Austrian Cases on Medical Liability

BERNHARD A. KOCH*

Introductory Overview

The four cases presented in the following address key aspects of medical liability in Austria, although they can certainly not paint the full picture.¹ In order to put them into perspective at the outset, the following introductory remarks shall serve as a first sketch which at least in part will be coloured by the subsequent case examples.

Austrian liability law in general

The Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) contains a separate section on “liability and compensation” (§§ 1293-1341) which not only deals with tortious, but also with contractual liability.² While key elements of a claim for compensation are therefore treated alike for both varieties, it nevertheless does matter inasmuch as it is in some respects easier for the plaintiff to bring a claim based on the violation of a contractual obligation than if she had to build her case solely on the infringement of general duties protected by the law of delict. In particular, the duties of care in a contractual relationship go much further, the burden of proving fault is shifted onto the tortfeasor (§ 1298 ABGB), and vicarious liability is more extensive in the area of contract liability (§ 1313a ABGB).³

As far as medical malpractice is concerned, this is particularly important in cases where the patient has only contracted with a hospital, but not with the doctors that it employs. The hospital’s staff is only liable according to the law of delict, since the contractual duties of the hospital owed to the patient do not extend to them. One should note that there is no difference between public or private healthcare institutions in this respect: Liability of either entity vis-à-vis their patients are governed by the rules of contractual liability. This is also true in a patient-
doctor-social security triangle: Even though social security entitles patients by (public) law to claim treatment as benefits in kind from the doctors or hospitals (who have contracted with the social security carriers that in turn reimburse them), the relationship between patient and doctor or hospital is nevertheless considered to be of a contractual nature.4

Tortious liability in particular

Since there are significant advantages for the plaintiff to base her claim on the violation of a contractual duty, it is rather unlikely that a patient will seek compensation for medical malpractice solely on the grounds of the law of delict. It may nevertheless be instructive to first take a glance at the most basic concepts of tort law before proceeding to the special case of contractual liability, where the principles outlined in the following apply in the absence of special rules.

Causation5

In order to succeed with her claim, the plaintiff will first need to prove that her injuries were caused by the defendant (or someone or something within the latter’s sphere).6 This may be particularly difficult in cases of medical malpractice, not only when it comes to showing that the doctor has actively done something wrong, but even more so in cases of harmful omissions. In the latter case, Austrian courts are somewhat more lenient to the plaintiff, who does not have to prove with absolute certainty that the defendant’s behaviour has caused the injuries, but it suffices if it is highly probable that she would not have been injured if the defendant had acted as necessary under the circumstances.7 The defendant then needs to rebut such proof by bringing forward evidence that another cause was more likely to have triggered the patient’s harm.8 In some recent malpractice cases, the pendulum has swung even further towards the plaintiff whose evidence now merely has to outweigh9 the probability that there was another cause, while the defendants in turn have to prove “with utmost probability” that this other cause did indeed bring about the harm.10

Wrongfulness11

Even if the plaintiff succeeds in establishing that the defendant’s behaviour or that of her auxiliaries has caused the injuries, such conduct must have been wrongful and faulty in order to trigger liability.