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“Patient trade” in Germany: an ethical issue at the practitioner-clinician interface in 1909 and 2009

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Abstract

In 2009 the German media featured the so-called “patient trade” scandal. Offending against the rules of the professional code for German doctors, some medical practitioners had accepted bonus payments from specific hospitals for referring patients to them. This article discusses a historical precedent for this scandal, the patient trade affair of 1909, in which several medical professors of the Berlin university clinics were accused of having paid agents for bringing them lucrative private patients. Although the historical contexts were different, then, as in 2009, a commercial attitude towards medical practice clashed with the ethical ideal of the economically disinterested doctor.

“PATIENT TRADE” IN 2009

In late summer 2009 the German media reported a seemingly new and scandalous phenomenon on Germany's health care market: medical practitioners were offered, demanded and received bonus payments from certain hospitals for referring patients to them.^{1 2} A recent change in the regulations for remuneration of hospitals by the health insurance organizations had been a key factor in this development. Hospitals could no longer claim day rates from the insurance for the whole period that a patient spent in hospital, but only a disease-specific fixed amount per case, i.e. a flat rate for each in-patient (*Fallpauschale*). A high frequency of a high number of in-patients was thus in the economic interest of hospitals.³ In order to increase the figures for in-patients and thus to maximize the hospital's claim to the health insurers, some hospitals now apparently paid practitioners in private practice for referring patients to them. The press did not mince its words about such practices: terms such as “patient trade”⁴, “catch bonus”⁵, “head bonuses”⁶, “bribery”⁷, and “the sold patient”⁸ were used. Professor Karl Lauterbach, the health expert of the Social Democratic Party and advisor to the then Minister of Health Ulla Schmidt, made the alarmist statement that the bonus payments for referrals could even have lethal consequences. Patients might die if, due to financial incentives, their doctors had sent them into a hospital that was incompetent to deal with their condition.⁹

The president of the German Medical Association (*Bundesärztekammer*), Dr Jörg-Dietrich Hoppe, saw the cause for the referral payments in an increasing commercialization of health care and observed that the traditional codes of honour no longer held back such behaviour.¹⁰ While the German professional code for doctors clearly prohibits receiving payment or other benefits for referral of patients,¹¹ such practices operated in a legal grey area. Often payments by the hospitals to practitioners were camouflaged as generous honoraria for diagnostics prior to the patient's admission to hospital, or for post-operative care of patients after dismissal from the clinic. In fact, the newly introduced system of integrated health care (2004), which aimed at better co-ordination of patient care outside and inside the hospital, had facilitated contracts between health insurers, doctors and specific hospitals - contracts which allowed for indirect bonuses for the referral of patients.^{12 13} The Berlin historian of

medicine Paul U. Unschuld commented that “for the first time in history” illness was understood as something that is valuable to the national economy, and that excesses were probably unavoidable in the “current transition of medicine from a scientific-ethical maxim of practice to a commercial principle”.¹⁴

What was not remembered in this lively debate (which however was soon eclipsed by the German general elections and change of government in autumn 2009) was that the phenomenon of a patient trade had already once caused a major scandal in Berlin exactly one hundred years earlier, in 1909. In fact, the German term for it, *Patientenhandel*, was used in the press then as now. This article gives a brief account of the historical patient trade affair, in which a group of Berlin medical practitioners and several eminent clinicians in the university hospitals clashed. It shows how professional disciplinary tribunals as well as the general courts became involved, and how the medical and daily press responded to the affair. It concludes with some thoughts on the assumptions about correct professional conduct and the ethical nature of medical practice that seemed to underlie the historical scandal - and perhaps also the recent debate.

