

Laws on Medicine

Lecture No.9 (Classroom 22, on Wednesday, November 26, 2008, at 15:00-16:40)

Chapter 9: Doctor's Duty of Confidentiality and Exception

- 1) What way should duty of confidentiality on a hereditary disease and its legal doctrine be?
- 2) How should relation between doctor's duty of confidentiality and police investigation be?

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Supplement to Last Class: Crime of Professional Negligence Resulting in Injury and/or Death

(Professional Negligence Resulting In Injury and/or Death, etc.)

Article 211: A person who has neglected necessary business-related care, thereby has someone killed and/or injured shall be punished by imprisonment with hard labor or detention for not more than 5 years, or a fine for not more than ¥1 million. The same shall apply to a person who has someone killed and/or injured with a grave error.

1) Negligence in the professional negligence and a grave error

2) Error in civil affairs and one in criminal matter

◆ Exclusion of the application of Article 211 to the doctor, or a reduction: Is this justifiable?

★ Nov. 20, 2008 (*Morning ed., Asahi Shimbun dated Nov. 21*): Case of dispensable chopsticks judged “not guilty” at the second instance too

- Negligence found but no causal relation at the first trial; neither found at the second instance
- “No example of reports found as to a case where a pierced foreign substance reached the cranium interior”; a peculiar example, and no duty of a medical examination by interview

Proposal of General Principles by Ministry of Health, Labour and Welfare

① To limit to grave errors (plus, cases of covering up and repeated mishaps)

② Reporting to the police to be left to the discretion of a medical-care body (Investigation Commission for Medical Safety)

Double special treatments

Cf. Story of a bus driver: Bus being a sole transportation means in an underpopulated region, and the job responsible for safety and life, then, 2 dead and 3 seriously wounded in an accidental fall

Doctor's Duty of Confidentiality—First Example of Doubt about Law

Discussion over a patient with Huntington's disease

No.1 of the series on dialogues between the doctor and the jurist

Article 134 of Criminal Law: “When the doctor, pharmacist, distributor of medical and pharmaceutical products, midwife, attorney, counsel, notary, or those who used to be in these occupations, without sufficient reasons, disclose the privileged information, they are to be sentenced to an imprisonment of up to 6 months or a fine of ¥100,000 or less.”

©Doubt from the doctor about the legal doctrine

Bioethics and Law: Case Studies (Yuhikaku, 2004)

● First Case

A 45-year-old woman is diagnosed as having Huntington's disease. But the patient says not to tell her family and relatives about the fact. What the doctor should do? Huntington's disease is a hereditary disease with an incidence rate of 50% in the family, and is incurable at present.

Three Panelists

Doctor: Shoji Tsuji, Professor at University of Tokyo

Sociologist: Kaori Muto, supporting the family group of
Huntington's disease

Jurist: Norio Higuchi

Image of Legal Consideration Viewed by Doctor

- 1 With little knowledge about job sites of medical care
- 2 Discussion being abstract and conceptual
Perfunctory and plain
Always the axis of confrontation between the two
(rights/duties, right or wrong, legal or illegal, good or evil)
- 3 Criminal law to constitute the law to many of doctors
Something one doesn't want to get involved if all possible
- 4 Only one merit: clear-cut law; it's this in law.

What are the problems in this case?

Hereditary disease

Not a problem of just a patient

Doctor is a being to support the patient's family as a whole

The jurist's discussion consists of nothing but the one on dividing the family from the patient, though it might be for the argument's sake.

As the result, the jurist is only interested in informing or not.

To the doctor, it's (important but rather) a trivial issue.

Weight of Prof. Tsuji's Indication

Amid the rulemaking on medicine moving forward:

Is that really good to society?

Isn't it necessary to reexamine legal considerations?

Absurdity of discussing criminal law in the foregoing example

Doesn't the jurist need to change?

Revealed Discontent with Legal Discussion/Consideration

- Legal discussion
- Doctor's duty of confidentiality stipulated in Article 134 of Criminal Law
 - Recent instance of an arrest of a psychiatric examiner in Nara

But the provision includes the phrase, “without sufficient reasons.”

What are sufficient reasons?

Situation with sufficient reasons → Case with duty to warn

Two duties: duty of confidentiality or duty to warn?

Doctor's Duty of Confidentiality and Criminal Justice

In the Matter of a Grand Jury Investigation of Onondaga County, 59 N.Y.2d 130, 450 N.E.2d 678 (N.Y. 1983)

On June 16, 1982, a certain woman was found killed and wounded with a knife. Judging from the conditions of the scene, it was quite likely that the culprit was also wounded. There, the district prosecutor, by serving Grand Jury subpoenas duces tecum on the hospital, requested to submit records of treatments for patients wounded with a knife since June 15, 1982. The hospital countered with confidentiality privilege (privilege to refuse both testimony and documentary submissions) based upon duty of confidentiality regarding the physician-patient relation.

