

### Special Feature

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

# Kyorin University Chopstick Case *From the standpoint of an otolaryngologist*

JMAJ 55(2): 159–165, 2012

Makoto HASEGAWA\*<sup>1</sup>

Today I will be speaking from the standpoint of an otolaryngologist. I was the supervising professor of the physician who was indicted in the Kyorin University chopstick case. After this case occurred, we—the persons concerned, the defense counsel, and the group supporting them—all shared the view that everything should be settled in a court of law now that the case had been indicted in the criminal court. The progress of this case has been informally posted on the Internet and other media in an informal fashion—but today, I wish to describe the progress of this case in a formal fashion.

Therefore, I will be mentioning the facts that Tokyo High Court has approved among all the statements that the defense, the so-called physicians, claimed in the courtroom. There are many more points we wish to claim, but the court does not approve of such act. So, I will mention only the facts that Tokyo High Court has approved.

### Overview of the Kyorin University Chopstick Case

I would like to briefly explain the Kyorin University Chopstick Case.

In July 1999, a 4-year old boy fell while holding a chopstick in his mouth, and was carried to Kyorin University Emergency Care Center. The attending physician did not diagnose that the tip of the chopstick had pierced the jugular foramen at the base of the skull and damaged the cerebellum, and that a broken piece was left in

the intracranial region. The boy died about half a day later.

The attending physician and the hospital staffs are deeply concerned about the fact that they could not save the boy, and would like to express their deep condolences and pray that his soul will rest in peace.

At the same time, however, this case was extremely difficult—and both medically and globally speaking, an unprecedented one. The indicted physician was found not liable for professional negligence in civil court in both the first and second instances, and he was also found not guilty in criminal court in both the first and second instances. Meaning, this case is neither a medical accident nor medical malpractice; it became legally clear that it was an unfortunate accident with a chopstick.

The violation of the human rights of the attending physician by the media was arbitrary and fierce. Through their newspapers and editing and organization of broadcasting programs, some media continuously reported as if the physician was in error even after the final decision of the court was made.

This case was a critical turning point that has led to a serious medical crisis in Japan, and it has shed light on the problem of claiming criminal liability for the result of “well-intended medical practice” in Japanese society. I must say, it is extremely naive and risky for a physician who practices clinical medicine to believe that he/she will never be involved in such incident.

\*1 Former Professor and Chairman, Department of Otorhinolaryngology, Kyorin University School of Medicine, Tokyo, Japan (hasegawa.srrd@nifty.com, Fax: +81-424-99-8070).

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

This article is based on the presentation made at Japan Medical Association Research Institute Symposium “Trust in Medicine—Learning from the criminal cases that are found not guilty” held on July 20, 2011.

## The Progress of the Chopstick Case

Now, I would like to talk about the progress of the chopstick case in more detail.

On July 10th, 1999, after 6:00 pm, at a day-care center called Sugino-ki Seikatsu-en (Suginami City, Tokyo), a child patient was running around and fell down facing forward while holding a sugar candy wrapped around a disposable wooden chopstick in his mouth. The boy was injured by the chopstick, which pierced his soft palate. In the infirmary, the nurse told the boy to open his mouth, and when the boy responded by opening his mouth, she examined his oral cavity and found a wound that looked like a dent with no sign of bleeding. There was no vomiting, and the boy was crying with his eyes closed.

The paramedic who arrived at the scene was told by a middle-aged woman nearby that the boy had pulled out the chopstick and thought that the entire chopstick was out of his body. When the paramedic instructed the child to open his mouth, the boy immediately responded. Then, when the paramedic asked the child if he could open his eyes, the boy responded right away and opened his eyes, so the paramedic determined that the boy's state of consciousness was satisfactory. The paramedic examined the oral cavity using a penlight, and he recognized what appeared to be a shallow wound with some bloodstain on the soft palate. There was no abnormality in the pupil diameter or light reflex, and the respiration, pulse, and arterial oxygen saturation level were normal. The boy did not show any vomiting or nausea. The paramedic reported the incident to Kyorin University on the phone saying that a chopstick had pierced the throat but the chopstick itself was already out, and transported the boy by ambulance. During transportation, the child vomited once, and showed signs of nausea several times.

