

STUDENT CONTRIBUTION

Self-Diagnosing Medical Malpractice: How Japan's Physician Self-Reporting Procedures Undermine Legal Deterrence and Medical Care

Andrew N. Ackley*

All physicians face the risk of medical malpractice, but doctors in Japan confront the risk of criminal charges for professional negligence. In addition to the burden of criminal sanctions, Japan's Medical Practitioners Law requires physicians to report "unnatural deaths" – which include deaths potentially caused by medical malpractice – to police within twenty-four hours. The language of the rule leaves the physician's legal duty ambiguous as to the extent and content of reporting. This Comment examines the physician duty in three forms of its evolution. The first approach comes from a string of lower court cases that have emphasized the importance of the physician-patient relationship and extended the physician duty to investigation and reporting to the patient's family. This broad duty treads on constitutional self-incrimination. A second approach comes from Japan's Supreme Court's 2004 ruling that upheld the Medical Practitioners Law against constitutional scrutiny. The Court only minimally defined the physician duty, yet emphasized the physician's role in society in order to justify state control over medical practitioners. The Court's unrestrained reasoning sets up a slippery slope for state control over physicians and other private actors. A third approach to the physician duty, the 2007 proposal by Japan's Ministry of Health, Labor, and Welfare, may relieve the systemic malfunctions of the investigation and prosecution of malpractice, but the proposed investigation commission would also codify self-

* The author would like to thank Professor Louis Wolcher and the editors of the Pacific Rim Law & Policy Journal for their guidance. He would also like to thank his family and friends for their support through the writing process.

incrimination. Suspect legal and policy reasoning in this evolution of the physician duty has overextended physician obligations and hindered both the deterrent effect of Japan's malpractice laws and medical care for patients. A more limited role for physicians in criminal medical malpractice investigations will better balance the private rights of doctors and the public interest in quality healthcare.

1. Introduction

Japan is unique among medical malpractice regimes in that it imposes criminal—in addition to civil—liability for “professional negligence.”¹ Physicians are prosecuted criminally for negligent—as opposed to reckless or intentional—misconduct,² and sentenced typically to fines, license revocation, and much less often, prison terms.³

Physicians also carry the burden of reporting their own possible negligence, a burden that carries constitutional baggage given the possibility of criminal prosecution. Article 21 of Japan's Medical Practitioners Law requires physicians to report “unnatural deaths” to police within twenty-four hours of the death.⁴ Undefined by the Medical Practitioners Law,⁵ the term “unnatural death” remains murky,⁶ leading to confusion over its application.⁷ District and high courts have understood the physician duty to include investigation and reporting to the patient's family as to the cause of death, which is justified by the physician-patient relationship.⁸ In a landmark 2004 case, Japan's Supreme Court upheld a seemingly more limited reporting requirement with different rationale, painting a broad role for doctors in society.⁹ In August 2007, Japan's Ministry of Health, Labor, and Welfare (“Health Ministry”) formally established a

¹ Robert B. Leflar & Futoshi Iwata, *Medical Error as Reportable Event, as Tort, as Crime: A Transpacific Comparison*, 12 WIDENER L. REV. 189 (2005)

² *Id.* at 216.

³ *Id.* at footnote 115. See generally *Doctor Acquitted of Negligence in Girl's Death During Heart Surgery*, JAPAN WEEKLY MONITOR, December 5, 2005 [hereinafter *Doctor Acquitted of Negligence*]; Yasushi Tsukamoto, *Criminal Prosecution Arising From Medical Mishaps: A Japanese Perspective*, 24 MED. & L. 673 (2005).

⁴ Tsukamoto *supra* note 3, at 673-74. Various translations have also referred to the Article 21 requirement as “unusual deaths,” “suspicious deaths,” and “abnormal deaths.” See e.g. *Medical Practitioner Law case*, in KEISHU vol. 58, No. 4, 2003(A)No. 1560, available at <http://www.courts.go.jp/english/h/judgments/text/2004.04.13-2003-A-No.1560.html> (using “suspicious deaths”); Leflar, *supra* note 1, at 206 (using “unusual deaths”); *Doctors Took 11 Days to Report Abnormal Death to Police*, DAILY YOMIURI, Apr. 22, 1999, at 2 (using “abnormal deaths”) [hereinafter *Doctors Took 11 Days*]. The Medical Practitioners Law is also sometimes translated as the Physicians' Act. See Tsukamoto, *supra* note 3, at 673.

⁵ Bruce Wallace, *Japan's Police See No Evil*, LOS ANGELES TIMES, Nov. 9, 2007, at 1.

⁶ Fumio Tanaka, *Supreme Court Ruling a Warning to Doctors*, DAILY YOMIURI, Apr. 15, 2004, at 4.

⁷ Tsukamoto, *supra* note 3, at 675, 677.

⁸ Yutaka Tejima, *Recent Developments Concerning a Doctor's Legal Duty of Explanation after Medical Treatment in Japan*, 40 KOBE UNIV. L. REV. 87 (2007).

⁹ JAPAN CONST. art. 38, available at <http://www.courts.go.jp/english/judgments/text/2004.04.13-2003-A-No.1560.html> [hereinafter *Constitution*] (last visited on Aug. 1, 2008).

“neutral” government entity, an “investigation commission” separate from the police, to investigate causes of death.¹⁰ Unlike the Health Ministry’s current power, the investigation commission would have the authority to compel physicians to submit to questioning in order to prevent recurrences of negligent medical care,¹¹ take swift punitive action against physicians,¹² and provide investigation reports to police.¹³

Suspect legal and policy reasoning permeates various conceptions of the physician duty through the course of its evolution. All conceptions of the physician duty overlook or dismiss the notion that the protection of silence against self-incrimination is a fundamental constitutional right with inherent societal benefits.¹⁴

Doing away with the application of the criminal system to medical malpractice, however, would be a misstep. Aside from the important social function criminal law serves in Japan,¹⁵ tort-oriented systems such as the United States often deny potential plaintiffs access to remedies and therefore lack accountability and deterrence.¹⁶ Japan’s system does need reform, however.

