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Yutaka Tejima*

1 Introduction

The main purpose of this note is to set forth the present state of the law of “informed consent” in Japan through showing digests of recent Japanese Supreme Court and lower court cases dealing with the informed consent, which is known as the duty imposed on doctors to provide adequate information to patients. The reason for illustrating the present state of the Japanese law of informed consent through summarizing cases is that the surroundings and substance of informed consent in Japan has dramatically changed over the past ten years, it is worthwhile to present the Japanese law of informed consent in foreign language such as English. Moreover, such transforming trends may help to reconsider the common view of Japanese informed consent law that has been shared among foreign researchers.

Professor Koichi Bai in 1965^{*1} introduced to Japan the concept existing in West Germany of a duty on the part of doctors to provide information to patients (SETSUMEI GIMU). He objectively described the German development of a doctors’ duty of explanation to patients but he reserved his own perspective on whether Japan should follow the route taken by Germany. Ten years later, in 1975^{*2}, Professor Ikufumi Niimi introduced the concept of informed consent as practiced in the United States. In this way, both the German medico-legal situation concerning the doctor’s duty of providing information and the American concept of informed consent were introduced to Japan through these Professors’ innovative articles where they have since been further developed. The Japanese are generally quick to accept foreign ideas if they are thought worth accepting in our society, and this is equally so in the medico-legal field. The *Japanese informed consent law* is basically rooted in values developed in Western countries and therefore the Japanese legal concept of

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1 Koichi Bai, Chiryokoi ni okeru Kanja no Shodaku to Ishi no Setsumei (Patient’s Consent and Doctor’s Explanation in the Medical treatment) in: Iji Hogaku he no Ayumi p3-76 (1970).

2 Ikufumi Niimi, Ishi to Kanja no Kankei (The Relationship between Doctor and Patient) 64 Hosei Ronshu 67 (Nagoya University); 65 Hosei Ronshu 182; 66 Hosei Ronshu. 149 (1975-6).

informed consent is quite similar to the concept found in Western law. Informed consent concept plays two important roles in the court cases: a) it is a useful detour to get damages without proving a doctor's failure to conduct medical duty in a medical malpractice case and b) the concept assists patients in realising their self determination rights.

In 1991 my colleague Professor Eiji Maruyama of Kobe University, authored a short article entitled "Japanese Law of Informed Consent" in the Kobe University Law Review^{*3}. In his article, Professor Maruyama set forth a summary of the Japanese informed consent law: its history, issues to be disclosed in the process of getting patient's consent, such as risks of the treatment and alternative courses of action, and causation between failure to disclose and loss. Readers found the article useful in getting a general idea of Japanese informed consent law at that time.

Professor Robert B Leflar pointed out in his 1996 article^{*4} that there exist differences between the United States and Japan in the notion and practice of informed consent. Professor Leflar formulated the Japanese legal concept of informed consent as "INFOOMUDO KONSENTO." Understanding that Japanese informed consent law is different from that of Western countries is relatively common among the Professors and researchers who write articles in U.S. Law reviews about the Japanese law of informed consent. For example, Professor George Annas and Professor Francis Miller of Boston University, in their co-authored article "The Empire of Death"^{*5} state that the reason that the Japanese health care system works is that Japanese patients are rarely informed. But, recent cases developments may change such pre-existing view of foreign commentators. The importance of informed consent is illustrated repeatedly by comments from even doctors in many medical specialties and by its discussion in medical textbooks. The words "informed consent" have gained popularity among ordinary Japanese people through discussion in the media and through grass-roots activities of citizens who want to change Japanese medical society. Some people advocate the concept of informed consent as one of the useful tools to change the traditionally paternalistic doctor-patient relationship. In this way, the core concept of

