 1.
57. For the 2008 bill, see http://www.qinquan.info/625v.html.
58. Yang Lixin, *Qinquan Zeren Fa: Tiaowen Beihou de Gushi yu Nanti* 侵權責任法：條文背後的故事與難題 (Tort Liability Law: Anecdotes and Issues Behind Statutory Provisions) (Beijing: China Law Press, 2010), p. 3.
59. Liang Huixing, *Zhongguo Minshi Lifa Pingshuo: Minfadian, Wuquan Fa, Qinquan Zeren Fa* 中國民事立法評說：民法典、物權法、侵權責任法 (Comments on Civil Legislation in China: Civil Code, Property Law, and Tort Liability Law) (Beijing: China Law Press, 2010), p. 274.
60. These circumstances included (1) violating laws, administrative regulations, rules, and guidelines regarding medical health administration; (2) concealing, or refusing to provide, medical documents or relevant materials in relation to the medical dispute; and (3) forging or destroying medical documents or relevant materials. See Article 58, 2008 Bill. In comparison, the 2010 Tort Liability Law contains a revised Article 58, which provides for three similar circumstances as follows: (1) violating laws, administrative regulations, rules, and guidelines prescribing the standards of medical treatment; (2) concealing, or refusing to provide, medical records in relation to the dispute; and (3) forging, falsifying, or destroying medical records.
61. See note 32 and the accompanying text.
62. It is generally agreed among leading academics that the standard of proof for civil proceedings in China is one based on the doctrine of actuality (or the doctrine of factuality), which emphases on "objective trueness." This doctrine places a much higher standard of proof than proof on the balance of probabilities and proof beyond reasonable doubt. See Jiang Wei and Sun Bangqing, *Minshi Susong Fa* 民事訴訟法 (Civil Procedure Law) (Beijing: China Legal Publishing House, 2008), pp. 189–190; Zhang Weiping, *Minshi Susong Fa* (Civil Procedure Law) (Beijing: Renmin University of China Press, 2011), p. 160. See also Zhang and Zwier, "Burden of Proof," pp.

431–432, 451–454.

63. This view was also one of the judiciary during the legislative process; see note 83 and the accompanying text.
64. See CMDA's website: http://www.cmda.gov.cn/xiehuijieshao/xxjj.html.
65. See CMDA's website: http://www.cmda.gov.cn/xiehuijieshao/xiehuilingdao/huichang/2010-12-21/8438.html.
66. See CMDA's website: http://www.cmda.gov.cn/xiehuijieshao/xiehuilingdao/fuhuichang/.
67. See CMDA's website: http://www.cmda.gov.cn/xiehuijieshao/xiehuilingdao/mingyuhuichang/.
68. See CHA's website: http://www.cha.org.cn/GD/GeneralDocument/GDContent.aspx?ContentId=2518&ClassId=121&ChannelId=22.
69. See NPC's website: http://www.npc.gov.cn/npc/fwyzhd/2008-03/15/content_1576189.htm.
70. Feng Yue and Zhang Huajie, "Quanguo Renda Changweihui Fenzu Taolun Qinquan Zeren Fa deng Duoxiang Cao'an" 全國人大常委會分組討論侵權責任法等多項草案 (NPCSC Panels Considered Tort Liability Bill and Other Bills), *Zhongguo Guangbo Wang* (China Radio Net), 23 November 2008.
71. As per Deng Liqiang, head of the Legal Department, CMDA. See http://www.cmda.gov.cn/topic/qinquan/dengliqiang.html.
72. Zhang Yanping and Chen Hui, "Lifa neng Kendong Yihuan Jiufen Zhekuai Gutou" 立法能啃動遺患糾紛這塊骨頭 (Legislation Is the Solution to Medical Disputes), *Yishi Bao* (MD Weekly), 5 February 2009.
73. As per Deng Liqiang, head of the Legal Department, CMDA. See http://www.cmda.gov.cn/topic/qinquan/dengliqiang.html.
74. As per Zheng Xueqian, vice-chair of the Legal Affairs Committee, CHA. See jnswsj.gov.cn/upfiles/file/201006/20100613150018547.ppt.
75. Legislative Collection, pp. 831–834.
76. Ibid., p. 832.
77. "Jiangxi, Anhui Liangsheng Qinquan Zeren Fa Diaoyan Baogao" 江西、安徽兩省侵權責任法調研報告 (Report on the Consultation Trips in Jiangxi and Anhui Provinces [Part II]), Legislative Collection, pp. 296–301.
78. Ibid., p. 299.
79. "Gansu Sheng Youguan Bumen, Renda Daibiao, Yiliao Jigou, Huanzhe he Zhuanjia dui Yiliao Sunhai Zeren de Yijian" 甘肅省有關部門、人大代表、醫療機構、患者和專家對醫療損害責任的意見 (Opinions of Relevant Departments, Deputies of People's Congresses, Medical Care Institutions, Patients and Experts in Gansu Province Regarding Medical Injury Liabilities), Legislative Collection, pp. 800–814.
80. Ibid., pp. 805–806.
81. Ibid., p. 806.
82. "Faguan dui Qinquan Zeren Fa Cao'an de Yijian (yi, er) 法官對侵權責任