“PATIENT TRADE” IN 1909

In October 1908, a committee of the Berlin-Schöneberg Medical Society launched an inquiry into alleged payments of specialist physicians and medical professors to middlemen for bringing them private patients. At the centre of the allegations was the so-called Russian Institute for Medical Consultations in Berlin, which was run by medical doctors Semjon Lipliawsky and Siegfried Weissbein.¹⁵ For a fee, payable by the patients, they arranged for Russian patients visiting the German capital consultations with Berlin’s eminent clinicians in the university and teaching hospitals. Besides this Institute, other agencies and individual agents also offered such services to foreign patients. Allegedly, these middlemen were not only paid by the patients but in addition also by the consulted clinicians. Some clinicians were said to even share part of their honoraria with the agents. Clinicians’ payments to agents, however, would constitute unfair competition in the eyes of medical practitioners who worked in their own practices, as they would lose out on lucrative private patients. At this time, only about 20 per cent of Germany’s population were members of the state’s health insurance scheme (which had been introduced in 1883),¹⁶ so that private patients were still a very important - in some cases the only - source of income for medical practitioners. To pay middlemen to obtain a lucrative private clientele was considered to be a breach of medical ethics. Julius Friedemann, the chairman of the Schöneberg Medical Society, called in the *Berliner Ärzte-Correspondenz*, the journal of the local medical association and professional societies, for information on such practices: “in the interest of the professional dignity (*Standeswürde*) of the German and especially the Berlin medical profession”.¹⁷ He was joined in this campaign by the well-known physician Albert Moll (1862-1939), who ran his own private practice for nervous diseases in Berlin and who had published, in 1902, a comprehensive book on medical ethics.¹⁸ 19 Moll was chairman of the so-called “Committee of Fifteen” (*Fünfzehnerausschuß*), a group representing the interests of the whole medical profession in the Berlin area, and he also stood that autumn as a candidate for the Berlin Medical Association (*Ärztékammer*), the official representative body for doctors.

The information that Friedemann and Moll collected - mostly in confidential conversations - turned out to be of an explosive nature. Clinicians who apparently had made or offered payments to the doctors of the Russian Institute or to other agents included: Ernst von Leyden (1832-1910), the doyen of internal medicine and former director of the First Medical Clinic of the Charité Hospital of Berlin University; Hermann Senator (1834-1911), director of the Third Medical Clinic and Outpatient Clinic of the Charité and chairman of the

prestigious Berlin Medical Society (*Berliner Medizinische Gesellschaft*); Karl Anton Ewald (1845-1915), director of the department for internal medicine at the Augusta-Hospital in Berlin and professor at Berlin University; and Carl Posner (1854-1928), extraordinary professor for urology and pathology at Berlin University. Initially, Moll and Friedemann seemed to have tried to handle the delicate matter discreetly, but in spring 1909 they made it public. Their method for going public was an unusual one: Friedemann and Moll used the platform of a private libel trial of Moll against another doctor of the Schöneberg Medical Society, Dr Albert Levin, to divulge details about the conduct of the four medical professors. They did this through witness statements by Friedemann and an extensive motion to take evidence by Moll's lawyer.^{20 21} Levin had accused Moll of cowardice for holding back incriminating evidence regarding the payments to agents or of pretending to have more evidence on this than he actually had. The judge in this libel trial, perhaps too hastily, acknowledged that such payments had really been made. He convicted Levin of libel and fined him. After appeals from both parties the trial ended with a settlement. Suspicions were raised that Moll and Levin had staged the whole libel trial to obtain the public audience of a court for their accusations against the professors – something that both, of course, rejected as an insinuation.^{22 23}

