Legal Interpretation of Face-to-Face Consultation in Telemedicine

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ABSTRACT

In legal studies on telemedicine, the requirement of face-to-face consultation emerges as a major concern. Although the legal basis of the “face-to-face consultation” requirement is often assumed to come from Medical Practitioners Law Article 20, it is actually from a notice issued on 24/12/1997 in Health Policy Publication No. 1075 by the Ministry of Health, Labor and Welfare (MHLW). In this article, through analysis of how the court made a judgment in regard to “face-to-face consultation” in previous rulings related to the Medical Practitioners Law Article 20, the authors clarify that judgment is based on these “notices”. In addition, through analysis of what policy on telemedicine the MHLW announces in the government ministries’ response issued on 20/10/2009 to the questionnaire from the members of a task force in the IT Strategic Headquarters, it is ascertained that interpretation of the “face-to-face patient care” in telemedicine becomes broader than the “notices”. This paper accelerates the broader interpretation and establishes a legal system defining telemedicine independently.

Keywords: Administrative Guidance, Face-to-Face Consultation, Medical Practitioners Law, Notice, Telemedicine

OBJECT

The purpose of this study is to, through comparison between respective ones of the notices issued from the Ministry of Health, Labor and Welfare (MHLW) in regard to interpretation of “face-to-face consultation” in telemedicine, recent court decisions, and the MHLW’s response to the questionnaire from the members of the task force set up in the Cabinet Office, analyze and clarify a difference there between and a future direction of the interpretation.

DOI: 10.4018/jehmc.2012010102

BACKGROUND

In legal studies on telemedicine, whether telemedicine meets the requirement of “face-to-face consultation” stipulated in Article 20 of the Medical Practitioners Law (hereinafter referred to as “the Article 20”) will emerge as a major concern. Although it might be considered that the legal basis of the “face-to-face consultation” requirement comes from the Article 20, the “face-to-face consultation” requirement cannot be directly derived from the following wording of the Article 20: “Any physician shall not provide medical treatment or issue a medical
certificate or a medical prescription without performing a medical examination himself/herself, or shall not issue a birth certificate or a stillbirth certificate without attending the birth himself/herself, or shall not issue a postmortem certificate without performing postmortem himself/herself, except for a death certificate to be issued when a patient under medical care dies within 24 hours after a consultation”, but it primarily comes from the notice issued on 24/12/1997 as an administrative guidance in the Health Policy Publication No. 1075 by the director-general of the Health Policy Bureau, the Ministry of Health, Labor and Welfare (MHLW) (Ministry of Health and Welfare, at the time) (it was partially revised in the Health Policy Publication No. 0331020 dated 31/3/2003) (Government of Japan, 1997, 2003).

The above two notices can be easily downloaded from “Policy-related links” in “Collection of Telemedicine-related links” on the home page of the Japanese Telemedicine and Telecare Association (JTTA), and thus details of their contents will be omitted here.

While it should be clarified what legal force the “notices” issued as a sort of administrative guidance have, i.e., whether there is a legal effect against violation thereof or whether a medical doctor accused of breaching the Article 20 can avoid his/her legal responsibilities by a defense based on compliance with the “notices”, this point will be discussed separately.

In actual telemedical care, the interpretation of the “face-to-face consultation” is slightly different from that defined by the “notices”, and is becoming increasingly diversified rather than being indefinite. Thus, many physicians have concerns about legal interpretation of the “face-to-face consultation”.

The term “telemedicine” used by the JTTA is described/expressed as “telemedical consultation” in the notices and the aforementioned task force. In this article, the two terms will be handled as synonymous terms, and each of the terms will be used as-is in a sentence quoting it.

**REVIEW AND ANALYSIS**

In this article, previous rulings related to the Article 20 will be reviewed to analyze how the court made a judgment in regard to the “face-to-face consultation”. Before the analysis, the legal intent of the Article 20 (paragraph 2) will be described. For example, Professor Norio Higuchi, Faculty of Law, the University of Tokyo (who holds the chair of medical laws at Faculty of Law, the University of Tokyo since 2008) says “the intent of the Article 20 is to prohibit a physician from conducting a certain practice without his/her medical examination, attendance or postmortem” (Higuchi et al., 1975).

Professor Norio Higuchi also says the significance of the Article 20 is “in a part thereof stipulated to prevent medicine from being performed without an evidence (so-called No-EBM: No Evidence based Medicine), specifically, a part which prohibits a physician from providing medical treatment or issuing a medical prescription without performing a face-to-face consultation for an ordinary patient”.

Among legal actions against violation of the Article 20, the following three precedents were extracted as a specific type in which the Article 20 becomes a point of issue in a medical malpractice suit.

(1) **Osaka District Court Decision, 26/3/1975**

In this case, a man (patient) had a fever of about 40°C, and his wife asked a physician in a hospital which is about a 5 minute walk from their home, to make a home visit. Due to being tied up with medical care for other patients, the physician just issued a prescription for an antipyretic drug “acetaminophen”, and promised home visit in the evening. The wife returned with the antipyretic drug. The physician was absolutely unacquainted with the patient, and learned a patient’s condition only from the wife. After returning to the home, the wife gave the antipyretic drug to the patient.
Improving Knowledge and Information Sharing to Promote Best Practices in Stroke Care: Evaluation of the VA Stroke QUERI Toolkit
www.igi-global.com/article/improving-knowledge-information-sharing-promote/76342?camid=4v1a

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