



## Volume 13, Issue 1/2011 - Legal

### The Legal Emergency Kit

**Nothing is more difficult to change than prejudices and inflexible opinions. Thus, many legal practitioners hold the opinion (and rightly so to some extent) that they cannot change the matters they assess because these matters have not been caused by them. A criminal judge, who has to deal with traffic accidents occurring far away from his workplace on a daily basis, may be quite right in thinking this way, because, no matter how hard he tries, he cannot control or even influence the road behaviour of complete strangers in complex traffic situations. However, does this also hold true for a lawyer at the legal department of a large hospital, who is working together with a liability insurance company on the settlement of patient claims for damage to property or personal injuries?**

If anything, would it be objective to state that the active efforts of a hospital's legal department have a noticeable effect on damage prevention? Even in cases where improvements have been achieved, it is still debatable whether these improvements are attributable to intervention by the legal department or to other causes.

#### Fundamental Questions

Considering that damage events in a hospital represent an absolutely undesirable development for all parties involved (including patients, personnel, the hospital's administration, the liability insurance company, etc.), it would make sense to assume that all parties have already made every effort to analyse precisely the genesis of these events in order to prevent them from happening in the future. Following this reasoning, the relevant background would already be well known and no mistakes could possibly occur for a second or a third time since employees are constantly being trained. Unfortunately, the above-mentioned assumption is, by and large, not verifiable;

- Why would otherwise classic mistakes – such as wrong side surgery, medication errors and misinformation – be committed repeatedly?
- What is the reason for hospitals still having "blank spots" on their legal maps despite the flood of regulations by lawmakers?
- Why is the (relative) frequency of damages considered as a fixed and therefore almost entirely unchangeable value, with no attempts being made to reduce it?
- Why is it so difficult for the medical profession and related health science professions to accept other complex work environments as models for the minimisation of damage?
- Why aren't healthcare professionals fighting for a different way of dealing with mistakes and damages in the healthcare system?

The list of questions can be continued indefinitely.

#### New Approaches to Claims Processing

Dwindling financial and human resources have one significant side effect: They compel the persons in charge to at least, for once, look into the possibility of using new and creative methods. However, the

decisions finally made are not always genuinely creative.

Towards the end of the 90s, the financing of the Austrian hospital system became increasingly problematic. The economic characteristics of healthcare institutions can be summarised briefly as follows: They provide vital (in the truest sense of the word) services, which are (relatively) very expensive, because the work is rendered by highly qualified employees; these services are also available at night and during weekends, which results in extra costs; and, finally, the demand for such services continues to grow (simultaneously with the requirements of beneficiaries).

An economic paradox should be briefly touched upon here: If an intensive care unit succeeds in restoring a terminal patient back to health, this generates worse operating results as compared to when the patient dies quickly. While a paper mill can react to a worsened market and revenue situation by temporarily ceasing operations, this course of action would be nothing short of unthinkable for hospitals due to their statutorily imposed coverage mandates.

Yet nonetheless, hospitals can also operate (to some extent) based on economic criteria. The following section discusses the premiums for public liability insurance as a specific example to this effect. By paying the premium negotiated with their insurance company, insured persons obtain the right to receive compensation for damages resulting from the operation of the hospital. If the total claims settlement amounts grow continuously in the course of time, which has been the case for many years, premiums follow suit.

There are several possibilities to slow the increase of premiums. In the event of major damage, it is possible to introduce many types of deductibles for the insured healthcare institution. The coverage amount can be reduced in general or the insurance protection can be cancelled for several damage events and potentially modified to a self-financing model (in the hope that the insurance incident does not occur each year). On the part of the insurer, available options include measures such as the constant increase of premiums or, in extreme cases, the termination of the contractual relationship.

The interest situation of the contract partners seems evident here: The insurance companies that are geared towards making profit and the primarily public hospital legal entities have entirely disparate interests, i.e. profit maximisation and the greatest possible savings.

However, the approach of Vienna General Hospital's (AKH) legal department back in the year 2000 was entirely different. In the long term, both types of institutions have the same interests: They want as few damage events as possible, less payouts as a result and, consequently, smaller premiums. The latter may seem paradoxical with regard to insurance businesses, but this is easily explained. Since insurance companies are "constrained" to pay out dividends to their owners (primarily shareholders), it is important for them to gain surpluses from the "premium-to-claims settlement amount" ratio. As is well-known, however, balance sheets provide little information on the sums that they are based on. Therefore, the objective in 2000 consisted of minimising damages and the subsequent damage payments to such an extent as to break the trend of premium increases without pressuring insurance companies into a *zugzwang* (a compulsion to move) towards their owners and reinsurance companies. The question remains as to whether a legal department of a hospital is in a position to achieve this alone or in cooperation with others. In other words: Can a legal department, which, after all, does not normally deal with patients, have any impact on the development of damage claims?

