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(Citation)
Kobe University law review,40:87-96

(Issue Date)
2006

(Resource Type)
departmental bulletin paper

(Version)
Version of Record

(JaLCDOI)
https://doi.org/10.24546/00520460

(URL)
https://hdl.handle.net/20.500.14094/00520460

Recent Developments Concerning a Doctor's Legal Duty of Explanation after Medical Treatment in Japan

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1 Introduction

In Japan, the number of medical malpractice lawsuits have dramatically increased since the 1990s, doubling in this ten-year period. In the most recent three-year period, almost 1000 cases alleging medical malpractice were filed with the district courts. Many types of medical malpractice, from pediatric to geriatrics, are brought to the courts. Causes of medical injuries are also different, ranging from the lack of basic common knowledge of medicine to alleged errors in making highly advanced medical judgments. Some patients suffer only slight misfortune, but some die or suffer serious injuries.[1]

With the increase of lawsuits, new legal subjects appear in the courts. The doctor's duty of explanation after treatment, discussed here, is one of such topics. From a comparative law perspective, the doctor's duty of explanation has been discussed and recognized in Canadian and British cases. In contrast, such a duty is not deemed owed in German and the United States cases, although some academic opinions would recognize the duty. I previously introduced this topic in an article,[2] but recent case law development in Japan concerning such duty warrant discussion of the subject in English.

In the Japanese legal system both tort and breach of contract relate to liability for a medical malpractice. Tort law and contract law are both based on a fault based principle. Whether breach of duty of tort law or default of obligation derived from a medical contract exists is decided according to the medical standard of care at the time of treatment. The standard of care is decided separately and personally in accordance with the character and local medical environment of the medical institution.[3] Doctors not only owe

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1 237 Minjiho Joho (The Civil Law Information) 2 (2006).

2 Yutaka Tejima, *Chiryo no Sippai ni kansuru Iryo Kankeisya no Kanja heno Houkoku Gimu*, in: Setsuo Komura=Yutaka Noda ed., Ijiho no Hoho to Kadai (THE METHODS AND SUBJECTS OF MEDICAL LAW), pp183-196, Shinzansha Publishing, 2004.

3 Supreme Court Judgment, 6.9.1995, 49 Minshu 1499.

a duty to professionally treat the patient but also to get informed consent from the patient before providing medical treatment. The Supreme Court of Japan recognized the duty of getting informed consent from the patient in a case of 1981,[4] but it has often been suggested that there exists a so called "Japanese style of informed consent," that, while it resembles the western idea of informed consent is in reality quite different because it is driven by a paternalistic approach.[5] With the development of the Supreme Court's Judgment, the situation has changed dramatically. The Supreme Court's informed consent rule requires that doctors give patients sufficient and accurate information concerning behaviors that can reasonably be expected in the course of treatment.[6]

2 Cases that discussed the duty of explanation after treatment

An outline of the cases that discuss in some way the duty of explanation after treatment in Japan follows. As none of these cases are judgments of the Supreme Court, it is impossible to infer how the Supreme Court will ultimately rule concerning this duty.

Case 1 Hiroshima District Court,1992,12,21, 814 Hanta 202.

A thirty-nine year old woman suffered from aggravated intercranial bleeding and underwent a hematoma abatement operation. The surgery resulted in acute renal failure. The patient died in the transferred hospital. The treating doctor mistakenly thought her cause of death was suffocation brought on by swallowing vomit. In reality her cause of death was heart failure.

The court states that it is natural for a patient's bereaved family to want to know cause of death and process of treatment of the patient. The court continues that even though the doctor's duty of explanation is not included in the contents of medical contract itself, a family member's expectation still deserves legal protection. This result follows from the importance of life, peculiarity of the medical treatment, existence of the doctor's duty of report to the patient derived from the Article 645 of Civil Code, and the fact that the doctor is in the best position to an explanation to the family. When patient undergoing treatment dies it becomes a doctor's legal duty to give the bereaved family an accurate of the cause of death. As the required explanation partakes of the characteristics of the original contract, it is not too much to demand accuracy of the explanation. When

4 Supreme Court Judgment, 6.19.1981,1011 Hanji 54.
5 F.Miller=G.Annas, Empire of Death, 20 Am.J.of Law & Medicine,357 (1994).
6 Supreme Court Judgment, 9.8.2005, 1912 Hanji 16; Supreme Court Judgment, 4.18.2006, 1933 Hanji 80.

the explanation is seriously flawed,such as through a lack of the basic knowledge of medicine, the doctor is responsible and must compensate the bereaved family for the damage inflicted by the inaccurate explanation, including consolation money. The court ordered the defendant to pay 500,000 yen as consolation damage.