This Comment argues that suspect legal and policy reasoning in the evolution of the physician duty has put physicians in an inequitable bind that undermines the deterrent purpose of criminal law and the practice of medicine. Lower court decisions, while grounded in contract law, have overlooked the imposed self-investigation standard that pits doctors against themselves. The Supreme Court’s 2004 decision may appear to be supported by precedent, but the Court’s reasoning for obligating physicians to society is both unrestrained and unfounded. While the Health Ministry’s proposal would eliminate procedural barriers to punitive medical review, its mandatory questioning for use in criminal prosecution merely codifies self-incrimination. Looking forward, a less extensive reporting requirement will better balance punitive review of medical care with the rights of doctors and the needs of patients.

Part II of this Comment explains the history of Japan’s criminal medical malpractice system and reporting laws. Part III reveals the flaws in the various legal interpretations of the physician duty. Part IV argues that a more limited role for physicians in reporting possible malpractice would avoid over-deterrence, which undermines both the goals of malpractice law and the practice of medicine.

¹⁰ *Panel To Require Hospitals to Report Unnatural Deaths to New Body*, JAPAN ECONOMIC NEWSWIRE, Aug. 10, 2007 [hereinafter *New Body*].

¹¹ *Id.*

¹² *Bill Targets Malpractice at Hospitals*, DAILY YOMIURI, Jul. 17, 2005.

¹³ *New Body*, *supra*, note 10.

¹⁴ Tsukamoto, *supra* note 3, at 678.

¹⁵ Leflar, *supra* note 1, at 192.

¹⁶ Matthew C. Sullivan, *Tort reform: Mississippi’s Tort Reforms as Compared to Other Jurisdictions Abroad—A Sensible Treatment Protocol for the U.S. Tort System Ills or Not?*, 19 TEMP. INT’L & COMP. L.J. 507, 529 (2006).

2. Japan Imposes Criminal Liability for Medical Malpractice Yet Struggles to Uniformly Define the Physician Reporting Obligation

Japan employs strict yet ill-defined reporting requirements to enforce its criminal professional negligence charge for medical malpractice. Part A describes generally the Japanese healthcare system and the laws pertaining to it. Part B outlines how Japan's lower courts have extended a physician duty to report unnatural deaths. Part C addresses the Supreme Court's ruling as to the constitutionality of the Medical Practitioners Law. Lastly, Part D defines the practical difficulties of medical malpractice prosecution in Japan and the proposed administrative solution.

A. Japanese Law Imposes Criminal Liability for Medical Malpractice and Requires Physicians to Report Their Potentially Criminal Behavior

To put medical negligence in context, healthcare in Japan meshes free-market and state-controlled policies. The medical system is organized as a fee-for-service system where patients may select their physician and physicians may select their employer.¹⁷ The Health Ministry regulates fees, which are uniform nationwide,¹⁸ while universal health insurance covers treatment for injury sustained by medical error.¹⁹

Japanese negligence law supports both civil and criminal actions for medical malpractice. Prosecutors pursue criminal liability with the charge of "professional negligence causing death or injury,"²⁰ a charge not found in U.S. criminal law.²¹

The standard of care is measured by the practices expected by the local medical environment surrounding the medical institution.²² To be convicted of negligence, the doctor's conduct must fall below the standard of care and the substandard conduct must have caused harm to the patient.²³

¹⁷ Robert B. Leflar, *Informed Consent and Patients' Rights in Japan*, 33 HOUS. L. REV. 1, 36-37 (1996).

¹⁸ *Id.*

¹⁹ Dana Derham-Aoyama, *U.S. Health Care Reform: Some Lessons From Japanese Health Care Law and Practice*, 9 TEMP. INT'L COMP. L.J. 365, 380 (1995)

²⁰ Leflar, *supra* note 1, at 216. Considerations in prosecuting include the seriousness of the harm, the egregiousness of the medical professional's acts or omissions, the clarity or proof of negligence, and the medical personnel's outreach to provide compensation and apologies to the injured. *Id.* at 220.

²¹ Leflar, *supra* note 1, at 216

²² Tejima, *supra* note 8, at 87.

²³ Leflar, *supra* note 1, at 209.

Civil and criminal actions continue to rise in Japan. The overall incidence of civil actions, however, is low compared to countries such as the United States,²⁴ where criminal prosecutions are usually reserved for reckless—knowing disregard for patient safety—or intentional acts of harm.²⁵ Still, civil litigation in Japan has doubled between 1995 and 2005. Criminal cases have increased at an even greater pace, nearly tenfold between 1999 (10 cases) and 2006 (98 cases).²⁶

Criminal prosecution for medical malpractice serves a distinct purpose in Japanese society. It arguably creates the most fear,²⁷ stemming largely from the public attention surrounding medical prosecutions,²⁸ and serves an important public accountability function.²⁹ Victims of negligence often turn to criminal prosecution when they feel that civil litigation does not sufficiently punish the physician or when they want to know the truth about a medical outcome.³⁰

Punishment is more severe, and prosecution is more likely, where it appears that the doctor is attempting to cover up mistakes.³¹ The Health Ministry has established the Medical Ethics Council, which examines criminal negligence and determines punishments, including mandatory training, suspension, or revocation of medical licenses.³² Other sanctions include imprisonment—generally, around one year—probation, or fines.³³

The most ominous aspect of criminal medical malpractice prosecutions, however, is the reporting requirement. Article 21 of Japan's Medical Practitioners Law requires doctors to notify the police within twenty-four hours of a patient death that is determined by the doctor to be "unnatural."³⁴ The ambiguity as to the extent of reporting has not gone unnoticed. Courts and administrative agencies have set differing parameters with differing rationales.

²⁴ Leflar, *supra* note 1, at 198-99.

²⁵ MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 76 (2002). *Id.* at 47.

²⁶ New Body, *supra* note 10.

²⁷ Leflar, *supra* note 1, at 215.

²⁸ *Id.* at 216.

²⁹ *Id.* at 192.

³⁰ Leflar, *supra* note 1, at 216, 221.

³¹ Leflar, *supra* note 1, at 216, 221; *Malpractice and Coverups*, JAPAN WEEKLY MONITOR, Jul. 8, 2002; LEAD: 4 defendants divided over accidental death at hospital, JAPAN WEEKLY MONITOR, Sept. 4, 2000.

