HEALTHCARE & LIFE SCIENCES - AUSTRIA

Spiritual healing – no (illegal) quackery

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The delineation between medical treatment and quackery is not always easy to draw. A recent Supreme Administrative Court decision has brought some clarifications as to what constitutes legitimate medical treatment as opposed to illegal quackery.

Overview

According to Section 2(2) of the Act on Physicians, the exercise of the medical profession comprises any activity based on medical-scientific cognitions, performed directly on humans or indirectly for humans, in particular:

- the examination of the presence or absence of:
  - physical or psychological diseases or disorders;
  - disabilities or malformations; or
  - anomalies of a pathological nature; and
- the treatment of such conditions.

According to Section 3(1) of the act, the self-employed exercise of the medical profession is reserved exclusively for general practitioners, approved physicians and specialists. Section 42(1) of the act permits the performance of complementary or alternative medical methods of treatment by persons not permitted to exercise the medical profession for demonstration purposes. The performance of medical activities by non-physicians is subject to a fine according to Section 199 of the act. Further, Section 184 of the Penal Code provides for imprisonment or a fine if a medical activity, solely reserved for physicians, is performed by someone without being entitled to exercise the medical profession in respect of a larger number of persons.

The applicant was fined by the district authority for performing activities reserved for physicians on a patient suffering from cancer between October 2014 and November 2015. At the beginning of the treatment the applicant had an extensive conversation with the patient who then had to lay down on a daybed. The applicant then stroked the patient from her feet to her head. During this process the applicant prayed and explained to the patient that this would give her energy to stimulate her body's capacity for self-healing. The applicant referred to himself as a 'spiritual healer' or 'faith healer'. After the treatment the applicant had another extensive conversation with the patient. The patient later died from cancer.

On appeal to the regional administrative tribunal, the decision was confirmed but the fine was reduced.(1)

Decision

The Supreme Administrative Court accepted the appeal and set aside the decision for unlawfulness. (2)

The court referred to the case law of the Supreme Court on unfair competition.(3) According to these

decisions, an activity based on medical-scientific cognitions is performed only if the applied methods have a certain degree of rationality and their performance typically requires comprehensive knowledge provided by medical training. The recommendation of a histamine-free diet to a patient suffering from eczema in combination with the offer to prepare a balm for treatment is an activity also performed by physicians and normally based on medical-scientific cognitions. However, advice provided by a non-physician on diseases and health disorders without prior examination is not based on medical-scientific cognitions and does not fall under the medical reserve. The same applies to an examination by illuminating fingernails with a flashlight or illuminating the pharynx and making energetic contact by touching the skin. Iris diagnosis also lacks the minimum rationality to fall under the medical reserve. Irrespective of the rationality of a method, medical knowledge is required if a method of treatment applied to the human body involves a significant health risk without prior medical consultation. In this respect, the application of a so-called 'AtlasProfilax-method' (a special type of neck massage) requires medical prescription.(4)

The Supreme Administrative Court also referred to its own 14 December 2010 (2008/11/0038) decision in which the court expressly followed the case law of the Supreme Court. The present case gives no reason for a different legal assessment.

In the court's opinion, the delineation of the medical reserve must be made on objective criteria. For an activity to belong to the medical reserve, the applied method must have a certain degree of rationality and the performance must require the comprehensive knowledge typically provided by medical training. The legal assessment in older case law that states that the wording "based on medical-scientific cognitions" is irrelevant for the delineation of the medical reserve, because it only relates to professional duties, is simply inconsistent with the wording of the law. The recitals of the law provide no indication that this wording about the definition of the medical profession is of no importance.

According to the findings of the regional administrative tribunal, the treatment of the patient which was described as "energy transmission" consisted of stroking the patient from feet to head and praying. The tribunal did not establish that a specific pressure in the sense of a particular manipulating activity was exercised. In light of recent case law, there is no indication that the performance of such a treatment requires the comprehensive knowledge typically provided by medical training or shows any rationality.

Comment

It may be surprising that such a case of obvious quackery is permitted, but this decision is consequential. The older case law based the assessment of quackery only on the question of whether an activity comprised an examination of the presence or absence of diseases, malfunctions or anomalies and considered the words 'medical-scientific cognitions' as irrelevant, because this criteria would only account for the imperative of duties of the medical profession and not as a precondition for the accountability of the diagnostic and therapeutic measures to the medical profession. By ignoring these words as a precondition of medical activity even irrational activities such as palm healing or faith healing become medical activities within the scope of the medical reserve. As long as such activities do not put the patient's health at risk, they do not fall within the legal scope of quackery.

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Endnotes

(1) Regional Administrative Tribunal Tyrol, 17 July 2017 (LVwG-2016/46/1079-5).

(2) Supreme Administrative Court, 26 April 2018 (Ro 2017/11/0018-3).

(3) Supreme Court 14 March 2006 (4 Ob 256/05h), Supreme Court 21 November 2006 (4 Ob 151/06v) and 5 October 2010 (4 Ob 155/10p).

(4) Supreme Court 8 June 2010 (4 Ob 62/10m).