Medical Accidents and Criminal Responsibility in Japan from the Viewpoint of Comparative Law

Katsunori Kai

I Introduction

The issue of medical accidents has been one of the most important subjects not only in medical law, but also in criminal law in the world. On the 13th and 14th April in 2017, International Symposium: "French Law from a Comparative Law Perspective: For an Overhaul of Medical Criminal Law?" was held in Lyon 3 University in France. Specialists attended this symposium from 13 countries, and discussed earnestly on medical accidents and criminal liability[1]. I reported on "Medical Accidents and Criminal Responsibility in Japan" in this symposium[2]. However I couldn't fully state our current arguments situation on these issues in Japan there. Therefore in this paper I amplify that presentation by including the viewpoints of comparative law on the basis of the information which I could gain in this symposium.

Also in Japan, a considerable number of criminal cases on medical accidents have been accumulated since the beginning of the 20th Century and these contents or theories have changed with the era and the system of medicine. I have classified the trends into 4 periods from the viewpoints of the character of the criminal precedents on the medical malpractice[3].

The first is the period from 1917 to the first half of the1960s, when the

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[1] The results have been already published as a book, Patric Mistretta (Ed.), French Law from a Comparative Law Perspective: for an Overhaul of Medical Criminal Law? Institut Universitaire, Varenna, 2017.

[2] Katsunori Kai, Medical Accidents and Criminal Responsibility in Japan, in: Mistretta (Ed.), supra note 1, pp. 133-138.

[3] See Katsunori Kai, Medical Accidents and Criminal Law (in Japanese), 2012, Seibundo, Tokyo, p. 21ff.

duty of care was widely and comprehensively acknowledged to physicians. The second is the period from the latter half of the1960s to the first half of the1970s, when the consideration of individual circumstances began in the criminal precedents. The third is the period from the first half of the1970s to 1998, when the division of medical conducts began to be considered, "the distribution of risks" and "the principle of confidence" began to be recognized. The fourth is the period from 1999 to 2015, when many people began to be interested in medical accidents because of some remarkable criminal cases. Furthermore we have had a new notification system of the medical accidents since October 2015, therefore we can now name the present time the fifth period.

In this paper I focus on the current situation of the malpractice in Japan from the viewpoints of the criminal law and comparative law. Of course there are other legal sanctions to the medical malpractice; the civil sanction such as tort and the administrative sanction such as suspending the medical activity. Therefore we must rethink the role of criminal law in the settlement of medical malpractice.

II An Overview of Criminal Treating System of Medical Accidents in Japan

The Criminal Treating System of Medical Accidents in Japan is the following.

When the fatal or injured accident happens to a patient due to medical practice, the professional negligence resulting in injury or death (Penal Code § 211) can be applied. The requirements of the establishment consist of mainly "causation" and "foreseeability" or "violation of duty of care". And yet the object of punishment is not only the latest medical practitioner, but also the superintendent or the supervisor. Furthermore there are many cases on the concurrence of negligence, where plural medical practitioners can be the object of punishment. This is one of the most important theoretical issues.

And also the notification of wrong death is a very important issue. The Medical Practitioners' Law § 21 provides that the physician must notify the wrong (unusual) death to the district police within 24 hours since he or she found it. And if he or she breaches the duty, the violation of this duty in itself is punishable (§ 33)[4]. However the definition of "the wrong

death" is vague. In spite of some guidelines by medical associations (Japanese Society for Legal Medicine, Japan Surgical Society etc.), the vagueness still remains. And yet the provision includes the problem whether it infringes the privilege of self-incrimination (Constitution § 38, Ⅰ) or not. But then in 2004 (so called "Tokyo Metropolitan Hiroo Hospital Case") the Supreme Court judged that Medical Practitioners' Law § 21 was not unconstitutional because of the public interest with a medical license[5]. However we are now discussing whether or not this provision should be continued. The reason of the abolition is why the duty of notification of the wrong death to the district police can bring an atrophy of various medical practices due to being afraid of the question about the cause of the accident. Nevertheless this provision still remains. In 2017, the number of the notification of the wrong death to the district police was 46 cases (in 2014; 137 cases, 2015; 65cases, 2016; 68cases).

