

Medical Care at the Time of Large-Scale Disasters and Its Legal Responsibility

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Introduction

I was asked by Dr. Masami Ishii, Executive Board Member of the Japan Medical Association (JMA), to give a lecture on emergency medical care provided voluntarily by physicians when a major disaster, such as the one that Japan experienced on March 11, 2011, occurs, as well as the issue of legal responsibility in providing this emergency medical care. However, since this topic is far too broad and abstract, I asked him about the specific issues I should address, in reply to which I was given a list of several items in question form from JMA members. My lecture today therefore takes the form of answers to these questions. However, before I begin, I would just like to say that I am not an expert on these questions, and I have not previously contemplated these issues deeply. As a legal practitioner handling medical issues, together with physicians and other health professionals, I have over a long period of time considered various issues both new and old, and in this article, I will consider the questions put to me as an extension of this previous experience.

Triage

Comprising more than 100 member national medical associations around the world, the World Medical Association (WMA) contains two important standing committees, the Medical Ethics

Committee and the Socio-Medical Affairs Committee, which examine various problems from regions throughout the world. It was the Budapest General Assembly held in 1993 when I firstly involved in the WMA activities. At that time one of the main topics was the revision of the Lisbon Declaration, which addresses the issues of patients' rights. This revision work had been referred to the Medical Ethics Committee, and discussions were held about how to handle the so-called disclosure of medical records to patients. In addition the General Assembly at that time was conducting serious discussions about the issue of triage (prioritization of the sick and injured at times of disaster based on the urgency of medical treatment for each person). I believe that the issue was discussed at the Socio-Medical Affairs Committee. In Japan at that time, there was little awareness of the word "triage," but around the world not only natural disasters but also ethnic, religious, and political conflicts are occurring without respite, and so the issue of triage was discussed repeatedly in terms of how medical treatment should be carried out in regions where there is an extreme lack of medical resources.

The year 1993 was one in which Yugoslavia, saw serious conflict, and so perhaps this situation was related to the choice of discussion topics. Actually, immediately before the WMA General Assembly, there had been the drama of Russian President Boris Yeltsin's attempted removal from

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office. During my stay in Budapest, I had an opportunity to watch the scenes of Yeltsin going alone to the Russian parliament on television, which was surrounded by tanks, to persuade his opponents to back down. Located only 300 km from Russia (Ukraine), Budapest could easily have become a stage for triage, and we General Assembly participants have memories of fearing that we would be caught up in a civil war.

Volunteer Activities and Legal Responsibility

Soon after returning from Budapest to Japan, I was invited at the request of the Japan Federation of Bar Association to speak at a training seminar conducted by the Japanese Red Cross Society. Members of the Society traditionally comprise wealthy individuals from regional areas who undertake various forms of community service. For this reason, one of the topics my lecture generated was, in the case that a group of children was taken to the river to play on a holiday and a child drowned in the river outside of the area, which was designated by the adult escorting the group, is the adult liable? I was also asked who would be liable in the case that a person was rescued with disaster relief efforts but the efforts were not successful and the person died? These are **issues concerning so-called responsibility related to volunteer activities.**

The former is an issue occurring under normal conditions that poses the question of who was the agent conducting the swimming trip to the river. However, since it cannot be said there is no likelihood of the escort who was nearby at the time of the drowning being held legally responsible (including criminal and civil liability), I recall replying that it is advisable for everyone involved to take out liability insurance. In contrast, the latter is an issue occurring under emergency conditions, and while making references to the triage I had just heard about in Budapest, I said that, if the agent performing the rescue activities was the Japanese Red Cross Society, then the Society was regarded as having civil liability. When I later checked with a general insurance company, I think I was told that such insurance did not exist.

Since these events, major disasters have occurred in Japan and elsewhere. Although human-induced accidents must have occurred during

rescue efforts in these disasters, in reality there are virtually no proper legal compensation or insurance presuming such accidents in existence, and those that do exist are extremely insufficient.

