

Laws on Medicine

Lecture No.5 (in Classroom 22, Wednesday, October 29, 2008, at 15:00-16:40)

Chapter 5: Doctor's Duty of Responding to Call-up

- 1) What is the doctor's duty of responding to call-up and of medical care?
- 2) Why does the doctor have a duty of medical care? Why doesn't the attorney have a duty to accept a commission?

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Supplement to Last Class

Administrative Punishment of Doctor

What sort of form should it be for the future?

Controversial relationship with the commission of inquiry on safety of medical care (the way the discipline should be relative to medical mishaps)

Variety of Administrative punishment: Medical Practitioners Law

Article 3: No license shall be provided to minors, adult wards, or warrantees.

Article 4: The license may not be provided to any person who falls under any of the following items:

- (i) Those unable to conduct medical operations due to mental or physical disorders prescribed in the Ordinance of Ministry of Health, Labour and Welfare
- (ii) Those addicted to narcotics, cannabis, or opium
- (iii) Those sentenced to punishment by a fine and heavier
- (iv) In addition to those who fall under the preceding items, any person who has committed a crime or malpractice with respect to medical affairs

Article 7: When any doctor falls under Article 3, the Minister of Health, Labour and Welfare shall cancel his/her license.

(2) When any doctor falls under any of items under Article 4, or has committed a conduct to lower the dignity as a doctor, the Minister of Health, Labour and Welfare may implement the punishments listed in the following:

- (i) Reprimand
- (ii) Suspension of the medical profession for less than 3 years
- (iii) Cancellation of the license

Article 7, item (ii): The Minister of Health, Labour and Welfare may order any doctor who has received punishments listed in the preceding Article, paragraphs (1), item (i) or item (ii), or anyone who is intended to apply for the renewed license pursuant to the provisions in the same Article, paragraph (3), to take what is provided for in the Ordinance of Ministry of Health, Labour and Welfare as the study training regarding the maintenance of ethics as a doctor or the knowledge and capacity to be possessed as a doctor (hereinafter referred to as “Reeducation Training”).

Draft plan, being aimed at guaranteeing medical safety, regarding the investigation to determine the causes of death due to medical mishaps and the way of the recurrence prevention should be—The third draft plan—April 2008

【Administrative Punishment】

- (46) While it is pointed out that system errors are the cause of many medical mishaps, current administrative punishments for medical mishaps are handed out to individual medical professions based on Medical Practitioners Law and Law for Public Health Nurses, Midwives and Nurses.
- (47) In local committees, since investigation is conducted from the standpoint of medical safety, using survey results of local committees as reference, the administrative punishment for medical mishaps shall be focused on the improvement of system errors aiming at the enhancement of medical safety.
- (48) Specifics shall be the following:
- ① From the perspective to improve system errors, the punishment to medical institutions shall be established in Medical Practitioners Law. Concretely speaking, medical institutions shall be ordered to submit a plan document regarding their structural development to secure medical safety, and be requested to take measures for preventing a recurrence of such problems. Accordingly the administrative punishment to individuals shall be controlled.
 - ② The punishments to individual medical professions based on Medical Practitioners Law and Law for Public Health Nurses, Midwives and Nurses are being implemented by the Minister of Health, Labour and Welfare listening to opinions of Medical Ethics Council. When the causes of medical mishaps are judged to be not just system errors but also the failure to perform individuals' duties, and medical institutions' submission of a plan document regarding the structural development to secure medical safety is not good enough, the punishments to individuals may become necessary. In such cases, the punishment shall emphasize reeducation, rather than one involving suspension of operations.
- (49) Still, as for the administrative punishment for medical mishaps, the judgment shall be made based on an extent of a breach of care duty by medical professions, and additionally, in the light of medical institutions' administrative system, medical system, and a degree of care duty on other medical professions. For this matter, deliberation in Medical Ethics Council shall be reconsidered.

Objective/Procedure of Administrative Punishment

Who administers the punishment and what for?

