Liability for Telemedicine

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ABSTRACT

This paper analyzes four issues about “telemedicine” in light of the systems (norms), responsibilities, and liabilities in effectively connecting health services. The structures are: First is “face to face examination” as a general principle and physician’s responsibility and liability. Second is dividing lines between physicians and physicians in telemedicine. Third are about areas which should be regulated by medical practitioners acts in providing telemedicine. Fourth is fee arrangements and cost burden for continuing telemedicine projects. The authors argue that not telemedicine’s special features as a means, but judgments for its medical necessity should be focused. The authors also alert that a responsibility can arise to establish a business model where all of the actors are responsible for managing healthcare delivery systems will continue to involve in the delivery of telemedicine, because patients become deeply in despair when telemedicine services stop without any alternative ways to get medical cares.

Keywords: Face to Face Examination, Liability, Medical Practitioners Act, Responsibility, Telemedicine, Telepathology, Teleradiology

1. INTRODUCTION

This paper tries to analyze the four issues listed below about so called “telemedicine” in light of the systems (norms), responsibilities and liabilities based on an assessing trial for effectively connecting health services related with telemedical-dialysis as an example.

- Face to Face Examination As A General Principle and Physician’s Responsibility and Liability
- Dividing Lines of Liabilities between Physicians and Physicians
- Applicable Areas of Medical Practitioners Acts
- Fee Arrangements and Cost Burden for Continuing Telemedicine Projects

Some kind of health services, in our trial and other consortium’s trials, which have been supported by the Ministry of Economy, Trade and Industry (METI), can be delivered through a network, because the aim in the trials was set as “connecting medical-health service providers via Information Technology, IT”. We can think the services as non-medical cares, which should not be regulated by the Medical Practitioners Act but it does not mean physicians owe no responsibilities and liabilities by delivering the services.

On one hand, even the services are not provided to patients by the face to face basis, it is not appropriate to think them medical...
cares in the cases that they are not therapeutic interventions in themselves, and are limited to services as physicians get requests for some advice under treatments (advisory opinions on delivering health services). The main reason why they cannot be thought as medical cares is all related persons in the trials knowingly involved for the services and the general principle of “face to face examination” under the article 20 of the Medical Practitioners Act can be seen inapplicable to them (Higuchi, 2008). The article 20 says “Physicians shall not provide any treatments without examinations by themselves, making a certificate or giving a prescription, giving a birth or still birth certificate without attending its delivery by themselves, or giving a postmortem certificate without performing autopsies by themselves. However, it is an exception when a death certificate is given in 24 hours after the death of a patient whom physicians provide medical cares.”

On the other hands, it is self-evident that physicians cannot avoid some responsibilities and liabilities as a profession, when they consequently provide inappropriate advice and do their patients some damages, without calling into account of kinds of advice such as advisory opinions between a physician and a physician or direct advice under treatments to patients.

In addition, physicians can owe responsibilities about delivering telemedicine, because it is technically provided by requests from patients, once it works as one of social infrastructures. We can easily understand that physicians are very concerned about their responsibilities in hoping for improved health of patients and communities, and trying for a means of telemedicine as a prominent tool or the last resort in limited cases. The services, even if they were introduced by bona fides (good conscience), will do harm not only to physician’s practices but patients and communities which need continuous health services after the services become clear as prohibited matters. When the telemedicine services are suddenly stopped by a reason unrelated with patients, the patients who have no any other alternative choices without the services, will profoundly be in disappointed.

2. FACE TO FACE EXAMINATION AS A GENERAL PRINCIPLE AND PHYSICIAN’S RESPONSIBILITY AND LIABILITY

Today, there are three categories in so called telemedicine listed below. Telemedicine will be done by putting IT to practical use for achieving:

(1) Efficient delivery of professional judgment and advice.
(2) Enhancement of connecting services among hospitals for efficiently utilizing limited human and material resources.
(3) Support in delivering health services to patients with a chronic disease who have difficulties to visit physicians due to the doctor shortage with insufficient traffic infrastructures or aging and depopulated area.

Basically, interventions such as operations and treatments in telemedicine could not have been provided from a distance, and telemedicine consisted of supporting and providing advisory opinions to decisions on treatment and operating strategies by pathologist’s and radiogram interpreter’s diagnosis based on images through a network. However, there have been some cases in foreign countries that surgical robots are used for surgeries using an endoscope. Even in Japan, the advisory council for MHLW on medical device and in vitro diagnostic approved a robot unit supporting to operate an endoscope device and a special endoscope kit on September 8, 2009.

Then, developments in IT, enabling providing information on images, advice, and other health services, made us realize the situation that we should not always think making a diagnosis without direct face to face communications as medical cares in qualified cases even without any examinations.

At facing the background mentioned above, the Ministry of Health, Labour, and Welfare (MHLW) reordered the relationships between telemedicine and the article 20 of the
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