Case 2-1 Tokyo District Court, 1997.2.25, 1627 Hanji 118, 951 Hanta 258.

In this case a sixty-seven year old hospitalized patient with abdominal pain died from an unknown cause. The question raised was whether, in a case of death through unknown cause, the treating doctor owed a duty to the patient's family to propose an autopsy (a pathological anatomy) to the bereaved family. The court said that the Autopsy Conservation Act (Shitai Kaibo Hozon Ho) requires the doctor to clarify the cause of death as much as possible in order to improve public health and medicine. The court found that the existence of this provision means that anatomy is socially recognized as the most direct and useful mean of discovering the cause of death. Taking into account the substantive law provisions, functions and role of a hospital, and the feeling of the bereaved family, the court held that a hospital may, in some cases, have a duty to give the deceased's family the opportunity to consider whether to have an autopsy performed. The court recognized that there had been a breach of duty on the part of the doctor and ordered payment of 4,000,000 yen.

Case 2-2 Tokyo High Court, 1998.2.25,1646 Hanji 64, 992 Hanta 225.

Case 2-1 above was appealed, and the high court reversed. The court said that the Autopsy Conservation Act cannot be used as the basis of the duty discussed in the district court. Although a hospital, on the basis of the medical contract, assumes a duty of sincere medical treatment corresponding to the standard of care. Such duty does not include the cause-of-death elucidation and accountability set out in the district court's opinion. Besides, such duty is different from what is called informed consent. In spite of all these considerations, because of highly specific professional character of medicine and the expectation and trust patients and their families have in medical providers as well as other reasons, the court found that if a deceased patient's spouse or children make an inquiry concerning an autopsy the hospital may then have a duty to properly explain. In the instant case no such inquiry was made and thus no such duty arose.

Case 3 Yamaguchi District Court, 2002.9.18, 1129 Hanta 235.

This is a case in which a dentist made a mistake during treatment and as a result the plaintiff suffered damage. The court said that it was a dentist's duty to confirm what had occurred and explain and report what

happened to the patient. The court awarded damages of 1,530,000 yen because the dentist was at fault and could not confirm the facts and was not able to properly report to the patient. The court did not state in detail when and how such duty arises.

Case 4 Kofu District Court, 2004.1.20, 1848 Hanji 119, 1177 Hanta 218.

This is a case where a thirty-two year old woman who was in labor in a hospital died after giving birth.

The court found that the defendant doctor planted false evidence, perjured himself and submitted manipulated medical documents when the patient's family asked for an explanation. These selfish activities betray the confidence of the patient and constitute a tort. The court continued that a doctor assumes the duty to give report and explanation of the outcome of medical examination to the patient based on the medical contract (Article 645 of Civil Code). Considering the seriousness of death, when the patient dies in connection with the treatment, the doctor in attendance is legally obligated to explain the circumstances of the medical treatment as well as the cause of death when the bereaved family of the patient asks for an explanation. The doctor was found to have intentionally trampled on the above-mentioned legal duty for the purpose of obtaining an advantageous result in the lawsuit. The defendant's series of acts were found to constitute a tort. It is easy to imagine the seriousness of the mental shock of the patient's bereaved family caused by the doctor's attitude. As consolation money for the mental anguish inflicted on the plaintiff by the above-mentioned defendant's act, the court awarded 15,000,000 yen.

Case 5-1 Tokyo District Court, 2004.1.30. 1861 Hanji 3.

