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Introduction to the Science of Law for Healthcare Sector Employees



*In the silence of his chambers:
judge stepping outside the law*

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Introduction to the science of law for healthcare sector employees

Preface:

This Script can, of course, only give a brief overview of the relevant legal provisions and, while minor national deviations are possible, they are highly unlikely.

In the event of any queries or uncertainties, expert legal advice should be obtained in the respective country.

1 Basic terms of the science of law

Living together in a community calls for order. There are various regulations but the most important is the **legal order**.

Legal order has two salient features: it has been set out in writing by state institutions and can, if necessary, be enforced by coercive measures.

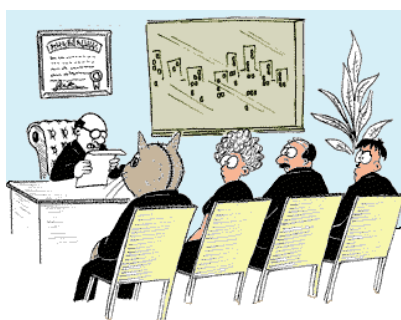
Example: A purchase price is not paid. The seller can bring a lawsuit to get paid the amount owed. If he still has not been paid after judgement is passed, the debtor can have the amount owed (in addition to the legal costs incurred) forcefully deducted from his salary.



Apart from legal order, customs (behavioural rules in a particular group or society) as well as morals (perceptions of conscience) also play a pivotal role.

Legal provisions consist of the elements of an offence and the legal consequence (by legal order).

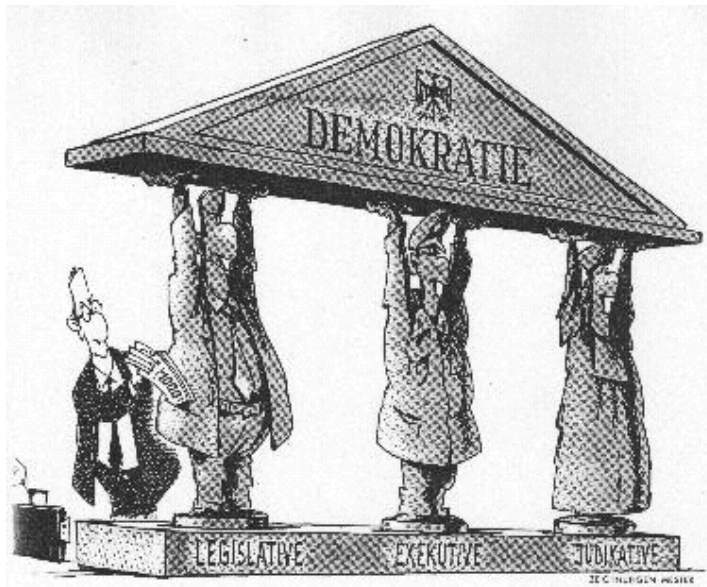
Example: If someone dies intestate (i.e. without having made a will), his estate will be divided up as provided for by the law. If there is a (valid) will, this shall determine how the estate is to be divided.



2 Basic terms of the constitution

The fundamental rules of human coexistence are summarized in the Constitution in every state governed by the rule of law. A constitution sets down the rules determining how the state is structured and how it functions in detail.

Enshrined in constitutions are the general principles underlying a legal order.



Democratic principle: the people decide by whom they will be ruled by conferring legitimacy on important organs through elections held at regular intervals. The terms of office are limited in principle, and re-election is possible.

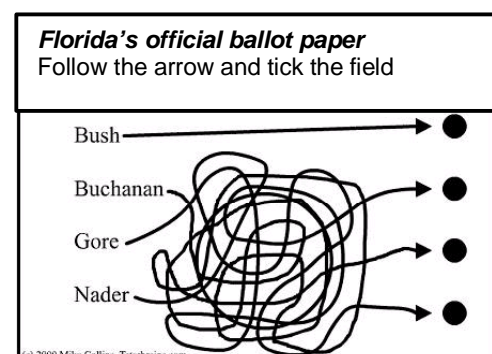
Republican principle: a republic differs from a monarchy in that the former has, instead of a monarchy (king or queen), a competent head of state (a president) whose period of office is limited.

Rule of law principle: all organs of state are bound by valid legislation. There are various legal protection institutions to ensure that laws are properly implemented.

