HEALTHCARE & LIFE SCIENCES - AUSTRIA

No liability for in-depth specialist knowledge

07 November 2018 | Contributed by Preslmayr Attorneys at Law

AUTHOR

Rainer Herzig

The Supreme Court recently provided an extensive description of the principles of medical liability and held, in concrete terms, that the standard of care principle must not be overstretched.

Facts

The plaintiff in the case at hand had a renal carcinoma removed at the end of 2010. The plaintiff's general practitioner subsequently sent him for several follow-up exams with the defendant, a radiologist. The exams concerned the thorax, abdomen and pelvis areas and constituted cancer aftercare.

During the defendant's 9 March 2011 examination of the plaintiff, neither blood nor clinical findings were available. The computer tomography images taken by the defendant showed parts of the thyroid gland so that the entire thorax covered by the referral could be seen, but the defendant noticed no abnormalities in this regard. It was only afterwards – when the defendant knew that the plaintiff had been diagnosed with medullary thyroid carcinoma and was looking at a single image – that he could see an inhomogeneity. However, on 9 March 2011 the defendant had produced an x-ray report in which he stated, among other things: "No other pathological findings". The plaintiff's neck area had not been covered by the exam. However, if an examination of the thyroid gland had been required under the referral, the defendant would have performed an ultrasound exam (sonography).

At the end of 2011 the plaintiff learned that he was suffering from medullary thyroid cancer. Subsequently, his thyroid gland was removed and an implant was inserted. In 2015 he learned that one of the computer tomography images created by the defendant had shown abnormalities. The plaintiff sued the defendant for €63,000 in compensation and sought a determination of the defendant's liability for all future damages resulting from the diagnostic and treatment area and the lack of warning and clarification in connection with the 9 March 2011 exam.

First-instance and appeal decisions

The first-instance court dismissed the claim.(1) The appellate court referred the matter back to the first-instance court for a new hearing and decision and ruled that appeal to the Supreme Court was admissible.(2) The Supreme Court followed the defendant's appeal and restored the initial judgment.(3)

Supreme Court decision

The Supreme Court held that the liability standard provided for in Section 1299 of the General Civil Code applied to the defendant, who was a specialist physician. Physicians must provide conscientious care to their patients in accordance with medical science and their experience (ie, the level of care which is expected from a proper and dutiful physician in the same specific situation). Treatment must be carried out in accordance with the principles of medical science and the rules of

medical art. Whether a doctor has fulfilled their duty of care therefore always depends on how a responsible and conscientious doctor would have behaved in the same specific situation. A physician will not act negligently if their chosen method of treatment corresponds to a practice which is recognised by respected physicians familiar with this method. Conversely, a physician will violate the rules of medical art if their chosen measures fall short of the standard recognised in professional circles (ie, they will be considered negligent if they deviate from the behaviour assumed by diligent and attentive physicians or specialists).

Specifically, with regard to diagnostics, it is recognised that physicians must provide a diagnosis and information and advice according to the recognised rules of medical art. For example, liability may arise if a physician fails to provide a diagnosis that was indicated by their exams.(4) How a responsible physician would have proceeded in the same situation is a decisive factor in this regard; further investigations cannot be demanded if, according to the circumstances of the specific case, no indications or concrete suspicions of a disease or injury can be ascertained by such an investigation.(5)

In the present case, the plaintiff had been referred to the defendant by his family doctor for a follow-up examination of his thorax, abdomen and pelvis areas following the removal of a renal carcinoma. As the first-instance court correctly pointed out, the examination of the plaintiff's thyroid gland was therefore not the subject of the referral or part of the treatment contract between the parties. According to the findings, the defendant had completed the general radiologist training and taken part in further training required by the medical association, and the plaintiff did not claim that the defendant was unsuitable to carry out the follow-up exam ordered by the family doctor. However, according to the further findings, "a majority of radiologists with in-depth training" would not have recognised chance findings concerning the thyroid gland, which was the issue at hand.

