

Special Feature

Should medical accidents be judged in criminal court?—Establishing a new patient safety system in Japan

Kyorin University Chopstick Case *From the standpoint of the defense counsel*

JMAJ 55(2): 166–171, 2012

Mitsuru KOBAYASHI*¹

The chief defense counsel of this case was Mr. Tamotsu Okuda. But upon consultation, I, the deputy chief counsel, will be making a presentation today. As for what I will be covering, I have already discussed the contents with Mr. Okuda.

Also, I feel it necessary to point out that I spent 40 years as a judge and 10 years as a lawyer. Even though I was involved in this case as a defense counsel, my experience in practicing law as a judge is far more extensive than that as a lawyer. So, what I am about to say may be influenced by my experience as a judge, and I ask for your understanding in advance.

The contents of this case, especially the cause and progress of the accident, have been explained by Dr. Hasegawa from the professional viewpoint. So, I will be mainly supplementing the legal viewpoints on the progress of this case—namely, what the prosecution or the defense legally claimed in the case and what the court decided upon hearing those arguments.

Dr. Nemoto, Who Was Accused of Professional Negligence Resulting in Death

Doctor Nemoto, the defendant, was indicted under the suspicion of professional negligence resulting in death. Article 211 Item 1 of the Penal Code stipulates professional negligence resulting in death as “a person who fails to exercise the due care required in the pursuit of social activities and thereby causes the death or injury of

another.” In this particular case, this “in the pursuit of social activities” would mean *in the pursuit of medical practice*, and there is no problem here. Also, there is no arguing with the part “hereby causes the death...,” since it is an objective fact that the patient died.

The problem lies in the part “fails to exercise due care,” which questions whether the accused violated his/her obligation to pay due care. This violation of the due care obligation is generally interpreted as *violating the obligation to both anticipate the likely outcome based on premise facts and to avoid such outcome*. The summary of the charged facts stated in the bill of complaint were as follows.

The defendant was practicing medicine as an otorhinolaryngologist at Kyorin University Hospital located in Mitaka City, Tokyo. On July 10, 1999, around 6:50 pm, when the defendant, the primary and secondary emergency care physician on duty at that time, carried out the initial treatment of A (then age 4 years and 9 months) who was transported by ambulance to the primary and secondary emergency care examination room in the emergency care center of the said hospital, paramedics reported to the defendant that A fell over while holding a chopstick in his mouth, hurt his soft palate, and vomited during transportation. Considering that A vomited during examination and was weak with a low level of consciousness, which leads to suspicion of intracranial damage by the impaled chopstick, in a situation like this,

*1 Attorney-at-Law, Okuda Law Office, Tokyo, Japan. Former President of the Sendai High Court, Sendai City, Miyagi, Japan (Fax: +81-3-3357-7790).

Please note that quotes and dialogues are unofficially translated into English for the purpose of this paper.

This article is based on the presentation made at Japan Medical Association Research Institute Symposium “Trust in Medicine—Learning from the criminal cases that are found not guilty” held on July 20, 2011.

the defendant had the professional obligation to pay due care to conduct sufficient hearing from A's accompanying mother that A was unconscious for a few minutes after the injury and that the entire chopstick had not been found, confirm the intracranial damage by examining A's epipharynx with a fiberscope or using a head CT scan, immediately have a neurosurgeon take over, and ask to perform proper treatment including controlling the rise of intracranial pressure by intracranial damage and removing the chopstick. However, the defendant failed in this obligation to pay due care, in that the defendant believed that A's injury was merely a minor stab wound that damaged the soft palate without realizing that the chopstick that penetrated the soft palate had impaled the intracranial region and caused intracranial damage, did not conduct sufficient hearing, carried out neither the observation of the epipharynx using a fiberscope nor the head CT scan, failed to provide proper treatment except applying antiseptics to the wound and prescribing antibiotics, and negligently allowed A to go home. As a result, the said damage worsened because hemorrhage from intracranial damage was left untreated, which led to cardiopulmonary arrest of A at A's father's resident (Suginami-ku, Tokyo), which caused the death of A at the said Kyorin University Hospital where A was again transported due to intracranial damages including cerebral damage, subdural hematoma, and cerebral edema.

The Point at Issue Was the Propriety of Violation (Negligence) of the Due Care Obligation

Constituent element for the violation of the due care obligation 1: Foreseeability

Was it possible to diagnose that the chopstick had stabbed inside the brain?

