

### Special Feature

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

# The Case of Fukushima Prefectural Ono Hospital From the standpoint of the special counsel

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### The Role of the Special Counsel in a Criminal Case

I experienced this case from the extremely difficult standpoint of the special counsel.

A lawyer on the defense team asked me to appear in court since the district court had accepted the special counsel, but I did not really know what the special counsel is supposed to do. When I looked it up, I found that, “in most cases, defense counsels for a public trial in a criminal case are chosen from among lawyers, but when a person who is knowledgeable in a specific area or specific field outside of law is needed, it is possible to appoint a counsel who is not a lawyer. That is the special counsel.” It is a very rare occurrence. In criminal cases in Japan, Kenzo Nakajima, Tsuneari Fukuda, and other notable literary figures pleaded for the defense when a battle over whether Sei Ito’s translation of *Lady Chatterley’s Lover* was obesity or not was fought in 1952. When I had looked recently at the Japanese Wikipedia, it was written that a currently practicing physician was firstly chosen as the special counsel in the Ono Hospital case. That physician is me.

On the day of sentencing, the press corps crammed into Fukushima District Court with their cameras ready. At the time, not only the Japanese medical community, but even the public was taking notice of the case.

In the courtroom, I was always at the side of Dr. Kato to assist him, or rather to be his body-

guard. The defendant’s lawyer Hiraiwa, who just made an address, was also close by. Within this defense team, I had the very important role of immediately pointing out when a mistake had been made, such as in the methods of medical expression.

### The Distress of the Special Counsel

One of the distressing things about being the special counsel was actually the fact that Dr. Kato had been given harsh conditions of bail. He had been arrested on February 18, 2006 and released on March 14 on 5 million yen\*<sup>2</sup> (65,000 USD) in bail. Apart from this, Dr. Kato’s strict conditions of bail absolutely prohibited him from seeing, telephoning, e-mailing, interviewing, or communicating in any way with persons involved with Ono Hospital, physicians from his alma mater of Fukushima Medical University, or anyone else concerned in the case. As it turned out, I was the only medical professional who could speak officially with Dr. Kato. The fact that I was the only window between Dr. Kato and the public and between him and the medical community put me under a great deal of pressure.

Another stressful point was the language barrier. When physicians speak with each other they can understand one another well enough, but when you get onto a defense team, for example, and have to interpret the language, you need to start with such things as explaining what Cooper scissors is. You have to start from the basics such

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\*2 Yen/US dollar exchange rate: 1 US\$=77 yen.

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

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how to hold Cooper scissors and that you detach tissue from this side. And of course you have a duty of confidentiality to the media, and so cannot say much. Then, naturally the police and prosecution are working from the beginning based on a scenario and so you cannot have a conversation with them either. On top of that the police have a pattern of leaking information to the media, and so no matter what you say it counts for nothing. This interpreting was extremely difficult. Moreover, Dr. Kato is a very reticent man and does not speak much. Just trying to get information out of him was no easy matter.

### **Increasing Public Distrust of the Medical Community following a Succession of Medical Accidents**

It was 1999 when medical accidents started to be prosecuted in criminal cases. In 1999 medical accidents that seem unbelievable to us today occurred at major hospitals. For example, there was a case in which patients were mixed up at Yokohama City University Hospital and a case in which a nurse mistakenly injected a patient with antiseptic solution at Tokyo Metropolitan Hiroo Hospital, and these incidents were not handled very well afterward. In 2000, a patient died from an overdose of vincristine administered by an intern at Saitama Medical Center. In 2001, in a case of falsification of clinical records at the Heart Institute of Japan, Tokyo Women's Medical University, the falsification of clinical records of a physician other than Dr. Sato was widely reported in the media, prompting a sudden increase of distrust in and uneasiness regarding medical practice.

