

# Legal intervention against medical accidents in Japan

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**Abstract:** The number of civil lawsuits in Japan concerning medical accidents has been increasing gradually. Emotional reports in the media about medical accidents have amplified people's distrust of physicians. Since 2002, the police have been more actively involved, and the number of criminal prosecutions against physicians as a result of medical accidents has increased. Fear of litigation and arrest has demoralized physicians. Communication of the risks associated with various medical practices is considered vital if physician–patient relationships are to be improved. Moreover, there needs to be a reconsideration of legal interventions into medical affairs.

**Keywords:** physician–patient relationship, medical accidents, civil lawsuits, criminal lawsuits

## Introduction

It took decades for the concept of “patients’ rights” to be established in Japan. Until the 1990s, insidious violations of human rights occurred in Japanese medical institutions. Nakajima and colleagues reported that little was known about the Japanese malpractice situation because claim information had been closely guarded.<sup>1</sup> In fact, medical malpractice was an issue hushed up and concealed. Victims of malpractice could not even vent their anger. For patients, it was like the Dark Ages.

Several groups, including patients and attorneys, have raised their voices and so contributed to changing the situation regarding patient rights. However, the more powerful forces driving changes have been the mass media and the police. The mass media’s sensational reporting of medical accidents and police intervention has undermined the standing and status of physicians. Indeed, the Dark Ages could be said to have now come for physicians in Japan.

The present report aims to review legal intervention against medical accidents in Japan, to explain the fundamental causes of the changes in physician–patient relationships regarding medical accidents, and to discuss necessary policy changes.

## Increase in civil lawsuits against medical accidents

“*Wa o motte totooshi to nasu* (Keep peace in your heart)” is a Japanese maxim. Traditionally, Japanese citizens’ access to civil lawsuits has been very limited.<sup>2</sup> This has partly been because Japanese people have a tendency to avoid antagonist situations or confrontation; preferring out-of-court settlements for dispute resolutions. Unlike the US, Japan is not a litigious society. The number of attorneys in Japan is approximately 27,000 (about 2.1 per 10,000 populations) in 2006,<sup>3</sup> a much smaller proportion than in the US. The shortage of jurists is associated with the difficulty of pursuing litigation, and the limitations of trial capacity and legal remedies.

Civil lawsuits concerning medical accidents have been difficult for both patients and jurists. Plaintiffs have to overcome three layers of reinforced walls: specialty, secrecy, and authoritarianism. Physicians have far more specialized knowledge about medicine than patients, medical practices have been carried out behind closed doors, and the authoritarianism of the medical professions often hinders the disclosure of facts.

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Despite struggling to obtain evidence including medical records, plaintiffs and attorneys often fail to overcome the three layers of protection put up by the medical profession.

Nevertheless, the number of civil lawsuits in respect of medical accidents has increased gradually.<sup>4</sup> According to Supreme Court records, the number of civil lawsuits regarding medical accidents rose from 102 in 1970 to 1139 in 2006.<sup>1,5</sup> However, this does not necessarily indicate a real increase in the number of medical errors or a decline in the quality of care, but would appear to be more a consequence of growing consumer awareness and activism. That is, grass-root movements of civil groups supporting plaintiffs; increases in the number of attorneys specializing in medical malpractice; and increases in the numbers of physicians who were prepared to cooperate with courts to appraise each case and give expert opinions. Civil lawsuits regarding medical affairs have in the past taken such a long time that they wear down the plaintiff. However, the courts have recently made every effort to shorten the trial period. While it took 36.3 months on average to receive a judgment in the district courts in 1997, the time was shortened to 25.1 months in 2006.<sup>5</sup> If courts decided cases and those settled by reconciliation are combined, the proportion of closed suits resulting in compensation to the plaintiff is approximately 60%.<sup>6</sup>

It needs noting that in Japan, the motives of plaintiffs to file a civil lawsuit regarding a medical accident seem related to harbored grudges and for retribution. They often say, "Money is not an issue." The bereaved may want to revenge a dead family member. Some have even begun to seek police help.

## Change of the attitude of the mass media and the police

In Japan, policemen must in principle investigate medical staff for "professional negligence resulting in injuries or death" as would be necessary when severe medical malpractice is obvious. However, until at least the late 1990s, very few physicians were prosecuted for such an offence. Almost all conflicts between patients and physicians were treated as civil cases.

However, two landmark cases in 1999 dramatically changed the attitude of the mass media and the police. In one case, two men underwent the wrong surgery at Yokohama City University Hospital because of a patient mix-up just before surgery.<sup>7</sup> In the other case, a 58-year-old female patient died after a mistaken injection of a disinfectant at Tokyo Metropolitan Hiroo Hospital.<sup>8</sup> These two unfortunate cases made attention-grabbing national headlines. Afterward the number of sensationalized mass media reports of physician bashing rapidly increased from 1999 and peaked in 2000.<sup>9</sup>

In February 2001, another case worsened the situation; a 12-year-old girl underwent corrective surgery for an atrial septal defect at Tokyo Women's Medical University Hospital but died because of the mishandling of a cardio-pulmonary pump. In this case, police arrested the operating surgeon because he falsified the medical records to conceal the malpractice.<sup>10</sup> The facts of the case were revealed by a whistleblower.

The number of criminal prosecutions against physicians because of medical accidents has been increasing in Japan.<sup>11</sup> From around 2002, the police began to extend their investigation to situations such as those involving operative complications. Indeed, when a surgical patient died, the police began by initially suspecting the operating surgeon of professional negligence. In November 2002, a 60-year-old male died at Jikei University School of Medicine's Aoto Hospital from a massive hemorrhage during a laparoscopic prostatectomy.<sup>12</sup> Police arrested three urologists, suspecting that their insufficient experience caused the death. The Tokyo District Court sentenced them to suspended prison terms. The ruling has been appealed.

