

**Current legal framework governing
manual-therapeutic osteopathic work
by physiotherapists in Austria.
An analysis from the perspective of self-employed
physical therapists**

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by

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St. Johann in Tirol, 2007

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DECLARATION

“Hereby I declare that I have written the present master thesis on my own.

I have clearly marked as quotes all parts of the text that I have copied literally or rephrased from published or unpublished works of other authors.

All sources and references I have used in writing this thesis are listed in the list of references. No thesis with the same content was submitted to any other examination board before.”

St. Johann in Tirol, December 7, 2007

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ABSTRACT

This literature research looks at and evaluates the legal background against which osteopathy is practiced by self-employed physical therapists in Austria. Since osteopathy is not recognized as independent therapeutic profession within the Austrian health care system, no statutory rules and regulations exist for osteopathy at the moment. Due to this fact, a number of training possibilities and institutions were founded in recent years, which differ considerably in their quality.

Physical therapists are entitled to use osteopathic treatment techniques (structural, visceral and cranio-sacral) on the basis of their competencies anchored in the Clinical Technical Services Act (MTD Act) and civil and criminal law regulations.

It is assumed though that certain elements of osteopathy must not be applied by physical therapists due to legal considerations. This paper will examine this kind of problems more closely.

A certain degree of legal knowledge is necessary for all self-employed physical therapists who want to practice osteopathy in order to protect their patients and clients and not least also themselves and to give osteopathy its *justification*.

PREFACE

During my six-year training at the Vienna School of Osteopathy (Wiener Schule für Osteopathie, WSO) I kept asking myself the same questions over and over again: Am I allowed to carry out this treatment? Is osteopathy compatible with the description of my job in all aspects? Am I protected by the law against legal action?

These worries increased even more when a colleague told me about a case in her practice: One of her patients claimed that he had become incapacitated for work as a result of her treatment. She was completely shocked at the time because in the osteopathic-physical therapy method she applied she could not find a cause for his accusations. In the end, the allegation of the patient proved to be untrue – fortunately. Nevertheless, she kept wondering for a long time whether in her professional capacity she had used treatment methods which were not explicitly attributed to the work of physical therapists and thus not legally supported.

Since this story of my colleague the application of some treatment techniques (e.g. manipulation of joints), which we used to practice in the osteopathic training without thorough examination, preparatory treatment as well as treatment after the manipulation, has become the very last resort for me in the treatment of my patients. I only use these techniques after I have made sure that I am safeguarded against all eventualities. But the question is can I be safeguarded against consequences of treatment techniques which I might not be allowed to use due to the description of the physical therapist profession? All of this led me to write this paper.

St. Johann in Tirol, December 7, 2007

Verena Panovits

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LIST OF ABBREVIATIONS

ABGB	Austrian Civil Code
ÄrzteG	Act on the Medical Profession
BCOM	University of Westminster
BGBI.	Federal Law Gazette
B-VG	Austrian Constitutional Law
cf.	confer
Dr.	Doctor
DUK	Donauuniversität Krems (Danube University)
e.g.	For example (Latin: <i>exempli gratia</i>)
etc.	e cetera (and so on)
f	and the following
ff	and the following (more than one)
GOT	General Osteopathic Treatment
i.e.	that is (Latin: <i>id est</i>)
I.A.O.	International Academy of Osteopathy
IPR	International Civil law
Jun.	Junior
Lat.	Latin
MET	Muscle energy techniques
MRK	European Human Rights Convention
MTD	Clinical technical services
MTD Act	Federal law regulating the clinical technical services
No.	number

SHD	Paramedic medical service
OGH	Austrian Federal Supreme Court
ÖÄGMM	Austrian Medical Association of Manual Medicine
ÖBIG	Austrian Health Institute
ÖGO	Austrian Osteopathic Association
ÖJZ	Austrian journal of legal practitioners
p.	Page
para.	Paragraph
Sen.	Senior
StPO	Austrian Code of Criminal Procedure
StGB	Austrian Criminal Code
UWG	Act on Unfair Competition
WSO	Vienna School of Osteopathy (Wiener Schule für Osteopathie)

1 INTRODUCTION

1.1. Preliminary remarks and problem statement

Over the recent years, during which osteopathy has gained a good reputation in Austria within the vast field of different therapy options, two kinds of osteopaths have emerged: on the one hand, the group of medical doctors practicing as osteopaths and on the other hand, the group of non-doctors. Since the profession “osteopath” is not recognized as independent profession in Austria, the legal rights and responsibilities of the therapists are determined by the original profession of the osteopath in question. In other words: a medical doctor with additional osteopathic training is legally regarded as medical doctor, while trained physical therapists working as osteopaths are still regarded as physical therapists. Due to the fast growing “wellness” sector the group of non-doctors among osteopaths can be divided further in those with a background of medical training (e.g. physical therapists) and medical “laypersons”. In how far the latter can be counted to the field of “osteopathy” and in what sort of legal grey area they operate when treating patients will only be discussed in passing in this paper. However, the mentioned issues and problems should represent a thought-provoking impulse to protect osteopaths and their patients in the future.

A doctor, who manipulates joints, establishes diagnoses or “shifts” organs, does not have to work under some sort of “disguise” or finds himself/herself in a grey area when treating patients osteopathically. The situation for physical therapists is different (cf. Engel/Mückler: *Osteopathie in Österreich, Europa und weltweit* (2005), p. 5). On the basis of the Austrian Federal Act on the Medical Profession doctors can apply all osteopathic treatment methods as long as they can provide medical reasons and as long as the patient has given informed consent.

According to the description of their profession physical therapists are subject to certain limitations by law with regard to osteopathy, which will be more closely examined in this paper.

The tendency of some physical therapists to turn away from their original profession and to devote themselves exclusively to osteopathy is understandable. Nevertheless, their change in attitude does not change their legal status. They still are regarded as physical therapists as long as the osteopathic profession is not defined and subject to legal regulation.

This paper will look at the current legal framework and evaluate in how far osteopathic examination and treatment methods can be reconciled with the legal provisions governing the physical therapist profession.

Other medical professions like midwives and occupational therapists will not be discussed in this context. The paper will only look at the situation of physical therapists, in particular self-employed physical therapists without contracts with the national statutory health insurance providers. Also treatments provided by medical or non-medical assistants are not analysed further.

The term “patient” will be used exclusively for “sick persons” who need a referral from a doctor to be treated. The term “client” will be used for “healthy persons” who come to the therapists to receive prophylactic treatment and advice.

It has to be pointed out that in this master thesis gender specific terms will be used where appropriate.

1.2. Questions and working hypotheses

Research-guiding questions:

What concrete legal knowledge (administrative law, civil law, penal law) should self-employed physical therapists in Austria, who mainly work osteopathically, have?

How is the osteopathic training in Austria regulated and in how far is osteopathy recognized as independent form of therapy in the Austrian health care system?

Can osteopathy as a whole (structural, visceral and cranio-sacral aspects) be reconciled with the physical therapist profession from a legal perspective?

Working hypotheses:

The self-employed work of physical therapists in Austria, who mainly use osteopathy, is regulated by provisions of administrative, civil and penal law. However, these provisions allow for a great deal of interpretation, which means that physical therapists who work mainly osteopathically do not have clear guidelines regarding the application of specific osteopathic techniques in practice.

Due to several different training facilities, the osteopathic training in Austria does vary considerably with regard to quality.

At the moment the concept of osteopathy is not officially recognized in the Austrian health care system.

However, most osteopathic techniques can be easily reconciled with the physical therapist profession. However, the techniques to manipulate joints and the field of visceral osteopathy have to be questioned from a legal perspective.

Since the right to manipulate joints is reserved to the profession of medical doctors and since the Clinical Technical Services Act (MTD Act, Federal Law Gazette No. 460/1992 as amended in Federal Law Gazette No. 90/2006) does not mention the treatment of organs, it is necessary to further examine these treatment techniques to find out whether they can be applied by physical therapists in compliance with the law.

1.3. Methodology and material

This literature research wants to shed light on and scrutinize the current legal framework. The sources that were used in this context (Federal Law Gazette, decisions of the Federal Supreme Court of Austria (OGH), relevant literature, etc.) were partly researched by the author of this paper; in part the information was obtained through conversations with experts. On the basis of these sources the central questions of this paper were analysed.

2 CURRENT PROBLEMS WITH REGARD TO THE APPLICATION OF OSTEOPATHIC TECHNIQUES IN AUSTRIA

2.1 Frame of reference for osteopathy

First of all the questions of what is osteopathy and how it is defined have to be answered.

At the moment there is no uniform scientifically founded definition of the term “osteopathy”. Philosophy, art, holistic medical concept are buzzwords which are often mentioned when it comes to its. Due to the increasing diversity which has characterized osteopathy since its emergence, a uniform definition is quite difficult. Since osteopathy was named by its founder Andrew Taylor Still (1828-1917), the concept has been expanded and amended by many of his students.

The Austrian Osteopathic Association (Österreichische Gesellschaft für Osteopathie, ÖGO) describes osteopathy as an independent, holistic, manual treatment method.

“It is based on the recognition that an unobstructed, healthy action of vital functions relies on an undisturbed mobility of the structures in the body. If there is a blockage, sooner or later the function of the affected organ or joint and thus all related structures of the organism will be disturbed.”

(<http://www.oego.org/ziele.php?zaehler=11>, 27/10/07).

The recognition that the human body is an entity and that all structures and organs are interrelated and influence each other, makes the concept of osteopathy a holistic approach. The osteopath releases restrictions and disturbances of structures in the body, after identifying them through a detailed conversation (case history), manual examination (palpation) and tests of function. Osteopathy disposed of many individual techniques thus the therapist can tailor the treatment to the specific needs of the patients or clients. The individual therapeutic techniques are always carried out

manually. After the restriction has been released the body has the possibility to use its self-healing powers.

The Vienna School of Osteopathy (Wiener Schule für Osteopathie, WSO), who was the pioneer of osteopathic training in Austria provides the following explanation of osteopathy on its website:

“Osteopathy is a holistic method in which the hands are used for diagnosis and treatment. Its most important principles are the functioning of the human body as unity, the body’s possibility to self-regulate and self-heal, as well as the interdependence of structure and function.” (<http://www.wso.at/neu/index.html>, 03/05/2007).

This definition describes osteopathy as a whole in a concise and clear way. Nevertheless, experienced osteopaths might regard it as incomplete. Where are the spirituality, art and philosophy?

Osteopathy has two faces, which have continued to develop over the past hundred years. There are the “bone setters“, which treat the patients with techniques that can be really felt, and the “healers“, who just put on their hands and stimulate the body to heal itself (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 17). These contrasts in the field of osteopathy already show how difficult it is to find a uniform definition.

Usually definitions serve as basis for a certain terminology. The term ‘definition’ is derived from Latin: “de” meaning “from” and “finis” meaning “border, limit or limitation”. Thus definition means delimitation. Delimitations are necessary to facilitate the scientific discussion of hypotheses or models.

(cf. <http://de.wikipedia.org/wiki/Definition>, 03/09/2007)

Thus a uniform, scientific definition, which is understandable for laypersons, is necessary for a speciality to be recognized by society. And a definition is required also from a legal perspective, which is emphasized by the following statement:

“From a legal point of view, osteopathy is not a scientifically recognized medical healing or treatment method.” (Kletecka-Pulker: Rechtsgrundlagen der Behandlung (2006), p. 3).

This illustrates that an exact definition is an important and indispensable precondition for official legal recognition.

In a resolution of the European Union (May 29, 1997) on the status of non-conventional medicines (A4-0075/97) osteopathy is mentioned as “other therapeutic method” besides chiropractice, acupuncture, Chinese medicine etc. and thus belongs to the category “non-conventional medicine“. The resolution reads:

“[...] whereas the whole corpus of medical systems and therapeutic disciplines covered by the term 'non-conventional medicine' is either not recognized as valid, or only partially so; whereas a given medical or surgical treatment applied instead of another may be described as 'alternative', and a treatment used to supplement another treatment may be described as 'complementary'; whereas it would be wrong to speak about 'alternative' or 'complementary' disciplines insofar as the fact of a medical discipline's being alternative or complementary can only be determined from the specific context within which it is being used; whereas an alternative medical discipline may also be a complementary one; whereas, in this resolution, the term 'non-conventional medicine' covers the notions of 'alternative medicine', 'natural medicine' and 'complementary medicine' as used indiscriminately in certain Member States to designate medical disciplines other than conventional medicine [...].”

(<http://eur-lex.europa.eu/Notice.do?val=318958:cs&lang=en&list=318958:cs.&pos=1&page=2&nbl=11&pgs=10&hwords=non-conventional%20medicine~&checktexte=checkbox&visu=#texte>, 07/12/2007).