So now we have introduced a new notification and investigation of medical accidents system with the 6th Medical Care Act Revision. According to this new system, when a medical accident happens, the hospital or physician must notify it to the 3rd party Center. And then the investigation in the hospital begins with help from Investigation Support Organizations. The cases to be notified or reported are adverse events by medical treatment, and yet "unpredictable cases". And then they must notify or report the result to the Center. The Center just analyze it. Exceptionally if patient's side is not satisfied, it is possible for him or her to bring the case to the Center. However the conception of "unpredictable cases" is no so clear. Therefore the number of the notification is less than the initial expectation. Incidentally in 2017 the number of medical accidents were 4,095 (in 2016; 3,882), which were the largest number ever.

And this system includes the issue whether we can use the materials, which were used in the investigation by such investigation, in the criminal investigation or not. This is a very disputable issue.

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[4] See in detail Kai, supra note 3, p. 271ff. There are 4 cases on Medical Practitioners' Law § 21.

[5] The Decision of the Supreme Court, 13 April 2004, Keishu Vol.58, Nr. 4, p. 247.

III Some Important Criminal Precedents on Medical Accidents in Japan

Here I pick up some important criminal precedents on medical accidents in Japan.

(1) Yokohama City University Hospital Case

Firstly, the most notable case was the Yokohama City University Hospital Case in1999[6]. In this case the medical staff mistook the patient X (74 years old), who was to have an operation on his heart, for the patient Y (84 years old), who was to have an operation on his lung. The origin of the mistake was the insufficiency of taking over 2 patients from the nurse A on night duty to the nurse B in charge of operating. A handed over 2 patients to B from the 7th floor of the ward to the 4rd floor of the exchange hall of the operation room by using a stretcher and an elevator by herself. A didn't accurately check the names of 2 patients. Also B didn't accurately remember 2 patients in spite of having visited them before the operation. She greeted to X "Good morning, Mr. Y", and greeted to Y "Good morning, Mr. X". Both X and Y didn't correct it. Therefore also 2 other nurses believed B's words. Thus X was carried into the operation room for lung operation, and Y was carried into the operation room for heart operation. Consequently X and Y were unnecessarily operated each organ. And yet all medical staff didn't notice their own mistakes till they were over.

However in the operation room of Y, where originally the heart operation was to be performed, the operation surgeon C and D, and the anesthetist E couldn't check the identification of the patient, but the youngest anesthetist F raised a question in the middle of the operation, whether the patient was really X or not. So they tried to check the identification of the patient, but the check was not enough. Ironically, after the operation, the mistake proved.

In this case A, B, C, D, E, and F were prosecuted for the professional negligence resulting in injury (Penal Code § 211). In the first trial (Yokohama District Court, 20th September 2001), only F was not guilty,

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[6] See in detail Kai, supra note 3, p. 97ff. and p. 112ff.

and other 5 persons were guilty. In the second instance (Tokyo High Court, 25th March 2003), however, all members were guilty on the basis of the concurrence of negligence. Against this decision, only F made a final appeal to the Supreme Court, but the Supreme Court (26th March 2007) dismissed the defendant's appeal[7]. According to the Supreme Court, other members didn't earnestly take the defendant F's question, and therefore a certain measure for the identification of the patient was not taken, but F herself made an effort anyway to avoid preventing to mistake 2 patients. However the Supreme Court said, "since she had the well-founded question on the most fundamental matter of the identification of the patient, we have to say that the defendant didn't enough perform her own duty of care even if under the conditions mentioned above".

In my opinion, this decision is too strict, because the youngest anesthetist F raised a question in the middle of the operation, whether the patient was really X or not, and then all members in the operation room tried to check the identification of the patient, and finally 2 operation surgeon C and D decided to restart to perform the operation. Of course we can't say that F herself perfectly performed her own duty of care. However I think that we can bring the conclusion of "not guilty" to her by denying the legal position as a principal in the criminal negligence. In my opinion, the theory of the concurrence of negligence often brings too strict conclusions to the people involved. So I have insisted the theory of "the withdrawal from criminal negligence" for a long time, which can bring a liberation from punishment to those who made a certain effort in order to avoid consequences in cases of the concurrence of plural criminal negligence[8], because Japanese Criminal Law punishes only a principal in the criminal negligence, doesn't punish an accessory, and therefore we should demote his/her legal position from a principal to an accessory in the criminal negligence, otherwise medical staff in the team medicine can't be released from the cycle of the punishment.

(2) Saitama Medical University Hospital Case

Secondly, also the Saitama Medical University Hospital Case in 2000[9]

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[7] The Supreme Court, 26th March 2007, Keishu Vol.61, Nr. 2, p. 131.

