How to avoid liability litigation in courts – Suggestions from a German example

So lassen sich Haftpflicht-Prozesse vor Gericht vermeiden – Vorschläge an Hand des Vorgehens in Deutschland

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Abstract

The medical art is difficult, its results can not always be predicted. After looking at TV, patients know more or think they know more about medicine. They tend to assume faulty diagnostics or treatment by their physician, if the good result promised by the news-media or by the doctor himself has not been obtained.
The resulting litigation in court is time-consuming, causes a lot of paperwork and frequently leads to negative publicity for the doctor in the local news-media. Therefore, in 1975, the German Medical Associations in the different federal areas have founded expert committees to help solve this problem.
These avoid negative publicity, heavy expenses and law-suits. Presidents of these committees are high-level judges – mostly retired – with experience in the field. They are masters of the procedure, choose the experts and formulate the final draft. This structure invalidates the understandable suspicion that physicians will protect each other or – as we say in Germany:
"A crow will not hurt the eye of another one". The system is now well accepted by liability insurances, lawyers and patients.

Zusammenfassung

Die medizinische Kunst ist schwierig, und ihre Ergebnisse lassen sich nicht immer voraussagen. Fernseh-erfahrene Patienten wissen mehr oder glauben mehr über Medizin zu wissen. Sie vermuten Fehler bei der Diagnostik oder der Therapie, wenn die von den Medien oder vom Arzt selbst versprochenen guten Resultate nicht erzielt werden konnten. Die daraus resultierenden Auseinandersetzungen vor Gericht kosten Zeit und Geld, führen zu erheblicher Schreibarbeit und lösen häufig eine negative Publizität für den betroffenen Arzt in den lokalen Medien aus. Deswegen haben 1975 die Ärztekammern in verschiedenen Bezirken der Bundesrepublik Gutachterkommissionen gegründet, um diese Probleme lösen zu helfen.
Sie vermeiden negative Publizität, hohe Ausgaben und Gerichtsverfahren. Die Vorsitzenden dieser Kommissionen sind hochrangige Richter – meist im Ruhestand – mit einschlägigen Erfahrungen. Sie steuern das Verfahren, suchen die Gutachter aus und fassen den endgültigen Bescheid ab. So wird der verständliche Verdacht ausgeräumt, dass Ärzte sich gegenseitig schützen oder – wie wir in Deutschland sagen – „Eine Krähe hackt der anderen kein Auge aus". Inzwischen wird dieses System von Haftpflichtversicherern, Rechtsanwälten und Patienten gut angenommen.

Letter

Especially in periods without dramatic events, the public is very interested in lawsuits concerning medical malpractice. As a consequence the doctor involved suffers from a lot of negative publicity from the newspapers and television.
Figure 1 emphasizes this situation. It shows public interest in an art exhibition and in a malpractice suit in the art of medicine.

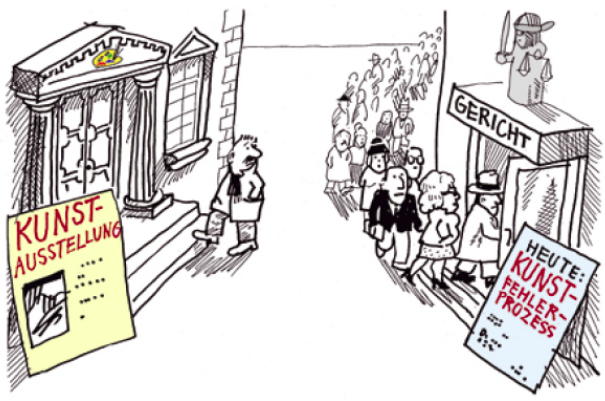

Figure 1: Public is interested in ...
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This unhappy situation and the often long duration of lawsuits has led the Medical Associations (Ärztekammern) in Germany which include all German medical doctors – even the retired ones – to establish expert committees to help resolve these problems with somewhat greater discretion.

The first German expert comittees (Gutachterkommissionen) were founded in 1975.

I myself serve in our regional committee since 1990 as first permanent medical consultant. This somewhat complicated title indicates an important fact: The commission is paid for by the Medical Association, the commission is headed not by a doctor, but by a highly qualified judge usually retired after presiding in high level-court for many years. He decides if a case is to be accepted, he chooses the medical experts and he renders the final decision.

