THE SYSTEM OF SANCTIONS IN MEDICAL CARE RELATIONSHIPS IN FINNISH LAW

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1. INTRODUCTION

By virtue of their profession doctors, dentists and other medical personnel (henceforth referred to as health and nursing staff) are responsible for people's lives and health to a far greater extent than other professional groups.[1]

The law lays down specific requirements for those who are given the right to work professionally in the fields of health and nursing and only those with the appropriate qualifications and the prescribed training are regarded as qualified. In addition, professional conduct is supervised in various ways. Punishments and other disciplinary measures apply to health and nursing staff in order to satisfy the requirements of careful medical treatment.

2. PENAL SANCTIONS

In the Finnish Penal Code there is a special chapter (ch. 21) dealing with the punishment for crimes endangering life and health. This chapter contains certain provisions relating to premeditated crimes, e.g. manslaughter (sec. 1) and murder (sec. 2), premeditated assault (sec. 5), grievous bodily harm (sec. 6), wilfully causing pain or bodily harm (sec. 7), subjecting to danger (sec. 11) and causing danger (sec. 12).

It is obviously wrong to describe surgical operations or other measures of a medical kind that affect a person's body as amounting to premeditated assault or any of the other crimes mentioned in this chapter. Such measures are taken with the express or presumed consent of the sick person. Only measures taken against the wishes of the sick person (e.g. for purposes of experiment) could be classified as premeditated assault and lead to the punishment of health and nursing staff.[2]

The Penal Code makes no special mention of crimes against life and health committed by health and nursing staff. The crime specified in sec. 3, namely euthanasia, in the text of the Code the killing of a person at his earnest request,

[1] Health and nursing staff are defined more precisely in the Act on the Medical Profession of July 14, 1978, and the Act on the Dental Profession of the same date (1978: 562–563), as well as in the Act on the Nursing Profession of October 31, 1962 (1962: 554).

[2] See, *inter alia*, Inkeri Anttila, *Loukatun suostumus*, 1949, p. 174. See also Nils Beckman *et al.*, *Kommentar till brottsbalken I* (Commentary on the Swedish Penal Code), 4th ed. 1974, p. 156.

could conceivably arise in the relationship between an incurably ill person and his doctor or other medical attendant.

In sec. 13 it is laid down that everyone has a duty, on pain of punishment, to help another person whose life is in real danger, as long as the rescuer can provide this help without endangering himself or others.

Health and nursing staff probably find themselves having to take rescue measures of this kind more often than do members of other professions. The ethical duty of such staff also includes providing help in the event of illness and accident.

However, it should be emphasized that sec. 3, like sec. 13, affects everyone, irrespective of profession, who is guilty of the acts or omissions in question. So the fact that a person is a doctor, for example, should not lead to a different interpretation of these provisions.

This means, for example, that if no prior agreement concerning treatment exists a doctor may not be punished under sec. 13 for refusing to provide medical attention to a person whose life cannot be shown to be in real danger. Compare, though sec. 9(4) of the Act on the Medical Profession which obliges a doctor, on pain of the punishment provided for in the Act, to provide medical attention to a person who because of serious bodily injury or a serious illness is in urgent need of such attention, irrespective of whether that person can afford to pay for it.[3]

In a discussion of the punitive sanctions in medical care relationships what emerges specifically is the interpretation of secs. 9 (causing death) and 10 (causing bodily injury or illness) of ch. 21 of the Penal Code. In these sections a punishment is laid down for anyone who through negligence or carelessness causes another person's death or inflicts bodily injury or causes illness that is not minor. The usual punishment provided for in sec. 9 is imprisonment or a fine. If gross negligence is involved the maximum prison sentence is 4 years, while under sec. 10 the punishment is a fine or imprisonment for not more than 2 years.

Special mention should be made of the fact that the crime specified in sec. 10 is in part described as one requiring a complaint by the injured party. Thus, according to sec. 14(2), the public prosecutor ought not to charge anyone with causing bodily injury or illness where the injury or illness is not serious, unless the injured party reports the matter for action. Consequently, causing bodily injury or illness that is not minor but which on the other hand does not involve serious injury or illness is to be regarded as a crime only if a complaint is made by the injured party; as against this, however, the public prosecutor must by virtue of his office prosecute if the injury or illness caused is of a serious kind.

[3] See, *inter alia*, Adolf Laufs, *Arztrecht*, Munich 1977, p. 21.