PUBLIC RESPONSES

However, the news that some of Berlin's most eminent medical professors seemed to have paid bribes to agents for bringing them private patients created a sensation. The shock waves went not only through the German medical^{24 25 26} and popular press, but also reached London and went as far as California: the *British Medical Journal* reported about the affair,²⁷ as did the *Southern California Practitioner*.²⁸ Posner, who was an editor of the respected medical weekly *Berliner Klinische Wochenschrift*, offered his resignation from this post.²⁹ Hermann Senator resigned, pending investigations, from his chairmanship of the Berlin Medical Society. Headlines in the daily press included "bribes",³⁰ "patient catching",³¹ and "patient haggling".^{32 33} A libel trial of Senator against the newspaper *Berliner Zeitung am Mittag* ended with a settlement,³⁴ but created even more publicity for the affair.³⁵ Anti-Semitic tendencies surfaced in parts of the press. Obviously being aware that Moll, Friedemann and Senator as well as Lipliawsky and Weissbein had a Jewish background, the newspapers *Deutsche Tageszeitung* and *Das Reich* emphasized that Jewish doctors were prominently involved in the affair.^{36 37} In a series of articles about the affair in the medical weekly *Therapeutische Rundschau*, written by Ewald's former assistant Hans Lungwitz (1881-1967), Moll and Friedemann's initiative was called "anti-German", as it had damaged the international reputation of German academic medicine. Lungwitz also ridiculed Moll as "God's ethicist" and a "medical Sherlock Holmes".³⁸ The accusers or whistle-blowers thus also turned into accused.

DISCIPLINARY CONSEQUENCES

In fact, Friedemann had initiated court of honour proceedings against himself to clear his name against accusations that his allegations were unjustified. The Berlin-Brandenburg medical court of honour concluded after its own extensive investigations that his allegations were based on facts and acquitted him.³⁹ On the other side, Weissbein as one of the accused agents took the same step. His trial likewise ended with an acquittal.⁴⁰ When the matter was raised in the lower house of the Prussian Parliament (30 April and 1 May 1909), the Ministry for Religious, Educational and Medical Affairs promised to investigate the allegations.⁴¹ At their own request, disciplinary proceedings were started against the professors Ewald, Senator and Posner; and later on also against the elderly and ill Ernst von Leyden. Prompted by the Ministry, the University judge Daude not only repeatedly interrogated Ewald, Senator and Posner, but also questioned several of the agents as well as

Friedemann and Moll as witnesses under oath. In the end, however, none of the four accused professors were found guilty. There was no denial that they had occasionally given money to some agents who had brought them private patients, especially Russian patients. But these payments, the professors stated, had just been small tips or compensations for long waiting hours, or small rewards for agents who acted as interpreters when the Russian patients were seen, or who had assisted during physical examination of the patients. The payments were not meant to be bribes for bringing more private patients. The disciplinary proceedings against Senator, Ewald and von Leyden were abandoned by the Ministry in November 1909.^{42 43} Posner, who had regularly paid one specific agent, the interpreter and health assistant Bernhard Rosenberg, had to face a full trial at the Royal Disciplinary Court for Civil Servants, but was acquitted in January 1910.⁴⁴

ANALYSIS AND CONCLUSIONS

Was this patient trade affair of 1909 then more than a storm in a tea cup, or a straw fire that burnt out? The series of trials and disciplinary investigations which the matter caused, the practices of some agencies that came to light in witness statements and the strong resonance in the press suggest otherwise. What was at stake in 1909, and as I want to argue also in 2009, was the ethical status and self-image of doctors as financially disinterested helpers of the sick. With the 1871 Trade Ordinance (*Gewerbeordnung*) for the German Reich medical practice had been classed as a trade that could be exercised by anyone (principle of *Kurierfreiheit*, “freedom to cure”), and special responsibilities of doctors, such as an official duty of medical assistance at any time and to anyone who asked for help, had been abolished. While this change had initially been welcomed by the profession, by the late 1870s dissatisfaction with the new status had spread among doctors who started to regret being legally placed in the same category as merchants and non-licensed healers. Such a status appeared to be incompatible with their bourgeois identity and social ambitions, and the regulations of the Trade Ordinance were seen as opening the floodgates to quacks, the so-called *Kurpfüscher*.^{45 46 47} How to charge honoraria in a gentlemanly manner that would clearly distinguish doctors from other healers and traders and preserve doctors’ reputation as selfless professionals became a prominent topic of medical ethics. For example, a common advice to young doctors entering medical practice was to be very tactful and cautious with reminders for patients who failed to pay. Never should a patient be sued for outstanding fees.^{48 49 50} However, the economic circumstances for doctors in late nineteenth- and early twentieth-century Berlin conflicted with such professional ideals of gentlemanly conduct which were rooted in the ethics of an earlier generation of elite practitioners such as the Prussian royal physician, Christoph Wilhelm Hufeland (1762-1836), and the Göttingen professor of medicine, Karl Friedrich Heinrich Marx (1796-1877).⁵¹ The latter had even suggested that only men of private means should practice medicine, as they would be able to care for the sick out of a pure sense of compassion and moral duty, without having to think about their fees.⁵²