Example: The actions of a police officer when making an arrest can be (retrospectively) deemed to have been unlawful by control bodies. The injured party is not only officially absolved of any wrongdoing but is also paid compensation.

The importance of the rule of law principle derives not least from the predictability of the state's actions. For the organs of state, too, there is legal certainty since its competences are rather clearly restricted.

Liberal principle: a state governed by the rule of law deliberately sets limits to its powers so that the individual citizen enjoys a certain amount of freedom.



Examples: Secret suffrage ensures that inside the polling booth everyone can cast their vote as they deem fit. The secrecy of letters ensures that the content of a letter will not be censored. Telephone secrecy prohibits telephone tapping. Only in very exceptional cases (strong suspicion of a crime) can the secrecy of letters or telephones be infringed.

Power sharing principle: power within the state is distributed in a way that ensures that too much power is not vested with any one individual. This helps to counter abuse of powers and corruption.

Example: Important official functions may not be discharged by any one person at the same time. However, a member of parliament may become a minister and, later, head of state.

3 Legislation

Every state needs a legislator. In general, legislative bills are adopted (in democratic states) by a parliament whose members are elected or re-elected at regular intervals.

Laws are promulgated (announced) and today can in general be accessed on the internet.

Note: A law that has already been published can only come into force later. Occasionally, the old and really no longer valid regulation has to be applied (for example, the notice of tax assessment issued by the financial authorities for the year 2008 is drawn up in 2009 and refers to the no longer valid legal situation as prevailing in tax year 2008).

Even lawyers have difficulty in remembering which is the valid legal situation, in particular since legal provisions are revoked because they have been deemed to be unconstitutional!

4 Introduction to civil law

Civil (private) law regulates relationships between private individuals, whereas the official law of the state has authority over the citizen.

Example: Buying a car from a dealer is covered by civil law. Issuance of a driver's licence is generally an act of state.

The **legal capacity** of a person begins at birth and ends on death. Disposing of legal capacity, the individual is accorded rights and duties.

While everyone is viewed as having legal capacity from birth, he/she is not immediately given the capacity to act. The **capacity to act** is characterized by the fact that, by virtue of their actions, people can justify their rights and duties.



Example: A godfather gives the newborn baby a savings book as a gift. But the baby does not have the capacity to act where his savings balance is concerned. Therefore the legal order makes provision for children to have legal representatives (the parents) in order to overcome this drawback.

The capacity to act has, in turn, two features: the capacity to enter into legal transactions and legal responsibility for tortious acts (civil wrongs).

Capacity to enter into legal transactions means that one can, for example, conclude a sales contract.

Legal responsibility for tortious acts means that one has to answer for any unlawful actions.

Example: An automobile driver injures someone in an accident that is his fault. If he was of sound mind (compos mentis) at the time of the accident, the driver must now pay the injured party compensation if requested to do so.

The most important legal entity in civil law is the **contract**.

A contract comes into being when **two (or more) consensual declarations of intention**, which entail legal consequences, have been presented.

Examples: A father buys 10 pieces of chewing gum for this child. By paying the purchase price, he becomes the owner. He can therefore give (as a present) the chewing gum to his child.

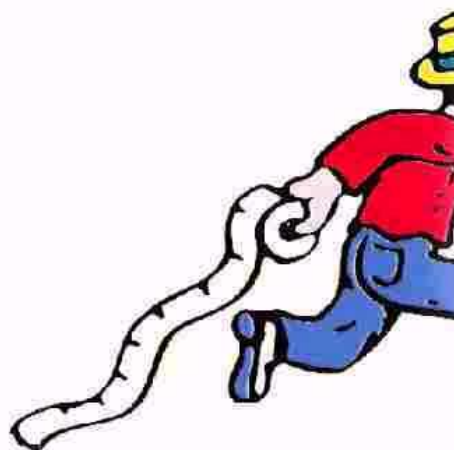
Examples: A married couple buy an apartment from a builder. Both parties sign the contract, thereby each now becomes owner (joint owners) of one half of the apartment.

In all countries of the world millions of contracts are concluded daily, such as sales contracts relating to goods for everyday use, transport contracts with the operators of public transport systems, etc.

The **written form** of a contract is the **exception**. Small purchases that are immediately paid for are also fully valid contracts that do not need the written form.