The child was transported to Kyorin University Emergency Care Center, and when a nurse first asked about progress after the trauma, she was informed that "the boy fell and a chopstick pierced his throat, but there was no sign of it," "it appears that he pulled it out by himself," "consciousness is clear," and "he vomited once in the ambulance." When the nurse told the child to open his mouth wide, he did open his mouth wide. The nurse then opened his eyelids, examined the pupil, and noticed no abnormality. When

the nurse asked the child if he wanted to be held up in her arms, the boy nodded, so she did. The child was holding onto her apron with his hand while he was held in her arms, and soon he repeatedly groaned several times and vomited transparent stomach contents with a sweet scent.

The attending physician started to examine the child 10 minutes after he arrived at the emergency care center. The physician first received reports from the paramedic including comments such as "the boy fell and a chopstick pierced the throat, but the chopstick is out," "he pulled out the chopstick," and "he vomited once in the ambulance," as well as reports from the nurse. Then, the nurse took the child to the otorhinolaryngology examination room, and the boy received examination by the attending physician while his mother had him on her lap holding him. The attending physician asked the mother what seemed to be the trouble, and the mother answered that the boy fell and a chopstick pierced his throat. The physician did not ask any further questions, and the mother did not explain the condition of the child on her own.

The attending physician told the child to open his mouth, visually examined the inside of his mouth, and using a cotton swab checked the site on the soft palate and the size of the wound by palpation. Although the depth of the wound was unknown, the bleeding had already stopped, and there was no particular abnormality around the wound. So the attending physician determined that the wound stayed in the soft palate, and treated the wound by sterilizing and applying some antibiotic ointment.

Because the wound itself was small in size, the attending physician decided to follow up on progress for a while. He was going to decide if the wound should be sutured in two days, which was July 12th. The physician prescribed an antibiotic and anti-inflammatory, informed the mother accordingly, and told her to come back with the child on Monday. At the same time, he instructed the mother to "give the child plenty of rest today," "not to bathe," make sure that he takes the medicine," "give him soft food," "have him lay down on his side in case he vomits so that the contents will not block his throat," and other words to caution, and explained about his medication. At that point, the mother asked if it is really all right to take the boy home even though he seemed so weak, and the physician answered

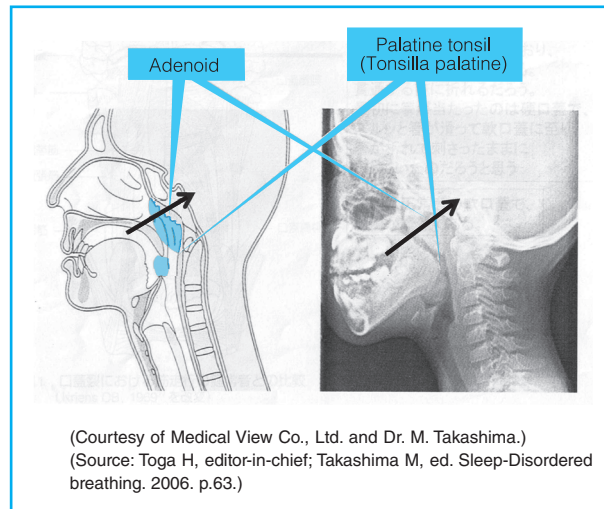


Fig. 1 The cross-section of the oral cavity and throat area

that the boy was just sleepy because he was tired and that she did not have to worry. During this time, the child vomited once in the otorhinolaryngology examination room and groaned several times.

The child showed no major changes in his condition and was responding to his mother's voice until the next morning around 6:00 am, Sunday, July 11th. But when the mother noticed a change in his condition around 7:30 am, his lips were blue and he showed no response at all. When an ambulance arrived at 7:44 am, he was in a state of cardiopulmonary arrest. He was transported to Kyorin University Emergency Care Center, where he was pronounced dead at 9:02 am.

Two years after this chopstick accident, Tokyo District Public Prosecutors Office indicted the attending physician on suspicion of professional negligence resulting in death.

### The Prosecution's Arguments

The chopstick entered the oral cavity and impaled from the posterior end of the soft palate slightly left from the median and toward the outer top in oblique fashion (Fig. 1). In terms of the direction, it is toward the top on the lateral plane and outward. The judicial autopsy revealed that the chopstick had passed through the jugular foramen at the base of the skull and pieced the

cerebellum.

