

Medico-legal Court Cases Concerning Infringement of the Right of Expectation

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The legal responsibility of a physician in a medical malpractice case is investigated only when three elements—medical negligence by a physician in exercising proper caution and performing his duty, damage suffered by the patient, and the cause-effect relationship between the aforementioned medical negligence by the physician and the damage suffered by the patient—are proven. However, even when the cause-effect relationship among the aforementioned 3 elements is not recognized and the physician is deemed not obligated to compensate for damage, he may be required to pay consolation money to the patient because the former failed to meet the expectations of the latter, who had expected appropriate medical care. Such a concept is called infringement of the “right of expectation”. From the Hanrei Master, a database of judicial cases, appropriate cases were extracted by using “right of expectation” or “infringement of the right of expectation” as keywords. Characteristically, there are few that are judged by the upper courts but the concept of the right of expectation has been adopted by the Supreme Court. On the whole, infringement of the right of expectation was upheld for 80% cases. Among the former, non-fulfillment of obligation, illegal acts, and both of these were, on a legal basis, generally equally represented. Delay or negligence in providing adequate medical care due to nonperformance by the physician was cited for many cases. The content of the right of expectation is not limited to prolonging one's life: it also includes the significance of sequelae. Recently, this right has been construed to mean the “right to receive appropriate medical treatment”. In addition, it was recently pointed out that monetary compensation for the cases upheld for infringement of the right of expectation was too small, which resulted in raising the amount of money awarded.

Key words: right of expectation, medico-legal court case, medical negligence, cause-effect relationship

Medico-legal cases concerning infringement of right of expectation

The legal responsibility of a physician in a medical malpractice case is investigated only when three elements—medical negligence by a physician in exercising proper caution and performing his duty, damage incurred by the patient, and the cause-effect relationship between the aforementioned medical negligence by the physician and the damage suffered by the patient—are proven. However, even when the above-mentioned cause-effect rela-

tionship is not recognized and the physician is deemed not to be obligated to compensate for the damage, he may be required to pay consolation money to the patient because the former failed to meet the expectation by the latter, who had expected appropriate medical care¹⁾²⁾. Such a concept is called infringement of the “right of expectation”²⁾³⁾. For the similar objective of legal gain, infringement of the right to prolong one's life and a loss of opportunity to receive treatment are cited^{4)~9)}. Cases in which infringement of the right of

expectation or the right to prolong one's life is recognized have been attracting attention since 1976. The intent of present study is to outline and review these topics by focusing on recent cases.

Collection and analysis of medico-legal cases related to infringement of the right of expectation

Court cases were obtained from a database of cases, the "Hanrei Master", and published articles. The "Hanrei Master" is a database containing court cases that have been published since October 2001. The published articles here include not only those that analyze cases but also others that indicate the trends in academic theories (e.g., comprehensive reviews). To extract court cases, the right of expectation, infringement of the right of expectation, and prolongation of one's life were used as key words; and the retrieval was limited to court cases. From the publications, literature on the original cases and all related information were collected. For each case, information such as: the name of the court, year when the judgement was made, the time that was required before reaching a verdict, the name of the case, reference legal provisions, legal components, affirmation or rejection, type of incident, outcome, outline of the incident and judiciary items, and the sum of money approved for compensation, were confirmed and compared.

As a consequence of the retrieval, 68 cases concerning the right to expectation and right to prolong one's life were obtained for analysis. Among the 94 cases retrieved by using "the right to expectation", 42 were related to medical actions. Using "prolongation of one's life" as the key word resulted in a retrieval of 62 cases, 51 of which were concerned with the right to prolong one's life. There were 20 cases that overlapped in these categories.

Trends in the cases involved in the right of expectation and prolongation of one's life in Japan

Fig. 1 shows the trends in each decade when the cases were divided into the right of expectation and right to prolong one's life by type of case. The concept of infringement of the right of expectation first appeared in a case that was judged by the Tokyo District Court on February 9, 1976⁴⁾. In prior judg-

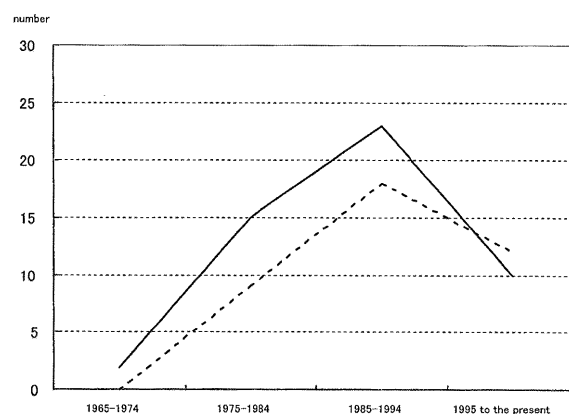


Fig. 1 Trends in cases involving the right of expectation and right for prolongation one's life
 ----- : right of expectation, — : right of prolongation one's life.