Nor is it necessary that at the time of making a purchase an agreement be reached (orally or in writing) on matters that are normally understood to have been agreed.

Example: A customer buys groceries in a shop which had been spoilt, but that became apparent only after consuming them. Although the purchase of unspoiled foodstuffs was not explicitly agreed at the time of buying the goods, that characteristic was automatically assumed to be assured, since purchase of spoilt groceries would not make any sense (and not just within the legal meaning). The injured party can thus claim compensation if he can prove a relationship between the purchase and the food poisoning. If the injured party did not keep the receipt, he can impose his rights (albeit, this will be more onerous).



The legal system grants broad latitude to the parties to the contract. So long as the parties to the contract have the capacity to enter into legal transactions, consented to the contract without trickery or coercion, execution of the contract is legally and de facto possible and does not infringe the law, a valid contract comes into force.

If agreed obligations are not discharged, the injured party to the contract can call upon the help of the state and bring a lawsuit.

Treatment services rendered by doctors in a surgery or hospital are also legal contracts (**treatment contracts**) and in the event of any mistake there is a legal basis for claiming compensation.

5 The treatment contract

If someone is treated in a doctor's surgery or in a healthcare establishment (a hospital or outpatient centre), a **civil law contract** comes into force, and that applies even if the hospital is run by the public sector (the state).

It is not just the main duties, i.e. medical treatment, that must be discharged but also ancillary duties, of which the patient is not at all aware.



For example, the hospital is obliged to comply with the rules of hygiene (infection control) to protect the patient against infection, etc. But the obligation on all hospital employees to observe confidentiality and data protection obligations (patients' medical history) are, among many others, obligations imposed by the contractual relationship. If there is any **interference with performance of an obligation**, the patient can invoke his rights, he is not a petitioner but rather a **party to the contract**, regardless of how payment is made (public or private insurance, state, own payment).

6 Patient rights

What we call **patient rights** are closely related to civil law as well as to human rights. Since the legal construct of the treatment contract has been with us for a long time now, in former times patients were also able to invoke their rights, however, often they had to bring a lawsuit to that effect. In particular the patients' legal representatives have endeavoured in recent years to find out of court settlements to disputes.

It is the duty of all healthcare sector employees to ensure that patient rights are respected, in other words: **patient rights constitute official duties of healthcare workers.**

The following examples help to explain (although not a comprehensive account) just what is meant by patient rights:

Right to considerate care:

Since patients find themselves in a more or less personally tense situation because of their illness, they need individual attention and care in accordance with their needs by **all** persons coming into contact with them, and not just those who discharge medical and nursing tasks.

Right to protection of their privacy:

Even in the multibed wards of a hospital, everything possible must be done to ensure that privacy is not infringed, for example that sensitive information about their state of health is not disclosed in the presence of other patients, but rather in a one-to-one discussion.

Right to confidentiality:

The data processed in the healthcare setting are probably the most sensitive of all a person's data. It is therefore of paramount importance that these data do not get into the hands of unauthorized persons or institutions. But confidentiality also applies to non-medical data generated in the course of treatment, e.g. addresses, telephone numbers, etc. Only in legally warranted cases may such data be forwarded to other parties or if the patient has agreed to this.

Right to expert treatment and care that should be as painless as possible:

Only recognized treatment methods shall be used to treat patients. Since the state of the art in medicine, care and other related fields is continuously advancing, this indirectly implies that persons entrusted with patient care should engage in continuing professional development.

Right to comprehensive information on treatment possibilities and rights:

Modern medicine is offering increasingly more diverse treatment possibilities which, however, have their pros and cons. Surgical procedures that leave only minimal scars may suffer the drawback that the risk of complications is higher because the surgeon operates via a camera. Armed with adequate information, the patient must decide before surgery which method he prefers.

Right to agree to treatment or to refuse treatment:

With very few exceptions (in the case of infectious diseases), the patient is not obliged to undergo treatment. He can refuse treatment (without giving any reasons!). However, a precondition for this is that the patient must be of sound mind and be able to appreciate the implications of his decision. The treating physician is also obliged to draw attention to the adverse effects of failure to undergo treatment. But if the patient, who is capable of understanding what is at issue here, continues to refuse treatment, the physician must accept this. An arbitrary decision on the part of the physician to carry out treatment would have punitive consequences, even if the patient's condition were to improve. The reason for that derives from the obligation to respect the patient's personal freedom and will.

