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Medical information duty: what constitutes reasonable steps to contact a patient?

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If a doctor recognises a patient's need for certain medical treatment, the doctor must inform the patient of the necessity of such treatment and the risks associated with not having it. The scope of this medical information depends on the individual case and doctors are not required to indicate all possible consequences of the treatment.

Facts

On 4 May 2012 a patient (the plaintiff) consulted a doctor (the defendant) because he felt anemic, had a headache and vertigo and felt discomfort. The defendant diagnosed cephalea and referred the plaintiff to an MRI institute for a head examination. The examination was performed in May 2012 and the findings showed the possibility of a glioma. The findings were not discussed with the plaintiff at the institute. The plaintiff collected the MRI pictures personally and dropped them off at the defendant's surgery. He did not take notice of the pictures or the findings. The defendant reviewed the findings and decided that they had to be discussed with the plaintiff. A few days later, the defendant's assistant tried to reach the plaintiff via the mobile number which he had left at the first consultation. Since the assistant could not reach the plaintiff by phone, they sent a letter asking the plaintiff to make an appointment. However, the plaintiff did not contact the defendant, who did not take further steps to reach the plaintiff.

Since the plaintiff had no further medical conditions, he did not make an appointment or consult with another doctor. In August or September 2014 the plaintiff noticed blurred vision in his left eye – essentially, double vision when looking to the left. These symptoms correspond with an abducensparese. In January 2015 the plaintiff consulted an ophthalmologist, who diagnosed a glioma in March 2015.

The findings of 2012 would have required further diagnostic confirmation by a neurologist. Although such verification was indicated, it was not urgent, but could have been made within three months. The glioma was likely already present in 2012 and could have been diagnosed. It is possible that in case of surveillance and treatment of the tumour, the neurologic deficit would not have occurred or would have been milder. From a medical perspective, it cannot be determined whether the plaintiff suffered a concrete health disadvantage and, if so, what this was.

The plaintiff claimed compensation for:

- pain and suffering;
- loss of earnings;
- the cost of special-purpose spectacles;
- the cost of hospitalisation; and
- the ascertainment of the defendant's liability for future damages.

Decisions

The first-instance court dismissed the claim for payment but granted the claim for ascertainment.(1) The appellate court reversed the judgment and remanded the case for further trial and decision.(2) Upon the defendant's appeal, the Supreme Court dismissed the claim.(3)

The medical information duty comprises the obligation to inform a patient of possible dangers and negative consequences of a treatment or failure to have such treatment. This information duty exists not only if the patient's consent to a medical treatment is required, but also if the patient must make an informed decision to

refrain from having further medical treatment. If the physician recognises that certain medical measures are necessary, they must inform the patient of their necessity and the associated risks.

Therefore, the defendant had been obliged to inform the plaintiff that he needed further diagnostic confirmation after reviewing the MRI findings. Contrary to the lower instances, the Supreme Court held that the defendant's efforts to contact the plaintiff were sufficient: the defendant had tried to reach the plaintiff not only by phone, but also by mail. In 2012 mobile phones registered received but not accepted calls, showing the number of the calling party, which allowed the receiver to call them back. In case of a change of phone number, it would have been the plaintiff's obligation to notify the defendant. In addition, the attempt to contact the plaintiff by mail was sufficient.

The present case is not comparable with Case 5 Ob 165/05h, in which the Supreme Court confirmed the liability of the defendant. In that case, the defendant had recognised anomalies in the MRI picture of a fetus and referred the plaintiff to a risk ambulance. However, the defendant did not inform the plaintiff of the fetus's possible abnormal development or that the purpose of the check-up was to verify whether there was a danger that she could give birth to a mentally and physically disabled child.

In Case 5 Ob 165/05h, the defendant had been in direct contact with the plaintiff and had had the possibility to not only suggest the consultation, but also inform her of the reasons for the suggestion. In the present case, the defendant did not have the possibility to inform the plaintiff directly but failed in his attempts to contact the plaintiff. Insofar as the facts of the present case are distinctive from those of Case 5 Ob 165/05h, it is unnecessary to further discuss the concerns addressed in literature.(4) Since in the present case the defendant's attempts to contact the plaintiff were sufficient, he cannot be accused of culpable conduct, so the claim for indemnity had to be dismissed.

Comment

Doctors' information duty is of the utmost importance for allowing patients to make an informed decision. However, patients must allow their doctor to provide this information. Consequently, the Supreme Court clearly distinguished between a doctor's information duty when both doctor and patient are present and the endeavours which a doctor must undertake to contact a patient to provide information when the patient fails to visit the doctor's surgery after dropping off the findings of an MRI or radiology exam without making an appointment.

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) Feldkirch Regional Court, 27 March 2019, 9 Cg 54/15y.

(2) Innsbruck Higher Regional Court, 9 October 2019, 4 R 90/19w.

(3) Supreme Court, 20 February 2020, 6 Ob 17/20y.

(4) Wilhelm, Ecolex 2006, 625; Merckens, AnwBl 2007, 237; and B Steininger, JBl 2007, 198.

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