In this case a hospital nurse mistakenly administered the wrong medicine to a fifty-eight years old female patient who died as a consequence of the accident. This incident implicated a criminal as well as a civil case. The district court stated that the contract between the patient and the hospital is a quasi- consignment contract that terminates when the patient dies. However, (a) the hospital has a monopoly over the medical documents and it is easy for the hospital to access the medical information, and (b) doctors are expected to play a public role. This expectation is reflected in the notification duty of Article 21 of the Medical Practitioners' Law. Accordingly, when a bad result arises from medical treatment and the patient concerned survives, the doctor has to explain the cause and process of the bad result. The court concludes from this that on balance it is unreasonable not to require the doctor to provide an explaination when a more serious result, such as death of patient, occurs. Accordingly, the hospital owes a duty of explaining the cause and process of patient's death to the patient's family member as part of the duty derived from the medical

contract. Furthermore, the hospital, as the opposite contract party, owes another duty of explanation. Surely a bereaved family suffers mental anguish from the death of the patient itself, but the breach of duty to make an explanation of the circumstances to the family is the source of a different mental pain, which must be protected by law. Those who can ask for compensation as a consequence of such the mental anguish should be restricted to those who are entitled to be compensated for the mental anguish arising from the death involved. The court ordered payment of 800,000 yen.

Case 5-2 Tokyo High Court, 2004.9.30, 1880 Hanji 72.

The district court decision was appealed. The Tokyo high court said that the medical contract contains an obligation to not only properly diagnose and offer suitable treatment to the patient, but also to give a proper and timely explanation. This explanation duty is an accompaniment to the contractual duty of the hospital. Medical treatment relates to the patient's life, body and health, and to respect the patient's self-determination patients should be given information concerning the contents and effects of the treatment before the treatment is provided. In addition, the patient needs to be informed about results when the treatment is completed. As the hospital has a monopoly over the medical information and has easy access to and can utilize the information, the doctor and the hospital have a joint duty to inform the patient concerning the details of the examination and treatment. Article 1-4 of the Medical Service Act (Iryo Ho) states that medical practitioners, such as doctors, dentists, pharmacists and nurses have an obligation to give proper information to and assist the patient (to the extent possible) in understanding the treatment. Moreover, the medical contract is considered a quasi-commitment contract and the Civil Code Art.656, which applies to this type of contract, provides the duty of report. As a consequence of all of the above (the duty of proper diagnosis and treatment, the uneven distribution of information and provisions of statutes), the hospital owes an accompanying contractual duty to not only inform to the patient in advance of the contents and effect of the treatment but also to inform the patient after treatment of the result of the medical treatment. The person who should be informed is, generally speaking, the patient himself or herself. When the patient is unconscious, dead or where there are other reasons that justify not providing the information directly to the patient, the medical contract expects that the duty to inform will be provided to an appropriate surrogate, such as family members. In this sense, the medical contract include the character of a third party beneficiary contract. The contract between the patient and the hospital will end with the death of the patient, but the accompanying duty to inform derived from the contract is not ended with the death of the patient. The

duty of elucidation of the cause of death should continue to reside with the hospital and there is no reason to believe that the doctor has any different duty. The duty of reporting medical injury to the police under article 21 of the Medical Practitioner's Act (Ishi Ho) is a sort of administrative law regulation and it is not owed for the sake of the patient or patient's family and is not derived from the medical contract.

Case 6 Saitama District Court, 2004.3.24, 1879 Hanji 96.

This is a case where a sixteen year old patient being treated for synovial sarcoma in a private University hospital died as the result of the unnecessary administration of an anticancer drug. The court said that although the main contents of a medical contract is to provide for diagnose and suitable medical treatment, the contract also contains a subordinate duty on the part of a hospital to give appropriate advance information concerning the medical treatment to the patient, and when the hospital is asked by the patient's survivor (or similar representative) to explain the reason and cause of death, the hospital owes a duty to explain to such people as part of the good faith obligation of the civil law. These subordinate duties are an aspect of the contractual obligation based on the good faith requirement of the civil law. The patient or the family member is guaranteed the right to be informed and accordingly the hospital is responsible in damages as a tortfeasor in cases where the medical practitioner failed to carry out this duty with the intention of escaping legal liability, concealing mistakes or similar activity.

Case 7 Tsu District Court, 2004.6.24, online data base LEX/DB is available on this case.