Right to inspect medical history and obtain a copy of it:

The patient has always the right to gain access to the data recorded while treating him (with very few exceptions), and this holds true for even a long time after completion of treatment. That means that everything recorded about a patient can be inspected at any time.

Right to medical information by a doctor using a language that is understandable and considerate:

According to our present-day interpretation of the law, the patient is a party to any contract concluded with a hospital or with the physician of his choice. Even though the treating physician can, thanks to his specialist knowledge, make the correct decisions without the patient's input, the legal system, nonetheless, decrees that the patient should play a part as far as possible in the decision-making process. But before making any decision, he needs as much information as possible. Information can be understood if it is not expressed in complex terms but in simple everyday language. Not every patient is mentally able to withstand negative prognoses about his course of disease. The doctor is therefore particularly called upon to take account of the patient's overall circumstances.

Right to adequate visits from, and contact with, the outside world:

Provided that there are no reasons prohibiting contact with the outside world (e.g. acute risk of infection, periods of rest after major surgery, etc.) the hospital, for its part, cannot ban contact with the outside world. However, without giving any reasons, the patient can decree that certain, or all, persons wanting to visit him be prevented from doing so. Relatives' visiting rights is also a right inferred by the patient himself.



Right of children to child-friendly fittings in their hospital rooms:

Since children find their hospital stay, and especially medical treatment procedures, very stressful, everything must be done to make their stay as pleasant as possible. Child-friendly rooms, enough toys, books, pencils, crayons, etc., in addition to the absolutely vital need to be shown consideration by all hospital employees, help children to cope better with their illness.



Right to observe religious practices and to psychological support:

Depending on their religion, patients have the right to have contact with representative(s) of their religion. But in no way should any religious practices be imposed on patients against their will, but equally the desire for religious support must not be ignored.

Right to early discharge:

Only in very few exceptional cases must the patient tolerate treatment against his will, for example in the case of certain infectious diseases (epidemics). Even in such cases the patient rights' system continues to be fully valid since here the intention is to protect healthy persons against unnecessary disease. If a patient wants to discontinue hospital treatment, he may do so but must first be made aware of the risks posed by this. If the patient is of sound mind, the doctor must respect this decision even if he deems the patient's behaviour to be unreasonable. Early termination of treatment regimens must be precisely recorded.

Right to issuance of a patient letter (medical discharge report):

To assure the best possible follow-up care (for example by a general practitioner), a hospital must issue a patient letter as soon as possible. Of course, the patient must know what course of action is needed after a hospital stay (e.g. to avoid engaging in any sporting activity for a few weeks, to keep to a special diet, etc.)

Right to put forward suggestions and complaints:

There would be no point in enacting patient rights if they could not be invoked. Patients must never suffer a legal disadvantage just because they have made a legitimate complaint. However, unfounded complaints made for wanton or legally unacceptable reasons could certainly have negative implications for the complainant. In a legal sense, it makes a lot of difference whether a complaint was put forward in a matter of fact way or whether insulting and untenable accusations were made.



Right to a dignified death, terminal care and contact with persons one trusts:

Today, most persons die in hospitals and nursing homes rather than in their familiar surroundings. To make the last phase of life as dignified as possible for the dying person as well as for relatives, the institutions involved must ensure that dying persons are accommodated in suitable, disturbance-free rooms with persons of their trust. Terminal care (care for the dying) must not be confused with assisted suicide, which is aimed at shortening life. Rather, terminal care means that the dying persons will not be left completely alone in their last hours and will not – something that, unfortunately, was not at all a rare occurrence in the past – be simply banished to some side room.

7 Compensation law

Compensation law is an important area of civil law and essentially this regulates **subject to what preconditions** compensation is to be paid.

In principle the loss for any damage suffered **falls upon the injured party**, unless the injured party can make a legally acceptable **claim against the party causing the damage** for compensation.



Preconditions for compensation are

1. **Occurrence of damage**
2. **Causality between behaviour and occurrence of damage**
3. **Unlawfulness**
4. **Fault**

It must therefore be examined in the concrete case whether the necessary preconditions for compensation have been met.