The resolution mentions that the effectiveness of all therapy forms that figure in the category “non-conventional” medicine is disputed. It also explains the terms “alternative” and “complementary” and that they have to be used with regard to the context in which the concrete form of therapy is applied. However, in some Member States of the European Union, also in Austria, the above mentioned terms are used indiscriminately even though there are no regulations governing certain forms of therapy.

It is obvious that osteopathy will have to overcome several obstacles on the way to official recognition. A clear definition and the possibility to scientifically prove the effectiveness of osteopathic treatment will be the cornerstones on the way to this recognition in the Austrian health care system, which is very much focused on conventional medicine.

This paper will look at the legal framework in a pragmatic way. It will evaluate the fields of osteopathy which “use the hands for diagnosis and treatment” as mentioned in the definition by the Vienna School of Osteopathy (WSO). These fields include structural techniques, manipulation techniques of joints, cranio-sacral techniques and visceral techniques.

Structural techniques are approaches that work on the mobilization of bones, muscles and ligaments, i.e. the locomotor system. Also the manipulation techniques belong to the structural techniques as they move structures but due to their greater intensity they are regarded as special category within the structural techniques. Cranio-sacral techniques are considered as gentle methods which release restrictions and tensions mainly in the cranium through subtle touch. Visceral techniques are the techniques used to treat the internal organs and their interconnections with the locomotor system (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 147ff).

Thus an osteopath has to learn many different individual techniques in order to fulfil the claim of osteopathy to provide a holistic treatment.

2.2 Osteopathic training in Austria

This chapter will present the current situation and problems of osteopathic training in Austria and the resulting application and osteopathic practice.

Someone who wants to study osteopathy in Austria can choose between several options. There are different schools and courses who try to convey their knowledge to those that are interested.

In her master thesis 2007 "Survey, Systematisation and Comparison of Professional, Advanced and Continuing Training Programs for Osteopathy available in Austria in the Winter Term 2006/2007" Wilfling points out that the different courses, training and continuing education programs offered in Austria differ considerably from each other. For reasons of systematization she speaks of two main groups in her paper: "professional training programs in osteopathy" on the one hand, and "osteopathic advanced and continuing training programs", on the other.

The group of "professional training programs in osteopathy" include the Vienna School of Osteopathy (Wiener Schule für Osteopathie, WSO) in cooperation with the Donauuniversität Krems (DUK), the International Academy of Osteopathy (I.A.O.) in cooperation with the University of Westminster (BCOM) and the Austrian Medical Association of Manual Medicine (Österreichische Ärztesgesellschaft für manuelle Medizin, ÖÄGMM) in cooperation with the Philadelphia College of Osteopathy (cf. Wilfling: Survey, Systematisation and Comparison of Professional, Advanced and Continuing Training Programs for Osteopathy available in Austria, Master Thesis 2007, p. 15).

According to Wilfling the schools have the following things in common:

- *The compared professional training programs for osteopathy all cooperate with a federally recognised university, conform an extra occupational part-time training in osteopathy and comprise all sectors of osteopathy (structural/functional system, visceral system, cranio-sacral system). Only persons with basic medical-scientific training (e.g. doctors, physiotherapists) are admitted to these training programs.*

- *All compared professional training programs for osteopathy are conducted in the form of block-seminars. The instructors in all institutions can be compared on the same level.*

- *In Austria the WSO represents the largest and oldest institution that offers professional training in osteopathy.*
(Wilfing: Survey, Systematisation and Comparison of Professional, Advanced and Continuing Training Programs for Osteopathy available in Austria, Master Thesis 2007, p. 116).

It is important to point out that the training offered at these institutions comprise all aspects of osteopathy and that they require a basic medical training like medical studies or physical therapy training. The other category, which Wilfing calls “osteopathic advanced and continuing training programs”, differ considerably from the above mentioned schools with regard to the program they offer. Only certain aspects of osteopathy, like cranio-sacral or visceral mobilisation techniques, are taught. This means that the holistic characteristic of the osteopathic approach is lost. The qualification of the teachers seems to be inadequate in part or is not traceable and most of the times there are no preconditions for participation. The “osteopathic advanced and continuing training programs” are generally open for medical laypersons, thus Wilfing points out the problem of ensuring the quality of training and practice of osteopathy in Austria.

At the moment it is difficult for the patients or clients to know whether their therapist did undergo a training of good quality or not (cf. Wilfing: Survey, Systematisation and Comparison of Professional, Advanced and Continuing Training Programs for Osteopathy available in Austria, Master Thesis 2007, p. 124).

It has to be mentioned in this context that in Austria the Training Reservation Act (Ausbildungsvorbehaltsgesetz, Federal Law Gazette No. 378/1996 as amended in Federal Law Gazette 155/2005) prohibits that non-entitled institutions provide training of activities that are subject to legal provisions in the field of health care (e.g. Federal Act on the Medical Profession, Clinical Technical Services Act (MTD Act), etc).

(cf. <http://www.aphar.at/pdfs/ausbildungsvorbehaltsgesetz.pdf>, 29/10/2007,
[http://ris1.bka.gv.at/bgbl-
pdf/index.aspx?page=doc&id=26154.bgblpdf&db=bgblpdf&rank=7](http://ris1.bka.gv.at/bgbl-pdf/index.aspx?page=doc&id=26154.bgblpdf&db=bgblpdf&rank=7), 29/10/2007).

2.3 Authorization to provide osteopathic treatment in Austria

At the moment basically anybody can offer osteopathic treatment in Austria, because the training is not recognized and thus there are no legal provisions regulating the profession.

Neither laws nor regulations exist which determine who may provide therapy with “non-conventional treatment methods“. Even the term “therapist” is not protected and can be used in any form without providing proof of training or qualification (cf. Federal supreme Court (OGH), November 8, 1994, 4Ob 116/94).

“The danger is that a grey area is developing with an ever increasing subculture of practitioners and so-called therapists”, criticises the director of the economic department of the Styrian Chamber of Labour Mag. Karl Snieder.

(<http://www.akstmk.at/www-395-IP-16025.html>, 11/08/07)

In comparison the German terms “Arzt” (doctor) or “ärztlich” (doctor-related) are defined in Austria in Article 1 of the Federal Act on the Medical Profession (Federal Law Gazette No. 169/1998 as amended in Federal Law Gazette No. 122/2006), and also the professional title “Physiotherapeut” (physical therapist) is protected by federal law (cf. Article 33 of the Clinical technical services Act).

Like the terms “therapist” or “practitioner” the term “osteopathy” is not protected. This means that there are no regulations and restrictions of access to the profession so that at the moment osteopathy can be provided “by anybody for anybody”. The only condition is that the “consumer” needs to be healthy. According to the current legal situation in Austria only the medical professions have the right to carry out treatments on patients. The following differentiation applies:

All medical professions – also the higher clinical technical professions like physical therapists or occupational therapists – with the exception of doctors may provide treatment to “sick persons“ only on the basis of a prescription/referral or under supervision by a doctor (e.g. medical masseur). If a treatment is carried out as prophylactic measure, i.e. on a healthy person, no prescription/referral by a doctor is necessary (cf. MTD Act and Chapter 3.2.). This means that currently also trained laypersons are allowed to offer osteopathic treatments. Therefore, the patients or clients have no guarantee of quality. It is more than questionable whether it can be approved that treatments which require relevant medical knowledge are carried out by medical laypersons. Even with regard to the physical therapy profession the practice of osteopathy has to be critically questioned. Do physical therapists have the legal permission to practice osteopathy? (cf. Chapter 5).

According to Mag. Karl Snieder it can be assumed that a large share of “sick persons” consume such treatments to achieve healing (cf. Bauer/Kiesswetter/Kirisits/Snieder: Neue Gesundheitsberufe, Expansionsmöglichkeiten für die Dienstleistungsgesellschaft (2004), p. 47).

Also the EU resolution of May 29, 1997 on the status of non-conventional medicines (A4-0075/97) points out the necessity of critical consideration:

“[...] whereas it is important to ensure that patients have the broadest possible choice of therapy, guaranteeing them the maximum level of safety and the most accurate information possible on the safety, quality, effectiveness and possible risks of so-called non-conventional medicines, and that they are protected against unqualified individuals [...]” (<http://eur-lex.europa.eu/Notice.do?val=318958:cs&lang=en&list=318958:cs.&pos=1&page=2&nbl=11&pgs=10&hwords=non-conventional%20medicine~&checktexte=checkbox&visu=#texte>, 07/12/2007).

Also Wilfing (2007, p. 126) points out the danger for treated persons, which results from inadequate medical background knowledge and only superficial practical skills of the therapists.

Already in 2004 the Styrian Chamber of Labour warned of an “uncontrolled growth” on the “wellness market”. A study commissioned by the Chamber of Labour evaluated 37 Asian and alternative techniques (e.g. cranio-sacral balancing, help to reach physical and energetic balance through kinesiologic methods under aspects of osteopathy), which go beyond normal wellness treatments with massage or sports and which are not subject to the Training Reservation Act (Ausbildungsvorbehaltsgesetz) for medical professions.

The Chamber of Labour talks about an area of conflict between healing and charlatanism and points out that the consumers are faced with uncertainty with regard to the effectiveness of these methods and the quality of training of the individual therapists (cf. <http://www.akstmk.at/www-395-IP-16025.html>, 11/08/07).

2.4 Summary

The critical considerations presented in the Chapters 2.1 to 2.3 can be summarized as follows:

1. A uniform, scientifically-sound definition of osteopathy is lacking.
2. There is also a lack of evidence regarding the effectiveness of osteopathy as a whole (cf. Resolution of the European Union of May 29, 1997 on the status of non-conventional medicines (A4-0075/97), <http://eur-lex.europa.eu/Notice.do?val=318958:cs&lang=en&list=318958:cs,&pos=1&page=2&nbl=11&pgs=10&hwords=non-conventional%20medicine~&checktexte=checkbox&visu=#texte>, 07/12/2007).
3. The use of the term “osteopathy” is not regulated.
4. The trend goes increasingly towards the not primarily medically oriented wellness sector (cf. Bauer/ Kiesswetter/ Kirisits/ Snieder: Neue Gesundheitsberufe, Expansionsmöglichkeiten für die Dienstleistungsgesellschaft (2004), p. 53).
5. Osteopathy runs the risk to lose its good reputation due to practicing “laypersons”.

3 DESCRIPTION OF THE PHYSICAL THERAPIST PROFESSION IN AUSTRIA

3.1 Description of the physical therapist profession

From an educational point of view the description of the physical therapist profession corresponds to the practical framework curriculum, which again forms part of the overall training curriculum (cf. Schwendenwein: Grundlagen pädagogischer Qualifizierung, 4th edition (2003), p. 73). The development of such a training curriculum was commissioned in 1999 by the then Federal Ministry for Health, Labour and Social Affairs after the framework conditions for physical therapy services had been determined in 1992 and 1993 in the training regulations of clinical technical services (MTD).

In Article 2 the MTD Act describes the profession of physical therapist as follows:

“Physical therapy service comprises the application of all physical therapy methods under the therapist’s own responsibility after prescription by a doctor in an intramural and extramural context, with particular consideration of functional interrelations in the fields of health education, prophylaxis, therapy and rehabilitation. This includes in particular mechano-therapeutic measures like all kinds of movement therapy, perception, manual therapy of joints, respiration therapy, all kinds of therapeutic massage, reflex zone therapy, lymph drainage, ultra sound therapy, all electro-, thermo-, photo-, hydro- and balneotherapeutic measures as well as the examination and evaluation methods specific to the profession and the participation in electrodiagnostic examinations. In addition, it includes advice and education of healthy persons in the mentioned fields without prescription by a doctor.”

A critical consideration of the description of the physical therapist profession in the MTD Act shows that it remains quite superficial and basically only provides a list of different fields of activity. The definition seems to be imprecise and outdated. It thus

cannot clearly delimit the versatile profession of a physical therapist (cf. Jäger: Qualifizierungs- und Berufsanforderungsprofile für den physiotherapeutischen Berufsvollzug. Eine Befragung erwerbstätiger Physiotherapeuten bezüglich notwendiger Voraussetzungen und Kompetenzen, unpublished Diploma Thesis at the University of Vienna (2006), p.13).

After a closer examination one realizes that this definition neither mentions the “entity” of the body nor the organic interconnections and interrelations. However, whether a visceral treatment is included in “all kinds of movement therapies” or in the field of “manual therapy of joints”, will be of interest in cases of liability. Chapter 5 will look at this problem in more detail.

If the current physical therapy training curriculum is analyzed, one realized that it also follows the MTD Act. In this context physical therapy measures are all measures that are mentioned in the MTD Act (cf. Clementi/Patzner/Riess: Curricula MTD - Physiotherapeutischer Dienst, Endbericht, im Auftrag des Bundesministeriums für Gesundheit und Frauen, ÖBIG (12/2004), p. 41).