In practice, court proceedings are instituted as a result of a complaint by the injured party or some other person with knowledge of the offence.[4]

Can we assume that health and nursing staff, too, are to be punished under these sections if, when providing medical treatment to a patient, they cause his death or other illness or bodily injury of the kind referred to in sec. 10?[5]

In Finnish legal writing and case law it is generally held that health and nursing staff who are guilty of providing incorrect or inadequate medical attention may be charged with the crimes mentioned in secs. 9 and 10. As an example is mentioned a nurse neglecting to give a patient medicine prescribed by the doctor with the result that the patient's health deteriorates. This falls under sec. 10. As an example of causing death mention is made of a doctor who carelessly prescribes a lethal dose of medicine. If a doctor starts an operation but does not complete it then this obviously is also punishable.[6]

Yet another punitive sanction is the punishment laid down in ch. 40, sec. 21, of the Code for what is known as dereliction of duty as a result of carelessness. Where health and nursing staff are employed by the state, a local authority or local government federation, they bear official responsibility (Penal Code, ch. 2, sec. 12). It follows that they can be punished for dereliction of duty caused by carelessness, negligence, oversight, lack of judgment or incompetence as provided for in ch. 40, sec. 21, of the Code by being admonished, fined or suspended from duty, or, in particularly grave cases, dismissed.[7]

Consequently, a heavy burden of responsibility rests on health and nursing staff in public employment. If such persons are guilty of negligent dereliction of duty, and incorrect or inadequate medical attention may be regarded as such, they are to be punished as provided for in ch. 40, sec. 21, of the Code. Should the incorrect or inadequate attention be held to come under ch. 21 of the Code then the matter will lie between two categories—between an ordinary crime and dereliction of duty. In that case ch. 7, sec. 1, of the Code is applicable, with the result that the punishment will be heavier than for a single offence (for example, a fine heavier than that imposed if the doctor or nurse is not a public employee). Another possibility is a combination of an ordinary punishment and a special one (for example, imprisonment along with dismiss-

[4] See also *Betänkande avgivet av kommittén för rättsskydd inom social- och hälsovårdsförvaltningen* (Report submitted by the Committee for Legal Protection within Social Welfare and Public Administration), *KB* 1979: 59, p. 79.

[5] In 1969 ch. 21 of the Penal Code was amended so that sec. 10 was renumbered sec. 9 and sec. 11(2) was renumbered sec. 10.

[6] See, *inter alia*, Brynolf Honkasalo, *Suomen rikosoikeus. Erityinen osa I:1*, 1970, pp. 33 f., 52; *SvJT* 1968 ref. 81; Matti O. Norri, "Lääkärin hoitovelvollisuuksien ristiriidasta", *Finlands läkartidning* (Finnish Medical Journal) 1972, pp. 2517–20.

[7] It has been suggested that ch. 40, sec. 21, of the Code be repealed in connection with a reform of the law relating to public employees. *Betänkande avgivet av kommittén för utredning av den offentliga personalens rättsliga ställning. Delbetänkande I* (Report submitted by the Committee of Enquiry into the Legal Position of Public Employees. Interim Report I), *KB* 1979: 26.

al of a public employee as a result of death having been caused by medical staff in particularly flagrant circumstances).

> An anesthetist and nurses at a central hospital, where a patient died during an operation as a result of poisoning caused by drip fluid used together with medicine, were held in accordance with ch. 21, sec. 9, ch. 40, sec. 21, and ch. 7, sec. 1, of the Penal Code to have caused another person's death and to have been guilty of dereliction of duty. They were fined and found liable for damages. Helsinki Court of Appeal, May 7, 1974. *JK* 1974, pp. 99f.
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> A hospital pharmacist, a head nurse and a student nurse were fined for causing another person's death and for dereliction of duty (ch. 21, sec. 10, ch. 40, sec. 21, and ch. 7, sec. 1, of the Penal Code). Patients had been given incorrect injections and died as a result. Turku Court of Appeal, January 27, 1954. *JK* 1954, pp. 42f.[8]

Health and nursing staff have sometimes been compared with taxi drivers or pilots where responsibility is concerned in that the two last-named professional groups have a responsibility under penal law for the lives and health of the clients, in this case their passengers. One difference, however, is that the work of health and nursing staff is directed solely towards caring for the lives and health of people. The working material of doctors and nurses is the human body, in all its fragility and mortality, whereas the taxi driver or pilot works with his means of transportation. Care for the passengers is merely an extra to this.

It has been suggested in some quarters that medical care should no longer be subject to the law relating to crime, but such suggestions have received little real support. Consequently, the general public view the retention of punitive sanctions as an important guarantee of satisfactory medical care. There has also been some discussion of the introduction of special penal provisions for health and nursing staff, who would in that case be exempted from the application of the general provisions of the Code that relate to causing death, bodily injury or illness.

This suggestion has not been given any support, either. It is true that incorrect medical care can result in health and nursing staff being charged with causing death or bodily injury or illness, but in practice such charges are rare. As a rule there are a good many arguments against applying punitive sanctions to health and nursing staff since, among other things, they often have heavy work loads and work in unsatisfactory conditions.[9]

[8] See also, *inter alia*, 1964 Supreme Court II 96; *JK* 1966, pp. 68f.; *JK* 1968, pp. 72f.; *JK* 1969, pp. 66f.; Supreme Court 6.6.1972 *JK* 1972, pp. 64f.; *JK* 1974, pp. 99f. Where Swedish law is concerned, see also, *inter alia*, Beckman, *op. cit.*, pp. 134ff., especially p. 165; 1943 NJA 522 and 1946 NJA 712.