Damage:

Damage is viewed as **any disadvantage** suffered by a person to his **property, rights or person**.

Examples:

A house is destroyed in a fire and assets have been reduced by the value of the house since it is now no longer available.

Because of incorrect legal advice, the advisee misses a deadline and consequently forfeits a right that he could have invoked had he observed the time limit.

In an automobile accident a passenger is seriously injured because of a mistake made by the driver. He can claim compensation from the latter.



There is material damage (damage to property / assets) and immaterial damage (non-pecuniary damage), such as damage to a person, offence and defamation (libel).

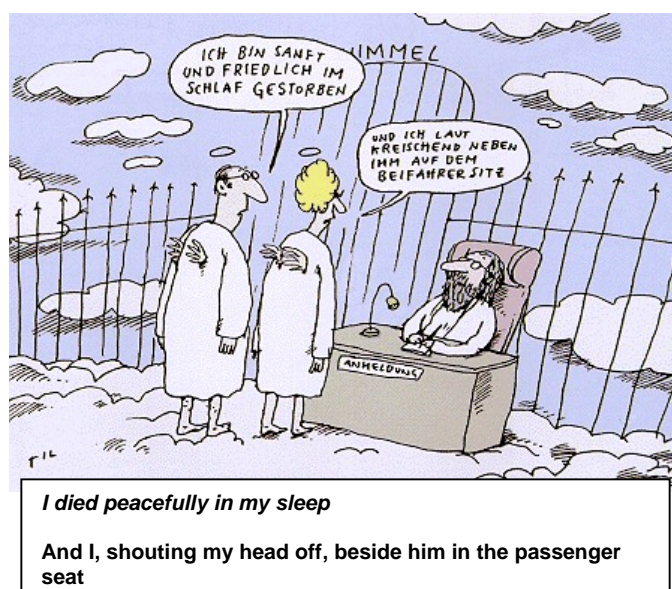
In principle, the compensation law provisions of most legal systems only award compensation for material damage, but compensation for non-pecuniary damage (solatium: compensation allowed for injury caused to the feelings of others) is **an exception** to that rule.

Furthermore, a distinction is made between **direct** and **indirect damage**.

Direct damage is damage caused by the first occurrence of damage, while indirect damage results from the first occurrence of damage.

Example: Two automobiles crash against each other and are completely destroyed. They block the traffic coming behind them, so many people reach work late and, in turn, clients have to wait longer for services.

Only in exceptional cases is indirect (consequential) damage compensated, e.g. the damage suffered by relatives because of the killing of a person (loss of income, loss of household management, etc.).



Damage must **actually have occurred**, merely potential damage that did not actually occur is only immaterial (annoyance of the party concerned) and as such does not qualify for compensation.

Causality: this is interpreted to mean a causal relationship between the behaviour of the person causing damage and occurrence of damage, whereby this may constitute an active action or failure to act.

Examples: Someone injures another person with a knife (action).

A railway employee fails to switch the points, causing two trains to collide (failure to act).

However, the legal system does not want to impute blame for unpredictable occurrence of damage to the person causing it, since this would not be adequate (reasonable).

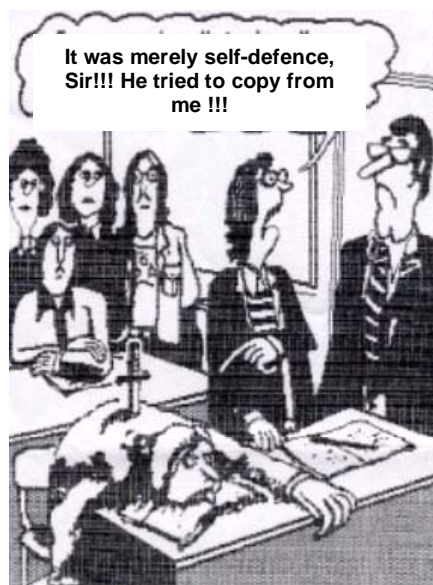
Example: A doctor injects an intravenous drug into a patient which he had taken from the original packaging. The patient dies immediately. It turns out that the manufacturer had by mistake used the wrong packaging. While the doctor's behaviour played a causal role in occurrence of damage, this was not adequate since, based on his experience, the doctor could not have expected that dangerous substances would be confused at the factory.