3 Eiji Maruyama, *Japanese Law of Informed Consent*, 25 Kobe University Law Review 39-43 (1991).

4 Robert B Leflar, *Informed Consent and Patients' Right in Japan*, 33 Hous.L.Rev 1 (1996). This article was revised and translated into Japanese in 2002. ROBERT B LEFLAR (Michiyuki Nagasawa translator), NIHON NO IRYOU TO HOU: LAW AND MEDICINE IN JAPAN: INFORMED CONSENT RENAISSANCE, Keiso Shobo publishing, 2002. Quoting Leflar's article, a commentator says "there is no policy of informed consent in Japan." Sean Fitzgibbons, *Cadaveric Organ Donation and Consent: A Comparative analysis of the United States, Japan, Singapore, and China*, 6 ILSA Journal of Int. and Comparative Law, 74, 91 (1999). See also David Eakin, *The International Conference on Harmonization of Pharmaceutical Regulations: Progress or Stagnation?*, 6 Tulsa J.Comp. & Int'l L.221, 231 (1999).

5 George Annas-Francis Miller, *The Empire of Death: How culture and Economics Affect informed consent in the U.S., the U.K. and Japan*, 20 Am. J. of Law & Med.357, 376 (1994). Their understanding was quoted by Derek Kroft, *Informed consent: A comparative Analysis*, 6 J. of Inter. Law & Prac.457, 473 (1997).

informed consent began to be understood as moving from “explanation and consent” to “informed consent and choice.” It is not certain whether the Japanese courts will continue to expand the categories of medical related information that should be disclosed like recent tendencies of United States courts (such as personal data concerning doctors’ recovery rates), but Japanese case law slowly but steadily has been taking steps to enlarge the range of disclosure required.

On the other hand, some professors regard the Japanese law of informed consent as going too far and attempt to justify restriction of the doctrine. For example, Professor Norio Higuchi of Tokyo University has introduced recognition of the doctor-patient relationship as a fiduciary relationship, which may lead to expansion of the discretionary powers of doctors. Professor Kunihiro Yoshida of Hokkaido University emphasises the strain that endless expansion of the informed consent concept places on limited medical resource of modern society and suggests the advantage of a Japanese style informed consent rule.

This note first introduces five Japanese Supreme Court cases that relate to informed consent. These cases were all decided after the 1980s. In the following section, this note shows lower courts cases digests that discuss informed consent. Readers will find through these cases that among the Japanese Supreme Court and the lower courts there have been various ideas and that differing views on informed consent doctrine.

2 The Japanese Supreme Court Cases concerning Informed Consent

1) The Supreme Court, 2nd petty bench, 1981.6.19 *⁶

A 10-year old boy living in Ozu, a small city located in the suburbs of Matsuyama city of Ehime Prefecture, injured the back of his head when he fell from his bicycle. He was conveyed to the Ozu city hospital. The doctor diagnosed that the boy’s skull could have suffered a cave-in fracture and he thought immediate operation was necessary to save his life. The doctor explained the need for an immediate operation to the patient’s father and requested that the father assist by making a blood donation. In spite of the immediate operation, the patient died as a consequence of the loss of blood. The parents of the deceased filed suit against Ozu city (which administers the hospital) claiming that the doctor had failed to inform the patient’s parents of the risk of the operation.

The Ozu branch of Matsuyama district court rejected the claim on February 25, 1976. The plaintiff appealed but the Takamatsu high court also rejected the claim on October 27, 1980. The parents appealed to the Supreme Court.

6 1011 Hanji 54, 447 Hanta 78.

The Supreme Court again rejected the plaintiff's appeal saying:

Generally speaking, the treatment doctor had a duty to inform to the patient or his legal representative about the contents of the planned treatment and the risks involved in the treatment. In this case, the doctor had the duty to inform the parents of the risk involved in a skull cave-in fracture treatment operation, but the information that the doctor gave was sufficient to fulfil his duty. When there are elements of uncertainty, the doctor does not have a duty to inform the representative or the patient concerning the patient's present condition, expected improvement possibility, or prospects in the event of non-treatment. Nor did the doctor have the duty to inform regarding his grasp of the patient's condition.

Comment:

Although details of this case are not clear, this case is understood as being the first case in which the Japanese Supreme Court approved the existence of the doctor's duty to provide information to the patient or his representatives concerning planned treatment. 10 years had passed since the Tokyo District Court in 1971 first discussed the issue of the duty of doctors to provide information before the first Supreme Court case appeared. The Supreme Court approved the existence of a duty on the part of doctors to provide information to the patient, but in its resolution of the case, the Court found there had been no breach of that duty by the doctor. As this case is not published on the official judgement record of the Japanese Supreme Court "Minshu", it may be possible to infer that the informed consent concept was not regarded as important at that time. It is easy to point out that the content of the information approved by the Court in this case is different from what is currently understood as required by the concept of informed consent.

