Contents

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 Reichsärzteordnung 1935 ............................ 29
       (iv) The Heilpraktiker Gesetz 1939 .......................... 31
   (B) Medical conceptions of error: The Kunstfehler .............. 32
       (i) The Fall Horn ................................................. 32
       (ii) The struggle for clarity .................................... 33
       (iii) Virchow’s resolution ....................................... 35
4. Medicine and the legal system ..................................... 39
   (A) The procedural and cultural-historical role of expert evidence ............................................. 39
   (B) Medicalising law: Kunstfehler Gutachten ................... 46
5. Conclusions: ......................................................... 53
Chapter 4: Medical Error and the Law of Delict

1. The Roman delictual inheritance
2. Nineteenth-century Germany
   (A) The crumbling mask of the Lex Aquilia
   (B) Legislation
   (C) Gemeines Recht
      (i) Germanist views of delict
      (ii) Pandectist views of delict
   (D) Zimmermann's sui generis approach
3. Delictual standards of fault
   (A) Academic writing
   (B) Codifications
   (C) Fault and the *actio contra mensorem*
4. Unorthodox practice
5. Conclusions

Chapter 5: Medical Error and the BGB

1. Introduction
2. Categorising medical error in the BGB
   (A) Arbeitsverträge in the BGB
      (i) Settling the contractual debate
      (ii) The patient as a third party
      (iii) The scope of the 'Arztvertrag'
   (B) The role of delict
      (i) Private patients and wrongfulness
      (ii) University and municipal hospitals
   (C) Concurrency and recoverable damages
3. Fault and medical error in the BGB
   (A) § 276 BGB
   (B) The *Kunstfehler* and 'erforderliche Sorgfalt'
      (i) The changing interpretation of the *Kunstfehler*
      (ii) Scope of application
      (iii) Therapeutic freedom and the problem of pluralism
      (iv) Unorthodox Practitioners
4. The *Kunstfehler*, medical advances and patient safety
   (A) X-Rays and diathermy