### **Prosecutors Pushed to Indict by a Growing Awareness of the Rights of Crime Victims**

At the same time that mistrust and concern over hospitals spread to the public as a result of a series of medical accidents starting in 1999, awareness of the rights of crime victims was also increasing. For example, in the Okegawa Stalking and Murder Case, the police did nothing even though the victim repeatedly complained to the police that she was being stalked. Afterward the police got hammered for possible dereliction of duties and the prosecution's awareness of itself

changed to that of a Public Prosecutor's Office for crime victims.

Although some decisions within recent Supreme Court rulings, for example, have denied violation of a patient's right of expectation (claim for consolation money for not receiving appropriate medical care), one medical institution after another has lost lawsuits, thereby clarifying the scope that they are subject to civil liability. In sum, since the thinking of the courts has also changed, the question of whether to indict or not has ended up being entrusted to the discretion of prosecutors through the principle of discretionary prosecution, which the lawyer Hiraiwa said in his address. From the standpoint of prosecutors, however, these various changes in circumstances may be pushing them into a situation where they have little choice but to file indictments.

### **One Cause of Criminal Indictment: Misunderstanding by Prosecutors of Physicians' Professional Ethics**

Behind this development is a difference in awareness between physicians and prosecutors. We physicians in Japan have a saying, "The second physician is always better." This is an admonition that the second physician should not slander the previous physician, since nothing is more shameful. Careless criticism of other physicians should be avoided, as it is an act that not only brings the targeted physicians into disrepute and damages the people's trust in them but also incites unnecessary anxiety in patients and causes other unexpected impacts. In particular, imprudent criticism against a physician who has seen the same patient before has long been admonished as stated from the past 'Do not criticize the previous physician' and 'The second physician is always better.'<sup>1</sup> It is even written in the Japan Medical Association (JMA) Guidelines for Physician's Professional Ethics that it is shameful as a physician to criticize with hindsight another physician. That is how we feel, but it is not the way prosecutors think. Recently there are physicians of a generation younger than mine who appear on TV or in other media and have sayings without consideration such things as, "It is better not to do that," and it makes me wonder whether such physicians know this admonition. In hindsight, it is possible to say anything. What is most important is the determination made by the physicians on the scene.