Case 2: The Supreme Court, 3rd petty bench, 1995.4.25 ^{*7}

This is a case where the plaintiffs, the husband and children of the deceased, filed suit against the Japan Red Cross claiming that the doctor at the Red Cross Hospital in Nagoya city neglected to inform either the patient or patient's family that the patient suffered from cancer. This failure was alleged to constitute a default in the medical contract.

Ms. M who was a clinical nurse visited Nagoya Red Cross Hospital in January 1983 complaining of epigastralgia. Based on medical test results her doctors diagnosed that there was a high percentage likelihood that she suffered from advanced gall bladder cancer. In spite of his diagnosis, he decided not to immediately explain the result of his diagnosis and treatment plan to a suitable person in the deceased's family but determined to wait on his explanation until after her hospitalisation. The doctor advised that the deceased should be hospitalised immediately and undertake examination

⁷ 49 Minshu 1163, 1530 Hanji 53, 877 Hanta 171.

because of severe cholelithiaiss. The doctor's diagnosis of gall bladder cancer was never explained to her or her family member when hospitalisation was recommended. Ms. M refused to take this advice. She agreed to make a reservation for future hospitalisation in the end but she subsequently cancelled the reservation without making contact with her doctor. Her condition became worse and half a year later she died. It was generally accepted practice at the time of 1983 for doctors to conceal from cancer patients their true evaluation and instead to provide a different diagnosis.

The Nagoya District Court did not accept the claim made by M's husband and children stating that at the time it was customary practice not to tell the truth to cancer patients. The husband and children appealed to the Nagoya High Court, but the appeal was similarly rejected. They appealed again to the Supreme Court. The Supreme Court rejected the appeal on the following basis:

As it was at the beginning of treatment, the doctor did not know the patient's personal character. Thus it was reasonable to give the patient a different diagnosis because a truthful diagnosis might have caused Ms. M mental anguish and consequently could have had a negative influence on treatment. It was, therefore, reasonable for the doctor to recommend Ms. M to be hospitalised and further examined before telling the patient of the cancer diagnosis. The doctor should at the same time consider whether the patient or patient's family members would cooperate with the treatment in the event of being advised of a different disease. The treatment doctor had a plan, after the hospitalisation, to choose a suitable family member to whom to explain the true result of the examination. Because the doctor didn't know Mrs. M's character in detail, such plan should not be seen as unreasonable. It is fundamental for patients to respect their doctor's opinion and to cooperate with the doctor. Considering the facts stated above, it is not a breach of contract for the doctor not to tell the patient or patient's family of his concern about gall bladder cancer.

Comment:

This is the first case in which the Japanese Supreme Court discussed whether doctors owe a duty to their patients tell the truth concerning a cancer diagnosis. This case, at the Nagoya District Court level, is well known to foreign researchers as a symbol of the paternalistic attitude Japanese doctors have toward their cancer patients through its discussion in Professor Norio Higuchi's article in the *Washburn Law Review**⁸. In addition to the doctor's responsibility, the court stressed the importance it placed on the patient's duty of cooperation in the treatment. Although the giving of a false diagnosis might, as a general rule, have been considered reasonable under general 1983 principles, it is doubtful whether the doctor's decision was reasonable considering Ms. M's occupation of nurse and consequent knowledge of medical matters.

8 Norio Higuchi, *The Patient's Right to Know of a Cancer Diagnosis: A Comparison of Japanese Paternalism and American Self-Determination*, 31 *Washburn L.J.* 455 (1992).