In the charges, the prosecution argued that: 1) when a chopstick impales the soft palate, there is a risk that the chopstick pierces through the epipharynx, perforates the bone at the base of the skull, and damages the brainstem, and failing to anticipate this was negligence, 2) not performing a CT scan for examination was negligence, and 3) had the diagnosis been made promptly and treatment started, there was a 90% chance that the child's life would have been saved, and thus failing to do so was negligence.

As for the cause of death, the prosecution's argument changed again and again. but ultimately, a professor who currently works for a national university in the Kansai region appeared at court as the prosecution's witness, and testified that cerebellar herniation due to hemorrhage was the cause of death. The forensic medicine professor of a private university in the Kanto region who was in charge of the judicial autopsy indicated cerebral edema as the cause of death, not cerebellar herniation.

### Autopsy Findings of Epipharynx and the Base of the Skull

As for the autopsy findings of epipharynx and the base of the skull, the forensic medicine professor who carried out the judicial autopsy stated in his autopsy report that the broken tip of a

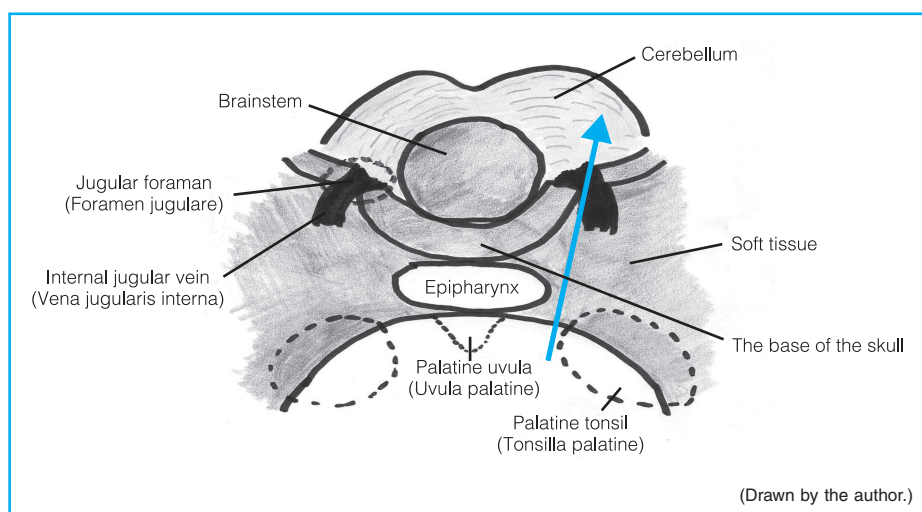


Fig. 2 The site of injury (illustration)

chopstick was protruding into the epipharynx. But the witness for the defense argued that this autopsy finding was a mistake made by an inappropriate anatomical approach. This argument was supported by another forensic medicine specialist for the prosecution, and ultimately the court judged that not even a fiberoptic examination would have been able to confirm the presence of the tip of the chopstick.

### The Entry Route of the Chopstick

In the judicial autopsy, the doctor in charge had made a U-shaped cut on the mucosa of the palate with a scalpel along the maxillary tooth row and detached the lower part, and by doing so he had cut open the muscle layer in the side wall of the epipharynx. As a result, he mistakenly believed that the tip of the broken chopstick had been protruding from the epipharynx. Had he opened along the median, he would have been able to examine the area without damaging the side wall of the epipharynx and the soft tissue. We believe that, in the end, it was this U-shaped cut that led the autopsy doctor to make a misjudgment. The autopsy doctor made a U-shaped cut to the soft palate and entered the soft tissue at the side wall of the epipharynx. Since epipharynx is located at the center, naturally his incision went toward its side wall.

In the end, this led to the misjudgment. But

then, I am a complete amateur when it comes to judicial autopsy. Maybe this technique used by the professor who performed the autopsy is the standard method — I am not denying that possibility. But, in my judgment, it was the incorrect approach as far as this case is concerned.

Regarding the direction, as I showed earlier, the chopstick went through the muscle layer, passed the jugular foramen, and entered the cerebellum (Fig. 2). Of course, the autopsy doctor in charge of the judicial autopsy was not expecting it at all. I would think that the chopstick came out all of a sudden as he was opening the head, and he was surprised at first and could not judge correctly — and I sympathize for him. But since an unexpected object showed up in a completely unexpected area, I believe he made an error in judgment where he should have entered from the median.