In this case the cause of death was the patient's pulmonary embolism. Survivors of the patient claimed that the defendant hospital's negligence caused the death of the fifty-six year old woman patient. The court said that the cause of patient's death is not unknown and it found no action constituting a tort because the defendants did not perform an autopsy of the patient against the plaintiff's request. The case was dismissed.

Case 8 Kyoto District Court, 2005.7.12, 1907 Hanji 112.

This is a case where improper medical treatmentof hives in a six years old patient caused low oxygen brain fever resulting in severe injury to the child. The court said that a medical institution or a doctor as a nominee is, in principle, obligated to report the results of medical examination as well as the progress and result of medical treatment to the patient. This arises from the medical contract or accompanying duty arising out of the contract. In this context, when a medical accident happens, a medical institution or a doctor as a nominee is obligated to investigate the cause of the accident and

report the results of the investigation to the patient or other proper person. According to the facts found by the court the defendant neglected his duty of investigation and report. The plaintiff suffered considerable mental anguish as a result of defendant's neglect and was awarded 1,000,000 yen as consolation money.

3 Scholarly opinions concerning the duty of explanation after treatment

The concept of a duty of explanation after treatment first was raised in the 1970s by civil procedure professor Koji Shindo of the University of Tokyo, as a part of a doctor's duty of justification.[7] Professor Shindo intended this duty to provide the legal ground for production and review of medical documents. He tried to argue that the duty of explanation was a proper way of appropriate distribution on the burden of proof between doctor and patient in medical malpractice cases. In spite of the persuasiveness of Professor Shindo's argument, the majority of scholarly opinion at this time was critical of his approach.[8] The main rationale against his argument was the view that a duty after treatment is not ordinary included in the medical contract. Such a duty was considered not enforceable as the performance of the main duty of a doctor. Since then, the duty of explanation after treatment has also been analyzed from the point of view of substantive law and the duty had been argued to arise out of an interpretation of Article 645 of the Civil Code.[9] [10] In this context, the contents of the medical contract play an important role. But these arguments had not evolved very far at that time.

Along with an increase in the number of cases that approve the duty of information after treatment in the lower courts, some academic discussion has begun to appear. Professor Noda imagines that the doctor's duty of report should not be restricted to a duty before treatment.[11] Another short article points out the importance of the information for the patients or survivors so that they can decide whether to take legal action or to accept the unsuccessful outcome of treatment as a matter of fate.[12] Professor Kanagawa,[13] in his note on case 1 above, commented that the decision suggested a new type of information duty on the part of the doctor. He pointed out in another article[14] that in the typical malpractice case

7 Koji Shindo, 382 Hanta 17 (1979).
8 Teiichiro Nakano, KASHITSU NO SUININ, 113 (1978).
9 Kiichi Nishino, "Setsumei gimu, Teni kansyo, Kanja no shodaku, Jiko kettei", 686 Hanta 87 (1989).
10 The Article 645 of the Civil Code requires the manatary to owe a duty of report concerning the status of management not only anytime in response to the demand of the mandator but also the completion of manadate.
11 Yutaka Noda, IJI SAIBAN TO IRYO NO JISSAI, 17(1985).
12 Yutaka Tejima, 85 Minjiho Joho 41(1993).
13 Takuo Kanagawa, 140 Bessatsu Jurist 24 (1996).
14 Takuo Kanagawa, Shiin humei to isi no setsumei gimu, in: GENDAI MINJI HOGAKU NO RIRON, 329 (2002).

questions are raised as to whether informed consent was obtained or whether proper treatment was given. In such cases the assertion of a breach of duty to provide information after treatment is *not always* necessary or important to discuss. Professor Kanagawa assumes that such allegation may be used in cases of insufficient proof of fault or causation or as a tactic in the lawsuit. Although he did not initially consider the duty of information after treatment as a separate right on the part of the patient or successors (reasoning that such information can be absorbed into the ordinary duty of information) he subsequently changed his view and concluded that it is significant to view the duty of information as an inherent right of survivor. The reason for his change of opinion was that ordinary duty of information was not playing a sufficient role in malpractice cases. Professor Kawakami,[15] in his case comment on Case1, Case2-2, and Case 5-5, categorizes this duty to provide information after treatment as a separate category that does not belong to the traditional duty of information. He continues that as long as the patient survives and can request the information, no difficult question exists.