[9] A glance at case law shows that the punishment of health and nursing staff has been kept within reasonable limits: as a rule only fines have been imposed.

1950 Supreme Court II 184: While examining a patient, a doctor failed to notice a splinter of wood

If the Penal Code were to contain special provisions concerning the consequences of "incorrect medical treatment" there is reason to suppose that such provisions would be applied more widely than the ordinary punitive provisions relating to causing death, bodily injury or illness. Since a more active system of penal sanctions where medical care is concerned would hardly be desirable, as it would obviously be unlikely to result in an improvement in the standard of medical care, the idea of special penal provisions for incorrect medical care must be rejected.[10]

3. DISCIPLINARY MEASURES. GENERAL

The characteristic feature of disciplinary sanctions is that they are applied if a public servant acts contrary to what is required of him while on duty and, in certain cases, can also apply if, while not on duty, he behaves in a manner unbefitting his position. Disciplinary responsibility supplements penal responsibility in that criminal procedure is resorted to, above all, in serious cases of gross dereliction and neglect of duty (cf., however, ch. 40, sec. 21, of the Penal Code with the ample opportunities for interpretation offered therein). Disciplinary measures taken by the administrative authority ought to be regarded as the normal form of sanction applied to a public servant who is guilty of punishable dereliction of duty.

Disciplinary responsibility under administrative law usually applies to public servants employed by official bodies. Even so, health and nursing staff constitute an exception in this respect because the disciplinary powers of the National Board of Health extend also to apply to doctors, nurses and others who are employed privately or are self-employed. This state of affairs may be explained by the social importance of these professional groups, irrespective of whether health and nursing staff are employed in a public or private capacity.

which had penetrated the patient's seat muscles and so did not provide the patient with the necessary treatment. As a result the patient died. On the basis of the information given by the patient and in view of the small size of the wound the doctor could not, nor for any other reason, be felt to have been guilty of carelessness or negligence, and so he was cleared of the charge and of any responsibility for damages.

1977 Supreme Court II 37: A patient had been refused admission to a hospital; when he returned and underwent an operation he died. The doctor who had refused to treat the patient had certainly made an incorrect diagnosis, but on the other hand the illness could only have been revealed by an operation. "In view of the circumstances known to him when he made his decision and from what emerged from the report on the patient and the examinations carried out", the doctor was nevertheless held not to have acted contrary to his official duty. The case was concerned with a demand for conviction without any claim for damages.

[10] See, *inter alia*, G. Levasseur, *Le médecin face aux risques et à la responsabilité*, 1968, pp. 133 ff.

4. THE DISCIPLINARY POWERS OF MUNICIPALITIES

Most of the public health and nursing staff are employed by local authorities. This is touched on in the Municipalities Act, sec. 75, which refers to the staff regulations of the municipality of local federation of municipalities where disciplinary sanctions are concerned. The sanctions themselves are nonetheless laid down in the Act; warning, temporary suspension from duty, involving also a loss of income for the person concerned, as well as dismissal (see also the Municipalities Act, sec. 134).

On the whole the service regulations of the municipalities and local federations conform to the approved standard proposal issued in January 1, 1981, by the office of the municipalities' collective bargaining delegation. According to this, disciplinary action may be considered if an office holder "wilfully or as a result of carelessness is guilty of dereliction of duty or has neglected his official duties or has in some other way acted contrary to his official duty or if in the exercise of his official duties he has conducted himself in a manner unbefitting a public official" (sec. 34(1)). Disciplinary sanctions (referred to as "disciplinary punishment") are 1) a written warning, 2) suspension from duty without pay for not more than 90 days, or 3) dismissal, i.e. the employment contract is unilaterally terminated without notice (sec. 34(2)).[11]

The board of the municipality or local federation has the power to decide on disciplinary sanctions, though if it is felt that an official appointed by the elected council should be dismissed for disciplinary reasons then the council has the necessary powers to do so. The same also applies in cases where a government authority makes the final decision to appoint an official chosen or recommended by an elected council (sec. 35(4)).

5. THE DISCIPLINARY POWERS OF THE NATIONAL BOARD OF HEALTH ACCORDING TO THE BOARD OF HEALTH ORDINANCE

As was pointed out above, the disciplinary powers of the National Board of Health apply to all health and nursing staff irrespective of who employs them and their sphere of employment.

Thus in sec. 5, point 6, of the Ordinance relating to the Board of Health and dated February 20, 1970/130, the following categories are listed:

> Offences committed while on duty and acts of insubordination by employees of the Board of Health and government employees subject to the authority of the Board, as well as by those employed at medical care establishments, whether run by a

[11] See also the commentaries on these regulations in the publication *Tjänstestadga* (Service Regulations), 1981, p. 48.