In addition to the definition of the MTD Act the profession “physical therapist” is also explained by the Austrian Health Institute (ÖBIG, Österreichisches Bundesinstitute für Gesundheitswesen). This description comes closer to the philosophy of osteopathy:

“Physical therapy is the professional and person-centred examination of the human locomotor system on the basis of scientifically sound knowledge.

Physical therapy has an effect on the human being as a whole through the reciprocal effect between locomotor system, organ function, the cognitive level and the experience and behaviour level. It is an implicit element of today’s medicine and is applied in preventive, curative and rehabilitative contexts.

The responsibility in the context of the development of the profession, the training and the quality of professional practice is taken serious and fulfilled.”

(http://www.physiotherapie.at/contents_suche.asp?bereich_id=9104&sprache=de&auto_id=4536, 28/10/07)

This definition talks about “the human being as a whole”, a concept that can also be found in osteopathy. It also mentions the function of organs, which also is a basic precondition for a holistic osteopathic approach.

3.2 Rights and responsibilities of self-employed osteopathic physical therapists

In Austria all rights and responsibilities, as well as fields of activity and training of clinical technical service professions, like physical therapists, occupational therapists, speech therapists, nutritionists, orthoptists, radiology technicians and biomedical analysts are regulated in a federal law, the MTD Act. Since osteopathy is not regarded as an independent profession, the MTD Act is the only law applicable to the group of osteopathic physical therapists. According to Dr. Ronald Klimscha anybody who practices his/her job according to its description commits himself/herself publicly to an art which comprises all aspects of the profession. He also explains that in this context not only the MTD Act has to be considered but also the provisions of the Austrian Civil Code (ABGB). Article 1299 of the Austrian Civil Code provides that everybody has to have sufficient knowledge of the description of his/her profession, which he/she should have obtained during professional training (cf. Klimscha/Radner in MTD und Recht – Ein Kompendium für rechtliche Fragen in den Berufsfeldern der medizinisch-technischen Dienste (1997), p. 16).

The profession of physical therapist includes the autonomous application of all physical therapy measures after prescription by a doctor (cf. Article 2 MTD Act). Often the German terms “Eigenverantwortlichkeit” (personal responsibility), “ärztliche Anordnung” (prescription by a doctor) and “Durchführungsverantwortung” (implementation responsibility) are misunderstood. Thus they will be explained in more detail below:

The doctor has the so-called prescription responsibility (in German: “Anordnungsverantwortung”). Thus the doctor has to decide whether a patient may or may not be treated with physical therapy/osteopathy. The criteria for an admissible prescription by a doctor result from the Federal Act on the Medical Profession and conform to the medical state-of-the-art knowledge and the doctor’s experience under consideration of the patients’ welfare. Thus it is the responsibility of the doctor to determine with what techniques and to what extent and how intensive a patient may be treated (cf. Görnly: “Eigenverantwortung” heißt Haftung übernehmen, in *Inform - Zeitschrift von Physio Austria* (9/2006), p. 12).

It is also the attending doctor’s decision whether he/she keeps the prescription quite “open” or whether he/she prescribes a very precisely formulated therapy (cf. <http://www.physioaustria.at/s.php?op=viewarticle&artid=627>, 11/08/07) (e.g. ten times mobilizing physical therapy in the case of lumbar pain or two times per week a traction treatment of the cervical spine of 15-minute duration). In this context a certain “minimum substrate” with regard to the doctor’s prescription responsibility is mentioned (cf. Radner: *Die Ausübung medizinischer Tätigkeiten durch MTD; MTF, SHD, und Hilfspersonen iS. des ÄrzteG* (1998), p. 5f).

Without a doctor’s prescription only clients may be educated or given advice (cf. Article 2 MTD Act). If an osteopathic physical therapist treats a patient cranio-sacrally without conferring with the attending doctor, who prescribed an active movement therapy, this would mean that the order of the doctor is disregarded. The implementation responsibility thus represents “*the execution of the doctor’s prescription as required under the description of the profession to the best of one’s knowledge taking into account the circumstances of the specific case.*” (Klimscha/Radner in *MTD und Recht – Ein Kompendium für rechtliche Fragen in den Berufsfeldern der medizinisch-technischen Dienste* (1997), p. 15).

This responsibility also includes the evaluation whether the doctor’s prescription is appropriate for the patient in question. Should this not be the case or should the prescription be insufficient the physical therapist must not carry out the treatment but has to contact the attending doctor immediately. The same holds for cases that go beyond the knowledge of the therapist or which give rise to certain problems (cf. Klim-

scha/Radner in MTD und Recht – Ein Kompendium für rechtliche Fragen in den Berufsfeldern der medizinisch-technischen Dienste (1997), p. 15).

Every member of the clinical-technical professions has a personal responsibility in his/her work. This “personal responsibility” (Eigenverantwortlichkeit) is regarded as indispensable duty and describes the “professional independence with regard to instructions” in the context of carrying out one’s work. In other words: the doctor decides “whether” and “how” but the physical therapist is liable for the execution (cf. Klimscha/Radner in MTD und Recht – Ein Kompendium für rechtliche Fragen in den Berufsfeldern der medizinisch-technischen Dienste (1997), p. 15).

According to Klimscha the term “personal responsibility” (Eigenverantwortlichkeit) expresses that the physical therapist is liable for damage he/she has caused through inappropriate treatment. In addition, he points out that every member of the clinical-technical professions incurs a penalty in case of breach of duty. The duties of physical therapists are regulated in Article 11 of the MTD Act:

“Members of higher clinical-technical services have to execute their profession conscientiously without distinction of person. They have to preserve the welfare and the health of the patients and clients considering the applicable rules and regulations taking into account technical and scientific knowledge and experience.”

Further, the duties of continuing education, omission of curative treatments on one’s own accord (cf. Chapter 4.3.2.), documentation (Article 11a), information (Article 11b) and confidentiality (Article 11c) are pointed out.

- The **continuing education duty** signifies that every member of higher clinical-technical professions has to keep up-to-date with the latest developments and knowledge in the profession and has to regularly obtain information through continuing education on medical science, as long as it is relevant for the profession.

- The **documentation duty** means that every physical therapist is required to document what he/she does during the treatment sessions. On request the patients/clients or their legal agents have to be granted insight in the respective documentation. The compulsory period of record-keeping for self-employed physical therapists is a minimum of ten years. If the patient/client changes the therapist, the colleague has the right to continue the documentation with the permission of the patient/client or his/her legal agent.
- The **information duty** obliges every therapist to inform the patient/client or his/her legal agent about the measures carried out by him/her. Also representatives of other medical professions, who treat the same patient, have the right to receive information about the delivered treatment.
- The **confidentiality duty** is one of the most important duties. The trust that the patient/client needs to have in the therapist, has to be protected by law. Thus members of higher clinical-technical professions are strictly interdicted to pass on information to third parties obtained by or confided to them during treatment sessions. According to Article 11c para. 2 of the MTD Act the therapist is not obliged to confidentiality if the patient/client has released him/her from this duty or if the disclosure of the information is necessary to maintain national security, public rest, economic welfare of the country, law and order and to prevent criminal acts, to protect health and morality or the rights and liberties of others; or in case of messages of the therapist to social insurance providers and hospital organizations for the purpose of the settlement of fees. The exceptions from the confidentiality duty are thus broader than those of medical doctors (cf. Article 54 para. 2 of the Federal Act on the Medical Profession).

Every self-employed therapist must not practice his/her profession without registered office (cf. Article 8 para. 4 of the MTD Act). In addition, every physical therapist must use the professional title “physical therapist” in the context of the execution of his/her work, which is stipulated in the law. Thus it is not admissible to call oneself only “osteopath” when executing one of the professions belonging to the higher clinical-technical services (cf. Article 10 para. 4 of the MTD Act).

Further there is a marketing and advertising restriction to protect the reputation of the profession. This means that self-employed physical therapists must not advertise their services in a way that seems to be comparative, discriminating or unobjective (cf. Article 7b of the MTD Act).

Every physical therapist should understand that these duties and regulations have to be observed. If someone contravenes these regulations, administrative penalties of up to € 3600 can be imposed pursuant to Article 33 of the MTD Act, provided that the behaviour does not represent a criminal offence anyway.

4 LEGAL FRAMEWORK REGARDING THE APPLICATION OF OSTEOPATHIC TREATMENT TECHNIQUES BY SELF-EMPLOYED PHYSICAL THERAPISTS IN AUSTRIA

4.1 Difference civil law – public law

The difference between public law and civil law is considerably important because of the enforcement of the rights resulting from the different laws. Various delimitation criteria were developed by jurisprudence but when it comes to details many problems are still disputed in the literature (cf. Antonioli/Koja: Allgemeines Verwaltungsrecht, Lehr- und Handbuch (1986), p. 98ff). However, in the context of this paper a detailed discussion of all these problems is not necessary.

Basically, one speaks of “public law” when the state with its sovereignty, authority and coercive power confronts a person who is subject to the law. In addition, all rules and regulations concerning the legislation, all government bodies and their organization belong to the field of public law.

This includes the constitutional law, the general and specific administrative law (e.g. industrial law, fiscal law, social insurance law, road traffic regulations, etc.), criminal law, law of practice and others.

Public law is usually executed by administrative bodies that are bound by instructions. Exceptions are the criminal tribunals, the constitutional court, the administrative court as well as collegiate bodies with a judicial element (e.g. independent administrative senate). They decide in the stages of appeal so that the basic right of procedure in front of a statutory judge, which is stipulated in Article 83 para. of the 2 Federal Constitutional Law and Article 6 para. 1 of the European Human Rights Conven-

tion is respected (cf. Walter/Maier: Bundesverfassungsrecht, 9th edition (2000), p. 591ff).

The provisions that are in particular important for the field of physical therapy and osteopathy are the regulations governing the access to the profession, all safety regulations in handling equipment and medications and remedies, as well as the criminal liability in case of violations of public law. If the therapist employs staff also the labour protection provisions are applicable.

In the domain of civil law the dominating position of the state becomes less important. Its role is limited to create the substantive law and the procedural law, which serve the law enforcement. As a general rule no automatic revision by the state, whether provisions of civil law are observed, is envisioned. In civil law cases the courts normally become active once the procedure has been instituted by one party or if the person concerned calls upon public help for coercive enforcement of his/her rights. The civil law includes the personal rights, the law of obligations, law of succession and family law, company law, large parts of the employment law as well as the competition law and copyright law (cf. Koziol/Welser: Bürgerliches Recht I, 13th edition (2006), p. 7ff).

The most important legal source of the general civil law is the Austrian Civil Code (allgemeines bürgerliches Gesetzbuch, ABGB). In addition, there are many provisions in special laws that belong to the domain of civil law (cf. Holzhammer/Roth: Einführung in das bürgerliche Recht mit IPR, 4th edition (1999), p. 4 and 32).

4.2 Responsibility according to civil law

If a self-employed physical therapist unlawfully causes injury of his/her patient, he/she can be prosecuted not only under civil law but also under criminal law.

The criminal proceedings are instituted by the Public Prosecution Service and the patient can join in as private party to petition for enforcement of his/her claims. Most of the times only parts of the total sum are assigned in case of a conviction under criminal law, since it is not the task of the criminal judge to evaluate evidence to determine the amount of the asserted claims. Concerning the outstanding amount or in case of acquittal the total amount the private party needs to take private legal action (cf. Bertel-Venier: Strafprozessrecht, 7th edition (2002), p. 53ff). A conviction by the criminal court is binding for the civil court so that only possibly contributory negligence by the patient and the amount of the claim have to be determined. An acquittal does not have a binding force because other rules of evidence apply in civil procedures (cf. OGH on 17.10.1995, 1Ob 612/95 and 20.11.1996, 7Ob 2309/96 a).

4.2.1 Liability

Under the general law of obligations liability means to account for one's fault. *"If this is not the case, the creditor can enforce his/her claims by resorting to the assets of the debtor"* (Koziol/Welser: Bürgerliches Recht II, 13th edition (2007), p. 10f).

Usually the term "liability" is used in the field of torts. It designates the duty to pay indemnification or compensation, thus the accountability for injury or damage (cf. Koziol/Welser: Bürgerliches Recht II, 13th edition (2007), p. 10). This means that every person can be called to account for injuries or damage resulting from his/her actions (cf. Hechenbichler: Die zivilrechtliche Haftung und strafrechtliche Verantwortlichkeit des gehobenen Dienstes für Gesundheits- und Krankenpflege im Krankenhaus, Diploma Thesis (2000), p. 16).