Case 3: The Supreme Court, 3rd petty bench, 2000.2.29 *⁹

Ms. T, born in 1929, has been an apostle of the Jehovah's Witnesses since 1963. In accordance with her religious beliefs she would never, under any circumstances, agree to receive a blood transfusion. Doctor C of Y national hospital was known among Jehovah's Witnesses believers as an experienced surgeon who performed operations without blood transfusion. Y hospital, had a policy of respecting a patient's desire to refuse a blood transfusion when a patient who was a believer of the Jehovah's Witnesses asked for an operation. But, when the patient could not be saved without a blood transfusion the Y hospital had a policy to transfuse blood in spite of the patient's request. In 1992 Ms. T was diagnosed at B Hospital with a malignant liver tumour. However, the doctors at B hospital told her that they couldn't perform an operation without a blood transfusion. Ms. T looked for a hospital where the operation was possible without a blood transfusion and she was introduced the doctor C, who had experience performing operations without transfusion. Dr. C advised that he could operate on her without transfusion as long as her cancer didn't spread. Ms. T transferred to the Y Hospital and the operation was performed. During the operation, Dr. C recognized that transfusion was necessary in order to save Ms. T's life and accordingly he gave her a blood transfusion. Ms. T lived for five years after the operation. As Ms. T was notified of her transfusion after the operation and she filed a lawsuit claiming that the doctor's transfusion treatment was a breach of her personal rights and demanding monetary damages.

The Tokyo district court dismissed Ms. T's claim. The court said that the doctor had the duty to save the patient's life and, as he performed the transfusion to save the plaintiff's life the doctor's conduct was not illegal. Ms. T died after the district court judgement and while the case was on appeal. In responding to the appeal, the Tokyo high court modified the judgement and ordered the payment of 550,000 Yen (including attorney's fees) finding that the doctor had breached Ms. T's right of self-determination by not giving her a chance to decide to undertake the operation under the condition of no transfusion under any circumstance. Both parties appealed.

The Supreme Court, on February 29, 2000, ruled as follows:

It is natural for a doctor to attempt any available treatment that meets the appropriate standard of care in order that the doctor could remove the patient's liver tumour. Nevertheless, in a case where the doctor knew of the patient's definite intention to reject blood transfusion under any circumstance, such intention should be respected as an expression of the patient's personal right. The doctor had to explain to the patient the hospital's policy under which the doctor would perform a transfusion in spite of the patient's intention when transfusion was indispensable to save the patient's life. As the doctor knew of Ms. T's belief and her expectation, he should have let her

9 54 Minshu 582, 1710 Hanji 97, 1031 Hanta 158.

make the decision whether she would undertake an operation in Y Hospital under such condition. As the operation was carried out without the explanation of Y Hospital's policy, she was deprived of the right to decide whether to undergo the operation or not in Y Hospital. Therefore, doctors are liable to the damages Ms. T. suffer and the Japanese government was liable as the employer of doctors for damages of Ms. T.

Comment:

In this case the Japanese Supreme Court discussed the duty of doctors to inform their patient who believe in the teaching of the Jehovah's witnesses of their intention regarding blood transfusion. The Supreme Court found that neglecting to inform the patient of the hospital policy was to be regarded as the infringement of personal rights, and the court ordered the payment of damages in spite of the fact that the treatment itself was successful and the patient lived for five years after the operation in spite of her serious condition. The court estimated the amount of damages at only approximately \$4400 (\$1=125 Yen). Some commentators criticize that the amount of damages awarded, as an estimate of the value of Ms. T's mental suffering was too small. The purpose of plaintiff is not get money but to get the announcement of illegality of the doctor's conduct, it may not matter the amount of damage is not high. It is interesting that the Supreme Court seems to be the most active and liberal among the courts that have considered this sort of informed consent issue.

Case 4: The Supreme Court, 3rd petty bench, 2001.11.27 ^{*10}

Dr. K, who runs a private clinic in a city located in the suburbs of Osaka city, is a qualified breast cancer specialist. He diagnosed Ms. I, age 44, as having breast cancer on February 14, 1992. Dr. K did not have much experience with the breast conserving surgery method. Ms. I's breast cancer stage was early enough to fit the requirements for breast conserving measures as opposed to breast excision. Dr. K explained his operation plan of mastectomy to Ms. I and gave his passive estimation concerning breast-conserving measures. In a letter, Ms. I expressed her desire for the breast conserving operation procedure, but Dr. K did not pay much attention to her wishes and performed the planned operation. It has been confirmed in Western countries that the breast conserving measures are superior to breast excision operation measures when measured against recurrence and survival rates. Nevertheless, the diffusion of information concerning breast conserving measures was limited in Japan at the time of operation. At the time, breast conserving measures were utilized in only 12.7% of all breast cancer operations. Most surgeons thought that many problems remained to be resolved before it could become a standard practice for breast cancer treatment, and in practice only breast cancer