> public authority or owned privately or by an association, or in professional private practice as doctors, dentists, dental technicians, public health inspectors or those engaged in the nursing profession, by opticians and qualified masseurs, as well as by other public health staff subject to the disciplinary powers of the Board of Health, and also by pharmaceutical chemists, by those responsible for the management of pharmaceutical factories and the sale of pharmaceuticals and by qualified assistant chemists and pharmacists.
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> Disciplinary measures may be taken if such official, employee or professional person "is guilty of wrongful acts in the course of his duties or of neglecting his official duties, though not to the extent that he ought to be brought before a court of law, or has ... conducted himself in an unsuitable manner" (Board of Health Ordinance, sec. 51(2)).

The disciplinary sanctions provided for in the regulation just mentioned are warnings, verbal or in writing, as well as fines, though as far as a government employee is concerned there can also be suspension from duty for a period not exceeding six months (sec. 51(2)). Under the 1926 Act on Government Employees the sanction applicable to certain permanent officials can be dismissal.

6. THE DISCIPLINARY POWERS OF THE NATIONAL BOARD OF HEALTH ACCORDING TO SPECIAL LEGISLATION

The National Board of Health exercises disciplinary powers with regard to doctors and dentists also under the special legislation concerning these two professions. Sec. 21 of the Acts dated 14th July 1978 contains the following provision:

> If in the course of exercising his profession a doctor (dentist) acts contrary to an Act of Parliament or to the rules and regulations issued under the authority of such an Act, or in carrying out his duties has otherwise been guilty of mistakes or negligence or has conducted himself in an unsuitable manner, the Board of Health may punish him by disciplinary measures by warning him verbally or in writing or by a fine, providing that the incorrect act or negligence is not such as to justify court proceedings.

7. DISCIPLINARY RESPONSIBILITY—A SUMMARY OF POINTS OF VIEW

There is much to suggest that sec. 21 of the Acts on the Medical and Dental Professions, rather than the municipal statutes, are the provisions that are mainly applied in practice when it is a question of taking disciplinary measures against doctors and dentists. The National Board of Health is the authority

that is best able to assess a doctor's (dentist's) activities within the framework of his exercising his profession. The disciplinary sanctions are the same as those set out in the regulations of the Board of Health and for this reason these regulations and the Acts on the Medical and Dental Professions should be seen in one and the same context.

In the event of serious cases of disciplinary offences of public health and nursing staff, when the punishment is likely to be suspension from duty or dismissal, the power to punish by suspension derives solely from the Board of Health Ordinance, while the power to dismiss derives from the municipal service regulations and the Act on Government Employees (where civil servants are concerned). The National Board of Health also has power in this last-mentioned respect.

It can be assumed that the dismissal by a municipality of health and nursing staff is not undertaken without the Board of Health being consulted. This also applies to other disciplinary sanctions imposed by a municipality except for the lightest one (warning). Disciplinary sanctions by a municipality are usually imposed as a result of misdemeanours connected with unsuitable acts of an administrative rather than a medical kind. According to this way of looking at things there is no real duplication of the disciplinary responsibility of municipally employed health and nursing staff.[12]

It ought to be emphasized that health and nursing staff other than doctors and dentists can suffer disciplinary punishment only by specific reference to the Board of Health Ordinance, since the Act on the Nursing Profession does not contain any provision corresponding to sec. 21 of each of the Acts on the Medical and Dental Professions.

Yet another circumstance worth noting is that a fine as a disciplinary sanction can be imposed only by the Board of Health, and not by the board of a municipality or local federation by reference to municipal service regulations.

The warning is found in all norms relating to disciplinary sanctions, though unlike the municipal norms the Board of Health Ordinance, as well as the Acts on the Medical and Dental Professions, have specific provisions concerning verbal and written warnings.

> A ward doctor at a country hospital who lost his temper with patients because of their irritating and somewhat unsuitable behaviour was given a warning by the Board of Health. *JO* 1964, p. 92.

The key provision relating to disciplinary dismissal in the Act on Government Employees is sec. 6, where as a precondition of dismissal it is laid down that a tenured civil servant

[12] Information supplied by the Board of Health.

as a result of his activities or his relationships in his official capacity or otherwise, or as a result of his neglecting his official duties has proved himself unworthy of the trust or the respect implied by his position as a civil servant.[13]

The senior physician of a (state) prison mental hospital was dismissed by disciplinary action because, *inter alia*, he had been drunk on duty, had been absent from his post, had used pharmaceuticals for experimental purposes without the consent of the patients and in return for payment, and also because while not on duty he had issued prescriptions to persons he had not examined. Public Employment Appeal Court, March 15, 1973, see *JK* 1973, pp. 88 f.

The Act and the service regulations provide for the possibility of dismissal of an official by disciplinary action if he has been found guilty of an offence by a court of law, but has not been sentenced to be dismissed (see, *inter alia*, sec. 13 of the Act on Government Employees, and sec. 36(3) of the approved standard proposal for municipal service regulations).

For this reason the courts are obliged to provide the Board of Health with copies of proceedings and decisions in cases that involve imprisonment for crimes committed by doctors, dentists and other health and nursing staff (sec. 17(3) of the Act on the Medical Profession, sec. 4(3) of the Act on the Nursing Profession). It can also be assumed that municipalities and local federations, too, are informed of such convictions.