³² See *Health Ministry Plans to Retrain Incompetent Docs*, DAILY YOMIURI, Feb. 21, 2005, at 1 [hereinafter *Retrain Incompetent Docs*].

³³ Tsukamoto, *supra* note 3, at Footnote 115.

³⁴ *Id.* at 673-74.

B. Japan's Lower Courts Reason That the Physician-Patient Relationship Supports Extension of the Physician duty to Investigate and Report on Unnatural Deaths

Japanese courts have trended toward an extensive physician reporting obligation, which is justified by the physician-patient relationship.³⁵ In 1992, a Hiroshima district court laid the foundation for the physician's obligation to a patient's family.³⁶ It found that although a doctor's duty to explain a patient's death is not enumerated within the medical contract itself, a family member's expectation to hear an explanation still deserves legal protection.³⁷ The court reasoned that physicians are in the best position to explain the death.³⁸

Later decisions confirmed Hiroshima's 1992 holding and attempted to supplement it. A 1997 Tokyo district court decision suggested that doctors have a duty to "clarify" the death as much as possible to improve public health and medicine.³⁹ The Tokyo High Court limited this ruling in 1998, however, holding that the physician duty did not extend to elucidation in the way the district court had described.⁴⁰ The court found that only if the family of the decedent makes a request for explanation must doctors comply.⁴¹

The most recent court decisions seem to put society's interest in an extended physician duty above disclosure protection, finding legal justification in contract law obligations. In 2004, just months before the Supreme Court's decision, the Tokyo district court again faced questions of a doctor's duty and found the physician-patient contract to be a quasi-consignment contract,⁴² one in which physicians have an obligation to perform services to a certain standard of care.⁴³ Although the patient contract technically expires at the time of a patient's death, doctors must explain the cause of injury to the patient, or the cause of death to the family, as part of the medical contract.⁴⁴

³⁵ Courts in many cases have extended the physician duty while reviewing civil lawsuits and not criminal prosecutions. *See generally* Tejima, *supra* note 8. However, the same conduct by a doctor may entail both civil and criminal suits. *See id.* at 90. Courts therefore change the scope of the physician duty for civil and criminal matters at the same time, and compliance with the physician duty may apply both to civil and criminal proceedings.

³⁶ Tejima, *supra* note 8, at 88.

³⁷ *Id.*, at 88.

³⁸ *Id.*

³⁹ *Id.* at 89.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 90.

⁴³ *Id.* at 89.

⁴⁴ *Id.* at 90.

The court further found that Article 21 suggested that doctors play a public role in serving society, in addition to individual patients.⁴⁵

On appeal, the Tokyo High Court affirmed, finding that the contractual obligations of hospitals included not only the right to proper diagnosis and treatment, but to timely explanation.⁴⁶ The court fortified its holding with public policy arguments, explaining that because hospitals and doctors have a monopoly on medical information, they have a joint duty to divulge that information to provide an explanation to the patient or the patient's family.⁴⁷ A Kyoto district court mirrored Tokyo's holding in 2005.⁴⁸

Other courts have expressed a similar holding with slight differences, emphasizing the good-faith requirement inherent to the physician-patient contract. For example, a 2004 Saitama district court decision found that a hospital's duty is rooted in the good-faith requirement of contract law.⁴⁹ Good faith obligates a physician to act within the meaning of a contract, whether a contract is articulated specifically or not.⁵⁰ In the case of physicians, good faith requires taking care of the patient even after death, which implies a duty to disclose the cause of death to surviving family members.⁵¹

The legal extent of a physician's duty to report the cause of death to a patient's family is now relatively uniform in Japanese courts, bolstered by public policy and good-faith contract principles. Japan's Supreme Court in 2004 seemed to reinforce the lower court extension of the physician reporting obligation, yet did not specify the precise requirements of unnatural death reporting.

C. The Japanese Supreme Court has Upheld a Limited Physician Reporting Duty Against Constitutional Scrutiny by Emphasizing the Physician's Role in Society.

In its 2004 decision, Japan's Supreme Court addressed a challenge to Article 21 of the Medical Practitioners Law under Article 38(1) of Japan's Constitution. Article 38(1) provides that "No person shall be compelled to testify against himself."⁵² The Supreme Court explained that no person can be compelled to "state matters" for which the person could be held criminally responsible.⁵³ In its landmark Medical Practitioners

⁴⁵ *Id.*

⁴⁶ *Id.* at 91.

⁴⁷ *Id.*

⁴⁸ *Id.* at 92-93.

⁴⁹ *Id.* at 92.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Supra* note 9.

⁵³ *Medical Practitioners Law case, supra* note 4.

Law case the Supreme Court upheld a one-year prison sentence for the former director of Hiroo Hospital for failure to report an instance of malpractice that resulted in the death of a woman in 1999.⁵⁴

Responding to the doctor's asserted self-incrimination protections, the Court construed the statute in a way that seemed to reduce self-incrimination conflict.⁵⁵ The Court interpreted Article 21 to require only that a doctor report "anything suspicious" in a postmortem inspection.⁵⁶ This is significant to Article 38(1) for two reasons. First, Article 21 does not require the physician to state matters that might amount to a criminal act, such as the relationship between the reporting physician and the dead body.⁵⁷ Second, the reporting physician need not be the same physician that treated the patient, meaning that reporting is not necessarily self-incrimination.⁵⁸

While its narrow statutory construction argument may have sufficed, the Court went on to justify physician reporting more broadly. Japan's highest court explained that the obligation to report should be construed as an administrative obligation to assist police with clues in a criminal investigation.⁵⁹ As the argument goes, physicians are licensed not only to practice medicine in order to affect people's lives, but also to assume a role of social responsibility to the public.⁶⁰ The obligation to report is "significantly necessary for the public interest" in protecting society from crime and investigating after a crime has occurred.⁶¹

Finally, Japan's highest court found no unjustified Article 38 conflicts. Even if Article 21 requires physicians to report "clues" to authorities that would expose a doctor's own crime, the imposition of such a burden is acceptable as a "reasonably-grounded" burden of holding a medical license.⁶² The Court's public-policy logic paralleled a Supreme Court Grand Bench case in 1962 involving a hit-and-run accident.⁶³ There, the defendant claimed that a requirement to report an accident to the police violated his rights against self-incrimination.⁶⁴ Denying the defendant's claim, the Court held that public interest took precedence over his right to be free from self-incrimination, and thus he was required to report the accident.⁶⁵ The Court, as in the Medical Practitioners

⁵⁴ Tanaka, *supra* note 6.