As an 'expert' within the meaning of Section 1299 of the General Civil Code, the physician was not liable for exceptional knowledge and diligence, but rather for the knowledge and diligence of his fellow specialists. Thus, the performance level of the professional group concerned was a decisive factor. Consequently, an 'objective standard of fault' applied, which is defined by the typical abilities of the respective professional group. Since this depends on the usual diligence of the persons who perform the activity in question, an individual cannot relieve themselves by invoking a lack of individual abilities. However, the standard of due diligence must not be overstretched. If the standard is not the specific individual experience of a member of a certain sub-group of a profession, but the average knowledge to be expected in the industry, there is also no liability for extraordinary knowledge and diligence.

A skilled person must use knowledge which exceeds the standard of their professional group (ie, knowledge which is also exceptional for a skilled person), only where they actually possess such knowledge and where it requires only reasonable efforts on the part of everyone. For example, a physician who, on the basis of their own research, is aware of the particular harmfulness of a drug that is considered harmless in the professional world must not use that drug.(6) Similarly, a surgeon who is also a trained anaesthetist must, if necessary, use their additional knowledge.(7)

Thus, there is no liability for knowledge that exceeds that which is typical for an expert's professional group.(8) According to the explanations regarding experts in the first-instance proceedings (ie, that only 15% of radiologists recognise abnormalities in the thyroid area) and the findings, it could not be assumed that the average radiologist would have recognised the carcinoma as a chance finding. In his response to the appeal, the plaintiff referred to an article which stated that the standard of care cannot be defined on the basis of a university professor, but on the basis of an average physician who has no doctorate *sub auspiciis*, but has – on average – a satisfactory performance.(9)

Further, according to the findings, renal cell carcinoma is not associated with medullary thyroid carcinoma. Metastasis in the thyroid gland after a renal cell carcinoma occurs in only 5% to 7% of cases. The frequency of a medullary thyroid carcinoma in the Austrian population is less than 0.001%. Neither computer tomography nor multi-layer computer tomography are suitable methods for examining the thyroid gland, particularly in the context of a medullary thyroid carcinoma. Rather, a sonogram should be carried out. The computer tomography showed more than 2,500 single images and 320 multi-layer images, whereby the pathological (abnormal) findings would have been recognisable only on one to three images in the marginal area.

Considering all of these circumstances, there is no reason to assume that the defendant acted in such a way as to give rise to liability. The defendant did not have to vouch for enhanced specialist knowledge which he did not have.

Comment

The Supreme Court has confirmed that the expert liability provided for in Section 1299 of the General Civil Code is based on an objective standard and thus depends on the usual diligence of the persons who carry out the activity in question. As such, the performance standard of the occupational group concerned will be a decisive factor. According to Section 31(3) of the Act on Physicians 1998, medical specialists must limit their professional activity as medical specialists to their specialty. In the absence of exceptional circumstances, the (usually implied) treatment contract between a physician and their patient will concern only the physician's specialist area.

For further information on this topic please contact Rainer Herzig at Preslmayr Attorneys at Law by telephone (+43 1 533 16 95) or email (herzig@preslmayr.at). The Preslmayr Attorneys at Law website can be accessed at www.preslmayr.at.

Endnotes

(1) Vienna Regional Court, 54 Cg 57/15x.

(2) Vienna Higher Regional Court, 12 R 119/16g.

(3) Supreme Court, 6 Ob 233/17h.

(4) See also Supreme Court 1 Ob 244/16p, 7 Ob 95/17x, 8 ObA 12/17y and 4 Ob 115/17s.

(5) See also Supreme Court 10 Ob 23/15b and 1 Ob 244/16p.

(6) See also Supreme Court 10 Ob 501/89, 7 Ob 218/17k and 7 Ob 224/16s.

(7) See also Supreme Court 14 Ob 140/86.

(8) See also Supreme Court 6 Ob 16/16w and 7 Ob 224/16s.

(9) Pitzl, Huber and Lichtenegger, *The standard of care of the treating physician*, RdM 2007/2.