According to the summary of the charged facts quoted above, the premise fact for the negligence lies in the point that, when Dr. Nemoto carried out the initial treatment of A who was transported by ambulance, paramedics reported to him that A fell over while holding a chopstick in his mouth, hurt his soft palate, and vomited during transportation, and A also vomited during examination and was weak with a low level of consciousness. It goes on to mention that intracranial damage due to penetration of the chopstick was suspected, which implies the significance

of possible death if left untreated. The prosecution therefore claimed that Dr. Nemoto had the obligation to foresee the outcome.

Constituent element for the violation of the due care obligation 2: Possibility of avoiding the outcome

Had proper treatment been performed, was it possible to save the patient life?

The next point, that, in a situation like this, the defendant should have conducted sufficient hearing from A's accompanying mother that A was unconscious for a few minutes after the injury and that the entire chopstick had not been found, confirmed the intracranial damage by examining A's epipharynx with a fiberscope or using a head CT scan, immediately had a neurosurgeon take over, and asked him/her to perform proper treatment including controlling the rise of intracranial pressure by intracranial damage and removing the chopstick, points to the obligation to avoid the outcome.

The part that follows, that, the defendant failed in this obligation in that the defendant carelessly believed that A's injury was merely a minor stab wound that damaged the soft palate without realizing that the chopstick that penetrated the soft palate had impaled the intracranial region and caused intracranial damage, did not conduct sufficient hearing, carried out neither the observation of the epipharynx using a fiberscope nor a head CT scan, failed to provide proper treatment except applying antiseptics to the wound and prescribing antibiotics, and negligently allowed A to go home, suggest the acts of violating the obligation to foresee and the obligation to avoid the outcome. And, consequently, it caused the death of A due to intracranial damage such as cerebral damage, according to the prosecution.

The Court of First Instance Admitted the Negligence, But Not the Causality with the Death

After the indictment of August 2, 2002, the court of first instance held over 40 public trials in the period of approximately 4 years, and the judgment was pronounced on March 28, 2006. In this case, the defense argued about two main points; one was whether the defendant violated the due care obligation, and the other was whether there was a causality between the death of A and the

violation of the due care obligation by the defendant.

The court of first instance admitted to the violation of the due care obligation but denied the causality with the outcome, and pronounced the defendant not guilty. Here is a brief summary of the court's reasoning.

Judgment 1: Foreseeability

The prosecution's claim was entirely accepted

The court judged as follows.

When the defendant carried out the initial examination of A who was transported by ambulance, paramedics reported that A fell over while holding a chopstick in his mouth, hurt his soft palate, and vomited during transportation. Considering that A also vomited and continued to show nausea, hardly spoke, and appeared to be in weak condition with a low level of consciousness, the defendant should have suspected the possibility that A suffered intracranial damage caused by the impaled chopstick from the fall. In a situation like this, to understand the facts and the level of consciousness of A, the defendant should have actively questioned A and also asked A's mother about the circumstance of injury, A's conditions immediately after the injury and during transportation, and any changes in A's attitudes and behavior from the usual. Had the defendant conducted such detailed interviews, it would have allowed the defendant to fully realize that A was apparently unconscious immediately after the injury, that A vomited in an explosive manner in the ambulance, and that A was behaving in a completely unusual fashion. Also, active interviewing of A would have allowed the defendant to strongly suspect the possibility that something abnormal was happening to A. By doing so, the defendant should have become increasingly suspicious that A was suffering intracranial damage, examined the epipharynx using a fiberscope by himself to confirm any remaining foreign object and depth and direction of the wound; or alternatively, the defendant should have consulted the neurosurgeon, asked the neurosurgeon to perform a head CT scan if such test were deemed appropriate, and entrust the neurosurgeon to conduct the rest of the treatment. However, the defendant failed in these due care obligations, and allowed A to go home only after applying Kenalog ointment to the wound, providing general words of caution to the mother at

home, and prescribing antibiotics and antipyretic anti-inflammatory analgesic. This is a violation of the aforementioned due care obligation.

Judgment 2: Possibility of avoiding outcome

The defense's claim was accepted

Next, on the issue of causality, the court decided as follows.

There are different opinions among experts regarding A's cause of death. But as the defense counsel argues, it is likely that the penetration of the chopstick to the left jugular foramen penetrated through the jugular vein, formed thrombus inside the jugular sinus, and completely obstructed the left jugular vein, which disabled the venous return to be completely processed through that route and caused fatal venous return disorder. Then, reconstructing the left jugular vein crushed by the said impaled chopstick was the only means of avoiding A's death. Even if the defendant had asked a neurosurgeon to take over immediately, considering the skills required and time allowed, it would have been extremely difficult to reconstruct the left jugular vein. Therefore, reasonable doubt remains that the possibility of saving A's life as well as prolonging it would have been extremely low. The defendant was negligent in failing in his obligations to foresee and avoid the outcome, however, reasonable doubt remains in the causality between his negligence and the death of A. Therefore, this court finds the defendant not guilty.

