

醫療常規 與醫師的注意義務

The Medical Standard and Due
Diligence of the Physicians

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摘要

醫療常規雖無明確的指引，但因臺灣的醫療糾紛鑑定機構皆為相關醫學專業之權威機構，鑑定人員均已熟悉相關醫療行為之操作方式，故司法實務以之作為判斷注意義務之標準，應係符合成本與效率的方法。且醫療行為有無過失，不能單指客觀注意義務之違反，仍須判斷主觀上有無預見結果發生之可能性，並已經採取迴避危險發生之措施。醫師對於可預見之結果，若已善盡告知義務及採取迴避結果發生之必要行為，即應認為已盡注意義務。對於無法預見之結果，並無告知義務，亦不具有可歸責事由。

Though there is no explicit guideline on medical routine, all domestic institutions which assess medical disputes are

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medical authorities, and every assessor is thus familiar with operations of medical field treatments. Therefore, it is cost-effective for judicial practice to make their assessment the standard of judging doctors' due diligence. Furthermore, for medical treatments to be considered as medical malpractice, not only a violation against the objective due diligence must be involved, but also a judgement must be made on whether a doctor subjectively predicts the possibility of facing the consequences and takes measures to avoid risks accordingly. As for predictable consequences, if the doctor fulfills the inform obligation and adopts necessary measures to avoid the risks, she / he should be considered to achieve doctors' due diligence. For unpredictable consequences, there is no inform obligation nor any responsible cause.

壹、案例¹

甲罹患胰臟腫瘤，乙醫師建議切除，手術前乙醫師告知若不切除日後恐惡化，但手術可能有腸黏連的後遺症。手術後，甲發生嚴重腸黏連，並導致腸阻塞，遂心生不滿，以乙醫師於手術前未盡告知義務，且手術過程中僅置放防沾黏膜，未盡注意義務，致其術後受有損害為由，向乙醫師請求損害賠償。乙醫師辯稱：「所為符合醫療常規，且腸黏連及腸阻塞為腹腔手術無法避免的後遺症。」

¹ 請參考臺灣花蓮地方法院103年度醫字第2號、臺灣高等法院花蓮分院104年度醫上字第1號、最高法院106年度台上字第1550號民事判決。