⁵⁵ *Medical Practitioners Law case*, *supra* note 4.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Tanaka, *supra* note 6.

⁶⁴ *Id.*

⁶⁵ *Id.*

Law case, held that police should be informed of accidents to prevent increased damage.⁶⁶ Protection of the general public, therefore, is paramount to constitutional privileges of the few.

D. The Health Ministry Offers a Procedural Solution for Investigating Medical Malpractice More Effectively than Police and Prosecutors

The actors in Japan's criminal justice system often have difficulty proving criminal medical malpractice.⁶⁷ First, the complexity of medical investigation and the expertise necessary for its prosecution make police and prosecutors wary of pursuing medical claims.⁶⁸ Second, inconsistent availability and performance of medical examiners contributes to the difficulty in meeting evidentiary burdens.⁶⁹ The Health Ministry's recent procedural changes, however, reduce the burden on police and prosecutors.⁷⁰

Police in Japan are not accustomed to dealing with medical issues and have little medical expertise to approach such factually complex claims.⁷¹ The high burden of proof—beyond a reasonable doubt, the intricacies of causation, and the community-defined standard of care add to the burden of busy prosecutors, providing little incentive to take on medical cases.⁷²

Japan's deficient medical examiner system exacerbates the problem of ineffective investigations.⁷³ Only four of forty-seven prefectures in Japan have a medical examiner and only fifteen percent of unnatural deaths in Japan occur in those four prefectures.⁷⁴ On the whole, Japan performs autopsies on only nine percent of all "unnatural" or "suspicious" deaths compared to twenty to one-hundred percent in other industrialized nations,⁷⁵ making Japan's autopsy rate the lowest in the developed world.⁷⁶

One explanation for a low autopsy rate and errors is Japan's cultural preference for determining the cause of death by sight or touch as opposed to internal autopsy.⁷⁷ More than ninety percent of doctors working for police, however, feel uneasy about

⁶⁶ *Id.*

⁶⁷ *Malpractice and Coverups*, *supra* note 31.

⁶⁸ Leflar, *supra* note 1, at 217.

⁶⁹ Tsukamoto, *supra* note 3, at 678.

⁷⁰ Leflar, *supra* note 1, at 222-23.

⁷¹ *Id.*, at 214-15; Tsukamoto, *supra* note 3, at 677-78.

⁷² *Malpractice and Coverups*, *supra* note 31.

⁷³ Tsukamoto, *supra* note 3, at 677-78.

⁷⁴ *Id.* at 678.

⁷⁵ *Autopsy budgets vary widely, poll shows / Faulty system could endanger public health*, DAILY YOMIURI, Jul. 9, 2007 [hereinafter Budgets].

⁷⁶ *Autopsy rate lowest in developed world*, DAILY YOMIURI, May 17, 2007.

⁷⁷ *Corpse checks failing to detect killings*, *supra* note 80.

reporting the cause of death without a full examination.⁷⁸ The low autopsy rate and the related low reporting rate is unlikely to prevent future crime and medical accidents,⁷⁹ meaning that the examiner system itself may fail its purpose in detecting unnatural deaths.⁸⁰

Beginning in 2005, Japan's Health Ministry attempted to resolve the procedural shortcomings in effecting criminal medical malpractice.⁸¹ In August 2007 a Health Ministry panel made up of lawyers, physicians, and relatives of victims of medical accidents formally agreed to require medical institutions to report fatal medical accidents to a "neutral" third-party investigation commission.⁸² The investigation commission will look into the causes of deaths by conducting autopsies, interviewing personnel, and checking medical records "to prevent recurrences" of medical malpractice.⁸³ Health Ministry panel members agreed to allow relatives of those who die in medical accidents to use the reports in civil and criminal actions.⁸⁴ The Health Ministry aims to create a legal right "to compel doctors to submit to questioning" in order to swiftly take punitive action.⁸⁵

This function is Japan's first attempt at external medical peer review.⁸⁶ Health Ministry officials plan to submit a bill to revise the Medical Practitioners Law to an ordinary Diet session next year.⁸⁷ They plan to formalize recommendations for the "medical accident investigation commission" ("investigation commission") by the end of 2007 and have the system fully operational by 2010.⁸⁸

In sum, Japan's reluctant police and ill-equipped medical examiners make prosecuting the professional negligence charge a difficult task. The Health Ministry's proposal offers an administrative solution to the shortcomings of medical malpractice criminal procedure, but also raises concerns of self-incrimination. Japan's system remains hindered by various courts' legal and policy arguments that overextend physician duties, undermining criminal malpractice law and the practice of medicine.

⁷⁸ *Docs pan cause-of-death check*, DAILY YOMIURI, May 22, 2007.

⁷⁹ Tsubasa Ogawa and Kohei Koizumi, *Sloppy forensic system questioned / Autopsy rate for unnatural deaths lower than 10%; new doctors shunning field*, DAILY YOMIURI, May 21, 2007 [hereinafter, Sloppy Forensic System].

⁸⁰ *Corpse Checks Failing to Detect Killings*, DAILY YOMIURI, May 21, 2007.

⁸¹ Leflar, *supra* note 1, at 222-23.

⁸² New Body, *supra* note 10.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Bill Targets Malpractice*, *supra* note 12. Traditionally, physician involvement has been voluntary. *See id.*

⁸⁶ Leflar, *supra* note 1, at 223-24.

⁸⁷ New Body, *supra* note 10.

⁸⁸ *Id.*

3. Suspect Legal Reasoning Has Overextended the Physician Duty in the Course of its Evolution

Suspect legal reasoning bolsters the overextension of the physician duty in all its conceptions. First, the lower courts' requirement that doctors investigate their own malpractice and report their findings potentially violates Japan's constitutional self-incrimination protections. Second, though the physician reporting duty may be grounded in existing law, the Supreme Court goes too far in upholding the Medical Practitioners Law with an expansive physician obligation to society. Lastly, although the Health Ministry's proposed investigation commission may clarify the physician role by limiting it, the new procedure demands that physicians incriminate themselves by providing evidence of potentially criminal conduct. Thus, the physician reporting duty has been overextended throughout its evolution with differing legal and policy justifications that do not hold up to scrutiny.

