

Terminal Care for the Elderly and Legal Issues

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my theme for presentation

- lawyers' interest in terminal care in Japan is too narrow in a sense, and too simple in another sense.
- We should reconsider the law's role in consideration of medical ethics and other type of rules like guidelines, so that we could face speed aging society in 21st century.
- The law in Japan is 40 years behind of U.S. in this field, we need to learn and skip.

Issues in terminal care is vast

- I pick up three issues:
- 1) role of law in terminal care
- 2) law or guidance
- 3) who should or could decide end-of-life decisions

1) role of law in terminal care in Japan

The interest of lawyers is narrow and useless for patients and physicians in trouble and dilemma.

Two issues are their legal interest:

- ① Withholding or withdrawing the terminal care is murder or not.
- ② Whether the fact of terminal stage should be informed, and if yes, whom?

Comparison with U.S.

- In the U.S. Quinlan (NJ 1976)-guardian could withdraw respirator.
- Natural Death Acts
- Informed consent doctrine

Legal and ethical rules are well settled.

1)Patients should be Informed.

2)Patients autonomy should be respected.

3)**Autonomy has its own limits: Futility by medical judgment, and how we should respect autonomy if patients have no capacity.**

In Japan

- The legal thinking is static and still faces issues of half a century ago in the U.S..
- Murder? Still our issue.
- But regarding information, in 2002, Supreme Court decision on terminal cancer patient whether he should be informed or not
- Yet, the decision is ambiguous. Physicians' discretion still kept whom they should inform.
- In principle, the patient, but if physician thinks it best, then to family.

Murder? The truth is that this issue is already over.

1) Only two judgments of conviction so far:

1995 Yokohama District Court

2007 Tokyo High Court affirmed by Supreme Court

2) Many other cases

- 1996 Kyoto Keihoku Hospital: Non-prosecution

- 2004 Hahoro Hospital, Hokkaido: Non-prosecution

2006 Imizu Hospital, Toyama: Non-prosecution

→Health Ministry Guideline 2007

2007 Tajimi Hospital, Gifu: Non-prosecution

2007 Wakayama Hospital: Non-prosecution

3) **The most important thing is that we have had no police intervention cases since 2008 after the Health Ministry Guideline.**

So, the issue of murder is already over.

- Still, some physicians fear the possibility of being charged.
- Some Parliament members prepare:
- **The death with dignity bill**
- Not probable to submit or enact in the near future.
- Why?
- Part of the reason is that people do not want law, but guidance would be enough.

Health Ministry and other Guidelines

- 1) Autonomy of patient should be respected.
- 2) Discussion and consensus among medical team and family is important.
- 3) Palliative care should be improved.

Mixture of autonomy, futility and consensus.

Consensus is the key word, but if patient make his or her wish clear, then it should be respected. So, the basic is autonomy, and reality is consensus.

To make Japanese law clear

- 1 Enactment: Death with Dignity Act
- 2 Court decision: Declaration judgment that the withholding and withdrawing is legal.
- But maybe for either route, the probability is low.

More serious issues are rising

- Aging is fast here in Japan:
- The increase of the number of deaths
- 1) How we could realize autonomy decision-making.
- 2) If no expressed wishes, there are many increasing cases in which the patient has no family.
- 3) Guardian in Japan has no duty or no power to make health decisions.

The role of law in Japan in 21st century

- We need not follow the half century efforts in U.S. law.
- Skip the living will acts and death with dignity acts:
- Rather we should face more serious issues in the current society.
- How we could encourage repeated discussion and communication between medical care team and patient with family if any.
- How we leave the decision if patient has no decision making power and no family.

New guidelines or new law

- **New simple law of 4 sections:**
- **Sec.1 As to terminal care, not one physician but a medical care team shall make a medical judgment.**
- **Sec. 2 As to terminal care, a patient's wish should be respected.**
- **Sec. 3 The way of respect of a patient autonomy includes a health durable power of attorney in case the patient has no capacity to make an end-of-life care decision.**
- **Sec. 4 Communication and repeated discussion among medical providers, patient and family should be encouraged.**

New guidelines for the most urgent situation

How to encourage communication and discussion repeatedly among the medical care team and the physician with family if any.

If no family and the physician has no capacity, how we should reach the decision.

Health ethics committee? Or some guidelines for that situation?

We are still talking about the value of advance directives, but AD has its own limits, as American experience shows.

Then we should learn from these experiences and create and share the problem with them.

To sum up

- Japanese law is off the point in terminal care issues. We are 40 years behind from American experiences.
 - We need not follow the 40 year period of American experiences.
 - Rather with speedy aging issues are more serious and urgent.
 - We should face these issues directly and try to answer practically and to respond to them.
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one additional thing

Suppose that a physician is doing a chest compression, or cardiac compression, but he knows that the patient will never recover or already died. When should he stop compression?

- In U.S., instantly, because it is futile.
- In Japan, he should see the faces of family, to assure that they are satisfied with the treatment to the extent everything possible was done.

The revival of respect for medical judgment is necessary. Then we could accept the concept of "futility". It was our tradition that we could accept that everything changes and everything dies. But with medical technology development, we almost forget that tradition.

In U.S. some family claim for everything possible

- In that case, physicians are required to **treat the family**, by telling that it is not for the benefit of the patient's body and mind, and that rather that is a conduct of increase of suffering for the patient.
- To teach the dying process, which is inevitable, may be important.
- Also autonomy does not mean that you can request everything possible, but it does only mean that you can deny medical intervention.