

Preface	IX
Introduction	1
1. The subject at hand	1
2. Why study this at all?	6
3. A brief map of what follows	7
Chapter 1: Medical Organisation, Regulation and Discipline in Germany: 1800–1945	11
1. Introduction	11
2. The organisation of care	11
(A) Accessing healthcare	12
(B) German medicine and medical practitioners	14
(i) Medical training in the German-speaking world	14
(ii) The persistence of unorthodox practice	16
(iii) Nazi medicine and medical practice	18
3. Internal regulation and conceptions of error	19
(A) Regulation and the Honour Courts	19
(i) The regulatory background of the nineteenth century	19
(ii) Medical Chambers, Honour Courts and standardisation	22
(iii) The <i>Reichsärzteordnung</i> 1935	29
(iv) The <i>Heilpraktikergesetz</i> 1939	31
(B) Medical conceptions of error: The <i>Kunstfehler</i>	32
(i) The <i>Fall Horn</i>	32
(ii) The struggle for clarity	33
(iii) <i>Virchow's</i> resolution	35
4. Medicine and the legal system	39
(A) The procedural and cultural-historical role of expert evidence	39
(B) Medicalising law: <i>Kunstfehlergutachten</i>	46
5. Conclusions:	53

Chapter 2: Medical Error and the Criminal Law	55
1. The <i>Carolina</i> 1532	55
(A) Medical error in the <i>Carolina</i>	57
(B) Fault in the <i>Carolina</i>	57
2. Medical error before 1871	57
(A) Criminal codification before 1871	57
(B) Criminal fault before 1871	61
(i) Early codifications and occupational duties	61
(ii) The <i>Fall Horn</i>	61
(iii) Medical error and early criminal scholarship	63
(iv) Mid-century codifications and scholarship	65
(v) A retreat from indulgence	67
3. The <i>Reichsstrafgesetzbuch</i> 1871	68
(A) The triumph of general rules	68
(B) Compensation and the <i>Reichsstrafgesetzbuch</i>	70
(C) Medical error in the <i>Reichsstrafgesetzbuch</i>	72
(i) An objective standard	72
(ii) The impact of the <i>Gewerbeordnung</i> 1869	74
(iii) Antisepsis as a recognised rule	76
4. Conclusions	78
Chapter 3: Medical Error and Contract Law... ..	81
1. The Roman inheritance	82
(A) Roman medicine and medical provision	82
(B) Roman medicine and the law	85
(i) The Roman contractual schema	85
(ii) Fault and scope of recovery	88
2. Nineteenth-century Germany	89
(A) Legislation and academic commentary	89
(i) Legislation	90
(ii) Pandectist scholarship	92
(a) Distinguishing forms of labour	93
(b) The emerging consensus	94
(iii) Germanist scholarship	96
(B) <i>Zimmermann</i> and <i>Hefke</i> 's exchange	97
(i) <i>Zimmermann</i> 's rejection of Roman orthodoxy	98
(ii) <i>Hefke</i> 's defence of contract	99
(iii) Court practice	102
3. Contractual standards of fault	102
(A) Mandate	103

(B) <i>Dienstmiethe</i> and analogous contracts	104
(i) Academic and judicial opinion	105
(ii) Codifications	107
4. Conclusions	108
Chapter 4: Medical Error and the Law of Delict	111
1. The Roman delictual inheritance	111
2. Nineteenth-century Germany	113
(A) The crumbling mask of the <i>Lex Aquilia</i>	114
(B) Legislation	115
(C) <i>Gemeines Recht</i>	116
(i) Germanist views of delict	117
(ii) Pandectist views of delict	117
(D) <i>Zimmermann's sui generis</i> approach	121
3. Delictual standards of fault	125
(A) Academic writing	125
(B) Codifications	128
(C) Fault and the <i>actio contra mensorem</i>	129
4. Unorthodox practice	134
5. Conclusions	137
Chapter 5: Medical Error and the <i>BGB</i>	139
1. Introduction	139
2. Categorising medical error in the <i>BGB</i>	143
(A) <i>Arbeitsverträge</i> in the <i>BGB</i>	144
(i) Settling the contractual debate	147
(ii) The patient as a third party	149
(iii) The scope of the ' <i>Arztvertrag</i> '	152
(B) The role of delict	154
(i) Private patients and wrongfulness	155
(ii) University and municipal hospitals	158
(C) Concurrency and recoverable damages	162
3. Fault and medical error in the <i>BGB</i>	166
(A) § 276 <i>BGB</i>	166
(B) The <i>Kunstfehler</i> and ' <i>erforderliche Sorgfalt</i> '	169
(i) The changing interpretation of the <i>Kunstfehler</i>	171
(ii) Scope of application	180
(iii) Therapeutic freedom and the problem of pluralism	184
(iv) Unorthodox Practitioners	193
4. The <i>Kunstfehler</i> , medical advances and patient safety	197
(A) X-Rays and diathermy	198

(B) Retained foreign objects	202
(C) Assessment	208
5. The impact of the Nazi Era	209
6. Conclusions	216
Conclusion	221
1. Developmental themes	221
2. Drivers of development	225
3. Change and continuity after 1945	228
4. A wider lesson	236
List of Abbreviations	239
Bibliography	241
Index of terms	259