The Charge of Negligence that the Court of First Instance Admitted Was Denied by the Court of Second Instance

The prosecution appealed to a higher court along with some new expert opinions, claiming that the court of first instance's finding on the cause of death was in error and consequently the decision that the defendant was unable to avoid the outcome of death based on such finding was false.

The defense, on the other hand, could not appeal to the judgment of not guilty under the law even if we were not satisfied with its reasoning. Therefore, as we answered the claims made by the prosecution in the appeal court, we argued that, although the findings by the court of first instance regarding the cause of death and the

consequent decision that denied the possibility of saving or prolonging A's life were just, the original finding was in error in that the defendant was found to have violated the due care obligation, and requested the appeal court to exercise its official authority to correct this error.

The judgment of the appeal court on November 20, 2008, included the issue of the violation of the due care obligation by the defendant—probably because the court considered the defense's request to exercise official authority. Ultimately, the defendant was found not guilty of violating the due care obligation, acknowledging that even if the defendant had treated A as stated in the bill of complaint, the saving or prolonging of A's life was not necessarily possible beyond reasonable doubt. That is to say, the court of second instance denied both the violation of the due care obligation and the causality.

As Dr. Hasegawa briefly summarized earlier, there were two opinions regarding the cause of death; one supports the presence of venous return disorder, and the other denies the presence of venous return disorder. The court stated that, although there are two such opinions in large, the reasoning of the latter is insufficient to deny the former, and that it is possible that venous return disorder was not the cause of death.

As for the violation of the due care obligation, the court stated that anticipating the possibility of intracranial damage caused by an impaled chopstick based on the circumstances of injury and the wound site was extremely difficult. This was because no similar case has been found anywhere before, as Dr. Hasegawa said earlier.

The court further found that:

It is likely that A's state of consciousness and the condition of vomiting were probably deeply associated with his intracranial damage. During the examination by the defendant, although A was not fully conscious and vomited several times, there was no severe consciousness disorder and the condition of vomiting could not be regarded as clearly abnormal. Therefore, it was possible to think that other reasons besides intracranial damage contributed to A's condition, such as the wound to the soft palate itself, motion sickness, mental factors, and others. Thus, it is difficult to conclude that the defendant had an obligation to anticipate the probability of intracranial damage and interview accordingly. Even if the mother were inter-

viewed, it is not clear whether sufficiently specific information to suspect intracranial damage could have been obtained. Furthermore, it is difficult to conclude that the defendant had the due care obligation to immediately suspect intracranial damage and conduct a CT or MRI test.

As for the point of causality, the appeal court judgment was mostly the same as the original judgment, as Dr. Hasegawa has described already.

When we compare the original judgment and that of the appeal court, although they both judged similarly regarding the probability of avoiding the outcome and the causality between a crime of omission by the defendant and A's death, they clearly judged differently in terms of violation of the due care obligation. The same can be said not only for the obligation to foresee intracranial damage but also for the determination of A's state of consciousness and condition of vomiting as well as the obligation to interview the mother. In addition, their findings differ in whether a broken piece of chopstick had been protruded into the throat and if fiberoptic examination would have allowed its presence to be visually confirmed. These differences undoubtedly influenced the decision regarding whether the defendant had an obligation to foresee and to avoid the outcome.

If a broken piece had not been protruding into the throat, even fiberoptic examination would not have discovered its presence, and therefore, the defendant would be at a loss to know what treatment would have been appropriate. Thus, common sense would tell that there is no point in arguing negligence.

The prosecution did not appeal to a final court, and the judgment of the court of second instance became final. As for the outcome of the civil lawsuit, Dr. Hasegawa already mentioned this earlier.

Medical Lawsuit Poses Difficulty for the Defense Counsel

Now that I have finished describing the progress of the lawsuit, I would like to share a few things I felt as a part of the defense counsel.

First, I must say that this case was extremely difficult. The complexity and difficulty of involving highly specialized fields, and the fact relevant

specialists significantly varied in their opinions, contributed to that. Fortunately, in the end we had a complete victory, in that both the obligation of due care and the causality were denied, which satisfied us. But during the proceedings, we were not always fully confident of such positive result. Rather, there were times we felt that we may not be able to void the guilty sentence.