¹⁰ 55 Minshu 1154, 1769 Hanji 56, 1079 Hanta 198.

specialists choose such treatment. Ms. I claimed damages stating that Dr. K breached his duty of providing her with appropriate information that derives from the medical contract.

The Osaka district court granted Ms. I's claim reasoning that Dr. K had breached his duty of providing information and ordered him to pay damages. Dr. K appealed. The Osaka high court reversed the judgement and dismissed the claim saying that Dr. K had explained the necessary information.

The Supreme Court quashed the original judgement and returned the case to the Osaka high court. The reasoning of the Supreme Court was as follows:

As the effect of a medical contract, the treatment doctor must inform the patient about the diagnosis of the disease, the nature and the contents of the operation, alternative treatments that can be chosen, and the advantages and disadvantages of the treatment. When two and more procedures exist as standard medicine, the doctor should also explain the contents of such treatment. It is difficult to choose treatment when on the one hand an established standard treatment procedure exists, but on the other hand a new treatment procedure with a good reputation begins to be known. The treatment doctor has a duty to inform the patient about new treatments in cases that meet the following all requirements: the new treatment has begun to expand in use among specialists and active evaluation is held between them, the patient may adapt the criteria of the treatment, the patient shows interest in the treatment, and the doctor already knows of the existence of the treatment. When it becomes the doctor's duty to inform the patient, he should explain the existence of such a treatment and the place where the patient can obtain such treatment even if the doctor himself doesn't evaluate the treatment. As the breast is the symbol of a woman, to lose a breast by reason of breast cancer surgery may cause her mental anguish. The operation is, therefore, strongly concerned with the quality of a patient's life style. When it is seen from the standpoint mentioned above, Dr. K's explanation was found to be insufficient.

The Osaka High Court to which the case was returned granted Ms. I damages in the amount of 1,200,000 Yen (app. 8160\$). (The Osaka High Court, 2002.9.26).

Comment:

This is the first case where the Japanese Supreme Court held that a doctor who knows of a specific treatment method has a duty to give detailed information to the patient even if such treatment is not enforceable as a standard medical practice. Although the range of explanation is limited by the standard of care, the court emphasized that the breast is a symbol of womanhood and tried to balance a woman's free choice of life style and treatment methods.

Case 5: The Supreme Court, 3rd petty bench, 2002.9.24 *¹¹

This is a case in which the deceased cancer patient Mr. U's family members, Mr. U's wife X1, and Mr. U's children X2, 3, and 4, filed a lawsuit against Y, who runs B hospital, claiming damages for emotional distress. X1 complained that the Y hospital's doctors should have informed Mr. U that he was in the terminal stage of lung cancer. If the doctor had explained that Mr. U was in such condition, X1 would have been able to take steps to make the remaining life of Mr. U satisfactory. X1 asserted that it was not difficult for the doctors to know of Mr. U's family relationship from Mr. U's medical record.

Mr. U lived with his wife, X1. Their children, X2, X3 and X4, lived separately from Mr. U, but as X2 lived in the same neighbourhood as Mr. U, they had close contact with each other. There were no difficulties in advising X2 that Mr. U's cancer was in a terminal stage. The doctor found shades in Mr. U's lung and doctor C diagnosed Mr. U as being in the terminal stage of lung cancer. C evaluated Mr. U's life expectancy would be at best one year. When Mr. U asked C questions about his condition, C thought it was inappropriate to explain that Mr. U was in the terminal stage. C therefore only answered that Mr. U's past illness of the chest progressed. As C thought that Mr. U's family needed to be advised of Mr. U's condition, he wrote in Mr. U's medical record that it was necessary to explain Mr. U's condition to Mr. U's family. Thereafter C's working term at Y hospital was completed and C stopped going to Y hospital. The doctor who took over Mr. U's treatment from C, merely gave Mr. U prescriptions to relieve his pain. None of the doctors including C tried to make contact with Mr. U's family. As Mr. U's condition got worse, Mr. U was taken to the D university Hospital. As the doctor diagnosed Mr. U in the terminal stage of cancer, he called Mr. U's family members to the hospital and explained Mr. U's condition to them. Mr. U died in D university hospital.