[8] See in detail Kai, supra note 3, p. 117ff. and p. 212ff.

is very important. In this case, the attending otolaryngologist A, who had never experienced a medical treatment for a synovial sarcoma, performed it to a young girl (16 years old) with a synovial sarcoma in the face by learning the treatment method (so called "VAC Treatment" including vincristine etc.) by himself from the literature in the hospital's library. However he mistook the quantity of anticancer drug, and administered 8 times drug because of misreading "once a week" as "once a day". Consequently the patient was died from the side effect of the drug.

In this case, not only the attending otolaryngologist A, but also his senior physician B and their professor of otolaryngology were prosecuted for the professional negligence resulting in death (Penal Code § 211), and all members were "guilty" by the first trial court (Saitama District Court, 25th March 2003), the second instance (Tokyo High Court, 24th December 2003), and the Supreme Court (15th November 2005)[10]. The theory of the guilty was the concurrence of negligence, but the logic was something different each other. We were very interesting in especially the guilty of Professor C. The reason of his guilty was why his role was not only a kind of attending physician, but also a kind of supervisor to A.

In my opinion, consequently the judgment of the Supreme Court was proper, but we must more carefully consider the logic of the concurrence of negligence, especially the relationship between the negligence of the supervisor and the normal concurrence of negligence.

(3) Fukushima Prefectural Ohno Hospital Case

Thirdly, in the Fukushima Prefectural Ohno Hospital Case[11] in 2004, an obstetrician was arrested, who performed a Caesarean section to a woman with the adhesion of placenta, and yet a separation of the placenta. Consequently she died from loss of blood. Although there are many cases physicians are indicted, it is unusual for them to be arrested. Japan Society of Obstetrics and Gynecology strongly objected to this arrest because the doctor performed only the usual medical treatment with the usual method, therefore the arrest was unlawful. This objection was widely supported.

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[9] See in detail Kai, supra note 3, p. 46ff. and p. 207ff.
[10] The Supreme Court,15th November 2005, Keishu Vol.59, Nr. 9, p. 1558..
[11] See in detail Kai, supra note 3, p. 122ff.

On the 20th August 2008, Fukushima District Court declared "not guilty". The district court admitted his foreseeability, but didn't admit the duty of care to exfoliate her placenta. The reason was why the court couldn't acknowledge that it was the then lege artis for the doctor to stop the separation of the placenta and to change over to the hysterectomy operation, and furthermore his separation of the placenta was against a duty of care.

In my opinion, the conclusion was proper, but the theoretical structure was not so enough. Anyway the most important problem of this case was rather in the arrest of the doctor. We must be more carefully to intervene in medical accidents from the viewpoint of criminal law.

IV A Consideration from the Viewpoint of Comparative Law

How should we think about our Japanese current situations on the criminal justice to the response to medical accidents in Japan from the viewpoints of comparative law? Here I try to pick up some countries' situations on medical accidents and compare them with Japanese current situation.

The UK is very unique in the respect of adopting medical manslaughter to medical accidents[12].

According to Oliver Quick, "The use of criminal law as a response to medical harm has been controversial in the UK. Historically, this has been limited to occasional manslaughter prosecutions of practitioners for their 'gross negligence'. Whilst the term negligence is a familiar civil law concept, the gloss of 'gross' suggests a higher degree of carefulness worthy of criminal punishment. However, precisely what is meant by gross remains somewhat unclear"[13]. Quick cites the leading case R v Adomako

[12] Oliver Quick, The Criminalisation of Medical Harm in the United Kingdom, in: Mistretta (Ed.), supra note 1, pp. 47-54. See also Emi Hiyama, Iryojiko to Keijisekinin—Igirisu niokeru Keijiiryoukago no Doukou wo Sankou nisite (Medical Accidents and Criminal: Referring to Trends of Criminal Malpractice in the UK), in Katsunori Kai (Ed.), A Series of Medical Law, Vol. 3, Medical Accidents and Medical Law, 2012, Shinzansha, Tokyo, pp. 237-263.

[13] Quick, supra note 12, p. 47. See also Oliver Quick, Prosecuting 'Gross' Medical Negligence: Manslaughter, Discretion and the Crown Prosecution Service', 33 (3) Journal of Law and Society, pp. 421-450.