### The Basic Understanding of the Defense (Physician's Side)

As for the basic understanding of the defense (the attending physician's side), the base of the skull is quite a thick bone even in a small child, and it is difficult to imagine that a disposable wooden chopstick pierced through it. Even if it did, considering the brainstem is the core that controls life functions, any damage to the brainstem usually results in instantaneous death. Or,

even if the person is saved, his/her consciousness will be severely impaired or he/she will experience quadriplegia. This child showed no extensive impairment of the consciousness, and as the fact that he held the nurse's sleeve when he was picked up in her arms clearly shows, he showed no quadriplegia. In this case, the chopstick passed through the jugular foramen and damaged the cerebellum without damaging the brainstem. There have been no similar cases anywhere in the world.

Another point in the defense's basic understanding is that clinical medicine is an empirical science, and we felt uncomfortable about criminal liability being pursued for not being able to diagnose an unprecedented condition at the level of emergency care during night hours. This case has proven that poking inside the oral cavity with an object like a chopstick could result in death. However, according to the studies by Children's Hospital Boston of Harvard Medical School or Children's Hospital Medical Center (Cincinnati, Ohio), there has been no previous case in which soft palate damage resulted in a serious outcome, and in their opinion they recommend careful follow-ups as outpatient for soft palate damage. Back then, there was no otorhinolaryngology textbook that mentioned the danger of soft palate damage resulting in intracranial damage anywhere in Japan, Europe, or the US. There was no case in which a CT or MRI scan was carried out, and similarly Kyorin University Hospital did not perform such examination. In those days, this level of clinical practice was standard at many university hospitals.

No X-P, CT, or fiberoptic examination was carried out during the initial examination because the attending physician never dreamed that a broken piece of a chopstick remained in the intracranial region. But even if he did, he probably could not diagnose it. Even if he did diagnose it, it is not likely that the child could have been saved, considering that the autopsy findings show that cerebral edema due to cerebral circulatory failure was likely the cause of death. At the level of care provided at an emergency care, it is extremely unlikely to diagnose the intracranial damage by a chopstick and the remaining chopstick, prepare for surgery, and complete the operation before the time of death of the child the next morning. Realistically speaking, we believe it was impossible to have done it all.

## **The Defense's Argument Concerning the Cause of Death**

---

As for the cause of death, the defense argued that cerebral edema caused by venous thrombosis, which was induced by the chopstick that impaled the jugular foramen. A neurosurgeon who is the director of the emergency care center of Showa University Hospital and another neurosurgeon who is the director of the emergency care center of Saitama Medical University appeared in court as defense witnesses. The autopsy doctor also stated the presence of thrombosis in his report.

## **The Judgment of Tokyo High Court**

---

The judgment of Tokyo High Court was, "In this case, it was extremely difficult to anticipate that the chopstick had impaled the intracranial region, and therefore, not conducting a CT scan with such assumption cannot be called negligent. The chopstick passed through the inside of the soft tissue at the side wall of the epipharynx, and even fiberoptic nasopharyngeal examination could not have confirmed it, therefore not conducting a fiberoptic nasopharyngeal examination cannot be called negligent. Because we can hardly say that saving the child's life or prolonging it was possible beyond any reasonable doubt, it does not constitute a charge of professional negligence resulting in death."

## **The Outcome of the Criminal and Civil Trials**

---

At the same time, the civil trial was in progress simultaneously. The defendant was found not guilty in the criminal court both at Tokyo District Court and Tokyo High Court—and, also in the civil court, he has been found not liable for professional negligence at both courts.

## **The Violation of Human Rights against the Attending Physician**

---

With regard to this case, I feel most strongly about the violation of human rights of the attending physician. The attending physician suffered a considerable human rights violation because of arbitrary and biased press coverage. Even after Tokyo High Court issued the final decision of not guilty of negligence in both criminal and

civil courts, some media (some major newspaper companies and television stations) repeatedly reported as if the attending physician was wrongly found innocent where he should have been found guilty.

### **The Obligations and Responsibilities of the Mass Media**

Society grants the mass media freedom of the press and editorial rights because society entrusts the mass media with the task of seeking truth based on fact. Press coverage may occasionally include errors since the media has limited time and information when preparing reports. I personally believe that, in such case, the misguided coverage itself cannot be condemned.