My duty is to evaluate this decision and eventually to add my signature to those of the presiding judge and the medical expert who wrote the opinion on which the decision was based.

This predominance of a high-level judge guarantees that colleagues do not exculpate each other too easily and avoids the public suspicion "that one crow does not peck at the eye of another".

The type of medical specialists who are involved in our proceedings varies markedly:

Conservative treatment is much more safe and operative specialties are concerned much more frequently.

Table 1 ranks the operative procedures involved.

Our work is well accepted by the public and the money underlying its work – about 5% of the budget of our medical association – is well spent. In addition for every case decided on the liability insurers pay a fixed amount of 450 Euros. The proceedings are free of charge for the patient-plaintiff as well as the defendant doctor.

In 2007, in all of Germany 10,432 cases were handled by the commissions. In our small area, the Saarland, with one million inhabitants served by 4,226 doctors, we had to solve 110 cases in this year. These 110 cases compare to more than 200,000 treated patients per year.

Table 1: Operative procedures involved

Suspected malpractice	
The mediation committees treated in 2008 a total of 7133 claims concerning suspected malpractice, among them:	
Coxarthrosis	234
Gonarthrosis	230
Fracture of the lower leg	145
Fractures of the femur	136
Breast cancer	134
Fractures of the lower arm	131
Intervertebral discs	129
Back pain	107
Shoulder pain, bursitis	104
Lesions of the knee	100

Source: German Medical Association/dpa

They result mostly from complaints addressed to the "Ärztekammer", but also from suggestions of liability insurers and lawyers which appreciate our work.

The presiding judge accepts complaints concerning malpractice with a time limit of five years. Both parties involved have to consent to our arbitration and cases already pending in court have to be declined. Both parties involved can be represented by lawyers.

The committee founds its decisions on documented facts, x-ray, films taken during surgical procedures, but not on oral statements, since it cannot interrogate upon oath. This poses a problem if the plaintiff insists that he was not sufficiently informed concerning the proposed intervention or diagnostic procedure. In these instances we have to limit ourselves to the written document of consent. If this document cannot be presented by the doctor, he gets into serious trouble: because the burden of proof is reversed. Normally during a court procedure the plaintiff has to prove that there was malpractice, but in the case of proof-reversal, the doctor has to demonstrate that there was no such malpractice which is much more difficult.

This situation is due to the German legal system which considers that every surgical intervention is a physical attack if there was no informed consent by the patient or his legal representative.

I therefore tell my assistants to always add some personal remark, sign or drawing to the document of consent to prove that a valid and personalized information has taken place.

During my twenty years in this field, I was astonished by the fact that throughout Germany and over time the rate for the recognition of complaints stays pretty constant at around one third.

In the relatively small number of cases in my home-area this rate of recognition varies from year to year between 24 and 35%.

Each third plaintiff is thereby confirmed in his opinion and entitled to ask for compensation.
The amount has to be fixed by the lawyers and the insurances involved. In some rare instances, we propose ourselves a financial agreement.
In very few cases (about 5%) one of the parties involved does not accept our decision and goes to court. But generally to no avail as in more than 90% the courts follow our line of thinking [1] (Figure 2).

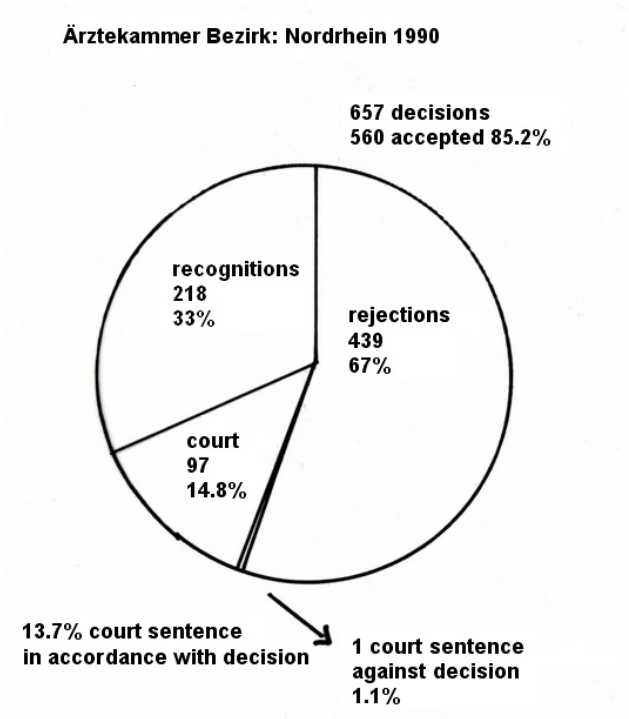

Figure 2: Most decisions are upheld in court.