My introductory remarks have been long, but I would now like to tell you my thoughts regarding the questions I was provided with in advance as well as the lectures of other speakers. Since the topics are so broad, please understand that my explanation will not follow a textbook-like logic.

At Times of Disaster, Can the Efficacy of the Law Be Suspended?

One question is, “There are various laws in Japan such as the Criminal Code, Civil Code, Medical Practitioners Act, Medical Service Act, and the Act on the Protection of Personal Information, but in the event of a major disaster affecting more than one-third of the Japanese Archipelago, such as that which occurred on March 11, 2011, do these laws no longer apply?” The answer to this is that, in the case that a certain law has been formulated and enacted, the law remains in effect as long as legal measures are not taken to suspend or abolish that law. In other words, even at times of disaster, please regard the Criminal Code, the Civil Code, and the Medical Practitioners Act as being alive.

Martial Law

Article 13 of the Meiji Constitution states that “The Emperor declares war, makes peace, and concludes treaties,” and Article 14 continues with “The Emperor declares a state of siege. (ii) The conditions and effects of a state of siege shall be determined by law.” Thus under this constitution, the efficacy of the law can be suspended as necessary in order to maintain and restore order. **Martial law was imposed at the time of the Great Kanto Earthquake of 1923 and the February 26 Incident of 1936.** Under the Meiji Constitution, “The Emperor” is the person who issues orders, and so the responsible agent is clear. (According to the “theory of the Emperor as an organ of government,” the Prime Minister (Home Minister controlling the police, Army/Navy Minister controlling the military) was the person to issue orders in practical terms.)

Special Measures for National Emergencies

When the current Constitution of Japan was established in 1946, the articles referring to martial law were dropped from the constitution and instead were incorporated into the 1947 Police Act under Chapter 7. “Special Measures for National Emergencies” (Authority of the Prime Minister). This was continued in Chapter 6. “Special Measures for Emergencies” of the 1954 Police Act. (Chapter 7 (2) of the Fire Service Act prescribes “Emergency Services,” and the “Act on Special Measures Concerning Countermeasures for Large-Scale Earthquakes” was established in 1978.) Accordingly, if the Cabinet and politicians were truly serious, they should have immediately declared special measures for a national emergency at the time of the March 11 earthquake disaster. Unfortunately, however, perhaps because the then-Prime Minister was unable to see the big picture, when the most crucial initial response activities were being carried out the government stood idly by, leaving the disaster zone uncontrolled. Despite the fact that the Cabinet, government, and legislative body needs to respond with a willingness to take full responsibility in situations such as this, it is extremely regretful and deplorable that they did no more than take the attitude of a commentator.

Volunteer Activities by NGO Specialists

Japan Medical Association Teams (JMAT) are emergency medical teams that are sent to assist relief efforts when major disasters occur in Japan. The teams are consisted of a physician and health professionals throughout the country, regardless of JMA members. You could say they are NGOs voluntarily carrying out emergency medical activities, and the acts they perform are literally volunteer activities.

When JMAT teams rushed to the aid for each affected area along the Sanriku Coast, in which confusion was at a peak and medical facilities had been destroyed and necessary pharmaceuticals were in short supply. **Under such conditions, the medical teams should do their utmost while considering how to provide support for people requiring medical needs in the affected areas. They should think “legal and interpretation problems will come later” and do their very best.**

This is because laws are created to be able to be applied in various situations, but there is no need to fulfill responsibilities that are impossible to perform.

Medical Error/Negligence Decisions Are Relative Evaluations

Another question was, “What should you do if a medical error occurs?” Whether or not an incident is a “medical error” is also related to what the physicians did under the circumstances they were given and what they could have done. **If a lawyer criticizes health professionals, saying that their actions were a medical error despite the health professional having done their best under the circumstances, then I think you can regard that lawyer as being ridiculous.** Of course, regardless of how busy they may be, if a physician prescribes (provides) the wrong dosage of a highly dangerous drug to a patient, mixes up patients and performs an unnecessary operation on a patient, or in other extreme cases, the criticism is warranted. However, such cases are extremely rare, and so we need not take up time discussing them here.