Unlawfulness: conduct that infringes an order or prohibition set out in the legal system is designated as being unlawful.

Example: A dog that is running around unrestrained bites a passer-by and injures him. While the dog did not behave unlawfully, since he is not the addressee of the legal provision, his owner certainly did if it can be demonstrated that he did not comply with his duty of supervision.



Only in two cases can unlawful conduct be justified: in **self-defence** and because of **necessity**.



Self-defence is a defence against an imminent unlawful attack on life, freedom or property through **moderate (reasonable)** defence.

Example: A nurse is attacked during the night shift by a drug addict who wants to get the key to the drugs' cabinet from her. Nurse Resoluta manages to knock down the man and restrain him until colleagues arrive on the scene. Her conduct is justified.

Necessity is defence against immediate danger by inflicting injury on the objects of legal protection of another party who is not the attacker.

Example: A mountain climber is close to becoming frozen and comes upon a locked hut, into which he breaks and thus saves his life. The object of legal protection life takes precedence over the object of legal protection property.

Fault: One uses the term "fault" if someone can be accused of having acted unlawfully.

Fault is adapted to the **personal nature** of the accused. The latter can be reproached only if he had the subjective capacity to **recognize** the **unlawfulness** of his conduct and to act accordingly.



A distinction is made between several types of fault:

Intent
Gross negligence
Slight negligence



Intent is assured if the person causing damage is conscious of its unlawfulness.

Example: Following a dispute with a neighbour, the offender damages the latter's flowerpot in anger.

NEGLIGENT



The term **gross negligence is used** if the failure to take care has been of such a magnitude that it could not possibly have happened to a careful person in such a situation.

Example: A surgeon conducts a scheduled operation without having performed an internal examination and satisfied himself with the findings, following which the patient suffers damage.

Slight negligence is demonstrated if the offender's conduct leads to a mistake which, while not excusable, could also occasionally happen to careful persons.

Example: A paramedic overlooks the fact that when arriving on the scene of a multi-vehicle accident that a further person is seriously

injured and he informs the emergency doctor too late about the urgent need for treatment, which meant that there was a delay in treating the injured person.

The **distinction made between the different degrees of fault** is therefore important since the scope of compensation liability increases in line with the degree of fault.

Tort liability and contract liability:

If there is any doubt, the presumption that damage occurred without the fault of another person applies.

This applies without limit for tort liability. The damaged party and the person causing the damage have no contractual legal relationship related to the damage.

Example: A traffic accident causing damage to the cars takes place on a country road. The two parties involved in the accident did not know each other prior to the accident. Even had they already had a legal relationship (for example as landlord and tenant) this would have no bearing in the case of the accident since the damage occurred outside the context of that legal relationship.

The damaged party must claim that the person causing the damage (the other party to the accident) was at fault and must prove this.

Damage can be inflicted by another person also within the **framework of a contractual relationship**, i.e. the damaged party and the person causing the damage have a contractual legal relationship. Damage occurs during performance of a contract.

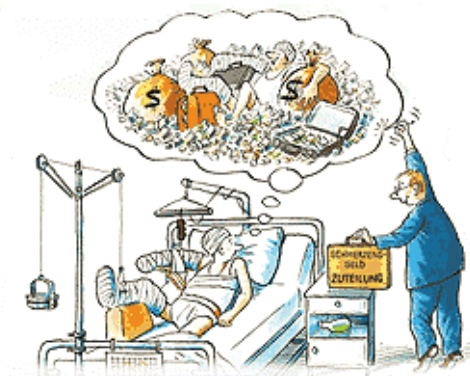
Example: The treating physician is inattentive and inflicts damage on his patient during a procedure carried out in his surgery.

Since the patient is a party to the contract with the doctor, **contract liability** applies here. If the patient now claims to have suffered damage the doctor, as the person inflicting the damage, must prove that he bears no fault for occurrence of the damage, i.e. that the damage would also have occurred if everything had gone according to the rules of the medical art.

Compensation is in principle to be paid in a form that ensures that the previous state is restored (**payment in kind**). Only if this is not possible and appropriate must compensation be paid in the form of money (**pecuniary compensation**).

Contributory fault on the part of the damaged party: if the damaged party played a contributory role in inflicting damage, he must bear a proportional share of the damage.