A. Lower Courts First Overextended the Physician Duty to Require Self-Investigation and Reporting in Spite of Criminal Law Repercussions

Many lower court cases before the Supreme Court's 2004 case have extended the physician duty beyond reporting and into self-investigation and disclosure. The emphasis on the importance and privity of the physician-patient relationship is sound both in law and in policy. Given the applicability of criminal penalties to physician reporting, however, the extensive duties created by Japan's lower courts seem to tread on Article 38 of Japan's Constitution.

The contractual relationship between physician and patient arguably creates an even weightier obligation to report than hit-and-run law or the Medical Practitioners Law—reviewed later by the Supreme Court—because parties to a contract have specific obligations to one another.⁸⁹ Treatment that does not involve death implies a result that continues as part of the care of the patient.⁹⁰ Given that the doctor contracts, impliedly at least, to protect the health of the patient,⁹¹ the physician must inform patients of medical results so that patients may have the most complete understanding possible of their health condition.⁹² Although the Tokyo High Court has suggested that the

⁸⁹ Tejima, *supra* note 8, at 88.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

physician-patient contract expires upon death,⁹³ abiding by such a law would prematurely end a physician's responsibility to the patient.⁹⁴ A patient's death, then, would incur less physician responsibility than mere injury.⁹⁵ Courts have conclusively rejected this possibility as conflicting with the good-faith requirements of contract law.⁹⁶ This contractual justification has allowed courts to extend the physician duty to one of investigation and reporting to the patients' families,⁹⁷ a duty that treads on the Japanese constitution.

Self-incrimination privileges protect suspects from a form of legal entrapment. The Supreme Court has found that persons cannot be forced to "state matters" for which they might be held criminally responsible.⁹⁸ Legally forcing a person to submit to questioning results in two possibilities. First, suspects could answer the questions and incriminate themselves, aiding their conviction. Alternatively, suspects could violate the law by not submitting to questions.⁹⁹ Self-incrimination privileges protect individuals from this bind.¹⁰⁰

Lower courts have put physicians in a similar lose-lose situation, and arguably have encroached on physicians' constitutional rights. A physician must report the cause of death to the victim's family,¹⁰¹ which may include an admission of fault.¹⁰² Doctors themselves prepare the external report they make for the victim's family, and as a result the contents therein constitute admissions.¹⁰³ Alternatively, physicians that do not report the cause of death accurately may appear to be covering up malpractice.¹⁰⁴ Thus, the law forces physicians to choose between admitting criminal conduct and openly violating their duty to report to patients' families.¹⁰⁵

While the circumstances physicians face do not match the prototypical instance of self-incrimination, the potential unfairness that underlines the privilege remains. Due to the fact that only breach-of-contract laws and not criminal penalties apply to the extensive investigation and reporting requirement,¹⁰⁶ physicians do not face the typical

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 90.

⁹⁶ *Id.* at Part II.B.

⁹⁷ *Id.*

⁹⁸ *Medical Practitioners Law case*, *supra* note 4.

⁹⁹ Tejima, *supra* note 8, at Part II.B.

¹⁰⁰ Tsukamoto, *supra* note 1, at 678.

¹⁰¹ Tejima *supra* note 8, at Part II.B.

¹⁰² Tsukamoto, *supra* note 1, at 130.

¹⁰³ *Id.* at 678.

¹⁰⁴ *Doctors Took 11 Days*, *supra* note 4.

¹⁰⁵ *Malpractice and Coverups*, *supra* note 31.

¹⁰⁶ Tejima, *supra* note 8.

crime-if-you-do, crime-if-you-don't bind. Failure to report the cause of death to the patient's family results not in a crime but in breach of contract. These cases also do not require physicians necessarily to "testify" against themselves in a courtroom or in an interrogation room,¹⁰⁷ as explicitly prohibited in Article 38.¹⁰⁸

To end analysis here would overlook the unfairness innate to the self-reporting practice. Incrimination for doctors investigating and reporting their criminal negligence is perhaps more subtle than testimony in court that risks criminal conviction, but is certainly no less menacing. Contract law, although not criminal itself,¹⁰⁹ forces physicians to actively work in furtherance of their own possible prosecution. More than merely telling the truth or not evading questioning, Japanese physicians must openly admit to criminal conduct to a deceased patient's family.¹¹⁰ These lower courts ask physicians not just to "state matters" for which they may be criminally prosecuted, as the Supreme Court later defined Article 38 protections, but to investigate and report in the same way police would.¹¹¹

As previously explained, contractual relationships create stronger obligations than those relationships not in privity. In overlooking Article 38's prohibition of self-incrimination, however, these district and high courts seem to presume that the implied elements and the obligations of the contract overcome constitutional privileges in criminal cases where physician disclosures also apply.¹¹² This suggests that a good-faith execution of the contract requires what amounts to a waiver of the right to protect oneself from criminal penalties.

This implicit waiver wrongly, even if inadvertently, ties a civil contract law requirement to criminal punishment. A party to a contract can expect to assume the risk of financial detriment in promising to execute a contract in good faith. The contract between physician and patient is, after all, a kind of business contract, and remedies for failure to perform call for monetary compensation.¹¹³ Parties to a business contract, however, do not assume the risk of losing the ability to protect themselves against criminal prosecution. Japanese law criminalizes the initial breach—negligent medical care—and failure to comply with the twenty-four hour reporting requirement of the Medical Practitioners Law.¹¹⁴ It makes little sense then, that physicians would lose

¹⁰⁷ *Id.*

¹⁰⁸ *Constitution*, *supra* note 9.

¹⁰⁹ *Tejima*, *supra* note 8, at 87.

¹¹⁰ *Id.*

¹¹¹ *Tejima supra* note 8, at Part II.B.

¹¹² *Tejima*, *supra* note 8, at 95.

¹¹³ *Id.* at 89, 90, 93, 95.

¹¹⁴ *Tejima supra* note 8, at Part II.A.

criminal protection rights for violating only civil contract law in failing to investigate and report to the deceased patient's family, as required by these lower courts.