The Sendai high court ruled as follows: although the doctor believed that Mr. U was in terminal stage of cancer, he exercised reasonable diagnostic discretion in not explaining the situation to Mr. U. Not informing Mr. U of the true diagnosis was regarded as within the reasonable discretion of the doctor and such omission should not be considered as a default of obligations under the medical contract or as an unlawful act. But the doctor also has a duty to examine whether he should explain the situation to Mr. U's family even if he judged that the diagnosis shouldn't be told to the patient. To fulfil this duty, the doctor must collect information about the patient's family. If the doctor recognized the necessity of family explanation he should contact Mr. U's family directly and should decide on the propriety of the explanation. If he neglects this duty, such omission would constitute a default of an obligation of the medical contract and thus would be an unlawful act. The court ordered Y to pay

11 1324 Saibanshojiho 1; 1106 Hanta 87.

damages of 1,200,000 yen (app. 8160\$). Y appealed.

The Supreme Court dismissed Y's appeal reasoning as follows:

the doctor owes a duty to explain to the patient the diagnosis of his condition, which derives from the medical contract. When the diagnosis is too serious for the patient to be told the truth because of the short life expectancy of the patient, the doctor has the discretion of not telling the truth to the patient. In that case, the doctor owes an accompanying duty under the medical contract to try to contact some member of the patient's family and should examine whether it is proper or not to tell the truth regarding the patient's diagnosis to the family member. If the doctor thought it proper to tell the truth, then he should explain the diagnosis to the family member. The patient's personal right to be taken care of sincerely by his family as a result of the doctor's timely explanation, which in turn would enable the family member to understand the doctor's treatment plan and help the patient's treatment, is an independent value to be protected by law. Although there was no difficulty in making contact with Mr. U's family, doctor C didn't even attempt contact. Other doctors of Y hospital also did not try to make contact with Mr. U's family. In this way, the doctors at Y Hospital did not examine the possibility of telling the truth to Mr. U's family, and they are responsible for the damage inflicted on Mr. U through their erroneous response to the terminal stage cancer patient. But for the doctor's fault, the plaintiffs could have spent much meaningful time with Mr. U. Y was liable as the employer for damages for the injury inflicted on Mr. U.

Comment:

In this case, the court regarded telling a family member instead of the patient himself as reasonable and within the extent of discretion of doctors, and the doctors were given a free hand to choose the family member to whom to tell the true diagnosis. But the court held that in choosing not to give the diagnosis to the patient doctors are under another duty, namely to examine the pertinence of their choice.

3 Cases concerning informed consent in the lower courts of Japan

The Supreme Court cases described in Part 2 are limited discussion of some aspects of the informed consent Law. Compared with them, lower courts cases include many aspects of malpractice and breach of informed consent. The following cases are digests concern informed consent or the treatment of the doctor's duty to explanation.

1) Before the first case dealing with informed consent was decided by the Japanese Supreme Court, there were 18 lower court informed consent cases published.

(1) Wakayama District Court Tanabe Branch, 1964.9.21 *¹²

In the treatment of haemangioma, the doctor should be careful not to cause skin problems through the use of radiation therapy. If such skin trouble is inevitable in the process of treatment, the doctor should only choose such treatment as will minimize such trouble and in addition the doctor must also inform the patient of the possibility of such trouble and obtain the patient's consent to the treatment. The appeals court (the Osaka High Court, 1967.4.28, 18 Kaminshu 476) did not take this case as a breach of informed consent issue, but rather treated the case as one of malpractice and dismissed the claim.