[1994] 3 All ER 79 and explains the development of this doctrine in this field[14]. This was the case where a locum anaesthetist lost his appeal against conviction after failing to spot a disconnected oxygen tube during a routine eye operation which caused the patient's death.

According to the test of the above judgement (Lord Mackay of Clashfern), the liability for manslaughter by gross negligence should be decided by considering "whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal."

Thus 4 elements have been established for manslaughter by gross negligence; (1) Duty of care, (2) Breach of that duty, (3) Causation, and (4) Gross Negligence[15]. This trend has been inherited by the some precedents (e.g. R v Misra and Srivastava [2004] EWCA Crim 2375 et al) ever since[16]. It is true that it seems proper, but it still remains vagueness[17].

Furthermore it is remarkable that manslaughter prosecutions against organisations have been possible since 6 April 2008, under the Corporate Manslaughter and Corporate Homicide Act 2007[18]. However, as Quick points out, "In the case of healthcare organisations, there is little doubt that they will be under a duty of care towards patients."[19] In the first case "Maidstone and Tunbridge Well NHS", NHS was prosecuted for the offence of Corporate Manslaughter[20], but I'm not sure if such punishment is proper. Incidentally, it is very important that Quick referees to the relationship between criminal law and patient safety[21].

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[14] Quick, supra note 12, p. 47f.
[15] Quick, supra note 12, p. 48.
[16] In detail see Hiyama, supra note 12, pp. 243-252.
[17] Quick, supra note 12, p. 48.
[18] Quick, supra note 12, p. 49. To corporate crimes in the world including the UK, see Katsunori Kai, Kigyou-hanzai to Keiji-konpuraiansu (Corporate Crimes and Criminal Compliance), 2018, Seibudo, Tokyo.
[19] Quick, supra note 12, pp. 49-50.
[20] Quick, supra note 12, p. 50.

Generally speaking, there are more countries where trend to restrain the use of criminal law to medical accidents than to intervene in medical accidents by punishments. For example, the Netherlands[22] and the USA[23] are typical in this point.

And Italy has continued making an effort to limit the punishment for medical accidents to gross negligence, and in 2012 Balduzzi Act was enacted, which was the first time that Italian legislator had expressly stated that a higher degree of negligence be applied in case of evaluating criminal liability[24]. However the interpretation of the provision (the article 3) was so unambiguous that some problems were pointed out by the people involved, therefore in 2017 Gelli-Bianco Act has been enacted[25]. According to Stefano Canestrari, Article 6 of the "Gelli-Bianco Act" has introduced into the Italians Penal Code Article 590-sixes, under the title "Death or personal injury in a medical context", and all reference to gross negligence has been left out[26].

On the other hand, Spain is one of the strictest countries where an omission such as oversight in the diagnosis is punishable in medical accidents[27]. However such a direction came in for harsh criticism in our congress. I think that the punishment of an omission such as oversight in the diagnosis is excessive response. Thus in my opinion, Japanese current situation of the inquiry into criminal responsibility in medical accidents is in the halfway point in the world from the viewpoint of comparative law.

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[21] Quick, supra note 12, pp. 51-53.
[22] See J.K.M. Gevers, The Role of Criminal Law in Regulating Medical Practice: The Dutch Experience, in: Mistretta (Ed.), supra note 1, pp. 55-61, especially pp. 57-59.
[23] Stephen J. Ziegler, The Regulation of Medicine in the United States: A Mixture of Civil, Administrative and Criminal Laws and Penalties, in: Mistretta (Ed.), supra note 1, pp. 65-72.
[24] Stefano Canestrari, Criminal Liability in a Medical Context: The Italian Law's Approach, in: Mistretta (Ed.), supra note 1, pp. 125-132, especially p. 127.
[25] Canestrari, supra note 24, pp. 130-131.
[26] Canestrari, supra note 24, p. 130.
[27] Joaquin Cayon De Las Cuevas, La responsabilité médicale et les crimes d'omission selon le droit et la jurispurudence espagnols, in: Mistretta (Ed.), supra note 1, pp. 141-148.

V Conclusion

Lastly I hope that the criminal intervention into medical accidents should be connected with the medical safety. In order to realize it, we need consider the clarification of the cause of the medical accident, the clarification of the responsibility, the prevention of a recurrence of medical accidents, and the rapid relief of the victim. And yet we should limit the punishment of criminal negligence to the gross negligence such as reckless medical treatments, and a remarkable negligence of the proper information collection etc.