Review Article

Recent Developments of Medical Law

Summary. The most spectacular aspect is the extremely rapid expansion of medical law. Even if there is a close connection between developments in medicine and in law, the question must be asked as to what extent new discoveries and advances in medicine play a dominant role here, and to what extent the emphasis is on the further development of law.

How advances in medicine can give rise to new legal problems was most impressively demonstrated some time ago by the discussion about cerebral death. In view of the progress made in the field of re-animation and intensive care, the current question is whether or not the physician’s duties and rights to maintain life should be limited in hopeless cases when patients are incapable of making decisions themselves. This is demonstrated in particular by the discussion about the binding character of “patient testaments” in which healthy subjects declare that they do not want treatment under such circumstances. The decisive factor will continue to be the presumptive will of the patient at the respective time, and this will have to be ascertained considering all circumstances prevailing at that time. New questions with regard to the ethical and legal limitation of the technically feasible also arise from the possibility of culturing embryos from legal abortions or extracorporally fertilized ova to obtain transplants, and from the possibility of implanting extracorporally fertilized ova into the uterus, perhaps that of a “hired childbearing wet-nurse.” In addition to ethical and legal problems, questions of parentage would arise here similar to those already of current interest in connection with artificial heterologous insemination. For physicians practicing these methods, questions concerning liability and the limitation of professional secrecy vis-à-vis the semen donor might become the issue of law suits in the

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near future. Current problems of "unsuccessful sterilization" and non-
performance of an abortion through the physician's fault although abortion
was indicated for eugenic reasons are, on the other hand, primarily due to the
fact that the law—possibility even for acceptable reasons—establishes legal
obligations for the physician which, in the last analysis, aim at preventing
human life from coming into being. Other legal questions that have primarily
arisen from advances in the field of medicine concern the conflicts between
public interest, protection of data and professional secrecy engendered by the
possibilities of electronic data processing; other questions have to do with the
legal aspects of "controlled therapy studies" in which a random decision
would have to be made in order to determine the better therapy with statistical
methods, but where according to the principles of law the patient would
already have to be informed about statistically non-significant trends. Finally,
in view of an increasingly differentiated division of labor, the question of
responsibility in team work could be included in the list of legal problems
arising primarily from the advances of medical science.

For all that, the growth of legal subject matter is predominantly due to the
development of law by court decisions and by the literature, with emphasis
clearly being on the further development of the civil law concerning liability,
and much less in the field of criminal law. This in turn is also due to the
general advances in medical science inasmuch as the broadened spectrum of
diagnostic and therapeutic possibilities does not only give rise to an increasing
number of unavoidable intervention-related risks, but also to an increasing
number of avoidable mistakes, in particular those that are difficult to avoid.
Accordingly, it is becoming increasingly difficult to distinguish between un-
avoidable intervention-related risks and avoidable therapeutic mistakes.

In order to separate the delicate question of fault (malpractice) from the
financial liability of the physician it has therefore been proposed to regulate
indemnification claims for therapeutic failures by strict liability (Gefähr-
dungshaftung) or by a patient-risk insurance. In the meantime, these con-
siderations have been given up because they were found unsuitable.

What remained was the realization that the physician's liability under civil
law would often have to be linked to minimal errors and to culpability of a less
severe nature, in other words, to facts which are difficult to prove and for
which the ethical and moral charge of negligent homicide or bodily injury
according to criminal law would also be inappropriate. The courts have found
a problematic way out of this dilemma by founding the physician's liability
under civil law predominantly on the less severe charge that the physician has
failed to comply with his duty to inform the patient of the nature and gravity of
his illness and/or the intended therapeutic measures, since the burden of
proving patient information lies with the physician. As a result, the demands
on the extent of patient information were set increasingly higher, forcing the
medical profession to expand this information more and more, and to secure
evidence of having given information by handing out information brochures
and have patients sign a form that information had been received. Thus a
specific German variety of "defensive medicine" came into being, a "culture
of small print" (Weyers 1978) that is threatening to destroy the confidential
relation between physician and patient. The courts have realized this and are
now obviously trying to let themselves be guided again to a greater extent by