The domain of torts regulates under which circumstances the injured party can claim replacement or compensation for his/her injury or damage from another party. In the Austrian legal system the claims can be based on two aspects: tortious liability (in German: "Verschuldenshaftung") or strict liability (in German: "Gefährdungshaftung") (cf. Koziol: Österreichisches Haftpflichtrecht I, 3rd edition (1997), p. 3).

Strict liability means the imposition of liability without finding fault (negligence or tortious intent). In the case of strict liability the person is by law liable for actions which involve a special danger. Someone who is using something dangerous to his/her own advantage or benefit should account for damage caused by the inflicted danger (cf. Koziol/Welser: Bürgerliches Recht II, 13th edition (2007), p. 300). The most common example is the liability pursuant to the railway and automobile liability law. Regarding osteopathic activities such liability is rarely applicable because no dangerous equipment is used for treatment.

The normal case is tortious liability. It is given if a culpably and unlawfully acting tortfeasor causes damage or injury. Depending on whether the damage or injury is caused within the framework of the fulfilment of a contractual relationship or an obligation resulting from it or whether there is no contractual relationship between tortfeasor and the injured party, Article 1295 para. 1 second half-sentence of the Austrian Civil Code differentiates between **liability through contract** (ex contractu) and **liability through delict** (ex delicto). This differentiation is important with regard to the burden of proof. In the case of liability ex contractu it is easier for the injured party to enforce his/her claims of indemnification or compensation.

A contractual relationship regarding treatment is established between self-employed physical therapists and their patients. Thus the therapist is subject to the stricter liability ex contractu. Besides the duty to correctly fulfil the contract on the basis of the established agreement the therapist also is liable for all injuries or damage the patients suffer through an unlawful violation of the contract.

4.2.2 Indemnification

The general law of tort in Austria is based on the concept of fault (tortious liability). To assert a claim the following conditions have to be fulfilled:

- Damage or injury must have been caused.
- The damage or injury must have been caused by the tortfeasor (causality).
- The tortfeasor must be culpable for the damage or injury.
- The damaging or injuring behaviour must be unlawful, i.e. it must violate a law or contract.

Only if all four of these conditions (which will be explained in more detail below) apply cumulatively, the tortfeasor is liable for the incurred damage or injury (cf. Bydlinski: Grundzüge des Privatrechts für Ausbildung und Wirtschaftspraxis, 3rd edition (1997), p. 206).

4.2.1.1 Damage or injury

Article 1293 of the Austrian Civil Code defines “damage or injury” as follows:

“Damage means any disadvantage which someone suffers regarding assets, rights or person. This needs to be distinguished from loss of profit someone might have gained through the normal course of events.”

The Austrian Civil Code thus differentiates between **financial damage** (material damage) and **ideal damage** (immaterial damage). The financial damage is further differentiated into positive damage and loss of profit. The latter must only be indemnified in case of gross negligence or intentional damage, because only in these cases the injured person is entitled to “full satisfaction” (cf. Harrer in Schwimann: ABGB Praxiskommentar, 3rd edition, volume 6 (2006), p. 34ff).

Positive damage includes all cases of considerable damage or destruction of existing goods as well as all expenses which the injured person incurs due to the damaging event (e.g. expenses for telephone calls, therapy costs, household aids, therapeutic equipment, or loss of income). One speaks of loss of profit only in cases where the damaging event prevents an increase of assets and a chance of acquisition was destroyed (cf. Koziol/Welser: Bürgerliches Recht II, 13th edition (2007), p. 304).

Ideal damages are damages which have to be indemnified only in exceptional cases that are regulated by law. They include all damages that cannot be measured in money-terms, in particular pain and suffering or claims arising from loss of holiday enjoyment (cf. Harrer in Schwimann: ABGB Praxiskommentar, 3rd edition, volume 6 (2006), p. 40ff).

Damaging actions by self-employed physical therapists who work osteopathically in the context of their work will usually concern the objects of absolute legal protection life, health, and physical integrity. According to the prevailing doctrine and judicature any therapeutic treatment which causes injury to the physical integrity has to be regarded as bodily injury in principle (cf. Juen in der Schriftenreihe Recht der Medizin: Arzthaftungsrecht, 2nd edition (2005), p. 8f).

4.2.1.2 Causality

The tortfeasor can only be held liable for damage if it was caused through his/her wrong act, neglect or default. “*Jurisprudence uses the `conditio sine qua non` formula to establish the causality. According to this formula a behaviour is the cause of a damage if without this action the consequences would not have occurred.*” (Koziol/Welser: Bürgerliches Recht II, 13th edition (2007), p. 309).

If a patient suddenly experiences heavy pain in the knee joint during or after a treatment technique, the causality is given if the pain had not occurred without the treatment.

The equivalence or causation theory (in German: “Äquivalenztheorie” or “Bedingungstheorie”) based on the above mentioned formula only represents the ultimate limit to evaluate causality. To avoid unrestricted liability jurisdiction and doctrine have provided a restriction in the form of the adequacy theory. According to this a person is liable for all consequences of a culpable behaviour which the person in abstracto could have expected to happen. An adequate causation has to be assumed if the behaviour was to a substantial degree able to facilitate a consequence in the form of the actual damage. However, the tortfeasor is not culpable for damage caused by an

extraordinary sequence of unfortunate circumstances. This situation can be given if free human action contributes to the damage, which the tortfeasor could not expect according to his/her experience. (cf. Harrer in Schwimann: ABGB Praxiskommentar, 3rd edition, volume 6 (2006), p. 58f).

In the above mentioned example it would be possible that the patient suddenly suffers a heart attack and dies because of the agitation caused by the pain in the knee joint. According to the equivalence theory the treatment would have been the cause of the death. However, the therapist is not liable for the consequence due to the heart attack because of the lack of adequacy, which has to be evaluated objectively (further examples can be found in: Harrer in Schwimann: ABGB Praxiskommentar, 3rd edition, volume 6 (2006), p. 59f).

In the evaluation whether a culpable error in treatment was really the cause of an incurred damage the jurisdiction alleviates the burden of proof for the damaged person, since he/she only has to provide a prima facie proof for the causality. If the damaged person can prove that a typical course of events has taken place, the burden of proof shifts to the tortfeasor, who has to provide evidence that the damage would also have occurred in the same form and to the same extent without the culpable error in treatment (cf. Juen in der Schriftenreihe Recht der Medizin: Arzthaftungsrecht, 2nd edition (2005), p. 236ff).

4.2.1.3 Default

As regards default it has to be proven whether the tortfeasor can be blamed for an unlawful behaviour which has caused damage. The damage could have been caused by an intentional and/or knowing action or by negligent behaviour due to a lack of knowledge or effort (cf. Holzhammer/Roth: Einführung in das bürgerliche Recht mit IPR, 4th edition (1999), p. 161).

The tortfeasor acts intentional if he/she is conscious of the unlawfulness of the action, if he/she foresees the damaging consequences and accepts them. Gross negligence (outstanding carelessness) is present if the carelessness can be regarded as so severe that it would not have happened to an ordinary person in the same situation. If, however, the damage is due to a fault which can occasionally happen also to a careful person, the behaviour has to be regarded as conducted with minor negligence (cf. Koziol/Welser: Bürgerliches Recht II, 13th edition (2007), p. 319f).

In this context it is important for therapists or osteopaths that the treatment executed by them falls under the severe liability of Article 1299 of the Austrian Civil Code. Thus more strict objective criteria of default are applicable. The evaluation of the default is based on the usual care of the “average therapist” in the relevant speciality. The decisive factor thus is the standard of performance in the respective profession as well as the knowledge of the applied treatment methods at the time of their application. In part one refers to the worldwide state-of-the-art and the knowledge of the relevant technical literature in this context (cf. Juen in der Schriftenreihe Recht der Medizin: Arzthaftungsrecht, 2nd edition (2005), p. 164ff).

In the case of liability *ex contractu* as well as in the case of the violation of protective laws the burden of proof is shifted according to Article 1298 of the Austrian Civil Code. Thus the tortfeasor has to prove that he/she is not culpable for the consequences (cf. Koziol: Österreichisches Haftpflichtrecht I, 3rd edition (1997), p. 507ff).

Should a contributory negligence of the damaged person have played a role (which the tortfeasor has to prove) the default is shared and has to be weighted according to the extent of negligence of the respective person. In case of doubt it has to be assumed that the parties are culpable to the same extent (cf. Dittrich/Tades: ABGB I, 36th edition (2003), p. 2088ff).

4.2.1.4 Unlawfulness

According to Article 1295 of the Austrian Civil Code a behaviour is unlawful if it violates the provisions of the legal system or morality. Concerning the liability *ex contractu* behaviour contrary to contract is regarded as unlawful.

Morality is a social convention and reflects the moral values of a society. It governs the way people live together and has a great influence on the jurisdiction (cf. Holzhammer/ Roth: Einführung in das Bürgerliche Recht mit IPR, 4th edition (1999), p. 1f). Thus the totality of civil law is subject to the dictate of morality.

The legal system comprises many concrete codes of conduct, which interdict behaviour that is dangerous only in abstracto. A contravention leads to a violation of a protective law and the burden of proof is shifted with regard to the question of default (cf. Koziol/Welser: Bürgerliches Recht II, 13th edition (2007), p. 319f and Chapter 4.2.2.3).

Damaging actions against the objects of absolute legal protection life, health, and physical integrity imply unlawfulness. According to the prevailing doctrine and jurisdiction medical treatments by doctors, which involve the damage of physical integrity, have to be regarded as bodily injury in terms of Article 1325 of the Austrian Civil Code. A justification is only given in the case of the patient's informed consent (cf. Juen in der Schriftenreihe Recht der Medizin: Arzthaftungsrecht, 2nd edition (2005), p. 49). To avoid claims of indemnification and compensation the content and documentation of the patient's information (in a personal conversation) plays a decisive role (for more detail cf. Chapter 4.2.3.3).

4.2.3 Treatment contract

4.2.3.1 Legal nature of the treatment contract

According to Article 861 of the Austrian Civil Code a contract arises through the concordant declaration of intent of (at least) two persons. In addition, the principle of freedom of form (Article 883 Austrian Civil Code) applies. Thus contracts can be established legally valid in verbal form and even through conclusive behaviour if not explicitly stipulated otherwise in the laws.

Since the content of the agreement has to be proven in the case of a legal conflict, it is recommendable to record important issues which deviate from the usual treatment contracts in writing and have both parties sign this documentation.

The legal evaluation of a treatment contract does not differentiate whether a doctor or physical therapist has carried out the treatment. The same provisions hold for both and thus the judicature which evaluated the treatment of doctors can be applied analogous also to physical therapists.

A characteristic of the treatment contract is that it is concluded between two parties (therapist and patient) not through explicit declaration but rather through conclusive behaviour. According to Article 863 para. 1 of the Austrian Civil code it is sufficient if both contractual parties declare their intent implicitly through their actions, which after consideration of all circumstances do not leave any reason of doubt. Thus the contractual parties only have to be aware that through their consensual behaviour they obtain binding rights and take on binding duties (cf. Juen in der Schriftenreihe Recht der Medizin: Arzthaftungsrecht, 2nd edition (2005), p. 56f).

In the absence of explicit legal provisions the question is how such a treatment contract has to be evaluated from a legal perspective. Even though it has characteristics of contracts of work and services, which are regulated by the Austrian Civil Code, it can be attributed to neither of these categories because of the peculiarity of this contractual relationship. Thus the almost unanimous view in the legal doctrine is that a

treatment contract has to be regarded as “free service contract” (in German: “freier Dienstvertrag”) (cf. Engljählinger: Ärztlicher Behandlungsvertrag, ÖJZ 1993, p. 490ff). In case of doubt one has to assume that the treatment was carried out in return for payment, so that it is not necessary to record this in writing. In the absence of other agreements, an adequate remuneration, which corresponds to the standard that is customary for the place, has to be considered as agreed.

A number of main and additional duties of both the self-employed osteopathic physical therapists and the patient or client result from the informally concluded contract. The therapist owes a professional treatment to the patients, which lives up to the objective standards of the specific speciality, but he/she does not owe them a certain success or in particular total healing (cf. Drda/Fleisch/Höpfberger: Recht für Mediziner – ein Leitfaden für Studium und Praxis, 1st edition (2003), p. 78). This means only that the care has to be carried out diligently and with regard to the latest state-of-the-art knowledge according to the legal provisions governing the work of self-employed physical therapists who work osteopathically (cf. Engljählinger: Ärztlicher Behandlungsvertrag, ÖJZ 1993, p. 497f).

Further, the osteopathic physical therapist has the duty to deliver the treatment personally and immediately or if need be in cooperation with other colleagues, to pursue relevant continual education, to comply with the regulations and legal provisions governing the profession and to pay attention to the information, documentation and confidentiality duties. (cf. Juen in der Schriftenreihe Recht der Medizin: Arzthaftungsrecht, 2nd edition (2005), p. 59f).