法草案的意見（一、二）”(Opinions of Judges on the Tort Liability Bill [Parts I & II), Legislative Collection, pp. 216–242.

83. Ibid., p. 235.
84. “Mou Fayuan Yanjiushi dui Yiliao Sunhai Zeren de Yijian” 某法院研究室對醫療損害責任的意見(Opinions of a Court’s Research Office on Medical Injury Liabilities), Legislative Collection, pp. 815–820.
85. “Mou Lvshi Xiehui dui Yiliao Sunhai Zeren de Yijian” 某律師協會醫療損害責任的意見 (Opinions of a Lawyers’ Association on Medical Injury Liabilities), Legislative Collection, pp. 820–826.
86. Ibid., pp. 822–823. This view has been widely held among academics. See, e.g., Xiao-Yang Chen, “Defensive Medicine or Economically Motivated Corruption? A Confucian Reflection on Physician Care in China Today,” *Journal of Medicine and Philosophy*, Vol. 32 (2007), pp. 635–648; William C. Hsiao, “When Incentives and Professionalism Collide,” *Health Affairs*, Vol. 27 (2008), pp. 949–951; Chunyan Ding, “Medical Negligence Law in Transitional China: A Patient in Need of a Cure,” available at http://hub.hku.hk/bitstream/10722/61086/1/FullText.pdf; Edwin C. Hui, “The Contemporary Healthcare Crisis in China and the Role of Medical Professionalism,” *Journal of Medicine and Philosophy*, Vol. 35 (2010), pp. 477–492.
87. Yuan Xiang and Wang Yiying, “Qinquan Zeren Lifa Xu Shenshen Keguan” 侵權責任立法須審慎客觀(Tort Liability Legislation Shall Adopt a Prudent and Objective Approach), *Guangming Ribao* (Guangming Daily), 30 October 2009.
88. “Guanyu Yiliao Sunhai Zeren: Qinquan Zeren Fa (Cao’an) Shenyi Zhai Deng” 關於醫療損害責任：侵權責任法（草案）審議摘登(Selected Remarks on Tort Liability Bill at the NPCSC Panel Meetings: On Medical Injury Liabilities), NPC website: http://www.npc.gov.cn/npc/xinwen/2009-11/12/content_1526481.htm.
89. See NPC website: http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2009-11/06/content_1525914.htm#.
90. “Shehui Gongzhong he Youguan Danwei dui Qinquan Zeren Fa Cao’an de Yijian” 社會公眾和有關單位對侵權責任法草案的意見 (Opinions of the Public and Relevant Departments on the Medical Liability Bill), Legislative Collection, pp. 111–121.
91. Ibid., p. 118.