This recognition figure of around 30% compares to the results of civil law-suits concerning medical malpractice, with only 4% of convictions [2]. This low figure demonstrates how heavy the burden of proof weighs on the plaintiff.
The sums involved can reach huge amounts: maximum 4 Mio. Euro for a newborn with a normal life expectancy. So in 2001 already, an obstetrician had to pay 15.000 Euro as annual premium for his liability-insurance, compared to 300 Euro by a general practitioner. This liability insurance is obligatory for every practicing doctor.
I insist very much on the choice of the experts: A practitioner for a practitioner, a medical superintendent for a colleague of his standing and university professors for other professors. This procedure avoids exorbitant demands by a specialist expert on a general practitioner. In the meantime, we have a pool of excellent experts in the Saarland. But we have a problem in this small area: for rare procedures and diseases we have sometimes only one or two specialists, and we have to ask outside the Saarland for experts at higher costs.
We are also able to profit more and more from guidelines. The last lines in these guidelines state almost always that these recommendations cannot be used for legal decisions. But lawyers and experts rely more and more on these descriptions of the state of the medical art, even if they are not prescriptions, but only recommendations for about 4/5 of the medical situations described. We tell the doctors that it is generally safe to follow these standards set by high-level experts, but that they can decide otherwise, if they have well-founded reasons for their differing approach in an individual patient.
Another advantage of the mediation committees (Schlichtungsstellen) is: they work much faster: We need for our decision an average of 9 months; some courts take 2½ years for their fastest decisions, not as an average.
Our system of these "health courts" is about to be introduced into the US following the health care reform of President Obama [3].
After many years the decisions of the mediation committees are now (since 2006) centrally registered and allow an overview as to which areas are especially liable to malpractice (Medical Error Reporting System (MERS) of the North German Medical Associations (Norddeutsche Ärztekammern)). We hope that the analysis of these data bases will result in proposals for improvements.
In addition, an anonymous central reporting system of near-mistakes will further help in this respect. This is CIRS=Critical incident reporting system close to the German Medical Association "Bundesärztekammer". The experience of airlines has shown, that anonymous reporting of potentially dangerous incidents (near-misses) which represent 99% of all potentially dangerous events is very helpful in finding solutions to prevent future mistakes.
Several more important points:

1. Many patients are not interested in any legal pursuit of their doctor, they just want to know if a mistake has occurred. Very often in spite of their doctor's explanation, they have no idea what has happened. By the way: one of my assistants working for his medical doctorate showed two normal x-rays: a thorax and an abdomen overview to laypeople. We were all astonished how little they knew and with how much fantasy they interpreted bosom, kidneys and heart [4]. Therefore: demonstrating x-rays to patients is not worth the effort in most instances.
2. Many legal procedures could be avoided, if the doctor involved talked sensibly with his doubtful patient.
3. Medical students and young doctors somewhat too proud of their newest knowledge start many of these procedures by stupid remarks in respect to preceding diagnostic or treatment measures.
4. The doctor should not promise "excellent" results of his endeavours, if he can not live up to his optimism.

What has impressed me very much during my 20 years of work in the health court is the manner of thinking of high level law-specialists. In many instances, I myself could see no solution, they then formulated the final draft after legal argument for example by "proof-reversal", which I could accept with a good conscience.

References

1. Madea B, Vennedey C, Dettmeyer R, Preuß J. Ausgang strafrechtlicher Ermittlungsverfahren gegen Ärzte wegen Verdacht eines Therapiefehlers. Dtsch med Wochenschr. 2006;131(38):2073-8. DOI: 10.1055/s-2006-951332
2. Winterthur. Geschäftsbericht. 2001. p. 6.
3. Mello MM, Gallagher TH. Malpractice reform--opportunities for leadership by health care institutions and liability insurers. N Engl J Med. 2010;362(15):1353-6. DOI: 10.1056/NEJMp1001603
4. Hoffmann P. Fehlinterpretation von Röntgenbildern durch medizinische Laien [Dissertation]. Saarbrücken: Univ.; 1983.

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