The patient has the duty to pay an appropriate fee, to provide information on personal data and possible previous diseases and conditions and – if necessary – to contribute to the therapy to an appropriate extent (cf. Krepler/Hackl/Marzi: Recht im Krankenhausalltag – ein Ratgeber für Pflegepersonal, Ärzte und Patienten (2002), p. 57).

Whether the information and contribution duties of the patient are enforceable by law or only obligations is a controversial issue in the legal doctrine. However, it is not possible to evaluate this problem further within the scope of this paper, because it is a purely judicial problem (cf. Engljählinger: *Ärztlicher Behandlungsvertrag*, ÖJZ 1993, p. 498).

A treatment contract must also be differentiated from a declaration of consent, which justifies bodily injury in the context of treatment. A declaration of consent is only legally effective if the patient has received proper information beforehand (for more details cf. Chapters 4.2.3.3 and 4.2.3.4).

4.2.3.2 Contractual capability

Like any other contract also a treatment contract can only be concluded by persons with full contractual capability.

Contractual capability is the ability to authorize actions and commit oneself through one's own acts of legal significance. If the patient or client has completed his/her eighteenth year of life, he/she is regarded to have full contractual ability, as long as he/she is of sound mind. According to Article 865 of the Austrian Civil Code mentally ill or mentally deficient persons cannot effect valid legal transactions. The same holds for persons who are temporarily not of sound mind (e.g. temporary mental disorders, drunkenness, under the influence of drugs etc.) (cf. Koziol/Welser: *Bürgerliches Recht I*, 13th edition (2006), p. 59). If a person suffers from a mental illness or is mentally disabled and thus cannot or only in part take care of all or some of his/her personal affairs without danger or disadvantage for himself/herself, a custodian has to be appointed. Should a treatment contract be concluded with such persons, the approval of the custodian is necessary for its legal effect, unless the conclusion of such legal acts is explicitly excluded from the custodianship.

The contractual capability is divided into different age categories in the Austrian Civil Code:

Persons under the age of seven (**children**) do not have no contractual capability at all. They can obtain rights or commit themselves not through their own actions but only through their legal agent. A treatment contract concluded with a child is thus generally invalid (null and void), so that it is not possible to establish its validity (legal remedy) through the subsequent agreement of the child's legal agent (cf. Koziol/Welser: Bürgerliches Recht I, 13th edition (2006), p. 54f). This would have to be regarded as a new offer to the therapist to conclude a treatment contract. If the therapist provides the treatment afterwards, the contract is established conclusively.

Persons between the age of seven and fourteen are called **irresponsible minors**. They have restricted contractual capability. If they subject themselves to a service, the legal act is not null and void but "provisionally invalid". This means that the agreement (authorization) after the fact by the legal agent can establish full validity (legal remedy). Until the legal agent's decision the contractual partner (in this case the therapist) is bound by his/her declaration. If the legal agent refuses authorization the contract is regarded as invalid from the beginning (cf. Koziol/Welser: Bürgerliches Recht I, 13th edition (2006), p. 55f).

Persons between the age of fourteen and eighteen are called **responsible minors**. Basically, they have restricted contractual capability. They can commit themselves to certain actions and dispose of their own income and of things placed at their free disposal in as far as this does not endanger their necessities (cf. Koziol/Welser: Bürgerliches Recht I, 13th edition (2006), p. 57). Contracts that go beyond this scope require the agreement of their legal agents. Until this agreement is given, contracts are "provisionally invalid". In the case of responsible minors the decisive aspect is how high the costs of the therapist's treatment are. If the costs lie within the scope of the person's income or pocket-money, the treatment contract is regarded as concluded and legally valid. If the therapy costs of the responsible minor patient or client go beyond the person's income or pocket-money, which in particular will be the case if already at the beginning of the therapy several treatment sessions are fixed in regular intervals, attention has to be paid to obtain the agreement of the person's legal agent.

4.2.3.3 Declaration of consent

The legal nature of a justifying declaration of consent is still disputed in the legal doctrine. The view which regards consent as a declaration of will in the form of a legal act remains in the minority, because in this case the rules of contractual capability would also apply to the declaration of consent. Thus it is better to follow the majority view in the literature according to which consent is a strictly personal right of the patient and has to be declared freely, seriously, determined and comprehensible. The consent must not be obtained through deceit or generation of unwarranted fear. It is only possible to obtain consent if the patient has been informed in detail about the kind, severity and possible consequences of the treatment. If the patient is not thoroughly informed, the consent is contestable according to the general rules of error or even generally invalid (cf. Juen in der Schriftenreihe Recht der Medizin: Arzthaftungsrecht, 2nd edition (2005), p. 85f).

This view has been confirmed by the legislator with the introduction of Article 146c of the Austrian Civil Code through the Act amending the law of parent(s) and child 2001 (Federal Law Gazette No. 135/2000). In this provision the consent to medical treatments by minors is regulated in more detail. A very broad interpretation of the term “treatment“ has to be considered, which does not only include therapeutic measures but also diagnostic, prophylactic and pain-reducing measures, irrespective of whether they are carried out according to the rules of conventional medicine or not (cf. Fischer-Czermak: Zur Handlungsfähigkeit Minderjähriger nach dem Kindschaftsrechts-Änderungsgesetz 2001, ÖJZ 2002, p. 298).

According to Article 146c para. 1 of the Austrian Civil Code the consent to medical treatment is a strictly personal right of a child that is able to understand and decide, so that principally no agreement of a legal agent is necessary. It has already been mentioned above that the conclusion of a treatment contract, which is subject to the general provisions of the Austrian Civil Code, is something different. It is thus decisive for a self-employed physical therapist working osteopathically whether the minor disposes of the necessary ability to understand and decide. In the case of responsi-

ble minors the legislator assumes this in case of doubt. Decisive is whether the patient has received sufficient information about the therapeutic possibilities and possible alternatives and the involved chances and risks and whether he/she was able to understand the value of the goods and interests affected by his/her decision and to make this decision according to this understanding (cf. Fischer-Czermak: Zur Handlungsfähigkeit Minderjähriger nach dem Kindschaftsrechts-Änderungsgesetz 2001, ÖJZ 2002, p. 299).

Since self-employed physical therapists who work osteopathically have to judge this ability to understand and decide on their own, they also bear the risk of a misjudgment. They thus have to act with the utmost caution. On the one hand, it is important to meticulously document the information provided to minors and also the facts and circumstances which have led the therapist to answer the question about their ability to understand and decide in the affirmative. In cases of doubt whether the minor has the necessary ability to understand and decide it is recommendable to obtain the agreement by a legal agent to be absolutely sure.

If the child or minor lacks the necessary ability to understand and decide (Article 146c para. 1 last sentence of the Austrian Civil Code) or if a child that is able to understand and decide gives consent to a treatment, which usually involves a severe or lasting impairment of his/her physical integrity or personality (Article 146c para. 2 Austrian Civil Code), the treatment may only be carried out if the authorization was obtained from the person who is entrusted with the child's care and education. Since the consent to a medical treatment as strictly personal right of a child with the ability to understand and decide cannot be replaced by the consent of the person who is entrusted with the child's care and education, both declarations of consent have to be available in cases subject to Article 146c para. 2 of the Austrian Civil Code (cf. Fischer-Czermak: Zur Handlungsfähigkeit Minderjähriger nach dem Kindschaftsrechts-Änderungsgesetz 2001, ÖJZ 2002, p. 300).

In the evaluation of a possible severe and lasting damage resulting from treatment („usually“) only those damages have to be considered according to the wording of the law, which represent a typical risk of the treatment. According to the explanations a severe damage of the physical integrity is only present if it equals the quality of an aggravated assault in terms of Article 84 of the Austrian Criminal Code; a lasting damage is present if it can be corrected only very difficultly or not at all (cf. Fischer-Czermak: Zur Handlungsfähigkeit Minderjähriger nach dem Kindschaftsrechts-Änderungsgesetz 2001, ÖJZ 2002, p. 299f).

An aggravated assault is given according to Article 84 para. 1 of the Austrian Criminal Code if it entails health problems or occupational disability which last longer than 24 days or if the injury or damage to health as such are serious in nature. This has been affirmed in the case of fractures with the exception of minor ones, bone splintering in the cervical spine (even the tiniest ones), cerebral concussions with loss of consciousness and similar severe injuries (cf. Fabrizy: StGB, 9th edition (2006), p. 279ff).

In the field of osteopathic and physical therapeutic treatments such severe consequences are given only in rare cases as typical risks of treatment. Nevertheless, one has to act with the utmost caution, in particular because it is imperative to wait how the newly created provisions will be substantiated by jurisdiction. Since each interfering with the physical integrity is illegal without consent, one can reckon that the provisions will be interpreted quite strictly.

The special provision of Article 146c para. 3 of the Austrian Civil Code regulating those cases in which immediate action is necessary because of a life-threatening situation or the risk of a severe damage of health, will practically never be applicable to the work of a self-employed osteopathic physical therapist, so that the provision must not be discussed in more detail.

The importance of the information duty and its documentation was often underestimated in the past. Due to the decisions of the Austrian Federal Supreme Court in recent years concerning issues of the liability of doctors, the attitude has changed in particular in the field of in-patient treatment in hospitals. This led to the use of com-

prehensive information sheets and detailed conversations to provide the necessary information. With regard to out-patient treatments as well as osteopathic treatment by self-employed physical therapists there is still considerable need of action. Since the information duty concerns every health care profession, in which treatments are carried out on the therapist's own responsibility, the therapists have to provide information to an extent that meets the demands of the Federal Supreme Court's decisions (cf. Görny: Aufklärung durch freiberufliche PhysiotherapeutInnen vor einer physiotherapeutischen Behandlung – Leitfaden für die Praxis, Bundesverband der PhysiotherapeutInnen Österreichs (2007), p. 1). Doctors who carry out therapeutic measures already have a better risk awareness due to their basic training. Other therapists or osteopaths might lack this risk awareness, which possibly can lead to a liability in the event of damage.

Since the patient needs to know to what measure he/she is giving consent, this consent is only legally effective if the therapist has appropriately fulfilled his/her information duty. If the information is not provided, the therapist is liable for the possible damage of the patient even if the treatment was carried out "lege artis". This also comprises the typical risks of treatment. According to the prevailing jurisdiction the information duty does not only apply in the case of surgical interventions but also in cases of therapeutic intervention through medications or physical interventions. Thus also the field of physical therapy and osteopathy is subject to this duty. Liability does not only apply in the case of proven treatment errors but also if the therapist did violate his/her information duty (cf. Juen in der Schriftenreihe Recht der Medizin: Arzthaftungsrecht, 2nd edition (2005), p. 95f).

According to the prevailing jurisdiction the information duty results as additional contractual obligation from the treatment contract, since the information is regarded as part of the therapeutic intervention (cf. OGH on 18.03.1981, 1Ob 743/80; 28.03.2007, 7Ob 21/07 z, 07.08.2007, 4Ob 137/07 m).

4.2.3.4 Information and explanation

The extent of the information is not regulated by law. The consequence is that the information duty has to be evaluated with regard to the individual situation. In this context certain criteria that were developed by the jurisdiction have to be considered. Basically, the information and explanation need to be less comprehensive the more necessary the treatment is for the health of the patient (e.g. in the case of a medical emergency). In return it is necessary to inform the patient in particular detail about all risks and alternative treatments if the execution of the treatment is not urgent or not at all necessary (e.g. an osteopathic technique in the context of a prophylactic therapy). In addition, also particularly dangerous treatment methods require a more comprehensive information and explanation than safe forms of therapy. Of course, the therapist has to inform the patient only about the risks that are already known and scientifically recognized at the moment of the conversation. In this context, it has to be pointed out that the therapist has the duty of continual education to keep up-to-date (cf. Juen in Schriftenreihe Recht der Medizin: Arzthaftungsrecht, 2nd edition (2005), p. 98ff).

Thus it is recommendable for every therapist and osteopath to critically question his/her treatment techniques and the involved risks. It is advisable to discuss relevant information sheets or letters with the patient and to tick the issues that have been explained for the purpose of documentation. The signature of the patient should be obtained afterwards. Attention has to be paid to the fact that he/she has enough time to ask questions or to re-read the text (cf. Görny: Aufklärung durch freiberufliche PhysiotherapeutInnen vor einer physiotherapeutischen Behandlung – Leitfaden für die Praxis, Bundesverband der PhysiotherapeutInnen Österreichs (2007), p. 3).

Information contents:

The appropriate information and explanation should serve as basis for the patient's decision whether he/she gives consent to or refuse the therapy or specific treatment measures. Thus he/she needs to understand the nature, significance and implications of the treatment, its risks and their probability but also the advantages and disadvantages of other methods, as well as the consequences if the treatment is refused (cf. Görny: Aufklärung durch freiberufliche PhysiotherapeutInnen vor einer physiotherapeutischen Behandlung – Leitfaden für die Praxis, Bundesverband der PhysiotherapeutInnen Österreichs (2007), p. 2).