The law also provides for the dismissal by disciplinary action of an official who has been acquitted by an ordinary court of law of a charge relating to dereliction of duty, but whom the administrative authority nevertheless considers ought to be dismissed for other reasons. On the other hand, the disciplinary dismissal of an official does not prevent him from being charged before an ordinary court of law (even for the same offence that led to his dismissal—Act on Government Employees, secs. 14 and 15).

Disciplinary measures are usually taken by the supervisor of the health and nursing staff or following a complaint made to the Board of Health (or municipal board) by the injured party or some other person.[14]

Disciplinary matters are dealt with by the administrative division of the Board of Health (Board of Health Ordinance, sec. 5, point 6). In such cases the prosecutor is an official with legal training appointed by the Director

[13] According to *KB* 1979:26, a general provision about discipline is proposed in the forthcoming Act on Government Employees which reads about as follows: "A government employee who acts contrary to his official duties or neglects the same may suffer disciplinary punishment ..." (sec. 56). The disciplinary sanctions proposed are a written warning, a fine, suspension and dismissal.

[14] See, *inter alia*, *KB* 1979:59, pp. 80 ff. See also *JK* 1979, p. 25 no. 5628: "The Ministry of Social Welfare and Public Health and the Board of Health have been informed of the views of the Attorney-General that in cases where the conduct of a senior doctor has been the subject of a complaint to the Board of Health and that Board has taken preliminary measures but has not felt able to proceed further because matters relating to the report or the doctor's conduct are the subject of court proceedings, the Board of Health should await the outcome of the court proceedings and then make its own decision known."

General (sec. 51(4)). No appeal can be made against decisions of the Board that result only in an official being given a warning (sec. 52(2)). Appeals to the Supreme Administrative Court can be made against decisions leading to other disciplinary sanctions, and also to the Public Employment Appeal Court where the dismissal of tenured civil servants is involved.

A warning (verbal or in writing) is the usual form of disciplinary sanction imposed on public health and nursing staffs. According to information supplied by the Board of Health, disciplinary sanctions against such staffs are rare and involve only up to about five cases a year.[15]

8. THE NATIONAL BOARD OF HEALTH'S PROCESSING OF COMPLAINTS AND ISSUING OF REPRIMANDS

As is noted above it is the Board of Health that is mainly involved in the work of supervision, and the various forms of sanctions associated therewith. This central board is also the most important authority for receiving complaints about the care of the sick, and receives every year several hundred complaints from patients and their relatives about alleged mistakes made in this field.

Thus, even though there is no statutory right of complaint, according to established custom, a considerable number of complaints from citizens are submitted to the Board of Health. The scale on which these complaints are made can be compared only with the corresponding (though regulated in statute) consideration of complaints undertaken by the Justitiekansler* and the Ombudsman.

On the whole the procedure followed by the Board of Health when dealing with complaints is similar to that of the Justitiekansler or the Ombudsman. The Board then conducts a hearing with the person against whom the complaints are made and investigates the matter.

A special type of sanction has become the usual one: admonition from the Board of Health similar to the criticisms made by the Justitiekansler or the Ombudsman. No appeal can be lodged against admonition from the Board. In

[15] In Sweden the disciplinary authority where health and nursing staff are concerned is vested in the National Social Welfare Board (disciplinary board for health and nursing staff). The disciplinary sanctions are warnings and admonitions.

See, *inter alia*, *SOU* 1978:26 *Hälso- och sjukvårdspersonalen* (Health and Nursing Staff), especially pp. 75 ff.; Act on the Supervision of Health and Nursing Staff of January 10, 1980/11, together with amendments.

See also Lotta Westerhäll-Gisselsson, *Om läkaransvar* (On the Responsibility of Doctors), 1977, pp. 5 ff., and the statutes mentioned therein; Uncas Serner, *Läkares arbete och ansvar* (The Work and Responsibility of the Doctor), 1968, especially pp. 71 ff.; the same, *Ansvaret för min sjukdom* (Responsibility for My Illness), 1980, pp. 100 ff.

*NB. The term "Justitiekansler" in Swedish is often translated "Attorney-General", a translation which gives a clearer idea of the tasks performed by the office.

view of the criticism that there finds expression admonition is nevertheless not without importance as a form of sanction.

Since published admonitions of the Board of Health do not mention any names their importance as a sanction is less than the corresponding measures taken by the Justitiekansler or the Ombudsman:

> The following may be mentioned as an example of a case which led to admonition from the Board of Health. The Board of Health found that Doctor X ought to have obtained the patient's consent before starting to remove a tumour from the front edge of the uterus. The removal was performed during an operation in this area, but this measure could not be said to be due to urgency, nor to have been necessary in other respects. Since the circumstances did not require the immediate removal of the tumour the Board of Health admonished the doctor.[16]

Owing to the mass of complaints made to the Board of Health processing dealing with them tends to be rather slow. In addition to the Board of Health the county council boards (social welfare and public health divisions) also help in investigating complaints from the general public.

