

Laws on Medicine

Lecture No.14 (in Classroom 22, on Wednesday, January 21, 2009, at 15:00-16:40)

Sequel to Chapters 8-10: Malpractice Suit—Japan and U.S.

- 1) What kind of lawsuit is a malpractice suit?
- 2) Comparison with U.S. where the number of malpractice suits is bigger by far
- 3) Let's reexamine the case of syphilis infection by blood transfusion in Tokyo University Hospital
- 4) Significance of the lawsuit over informed consent

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Malpractice Suit—Japan and U.S.

1 Number of lawsuits: social importance

Japan: part where medical treatment is concentrated; central problem of tort law

U.S.: Tort Reform

2 Japan: default of obligation and tort

U.S.: tort (point of view on contract)

3 Low rate of victory in legal suit

U.S.: necessity for expert witnesses; jury

4 U.S.: possibility of punitive damages; jury; liability insurance

Hall v. Hilbun, 466 So.2d 856 (Miss.1985)

Facts: In May 1978, a female patient with abdominal pain checked into a hospital in Mississippi. And who received exploratory laparotomy in two days, which finished with no problem (so it seemed). She died only in 14 hours after that. The patient's husband filed a malpractice suit in May 1980.

Point in dispute: Whether there were errors in the postoperative administration.

- A surgeon from Cleveland as an expert witness
- Witness's testimonial ability and the rule on standards for judgment

Defendant's Victory in First Trial by Directed Verdict

The State Supreme Court newly adopted the national standards; overturned the original decision.

- ① Responsibility for a tort by a specialist like the doctor
 - Reason and fairness of the rule
 - Reason and fairness in the locality rule
- ② National standardization of medical education, study training
 - Doctors' movement to other states is normal.
 - Access to information
- ③ Observance of medical custom practiced in a certain region does not constitute a definitive proof of the duty of care.
- ④ However, the national standard rules require to set boundaries of surroundings and conditions for each doctor.

Several Questions

- ① Why wasn't the hospital a defendant?
- ② Why did they call only a tort into a question?
- ③ Way of appointing and positioning of an expert witness
- ④ Positioning of medical custom ; judgment on regional disparities and medical standards
- ⑤ Jury's role

Case of Syphilis Infection by Blood Transfusion in Tokyo University Hospital

Verdict in Tokyo District Court dated Apr. 22, 1955, *Collection of case reports of civil decisions of the inferior courts*, vol.6, no.4, p.784; Verdict in Tokyo Higher Court dated Sep. 17, 1956, *Law News Reports*, no. 88, p.3; Verdict in the Supreme Court dated Feb. 16, 1961, *Collection of case reports of civil decisions*, vol. 15, no. 2, p.244

Facts: A female who checked into University of Tokyo Hospital for the treatment of myoma of the uterus in 1948. Got a blood transfusion; then the state was in the system of selling blood for money. Caught syphilis, a serious damage on the patient. Sued the state for the doctor's error in order to question the employer's liability.

- Doctor's error = an error made at the time of collecting blood from a donor

State's Grounds for Appeal

- ① There was no duty of a medical examination by interview; then it was the mediation office for blood transfusion founded on the Welfare Ministry's ordinance, which provided a certificate after its test, and it was customary to omit another examination on a blood donor with that certificate.
- ② In this case, even if there had been the duty of a medical examination by interview, although questions were briefly asked in actuality, it was the accident further queries could not have prevented.

Decision by Supreme Court

- ① There was the duty of a medical examination by interview. “The existence of the duty of care is by nature something that ought to be determined on a legal judgment; provided that the custom expressed as an opinion should have been practiced, it is simply limited as a matter to be taken into consideration regarding a judgment of the relative importance and extent of the error, but it is unfounded to directly deny the duty of care because of that.”
- ② There was a possibility that the situation would have been different should a medical examination by interview have been conducted in detail. Although claimed to be an excessive duty of care, “it is inevitable for those engaged in the profession (medical profession) worthy of managing human lives and health to be demanded for the duty of the best care experimentally required for the prevention of danger in the light of its profession.”

Three Legal Scholars

- ① Professor Kazuo Shinomiya's view: "There is nothing that can be called an error," and "an extremely slight neglect of the duty of care."
- ② Professor Koichi Bai's view: To bring into question not the doctor's liability arising from negligence but the hospital's contractual liability, utilizing legal principles of contract.
- ③ Professor Eiichi Hoshino's view: The judgment that it's the doctor's fault is utterly right. The actual situation in medical-services community is nothing but a point of view or custom in a partial society.

