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RISK DISCLOSURE IN SECURITIES EXCHANGE AND MEDICAL TREATMENT CONTRACTS

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ABSTRACT

The duty of risk disclosure in medical treatment contracts is examined first through comparison with securities exchange contracts, second, by examining the contract as dealt in judicial precedent, ensued by an analysis and proposal by the author. In both types of contracts, the number of judicial judgments finding for the plaintiff based solely on violation of the duty of risk disclosure is increasing. Different explanations, however, should apply for the increase. In the case of the securities exchange contracts, the duty to inform is understood as a means of providing material for informed choice and self-determination, thus supporting the argument for self-discipline. Whereas, in the case of medical treatment contracts, adding to the argument for self-determination, another line of reasoning is given: disclosure of relevant information as a means by which the medical services secure the life and physical well-being of the patient. The reason the principle of self-determination is not in full play is analyzed as a case in which higher norms of the professional ethics of the medical staff is functioning. Thus, in providing medical information of possible treatments to the patient, the physician is exonerated from legal liability, but remains burdened with the ethical responsibility to provide appropriate care. As the overlap of the two types of responsibility seems not to be fully realized, further investigation and dissemination of findings of this issue is proposed.

Key Words: Risk disclosure, Self-determination, Self-discipline

INTRODUCTION

Since the 1970s, disparity of information and expert knowledge between parties in contract reached a point where it can no longer be neglected in medical treatment contracts and securities exchange contracts. This has resulted in the recognition by the courts of the obligation to disclose risks in the two fields.

In order to alleviate the disparity and achieve equity of the parties, in addition to the obligation to supply the object of the contract, the supplying party was deemed to have the duty to provide relevant information.[1)]

In the following two sections, accountability of the supplying party in securities exchange contracts will be compared with that of medical treatment contracts. In the case of securities exchanges, the influx of greater numbers of inexperienced investors has made the necessity of disclosing relevant information pertaining to the risks involved acute.[2)]

Though it is not the case that there has been a vast increase of first time patients at the

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hospital, the principle that the patient lacking in expert knowledge should not be left uninformed of the treatment to be given is becoming widely acknowledged.[3)]

RISK DISCLOSURE IN SECURITIES EXCHANGE

In daily life, the importance of merchandise offered in the securities exchange market has been rising gradually. Various financial products that distribute risk were developed for the individual investor.

Investment in the securities exchange market involves risk. The investor should be fully aware of the risks involved before buying into the market.[4)] When there is a loss, the investor, who has taken action voluntarily, will bear the consequences thereof. The principle of self-discipline is operative in this context.

However, many of the individual investors lack knowledge concerning financial products. On the other hand, the financial institution possesses abundant knowledge and experience dealing with financial products, and can explain the mechanism and risks involved in investing in financial products.[5)] Thus, to apply the principle of self-discipline, it is only fair that the financial institution provide sufficient explanation to the investor about the dealing concerned and its possible consequences beforehand.[6)]

Therefore, new legal regulations making explanation mandatory, allowing informed investment to the investor have come into place, or have been strengthened. Recently, judicial judgments that admit damages for the violation of risk disclosure rules on price fluctuation risk and credit risk in securities exchange have appeared.[7)] The banking business feverously dissent to any such move admitting damages on the part of the financial institutions as an incorrect revision of the self-discipline principle.[8)]

The principle of self-discipline requires the investor to have acquired sufficient information, and to have reasonable power of judgment. When the assumption is unfulfilled, a principle supplementing it is necessary. The principle of adequacy is deemed to be such a precept in the United States.[9)] The principle of adequacy is a principle that assumes a financial institution must not solicit securities exchange products inappropriate for the customer. Whether a product is inappropriate is decided by considering the circumstances of the customer, such as her purpose of investment, assets, and investment experience at the time of investment solicitation. The principle has been adopted to a degree in Japan.[10)] The trend has culminated in the Financial Instruments and Exchange Act (2006 Act No.65), making official the principle of adequacy. Although the courts do not regard the violation of this principle as ground for damages,[11)] it seems to function as one of the criteria for recognizing the violation of the judicial accountability rule.[12)]

The Supreme Court has found the standardized form of solicitation used by security firms to be a grave violation of the accountability rule. It has delivered a judgment to have the firms pay an appropriate amount of damage, using the concept of comparative negligence.[13)] This seems now to have become the leading precedent.