An analysis of the way complaints are handled at the Board of Health shows that very few indeed ever lead to disciplinary or other sanctions or even to admonitions.

See the statistics in *KB* 1979: 59, pp. 80 f.:[17, 18]

Year	Complaints dealt with	Resulting in admonitions	Resulting in warnings
1974	368	36	3
1975	376	37	2
1976	309	32	5
1977	353	19	1
1978	465	41	–

9. SUPERVISION OF LICENCES

Parallel with its powers to admonish and discipline health and nursing staff the Board of Health exercises another form of supervision. This concerns profes-

[16] See Kalle Achté – Olli Blomqvist, *Finlands läkartidning* 1976, pp. 189 ff. See also Kalle Achté *et al.*, *Lääkintäetiikka*, 1982, pp. 186 ff., Kalle Achté – Esko Hoppu, *Lääkärin taitovirhe ja vahingonkorvausvastuu*, Helsinki 1983.

[17] In Sweden it seems that the percentage of complaints that lead to sanctions is a good deal higher. See *SOU* 1978: 26, pp. 80 ff., 195 ff.

[18] Concerning the handling of complaints in the Board of Health, see, *inter alia*, Allan Rosas, *Förvaltningsklagan* (Administrative Complaints), 1980, especially pp. 154 ff. See also Rainer Oesch, *Lääkärin vahingonkorvausvastuusta*, 1977, pp. 102 ff.; *JO* 1975, p. 148, 1979, pp. 20 f., 133 f.

Complaints about health and nursing staff made to the Board of Health during the years 1975–79 were taken up in a dissertation by Ritva Fagerström discussed at the Medical Faculty of the University of Helsinki in August 1983. See Ritva Fagerström, *Terveydenhoitohenkilöstöstä lääkintöhallitukseen tehdyt kantelut vuosina 1975–79*, Helsinki 1983.

sional licences to practice, the right to work professionally. Like the disciplinary authority, the supervision of licences applies to the whole of the professional body: persons employed by public bodies or privately as well as individual self-employed professional people active within the various branches of medical care and the pharmaceuticals industry, etc.

The provisions about the supervision of licences are to be found in various statutes. The most important of these statutes are the two Acts on, respectively, the Medical and the Dental Professions. It is evident from these that if a doctor (dentist) is sentenced to a term in prison for an offence he has committed while practising his profession the Board of Health can either temporarily or permanently deprive him of the right to practise his profession. It is a precondition of such a step that the person concerned has shown himself to be unworthy of the trust he ought to enjoy and also, if he is permanently barred, that the circumstances are particularly flagrant (sec. 17(1)).

A prison sentence is not the only punishment that can lead to a person being deprived of his licence. If a doctor (dentist) is employed by the state or a municipality, then the disciplinary sanctions suspension and dismissal can also lead to his losing his licence to practice medicine (dentistry) (sec. 17(2)).

Revocation of the licence to practise can also arise if it can be shown that because of old age, illness or some other cause (for example, abuse of intoxicants) a doctor (dentist) is unfit to practise his profession. Issuing incorrect certificates, abuse of a patient's trust or of a patient's dependence on the doctor (dentist) can also led to revocation of licence (sec. 18).

In practice, revocation of licence is a temporary measure as a rule (see also secs. 19 and 20 of the Acts on the Medical and Dental Professions).[19]

The Act on the Nursing Profession includes provisions for suspension of licence in respect of, for example, nurses, midwives, assistant nurses, mental hospital attendants and children's nurses (secs. 4–5).

Matters involving licences to practise are decided at full sessions of the Board of Health (Board of Health Ordinance). The appeal body is the Supreme Administrative Court.

10. RESPONSIBILITY FOR DAMAGES

It should be pointed out that the damages sanction is less important these days than it used to be because of current rules contained in the Torts Act (1974: 412) which place responsibility in the first place on the employer when injury is caused a third party by an employee.[20]

[19] See also *Prop.* 1976: 235, pp. 3 f.

[20] See, e.g., Tore Modeen, "Enligt vilka regler ansvarar sjukhus som ägs av kommun eller kommunalförbund för skada som av anställd vållats patient genom vårdslöshet eller oskicklighet?" (According to which rules is a hospital owned by a municipality or local federation responsible for

The personal responsibility for damages of health and nursing staffs appears, as far as those employed in an official capacity are concerned (and the majority of them are), only when 1) incorrect medical treatment can be shown to have been caused by the act or negligence of a certain individual (and not in the event of injury by persons unknown), 2) the mistake can be described as causing injury that is more than minor, 3) the municipality, local federation or state, that will in the first place be responsible for the injury, wishes to exercise its right of recourse against the employee concerned.

What is of importance in this connection is also that the municipality or local federation as the chief responsible of the hospital is entitled to a state grant for damages paid to a patient (even without a court order) as a result of incorrect medical treatment.