U.S.: Committee in each state

Core members being medical workers, plus others

Subject being naturally medical mishaps, and others

Combination of regulation, autonomy, and market

Our country is at the starting line...

but it's difficult to be uniform throughout the nation (to cover 380,000 people)

Doctor's Duty of Responding to Call-up

Article 10, paragraph (2) of Medical Practitioners Law: “A doctor engaged in medical care, when requested for medical examination and treatment, shall not refuse said request without justifiable grounds.”

To look at the meaning of the terms...

Doctor engaged in medical care

Request for medical examination and treatment

Justifiable grounds

Similar provisions on other medical professions

Doctor's Duty of Responding to Call-up

A family physician R, having participated in a drug trial on osteoarthropathy and produced certain results, came to attend a conference in Melbourne in order to join a debriefing session on researches.

In the plane for Melbourne, someone was suddenly taken ill. A flight attendant called out, "Is there a doctor here?" Dr. R hesitated as he had limited experience of examining patients having heart stroke. In this case, what should Dr. R do?

In-flight Emergency Case and Doctor's Role, and Law's Role

Two approaches

A. Sanctions Type

To impose a duty of rescue on the doctor (duty of responding to call-up), and, if refused, inflict a criminal punishment. When the doctor actually gave treatment and made a mishap, to place civil liability on him, and further, to consider an administrative punishment.

© Triple punches of criminal sanction, civil recompense, and administrative punishment

B. Support Type

To declare a duty without sanctions for the doctor to stand up on his goodwill. To set up an exemption of liability for negligence when an actual treatment was given. Even if the result was unfavorable, there would be no civil recompense, not to mention an administrative punishment.

© To encourage a good act by lowering legal risks

In-flight Emergency Case and Doctor's Role, and Law's Role

Two real laws 【Emergency Affairs Administration and Duty of Responding to Call-up】

A. Article 698 of Civil Law: “An administrator, when practiced administrative affairs in order to help a person stave off a pressing injury on his/her body, honor or property, unless there was malice or a serious mistake on the administrator's part, is exempt from the responsibility for compensation for damage incurred thereby.

→Article 697: “A person who has begun the administration of affairs for other persons without obligations (hereinafter referred to as an “administrator” in this chapter)

B. Article 19 of Medical Physicians Law: “A doctor engaged in medical care, when requested for medical examination and treatment, shall not refuse said request without justifiable grounds .” (Without penal provisions)

©Obviously responding in “Support Type”

Thoughts of Some Doctors

1 Article 698 of Civil Law is no help.

For, this won't be applied as the doctor assumes the duty of responding to call-up.

2 There is a possibility to be blamed for negligence liability and sued if involved and gotten bad results.

3 So let's feign ignorance, like pretend to have fallen asleep.

Mistake as Legal Theory

1 Is feigning sleep safe?

→If the duty of responding to call-up is applicable to the inside of an aircraft, there is a possibility for a jurist to press the doctor hard for (nonfeasance) professional negligence resulting in injury and/or death.

→If someone in the plane who knows the said person is a doctor, there is an enormous risk.

2 Nonetheless, there remains a question as to whether a sanctions-type law is relevant after all.

As Legal Theory

1 There is no duty of responding to call-up to a doctor inside a plane.

Thus Article 698 of Civil Law gets applied.

2 The duty of responding to call-up is applicable to an in-flight doctor but there is no punitive provisions to it. Accordingly, as it is not so much obligations as in Article 698 of Civil Law stipulating “without obligations,” Article 698 of Civil Law gets applied, too.

*In whichever interpretation, a doctor is safe.

Because that’s a commonsense conclusion.

Commonsense=Law: To encourage an act of a well-intentioned doctor

As Legislative Theory

- By legislating a Japanese version of the law to promote life-saving acts, rescuers including medical care personnel should be granted an exemption of negligence liability
- Good Samaritan Act adopted throughout the all states of the U.S. and some states in Canada is what the medical societies have pushed forward.