ments (1965¹⁰⁾ and 1974¹¹⁾), a similar topic was handled as an infringement of one's gain in having a longer life. The number of related cases increased between 1985 and 1987 and the beginning of the Heisei Era (1988 and thereafter). Infringement of the gain by prolonging one's life is closely related to that of the right of expectation; and almost all of these patients had taken a fatal turn. In these cases, therefore, it is easy to adopt the theory of the advantage of prolonging one's life by noting the type of damage inflicted on the plaintiff. For this reason, the number of cases appealing for this infringement of the right of expectation decreased and those on infringing on gain by prolonging one's life increased during a certain period. In some cases, however, appeals were made for both types of infringement.

Trends in cases that were affirmed or rejected

In Fig. 2, affirmative and negative decisions that were made on the infringement of rights (such as for expectation and prolonging one's life) are listed and classified by decade.

For overall trends, the affirmative and negative decisions were about equal in number between 1975 and 1984 but the affirmative decisions increased slightly starting around 1985 and thereafter. Currently, affirmative decisions are being made in over 80% of the cases. Accordingly, academic theories have evolved: between 1975 and 1984, many theories disapproved the affirmative decisions^{12)~15)} but currently almost all approve them^{16)~21)}.

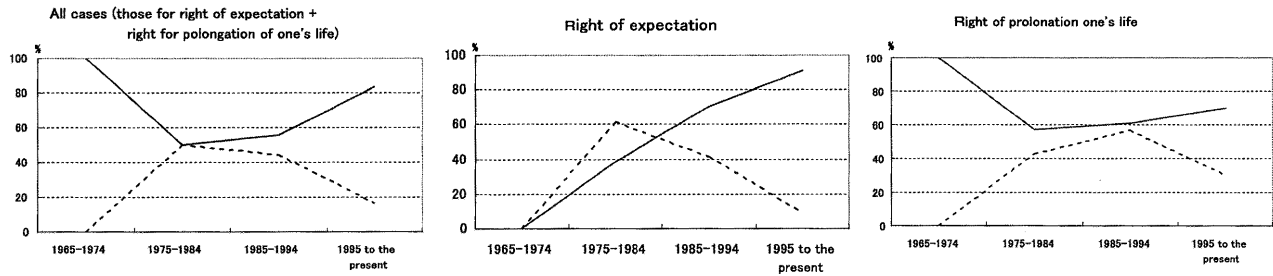


Fig. 2 Trends seen in cases that have been upheld and rejected
 — : upheld, - - - - : rejected.

For the cases on appeal for infringement of the right of expectation, the decisions for rejection outnumbered those for approval between 1975 and 1984 but later the trend reversed. Currently, an affirmative decision is being handed up in more than 90% of the cases.

Among the cases on appeal for infringement of the right to prolong one's life, the number of judgments for approval and rejection approached being equal in number between 1985 and 1994 and shortly thereafter but the affirmative decisions outnumbered the latter throughout.

From the findings above, it appears that the increase in the number of cases appealed for infringement of the right of expectation in a certain period is explained by the greater number of affirmative judgments given to them than to the infringement of the right to prolong one's life. Each graphic presentation shows that the cases of infringement of the right to expectation and for the right to prolong one's life increased substantially after 1995.

Details on the right of expectation that has been infringed

Among the details on a physician's medical malpractice, which is the subject of the infringement of the right of expectation, delay in applying appropriate medical treatment due to a physician's medical failure to discharge his duty, and delay or medical negligence in providing medical treatment are frequently cited²²⁾. This can be explained by the fact that the cause-effect relationship between a physician's medical failure to discharge his duty and damage inflicted on the patient is more difficult to prove than that between an intentional action and

the damage.

When sorted by decade, errors in medical actions, such as inadequate diagnosis or testing, were blamed for all cases from 1926 to 1988. From 1989, however, the problems related to selecting therapeutic methods, transfer to another medical facility, and the relationship between the physician and patient in deciding on medical treatment (i.e., refusal for hospitalization) began to appear in addition to the conventional problem of medical errors^{23)~26)}.