The Problem of “Barrier of Speciality”

Immediately after the indictment when the prosecution disclosed the evidence, I first felt the “barrier of speciality.” The evidence that the prosecution had disclosed included the opinions of five experts who supported the indicted facts, all professors of medical schools and hospital physician with rich experience. In addition, during public hearings of the first and appeal courts, the prosecution added four more professors and physicians. The very fact that there were many experts who supported the indicted facts shows that this case could not have been won easily.

Speaking of public hearings, 44 public hearings were held for the court of first instance, and 9 for the appeal court. But in addition, we the defense counsel had a total of 33 meetings to prepare for these public hearings. We needed to make this much effort to prepare, not just to consider the witnesses’ testimony but also to consider the contents of the great deal of reference material used by witnesses.

A public hearing is basically held twice a week from morning till evening except during the summer and end-of-the-year vacation times of the court. So, added with the preparation time, it was quite a burden for the members of the defense counsel. When I was a judge, I often mentioned to the defense counsel that they should speed up the appointed dates for prompt court proceedings. But now that I belong to the defense counsel, things do not go so smoothly—at least in a case like this one. Suffice to say, this case required considerable efforts from us.

Next, regarding the experts on the prosecution’s side, we submitted our disagreement with their statements and had them testify in court. But I became painfully aware that it is extremely difficult to refute the statements of these specialists in cross-examinations. An expert will not easily change his/her opinions just because he/she is being cross-examined—it is normally

inconceivable. If anyone does so, his/her credibility is at stake. Rather, cross-examination often ends up with establishing his/her expert opinions even more firmly.

So, we used the strategy of using expert opinions to refute expert opinions, and looked for specialists and physicians who would support our claims. But it did not go as smoothly as we had hoped. We were able to obtain support from an otorhinolaryngologist Dr. Hasegawa and a neurosurgeon Dr. Saitoh (both Kyorin University Hospital) from the relatively early stage, however, the other two physicians we initially approached had turned us down.

Yet we continued our search through various routes. One member of the defense counsel sought help from a person involved with Japan Medical Association, and as a result, we were able to obtain assistance from many well-known physicians of the relevant fields of medicine—namely, Professor Aruga and Professor Tsutsumi (both neurosurgeons), Professor Ohnishi (oral surgeon), Professor Takatsu (forensic medicine), Dr. Kudoh (pediatric otolaryngologist), and others. With the expert opinions of these specialists, the court found that the cause of death stated in the charged facts cannot be concluded as absolute and that the entry route of the chopstick did not pass through the epipharyngeal cavity.

The Factor That Most Complicated the Case—The initial autopsy report

Lastly, I would like to point out that the major reason that this case became so complicated lies in the initial autopsy report, which stated that the chopstick was protruding into the epipharyngeal cavity. As I mentioned earlier, if that were true, then, naturally fiberoptic examination would have found it and proper care could have been taken—and then, the reasoning that failing to do so was negligence becomes convincing. But, if the chopstick was not protruding, then, the attending physician could not see it even with a fiberoptic—then, the reasoning that the attending physician could not decide what to do becomes convincing.

Actually, only the autopsy physician insisted that the chopstick was protruding into the epipharyngeal cavity, and other specialists testified that the chopstick went through the muscle layer at the side of the throat. During the appeal court when I asked a question about this point as an

issue relating to the cause of death to a famous forensic medicine specialist who was the prosecution's witness, even he stated that it was impossible to admit that the chopstick was protruding into the epipharyngeal cavity. Maybe it is inappropriate to say this, but I could not help feeling relieved when I heard that testimony.

I believe it is safe to say that the court of first instance's finding was false. But since the physician who first autopsied the body stated what he saw, the court probably had no choice but to trust his statement. As to why the autopsy physician made a misjudgment, Dr. Hasegawa has already explained. But in any case, I became keenly aware of the importance of the initial autopsy findings. In a crime investigation, initial investigation—such as preserving the crime scene at the begin-

ning of the investigation or securing eyewitnesses—are considered essential. I again realized that the results obtained from the initial autopsy are critical in a case like this.

The Importance of Nurturing Forensic Medicine Specialists Who Are Responsible for Investigating the Cause of Death

I recently hear that there is a shortage of young students and physicians in the field of forensic medicine. I strongly believe that good forensic medicine specialists are crucial for criminal justice. I would like to end my presentation by asking all interested parties to pay heed to their education.