Doctor's Duty of Responding to Call-up

Article 19, paragraph (1) of Medical Practitioners Law: “A doctor engaged in medical care, when requested for medical examination and treatment, shall not refuse said request without justifiable grounds.”

To look at the meaning of the terms...

Doctor engaged in medical care

Request for medical examination and treatment

Justifiable grounds

Similar provisions on other medical professions

Case of Pregnant Woman's Death—Turn-away by Hospitals

<Death of Pregnant Woman> One intern on night duty at Bokutoh Hospital, unable to maintain 2-doctor system

Mainichi Shimbun, distributed at 15:01, October 23, 2008

As to the problem of a 36-year-old pregnant woman in Tokyo who died after being turned away by seven hospitals, a duty doctor at Metropolitan Bokutoh Hospital (Sumida-ward), which had at first turned her away, was an intern referred to as “Senior Resident”, it was found out. There were reportedly four days that one intern alone went on night duty in October. In June, Bokutoh Hospital notified in writing to related organizations that, in occasions of Senior Resident on night duty, the hospital “in principle would restrict the receiving of maternal transport.”

According to the hospital management headquarters of Tokyo Metropolitan Government, Bokutoh Hospital's obstetrical section became unable to keep the system of two doctors on night duty due to one doctor's resignation at June end. For this reason, the hospital sent out those concerned the notice on restricting the receiving that, as for the night-duty system on Saturdays, Sundays and holidays starting in July, “in addition to being one-member night duty, there are situations where its member is Senior Resident, which would make the treatment of deliveries at high risk difficult.”

Senior Resident, having completed the initial-stage clinical training for two years, is an intern doctor under further training of the latter stage aiming at a medical specialist. The Metropolitan Government said the doctor who turned away this time had a career of four years since obtaining the medical license.

Situations like this have not changed since the latest problem was revealed, it is said; Osamu Tanida, manager responsible for the managerial strategy in the hospital management headquarters of Tokyo Metropolitan Government, says, “We are aware that something has to be done, but cannot come up with any remarkable remedial measures at this point.”

Q: Considering University of Tokyo Hospital and including other hospitals, are there legal problems related to Subsection 1 of Article 19 of Medical Practitioners Law?

Doctor's Duty of Responding to Call-up

Comparison with the attorney and such
Enforcement to conclude a contract

Presence or absence of a punishment; nature of
stipulations; historical changes

Doctor's Duty of Responding to Call-up

To legislate Article 19, paragraph (1)

- ① Basis for an administrative punishment
- ② Basis for civil compensation
- ③ Basis for criminal sanctions

Justification

Monopoly for the medical profession; Public nature of medical care

To make medical care better with a course of Sanctions- Type action

Justifiable Grounds

Situations acknowledged as justifiable grounds (i.e., situations to allow refusals)

- ① Unable to see patients due to absence or sickness of the doctor
- ② Medical care outside the doctor's area of expertise and which the patient acknowledges (but, if not acknowledged, the doctor is to provide emergency care and whatever he can possibly do)
- ③ To direct a patient to consult a doctor in a region where medical system on holidays and nighttime is provided (except for a situation where an emergency measure is necessary due to a critical condition of a patient)
- ④ Patient requesting of a hospital doctor to look after at the doctor's home (except for an emergency)

Situations not acknowledged as justifiable grounds (i.e., situations not to allow refusals)

- ① Slight exhaustion, drunkenness
- ② Default on medical care fee
- ③ Off day, outside consultation hours; but, ref. ③ in the above
- ④ Request for a house call when medical examination and treatment are necessary

Attorney's Duty to Accept Commission

- Article 21 of Judicial Scriveners Law expressly stipulates for a duty to accept a commission: “A judicial scrivener shall not refuse a commission (except for affairs related to summary court counsel or the like) without justifiable grounds.” Additionally, even a maximum fine of ¥1 million is provided in Article 75.
- Attorney= Freedom and independence from the client