First trial court: the prosecution's victory

Appellate division : the hospital's victory

State Supreme Court: the hospital's victory with 5 to 0

1983 New York Supreme Court

- ① It is important to have an interpretation in light of the intended purpose of the law that has acknowledged the duty of confidentiality (privilege), and that is to encourage a patient to provide complete information so that the patient can trust a doctor and receive proper medical service, and a broad and liberal construction is necessary to implement its policy objectives.
- ② Information to be the subject of refusing testimony and documents presentation is the one acquired from the patient by the doctor through the application of professional skills and knowledge, which is necessary to act as a medical professional; its exceptions are facts that are plainly observable to a lay person without professional knowledge.
- ③ Although the privilege belongs to the patient, the doctor or the hospital is allowed to claim for the patient's benefit. But this is not in the doctor's discretion, and the privilege must be claimed unless and until the patient waives it.
- ④ Against an allegation to be in the public interest named a crime investigation, the precedents in the state of New York are being quoted that supported the doctor's confidentiality privilege even in murder cases: First is the precedent in 1956 in which a driver, having an epileptic seizure and being conscious of the possibility of its onset, came to suffer the seizure in driving and killed 4, and what the driver confided in the doctor providing medical care was approved to be the subject of the refusal to testify.: Another is the precedent in 1886 in which a doctor who had examined a woman being accused of feticide was prohibited to testify what the doctor had heard from the woman.
- ⑤ In case of a murder instance, the federal legislation has a clear-cut regulation not to approve the confidentiality privilege based on the physician-patient relation, while the state of New York statute has no such stipulation. Conversely, the exceptions to the confidentiality privilege are clearly enumerated, and this case does not apply to any.

2002 New York Supreme Court

Case:

On May 25, 1998, a homicide occurred in Manhattan, and a witness testified that the assailant was bleeding too. The investigating authorities thought of looking into records of treatments provided at emergency wards on May 25 and 26. Mindful of the precedent of 1983, the authorities served the subpoenas duces tecum specifically excluding information acquired by a physician or nurse in attending said patient. Among 23 hospitals served with these subpoenas, a medical corporation running 4 hospitals refused to submit records, and came to the lawsuit.

Result:

Once again, the state Supreme Court decided in favor of the hospital-side's allegation.

“Patients should not fear that merely by obtaining emergency medical care they may lose the confidentiality of their medical records and their physicians’ medical determinations... A contrary result (by the Court) would discourage critical emergency care, intrude on patients’ confidential medical relationships and undermine patients’ reasonable expectations of privacy.”

Points of Interest

First, amid conspicuous actions promoting criminal investigations on terrorism and such since 9/11 incidence in 2001, it is surprising that the state Supreme Court handed down the decision to emphasize the duty of confidentiality of doctors and hospitals.

Second, what's valued as the subject of the duty of confidentiality in New York is information provided in confidence by a patient to a doctor related to the state of a disease and treatment. Conversely, in the precedents, photographs of all patients who match a certain description, or the names and addresses of a certain doctor's patients constitute exceptions to the duty of confidentiality. Should such be applied in Japan, it might become a problem for being accused of the disclosure of private information despite having nothing to do with the content of medical care.

However, a question as to whether or not the New-York-type treatment is universally prevalent across the U.S., there is some reservation to make. Relation between the physician's duty of confidentiality and criminal justice is up to each state's statute law, and in some states, the application of said duty is limited to cases of civil affairs.

HIPAA Privacy Rule and Criminal Justice

○ What is HIPAA Privacy Rule?

Circumstances where protected health information (PHI) can be disclosed: 12 patterns of activities in the public interest

Clause of “Disclosures for Law Enforcement Purpose”; the hospital is permitted to disclose PHI to law enforcement agencies under the following circumstances:

- ① To respond to a request for PHI, such as a court order or warrant of other judiciary proceeding
- ② To respond to a request from a medical supervisory body
- ③ To respond to a request from law enforcement agencies including the police on the condition that the following are confirmed prior to disclosing information; (a) that de-identified information cannot be used, (b) that the information requested is relevant and material for the law enforcement purpose, (c) the scope of information requested is the minimum necessary for their lawful purpose.
- ④ When the disclosure/provision of information is required by law (e.g., cases of abuse, bodily harm by weapons capable to inflict a mortal wound)

Provision of Information to Police

- ⑤ To respond to a request from the police and such for purposes of identifying or locating a fugitive or suspect; but with a limited scope of personally-identifying information as follows: (1) name and address (2) date and place of birth (3) social security number (4) ABO blood type and rh factor (5) type of injury (6) date and time of treatment (7) date and time of death (8) description of distinguishing physical characteristics such as height, weight, gender, race, color of hair, presence or absence of beard/mustache and scar.
- ⑥ To respond to a request for PHI about a live victim of a crime (Provided the victim agrees in principle; in case the agreement is difficult to obtain, the disclosure is permitted only if it is confirmed that the information is needed to determine whether another person broke the law, and that said information is not intended to be used against the patient, and it is judged that doing so is in the best interest of the patient.)
- ⑦ To alert law enforcement to the death of a crime victim (Limited to this case, the hospital is permitted to positively provide information of the victim prior to a request from an investigation agency.)
- ⑧ When a crime is suspected to have been committed within the hospital (No request from an investigation agency is necessary.)
- ⑨ When responding to an off-site medical emergency, as necessary to alert law enforcement about the perpetrator or the victim

