1 Introduction

According to the Ministry of Health, Labour and Welfare of Japan, medical malpractice occurs when “a person in connection with medical treatment breaks a rule and causes a patient to suffer”. In plainer terms, medical malpractice is a type of medical accident. Medical malpractice can involve either civil or criminal liability, depending on the nature of the damage. In years past, doctors were rarely the object of legal action because of the power imbalance between physicians and patients. In addition, doctors were afforded a great deal of deference because of the specialized nature of their work and their social status. However, this situation is now changing.

This report analyzes the present condition of the medical malpractice in Japan with regard to penal law and suggests ways in which the issue should

* Prof. Dr. Chuo University, Faculty of Law

1) The risk management standard manual preparation committee of the Ministry of Health, Labour and Welfare reported the “risk management manual preparation indicator” on August 22, 2000 as an indicator at the time of creating the manual about the prevention of medical accidents. This was quoted from the “definition of the 3rd term.”
be examined from now on.

2 The medical scene in Japan

Before examining the medical malpractice in Japan, I will outline some of the contributing factors in my country.

A major problem is the shortage of doctors (kin-mui) working in hospitals. Although hospitals are expected to support the health of their communities by employing a wide array of specialists, in reality many places—especially in rural areas—are understaffed.

Economics may have something to do with this shortage. The system of controlled medical expenses\(^2\) may have discouraged as many people from entering the profession as in other developed nations.\(^3\) In addition, the introduction of required clinical training may have intensified the tendency to locate to urban areas.

Moreover, many physicians opt to start their own practice rather than work as part of a hospital team, thus diminishing the personnel available for medical institutions. The lack of practitioners in obstetrics, pediatrics, and emergency medicine is acute. In a number of instances, emergency patients, such as pregnant women, have died after being refused admission by multiple hospitals.

Medical knowledge and technology change by the day, and more patients

2) The Cabinet decision in September, 1982 about the cultivation plan of a doctor and dentist based on the “3rd reply — basic reply — about administrative reform” (July, 1982) of Ad Hoc Commission on Administrative Reform.

3) The number of the clinicians per 1,000 population in 2008 was 2.15, very low among advanced nations (OECD Health Data 2011 and Density per 1,000 population (head counts)). Also, Yumiko Maeda “International comparison of medical related data from OECD Health Data 2009” Japan Medical Association Research Institute research essay No.55 Reference (2009).
in Japan present problems complicated by aging as the country’s demographics get older. Requirements such as obtaining informed consent also add to the workload of physicians, perhaps discouraging them from working in hospitals where the physical and mental burden is high. Some doctors also feel squeezed between the goal of providing the best treatment and the pressure to contain costs, adding to the stress of those employed in hospitals.

3 Medical malpractice and criminal liability

Generally, criminal responsibility is divided between instances of intentional conduct and negligence. Negligence, then, is further divided into the common negligence and that related to occupation. In medical malpractice, a doctor will be punished for the crime of professional negligence resulting in death and/or injury if he/she is found to have violated a duty of care. In other words, if the damage was foreseeable and the physician failed to avoid it, he/she will be convicted.

As a result, in many medical malpractice cases, the issue lies with the violation of a duty of care. And that raises the question of how to judge such a violation. The general view is that the duty of care should be based on the capability of an ordinary person in the same position as the defendant. For example, one defendant in a case involving the use of HIV-tainted blood products was found not guilty on the basis of the standard applied to “a usual

leukemia medical specialist.” However, it could also be argued that such a specialist should have an ability to foresee such a result.

4 Recent approach to the prosecution of medical malpractice

Between January 1999 and April 2004, medical malpractice cases occurred in the following categories: injection-13, medication-6, anesthesia-3, transfusion-3, operation-20, medical mechanical control-24, diagnosis / medical treatment-3, nursing-3, and management-4.

As opposed to previous decades when criminal actions against physicians were rare, the public consciousness of medical malpractice has heightened along with a sense of patients’ rights. As a result, such malpractice has come to be seen as a social problem. Physicians who are involved in more than one incident are often scrutinized in the press as “repeater doctors.” The taboo against investigating a doctor’s responsibility has come to be replaced by a notion of natural right.

However, the pendulum may have swung too far in the opposite direction, as fears have arisen of inappropriate prosecution and excessive punishment. Medical science cannot remedy every problem. Some patients will not improve or their conditions could even deteriorate with treatment, regardless of whether their physicians exercised an adequate level of care.