Furthermore, because criminal sanctions do not apply to the investigation and reporting requirements that stem from contract law,¹¹⁵ physicians put themselves in more jeopardy by reporting than if they remain silent. The fact that the physician may have already breached good faith performance of the contract with negligent medical care only adds incentive to not report the cause of death to the patient's family.

B. The Supreme Court Avoided Constitutional Conflict by Narrowing Article 21 and Overextending the Physician Duty to the Public

In the *Medical Practitioners Law* case of 2004, Japan's highest court limits the physician duty stemming from Article 21 while it expands the physician obligation to society.¹¹⁶ The Court averts constitutional conflict in two ways. First, it explains that Article 21 does not require physicians to report their relationship to the examined body, where guilt of negligence may be established.¹¹⁷ The Court supports this argument with hit-and-run precedent.¹¹⁸ This reasoning for averting constitutional conflict seems to suggest that a more extensive obligation may violate Article 38 self-incrimination protections. Second, the Court changes course from its initial implication by projecting a broad role for physicians in society with public-first reasoning.¹¹⁹ The unrestrained policy rationale of the Court leaves its ruling open for broad application to control doctors and other pseudo-state actors.

The Supreme Court's decision first avoided constitutional conflict by narrowing the physician reporting duty under the *Medical Practitioners Law*. The Court explained that the reporting requirement does not necessitate that a physician report the relationship between the physician and the examined body,¹²⁰ in other words, whether the examining physician treated the patient, and if, so how. This limit allows a physician to report a result without having to report the source of the result, which is where guilt may be established.¹²¹ By reporting only the fact of an unnatural death, the *Medical Practitioners Law* does not require physicians to "state matters" for which they

¹¹⁵ Tejima, *supra* note 8

¹¹⁶ *Medical Practitioners Law case*, *supra* note 4.

¹¹⁷ *Id.*

¹¹⁸ Tanaka, *supra* note 6.

¹¹⁹ *Medical Practitioners Law case*, *supra* note 4.

¹²⁰ *Id.*

¹²¹ Law Library— American Law and Legal Information, *Self-Incrimination —Further Readings*, available at <http://law.jrank.org/pages/10135/Self-Incrimination.html> (last visited Dec. 28, 2007).

may be held criminally responsible.¹²² The Court concedes these procedural limitations of Article 21 to avoid a direct conflict with the Japanese constitution.¹²³

The Supreme Court's hit-and-run legal analogy is reasonably comparable to physician reporting.¹²⁴ Hit-and-run law shares similar limited duties. It too does not require an admission of fault per se but requires merely an admission of a result, the fact of an accident. Effectively, however, car accidents will always involve reporting some fault,¹²⁵ whereas not all reported deaths would include fault merely for being unnatural.¹²⁶ Physician reports that require even less incriminating information, therefore, should logically not amount to self-incrimination.

Some policy justifications for hit-and-run law also advance the argument for limited physician reporting. Like a requirement to report the fact of property damage, which protects property when the owner is absent, Article 21 protects patients, post-mortem, who are harmed when incapacitated.¹²⁷ Additionally, reporting the fact of unnatural death prevents "increased damage" to future patients by exposing possible substandard care and educating physicians about risks of treatment.¹²⁸

In spite of the Court's holding and reasoning for a limited reporting duty under the Medical Practitioners Law, it declined an opportunity to respond to contract law justifications for the more extensive physician duty laid out by lower courts.¹²⁹ The Supreme Court's limitation of the reporting duty to the fact of unnatural death, to avoid constitutional conflict, implies that reporting the relationship to the body would, or at least may, constitute an Article 38 violation.¹³⁰ The contractual requirement that physicians explain the cause of an unnatural death presumes that physicians report their relationship to the deceased patient and their contribution to the patient's death.¹³¹ The Court thus implicitly rejects the lower courts' holdings in its narrow conception of the Medical Practitioners Law.¹³²

¹²² *Medical Practitioners Law case*, *supra* note 4.

¹²³ *Id.*

¹²⁴ Tanaka, *supra* note 6.

¹²⁵ Free Advice, Accident Law—Auto Accidents—Auto Accident Articles at 7, available at <http://accident-law.freeadvice.com/auto/car-accident-claim-fault.htm> (last visited Dec. 28, 2007).

¹²⁶ Deaths could be from crime in society or merely a false alarm. See Tsukamoto, *supra* note 3, at 675, 678.

¹²⁷ *Doctors Took 11 Days*, *supra* note 4; *Malpractice and Coverups*, *supra* note 31.

¹²⁸ James K. Carroll, Linda A. Klein, Steven B. Lesser, *Report on Contingent Fees In Medical Malpractice Litigation*, in AMERICAN BAR ASSOCIATION TORT TRIAL & INSURANCE PRACTICE SECTION, Sept. 20, 2004, available at <http://www.abanet.org/tips/contingent/MedMalReport092004DCW2.pdf>. For details, see *Sloppy Forensic System*, *supra* note 80.

¹²⁹ *Medical Practitioners Law case*, *supra* note 4.

¹³⁰ Tsukamoto, *supra* note 3, at 679 (mentioning the Burial Act of Hamburg).

¹³¹ Tejima, *supra* note 8.

¹³² *Medical Practitioners Law case*, *supra* note 4.

The Supreme Court does not directly address, however, whether other legal justifications, such as contract law, may yield different constitutional results. Instead of clarifying whether reporting only the event of unnatural death is dispositive of constitutionality in all cases, the Court focuses on a broad physician obligation to the general public. Its emphasis on there being no unjustified constitutional conflict seems to undermine the implied dispositive issue in reporting only the fact of unnatural death and implicitly support the extended duties found prior in lower courts.¹³³

While the Court narrowly defines the Medical Practitioners Law to uphold its constitutionality, it also broadly construes the physician's obligation to society, leaving a slippery slope for later cases to capitalize on this constitutional loophole. The Court assigns doctors a public-service function that becomes an "administrative" role partly due to the requisite licensing, and describes the reporting obligation as a "reasonably grounded" burden of a medical license.¹³⁴

Physicians do not appear to fit the public-function mold of an average public servant, however. Although fees are controlled and uniform throughout Japan, physicians are free to choose their employer,¹³⁵ free to choose their field of practice,¹³⁶ and free to determine how many patients to take.¹³⁷ Doctors serve at both public and private hospitals.¹³⁸ This level of independent choice strongly suggests that physicians are not properly considered administrative actors who would be subject to more governmental control.