Imperial Berlin was a notoriously competitive market for medical doctors. The perceived overcrowding of the German medical profession since the 1890s was thought to be particularly serious in the cities.⁵³ In 1899 Prussia had introduced by law medical disciplinary tribunals or courts of honour in order to control the consequences of rampant competition among doctors. Among the most common disciplinary offences were excessive advertising, financial misconduct, slander or libel, or so-called “lack of collegiality”. As many as 10 per cent of the medical practitioners in Prussia appear to have been involved in disciplinary proceedings by the beginning of World War I.⁵⁴ Taking this context into account, the 1909 patient trade affair seems to have attracted so much attention because it indicated that a commercial, competitive attitude to medical practice had become so widespread that it had now reached the very top of the profession: the professors in the

Berlin medical faculty, which was then seen as the leading such institution in Europe. The 1909 affair also put a spotlight on the tensions between doctors in private practice, such as Moll and Friedemann, and those who had privileged access to patients as doctors in the outpatient clinics of the university hospitals. For private medical practitioners the outpatient clinics, directed by prominent professors, were serious competitors. As Rosemary Stevens has pointed out for the American context, the rise of specialism in medicine around 1900 led to the problematic practice of secret fee-splitting between specialist surgeons and referring general practitioners.⁵⁵ Medical specialization was also a relevant background to the Berlin patient trade affair of 1909: Posner was a leader in the new specialism of urology; and the three involved professors of internal medicine were known for their expertise in specific areas: Ewald in gastroenterology,⁵⁶ Senator in kidney diseases and von Leyden in diseases of the nervous system.

A hundred years on, German health care has changed considerably. The health insurance system now covers the whole population. And there is now much concern about a shortage of doctors, at least in some areas. However, problems of competition have not gone away. The health insurers themselves have moved away from their original conception as collective funds based on the principle of solidarity and now compete with each other for members through their offers of services, in the manner of health companies.^{57 58 59} Hospitals likewise had to follow economic pressures, as did medical practitioners. The continuing rise of specialist practitioners dependent upon referrals from generalists has further increased tensions within the profession. In this climate, too, some doctors at least seem once again happy to exploit the health care system to their own financial advantage. The traditional ideal image of the economically disinterested doctor who only follows the medical needs of his patients, as still reflected in the German professional code's prohibition of receiving payments for referrals, is violated once again. The interface between (referring) general practitioners and hospital-based specialists remains a site of potential conflict and transgressions. The patient trade phenomenon is not an exceptional failure in medical ethics. It is indicative of a commercial attitude in modern medicine within a competitive market – then and now. In such a context, there was, and is, a danger that patients are increasingly viewed as commodities. Patient trade scandals appear to flare up in historical constellations in which strong economic pressures on doctors, caused by overcrowding of the profession in a market dominated by private practice or by demands for cost-cutting in a competitive insurance-based health care system, clash with the altruistic foundations of a gentlemanly type of medical ethics. One might therefore ask to what extent adherence to standards of medical professional ethics are dependent upon the economic circumstances in a given period and place; or, to put it more provocatively: can we only expect the kind of ethics that we can (financially) afford?

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