A non-negligence guarantee system may provide an alternative to a guilty-

7) In the scandal over HIV-tainted blood products by blood coagulation factor tablets (unheated blood product) mainly used as a curative for hemophilia, many patients infected with human immunity deficiency Oui Sour (HIV) showed symptoms of AIDS and died. Teikyo University route was one of three sites.

or-innocent approach. Under such a system, a certain sum of money is paid to a patient regardless of whether a doctor is negligent. The goal is avoiding a long-term lawsuit and providing a solution that both a doctor and a patient can accept. One area in which such a system may be especially helpful is that involving problems with births. The cause is often difficult to determine but the consequences tragic. If physicians know their liability will be limited under this sort of approach, more of them may be willing to become obstetricians. Even so, a number of recent prosecutions have occurred in which the doctors were found to have fallen short of their responsibility. So, it is still too soon to tell how a non-negligence guarantee system would work out.

Malpractice cases involving children have become well-known. In particular, the Fukushima prefectural Ono hospital incident in 2004 and the Kyorin University chopsticks death in 1999 are infamous. In Ono, a woman in labor who underwent a cesarean section died from excessive bleeding during separation of the placenta. The doctor who performed the procedure was prosecuted for death through negligent conduct. In the Kyorin University case, a boy was brought to an emergency room after falling with chopsticks in his mouth. The doctor who examined him was prosecuted for death through negligent conduct for not discovering that a piece of the chopsticks

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9)  http://medical-today.seesaa.net/article/36484160.html

10) There have also been cases involving euthanasia. For example, in a Kawasaki hospital in 1998, a doctor prescribed a painkiller in response to the desire of the patient’s family not to provide life-prolonging treatment. The patient died, and the doctor was prosecuted for homicide. He was found guilty and sentenced to 1 1/2 years in prison, suspended for three years.

11) Ken-ichi Nakayama and Katsunori Kai (writing and editing) “New edition-criminal judicial precedent of medical accidents” Seibundo (2010), p. 175. Although confinement of one year and a fine of 100,000 yen were demanded, the defendant was found innocent in the district court and prosecutors opted not to appeal.
had become lodged in the patient’s brain.\(^{12}\)

Both of these incidents involved unusual situations in which medical knowledge or experience made it difficult to determine whether a duty of care was breached. Nevertheless, the physicians were arrested and prosecuted, resulting in widespread media attention and intense arguments in the medical community.\(^{13}\)

If the judgments of doctors in selecting medical treatment and method are turned into questions of negligence, the basis of a physician’s ability to exercise his expertise is threatened. This adds to the stress of the job, discouraging doctors from choosing hospital jobs, in which the occurrence of difficult cases is likely to be greater. In addition, one must wonder how appropriate standards can be set for treatment of emergency patients whose actual condition itself is hard to determine, let alone an appropriate course of action.

These afore-mentioned two cases are said to have intensified doctors’ aversion to hospital practice in particular and to the practice of medicine in general. Many have left hospitals (“slowdown by leaving”)\(^ {14}\) for such reasons. Hospitals, in turn, have withdrawn from providing emergency care because of a lack of physicians to provide it. Beyond that, some surgeons see the need to obtain a consent document from patients prior to surgery as undermining the doctor/patient relationship. Those who are especially discouraged choose to relocate to other countries. The climate of fear also reaches researchers, as the willingness to delve into difficult problems may be compromised when

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12) The defendant was found not guilty in both the District and High Court. Prosecutors decided against any further proceedings, causing the judgment to become final.

13) Keiichi Hiraiwa “Looking-back upon the Fukushima prefectural Ono hospital incident” Japan Association of Obstetricians & Gynecologists news (October 1, 2008). Makoto Hasegawa “The report on “the chopsticks incident” is the pen’s violence caused by media” Nikkei Medical On-line (June 18, 2009).

such matters may become a matter for prosecution. Thus, we can say that the collapse of the medical treatment system itself begins with the demise of hospitals.

Not every country would ascribe negligence to the examples of medical malpractice cited above. The lack of a favorable medical outcome is not necessarily the result of a failure to meet the duty of care. Indeed, an increase in prosecutions in such cases could deter specialist physicians from engaging in the kind of specialties where risks are high. And yet, those are the very fields where more doctors are needed most.\(^{15}\) The failure to take a risk in medical treatment may mean that the patient is deprived of the most promising option for recovery.

