

Autonomy and Informed Consent in the Patients who Attempted Suicide

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Abstract

With medico-legal aspect, even though the patient attempted suicide, the patient legally has the right to refuse any treatment, and the physician can respect the patient's refusal. When adverse effects occur as a result of medical treatment performed forcefully without a patient's consent. In that case, the doctor can be held liable for the adverse effect.

The Korean Supreme Court held that the physician should forcefully perform invasive medical treatment such as gastric lavage in acutely intoxicated patient if it can be a matter of life or death for the patient. The doctor was held negligent in failing to perform an act which he/she had a duty to perform. And in that case the physicians should consider

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the patient mentally competency.

In summary, the physician can be held responsible for any damage occurred as a result of the failure to perform a medical procedure that is necessary for the patient such as omission. And he/she also can be sued for death or any clinical deterioration resulted from the lack of treatment or ineffective treatment.

1. Introduction

The physicians are obliged to obtain a patient's informed consent when medical practice. And an invasive procedure performed without informed consent constitutes a violation of applicable law.¹

The doctrine of informed consent developed out of strong judicial deference to individual autonomy, reflecting a prevalent belief that an individual has a right to be free from nonconsensual interference with his or her person, and a basic moral principle that it is wrong to force another to act against his or her will.²

In contrary, the physicians are responsible for negative clinical consequences resulted from the situation in which a patient who needed certain medical treatment such as gastric lavage in acutely intoxicated patient but did not receive the procedure due to the patient's refusal.³

In South Korea, there was the case where a patient, who ingested the organophosphate insecticide to attempt suicide and refused lavage. The Physician failed to perform the gastric lavage to the patient and decided to transfer the patient to the higher level of medical facility. However the patient was worsened symptom and died from organophosphate intoxication. The Supreme Court concluded that the physician is liable

¹ Korean Association of Medical Law. Public Health Law. revision edition. Donglimsa, 2004 p123.

² *Schloendorff v. Society of New York Hosp.*, 105 N.E.92(N.Y.App.1914)

³ Korean Supreme Court 2005.1.28, 2003 Da 14119

for death of patient. The court concluded that, although the patient did not show decreased mentality at the hospital with his expressed refusal and uncooperative attitude, gastric lavage should have been attempted with the use of a physical or chemical restraint.

So, author will discuss what should be considered in the patient who attempted suicide to obtain informed consent and secure patient autonomy.

2. Invasive Medical Treatment as a Battery without Informed Consent

Under law, every medical procedure should be performed after informed consent was obtained from the patient. Without informed consent, the patient's right of self-determination is infringed, leading to a violation of applicable law, regardless of the outcomes of treatment.⁴

Patient autonomy in medical decision-making is the underlying principle in all consent cases, whether based in battery or negligence. The doctrine of battery protects a patient's physical integrity from harmful contracts and her personal dignity from unwanted bodily contact.⁵

Unlike boxing or wrestling matches where the battery is exempted

⁴ Lee SD. *Medicine and Criminal Law*. Bobmunsu. 1998. pp91-6

⁵ Barry RF, Thomas LG, Sandra HJ et al. *Health Law*. 2nd edition. 2000. p311

under the agreement of the victim, medical malpractice can be considered an invasive intervention. Medical practices are carried out with the purpose of treating patients. The majority of the opinion that discipline should not be given in medical malpractices that were conducted objectively following the standard requirements with the purpose of treatment. As the reason for advocating exemption from discipline, the conventional wisdom or court decision regard medical malpractice as an act that can be justified in the medical context or tolerated due to informed consent from the victim, although it can constitute elements of the crime of causing damage or injury. Recently, some claimed that the consequences of medical malpractice differ from damage or injury defined in the law, denying the association between medical malpractice and criminal act⁶.

Medical malpractice is sometimes interpreted as exemption from liability and an act that does not constitute the negligence. It is based on the assumption that physicians carry out medical practice in compliance with the standard requirements to achieve the subjective objective of treatment. Physicians should not therefore be disciplined according to the law regardless of the results of their practice. Such an exemption from liability can be applied from the two different points of view that medical malpractice is a justifiable act due to duty and that the patient's consent is the reason for the exemption.

The "justifiable act due to duty" in Korea means that medical

⁶ Choi JC, Park YH, Hong YG. Criminal Law in medical Relations, Yukbeobsa, 2003. p35-41.

malpractice can constitute elements of the crime of causing damage or injury or professional negligence, but it is solely intended to sustain or improve the patient's health, so exemption from liability is applied in accordance with exculpatory act in Section 20 of the Criminal Act.