The Supreme Court's administrative umbrella is useful, nevertheless, because it provides two related legal bases for sidestepping Article 38 protection. First, by holding that doctors as licensed professionals submit to a role of social responsibility, the Court implies that physicians waive certain individual rights.¹³⁹ Doctors arguably waive their self-incrimination privileges in choosing their profession. Consequently, when a physician, through licensing, takes on the "reasonably grounded" burden of putting society ahead of individual Article 38 rights, the physician is not compelled to testify and therefore falls outside of Article 38 protections.¹⁴⁰ Physicians choose to be licensed, choose to waive their privilege, and thus choose to take on the risk of self-incrimination prescribed by the state.¹⁴¹

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Leflar, *supra* note 17, at 36-37.

¹³⁶ *Id.* at 37-38.

¹³⁷ *Id.*

¹³⁸ *Id.* at 98.

¹³⁹ *Medical Practitioners Law case, supra* note 4.

¹⁴⁰ Constitution, *supra* note 9.

¹⁴¹ *Medical Practitioners Law case, supra* note 4.

This reasoning parallels that of lower courts' implied waiver principle, with one important difference: medical licenses create an obligation to the public through the state.¹⁴² The contractual privity, then, lies between the doctor and the state rather than the doctor and any particular patient. The physician-state relationship more naturally overlaps criminal procedure with a state license because, unlike any individual patient, the state may criminalize and prosecute conduct as a remedy. This possibility makes it somewhat more reasonable that physicians assume that risk in contracting with the state.

The Supreme Court, however, has placed self-incrimination rights on a slippery slope. The Court's declaration of the "reasonably grounded burden," which implies that there are no unjustified constitutional conflicts, demonstrates the Court's power to supersede supposedly immutable individual constitutional rights so long as those individuals assumed a burden of responsibility or privity with the state.¹⁴³ Some degree of control over physicians may be justified. By not limiting its ruling, however, and offering no legal justification for its policy-oriented balance analysis between public need and individual rights,¹⁴⁴ the Court sets a dangerous precedent for control of individuals and manipulation of constitutional protections.¹⁴⁵

C. The Supreme Court's 2004 Ruling Failed to Restrain Later Conceptions of the Physician Duty

Both court and administrative law after the Supreme Court's decision demonstrate the impact of the Court's unrestrained reasoning. Lower courts have bolstered their previous reasoning with public policy logic similar to the Supreme Court's 2004 holding. Additionally, the Health Ministry's administrative solutions to medical malpractice investigation may limit the physician's role, but also codify self-incrimination.

In the aftermath of the Supreme Court's decision, lower court rationale for reporting in the physician-patient contract has continued.¹⁴⁶ The most recent decisions have reinforced physician-patient contract obligations with the Supreme Court's emphasis on the obligation to the public.¹⁴⁷ Thus, in the battle between the Supreme Court's dichotomous arguments, the public duty reasoning seems to have triumphed. Lower

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ For explanation of the influence of Japanese courts, see Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability?*, 43 UCLA L. REV. 635 (1996).

¹⁴⁶ Tejima, *supra* note 8, at 91-93.

¹⁴⁷ *Id.*

courts continue to ignore the overlap of the Medical Practitioners Law and the physician-patient contract at the criminal law juncture.¹⁴⁸ The Supreme Court's reasoning, therefore, and its failure to address lower court rulings, have further blunted the enforceability of physicians' self-incrimination rights.

The Health Ministry's proposed amendments to the Medical Practitioners Law may resolve the ambiguities in reporting unnatural deaths left unanswered by the Supreme Court, and may relieve the procedural barriers of the current system.¹⁴⁹ However, they would also codify self-incrimination, a possibility left open by the Supreme Court's unrestrained approval of the "reasonably grounded burden" of medical practitioners. While the investigation commission would investigate unnatural deaths instead of physicians, doctors would be compelled by law to speak to these "third-party" officials.¹⁵⁰ It remains to be seen if this requirement would have any restrictions. Because the Health Ministry's stated purpose is to expedite investigative and punitive measures, and because the Health Ministry declares the investigation commission a "neutral" party,¹⁵¹ it is entirely possible that physicians will be forced to reveal any and all information upon request. The "third-party" government body's reports would then be readily released for purposes of criminal investigation.¹⁵² Thus, while physicians would not be forced to investigate their own crimes, as under the lower court decisions previously explained, they would be forced more directly to incriminate themselves with statements. The Health Ministry's new laws therefore seem to have the side effect of expediting self-incrimination, in addition to investigation and punishment.

In sum, genesis of the physician duty to report and investigate unnatural deaths demonstrates various suspect means to the same inequitable end. Lower courts have extended the physician duty under contract law and public policy surrounding the physician-patient contract. The Supreme Court's 2004 decision on the Medical Practitioners Law construes the statute narrowly, but defines broadly the physician's role in society and resulting heightened obligation to patients and connection to the state. The Health Ministry proposes a statutory revision that may clarify the physician duty by shifting responsibility to an administrative agency. However, it also would codify more explicit self-incrimination than courts have currently held. All three interpretations of the physician reporting duty, in the context of criminal prosecution, over-deter physicians, which undermines medical care and the efficacy of criminal law as a deterrent.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at Part II.D.

¹⁵⁰ *Bill Targets Malpractice*, *supra* note 12.

¹⁵¹ *Id.*

¹⁵² *New Body*, *supra*, note 10.

4. A Less Extensive Physician Duty would Improve the Value of the Crimina System as a Deterrent and the Practice of Medicine

Japan could improve the deterrence value of criminal law and the practice of medicine with a less extensive physician reporting duty. The extension of physician duties, both in courts and under the Health Ministry's proposed requirements, undermines both law and medicine by over-detering medical practice.¹⁵³ Over-deterrence affects medical practitioners, patients, and the advancement of medicine. The Health Ministry's proposal would offer a helpful remedy for the procedural and substantive hurdles of medical malpractice if it did not compel self-reporting.