> *1981 Supreme Administrative Court II 78:* A doctor was considered to have caused the death of a patient in hospital through a careless mistake. Even so, according to the medical disciplinary board, the doctor's error was to be regarded as minor, and so the responsibility for the injury remained with his principal, namely the Vestrobotnia central hospital federation, which paid the damages without a court order being needed. The damages due to the patient's relatives under the Torts Act were, according to the interpretation of the Supreme Administrative Court, to be treated in accordance with sec. 5, point 8, of the Act relating to State Grants and Subsidies to Municipalities and regarded as a hospital operating cost for which, according to the said Act, a state grant should be paid.

There is, in addition, the fact that third party insurances taken out by health and nursing staff (which cover virtually all doctors and most other personnel) protect those concerned in cases other than wilful mistakes or mistakes that can be described as gross negligence, in other words, in cases of what is known as ordinary negligence, when according to the Act relating to Damages the employee is personally liable.

For those privately employed there is also personal initial liability if the employer cannot afford to accept his employer's vicarious liability (sec. 6(2) of the Torts Act), as well as liability applying to minor injuries, in respect of independent entrepreneurs or professional persons (sec. 3(1) of the Act). As I

an injury caused to a patient by an employee's carelessness or incompetence?), *FJFT* 1977, pp. 359–84; "Ansvarsprinciperna i skadeståndsmål rörande felaktig medicinsk behandling" (Principles of Responsibility in Actions for Damages concerned with Incorrect Medical Treatment), *FJFT* 1978, pp. 207–31, and "Om sjukvårdsförhållandet—särskilt om sjukhusvård i specialavgiftsklass" (Concerning the Medical Treatment Relationship—with particular reference to hospitalization in the special-fee category), *FJFT* 1979, pp. 564–88.

1982 Supreme Court II 163: As the owner of a hospital a local federation had failed to take the necessary technical measures to ensure that the water in a shower used by the patients was at a suitable temperature, and had also neglected to ensure that the shower could not be used by unsupervised patients. The local federation was responsible for an injury suffered by a patient who as a result of a sudden incapacitating illness had lain under running hot water in the shower. The sum paid in damages was adjusted.

see it, doctors in the special fee category relationship ought also to have a primary personal responsibility that applies also to ordinary fault situations.

Even so, on balance the damages sanction is relatively light because of its limited scope. As an action for damages against an official body must be conducted as a civil action (Torts Act, sec. 7(4)), there is also reason to suppose that in cases where damages are claimed the injured party is content to take civil action and refrains from simultaneously bringing charges against health and nursing staff and may also decide not to press for disciplinary sanctions against the staff responsible for the error or negligence. On the other hand, by reporting, for example, the causing of serious injury or illness to the police and prosecuting authority, the injured party is in a position to ensure that the medical treatment provided is officially investigated, and if an error is held to have been made and the court imposes a punishment, then he will thereafter stand a good chance of being awarded damages against the employer.

Even though the Torts Act should be regarded as having a moderating effect as regards the use of punitive sanctions against health and nursing staff, one must nevertheless assume that there will always be a certain number of court cases, especially since the Board of Health, the Justitiekansler, the Ombudsman and the public prosecutor must act in serious cases of incorrect medical treatment.[21]

The following recent court case sheds light on the Supreme Court practice in actions for damages connected with incorrect medical treatment:

> *Supreme Court, April 1, 1982, no. 3938/81.* A doctor had started to remove a tumour using general surgical methods. He ought nevertheless to have been able to observe that the tumour was so closely linked with the calf nerve that the nerve could be damaged by the removal of the tumour. The Supreme Court held that the doctor ought to have known that this danger could quite probably have been avoided if a neurosurgical operative technique had been used. For this reason the doctor ought not to have completed the operation but should have informed the patient of the risk and obtained her consent to the operation. By continuing the operation without informing the patient of the danger the doctor had acted negligently and was responsible for the fact that the patient's calf nerve had been partially paralysed and for the consequences of this.[22]

[21] The committee for legal protection within social welfare and health administration has considered the responsibility for damages, too, and has suggested an enquiry into the introduction of an insurance system for patients along the lines of the Swedish one that would make it possible to strengthen the right to damages. *KB* 1979: 59, pp. 82–5.

This enquiry has been held and it proposes in the first place compulsory insurance for employers and self-employed persons in health and nursing. *Betänkande avgivet av kommissionen för frågor om rättsskydd inom hälsovården I* (Report submitted by the Commission on Questions relating to Legal Protection within Public Health I), *KB* 1982: 29.

[22] The case is reported by Raimo Lahti in *Vastuu ja oikeusturva terveydenhuollossa*, 1983, p. 10. See also Lahti, "Oikeusturva terveydenhuollossa", *Oikeus* 1980, pp. 143–9, as well as Thomas Wilhelmsson, *Lääke- ja potilasvahinkojen korvausjärjestelmän uudistussuunnitelmat. Vastuu ja oikeusturva terveydenhuollossa*, 1983, pp. 49–61.