Points of Interest

Firstly, most of items listed in the above is the enumeration of the cases that permit medical institutions to provide protected health information of patients, and not of those pertaining to the duty of disclosing said information. There are instances the duty of confidentiality is imposed on medical institutions, and HIPAA merely guarantees that no legal liability is charged against them even if they lift the ban and disclose protected information.

Second, the disclosure of a quite limited scope of information is allowed even as to a perpetrator, not to mention a victim, let alone a deceased victim of crime.

Furthermore, thirdly, this federal privacy rule on protected health information specifies that any state statute that takes better care in supporting information protection supersedes subject federal rule, thus, for example, not reversing the sentence of New York in 2002.

All things considered, when the doctor or hospital is requested to provide medical information by the police, said profession or institution is able to refuse the request on the ground of the duty of confidentiality, or there is a considerable number of cases where that needs to be refused.

Personal Information Protection Law and Police's Perplexity

- As to a corpse whose cause of death remains unknown, a coroner upon the examination found a hospital ID card nearby the corpse, and made an inquiry about a medical record of the decedent at the hospital. And which refused the request by saying, “the information cannot be revealed without a consent of the person in question or his/her family.”
- “No disclosure without the subject person’s consent,” was the response regarding the degree of damage in a traffic accident or an injury case. The same reply was given even when the patient remained unconscious and could not respond.
- Amid an investigation of the alibi of persons involved, no answer was provided to questions like, “Was this person hospitalized here during this period?”

Q & A “Guideline for Appropriate Handling of Personal Information for Medical and Nursing Care Operators” (Collection of Cases) by Ministry of Health, Labour and Welfare

Q5-24 As to a referral and an interview by the police or an investigation agency like prosecution, what are the cases that correspond to “exceptions to the restriction on the provision to the third party”?

A5-24 The referral by investigation agencies such as the police and prosecution based on Subsection 2 of Sec.197 of Code of Criminal Procedure (also the one based on Sec.507 of said code) is regarded to come under the “cases grounded on statute” stipulated in Para.1 of Subsection 1 of Sec.23 of Personal Information Protection Law, constituting the exceptions to the restriction on the provision to the third party; such referral, in addition to being considered to impose the obligation of reporting upon the other side, an investigation on a voluntary basis, though cooperation in it is voluntary, is conducted by investigation agencies such as the police and prosecution on the specific legal bases.

Q5-25 When there is a referral or an interview by the police or an investigation agency like prosecution regarding a situation of a patient, is it permitted to respond without the consent of said patient? Should we change the way to handle referrals from the police and such in the wake of the enforcement of Personal Information Protection Law ?

A5-25 Inasmuch as a referral and an interview by the police or an investigation agency like prosecution correspond to the “cases grounded on statute” stipulated in Para.1 of Subsection 1 of Sec.23 of Personal Information Protection Law, to respond without the patient’s consent does not constitute the violation of said law. Also, as for a referral in the occurrence of a disaster, because it is regarded to come under Para.4 of Subsection 1 of Sec.23 of said law, no changes is considered necessary in the way to handle these, thus allowing the response in a conventional manner.

- Furthermore, it is hard to consider under a normal circumstance that the provision of a patient’s situation and other medical information requested by the above-mentioned referral and interview without said patient’s consent constitutes an unlawful act under civil law. An exception to this is a case of providing information other than what is requested for, in which case a possibility of a claim for compensation cannot be denied. So, when providing personal information to the police or an investigation agency like prosecution in response to their referral or interview, it is considered necessary to confirm the position and name of an investigator who made a request for the disclosure of said information, and to be prepared to explain on a later date about the provision conducted pursuant to such request.

What Japan's Course of Events in Uproar Indicates

First, the problem lies in the very fact that, upon the enforcement of Personal Information Protection Law, medical institutions hesitated to cooperate on investigations. In reality, it should be a question more than Personal Information Protection Law.

Truth: effectiveness

Personal Information Protection Law > Sec.134 of Criminal Law

There is no stance to protect a patient's secret as medical ethics.

Secondly, the subject medical institutions "overreacted" against is such information as name and address. In the precedents of the New York state, the names and addresses of a medical professional's patients are outside the ambit of his/her duty of confidentiality.

It is a posture to say, "It's the law and there's nothing that can be done about it." In reality, this is an "insensible" or absurd conditioned reflex to the signification of the law.