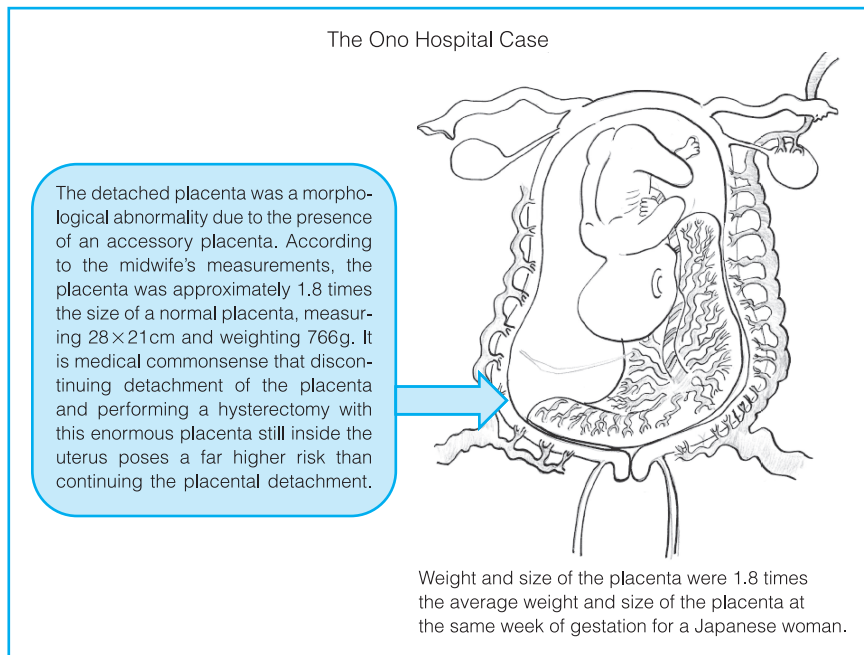


Fig. 1

Textbooks for police officers and prosecutors, on the other hand, say to be careful when conducting an investigation into medical crime, since such cases are characterized by their specialty, secretiveness, and feudalistic character. One textbook writes, “Feudalistic character means that the world of physicians is an extremely closed community of interest. With supervising professor at one’s alma mater at the top, posts at medical offices and affiliated hospitals are established, and even physicians in private practice are inescapably tied to their alma matter, for everything from continuing postgraduate education to the arrangement of part-time physicians. On the other hand, in case when a medical accident has occurred, even if the investigator tries to obtain the cooperation of medical professionals, there is a strong tendency to avoid speaking badly about their colleagues, due to the medical community being a closed society, making it no easy matter to find a conscientious cooperator.”<sup>2</sup> In this way, we have a mentality that says it is shameful to speak ill of a previous physician, but that concept is taken by prosecutors in a completely different manner. In the movie *The Fugitive*, surgeon Richard Kimble flees after being falsely accused of murdering his wife. Since Kimble is a physician

who is highly trusted by his colleagues, all his friends who are medical professionals protect him. In the Japanese novel *Shiroi Kyoto* (The White Tower), the secretiveness and feudalistic character of the surgeon who is the main character are portrayed. This seems to have been taken up to now as one of the symbols of us medical professionals by prosecutors and a part of the public.

### The Medical Accident Investigation Report that Triggered the Criminal Investigation

As for the problem at the Ono Hospital case—the lawyer Hiraiwa made a comment about the legal problems—the overview of the case is professional negligence resulting in death and violation of Article 21 of the Medical Practitioners Act. As mentioned earlier, a medical accident investigation report was submitted by the Fukushima Prefecture and this report was written with the purpose of compensation. On the other hand, an apology from the hospital director and the prefectural hospitals bureau for the case as a medical malpractice appeared on one page of a local newspaper, and that is what initiated the criminal investigation. The arrest was very

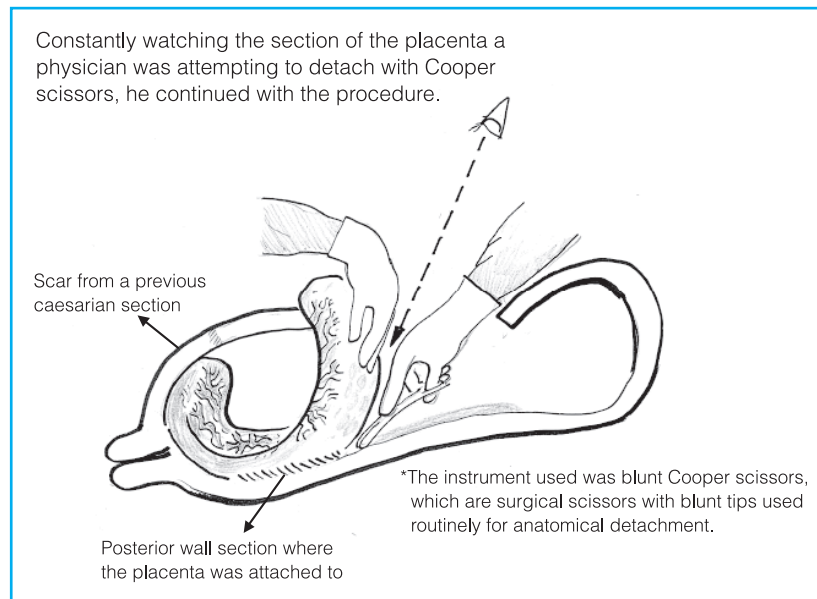


Fig. 2

shocking for us and for some reason Dr. Kato was detained one year after the accident analysis had already been completed.