11. SUPERVISION BY THE JUSTITIEKANSLER AND THE OMBUDSMAN

A presentation of the system of sanctions would be incomplete without a mention of the supervision of public health and medical services exercised by the Justitiekansler and the Parliamentary Ombudsman. The admonitions these authorities can issue to public health and nursing staffs (or bodies) must be regarded as an important kind of sanction, especially as they are usually published (in some cases together with names) in the annual printed reports by the Justitiekansler (JK) or the Ombudsman (JO) and are thus generally known in circles even outside public administration.[23]

Under sec. 46 of the Constitution Act the Justitiekansler is to ensure that authorities and their officials observe the law and also carry out their duties "so that no one's legal rights are infringed". Consequently, there is no doubt that the supervision exercised by the Justitiekansler covers the organization of public health and medical care in the public sector and, in addition, in that he has a right to take note of the supervision exercised by the Board of Health of the whole field of public health and medical treatment, indirectly in the private sector. Direct supervision of doctors and other medical care personnel in private practice can only be undertaken in exceptional cases, for example if, by invoking ch. 2 of the Act on the Medical Profession, which deals with a doctor's responsibilities (such as obligation of secrecy), a patient claims that his legal rights have been infringed.

Under sec. 49 of the Constitution Act the supervision exercised by the Ombudsman is linked directly to the work of official bodies and ought therefore to be regarded as more limited than that of the Justitiekansler. There is no doubt that the Ombudsman supervises the Board of Health and the hospitals, health centres and other bodies for health and medical treatment in the public sector, but he has no authority as regards the privately organized medical services and their staffs.[24]

As prosecuting authorities the Justitiekansler and the Ombudsman can also institute court proceedings and disciplinary measures against public health and nursing staff.

12. THE SANCTIONS SYSTEM. A SUMMARY

This survey indicates the multiplicity of different alternative sanctions which together are designed to ensure competent and careful medical treatment. It

[23] See, e.g., *JO* 1980, pp. 112 ff.: A senior doctor working at a clinic was severely reprimanded because he had issued a medical report on what is known as an MT 1 form relating to immediate need of mental treatment without having personally examined the patient.

[24] See also *Instr. för JO* (Instructions for the Ombudsman) 10.1.1920: 2; *Regl. för JK* (Rules for the Justitiekansler) 12.12.1957/416.

also indicates the large number of different authorities entrusted with the supervision of health and nursing staff, though to a considerable extent supervision also takes place as a result of initiatives taken by patients and other persons not connected with official bodies.

In the first place the punitive sanctions where public health and nursing staffs are concerned do not differ from those that apply to others charged with responsibility for a person's life and health. This being so, it is not possible to speak of a special criminal law for health and nursing staff but only of the application of general penal norms where this professional group is concerned.

As regards the disciplinary power exercised by those in charge of hospitals, in the first place the municipalitities and local federations, the general rules concerning the discipline of office holders also apply where disciplinary sanctions are concerned. Even here there are no particular disciplinary rules for public health and nursing staff as the provisions applicable are those dealing generally with municipal employees (based on the Municipalities Act).

It is not until one examines the disciplinary powers of the Board of Health that one meets a set of rules specially framed for disciplinary action within the field of medical treatment, supplemented by the supervision of licences exercised by the Board of Health.

Nor are the authorities who exercise the punitive and generally disciplinary supervision of health and nursing staff experts in the sphere of medical treatment. As a rule the police, the public prosecutor, the boards of municipalities or local federations possess no medical expertise, and the same applies to the officials working for the Justitiekansler and the Ombudsman, who exercise a general supervision of legality.

Even if these authorities have reason to call for reports from experts, above all from the Board of Health (the social welfare and health divisions of the County Council Boards and the Hospitals Association also have access to medical experts), their supervisory work where health and nursing staff are concerned will nevertheless take second place to the surveillance and supervision exercised by the Board of Health, the real professional body.

It is obvious that as the injured party or plaintiff in such matters the patient occupies a central position in the system of supervision in that he often alerts public authorities to mistakes and defects in the care of the sick, whether this takes the form of a report to the police, a civil action for damages, a complaint to the Justitiekansler, the Ombudsman or the Board of Health or an approach to the employer or supervisor of health and nursing staff.

The system of sanctions is designed to cover various areas of defective activity within the care of the sick and to satisfy various supervisory requirements. On the other hand, it is evident that the sanctions involve some overlapping in similar situations, just as the punishments are often the same

The Association ensures that the doctor fulfils his ethical obligations and punishes acts that are contrary to these.

> For example, a doctor was expelled from the Association because he was guilty of drunken driving and of leaving a motor accident victim to his fate.[26]

The rules of the Finnish Nurses' Association do not contain any corresponding disciplinary provisions as the Association and its branches are purely trade union organizations.[27]

[26] Information supplied by the Finnish Medical Association.

[27] See rules of the Finnish Nurses' Association, *Fackavdelnings modellstadgar* (Model Rules for Branches), Vanda 1977. A very high percentage of all health and nursing staff are members.

See also Niilo Pesonen, *Terveyden puolesta sairautta vastaan,* 1980, especially pp. 673 ff.; Kalle Achté *et al., op. cit.,* pp. 177 ff.