Several Questions

- ① Theory of standards of medical care—relationship between legal standards and medical practices
- ② Trend of recent decisions by Supreme Court: “thus it is safe to say that the Supreme Court sets out a course of action to broadly acknowledge doctors’ liability for damage as to mishaps in medical practice, and to give thoughtful attention to patients who have been confronted with medical mishaps by the following measures ;
 - To make criteria for judgment on doctors’ errors stricter;
 - To ease an extent of proving a causal link;
 - To approve accountability for treatment methods that have not reached standards of medical care in exceptional cases;
 - Where there are multiple therapies (techniques /method s) that have been established as standards of medical care, to approve doctors’ accountability in a broad spectrum as in requesting them to provide simple explanations about differences in these therapies and their advantages and disadvantages so that patients may be able to make a choice after careful consideration.”
- ③ Objective of a malpractice suit: the relief of victims, and other

Canterbury v. Spence, 464 F.2d at 772 (D.C. 1972)

Facts: A 19-year-old man complaining of back pain checked into a hospital in Washington in Feb. 1959. After making a myelogram through a bone marrow puncture, the patient underwent a laminectomy; subsequently his lower body was paralyzed.

In the court of first instance, the plaintiff lost the suit by a directed verdict. The dismissal and remand by the appellate court, to say, “While a doctor bears the duty to treat a patient appropriately, to be good at a diagnosis and treatment is not considered for this doctor to have fulfilled all of his responsibility. According to the precedent, when there is a demand for a reasonable duty of care, the doctor is obliged to provide certain information to the patient.”

“A reasonable duty of care means the duty to warn of all that affects the patient ‘s welfare among risks which potentially accompany the therapy method about to be practiced.

It is a prerogative of the patient that determines a course of action having to do with his/her own interest, not one of the doctor. And for the patient to be able to determine a therapy with mutual understanding , it is imperative for him/her to be informed of alternatives of the therapy and their risks to a certain extent.

Traditionally the relations the patient relies on the doctor are the ones of trust accompanied with a duty beyond the ones that come about between independent persons concerned on an equal footing. The situation might be described almost as being pitiful in that the patient has to completely rely on the doctor as to information on subject therapy affecting own welfare. This court itself forms its judgment that ‘in the light of fiducial qualities of the doctor-patient relationship, there is the duty for the doctor to clearly show what the patient ought to know taking his/her best interest into consideration.’ In the face of subject case, this court pronounces that, as a part of the doctor’s overall duties by the patient, the doctor bears the same kind of duty to expose within a reasonable scope other alternatives and risks that are latent and possible to come about.”

Significance of Canterbury Verdict

- ① The ground for accountability is the personal right to decide of a patient.
- ② To fix an appropriate scope as to what kind of information out to be provided to the patient should be centered on the benefit of the patient, which was formulated as the information that's material to the patient's decision.
- ③ What is important is not determined on the basis of the custom of medical practices among doctors, thus no specialist witness of the doctor is required for substantiation.
- ④ However, a patient to become criteria = a reasonable patient

Limitation of Lawsuit over Informed Consent

- Losing suits in the end in actual trials
- It is often questionable whether there is a duty to present and explain extremely small risks.
- Substantiation for the doctor's negligence in providing information to the patient
- Difficulties to prove that a different decision would have been made if an appropriate information had been obtained, and further that under a different decision a better outcome should have been had.
- Is the increase of explanations thanks to laws?

Lawsuit over Informed Consent as Paper Tiger

- ① Maintenance of doctor standards
- ② Barriers of a “cause-and-effect relation at the decision level,” and a “cause-and-effect relation at the damage level.”
- ③ “Damage” of the loss of an opportunity for self-determination
- ④ Contradiction between the patient’s “self-” determination and the criteria for the “reasonable patient”

Idealism and Realism

Idealism: to protect the patient's right to self-determination; everything from the patient's perspective; agreed-upon means; laws are to show what medical treatment should be and to change actuality.

Realism: the patient doesn't wish for any decision, wishes to entrust the specialist, doesn't understand the explanation; you talk about self-responsibility, but...; the intervention of laws is to intimidate with a threat of a lawsuit, leading to a formalization only to increase signatures; good medical treatment cannot be actualized with laws.

Relationship Between Law and Medical Treatment

- Flourish of lawsuits over infringement of the duty to explain in Japan
- Lawsuits over informed consent in the U.S.
- In what forms does legal influence turn up on medical treatment ?

Bibliography

○ Norio Higuchi, *Sequel to Consideration of Medical Care and Law— Medical-Care Guidelines for Terminal Phase of Disease*, chapters 8-10 (Yuhikaku, Nov. 2008)