Except in instances where negligence is clear, criminal prosecution for medical malpractice may be misguided. It may not even do much to deter subsequent cases if the problem resulted from specific circumstances. Constructing policy with the goal of prevention would be better for society than expending great effort on assigning criminal culpability to acts in the past.\(^ {16}\)

5 Risk society and the criminal code

The previous discussion has focused on physicians, but they are hardly the only professionals be called to account for their conduct in cases involving injury and death. In the city of Akashi, people coming to watch a fireworks display gathered on a footbridge, leading to its collapse. Eleven died and 247 were injured. Prosecutions were commenced against twelve persons connected with the city—which sponsored the fireworks display, the Hyogo

\(^{15}\) Akiko Ono “producing the life” Gakken (2008).

\(^{16}\) The comment of a blog “a certain obstetrician and gynecologist’s soliloquy” (October 11, 2008). http://tyama7.blog.ocn.ne.jp/obgyn/cat2780594/
Prefecture Police (Akashi police station), and a security company.\textsuperscript{17)}

Another example is the derailment of a train on the JR Fukuchiyama line, between Tsukaguchi and Amagasaki stations. The train crashed into a residential building, and 107 passengers died. The president of JR West was prosecuted for not having taken action to ameliorate the danger at the curve in the track, where the accident occurred. The existence of recognition of the danger was an important issue in the trial.\textsuperscript{18)}

In these two cases, although professional prosecutors opted against bringing charges against certain people, prosecutions commenced as a result of action by inquest committees,\textsuperscript{19)} which were directly influenced by public opinion.

This is consistent with a current penchant for regulation of all manner of things and strengthening of criminal responsibility. Recently, new criminal negligence regulations have increased dramatically and penalties have become harsher.\textsuperscript{20)} It seems that the anxiety over risk society strengthens the

\textsuperscript{17)} Five persons were found guilty in the criminal trial. On the other hand, prosecutors decided not to proceed against two persons (the chief and the assistant chief of the Akashi station). Subsequently, the Committee for Inquest of Prosecution issued the equivalent of a prosecution decision 3 times, but prosecutors twice resisted. However, the resolution of the 4th prosecution was taken in 2010. Forcible prosecution was carried out in this way, and the assistant chief is disputing it now. (The chief died in 2007).

\textsuperscript{18)} In response to two prosecution equivalent decisions of the Committee for the Inquest of Prosecution, forcible prosecution was carried out, which all three past presidents are disputing now. The president prosecuted previously was found not guilty in January of 2012.

\textsuperscript{19)} The Committee for the Inquest of Prosecution is established in the location of the District Court or its branch for the purpose of reflecting public opinion on prosecution. Although decisions of the Committee for the Inquest of Prosecution used to be non-binding, revisions in May 2009 gave them binding force.

\textsuperscript{20)} Recently, new criminal negligence regulations have increased dramatically and
exposure of criminal negligence, and a tendency of severe punishment. Increased numbers of prosecutions over alleged medical malpractice are also in line with this trend, predicated on the notion that wide-ranging criminal punishment will make civic life safer. Excessive attention to “victim’s rights” is counter-productive to this proposition.

Despite all this, criminal punishment for negligence is an exception in Japan’s criminal code. Thus, criminal proceedings for medical practice also should be seen as outside the normal confines of the law. Blindly intensifying criminal negligence exposure in a futile attempt to rid society of risk will lead to neglect of the responsibility principle in Criminal Law (i.e., “in dubio pro reo: benefit of the doubt”), the principle of burden of proof, and the notion of no punishment where there is no responsibility. So, the applicability of criminal liability to medical malpractice should be reconsidered in such a developed nation, to ensure that it does not exceed what is appropriate to address actual social risks.

To summarise, for medical malpractice to be properly managed to protect both the rights of doctors and patients, there needs to adequate protection for doctors so they do not feel unable to carry out their duties, there needs to be more support for doctors at hospitals, there needs to be clear cut guidelines for processing medical malpractice with case studies and examples, and there needs to be a strong system of guarantee for no-negligence.

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penalties have become harsher. For example, the offense of dangerous driving resulting in death or injury for controlling alcohol operation was enacted in 2001. The crime of causing death or injury through professional negligence by driving a vehicle was enacted in 2007.