RISK DISCLOSURE IN MEDICAL TREATMENT

In recent years, more patients are asking the courts for damages in cases where there is a significant lack of explanation on the part of the physicians. The courts have established through precedent that the physician has the duty to explain to the patient.[14)] The reasoning for the recognition of the duty is twofold. One, the patient, as a party to the medical treatment

contract, can ask for sufficient explanation of the treatment. Two, the right of the patient to self-determination should be substantiated through law. The right to self-determination is a right that the patient determines what is best for her own body after understanding the physician's explanation. In order for the patient to make up her own mind, sufficient information must be given by the physician.[15] This implies that the physician must abide by the judgment of the patient thus made. In a word, the accountability of the physician was established in tandem with the introduction of the concept of informed consent.[16]

On the other hand, the physician should give such explanation to the patient not only to fulfill her contractual duties, thus respecting the patient's right to self-determination, but also to meet her professional responsibility to care for the life and health of the patient. This can be said to be based on the concept of the human dignity. When this aspect of the duty to explain is emphasized, the room for discretion on the part of the physician will need to be widely admitted.

It can be said that the duty to explain can be best understood as a balancing act between the patient's right to self-determination and room for discretion on the part of the physician.[17, 18]

Judicial precedent on the violation of the accountability rule has been building up. However, it is yet too early to say that the criteria for the violation are clear. One of the main issues is whether the criteria are relative to the patient in question.

The author claims that the limits of accountability should be based on the patient in question rather than the common man. To this claim the following argument is often given. The physician cannot possibly know everything about the patient. Asking her to fathom all relevant details is asking for the impossible, thus making the judgment whether the criteria applies a very subjective one. Neither the judge nor the physician, and in the case of adverse judgments, even the patient would like such uncertainty. To this argument, the author points out that the courts have found that knowledge about everything is not necessary, only of such relevant general facts that establish the individuality of the patient.[19] The author concurs with this view and finds these criteria to be objective enough to be practical.

A further issue is that of how much explanation is sufficient. Again, the courts have found that the particularities of the case should be taken into account, such as the medical institution involved, the level of medical care expected at the time, and the specialty of the physician in question.[20]

A serious problem in this context is the notification of diagnosis of cancer. Traditionally, the dominant opinion was that refraining from notifying does not necessarily constitute a breach of the duty to inform, if the expected negative effects of the notification would severely affect the mental and physical state of the patient. There is indeed a case where the courts denied the liability of the physician who did not bother to notify the patient of the cancer diagnosis after regular visits to the hospital had ceased.[21]

However, the author believes that the same physician would be found liable if the case were brought to court today. Times have changed and the notification of cancer is now the rule rather than the exception. Measures against pain caused by cancer can advance and the patient's cooperation is received more easily by the notification. As for the notification of the diagnosis of cancer, the courts are varied in their judgments, and one must proceed case by case. Concerning notification only to family members, but not to the patient herself, the author believes that the physician would be liable, which accords with the establishment of the principle of self-determination in the courts. On a related matter, the courts have found for the plaintiff when the physician failed to notify the family of the diagnosis.[22]

As the case of the notification of cancer demonstrates, the duty to inform can be different from one case to another. Many more cases, and many more types of case such as that of explaining

to children[23, 24] must be decided before we may begin to classify and theorize on the criteria.

DISCUSSION

Medical treatment contracts and securities exchanges contracts

Medical treatment contracts take place daily in the context of medical consultation before treatment. True, it has been the case that not everyone can afford to see a physician. However, we now have a health-insurance scheme that allows most everyone to seek medical care at little cost. The physician cannot refuse consultation and treatment. The physician has the duty to treat all requests for medical care.

In such a context, both parties to the contract rarely feel they are indeed entering into a contractual relationship when the physician begins consultation.[25]

When the physician explains the risks of the possible treatments, in most cases she does not feel that she is fulfilling a contractual obligation. Rather, it is usually the case that the physician feels that such an explanation is mandated by the ethics of the medical profession.

The patient seldom asks the physician for explanation of the risks involved. She usually believes that the treatment is safe. Only in the unfortunate event that negative consequences of the treatment materialize does the issue of sufficient explanation of the risk before treatment arise.

On the other hand, people are aware that the securities exchange contract is indeed a contract. Buying financial products is not something most people do every day. The person buying securities realizes that she is acting as an investor, if not a speculator. As such, she would expect to be explained the risks involved in performing a financial transaction.

Necessity of accountability

In both types of contract, there is the expert on the one hand, i.e., the financial institution or the physician, who tend to monopolize relevant information, with the disadvantaged investor or patient on the other hand. Therefore, both types of contract require principles designed to protect the investor or the patient, in order to serve as a fair and just instrument of transaction.[26]

In securities exchange, the risks involved are explained to the investor. Moreover, financial risk can be spread across several investments. In turn, the investor assumes the responsibility of the result of the transaction. This is explained in term of the principle of self-discipline.