Example: On being discharged from hospital, the patient is told that in the event of any problems during the convalescence period he should immediately visit the outpatient centre. Because he delayed availing of the services of the outpatient centre, there is also a delay in noticing a previous treatment procedure. Compensation, to which the injured party has a right, is thus accordingly reduced.



Vicarious liability for another's actions: In principle everyone is liable only for their own conduct, but do not bear liability for that of others. An exception to that rule is **vicarious liability**. Typically, an entrepreneur employs several employees to discharge his contractual obligations. These are known as **vicarious agents** (persons employed by debtor in performance of this obligation). The employer is liable for any of their misdeeds just as he is for his own. The term "**agent**" does not entail any connotation of **qualification**, an excellent doctor is also the vicarious agent for the hospital's legal authorities!

Example: Due to the slight negligence of a surgeon, a patient suffers damage while undergoing surgery in a hospital. The legal authorities of the hospital are obliged to pay compensation as the party to the contract.

Under certain circumstances the employer has a right to demand reimbursement of the damages paid by him from the person who actually caused the damage (the employee) (this is called **recourse**). The right to recourse will, however, depend on the degree of fault, whereby no liability at all is borne for "excusable mistakes", and in the event of negligence, this can be reduced by the court. But if intent can be proved, liability is not limited.



**The operation was just in time.
Another four hours and he would
have recovered on his own**

A limit has to be put on the right to recourse since complete recourse could deprive the employee of his economic existence and, as a rule, the entrepreneur will be the stronger party in an economic sense. The entrepreneur can also improve his economic situation by hiring employees, for which he must also accept risk.

Liability for the observed violations by others: In a strict sense, only superiors are obliged to observe the actions of others and to intervene if such actions could give rise to disadvantages for other persons. Colleagues need not continuously monitor each other. However, in the case of any conspicuous mistakes, any who fails to try to put an end to such an obvious action can make himself liable.



Examples: A hospital employee regularly steals consumables for this own personal use. One colleague is aware of this, but does not want any trouble so he does not report this to his boss. As such, he is liable to prosecution and to having to pay compensation..

A nurse notices how a colleague administers drugs that been exchanged and only reports the mistake later to her superiors. She should have drawn attention immediately to the mistake to prevent damage to the respective patient.

Even without any **special agreement** between employer and employee, both are called upon within the framework of a **welfare or fiduciary duty** to as far as possible prevent damage to others. For example, the employer is obliged to, among other things, pay attention to the **health** of employees, while the employee must exercise care when handling the **property** of the employer.

8 Interface between hospital law, professional law and occupational law

Every hospital employee often finds himself (often unwittingly) in the crossfire between three large areas of law: **hospital law, professional law and occupation law.**

Hospital law regulates how the hospital's activities are run such as, for example, who is in charge of such activities, subject to what conditions must patients be admitted, when they are to be discharged, etc.

Professional law bestows rights and obligations on the various professional groups, such as the right certain physicians have to use the title "Head of Department" or the professional duty to provide the necessary emergency help even when off duty.

Not all professional groups are governed by special professional law. In the healthcare setting this is the case, in particular, for doctors, nurses, medical/ technical service providers, midwives, etc. Nonetheless, several professional groups have developed a certain standard for their everyday working practices, and often this is accepted and laid down as law only much later.

Occupational law regulates general relationships between employer and employee, e.g. the employer's right to give instructions to his employees and his duty to pay appropriate remuneration.

Example: A nursing aid is unable to carry out all the everyday duties he was learned and is capable of discharging because the employer has reserved some of these for qualified nursing personnel.

The employer is legally entitled to place such a restriction but he cannot at the same time demand performance of tasks that are not included in the job description.

Example: The pathologist's assistant helps the doctor during autopsies. But the assistant cannot by any means be obliged to carry out autopsies on his own since this is not included in his job description.

Where lawyers are concerned the, often only seeming, contradictions between the various legal areas are generally easy to overcome. In general it can be stated that an employer can exert a lot of influence by virtue of his instructions and general commands but this influence is limited by professional law. However, the in some cases extensive rights of the employer are counterbalanced by the rights of the employee, e.g. in many countries the salary continues to be paid for a certain period of time in the event of illness. Disputes between employer and employee **can if necessary be settled in the courts.**