In general the following issues have to be included in the information on any kind of treatment:

- The “**information on self-determination**” explains to the patient that he/she has the right to decide freely whether he/she wants to undergo a certain treatment which interferes with his/her physical integrity or not.
- The “**information on diagnosis**” provides information about the results of the physical therapeutic (osteopathic) examination and evaluation.
- In the “**information on therapy**” the advantages and disadvantages of the planned treatment measures should be explained or their refusal discussed. Further, the planned sequence of therapy and possible alternatives should be presented.
- The “**information on risks**” has the objective to inform the patient about possible side-effects and risks involved in the treatment. In particular, the probabilities of the risks and their implications have to be explained.
- The “**information on preservation of the treatment results**” should provide the patient with advice and rules of conduct that are necessary to achieve the best possible treatment success.

(cf. Phleps: Die zivilrechtliche ärztliche Aufklärung und ihre Handhabung in der Praxis, Diploma Thesis (2005), p. 36ff).

From the comprehensive judicature the following important aspects regarding the content of the patient information can be deduced:

- *“To evaluate the extent of the information duty particular importance is attributed to the personal conversation with the patient. A ‘mere consent’ obtained through bureaucratic means (information through a set form or information sheet) cannot replace the personal conversation.*
- *The information should put the patient in a place where he/she can comprehend the implications of his/her decision and to judge whether a (further) treatment or visit to a doctor or therapist can be omitted.*
- *The information of the patient has to take into account whether it is provided to a mentally unstable, anxious patient or e.g. to the parents of a minor who are not directly affected by the operation.*
- *Typical risks involved with the planned intervention have to always be pointed out even if they occur very rarely. Such typical risks do not result from the frequency of complications. In the case of rare risks the information can be omitted if the therapist or the osteopath can be convinced that the rare risk represents such a minor factor in comparison with the consequences of an omission of the intervention, that a reasonable patient would not even include it in his/her considerations.*
- *Insignificant and rare risks have to be pointed out if the therapist can recognize that they are important for the decision-making process of the patient. In this context the patient is subject to an appropriate cooperation, i.e. the patient’s obligation to also provide the necessary information.*
- *The patient information also has the objective to avoid wrong hopes and to protect the patient of useless treatments and their costs.*
- *The explanations and information have to be provided even more insistently the clearer the harmful consequences of the omission of a (further) treatment are for the therapist.*
- *In the case of interventions that are not urgent or not necessary for maintaining (restoring) the patient’s health, the patient has to be provided with all relevant information as basis for his/her decision.*
- *An exaggeration of the information duty has to be avoided in particular in urgent cases.*

- *Consequences that cannot be expected according to the current state of knowledge do not have to be pointed out.*
- *It has to be manageable and realistic for the therapist to provide the information.*
- *If (differently dangerous, painful or intensive) alternatives are available, the patient needs to be informed about all to have a true choice.*
- *The information that the chosen method is the safest is enough to clarify that one cannot expect 100% success.*
- *Mere mention of the possibility of ‚nerve damage‘ (disturbed sensitivity) is not enough explanation about the risk of a nerve paralysis.*
- *Circumstances that are known to the patient do not have to be included in the information. However, the fact that a patient is informed about a circumstance does not mean that he/she knows about other related factors.”*

(Stellamor/Steiner: Handbuch des österreichischen Arztrechtes I, Arzt und Recht (1999), p. 122ff).

Documentation of the patient information:

There are no provisions prescribing the form and documentation of the patient information with the exception of certain cases that are regulated by special laws. However, a meticulous written documentation of the patient information is indispensable for the purpose of evidence. According to the prevailing jurisdiction self-employed physical therapists who work osteopathically have to prove that they did not violate their information duty, which means that they have to provide evidence that they have provided the appropriate information. In addition, failure to document a measure gives rise to the assumption that this measure was not carried out (cf. Juen in der Schriftenreihe Recht der Medizin: Arzthaftungsrecht, 2nd edition (2005), p. 134f). During court proceedings it will definitely be possible to provide evidence for the content of the patient information through witnesses (colleague or receptionist). However, such evidence is problematic since it seems questionable whether the witness can remember the details of the information at a later moment in time.

Self-employed physical therapists who work osteopathically thus run the risk that they have provided the patient with the necessary information in a conversation about the relevant issues, but cannot prove this in the case of court proceedings about claims of damage in the context of complications resulting from the treatment because they did not document this conversation in detail in a written record. This would mean that the claim of the patient has to be admitted on its merits.

4.3 Criminal liability

Besides the liability under civil law there is the additional risk of criminal prosecution. In this context, one has to differentiate between actionable criminal offences, which are mainly subject to the provisions of the Austrian Criminal Code, and cases that are subject to criminal administrative proceedings.

Since other evaluation criteria apply in criminal law than in civil law, this paper can only provide a gross overview over the criminal actions and the competency of the courts that are relevant for the work of physical therapists and osteopaths.

The most important difference to the civil law is that in criminal law the State acts as public prosecutor represented by the federal prosecutor. The prosecuted self-employed physical therapist who works osteopathically is called defendant.

The principle “in dubio pro reo” is applied in criminal law, which means that in case of doubt the defendant has to be acquitted. All ambiguities and ranges of explanation are interpreted in favour of the defendant (cf. Bertel/Venier: Strafprozessrecht, 7th edition (2002), p. 25f).

Violations of certain legal provisions, e.g. of Article 33 of the MTD Act, are regarded as administrative offence, which are punished by administrative bodies. A detailed discussion, however, would go beyond the scope of this paper.

The course of the preliminary investigation and the criminal proceedings are regulated by the Austrian Code of Criminal Procedure.

Members of the higher clinical-technical services continually run the risk of criminal liability. Errors due to lack of carefulness can occur quite easily (cf. Hechenbichler: Die zivilrechtliche Haftung und strafrechtliche Verantwortlichkeit des gehobenen Dienstes für Gesundheits- und Krankenpflege im Krankenhaus, Diploma Thesis (2000), p. 70ff).

Particularly due to the unclear description of the osteopathic profession and the insufficiently regulated osteopathic training, there is the risk that possibly techniques are used by someone who does not master them sufficiently. In this context, it is also important to consider the economic pressure. If a competitor successfully applies risky techniques to treat patients, it is difficult for a therapist to argue why he/she does not use such techniques and why he/she thinks the risk is too great.

The following section will present examples of the most important criminal offences. However, there exist many more offences which a self-employed osteopathic physical therapist can commit in the context of his/her work.

4.3.1 Intention and negligence

Depending on the degree of default one differentiates between intentional and negligent criminal offences. The two forms of default are separately regulated in the Austrian Criminal Code. The concept of “negligence” in civil law does not correspond completely to that of criminal law.

According to Article 5 para. 1 of the Austrian Criminal Code someone acts intentional if he/she wants to realize circumstances which comply with the legal picture of a criminal offence. It is sufficient that the perpetrator seriously considers the realization and accepts the consequences. Already the eventual intent is sufficient. The perpetrator does not aim at realizing the injustice of the circumstances and he/she does not even count on success, but assumes it to be possible. In individual cases it is difficult to distinguish it from negligence (cf. Fabrizy: StGB, 9th edition (2006), p. 42ff).

According to Article 6 of the Austrian Criminal Code those act negligent, *“who disregards the necessary carefulness, to which they were obliged to depending on the circumstances and capable according to their mental and physical conditions and which could be reasonably imposed on them, and thus does not recognize that they could fulfil circumstances which correspond to those of a criminal offence. Also those act negligent who consider that they could possibly realize such circumstances even though they do not want to bring them about”*

First of all, it has to be verified to which degree of carefulness the perpetrator is obliged to according to the circumstances. This objective criterion is evaluated on the basis of the applicable legal provisions, objective standards of behaviour but also the rules of medical science. Particularly there is the duty of continual education in the profession. The benchmark is the behaviour of the average ordinary, diligent and dutiful therapist or osteopath, who fulfils his/her duty of continual education and further training. The subjective benchmark of carefulness depends on the mental and physical conditions of the respective perpetrator. Physical or mental impairments can possibly free the perpetrator from his/her liability, unless he/she knows about his/her liability and gets involved in situations, in which he/she cannot recognize possible risks

because of his/her lacking knowledge (the German technical terms are: 'Einlassungsfahrlässigkeit' or 'Übernahmefahrlässigkeit'). In addition negligent behaviour is only punishable if the necessary carefulness could be reasonably imposed on the person (cf. Stellamor/Steiner, Handbuch des österreichischen Artzrechtes I, Arzt und Recht (1999), p. 255ff). Self-employed physical therapists who work osteopathically can thus not invoke that they could not know the risks of treatment or certain treatment methods due to their state of knowledge, if an objective consideration comes to the conclusion that they should have known them. In this case they would have gotten involved in a treatment, which on the basis of their subjective knowledge they were not able to provide. Also in this case the behaviour has to be regarded as negligent in terms of criminal law.

4.3.1.1 Bodily injury caused by negligence

The concept of negligence has already been explained in the previous chapter.

Bodily injury is any sort of impairment of someone's physical integrity, whether someone damages another person's body or health (cf. Fabrizio: StGB, 9th edition (2006), p. 288ff). Minor bodily injuries include lacerations, haematoma, abrasions, swellings or contusions.

By attributing certain privileges to the health care professions the legislator has taken the particular risk disposedness of their activities into account. According to Article 88 para. 2 number 3 of the Austrian Criminal Code members of the higher clinical-technical services (thus also self-employed physical therapists who work osteopathically), who cause a bodily injury or health impairment with a duration of less than fourteen days through the execution of their work, must not be punished if they are not guilty of serious default (i.e. gross negligence in civil law).

If an action causes damage to health or occupational disability that last more than 24 days or if the action represents an aggravated assault as such the consequences are regarded as severe bodily injury. (cf. Fabrizio: StGB, 9th edition (2006), p. 278ff).

Negligent minor bodily injuries are threatened with a prison sentence of up to three months or money fine of up to 180 daily rates. If the consequences of the injury are serious the statutory range of punishment is increased to a prison sentence of up to six months or money fine of up to 360 daily rates.

Regarding the relevant judicature, please refer to Stellamor/Steiner: Handbuch des österreichischen Arztrechts I, Arzt und Recht (1999), p. 295ff.

In this context the saying “every good osteopaths at some point causes a rib to fracture” has to be regarded very critically. Further, osteopathic techniques which cause bruising should be applied with the utmost caution. Osteopaths should be aware of the legal consequences which the applied treatment techniques might entail.

4.3.1.2 Involuntary manslaughter

Involuntary manslaughter is regulated by Article 80 of the Austrian Criminal Code. According to the provisions someone who involuntarily causes the death of a person has to be punished with a prison sentence of up to one year. The negligent behaviour of the perpetrator must extend also to the event of death. This means that a treatment error has to be so severe that the therapist would have had to consider the death of the patient.

It seems to be terrifying to mention the term “manslaughter” in the context of a physical therapeutic or osteopathic treatment. However, the following example will illustrate that such an event might happen any time: a patient of about forty years of age mentions (in the presence of witnesses) that he does not want a “cracking technique” (manipulation technique). Nevertheless, the therapist manipulates the patient’s cervical spine during the treatment session, which causes bleeding of the vertebral artery. The patient dies. In addition, the patient took anticoagulants, a fact that was mentioned in the case history. This example shows that the therapist did not have the patient’s consent to carry out such a technique and that due to his training he should

have been aware that anticoagulants are a relative contraindication to manipulation. Thus he had to expect that the performed treatment error when he applied the technique could entail the death of the patient. Thus he would be liable for involuntary manslaughter. In a criminal procedure this would be established with the help of a medical expert opinion.

4.3.2 Therapeutic treatment on one's own authority

According to Article 110 of the Austrian Criminal Code someone who treats another person intentionally without the person's consent, even if the treatment is carried out according to the rules of medical science, has to be punished with a prison sentence of up to six months or money fine of up to 360 daily rates. Anybody who carries out such a medical treatment can be considered as perpetrator. The term medical treatment includes all measures which serve the purpose of diagnosis, therapy, prophylaxis or pain reduction.

This criminal offence underlines the particular importance of obtaining the patient's consent to treatment measures. In cases of lacking consent therapeutic interventions affecting the patient are usually unlawful both in terms of civil law and also criminal law. In this context also the previously mentioned problems involved in the patient's appropriate information have to be considered.

An exemption from punishment is only given if the consent could not be obtained because of imminent danger. However, this will hardly be the case in the context of physical therapeutic or osteopathic treatments.

