

3. Law of Property and Obligations

Supreme Court 3rd P.B., February 29, 2000

Japan v. Takeda

54 (2) MINSHŪ 582, 1710 HANREI JIHŌ 97, 1031 HANREI TAIMUZU
158, 1262 SAIBANSHO JIHŌ 8

When doctors adopted a policy in which the hospital where they worked gave a blood transfusion to a patient regardless of his consent when there was no other means to preserve his life and did not explain the policy to the patient who refused blood transfusions on grounds of religious belief, they breached their duty to inform the patient.

References:

Civil Code Articles 709, 710, & 715

Facts:

X was a member of the Jehovah's Witnesses and had a firm intent to refuse blood transfusions in any event on grounds of religious belief.

X went into hospital and was told that she had angioma of liver. But, because she was told that the operation could not be performed without a blood transfusion, X left the hospital and started to search for one whose doctors could perform the operation without a blood transfusion. A member of the committee of the Jehovah's Witnesses, which introduces doctors who are cooperative to believers, told Y, a doctor who worked at the Research Hospital of the Institute of Medical Science, University of Tokyo (hereinafter "the Hospital"), that X would suffer cancer of the liver and asked him to examine X.

Certainly, Y is known to the members of said committee for having performed operations without blood transfusions. But the Hospital has adopted a policy that, when a patient was a Jehovah's Witness, it would respect his refusal of blood transfusions but would give him one regardless of his consent, if there were no other means to preserve his life.

Between X going into the Hospital and the operation which would remove the tumor from X's liver (hereinafter "the Operation") being performed, X, her husband, and her son told Y etc. that X could not accept a blood transfusion. And her son handed Y a document signed by X and her husband. The content of the document was that X could not accept a blood transfusion and that X etc. would not claim damages resulting from her rejection of such a transfusion.

Yet Y started to perform the Operation after preparing a blood transfusion, because it was possible that in performing the Operation a transfusion would be needed. Because the volume of hemorrhage was more than anticipated, Y etc. thought that if they did not give X a transfusion they could not preserve her life, so they gave her one.

X brought an action against Y etc. and Japan, who is their employer, to compensate for the damage incurred by the giving of a blood transfusion without her consent. While this case was pending in the court below, X died, so her husband etc., or her heirs, substituted for her.

One of the major issues in this case is as follows; although the doctors adopted the said policy, their not explaining it to X was against their duty to inform the patient.

The court of first instance held as follows; it confirmed the patient's right of self-determination and the doctors' duty to inform the patient generally. But information from doctors is provided from a medical viewpoint, confined only to explanations of the kind, way, and dangerousness etc. of blood transfusions, and did not include considerations about whether or not the doctors would give transfusion to the patient in any event. Because doctors have a duty to preserve a patient's life, it is not directly illegal that they did not say they would give a transfusion if there were no other means to preserve the patient's life and that they caused the patient not to refuse the operation in order that they could try to preserve the patient's life. So if various circumstances were not taken into account synthetically, these doctors' acts could not be judged. And then the facts in this case being taken into account, these doctors' act was not declared illegal. And again the transfusion in the Operation was not illegal as a socially just act, for it was done to preserve X's life.

But the court below found a breach of duty in Y etc., and declared it tort that X had been deprived of her opportunity to exercise her right of self-determination because of this breach of duty, and ordered that Y etc. and Japan should pay damages. And then Japan filed a *jōkoku* appeal and X's husband etc. joined in the appeal. (The doctors also filed a *jōkoku* appeal and X's husband etc. joined in the doctor's appeal, both the *jōkoku* appeal by doctors and the *futai-jōkoku* joint appeal by X's husband etc. were dismissed on the same day that the Supreme Court ruled this case.)

Opinion:

Both the *jōkoku* appeal and the *futai-jōkoku* joint appeal were dismissed.

When a patient has a clear intention to refuse medical treatment involving blood transfusions because he thinks that it is against his religious belief that he is given a transfusion, his right to determine this intention should be respected as a content of the right of personality (*Personlichkeitsrecht*). And then, in the facts of this case, when Y etc. concluded that they could not deny the possibility that there would be no other means to preserve X's life than blood transfusions, they should have explained to X that the Hospital had chosen the policy that it gave transfusions to patients in that circumstance and left it to X's self-determination whether she continued to stay in the Hospital and whether the Operation would be performed by Y.

But although Y etc. knew during about one month before the Operation that there was a possibility that a transfusion would be necessary in the Operation, they did not explain the policy of the Hospital to X and tell X and her husband etc. of the possibility that X would be given a transfusion, they performed the Operation and gave a transfusion to her according to the Hospital's policy. And then in this case, due to the omission of explanation by Y etc., they deprived her of the right to determine whether she would accept the Operation with a blood transfusion, violated her right of personality in this respect, and therefore they should owe a liability to compensate her for the mental torment incurred by the deprivation of her right of self-determination by Y etc. And again Japan should owe a tort liability to X as the em-

ployer of Y etc. under to article 715 of the Civil Code.

Editorial Note:

In earlier case law in Japan, a doctor's duty to inform his patient has been recognized. Nevertheless, the reason why this decision is estimated to be epoch-making is, however the facts of this case are rather particular: ① the Supreme Court held that the patients' right to decide to refuse a blood transfusion on grounds of religious belief is respected as a content of a patient's right of personality, ② for the patient to exercise this right it demands doctors to inform a patient about the Hospital's policy about a blood transfusion, and ③ it grants damages to the patient who refused a blood transfusion due to the doctors' omission of information. Yet there is a difference of opinion about whether or not the rationale of this decision applies when the religious beliefs of a patient are not in question. And then the Supreme Court does not declare that this patient's right is always superior to the doctors' duty to preserve the life of a patient and their discretion, but presumes this right should be harmonized with this duty and the discretion of doctors in concrete circumstances.

YASUHIRO AKIYAMA
KAZUTOSHI OHYAMA

4. Family Law

Supreme Court 1st P.B. March 10, 2000

Kono v. Otsuyama

54(3) MINSHŪ 1040, 52(10) KASAI GEPPŌ 81, 1716 HANREI JIHŌ
60, 1037 HANREI TAIMUZU 107

When a *de facto* marriage is terminated by the death of either partner of such a marriage, Article 768 of the Civil Code, providing the distribution of property, cannot be applied.