Medical or surgical intervention conducted in compliance with standard requirements to achieve the objective of treatment is considered a legitimate act if the use of such an intervention is justified and clinically appropriate even though there is no informed consent. Medical practice is carried out with the objective of improving or restoring the patient's health, and there is no intention to cause damage to the patient regardless of whether the patient provided an informed consent or not. Once a medical practice is performed meeting objective requirements, it is a legitimate act.⁷

The proposition in which exemption from liability is justified by the informed consent suggests that exemption from liability is guaranteed with the informed consent although medical malpractice can constitute elements of the crime of causing damage or injury or professional negligence. Without the informed consent, a malpractice is seen as a violation of the law although it is an invasive intervention, and exemption from liability is denied.⁸ Under this proposition, medical practice is interpreted and understood on the basis of the patient's right of self-decision using the criminal law. This means that once the right of self-decision is infringed, exemption from liability is denied even

⁷ Yu GC, Criminal Law General Iljogak 1980. p193.

⁸ Lee JS, Criminal Law The Particular, Parkyoungsa. 1996 p46

after medical practice is performed professionally and successfully. This proposition is explained by "die eigenmachtige Heilbehandlung."⁹

There is also the proposition claiming that medical malpractice cannot constitute elements of the crime of causing damage or injury as long as it is performed in compliance with standard requirements in favor of exemption from liability.¹⁰ That is, physicians are exempted from liability when they perform medical procedures to treat their patients following the guidelines applied in clinical practice, no matter the informed consent is obtained or not.

According to precedents in Korea, a medical malpractice constitutes elements of the crime of causing damage or injury, regardless of its outcomes. Once a medical malpractice is performed in accordance with the guidelines applied in clinical practices, it is interpreted as innocent and exemption from liability is guaranteed, according to court decision.¹¹

Since the patient's right of self-decision has been recently emphasized, the court began to see the informed consent, which was previously unnecessary to meet the requirement for exemption from liability, as a pre-requisite for undergoing a treatment procedure.¹² But this precedent does not mean that the court has changed its interpretation of applicable law because the court evaluated a medical practice on the basis of the

⁹ Seok HT, Informed Consent and Self Determination, Yonsei University YonseiHangjungronjib 1980;17:303.

¹⁰ Lee JS, Criminal Law The General, Parkyoungsa. 1995. p254

¹¹ Supreme Court 1976.7.13 75do1205; supreme court 1974.4.23 74do714, supreme court 1978.11.14 78do2388

¹² Supreme court 1993.7.27 92do2345

consent law and decided whether it was an arbitrary medical intervention. Thus the court should review the case with issues involving the liability of health care professionals itself such as negligence.

3. Medical procedure performed without informed consent

Under law, every medical procedure should be performed after informed consent was obtained from the patient. Without informed consent, the patient's right of self-decision is infringed, leading to a violation of applicable law, regardless of the outcomes of treatment. To discuss whether liability against a forced medical procedure can be established, the legal nature of the practice and the criminal law covering an medical intervention should be reviewed.

For example, one of invasive medical procedure is gastric lavage. Gastric lavage can be employed for patients in acute intoxicate state. In a study¹³, legal issues involving a forced gastric lavage focused on the patient's level of consciousness. A conscious patient is deemed to be able to speak and behave even in a passive way to show his or her consent for the procedure. At the same time, if there is any evidence showing that the patient is conscious, the patient is deemed to have understood and agreed to the procedure.

To obtain informed consent from a patient, it is necessary that the

¹³ Andrew Herxheimer, Legal Aspect of Forced Gastric Lavage, Drug and therapeutic bulletin, 1881;19(2);7-8

patient can understand fully what he or she agreed. The patient who will undergo gastric lavage for the first time should be informed in detail about how and why the procedure will be done, otherwise detailed explanation can be omitted.

In case a conscious patient refuses to undergo some treatment, the physician needs to persuade the patient by explaining negative consequences in the absence of such a procedure.

As for the patient who refuses to undergo the procedure, the physician should ensure whether the patient would persist in his or her refusal or whether the patient could change his or her mind. If the physician decides that the patient is not really willing to die despite his or her refusal, the physician can force the patient to undergo the treatment it can be even invasive. Thus a forced medical procedure can be performed based on the physician's subjective decision that the treatment is necessary to save the patient's life. Physicians tend to ignore the opinions of those who tried to kill themselves without paying much attention to the consequence of such indifferent attitude regardless of the expected outcomes and prognosis. But the court could think it differently.

When the patient overdosed toxic substance or antipsychotic drugs, his or her rationality could be doubted. Considering the medical condition for competency of the patient, the physician performs medical procedure without consent when he or she decides it is vital for the patient with documentation of the reason why the physician decide to do like that. It means that the decision should be made after evaluation

if the patient is competent legally or medically.

Theoretically the patient is able to defend him or her under law and make a lawsuit about infringement of their right. After the procedure, the patient can claim a violation from the physician because the procedure was undertaken despite a refusal. Even though the medical procedure saved the patient's life after it was forcefully undertaken, the patient has a right to claim damage occurred to him or her.

When forcefully performed medical procedure without consent results in clinical deterioration, a medical malpractice lawsuit also can follow.

The physician can be held responsible for any damage occurred as a result of the failure to perform a medical procedure that is necessary for the patient. In other words, the physician can be sued for death or any clinical deterioration resulted from the lack of treatment as omission or ineffective treatment.