On the whole, it appears that there is a recent trend in which infringing on the right of expectation is being approved for cases that encompass more complex medical failures to discharge one's duty. The following 3 cases illustrate such a situation.

Case 1²⁷⁾: In a 1992 case at the Hiroshima District Court, an erroneous explanation given by a physician to the family of the deceased concerning the cause of his death as well as the clinical course leading to it was deemed to constitute an unlawful action. The total sum demanded from the physician by the family of the deceased was 500,000 yen.

Case 2²⁸⁾: In a 1997 case handled at the Tokyo District Court, the cause of death of an inpatient was unknown. His family expressed a desire for an autopsy but the physician failed to make suggestions that are necessary to explain the cause of death (such as a pathological autopsy). The court awarded the family a consolation fee of 4,000,000 yen.

Case 3²⁹⁾: In a 1998 case at the Kyoto District Court, an employee complained that his heart disease had exacerbated because he was not informed

Table 1 Time required to reach a verdict for cases involving right of expectation and right for prolongation of one's life

Time required to reach a verdict (year)	Cases involving right			Cases that		1965—1974	1975—1984	1985—1994	1995 to the present
	All cases	of expectation	for prolongation of one's life	have been upheld	have been rejected				
0	2	1	1	0	2		0	6	7
1	5	5	4	2	3		3	1	2
2	8	4	5	6	2		3	4	1
3	14	6	9	9	5	1	1	8	4
4	14	7	14	10	4		5	9	0
5	9	6	5	7	2		1	6	2
6	4	2	3	3	1	1	1	2	0
7	6	3	4	5	1		1	3	2
8	2	1	1	2	0		0	2	0
9	5	2	4	1	4		1	4	0
14	2	2	0	0	2		0	2	0
Average	4.49	4.51	4.24	4.13	4.81	4.5	3.69	4.93	3.57
non-parametric test		p = 0.21		p = 0.10			p < 0.01		

of the abnormal results from electrocardiography conducted during a health screening at his place of work. His employer, the company that was responsible for the health examination, was instructed to pay this employee 3,300,000 yen.

Duration leading to judgment in medico-legal cases involved in infringement of the right of expectation

Table 1 shows the duration of time that was required to reach a verdict. The average among all cases was 4.49 years. Compared with other cases related to medical actions (such as an average of 5.18 years for injury-related cases³⁰⁾ and 5.7 years for emergency-related cases³¹⁾, 4.49 years is not very long for lawsuits related to medical actions. No statistically significant difference was found between the cases for the right of expectation and those related to the right to prolong one's life or between the approved and rejected cases. When sorted by decade, between 1985 and around 2000 when the number of cases was the greatest and the academic theories shifted from rejection to support of the right of expectation, the duration for reaching a verdict was long. After 1995 when academic theories evidently shifted toward approval of the right of expectation, the duration became briefer.

The frequency of intermediate and final appeals of medico-legal cases related to infringement of the right of expectation

Table 2 shows the frequency of intermediate and

Table 2 Frequency of intermediate and final appeals made for cases involving right of expectation and right for prolongation of one's life

Hearing of	All cases	Cases involving right	
		of expectation	for prolongation of one's life
intermediate appeal	14 (21%)	7 (17%)	7 (12%)
final appeal	2 (3%)	2 (5%)	0 (0%)

Percentage of rejection at the intermediate court: 8 (57%)

Table 3 Amount of money awarded by court in cases involving right of expectation and right for prolongation of one's life

All cases	12 (17.6%)
Cases involving right of expectation	2 (2.9%)
Cases involving right for prolongation of one's life	10 (14.7%)
1965—1974	0 (0%)
1975—1984	0 (0%)
1985—1994	7 (10.2%)
1995 to the present	4 (5.8%)

Number of cases in which 10 million yen has been awarded

final appeals and percentage of rejections at the appellate courts for all cases, cases for the right of expectation, and those for the right to prolong one's life. Frequency of intermediate and final appeals made for medico-legal cases related to emergency care is 25% and 1.3%, respectively³¹⁾³²⁾. The frequency of intermediate appeals made for the cases related to the right of expectation and the right to prolong one's life are likely to be slightly lower than those of other medico-legal cases. Among general

Table 4 Legal components of right of expectation and right for prolongation of one's life