### **Retrospective Damage Analysis**

In order to even begin to solve this apparently unsolvable medical and economic problem, it is necessary to find out the true causes of damaging events. Thus, it is not sufficient by any means to stop halfway by only establishing the facts. Even laypersons know that certain medical disciplines are more damageprone than others. Rather, the question was what factors (to some extent, entirely independent of the discipline) lead to the classic error types (omissions, mix-ups, oversights). Therefore, the survey conducted in 2005 analysed all cases of damages since the year 2000, which had caused costs exceeding 700 euro (previously ATS 10,000) based on approximately 40 parameters with the assistance of the liability insurance company. The parameters included not only

the age and length of service of those responsible for the damages, but also the time, weekday, month of occurrence as well as other factors such as communication or discipline-based aspects.

In summary, the following was established: The typical damage case occurs to an above-average employee in a risk-prone discipline especially often between Friday and Sunday in the months of January, March or July due to a preceding communication error, which resulted in the administration of the wrong medication.

It was remarkable that mistakes and, as a consequence, damages, were less attributable to skills than human weaknesses (lack of concentration, tiredness, overestimation of one's skills). Already decades ago, it has been established in other high-risk areas (for instance in aviation) that 80 percent of mistakes can be attributed to the human factor. Yet error prevention focuses exactly on this factor and staff are trained accordingly.

Even so, the insights of the retrospective damage analysis are relatively worthless if its results are, and remain, known only to the insurance company and the legal department of a hospital. Therefore the most important challenge was, on the one hand, to raise the awareness of the respective employees to (relatively infrequently occurring) cases of damage with a great impact, but without causing unnecessary panic and fear, on the other hand. The last point is especially relevant considering that those involved in such incidents very frequently tend to react in wrong way when they don't have access to proper assistance.

### **The Legal Emergency Kit**

In 2007, the "legal emergency kit" was introduced in the Vienna General Hospital after being developed jointly by the legal department and the liability insurance company. It represents a handy plastic case, which is labelled accordingly and on which a section sign (§) is stamped. Every employee must be able to access such a plastic case within one minute of his/her workplace.

The legal emergency kit contains manuals on the correct behaviour in the event of damage (notification of superiors and the legal department, establishment of communication with the damaged patient, etc.) as well as reporting forms, important general information on liability insurance and the book "Legal matters in everyday hospital life" ("Recht im Krankenhausalltag"). Each clinic or department is permitted to add further materials to the kit.

Due to its distinctive design, the case has a high attention-getting value. Employees in the hospital have to open and familiarise themselves with the content of the case even before an actual emergency occurs.

One year after its introduction, the following intermediate results can be established: Clear improvements could be registered in terms of the raising of awareness among employees with regard to proper behaviour in the event of damage and critical / undesirable events are now being reported even faster than before. In general, the interest in damage prevention has increased.

### **Fast Accessibility of Legal Aid in Delicate Situations**

Of course, the mere deployment of a certain number of legal emergency kits is not sufficient. The project only makes sense if legal advice is accessible quickly and non-bureaucratically in difficult situations. Since the office hours of a legal department do not usually correlate with the around-the-clock operation of a healthcare institution, it was necessary to address this problem as well. The solution here was to implement a telephone switchboard, via which the affected department could reach a lawyer after office hours in the evening and during the weekend. In most cases, initial advice over the telephone is sufficient, with the presence of the lawyer on site being essential only in some rarer cases.

Yet, why is this quick accessibility – for instance during weekends – so necessary? Many – lawyers – frequently argue that there is nothing so important, which cannot be dealt with early on the following workday. However, the fact of the matter is that all cases of damage, which have had long legal sequels, got out of control during the first three calendar days, i.e. independently of the weekday, on which the case occurred, due to incorrect behaviour of those involved. While the patient was already in contact with his or her lawyer, information was still underway to the legal advisor of the hospital.

The quickly accessible legal assistance is held in very high esteem by the hospital's employees; it means improved security, which ultimately benefits the patient. The damage statistics of AKH Vienna since the year 2000 show a clear reduction of the number of cases and also a decrease in the amount of damage claims payments. This can be attributed to many different measures including legal post-processing.

### **Summary**

The legal emergency kit is but one element contributing towards the successful reduction of damage claims cases in AKH Vienna. Team trainings on the basis of already closed cases are just as sensible as the teaching of discipline-specific legal knowledge to employees. However, sustainable success is possible only if the endeavours persist unabatedly and all participants do not stop their continuous work on improvement.

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