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GERMANY

MEDICAL DISCLOSURE OF TREATMENT ALTERNATIVES

This report concerns the standard of disclosure applicable to German physicians with regard to informing patients of alternative treatment options.

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MEDICAL DISCLOSURE OF TREATMENT ALTERNATIVES

Executive Summary

Although it is often stated in the German legal literature that the physician is required to disclose alternative treatment methods to the patient in order to obtain his informed consent prior to a medical treatment, the existing case law appears to be somewhat restrictive, by applying the principle mainly in egregious cases involving controversial, novel, or very risky treatments. The standard of disclosure has evolved from medical malpractice litigation and is not based on statutory law.

In Germany, medical disclosure is not governed by specific statutory provisions. Instead, disclosure requirements have evolved from the case law on medical malpractice,¹ which is based on the general torts law provision of section 823 of the Civil Code.² On the basis of this very broad statutory provision, the courts have developed medical disclosure requirements.³ These, however, aim at striking a balance between the constitutional right of the patient to give or withhold his informed consent⁴ and the physician's right to choose the appropriate treatment.⁵

The cases on the duty to inform of different treatment methods reflect this tension between the doctor's choice of treatment and the patient's right to disclosure. In 1991, the Federal Court of Justice held that a requirement to inform of an alternative treatment exists when it is foreseeable that a patient will require a blood transfusion during an operation. In such a case, the physician must inform the patient of the alternative of giving blood himself, to be used during the operation and thereby to avoid the risk of infection from contaminated blood.⁶ In 1996, however, an appellate court held that the disclosure of the possibility to donate his own blood was not required when a blood transfusion was urgently needed and there would have been no opportunity to collect the patient's blood.⁷

¹ CHRISTIAN KATZENMEYER, ARZTHAFTUNG 77 (Tübingen, 2002).

² Bürgerliches Gesetzbuch, repromulgated Jan. 2, 2002, BUNDESGESETZBLATT [official law gazette of the Federal Republic of Germany] I at 42.

³ KATZENMEYER, *supra* note 1, at 326.

⁴ Bundesverfassungsgericht (Federal Constitutional Court) decision of July 25, 1979, 52 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 131, 171.

⁵ KATZENMEYER, *supra* note 1, at 331.

⁶ Bundesgerichtshof (Federal Court of Justice) decision of Dec. 17, 1991, 116 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN 379.

⁷ Oberlandesgericht [Higher Regional Court] Düsseldorf, decision of Mar. 7, 1996, *reprinted in* NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1996, 1599.

In three decisions of 2006 and 2007, it becomes apparent that a duty to disclose other treatment methods is more likely to ensue if the treatment recommended by the physician is new, controversial, or falls outside the realm of established conventional medicine.⁸ Other cases of 2007 indicate that the disclosure requirement of other treatment options increases with the riskiness of the recommended treatment. Several of these recent cases dealt with gynecological issues including birth, and one case dealt with a dentist's duty to inform of alternatives to dental implants.⁹

Despite this apparently restrictive case law, the legal literature continues to insist that the disclosure of alternative treatments is generally required, albeit only if truly equivalent treatment methods are available.¹⁰ A governmentally sponsored primer on patient's rights that was prepared by leading medical and legal experts¹¹ describes the duty to disclose alternative treatments as follows:

If several equivalent medical treatments or treatment methods come into consideration, the physician must provide extensive disclosure on the chances and risks. The patient may select the treatment.¹²

It seems unlikely that this wording requires a physician to inform a patient of treatments belonging to the sphere of alternative medicine as being equivalent to state-of-the-art conventional medicine. Although Germany has in the past developed various schools of naturopathic and homeopathic medicine, and although a large percentage of the German population believes in these treatments, they are generally not covered by the social health care system and the medical establishment does not generally consider these methods as being effective.¹³

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⁸ Cited and analyzed in Marcus Vogeler, *Die Haftung des Arztes bei der Anwendung neuartiger und umstrittener Heilmethoden nach der neuen Rechtsprechung des BGH*, MEDIZINRECHT 2008, 697.

⁹ Cited and analyzed in Andreas Spickhoff, *Die Entwicklung des Arztrechtes 2007/2008*, NJW 2008, 1636, 1640.

¹⁰ *Id.* Vogeler, *supra* note 7, at 704; KATZENMEYER, *supra* note 1, at 331.

¹¹ Bundesministerium für Gesundheit & Bundesministerium der Justiz, *Patientenrechte in Deutschland Leitfaden für Patientinnen/Patienten und Ärztinnen/Ärzte*, available at <http://www.bmj.bund.de/files/-/3015/Patientenrechte%20in%20Deutschland.pdf> (last visited Jan. 12, 2010).

¹² Translated by the author.

¹³ Hufelandgesellschaft e.V., *Bündnis Komplementärmedizin*, available at http://www.hufelandgesellschaft.de/pdf-downloads/buendnis_wahlpruefsteine.pdf (last visited Jan. 12, 2010).