The justification for such provisions in the medical treatment contract is often derived from the necessity for the patient to decide for oneself. Contrary to financial risk, the risks to the patient's life in medical treatment are not and cannot be diversified: you only die once. Therefore, the patient should be fully aware of matters that have to do with her life, including the nature of the treatment available. The right to be informed should be independent of the consequences caused by lack of information. Today, the court admits such claims; claims based on the violation of the accountability rule even if there is objectively no adverse medical consequences involved.[27]

The purpose of recognizing the accountability of the physician is to ensure the right to self-determination by the patient. For the same reason, the physician's room for discretion in treatment is restricted.

Note the difference between the principles of self-discipline in securities exchange and that of self-determination in medical treatment. The latter is a principle that matters that have to do with my life and health are to be decided by myself. It does not entail that the patient assume the responsibility of the consequences of the treatment.

Besides the problem of who would be liable for the unfortunate consequences of the patient's voluntary choice, there is the issue of what the obligation for the physician would be in providing

for the patient's choice. Even if the terms of the contract require no more than the patient to be free from the effects of negligence of the physician, it may be that the professional ethics of the physician requires that she provide the best possible condition for the making of the choice.

If only the former obligation exists, the physician would not be liable for a bad choice made by the patient, if the physician gives what would be considered a fair and sufficient explanation to the patient. However, if the latter ethical obligation applies, then the physician would tend to be responsible for the bad choice, e.g., when through the explanation was acceptable, the patient did not fully understand the possible outcomes of the treatment.

Further, what if the patient makes a medically poor choice in spite of her understanding of the choices? A strong reading of the ethical obligation would require the physician to continue explaining the consequences of the choice to the patient.[28] The reasoning behind this conclusion is that the preservation of the life and health of the patient is based on the human dignity, a principle that values the saving of a human life to be greater than that of self-esteem. In this case, its harmonization with the patient's right to self-determination become a problem. It is a problem that should be examined in the future.

Therefore, based on the strong theory of professional ethics and this interpretation of the human dignity, the accountability of the physician resides not only in the right to self-determination of the patient, but also in the professional ethics of the physician and the human dignity. As a result, the physician is bound to honor the right to self-determination of the patient, and at the same time, is also bound to give medically appropriate care to the patient so as not to violate the patient's dignity as a human being. On this reading, it is obvious that the responsibility of the physician is much more complicated to perform and of greater weight compared to that of the financial institution. Such an interpretation of the obligation of the physician is nevertheless recognized by the profession, based on the sublime standard set by the professional ethics of the physician.

Accountability in judicial precedent

When comparing judicial precedent of the two fields, we notice a stark difference in the objectivity of the criteria to be applied. We have a reasonable number of cases where breach of accountability was found in both fields. In the cases the case of the securities exchange contract, the criteria are clear enough for the financial institutions to formalize the requirements in their standardized documents, which can be handed out to prospective investors. Whereas, in the case of medical treatment, for the reasons set above, setting a clear standard was difficult. The standard cannot be abstracted because there are peculiar circumstances to each case. Therefore, no clear standard that can be applied in everyday practice is available. For instance, accountability is recognized to vary according to the physician's expertise, or place of work. Judicial precedent has yet to answer the call from medical practice for a clear set of standards that can readily be applied.[29]

The right to self-determination and the physician's discretion

The right of the patient to self-determination is sure to be strengthened more and more in the future. As a result, the physician must respect the patient's judgment and the physician's discretion in treatment would be restricted.

However, the physician should uphold her professional responsibility to care for the life and health of the patient. When this responsibility is emphasized, discretion on the part of the physician will be widely admitted.

The patient can acquire medical information comparatively easily by the spread of the internet in recent years, and the uneven distribution of information between the physician and patient is

becoming a thing of the past. In the not too far away future, the physician and the patient might well be able to build a fifty-fifty relationship as parties in a medical treatment contract. In the event, the patient may insist on her choice of treatment, and the physician may be obliged to follow it. As a result, the physician's discretion would be reduced.

CONCLUSION

The physician should explain the risks involved in possible treatment to the patient not only to respect the patient's right to self-determination, but also to meet her professional responsibility based on the concept of the human dignity. As a result, the physician is bound to honor the right to self-determination of the patient, and at the same time, would also bound to give medically appropriate care to the patient.

As the overlap of the two types of responsibility seems not to be fully realized, further investigation and dissemination of the findings is proposed.

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