Since a treatment on the therapist's own authority often is carried out for the benefit of the treated person, he/she usually has no interest in punishing the therapist. Thus this offence is subject to civil law. It is only prosecuted on the request of the treated person.

4.3.3 Violation of professional secrecy

If a therapist intentionally violates the duty of secrecy or confidentiality, he/she can be punished with a prison sentence of up to six months or money fine of up to 360 daily rates according to Article 121 of the Austrian Criminal Code. The therapist is only prosecuted on the explicit request of the person, who was injured in his/her interests though this violation of secrecy (cf. Stellamor/Steiner: Handbuch des österreichischen Arztrechtes I, Arzt und Recht (1999), p. 340ff).

There is no criminal liability if the therapist was obliged to disclose the information according to the applicable legal provisions (cf. Chapter 3.2).

4.3.4 Charlatanism

“Someone who performs an activity, which is reserved to doctors, without the appropriate training that is necessary to execute the medical profession, with regard to a larger number of patients with the intention to make profit, has to be punished with a prison sentence of up to three months or money fine of up to 180 daily rates.” (cf. Article 184 of the Austrian Criminal Code).

Which activities are reserved to doctors can be deduced from the relevant legal health care provisions, in particular from the Act on the Medical Profession. If examinations are carried out or treatments are performed which fall under the exclusive rights of doctors, the therapist runs the risk of criminal prosecution in addition to an action of injunction under civil law.

In the fields of physical therapy and in particular osteopathy one has to pay attention not to perform activities which are reserved to doctors. An exemption from punishment is given if the therapist has studied medicine and finished the medical studies (cf. Stellamor/Steiner: Handbuch des österreichischen Arztrechtes I, Arzt und Recht (1999), p. 355ff).

5 DESCRIPTION OF THE PHYSICAL THERAPIST PROFESSION IN LEGAL ACCORD WITH OSTEOPATHY

5.1 Diagnosis

The term “diagnosis” is used quite often in the osteopathic training courses. This causes certain problems because some of the teachers are not familiar with the legal situation concerning this issue in Austria. Also the fact that the student groups at e.g. the WSO consist of doctors and physical therapists contributes to the problem. Since both professional groups differ considerably from each other the danger is that in particular the physical therapists might act beyond their competencies. This can entail serious legal consequences. In Austria only doctors are entitled to use the term “diagnosis” (cf. Federal Law Gazette II No. 2/2006, Annex 1; www.ris.bka.gv.at: Fachlich-methodische Kompetenzen des Pysiotherapeuten/in). The following section will take a closer look on court decisions in this context.

“In the field of the legislation on competition the evaluation of whether the actions of a non-doctor represent an immoral interference in the rights reserved to doctors or whether these actions are not capable of affecting the competition between doctors and non-doctors, have to be based on the impression the consulter must have from the non-doctor. Someone who carries out examinations of any nature as non-doctor with the recognizable intention to give the consulter information about the presence or absence of disease or pathological conditions, disabilities or abnormalities, or who provides such information as non-doctor in the form of a diagnosis (on the basis of any source of knowledge), gives rise to the impression that a visit to a doctor is unnecessary; this person promotes his/her own competition in an immoral way, i.e. by violating Article 2 para. 2 of the Act on the Medical Profession, at the expense of the doctors. Thus he/she contravenes Article 1 of the Act on Unfair Competition” (OGH on 23.09.2003, 4Ob 166/03 w; OHG on 10.02.2004, 4Ob 19/04 d; OGH on 06.07.2004, 4Ob 156/04 a; OGH on 08.11.2005, 4Ob 172/05 f; OGH on 21.11.2006, 4Ob 151/06 v).

This decision clearly shows that a self-employed osteopathic physical therapist has to pay attention in his/her patient conversations to not use “wrong terms”. If questions concerning a pathology, which was not detected by the referring doctor, should arise during the case history and examination and if the self-employed osteopathic physical therapist detects something (e.g. inguinal hernia) through one of his/her tests, he/she should never talk about a diagnosis. The therapist should immediately contact the attending doctor and discuss the problem. It would only be acceptable to talk about a “physical therapy finding” or “osteopathic physical therapy finding”. In no case he/she may give the impression that someone who is not a doctor gives the patient or client information about his/her state of health without a doctor’s instruction so that a visit to the doctor would seem to be unnecessary.

Someone who practices in the higher clinical-technical services in the field of medicine without being entitled to do so, has to account for a violation of the law according to Article 33 of the MTD Act which can be fined with a penalty of up to €3600.

The definition of the Vienna School of Osteopathy (Wiener Schule für Osteopathie, WSO) also uses the term “diagnosis”: “*Osteopathy is a holistic method in which the hands are used for diagnosis and treatment.*” (<http://www.wso.at/neu/index.html>, 03/05/2007). To avoid any sort of misunderstanding on the part of self-employed osteopathic physical therapists, it would be indicated to amend the definition.

The relevant technical and methodical competencies of physical therapists are described in the regulation on the training in higher clinical-technical services within the framework of bachelor studies at colleges of higher education (Federal Law Gazette II No. 2/2006, Annex 1):

“The graduate can

- 1. practice physical therapy as part of the overall medical process after prescription by a doctor; this includes the aspects of identifying the problem, treatment planning, execution of the treatment as well as securing quality, evaluation, documentation and reflection;*

[...]

- 7. establish physical therapy findings on the basis of the results of the collected information and through specific examination procedures led by hypotheses through observation, palpation or tests of function. “*

Thus physical therapists are only allowed to establish “physical therapy findings“. Should they work osteopathically they are only allowed to establish “osteopathic findings“.

5.2 Providing physical therapeutic-osteopathic information in a personal conversation

It has already been explained in Chapters 4.2.3.4 that every patient should be informed about the following issues in a personal conversation:

The **information about self-determination** should clearly inform the patient about the fact that he/she decides which treatment is carried out on his/her body.

The **information about diagnosis** serves the purpose to present the physical therapeutic-osteopathic findings to the patient. Self-employed osteopathic physical therapists should try to explain the results of their examinations and evaluations in a clear and comprehensible way without giving rise to the impression to interfere with the field of activity of a medical doctor. In order to avoid violations of competition rules the therapist should never talk about a “diagnosis“.

The **information about therapy** informs the patient about the planned treatment and series of treatment sessions as well as the treatment methods that will be used. If a manual therapeutic technique is explained in this context and the patient has a rather sceptical attitude towards this method, this should be documented in the patient's records. The scepticism should be regarded as "non-consent". In this case the patient needs to be informed about alternative treatment methods including their advantages and disadvantages.

The **information about risks** should explain the possible side-effects, reactions and risks to the patient. In this context attention should be drawn to the "0.3% complication rate" (cf. Phleps: Die zivilrechtliche ärztliche Aufklärung und ihre Handhabung in der Praxis, Diploma Thesis (2005), p. 43) and the *degree of severity and probability*. All complications which occur with a greater probability than 0.3% and treatment techniques which can possibly lead to severe damage have a higher priority in the conversation about risks.

"A manual therapeutic treatment of the cervical spine can cause severe damage in relatively rare cases. The risk is rather small (low probability), however, if something really happens, it can cause serious injuries. In such a case it has to be documented that the patient was explicitly informed about this risk." (Görny: Aufklärung durch freiberufliche PhysiotherapeutInnen vor einer physiotherapeutischen Behandlung – Leitfaden für die Praxis, Bundesverband der PhysiotherapeutInnen Österreichs (2007), p. 2).

With this concrete example Görny points out how important it is to thoroughly inform the patient. A therapist who does not follow this recommendation, would act unlawfully.

The significance of the **information about preservation of treatment results** consists in explaining the patient all rules of behaviour that contribute to the success of the treatment.

All the issues listed in this chapter should always be documented in the physical therapeutic-osteopathic patient records for the purpose of evidence.

5.3 Osteopathic examination and treatment techniques

This chapter will examine whether the techniques used in osteopathy correspond with those of physical therapy. Since the osteopathic training is also advertised via the Federal Association of Physical Therapists in Austria (“PhysioAustria”) as continuing education, it seems to be obvious to suspect conformity. A problem that arises is that doctors and non-doctors “face each other” in the osteopathic training. Thus a discussion about how far a member of the higher clinical-technical services can lean out into the field of human medicine is inevitable. In his work “Die Ausübung medizinischer Tätigkeiten durch MTD, MTF, SHD, und Hilfspersonen iS. des ÄrzteG“ Radner examined the legal aspects in this context in 1998. He points out that the health care system has experienced a big change in recent years due to modernization, mechanization and specialization. New health professions developed and the competencies of already existing medical-therapeutic professions were and still are continuously expanded. Due to this fact the fields of activity partially overlap like those of doctors and the members of clinical-technical services. It is derived from Article 1 para. 1 of the Federal Act on the Medical Profession that a doctor is competent to practice medicine. According to Article 2 para. 4 Federal Act on the Medical Profession non-doctors are interdicted to practice the profession of a medical doctor. Thus it seems to be obvious that doctors are the “autocrats” of human medicine. However, the reservation of medical practice has to be regarded in the context of Article 2 para. 6 Federal Act on Medical Profession. According to Radner certain aspects of the general view of medicine may also be executed by members of other regulated health care professions, e.g. physical therapists.

The field of activity which is attributed to physical therapists by law is only defined quite rudimentary. This results in delimitation problems (cf. Radner: Die Ausübung medizinischer Tätigkeiten durch MTD, MTF, SHD und Hilfspersonal iS. des ÄrzteG (1998), p. 1ff).

Osteopathic techniques

The literal translation of osteopathy means “pathological change of bone”. Often this gives rise to misunderstandings. Andrew Taylor Still, the founder of osteopathy, called his therapeutic method by this name because his original studies were mainly focused on the bony skeleton. His basic idea was that all fluids in the body (e.g. blood, lymphatic fluid) need to be free flowing and that movement is the expression of life. Also environmental and lifestyle factors (e.g. diet, sleep pattern, socialization, exercise) influence the entity of body-mind-soul. If a movement is restricted it inevitably causes “congestion”. These local or general disturbances of circulation generate diseases. Still used the leverage of bones in order to remove restrictions of flow. This basic idea is still applicable today just like in the past (cf. Liem: *Kraniosakrale Osteopathie - Ein praktisches Lehrbuch*, 3rd edition (2001), p. 5).

A variety of techniques, which were developed after Still, have expanded the treatment spectrum of osteopaths today. To consider the human being as a whole in its somato-visceral-mental entity and function various therapeutic concepts were developed. These differ in their approaches or intensity but they share their philosophical origin. Through the diversity of therapeutic methods osteopaths have the possibility to adapt their treatment to the specific needs of the individual patient.

For didactic reasons this paper will divide the techniques in four main categories: structural techniques, manipulation techniques of joints, cranio-sacral techniques and visceral techniques.

5.3.1 Structural techniques

The structural techniques include all methods that work on the locomotor system. The techniques directly approach muscles, tendons, bones, ligaments and fascias (sheaths of connective tissue that envelop all structures of the body) to have a positive influence on them. Osteopathy offers a broad spectrum of these techniques, among them the General Osteopathic Treatment (GOT), mobilization of joints, strain-counterstrain techniques and muscle energy techniques (cf. <http://www.wso.at/neu/index.html>, 01/11/07).

The method of **General Osteopathic Treatment (GOT)** was founded by Dr. John Martin Littlejohn and further developed by John Wernham in the second half of the 20th century. Its aim is to establish diagnostic findings and provide treatment of the whole locomotor system. Through rhythmic, circumductory movements of all joints the therapist can palpate and influence the quality and quantity of the movement in the tissues. The local blood supply is improved, the proprioception of the joints is affected and the lymphatic circulation is enhanced (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 147).

The **mobilisation of joints** has been used for centuries by different cultures to treat joint problems and restrictions of movement. The joints are articulated passively through the therapist. The treatment objective can be compared with that of the GOT method (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 148).

The **strain-counterstrain technique** was developed by Lawrence H. Jones and published in 1964 for the first time in an article. Also this method focuses on the locomotor system. The painful joint is moved passively in the most pain-free position. In this position the body has the possibility to “re-boot” to achieve a new muscular balance. In addition, this method uses so-called tender points (points that are very sensitive to pressure under the skin) to establish diagnostic findings and to control the treatment effect (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 152).

The **muscle energy techniques (MET)** are based on an idea of T.J. Ruddy and Carl Kettler and were established and developed further by Dr. Fred L. Mitchel sen. and Dr. Fred L. Mitchel jun. in the middle of the 20th century. This method of diagnosis and treatment uses muscle contractions in a targeted way in specific techniques to remove restrictions of movement and resolve disturbances of the locomotor system (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 150).

The side-effects of the above mentioned osteopathic methods can be regarded as small (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 115). The explanation of the techniques illustrates that the structural techniques of osteopathy always work on the locomotor system.

