醫事法學教室

存活機會喪失之理論適用

On Applications of Loss-of-Chance Doctrine

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摘 要

在病人就診前，其本身原所罹患之疾病已足單獨作為死亡發生之優勢原因，從而可認醫師之行為與病人之死亡結果間不具因果關係，而毋庸令醫師負侵權行為損害賠償責任之情形，或可借鏡英美法上之「存活機會喪失理論」。該理論指出病人尋求醫療輔助時，有權期待獲得適當照顧，故因醫療人員之過失而降低其生存機會時，應獲得賠償。本文試舉一例說明符合該理論適用之情形，供讀者參考。

There might not be any adequacy between the treatment of the physician and the death of the patient as the consequence, when the patient had an illness which could lead to death with a superior possibility before seeing a doctor. Therefore, the physician doesn't have any responsibility

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for damage compensation. Under this kind of condition could the loss-of-chance doctrine in Anglo-American Law be referred. According to it, the patient could have damage compensations form the hospital due to faults which lead to the declination of chance of living, because the patient observes to have adequate treatments when seeing a doctor. A case as a reference would be introduced in this thesis to discuss an application of the theory.

壹、案例事實

病人甲前往A醫院就診，因乙醫師之過失，未能正確診斷出甲當時已罹患肺癌，嗣後甲因肺癌死亡，甲之家屬丙因此支出殯葬費用新臺幣100萬元。惟就診當時，甲之存活機會亦僅有30%。試問：家屬丙得否請求乙醫師負損害賠償責任？如可，金額若干？

貳、爭點

一、因果關係有無之認定。

二、英美法上之存活機會喪失理論（loss-of-chance doctrine）。

參、解析

一、家屬丙可能得基於民法第184條第1項前段及第192條規定，請求乙醫師負損害賠償責任

民法第184條第1項前段規定：「因故意或過失，不法侵害他人之權利者，負損害賠償責任」，此為侵權行為之基本規定，一般學說上咸認其構成要件有七，於客觀上：（一）須有