However, when an error in press coverage became apparent later, I believe that the mass media has the responsibility to sincerely examine why the error occurred, report the results, and correct the error it made. But in this said case, no newspaper companies or television stations have reviewed their faulty reports even now, and the human rights violation of the attending physician brought about by the media still remains. If the mass media do not fulfill their responsibilities and obligations for faulty reports, in my understanding, then maybe the mass media think that *freedom of the press means freedom to freely violate human rights under the name of social justice, and editorial rights means freedom to not cover reports that are inconvenient for them.*

Society is not asking the mass media to seek justice—but to seek truth based on fact. The mass media must fulfill its responsibilities and obligations, I believe.

### **Broadcasting Ethics & Program Improvement Organization (BPO)**

Broadcasting Ethics & Program Improvement Organization (BPO) was established by National Association of Commercial Broadcasters and Japan Broadcasting Corporation (NHK), and one of its purposes is to remedy human rights violations caused by broadcasts. When a claim was made that the reports on the chopstick case covered by a Tokyo Broadcasting System (TBS) program called the “Mino Monta’s Asazuba!” is the defamation of character and credibility of the attending physician, BPO advised TBS

to give heed to securing accuracy and fairness. I appreciate BPO issuing such advice.

However, BPO’s statements are somewhat contradictory. BPO admitted that the broadcasted contents lacked accuracy in understanding the contents of the civil court judgment, and determined that the program “damaged the social standing of the claimant” and “also failed to accurately recognize the contents of the court decision, and can be called insulting to the claimant and damaging his social standing.” On the other hand, BPO also stated that “the broadcasts on this said case are not meant to damage the reputation and credibility of the said physician, and the mental pressure suffered by the claimant and his family is not beyond the permissible limit of damage.” BPO quoted a Supreme Court precedent on September 9, 1997, and decided that this cannot be said a violation of human rights. But I am uncomfortable with this decision.

BPO determined that it was “insulting and damaging to the social standing” on one hand, and decided that it was not a human rights violation on the other. Such decision can lead to the misunderstanding that BPO is an organization established to protect the mass media rather than seeking the true nature of a matter.

### **Accidents during Examination and Unexpected Death Turning into Criminal Cases**

I believe that Japanese Society of Legal Medicine (JSLM) is significantly involved in accidents during examinations and unexpected deaths that became criminal cases. In order to address abnormal death as prescribed under Article 21 of the Medical Practitioners Act, JSLM established new guidelines in 1994, in which medical accidents and the unexpected death of patients during treatment are included as abnormal death. This new guideline on abnormal death facilitated the movement to turn medical accidents and unexpected death of patients into criminal cases in Japan. In Fiscal 2002, JSLM emphasized that their “abnormal death guidelines” would neither invite withering of medical practice by physicians nor result in destroying the physician-patient trust. However, I myself as a clinician feel that their claim contradicts the facts and cannot accept it.

## Medical Malpractice and the Liability of Attending Physicians

---

Medical accidents differ from medical malpractice. But as far as medical malpractice and the liability of attending physicians are concerned, I believe establishing the concept of *not seeking criminal liability for the result of "well-intended medical practice"* in society is the first priority. On the other hand, individual rights are guaranteed under the Constitution, and therefore, I think civil actions against medical malpractice should not be denied. But bringing too many cases into civil court carries the risk of stifling medical practice and physicians avoiding examining patients. I believe setting up some level of legal limitation in order to avoid those risks may be unavoidable.

## Awareness as a Physician

---

Lastly, and also in my understanding most importantly, when a physician is asked to give testi-

mony or make a statement in court or for the media, he/she should do so according to his/her conscience. Meaning, a physician should not be biased in his words because of a hidden agenda. In addition, a physician should not speak lightly about issues of which he/she does not sufficient experience and knowledge. When a physician is to speak, he/she should be confident in being able to repeat the same words to whenever, whoever, and wherever asked for. Otherwise, I think he/she should refrain from making statements.

Right now, we physicians are asked to have professional autonomy. This so-called *professional autonomy of physicians* in the world generally means that, if a physician makes a mistake, then other physicians in the same group exercise an act of self-cleansing and deal with the issue. However, in addition, I believe self-discipline of individual physicians, as in individual physicians acting according to his/her conscience, should also be included in the *professional autonomy of physicians*.