Is Keeping Medical Records Essential?

Another question asked was, “When providing emergency medical treatment to people who are ill or injured in a disaster zone, is it essential to keep medical records?” Unlike under normal conditions, there may be instances where it is not possible to bring paper or other materials for medical records. Not only this, I have heard that in some instances, few physicians had to examine between 100 and 200 people in a day. Under such circumstances, the question is whether to give priority to medical records or to patient examinations; the latter should be given priority, and so it cannot be helped if records cannot be kept. Records can even be written on notebooks or even memo paper, it does not matter. Another possibility would be to take notes in some form during the patient examination and then writing these up later when you have some time, and this is a desirable form of response for physicians, who are specialists. During the night at short-staffed hospitals, I have seen nurses writing on their wrists each time they performed a procedure, and so what is important is that you keep notes in some way.

Is Patient Information Permitted to Be Disclosed to a Third Party Through Cloud Computing?

In relation to the handling of charts and medical records, there was also a question about whether or not sharing patient information with a third party using new methods such as the “cloud computing” we saw demonstrated today was permissible for the purpose of treatment in emergency situations. This issue is also related to the Act on the Protection of Personal Information, but since before this and similar laws were established, physicians have had a duty of confidentiality, and similar issues have been debated in relation to this duty of confidentiality.

The duty of confidentiality is a classic duty common to physicians, persons of religion, and legal practitioners, but traditionally it has been deemed possible to exempt such professionals from this duty if it is necessary for the person involved or for society. While I do not know whether or not the basic patient information provided on the cloud computing can be called a “medical record” because I am not familiar with the actual situation, I do think that the information resources provided should be regarded as a kind of “medical record” and protected accordingly. However, since the sole purpose of sharing such information on the cloud computing is to save the patient in question, surely it would be possible to consider this as a justifiable reason for sharing the information and process the information constructively. Of course, there would be no justification for using the cloud computing to pass information to the curious mass media, and such a scenario is completely different from what we are discussing here. In any case, the issue of cloud computing is one that applies under both emergency and normal conditions, and so it needs to be discussed thoroughly over time.

Transitioning From Emergency to Normal Conditions

No matter what the disaster, the situations

requiring emergency measures converge and gradually change to a situation with some leeway both time-wise and human-wise. The process of transitioning to such a stage requires careful attention, and I recommend that steps are taken slowly and continuously, keeping in mind actions for normal situations, which differ from emergency situations.

In addition, under emergency conditions there is also something that I would like everyone to do as far as possible, and that is to avoid as far as possible making decisions alone when carrying out a proactive treatment of some sort. This is necessary both for self-protection and in terms of exercising wisdom.

Last but not least, there was a question concerning pharmaceuticals: “Does one medical team passing on left-over pharmaceuticals used in relief activities to the succeeding team violate the Pharmaceutical Affairs Act or go against the Medical Practitioners Act?” This is also an issue that applies to times of emergency, and asking in hindsight “Which law should be followed?” is far more ridiculous. Even in a situation where there are people in the position of being able to say, “Do it!” this does not mean there is no need for physicians’ efforts, and so in that sense I believe that you should carry out relief activities thinking “there is significantly broad leeway for discretion.”

Conclusion

My comments above may be called quite a rough discussion, but I believe that in at times of major disaster, one can only carry out relief activities focused on doing one’s very best under the given circumstances. Moreover, I am sure that many lawyers would support this way of thinking.

Finally, the American Medical Association has published *the Code of Medical Ethics* for more than 165 years, in which a subject on physician obligation in disaster preparedness and responses is mentioned. I would like to recommend medical professionals this guideline as well in considering the theme in this article.