Commentators have noted that there are two basic principles of any malpractice system: compensation and deterrence.¹⁵⁴ Deterrence protects patients from negligent medical care with physician accountability and punishment.¹⁵⁵ Over-deterrence occurs when legal risks are so high that the law not only discourages blameworthy behavior but negatively affects the practice of medicine.¹⁵⁶ When this occurs, the value of the law itself suffers. Thus, the failings of extended reporting laws and medical practice interconnect and reflect one another.

The Supreme Court's hit-and-run analogy illustrates the unreasonable burden put on doctors. Although physician reporting may legally parallel hit-and-run laws, physicians are not practically similar to automobile drivers and their actions should not be judged on the same scale. As the Supreme Court rightfully notes, doctors play a prominent role in public welfare.¹⁵⁷ The controlled fee system encourages physicians to take on more patients to earn more money, sometimes seeing as many as one hundred per day.¹⁵⁸ In seeing numerous patients every day that require delicate expert treatment, physicians take on many more risks than the average automobile driver.¹⁵⁹

Consequently, as the Japanese Surgical Society argues, a broader application of the law would "demoralize doctors."¹⁶⁰ Doctors would be denied the constitutional rights

¹⁵³ Tanaka, *supra* note 6.

¹⁵⁴ Matthew C. Sullivan, Comment, *Tort Reform: Mississippi's Tort Reforms As Compared to Other Jurisdictions Abroad—A Sensible Treatment Protocol For the U.S. Tort System Ills or Not?*, 19 TEMP. INT'L COMP. L.J. 507, 529 (2005).

¹⁵⁵ Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 684 (1973).

¹⁵⁶ Lori A. Nicholson, *Hedonic Damages in Wrongful Death and Survival Actions: The Impact of Alzheimer's Disease*, 2 ELDER L.J. 249, 288 (1994).

¹⁵⁷ *Medical Practitioners Law case*, *supra* note 4.

¹⁵⁸ Leflar, *supra* note 17, at 37-38.

¹⁵⁹ Tanaka, *supra* note 6.

¹⁶⁰ *Id.*

retained by petty thieves and violent criminals.¹⁶¹ While malpractice and cover-ups are certainly blameworthy, the “right of silence against self-incrimination to police is a fundamental constitutional principle.”¹⁶² Physicians are not merely unprotected against silence, however. Current reporting requirements, whether to families, police, or the Health Ministry, force physicians to supply the facts and admissions for their own prosecution.¹⁶³ In spite of their heightened exposure to risk of negligent conduct and regardless of good intentions, physicians suffer a burden equal to if not greater than violent criminals.¹⁶⁴ To stay in medicine, practitioners must choose to subject themselves to these dispiriting practices.

Demoralization of medical professionals reflects an overreach of the law and the consequential stifling of medical care. The Japanese Surgical Society asserts that a broad application of the physician duty to report would prevent physicians from fully applying their skills, and would lead to a deterioration of medical treatment generally.¹⁶⁵ While the extended physician reporting duty discourages malpractice, it also discourages physicians from performing any but the most routine and well-known procedures.¹⁶⁶ The safest medical treatment for doctors hoping to avoid malpractice, however, may not be the most valuable medical treatment for patients. Patients in need of more advanced, probing, or experimental treatment bear the backlash of extended reporting requirements because of doctors’ reluctance to subject themselves to risks.¹⁶⁷ Even more, an extended duty pushes current and future practitioners out of medicine, those who find the risks simply not worthwhile.¹⁶⁸

The investigation commission already proposed by the Health Ministry would improve the legal and medical functions of criminal malpractice liability if it did not compel physicians to answer questions about their own crimes.¹⁶⁹ Retention of the administrative peer review function would benefit patients with built in, private, and

¹⁶¹ *Japan’s lawyers struggle to protect rights, reputations*, JAPAN POLICY AND POLITICS, Feb. 1, 1999 [hereinafter Japan’s lawyers].

¹⁶² Tsukamoto, *supra* note 3, at 678.

¹⁶³ Tejima, *supra* note 8, at Part III.

¹⁶⁴ Japan’s lawyers, *supra* note 161.

¹⁶⁵ Tanaka, *supra* note 6.

¹⁶⁶ *First Do No Harm*, DAILY YOMIURI, Apr. 17, 2003, at 8; Kaoruko Sunazawa, *Doctors Need to ‘Broaden View’*, ASAHI SHIMBUN, Apr. 2, 1999.

¹⁶⁷ Sunazawa, *supra* note 166.

¹⁶⁸ Atsuko Kobayashi, *Burdened Obstetricians Fail to Deliver*, DAILY YOMIURI, Nov. 16, 2007, at 3; *Society Eyes 24-Hour Centers for Obstetrics, Gynecology*, DAILY YOMIURI, Feb. 8, 2007, at 3.

¹⁶⁹ Leflar, *supra* note 1, at 222-224; Tsukamoto, *supra* note 3, at 681; *Malpractice and Coverups*, *supra* note 31. See Tejima, *supra* note 8, at Part IV.A.

standardized accountability such as license suspension or revocation,¹⁷⁰ while buffering physicians and the practice of medicine generally from the current draconian criminal system.¹⁷¹ Further, the investigation commission would expedite the investigation and charging process above and beyond the capacity of current police and prosecutors.¹⁷²

5. Conclusion

Accountability and fairness are important but competing goals in any legal system. The Medical Practitioners Law Supreme Court case and many lower court cases extend the physician duty beyond the Medical Practitioners Law. Japanese physicians must investigate their own mistakes and report to police and patients' families, diagnosing their own negligence. The Health Ministry's 2007 proposed legislation takes the investigatory burden off of physicians but compels them to answer questions to their own detriment. These reporting policies are detrimental to both the law and medicine. They over-deter physicians, discouraging not just negligent treatment but any treatment that is prone to high risk of a bad outcome for which doctors could be blamed. The laws demoralize doctors, pushing many out of the profession and preventing others from ever entering. The Health Ministry's investigation commission, without compelled disclosure, would effectively cut doctors out of the investigation system and eliminate the burden on police. The hope is to find the balance between protecting patients and fairness to doctors. Current law skews this balance against physicians and consequently undermines medical treatment.

¹⁷⁰ *Bill Targets Malpractice*, *supra* note 12.

¹⁷¹ Leflar, *supra* note 1, at 223-24.

¹⁷² New Body, *supra* note 10.