In conclusion, the patient legally has the right to refuse any treatment, and the physician can respect the patient's refusal at first. However, the physician should forcefully perform medical procedure if it can be a matter of life or death for the patient.

4. Issues for the patient attempted suicide

The critical issue for the patient who tried to kill him or her is an immediate intervention to avoid serious damage. If the patient is still conscious, an emergency procedure such as gastric lavage can be

conducted upon his or her consent. As for a comatose patient, it is impossible for the physician to draw a conclusion that the patient would accept any invasive medical procedure to be undertaken to save his or her life, given the fact that the patient committed suicide. As discussed above, the physician can hesitate between the possibility of being held responsible for outcomes after performing a medical procedure without informed consent and the legal requirement for emergency treatment for the patient in life-threatening state.

In Korea, some emergency treatment to the unconscious patient who attempted suicide can be justified.¹⁴ As for the conscious patient, treatment is provided based on his or her consent. Committing suicide is seen as an anti-social act, and any decisions made in drug poisoning state are nullified.¹⁵

In Germany, the physician should provide medical treatment without considering what a suicidal patient wants him or her to do. They have authority to treat suicidal patients and responsibility to comply with the criminal law. Suicide is defined as an "accident" in Section 330 of the Criminal Act and subject to punishment under the criminal law as omission.

This means that physicians have not only responsibility but also authority to take medical procedures. Under the criminal law, physicians have authority to provide treatment that they consider appropriate

¹⁴ The Act on Emergency Medical Service, article 9

¹⁵ Seok HT, Informed Consent and Self Determination, Yonsei University YonseiHangjungronjib vol7(1980), p303

regardless of the will of the suicidal patient, and such treatment is also justified under the civil law. This means that physicians are not liable for any damage occurred following the treatment unless there is a specific medical negligence such as intention.

As a justification for not requiring the suicidal patient's consent, the theory of "office management" is applied.¹⁶ But the theory is not enough to justify any medical practices conducted on the contrary to the will of the patient. Only the life-saving medical procedure without consent could be justified.

As the Section 679 of the German Civil Law, medical procedure without consent could be applied for public interest. Suicide is neither permitted nor banded in the German law system but the ethical code strictly prohibits suicide. Separately, there is also a general opinion that any medical practice performed in the treatment of suicidal patients on the contrary to their will but in accordance with ethical principles cannot be blamed in the legal context. In other words, the fact that physician serves as a rescuer with humanity can be justified on the basis of fairness.¹⁷

The unconscious patient's presumed desire is presumed because it is difficult to identify the opinion of suicidal patient in coma. But the question is raised as to whether the patient still want to die in the coma state. The concept of the unconscious patient's presumed desire can be understood objectively and suggests that every possible condition should be taken into consideration to figure out what is desired by the

¹⁶ The Korean Civil Law article 734

¹⁷ Lee JT, The Theory and Practice of Malpractice. ChungAm Media. 2001. p9

patient. Thus the concept indicates an attempt to provide treatment in protection of the patient. Based on this concept, there are no elements in the legal context that can support the proposition saying "it is essential for every human being to sustain his life and health."¹⁸ That is why a comatose patient is presumed to have a desire to undergo treatment. That is, the patient's presumed desire is determined objectively and the consent of a suicidal patient is assumed on the basis of value of life.

The treatment of suicidal patients is also justified with the view of "fair act in an emergency situation" in Germany. Based on the Section 34 of the German Criminal Law stipulating a fair act in an emergency situation, the treatment of suicide attempters can be justified under civil law. As for the physician's rescue responsibility and the patient's self-decision right, the Section 330 of the German Criminal Law stipulates that the physician should infringe the patient's self-decision right to fulfill his or her responsibility, which prevails over the suicidal patient's right of self-decision as the latter is not ethically acceptable.

Thus physicians who provided a life-sustaining treatment to suicide attempters would not be held accountable under law. However, when physicians did not provide proper treatment, they also can be charged with a failure of rescue responsibility.

¹⁸ Supreme court 2005.1.28 2004da14119

5. Physician's Obligation to Treat the Patients

In Korea, physicians who refused to treat suicidal patients can be charged with a violation of Section 16 of the Medical Law and Section 6 of the Emergency Medical Service Act of Korea. It may be therefore questioned whether a treatment of suicidal patient can be justified in the medical and legal contexts. However, the same section of the Emergency Medical Service Act bans physicians from forgoing treatment of any types of patients, and it is not true that every medical practice performed without considering principles of informed consent cannot be justified. It is therefore necessary to determine whether the treatment performed for a suicidal patient is justified.

It is likely that the discussion over the justification criteria for the treatment of suicidal patients focused how to resolve the conflict between legal requirements and principles of informed consent.

6. Conclusion

With medico-legal aspect, even though the patient attempted suicide, the patient legally has the right to refuse any treatment, and the physician can respect the patient's refusal.

In that case, physician should consider the patient's medical condition and legally competency on refusal of treatment. And the

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physician could treat the critical patient even without obtaining informed consent if the treatment is vital to save the patient life.

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