### The Prosecutions' Indicted Facts Contrary to Medical Standards

The Ono Hospital trial was, in actuality, argued on contentions that were absolutely unrelated medically.

Take foreseeability for instance. Ultimately it was argued on pathological diagnosis whether the placenta was attached to the anterior wall, but Dr. Kato had in fact performed intraoperative ultrasound. Intraoperative ultrasound means that the physician opens the abdomen and places a sterile probe directly against the uterine wall. The analytical power of this procedure beats everything else. That is why from the beginning foreseeability could not become a problem. Thus it is no problem to say that Dr. Kato did everything.

Then there is the duty to avoid risk. In a nutshell, the issues in dispute were whether Dr. Kato should have not used Cooper scissors and whether he should have immediately moved to perform hysterectomy confirming placenta accreta during detachment, which procedure was impossible from the start.

In the Ono Hospital case I find it very strange

that the morphology and size of the placenta were not much of a topic. In point of fact, this case was placenta previa that the placenta attached to the posterior wall extended to the anterior wall and there was a morphological abnormality with the detached placenta being accompanied by an accessory placenta. These facts were written in the pathology report. Also the size of the placenta was 28×21 cm with a weight of 766 grams, which is extremely large—about 1.7 to 2 times larger than a normal placenta. Hysterectomy with two placentas still inside the uterus has by far a greater risk than continuing with detachment, since the ureters run through here. From our point of view this is obvious (Fig. 1).

This fact did not become much of a point at issue during the trial. Dr. Kato safely removed the uterus after carefully detaching the entire placenta. This method was absolutely correct. It is the only conceivable option. No matter who performed the operation, it should have happened, but that is the fact that does not surface much. I think that this led to what the lawyer Kitamura had been saying: “A criminal trial is definitely not system to investigate the fact or the cause of medical accident.”

As for the point that Dr. Kato used Cooper scissors in the detachment, I said at the outset

that there was the language barrier with non-medical professionals. What I felt keenly is that when I operate I always stand on the right side of the patient. I stand on the right and perform the operation with my right hand. At the Fukushima Medical University, the physician stands on the left. In that case, in the operation that Dr. Kato was able to use his right hand skillfully and actually detached the placenta. He lifted the placenta up with his left hand, applied tension, and slowly detached the placenta, snipping bit by bit along where tension was applied, using blunt Cooper scissors. That is, he performed a safe act using Cooper scissors (Fig. 2). But the scenario written by the prosecution was that he was blindly hacking away with the Cooper scissors causing gashes while blood was splashing about. But that is the procedure that we would absolutely never do. That is so scary we could not do it. This is the fact regarding the use of Cooper scissors.

### Problems in the Ono Hospital Case

Common problems that emerged in the Tokyo Women's Medical University case, the Kyorin University Hospital case, and the Ono Hospital case are: (1) lack of medical knowledge on the part of persons involved in the investigation; (2) investigative authorities faced with the feelings of the bereaved family; (3) problems in the medical accident investigation report; and (4) delay in lawsuit.

The lack of medical knowledge on the part of persons involved in the investigation comes, in short, from inadequate interviewing of specialists. Investigators continue to search until a specialist appears who says things that serve their purpose. They, I believe, are obsessed with the images of physician's feudalistic character and secretiveness that I spoke of before.

Then, as today's speakers are mentioning again and again, the problem of the medical accident investigation report will likely continue in the future.

As for delay in lawsuit, in the Kyorin University Hospital case it took 40 sometimes until the trial was concluded. During that time the defendant could not practice medicine at all until everything was finished. If he or she wants to get qualified as a specialist, it cannot be done. In the end, the physician's career is totally lost. I think that is a really big negative for society.

### Any Physician Could Be the Person Concerned in Criminal Trials of Medical Accidents as long as Article 21 of the Medical Practitioners Act Is Not Revised

This was mentioned before, but things are not finished. Professor Higuchi questioned how medical professionals can feel at ease even though the issue of Article 21 is still not settled. Nothing has changed at all.

