

2. Law of Property and Obligations

Suspected advanced gall bladder cancer, the obligation to disclose and medical discretion

Decision by the Third Petty Bench of the Supreme Court on April 25, 1995. Case No. (o) 168 of 1991. 49 *Minshū* 1499; 1530 *Hanrei Jihō* 53; 877 *Hanrei Taimuzu* 171.

[Reference: Civil Code, Articles 415 and 709.]

[Facts]

On January 31, 1983 the plaintiffs' ancestor, a nurse, went to the defendant hospital, and complained of stomachpain. The physician in charge tested the patient and suspected gall bladder cancer. On March 2, another physician of the Gastrointestinal Division of the defendant examined her and strongly suspected advanced gall bladder cancer. He advised her to enter the hospital and to take test. However, the physician told her the suspected disease was not advanced gall bladder cancer but cholelithiasis, which required surgery. She rejected the hospitalization because of her forthcoming travel and her business. On March 16 she was re-examined and gave consent to hospitalization after travel, after April 11, and made an appointment. After that, she never visited the hospital and did not enter the hospital. In June, as her condition turned for the worse, she entered another hospital and was diagnosed as having gall bladder cancer. She was treated but died in December. The plaintiffs, her husband and children, sued the defendant for breach of the duty to inform on the ground that the failure to give her the correct diagnosis caused her to miss the chance to have proper treatment.

The trial court held for defendant by reason of the medical profession's discretion to decide whether to provide or withhold information under the duty to disclose, although disclosure is recognized as a general duty of the medical profession. The appellate court also held for the defendant on the ground that the medical profession generally did not owe that duty and in the current case there existed no exceptional situation. The plaintiffs appealed to the Supreme

Court.

[Opinions of the Court]

Appeal dismissed.

At that time it was generally recognized procedure for doctors that if it was the first medical examination for the patient and the doctor was not sure about the character of the patient, he or she should obtain another diagnosis if cancer was suspected, because the patient would suffer a great shock and it could lead to the difficulties in treatment. Therefore, in a situation such as this case in which the patient unilaterally terminated treatment, the physician's failure to inform the patient about the suspicion of advanced gall bladder cancer does not create a breach of duty.

The physician notified the patient that her diagnosis was cholelithiasis so that she might feel relieved, and as a result she decided not to enter the hospital. In such a situation the physician is required to act in order to prevent her non-cooperation. In this case the physician had taken reasonable care and therefore he did not breach his duty.

People may say that the physician should inform the family of the patient of the suspected diagnosis and therefore he breached his duty, however the Court found no breach, because in the current case the patient was examined only twice and her family situation and the prospect of their cooperation were not clear. Besides, although the physician intended to inform her family after her hospitalization, she canceled her appointment to enter the hospital.

[Comment]

This is the first Supreme Court case concerning notification of a diagnosis of cancer. The Court held that whether there exists a duty to disclose the cancer or not depended on the relationship between the physician and the patient. This argument relates to the duty to inform of the medical profession and its development in Japan.

Traditionally, the relationship between the medical profession and patient has been regarded as one of master and servant. The physician had best knowledge about disease so all the patient had to do

was to leave his physical condition to the medical professional. There was no notion of so-called informed consent. The information about disease was entrusted to medical discretion. However, due to effect of the rights of self-determination and consumerism in medicine, the range of medical discretion has become narrower, and now the notion of the duty has resulted in general recognition, although its particular content is not yet well understood.

With respect to such a potentially untreatable disease as cancer, there exists a further problem. A disease which is hard to cure makes the patient depressed which lessens her will to fight the diseases. So whether the medical professional should notify the cancer patient or not creates a very sensitive question. From the public's perspective, it is still strongly believed that cancer is an untreatable and terminal disease, so if afflicted a person has to be resigned to die. Because of this strong image, cancer notification has been treated widely as a matter of medical discretion. In other words, it has not been the medical profession's duty to disclose the true diagnosis in the case of the cancer. Recently medical techniques have increasingly developed, and our awareness has gradually changed. Research by a newspaper about cancer notification indicates that 57% of the cancer patients' bereaved families wanted to notify the patient about the cancer (40% had actually notified the patient). This percentage is 15 points higher than it was five years ago. In addition in the same research study, 80% of medical professionals wanted to be notified about cancer if they themselves suffered from cancer. These days we might generally accept the idea that cancer notification is a legal duty, but this case occurred 12 years ago. Our perception at that time was that cancer notification was not wise and the medical profession generally should not disclose the diagnosis of cancer. The Court's argument that there needs to be a mutual trust relationship between physician and patient would be reasonable.

When it is better not to disclose the cancer to the patient, we may think that the doctor should notify his or her family of the cancer, for they could accept the cancer more objectively and their cooperation is indispensable to proper treatment. How to identify the person to whom the doctor should disclose the diagnosis is a difficult

problem. One commentator says that the proper person corresponds to the agent of the patient because the case in which disclosure to another person is necessary indicates that the patient lacks requisite ability to decide about treatment. According to this view, the person who has the greatest knowledge about the patient's preference and values and to whom the patient has no objection is the best person in relation to disclosure. Generally it would be the relatives of the patient, however, in the current case, these discussions have little use, because in this case the patient met with the physician only twice. The physician probably had insufficient time to inquire about her family relationship, so it was inevitable that the physician did not disclose the cancer to the family of the patient.

In the current case, the cancer was not definitively diagnosed but remained a suspicion. Is there any difference between clear diagnosis and suspicion? A suspicion leads the patient in two other directions. On the one hand, the patient increases her anxiety so that her medical treatment becomes less effective, notwithstanding the fact that the cancer remains a possibility and may be mistakenly suspected. On the other hand, the patient hopes that her disease is curable. She may cooperate with further extensive examinations. This may result in the early detection of cancer, which enables radical therapy, though the patient feels anxiety. The cancer is not completely incurable. It is important to detect the cancer at an early stage in order to give proper medical treatment. The possibility of saving his or her life has greater importance than the bad psychological effect on the patient, therefore the latter direction should be stressed. The doctor then is required to try every possible means to get the patient to cooperate. In this case, the doctor has tried to have patient hospitalized and even got an appointment. Non-cooperation resulted from her own will. Therefore, the Supreme Court decision should be approved.

Prof. KATSUICHI UCHIDA
YASUO OKADA