

Medical finding or diagnosis?

On the difference between the diagnostic error and the error of medical finding and its effects on the medical practice.

The differentiation between errors in medical findings and diagnostic errors is one of the most important problems of medical malpractice law. This is due to the fact, that under different circumstances both errors can lead to a reversal of the burden of proof regarding the causal link between breach of duty and infringement of rights. In the area of medical malpractice liability, such a reversal of the burden of proof with regard to the causality between treatment error and damage to health is regularly of decisive importance in litigation. Thus, a careful jurisprudential penetration of the problem is highly advisable. The dissertation proceeds in three steps.

The medical finding error

Firstly, the error of finding is located in the context of medical treatment. Its prerequisites are described in more detail and the legal consequences of the reversal of the burden of proof are examined. The medical treatment of a patient can be divided into the areas of medical finding (information acquisition), diagnosis (information interpretation) and therapy (information implementation). If the physician makes treatment errors in these areas, this can lead to a reversal of the burden of proof with regard to the causality between treatment errors and damage to health in accordance with the requirements of § 630h para. 5 sentence 2 BGB. Within the framework of the diagnosis, a reversal of the burden of proof can only be considered in the case of a serious error of treatment within the meaning of § 630h para. 5 sentence 1 BGB. This means that the liability risk for physicians in the case of treatment errors is greater in the area of medical findings than in the area of diagnosis. This is generally considered desirable in terms of legal policy against the background of medicine that is fallible according to the current state of science and technology. In addition, the legitimation of the reversal of the burden of proof by case law is critically examined and an alternative legitimation approach is presented. This is based centrally on the idea of increasing the risk for the patient, the weight of the legal interests involved and the special relationship of care between the doctor and the patient.

Differentiation between the medical findings error and the diagnostic error

Secondly, this paper deals with the central problem of the distinction between the diagnostic error and the error of medical finding. For this purpose, the existing approaches of case law and literature are presented in detail and critically examined. Subsequently, an own delimitation model is developed and criteria are worked out which can facilitate the delimitation. The jurisprudence strictly distinguishes between the simple and the serious diagnostic error and makes the decision between them in each individual case. However, clear criteria of demarcation or their weighting are not developed by the courts in the individual case decisions. In addition, it appears problematic that since 2010 the Federal Court of Justice has required the physician to be aware of the symptoms which would have indicated that the collection of further medical findings was necessary. On the one hand, this entails practical difficulties in providing evidence and, on the other hand, adds a penalty component to the error of assessment. For this reason, case law in the literature is accused of lacking transparency, comprehensibility and arbitrariness in these decision-making processes. However, the approaches proposed by the literature also have their weaknesses. For example, they partially deny the existence of the error of medical finding, massively expand its scope of application, or produce delimitation formulas that are no less vague than those of case law.

Instead, the problems of medical finding errors could be solved differently. For example, the medical finding error could be evaluated from a purely objective perspective, in that, in addition to the omitted

acquisition of medical findings, the omitted analysis of those findings would also be evaluated as a medical finding error. This is because both elements are a component of information acquisition and thus of the medical finding in the context of medical treatment. This would mean that the medical finding error would lose its practical difficulties in providing evidence as well as its penal component. Further, the evaluation of errors in medical reporting should be based on comprehensible and transparent criteria. This may be based on previous decisions in case law. Even though the reasons for the delimitation have not been explicitly dealt with so far, they are still based on criteria that are introduced into the processes by medical experts. On this basis, a catalogue of disease-, findings- and diagnosis-related criteria has been developed in the paper, which can be continued and weighted by case law. This could not only make decisions more transparent and predictable in the future, but also improve communication between the courts and the experts.

Economic analysis and practical implications of the error of finding

Thirdly, the simple error of assessment is considered from the perspective of the economic analysis of law and its effects on medical practice are examined.

The economic analysis of law examines the extent to which legal regulations are efficient. In the area of liability law, the aim is to avoid damages efficiently. In concrete terms, this means that only expenditures for damage avoidance should be made that do not exceed the corresponding damages. Otherwise, society would suffer an economic disadvantage because damage would be avoided, but too much expense would be incurred. In the area of medical malpractice liability, this means that doctors should be motivated to take preventive measures up to a maximum of the damage incurred. This is achieved by requiring physicians to compensate exactly the damage they have caused themselves. In the area of uncertain causal processes, this goal is not easy to achieve. For it is not clear whether the doctors have actually caused the damage or the damage occurred because of predispositions of the patients. Therefore, the liability obligation to pay compensation should be based on the probability of causation. If the probability of liability corresponds to the probability of causation, doctors must on average compensate exactly the damage they caused. This would motivate doctors to avoid losses efficiently, which would ultimately be expressed in the adjustment of liability insurance premiums. The preconditions of the medical finding error offer the possibility of orienting oneself towards this probability of causation. Thus, the recognition of the medical finding error is basically a means of promoting efficient loss prevention.

Subsequently, the practical effect of the case law on the medical finding error is examined. In particular, the extent to which case law and legislation have influenced medical practice is investigated. To prove such an impact, the physicians' reporting behaviour, the patients' process behaviour and the number of large medical-technical devices since 1982 were analysed econometrically and compared with the legal decisions on simple reporting errors. The number of surveys, the equipment required for them and the legal assertion of the simple error in the reporting of findings have increased significantly in the periods investigated. In principle, this could indicate that the liability risk of the medical finding error has influenced both medical practice and patient behaviour. As a result, however, no statistically significant correlation could be established between the court rulings and legislative decisions on the medical finding error and the aforementioned effects on medical practice or patient behaviour. The reasons for this may be that physicians are insufficiently informed about the liability risk of the medical finding error and misjudge the risk, the data are distorted by external shocks, or the available data material is not sufficiently meaningful. Further research will be needed in this area in the future.