### Are There Any Reliable Lawyers, Just in Case?

If ever criminal proceedings start against you, you will have to look for a lawyer. But, there are no reliable lawyers. In the case of Dr. Sato from Tokyo Women's Medical University, just by chance he had a high school classmate who had become a lawyer. In the Kyorin University Hospital case, there was a connection to the legal profession within the family. Then, in the Ono Hospital case, a physician who is now a professor at Fukushima Medical University happened to telephone me, and I just happened to know a lawyer who is well-acquainted with criminal cases, since I was doing a workshop right at that time.

Lawyers in an advisory contract with a hospital usually refrain from accepting responsibility for criminal defense of a physician employed by the hospital because the hospital must dismiss the physician if he or she is found guilty. Insurance company lawyers will also not take you on as a client. That is why you have to look for a new lawyer. And that is a very difficult problem.

### Basic Knowledge if You Get Caught Up in a Criminal Case

There is a difference between prosecution and non-prosecution, but investigation will primarily conduct the interrogation with the consent of the party concerned. Usually the decision to prosecute or not to prosecute is made while the suspect remains at home, but if you are arrested, as happened to Dr. Sato and Dr. Kato, you can be arrested for up to 72 hours and then held in detention for about 20 days. From there it is decided whether to prosecute or not.

There are two types of prosecution: a formal trial or a summary trial. There are different reasons for non-prosecution: insufficient evidence,



no crime, and suspension of indictment. In the case of non-prosecution, no accusation is made from a legal standpoint and you are left with no criminal record. Of course there is also no administrative penalty.

An expression that is often heard in Japan is *shorui soken* (sending a case to the prosecutor's office). When I asked legal professionals what that means, they only said, "It is not our term; it is something that the mass media says." It is often said, "the case was sent to the prosecutor's office," and what that means, according to the dictionary, is that "the police, without detaining the suspect, send to the competent Public Prosecutors Office the report from the interrogation of the suspect and other information in order to help assess the property of prosecution." This is a mass media term, which implies that the police have decided not to make an arrest. Just because the suspect is not arrested, he/she receives no legal advantages by "sending the case," but is not relieved of the possibility of future prosecution. I have a feeling that when someone uses the term, an image will definitely stick that, "That physician must have done something bad." In other words, this is what "sending a case" means, and it is a term with no particular legal meaning. However, the term is used an awful lot by the media. Since it has a negative image no matter what it is used for, I have a feeling that the media consciously uses it.

### Apprehensions for Choosing Summary Proceedings

All three cases presented in this symposium were handled in trial proceedings, this means all trials were open court. In a summary proceedings you would only be sentenced to pay a fine, but in trial proceedings there is no limit to the type of punishment. In the case of public proceedings, the mass media will cover the case in the national papers. If you plan to fight for your innocence, you have to expect that it will take at least two years. Moreover, such a case is difficult for one lawyer to handle the entire case and so you will need a defense team. And sometimes that can come with a hefty price tag.

In the case of summary proceedings, the proceedings are conducted very simply in a summary court and you can get out with a fine of up to 1 million yen (13,000 USD) or an administrative

fine. On a practical level, however, the major premise is that you will acknowledge your own guilt, and there is a high risk that you will be falsely charged. Coverage in the mass media will be in a corner of the local papers. Actually, the reality of summary proceedings is hard to dig up even if you look into it, and I suspect that many people in criminal cases of medical acts were falsely charged in summary proceedings. The JMA Research Institute is looking into the matter, but it is difficult to get a clear picture. But I fear that many people have gone this route.

In cases handled in public proceedings there are two patterns: a request for a public trial under detention or a request for a public trial without detention. Cases of a request for a public trial with detention include the Tokyo Women's Medical University case, the Ono Hospital case, the HIV-tainted Blood Teikyo University Route case defended by a lawyer Kitamura, and the Jikei University Aoto Hospital case. Cases of a request for a public trial without detention include the Kyorin University Chopstick case, the Tokyo Metropolitan Hiroo Hospital case, and the Yokohama City University Hospital case.