4 Discussions

The duty of explanation after treatment is distinguished from the original informed consent notion in that informed consent must be taken from the patient before the planned treatment or examination begins. In contrast, the duty of explanation discussed herein is fulfilled *after* the treatment or examination. Moreover, it is implemented to the patient *or* the bereaved in cases where the patient has died. One of the expected functions of such a duty is to provide satisfaction to the patient or the bereaved family through informing them as to what had happened and why. As a practical matter, such a right to obtain information and the doctor's duty to provide information is likely to restrain frivolous or unnecessary lawsuits because one of the main reasons Japanese people sue a doctor is to discover the truth surrounding medical accidents. Case 1 discussed above is the initial case in the field and since it appearance in1992 discussion of the doctrine has steadily developed.

One of the legal grounds for imposing such a duty on doctors is derived from the idea of an accompanying or subordinating duty arising out of the medical contractual relationship. Although in cases where the patient dies, a contractual relationship between the doctor and the patient ends at the time of the patient's death, some cases hold that a doctor's duty continues and runs in favor of the bereaved family because of the character of the good faith obligation the civil law places on contractual relationship. Case

15 Shoji Kawakami, 183 Bessatsu Jurist 132(2006).

5-2 indicates that such contract based right may even run to the benefit of a third person. The fact that the treating doctor is the best position to know why the treatment went wrong, the uneven availability of information between doctors and patients, and the highly respected specific character of the doctor/patient relationship support the reasoning underlying the evolving rule. Legal theory aside, eventually a sort of sympathetic understanding of the desire (and in many cases need) of the bereaved family members to know the circumstances of the last minutes of the patient drives one to conclude that such feeling should be protected by law. The district court in Case 2-1 above adopted a public law approach to reach this conclusion, but its approach was not accepted on appeal and is not well accepted.

According to the cases, the duty is fulfilled simply by giving some general information to the patient or the bereaved and strict accuracy of the information may not be required.

Nevertheless, in cases where it is shown that the doctor is at fault for providing the incorrect information, such as cases arising from a of lack of basic medical judgment or some other reasons, the doctor or the hospital has been ordered to pay for the non-pecuniary loss that was incurred by either the patient or bereaved. In addition, if the doctor tried to conceal the fault or manipulate or falsify documents, such behavior is seen a tort and the doctor has been held responsible to pay damages for injuries that were caused from such improper behavior. A clear distinction between tort and breach of contract exists in falsification or fault cases and tort responsibility is only recognized in some limited situations.

The remedy provided in cases of failure to make disclosure is consolation money. Most of the cases involve recovery of less than 2,000,000 yen, and a commentator has pointed out that the low recovery of damages is a reason why this duty had not been discussed with vigor. To some extent the limited recovery in these cases is reasonable considering the legal ground on which such a duty has been based.

Incidentally, accepting the duty of explanation may lead to issues arising from the Constitutional privilege against self-incrimination in that such duty may lead to extortion of confession. But it appears to be understood by the courts that the constitutional problem does not exist in medical duty of explanation cases, and Cases 5 and 5-2 clearly denied the existence of a constitutional issue quoting earlier cases.

As mentioned above, although this duty of explanation after treatment has not appeared in the Supreme Court, lower courts, including high courts, began to approve such a contractual duty as part of the good faith obligation between doctor and patient. The number of cases recognizing the duty has been steadily rising over the past few years. Some influential academic opinions follow the tendency of the lower courts to recognize such

a right/duty. While there are some differences among academic opinion as to the proper ground of such a duty, such duty is recognized to arise out of either contract or tort law. Whatever the grounds, the conclusion of academic opinion ultimately approves of the existence of such duty.

If this duty of explanation after treatment achieves a more solid position, it may play an important role in dispute settlement both inside and outside the court.

One must be careful not to expand this duty too much, but it is nonetheless appropriate to approve the existence of such a duty in principle as a step in improving the relationship between the doctor and the patient.

[This note is one of the outcome of the research of the Grant-in-Aid for Scientific Research (C) offered by Japan Society for the Promotion of Science (JSPS).]