Mobilizing massage and resisted counter mobilization, which are part of the functional kinetics by Susanne Klein-Vogelbach, are quite similar concepts. They also use targeted mobilizations and massage techniques to improve the mobility, blood supply and proprioception (cf. Klein-Vogelbach: Funktionelle Bewegungslehre, 4th edition (1990, p. 299 and 309).

A comparable examination and treatment concept of manual joint therapy is the manual mobilization by Freddy M. Kaltenborn. This concept is a basic one in the physical therapist training. It is interesting that Freddy M. Kaltenborn has also studied at osteopathic schools (among others) between 1950 and 1954 in London (Kaltenborn: Manuelle Mobilisation der Gelenke, 9th edition (1992), p. III).

Thus the structural osteopathic treatment techniques correspond largely with the therapeutic objectives of physical therapy and therefore are mainly consistent with the description of the physical therapy profession.

5.3.2 Manipulation techniques of joints

Manipulation techniques and the manipulation of joints cannot be attributed to one single person or founder. They have been passed on over centuries. Most of the times, the methods were applied outside the medical practice. They were used to have a therapeutic effect on reversible restrictions of mobility. As so-called “bone setter” A.T. Still studied the functional anatomy of the human being quite extensively and further developed already known techniques.

If a joint is manipulated it is positioned in the direction of the restricted movement. The art of manipulation consists in releasing the restriction of movement through an impulse with very high velocity and low amplitude (thrust). The exact effects of these commonly called “cracking techniques” are discussed quite controversially. At the moment it cannot be explained which factors really cause the improved mobility after the thrust (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 149).

In comparison with other osteopathic techniques the manipulation techniques take on a particular role because of the increased risks related to them. The complications in the context of manipulations have been classified according to Gibbons and Tehan. The categories range from dizziness and nausea, via disc prolapses, fractures, and loss of consciousness to death. The authors mention that the reason for such complications usually is a lacking diagnosis, disregard of contra-indications, insufficient examination or badly executed techniques (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 115).

Due to the high risk potential of the manipulation techniques the question arises whether such techniques may be used by physical therapists to treat patients. In Article 2 of the MTD Act the manual therapy of joints is attributed to the field of activity of physical therapists. However, neither the law nor the current training curriculum explicitly state whether this only includes the mobilisation of joints or also the manipulation techniques.

Also a conversation with representatives of the physical therapist association PhysioAustria could not provide a clear answer to this question. According to Muzar (telephone interview in October 2007) the problem is intensively examined by the organization's legal department. The competencies of physical therapists are compared on an international level and the situation is evaluated from a legal perspective. So far there are no relevant court decisions in Austria which could be consulted for the purpose of comparison. Experts represent the opinion that the right to manipulate joints should be reserved to the profession of medical doctors. Others argue understandably that physical therapists may be allowed to apply these techniques as well because of their special training.

The Maitland concept, which represents a classical physical therapy treatment method, also includes the manipulation of joints. Already in the basic physical therapy training this concept, where the manipulation is carried out as sudden impulse with low amplitude, is taught (cf. Maitland: *Manipulation der peripheren Gelenke*, 2nd edition (1996), p. 19).

Since no legal regulation exists at the moment, which allows the application of manipulation techniques for the physical therapist profession, this kind of treatment is used in a legal "grey area". Thus it is not foreseeable how the courts would decide in the event of damage.

5.3.3 Cranio-sacral techniques

The cranio-sacral therapy was developed at the beginning of the 20th century by Dr. William Garner Sutherland. The techniques help to establish diagnostic findings and provide treatment of the whole body. Cranio-sacral therapy is one aspect of the overall osteopathic concept. Due to intensive anatomical studies, in particular of the bony skull, Sutherland discovered that there is movement in the human cranium. The so-called inherent movement of the bones, membranes and fascias (sheaths of connective tissue enveloping all structures of the body) can be felt, evaluated and treated through gentle palpation. The application of this method presupposes a detailed

knowledge of anatomy. It is very gentle and causes minor side-effects (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 154).

In contrast to the other usual treatment techniques applied in osteopathy the Austrian Federal Supreme Court (OGH) has made a decision concerning the right to apply cranio-sacral therapy. The Austrian association of physical therapists filed a *masseuse*, who was practicing under a business license, for injunctive relief because she had promoted treatments for tight muscles in the back, pain in the shoulder region, humpbacks or disc prolapses, scolioses, malpositions in children as well as treatment after accidents, falls and operations in several brochures. The therapy was explained as subtle movements along the spine, which would be mobilized through these movements. This would lead to a noticeable improvement and better mobility. The Austrian association of physical therapists argued that the offer of this kind of treatment would violate Article 1 of the Act on Unfair Competition (UWG). The question whether the application of cranio-sacral therapy was admissible under a business license was answered in the negative. To judge whether the *masseuse* carried out activities violating Article 4 of the MTD Act, i.e. activities belonging to the higher clinical-technical services, which include physical therapy services, the only thing that is decisive is which treatments are actually offered and executed. The judge decided that the mechano-therapeutic treatment offered by the *masseuse* would fall under the clear provisions of Article 2 para. 1 of the MTD Act. Thus the *masseuse* has acted against public policy in terms of Article 1 of the Act on Unfair Competition by promoting her own (or other) competition through activities which interfere with the rights reserved to doctors (cf. OGH on 06.07.2004, 4Ob 156/04 a).

Due to this decision it can be supposed that cranio-sacral therapy may only be provided by physical therapists or doctors. (cf.

<http://www.konsument.at/konsument/print.asp?id=24392&definitionname=DiesUndDas&cookie%5Ftest=1>, 21/10/2006)

5.3.4 Visceral techniques

Jean-Pierre Barral and Pierre Mercier are seen as the founders of visceral osteopathy (Lat. viscera: bowels). It is due to their work that the visceral techniques developed into an integrative part of osteopathy towards the end of the 20th century. (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 154).

In visceral osteopathy it is assumed that the abdominal organs of the human body move “freely”. They owe this freedom of movement to their serous envelopes, the fascias, the ligaments and other kinds of connective tissue, which act as sliding surfaces. Any pathological change leads to fixations or restrictions of movement of the organs. If the body cannot adapt to the situation, this leads to a functional disturbance of the mobility of the organs. The osteopathic treatment tries to stimulate the mobility of the organs through techniques which support, maintain or restore the physiologic movements. These techniques require “sensitive hands”, detailed knowledge of anatomy as well as an understanding of the body functions. The intensity of the visceral osteopathic techniques vary from patient/client to patient/client, but they are always carried out as gentle as possible. The organs are mobilized gently and cautiously and the surrounding structures like ligaments and fascial envelopes are stretched (cf. Barral/Mercier: Lehrbuch der Visceralen Osteopathie, volume 1, 1st edition (2002), p. 1ff). The application of visceral osteopathy to the internal organs is limited through certain contra-indications. These include disturbed coagulation, acute inflammations and aortic aneurisms (cf. Liem/Dobler: Leitfaden Osteopathie, 2nd edition (2005), p. 154).

No comparable concept exists in the field of physical therapy. The visceral techniques can only be compared to classical massage (abdominal massage) or to the treatment of the abdomen with methods of lymphatic drainage according to Dr. Vodder. Traditional therapeutic massage forms an integrative part of the physical therapy training. It aims at harmonizing the muscle tone, stimulating the venous and lymphatic drainage as well as affecting digestion. The optimization of the function of organs through therapeutic massage is also mentioned in the curriculum of physical therapist training (cf. Clementi/Patzner/Riess: Curricula MTD - Physiotherapeutischer

Dienst, Endbericht, im Auftrag des Bundesministeriums für Gesundheit und Frauen, ÖBIG (12/2004), p. 109).

The lymphatic drainage according to Dr. Vodder also focuses at the treatment of the abdomen. The colon and certain abdominal lymph nodes are stimulated through a certain sequence of hand contacts to drain better. In the training certain relative (e.g. no abdominal treatments during menstruation) and absolute contraindications (e.g. all malign diseases, all acute inflammations) are mentioned explicitly (cf. Wittlinger/ Wittlinger: Lehrbuch der manuellen Lymphdrainage nach Dr. Vodder, volume 1, 12th edition (1996), p. 93f and 131).

The description of the physical therapist profession specifies four therapeutic cornerstones of physical therapy. These are: the improvement and control of movement, the function of the locomotor system, the behaviour and experience, as well as the function of the internal organs (cf. Moritz/Muzar: Physiotherapie-Berufsbild, 2nd edition, Bundesverband der Diplomierten PhysiotherapeutInnen Österreichs (2001), p. 5). This illustrates that physical therapists are familiar with the function of the internal organs and have an influence on them with their work. However, the treatment techniques of traditional therapeutic massage and lymphatic drainage cannot be compared with the visceral osteopathic techniques, neither in their approach nor in their anatomical and functional complexity. Thus a comparison of the different methods alone does not provide sufficient and significant information.

Summarizing it can be said that at the moment it is not clear to what extent physical therapists are allowed to treat the internal organs of human beings with manual techniques. From a legal perspective the visceral techniques can be put on a par with the manipulation techniques of the joints.

Physical therapists who use these methods currently act in a legal “grey area” even if they have a thorough additional osteopathic training. In the event of damage the legal consequences cannot be foreseen.

6 CONCLUSION

Summary and recommendations regarding safe and justified osteopathic work

This paper mainly evaluates the situation of self-employed osteopathic physical therapists and the legal rules and regulations governing their work. Since in Austria the osteopathic profession is not regulated, self-employed osteopathic physical therapists are regarded as physical therapists without additional competencies despite their osteopathic training.

In this context the question arises whether the osteopathic treatment techniques correspond with those described for the physical therapist profession. This is not the case. It could be revealed that due to this dissatisfactory situation osteopaths are continuously threatened with legal consequences when practicing their profession. Therapists who apply osteopathic treatment methods in Austria run the risk of administrative penalties and civil and public liability. Thus it is important that every self-employed physical therapist who is working osteopathically is familiar with the legal framework to protect himself/herself and his/her patients and clients. This knowledge should contribute to a better awareness of the risks involved in the application of more dangerous treatment methods. This is the only way to preserve the good reputation of osteopathy. The information of the patients and clients and the additional efforts involved in its thorough documentation should not be regarded as additional burden but as chance to improve quality and avoid cases of liability.

Only few singular decisions by the Supreme Court exist concerning the question which therapeutic treatment must be delivered only by physical therapists or doctors.

Currently, it is not possible to judge whether physical therapists are allowed to practice and apply the totality of osteopathy. Every self-employed physical therapist who works osteopathically should be aware of this. If a physical therapist causes damage to a patient or client through a treatment which he/she was not allowed to deliver in his/her capacity explained in the description of the profession, this would have serious legal consequences.

Since the osteopathic profession is currently not protected by law, it is possible that parts of this complex treatment concept are learned and practiced by laypersons. To protect the patients and clients one must not talk about comprehensive osteopathic training in this context. If unreliable laypersons offer osteopathic treatment, osteopathy might lose its good reputation. It has to be ensured that patients and clients know what training the therapists underwent and what technical competencies they have. Currently this is only possible through intensive information of the population, e.g. through the media. It is the task of the legislators to terminate this dissatisfying situation. They have to create a legally sound framework for osteopathy. Besides a clear definition of the osteopathic profession also the criteria of access have to be determined. Further, the training should be regulated uniformly.

From a legal perspective safe osteopathic practice as physical therapist is currently only possible if the therapist abides by the legal provisions governing his/her profession. Treatment techniques, which a physical therapist is not entitled to carry out, must not be applied. In this context, the manipulation techniques of joints and the visceral techniques have to be questioned.

Since in Austria only doctors are entitled to establish a diagnosis, physical therapists are urged to talk only about physical therapeutic findings. Self-employed osteopathic physical therapists may establish physical therapeutic-osteopathic findings. It would be important to pay attention to this aspect also in the communications among osteopaths.

The request of the Austrian Osteopathic Association to settle fees for osteopathic treatments not in the same account as physical therapeutic treatments because of the political targets of the profession (Barbara Merkingner, communication via e-mail, April 2007) has to be regarded critically. Self-employed physical therapists who work osteopathically could thus only treat “healthy persons” without prescription or would need a prescription by a referring doctor with the explicit notation “osteopathy”. Patients whose statutory health insurance provider does not recognize osteopathic treatment would suffer a financial damage if the fees are not refunded, which would give osteopathy the reputation to be unaffordable.

It has to be an important concern that the official legal recognition of osteopathy is promoted. At the moment there are only two possibilities to establish a legal foundation for the work: either the osteopathic profession is regulated in a separate law or osteopathy is integrated in the MTD Act to give physical therapists the possibility to practice osteopathy within the framework of the physical therapist profession.

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