The two patterns for summary proceedings are: a summary trial with detention or a summary trial without detention. This is extremely common. In the case that a physician have his/her own clinic or that the physician have patients who are hospitalized, when the physician is told, "Doctor, rather than get tangled up in a long trial, if you just confess now it will all be over with a fine of 500,000 yen (6,000 USD) and you can go home today," I think that many physicians definitely choose that option. I am really impressed that Dr. Kato did not go along with that. Thinking that it is maybe the tenacity of people from the Tohoku region or his feeling to not give up, I immediately admired that doggedness the first time I met Dr. Kato. If someone hinted to you to take summary proceedings, what would you do? If you had your own guilt, wouldn't you choose summary proceedings to protect your clinic or patients by admitting a little crime, even though that may entail an administrative penalty? In fact, though, that is a really scary thing.

If you are detailed, the high bail is needed. In the HIV-tainted Blood Teikyo University Route case it was 100 million yen (13,000 USD). In Dr. Sato's case it was 20 million yen (25,974 USD). In Dr. Kato's case it was 5 million yen (64,935

USD). In all these cases the defendant was innocent, but the high bail was a heavy burden. Especially for Drs. Sato and Kato, who were both hospital-employed physicians in their 30s, I have heard that they had a difficult time raising the money.

### **Criminal Trials of Medical Accidents: The Epitome of the Problems of Criminal Trials in Japan**

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The problems in the Japanese criminal justice system are nowadays being called and criminal trials of medical accidents include the elements. There is a problem of *hitojichi shiho* (“hostage justice”), in which suspects are sometimes put into substitute prisons in order to force a confession. Investigations of other cases have problems such the unnatural death. There are also problems in non-transparent interrogation. Including these aspects, criminal trials of medical accidents are the common elements of the problems in Japan’s criminal justice system.

### **Conclusion**

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The JMA, medical societies, and specialists groups gave tremendous support in regards to this case. Many physicians truly gave us their cooperation to help Dr. Kato in this case.

The Japan Society of Obstetrics and Gynecology (JSOG) and the JMA in particular are organizations that I feel are quite courageous for having cooperated in the case that could have been lost.

The chairperson of the Executive Board of the JSOG at that time, Professor Yoshimura of Keio University, was a real emotional support for Dr. Kato. He came alone to the last meeting

with the defense team and said to Dr. Kato, “I don’t know whether Article 21 will win out, but I will support you until the end, so don’t give up.” He really was a great help. Of course, all the other physicians cooperated as well.

After the sentence was handed down, the JSOG issued the following opinion: “When a medical accident unfortunately occurs, the most important thing is to sincerely explain the situation to the patient or family. Also, from the viewpoint of improving healthcare quality and safety, it is most important for the investigative committee to evaluate the clinical course with fair-mindedness to prevent a recurrence. Not only underscoring medical professionals’ logic that questioning the criminal liability of medical acts to handle serious diseases would mean that medical professionals could be no provide medical care, but a system must be created through this case to enable the provision of medical care that is trusted by the public. Moreover, the utmost effort must be made to establish medical care that can save the lives of both mother and child in serious obstetrical diseases such as in this case.”

Finally, in *An Essay on Criticism*, Alexander Pope wrote, “To Err is Human, to Forgive Divine.” This means that humans will always make mistakes, but those mistakes may not be forgiven except by God. I think that goes to the heart of the matter. There is a patient and a physician, and when an outcome that was not much expected occurs, a gulf may develop between the two for a time. If that happens, filling that gulf is hard work. But, if they meet each other halfway, they can understand each other’s feelings. The JMA is making an effort to build such a system, and I hope that we will get your cooperation in that effort.

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