	Illegal acts	Default of obligation	Illegal acts + default of obligation
All cases	82.4 %	69.1 %	33.8 %
Cases involving right of expectation	26.7 %	38.2 %	14.7 %
Cases involving right for prolongation of one's life	55.9 %	6.8 %	13.2 % p = 1.0 *
Cases that have been upheld	48.5 %	41.2 %	14.7 %
Cases that have been rejected	35.3 %	22.0 %	16.2 % p = 0.285 *
1965—1974	2.9 %	0 %	0 %
1975—1984	11.7 %	13.2 %	1.5 %
1985—1994	38.2 %	41.2 %	23.5 %
1995 to the present	26.5 %	13.2 %	10.3 % p = 0.032 **

*: Wilcoxon, **: Friedman.

medico-legal civil cases, Oshida et al reported that for more than 60% of the cases that received a verdict at the first trial in favor of the family of the deceased with compensation for damage, the intermediate appeals court reversed the judgment, rejecting monetary compensation³³. One gets an impression that the percentage for rejection of the cases for the rights for expectation and for prolongation of one's life at the intermediate appeals court is slightly lower than that for the general medico-legal civil cases.

Medico-legal cases involving infringement of the right of expectation and the sums that have been approved

Table 3 shows the number of cases that were awarded more than 10 million yen among all cases, cases for the right of expectation, and those for a right to prolong one's life (divided by decade). The table shows features, such as a notably low amount of compensation for the cases related to the right of expectation, a markedly higher compensation for cases on the right to prolong one's life in comparison with those for the right of expectation, and a recent trend for an increase in the amount of compensation after 1985 (when examined by decade).

Legal components of the medico-legal cases involving infringement of the right of expectation

Table 4 shows the legal components by classifying the cases by whether they constitute illegal acts, the defendants are at default of discharging their obligation, or both.

In all cases, illegal acts accounted for 82.4%, which is cited more frequently than cases at default for discharging obligations. This can be partly ex-

plained by the fact that it is difficult to prove an actual cause-effect relationship related to an illegal act by omission¹⁷⁾ but such difficulty can be circumvented by resorting to the theory of the infringement of the right of expectation. No statistically significant difference was noted in the legal components of the cases related to the right of expectation and those associated with the right to prolong one's life and approved and rejected cases. When sorted by decade, lawsuits citing the illegal acts significantly exceeded the number of cases involving default at discharging one's obligation between 1985 and around 2000.

Conclusion

The current study may be summarized as follows: the number of cases involving infringement of the right of expectation has been increasing, beginning around 1965 and continuing to the present. Consequently the number of cases that were upheld by the court is also on the increase. The details on a physician's medical failure to discharge his duties, the object of the dispute concerning infringement, have expanded to include not only errors in medical actions but also problems related to the physician-patient relationship. The amount of compensation is also increasing.

It was found that in medico-legal cases such as those involving infringement of the right of expectation, a tendency was noted in which the physician's responsibility for compensation is being extended.

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期待権侵害に関わる医事裁判例

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医療過誤における医師の法的責任は、原則として、医師の注意義務違反・患者の損害発生、医師の注意義務違反と患者の損害との間の因果関係の3者がそろった時にのみ追及される。しかし、この3者の中で因果関係が認められない場合でも、適切な医療を求める患者の期待を裏切ったとして、医師は損害賠償義務はないとしても慰謝料を払わなければならないことがある。この考え方は「期待権」侵害と称される。医事訴訟における期待権侵害を肯定する判例は、昭和51年以降注目されているが、このような判例についての最近のレビューとしての報告はない。本稿においては、最近の判例に焦点をあてて、期待権侵害に関わる医事判例の概要を把握し、解析することを目的とする。昭和22～平成13(1947～2001)年の誌上公開判例を収集した判例データベース判例マスターを用い、“期待権”あるいは“期待権侵害”をキーワードとして該当判例を抽出した。抽出された判例は、56判例51事例であり、控訴審8例・上告審1例を含んでいた。上級審での判断が少ない点に特徴があるが、最高裁においても期待権という概念が使用されている。全体では、期待権侵害が肯定された判例が41例、否定された判例が12例であり、肯定判例が優勢である。期待権侵害を肯定する判例では、債務不履行責任・不法行為・債務不履行と不法行為の双方を法的根拠とするものがほぼ等数であった。期待権の内容は、時代の変遷に伴って変化し、延命のみならず、後遺障害等を含むものとなり、最近では「適切な治療を受ける権利」として把握されている。更に、期待権侵害の肯定判例における慰謝料の認容額は低額にすぎることが指摘され、最近では高額化してきている。期待権等侵害医事判例においては、医師の賠償責任が拡大される傾向にある。