In February 2006, at Ono Municipal hospital, Fukushima Prefecture, police arrested a 38-year-old obstetrician on suspicion of professional negligence in the case of a death in 2004 of a woman who suffered massive bleeding after a caesarian section.<sup>13</sup> The reality was that the obstetrician had great difficulty removing the placenta because of its severe adhesion to the uterine body. Two obstetric societies, the Japan Society of Obstetrics and Gynecology and the Japan Association of Obstetricians and Gynecologists, issued the following joint statement: "If physicians must take criminal liability simply based on the severity of an adverse event, they will possibly avoid risky surgeries."<sup>14</sup> Finally, in August 2008, The Fukushima District Court acquitted the obstetrician.<sup>15</sup>

The name of a physician is made public upon their arrest. The lay media, unfortunately, report as if they are shocking criminals. Such accused lose their jobs and status, and are in effect pilloried and severely punished before they face trial. For many physicians, fear of litigation and being arrested by the police appears to have resulted in a collapse of morale. Furthermore, fear of litigation causes defensive medicine,<sup>16</sup> which is one of the major problems in recent Japanese medical situations.

## Discussion

The prevention and the management of medical accidents are issues of growing interest in many countries. The scope of interventions related to medical accidents can be divided into

the following three components: (i) preventive measures to reduce the incidence of medical accidents; (ii) communication with patients or their relatives in the event of medical accidents; and (iii) legal procedures. All these issues need addressing to improve physician–patient relationships.

From considerations of the several landmark Japanese malpractice cases, error prevention systems in Japan have been greatly overhauled. Systems-oriented interventions have been introduced to enhance patient safety. Today, physicians, nurses and co-medicals at the forefront of medical care must strictly abide by safety rules. However, the safety management system in Japan lacks in the most important element: manpower reinforcement. Under budget constraints, Japanese government has been reluctant to increase human resources. Today, the shortage of physicians is apparent, which has resulted in overworked physicians.<sup>9</sup>

As reported more than 20 years ago, medical disputes frequently occur because of miscommunication.<sup>17</sup> The failure to communicate effectively with patients diminishes patient trust and satisfaction, and potentially enhances the likelihood of litigation. In Japan, the earlier problems had been highlighted by a lack of transparency or, indeed, honesty. Cover-ups, or at very least a strong propensity for secrecy, had been a nefarious characteristic plaguing the Japanese medical profession. However, after the 2001 malpractice cases this situation drastically changed. Most Japanese physicians now acknowledge that transparency, truthfulness and empathy are important communication elements.

Nevertheless, conflicts between physicians and patients continue to increase.<sup>9</sup> Error prevention and communication with patients are essential matters, but do not necessarily solve all the problems. The following issues should also be given attention: (1) media literacy should be checked, and “risk communication” with mass media enhanced; and (2) legal interventions into medical affairs should be reconsidered.

## **Necessity of risk communication**

Medical practice is by its very nature often risky because it includes invasion of the human body. Results of medical treatment can be uncertain because of the complexity and diversity of individual life. Even without error, severe complications can and do occur. No surgeon can, in reality, completely avoid operative death.

Medical professionals have failed to communicate the risks and uncertainty in medicine to media. A lack of media literacy has caused confusion and anxiety among people, which may be similar in any advanced nation.

In this regard, risk communication is more essential than ever to eschew the friction that has arisen between physicians and patients. The mass media, as well as patients, should be properly informed that modern medicine is dangerous. Total safety should not be insisted on. Medical professions should recognize there is a communication gap and then provide careful explanations and allow for exchanges of opinion between people and the lay media.

## **A reconsideration of legal interventions into medical affairs**

Civil lawsuits are used to deal with medical accidents in many advanced nations, including Japan. Their purpose is to predicate compensation on proof of a physician’s fault. Civil lawsuits, where individual’s rights and obligations are ultimately determined by a judgment, have many potential problems. Firstly, blame on individual physicians is not necessarily useful for improvements in medical safety systems, including error prevention ones. Secondly, money talks in litigation, although money is not the big issue for patients and their family. Thirdly, lawsuits are based on confrontation and are not a cooperative procedure; they can hardly resolve emotional conflicts between patients and physicians. Lastly, litigation can have adverse effects. Fear of litigation may result in wasteful costs for defensive medicine. It may cause physicians to withdraw from undertaking risky procedures, including those in surgery and obstetrics. It may obstruct physicians from challenging novel technologies, thus resulting in restrictions of long-term public health gains.

To clearly differentiate error from an unavoidable complication is often difficult for jurists, let alone for the police. The reality is that the police do not have much knowledge about medicine and its practice. Their motivation may just come down to compassion for patients and the bereaved. They may thus be acting as avenging agents of perceived victims. It is unacceptable to physicians that the police decide the extent of a crime concerning medical accidents.

Possible alternative methods such as a third-party peer review system, like the coroner or medical examiner systems in the US and UK, need investigating. In Japan, the establishment of a third party system to investigate a cause of death related to medical practice is presently being planned for legislation. An organization, the ‘Medical Safety Investigating Committee’, is expected to investigate a cause of death from reviews of clinical charts and autopsy results, and not to look to individuals for blame. Improvements must be found in error prevention systems and a re-education protocol set up for medical staff. The committee will be mainly composed

of medical experts. Only definitely clear malpractice cases will be notified to the police and prosecutors, who will have to respect the results of the committee's investigation. Such a system is expected to avoid many civil and criminal lawsuits and to help rebuild positive physician–patient relationships.

## Disclosure

The authors report no conflicts of interest in this work.

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