(2) Tokyo District Court, 1971.5.19 *¹³

In the treatment of breast cancer, the doctor performed a mastectomy of both breasts, but the patient did not consent to removal of her left breast. The court said that it is necessary for the doctor to get the patient's consent. Especially in the case of surgery where there can be serious effects to the patient's bodily function and figure, the doctor should confirm that the patient consent to the planned treatment. If the doctor operates on the patient without the patient's consent, such operation would be an illegal invasion of the patient's body.

(3) Kochi District Court, 1972.3.24 *¹⁴

Failure of the doctor to explain to the patient the dose of chemotherapy being used against colon cancer and initiation of the medication without explanation is not always unlawful because it is within the doctor's discretion to inform cancer patients of treatment.

(4) Akita District Court Omagari Branch, 1973.3.27 *¹⁵

When the doctor has a plan to conduct surgery that invades the patient's body, he owes the patient a duty to explain the nature, purpose and extent of the operation and get the patient's consent unless the patient is underage or incompetent or immediate treatment is necessary. Although the patient suffered from cancer of the tongue, as the patient clearly rejected the operation, it was illegal to remove one third of the tongue without his consent.

12 15 Kaminshu 2226.

13 22 Kaminshu 626, 660 Hanji 62.

14 277 Hanta 199.

15 718 Hanji 98.

(5) Tokyo District Court, 1974.11.11 *¹⁶

When the kidney biopsy was performed to determine if there was renal hypertension, one kidney was damaged and had to be removed. The court said that it was necessary for the doctor to inform the patient of the contents, effectiveness or risk of the biopsy and get his consent, and the doctor fulfilled his duty.

(6) Kobe District Court, 1975.9.4 *¹⁷

The patient died due to an asthmatic attack, which occurred during an appendectomy. The court found that the doctor had a duty to explain the risk of the operation, but concluded that there was no causal relationship between the breach of this duty and the death of the patient. The doctor had the duty to tell the patient in advance that appendectomy is more important than the risk of sudden asthmatic attack during the operation, and the doctor defaulted in his obligation in that the patient's mother, who was worried about the safety of operation, was not told of the risk. However, it could not be found that there existed any causal relationship between the breach of duty and the resulting death. Moreover, there was no proof to support the claim that the plaintiff would not have agreed to the operation if he was told in advance of the risk.

(7) Kochi District Court, 1976.4.19 *¹⁸

In a case involving sharp pain in a scar, the court noted that the orthopaedist should, as far as possible, adopt a preserving treatment method rather than aggressive treatment because paralysis accompanies nerve resection. The court also said that when the doctor unavoidably adopts a plan to perform an operation, the doctor has a duty to explain to the patient the method and effect of the treatment. At the same time, the doctor also owes the patient the duty to keep the area of operation as small as possible.

(8) Kyoto District Court, 1976.10.1 *¹⁹

The doctor did not explain to the conjunctiva tumour patient the complications accompanying cosmetic surgery. Although the court was of the view that the doctor as a specialist could make a better decision than the patient, the doctor nonetheless should get the patient's consent before performing an operation. In the case of cosmetic surgery, the necessity of obtaining the patient's consent is especially important.

16 25 Kaminshu 902, 786 Hanji 54, 320 Hanta 261.

17 17 810 Hanji 67.

18 340 Hanta 284.

(9) Hiroshima High Court, 1977.4.13 *²⁰

In the case of a patient's death caused by local anaesthesia during a radical operation on paranasal sinuses, the court found the doctor breached his duty by failing to adequately inform the patient and obtain the patient's consent. The court said that when special risk may accompany medical treatment, the doctor should inform the patient of the risk in advance of the operation and obtain separate consent for the operation. Further the court concluded that consent obtained without such information is not valid and treatment without valid consent constitutes an unlawful act.

(10) Kumamoto District Court, 1977.5.11 *²¹

The court found that the doctor's duty to explain required that the doctor provide to the patient or his family sufficient information to enable the patient to freely and seriously decide whether he would take the mitral valve permutation operation. Such information included information about the condition of the disease, the contents of the operation, the possibility of improvement of symptoms, predictable life expectancy of the patient, and the risks of death from the surgery. As for the danger of not surviving the operation, the doctor should inform the patient not only about general data concerning the risk, but also should explain the actual experience of the institution concerning the risk of the operation. Regarding this case, the doctor breached the duty of providing sufficient information but a causal relationship did not exist between the breach of duty and the patient's resulting death. Nonetheless, because of the defendant's unlawful act the patient lost the chance to make his own choice.

(11) Sapporo District Court, 1978.4.18 *²²

The court held the doctor's duty of explanation is derived from the expectation and hope of the patient. Moreover, the court found that it was usual practice for patient's to be informed concerning their condition and the duty extended to informing the malignant mesenchymoma patient or the patient's parents concerning present condition, cause and summary of the planned treatment for the patient. In addition, as the doctor ordinary knows the patient expects to be informed concerning such matters and since medicine is made under a collaborate doctor-patient relationship, the doctor has a duty to at least provide the type of explanation referred to above, and finally the court found that this duty is included in the medical contract. In the event that providing such information may adversely affect medical treatment, the doctor may omit explanation of such information.

19 848 Hanji 93, 348 Hanta 250.

20 30 Kosai Minshu51, 863 Hanji 62, 357 Hanta 296.

21 863 Hanji 66.

22 916 Hanji 61.

But if the explanation would not adversely affect the patient's treatment then the information must be given.

(12) Sapporo District Court, 1978.12.22 ^{*23}

In a negligence case involving forearm electrical injury and its necrosis after treatment, the court said that the doctor's duty of explanation would be satisfied so long as the doctor at the appropriate time balanced explanation against the patient's condition and the progress of treatment.

(13) Yokohama District Court, 1979.2.8 ^{*24}

In the case of a 6 year old patient's death through the chloramphenicol drip infusion to prevent purulence after skin graft treatment, the court held that it was necessary to get the patient's or patient's parents' consent for the treatment in spite of the wide range of discretion of the doctor.

(14) Tokyo District Court, 1979.9.18 ^{*25}

In the case of the rubella syndrome congenital, the court found the doctor at fault ruling that the doctor should have explained to the patient that the possibility of the baby being disabled was higher if the pregnant woman contracted rubella in her early stage of pregnancy, and that such information should enable the woman to make the choice of whether or not to deliver the child.

(15) Tokyo District Court, 1980.3.17 ^{*26}

In the case of an elderly patient's death after use of general anaesthesia as part of the treatment of scrotum edema, the court did not require the doctor to obtain specific consent to the use of general anaesthesia in addition to the patient's consent to the operation because the court was of the view that the use of general anaesthesia was a part of the operation and that the operation with general anaesthesia was not as dangerous as the operation with local anaesthesia.

(16) Kobe District Court, 1981.2.24 ^{*27}

In the case of the death of a vesicle papilloma patient through contrast agent shock, the court found that there was no breach of duty when the doctor did not explain to the patient the potential fatal side effect of contrast

23 380 Hanta 146.

24 941 Hanji 81, 382 Hanta 127.

25 945 Hanji 65.

26 979 Hanji 83, 417 Hanta 134.

agent considering the slight rate of such side effect and the negative effect such information would have on treatment.

(17) Nagoya District Court, 1981.3.6 *²⁸

In the case of a lobotomy performed on a schizophrenia patient, the existence of the patient's consent was discussed. The court noted the importance of the patient's self-determination right and found negligence in the surgery when the doctor failed to confirm for himself that the patient had consented to the operation.

(18) Sapporo High Court, 1981.5.27 *²⁹

In the case of the death of a patient who underwent a preventive appendectomy caused by the side effect of general anaesthesia, the court found that there was no breach of the doctor's duty considering following facts: although the doctor did not explain the risk of death to the patient before the operation, such risk was very small and not only the rate of death due to general anaesthesia was very small, but also the operation was executed in an institution that can cope with an emergency situation. Besides, it is generally known that appendectomy is not absolutely safe and the doctor did not know the patient was unaware of such common knowledge.

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27 1026 Hanji 121, 441 Hanta 137.

28 1013 Hanji 81, 436 Hanta 88.

29 34 Kosai Minshu 67, 1020 Hanji 55, 446 Hanta 140.