寰宇醫事裁判

不符醫療水準之第二次手術的假設同意

The Hypothetical Consent of the Second Surgery which Was Incompatible with Medical Standards

編輯部　編譯 *

案號 BGH 4 StR 549/06

摘　要

被告為美容外科醫師，首為患者A進行第一次抽脂手術，並履行術前告知抽脂與麻醉風險之義務，而獲得患者A的同意。其後，在被告建議下患者A進行第二次抽脂手術，此時被告卻未告知手術風險。況且被告僱請未經訓練之化學系學生為其協助手術施行，並自認有能力對患者A進行生理監測。然而被告過量使用藥物，且未注意患者A已有呼吸抑制之前兆，同時急救準備不足，致患者A最終死亡。本案經邦高等法院認為被告並非故意傷人致死，而基於患者A的假設同意，毋寧是過失傷人致死。經被告與患者A之妻提起上訴，聯邦最高法院撤銷邦高等法院之判決。聯邦最高法院認為，醫療手術乃故意傷害行為，在未告知手術風險、病程、成功率等情況下，若可假設有告知而患者依然

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同意，則此時具有假設同意，而該手術不具違法性。然而若無進一步之告知，患者的同意僅限於依醫療水準所施行之手術。因此對第一次手術的同意，並不及於第二次手術的假設同意。本案第二次抽脂手術並不符合醫療水準，且在審酌患者有無假設同意時，應考量到患者即使知道第二次抽脂手術之準備不如第一次抽脂手術，則是否依然同意。準此，聯邦最高法院認為本案並無假設同意，故被告施行的第二次抽脂手術，仍是具違法性之故意傷害行為。

As a cosmetic surgeon, the accused performed the first liposuction for the patient A, informing the risks of the liposuction and the anesthesia according to the obligation. The patient A consented as well. After that, the patient A underwent the second liposuction because of the accused's suggestion. However, the risks of the surgery wasn't informed this time. Besides, during the second liposuction, the accused hired an undisciplined chemical student as an assistant of the surgery which thought that he was capable to monitor the patient A's physiological condition. The accused overdosed A, ignoring that there was a sign of the suppression of A's breathing. Furthermore it was lack of preparation for the accused to response the emergency during the surgery. A dead eventually. According to the Higher Regional Court, the accused didn't mean to injury the patient A to death. On the ground of A's hypothetical consent, what the accused did was rather negligence injuries to death. After the accused and the patient A's wife appealed, the supreme court invoked the judgment made by the Higher Regional Court, deeming that, since the surgery belongs to an intended injury, the consent of the patient could only be hypothetically valid and the surgery would not be illegal on the ground of the hypothetical consent,

when the patient might still consent, even though the risks of the surgery, including medical courses and the survival rate, were not informed. Nevertheless, if there was no further informing, the consent of the patient was only valid in respect of the surgery which was performed according to the medical standards. The validness of the consent for the first surgery couldn't extend to the second one, as the hypothetical consent. The issued second surgery was incompatible with the medical standards. Besides, during the reviewing the hypothetical consent of the patient, it should be taken into consideration whether the patient A might consent to the surgery, even if he knew the second surgery was less prepared than the first. In this regard, the supreme court figured that there was no hypothetical consent in the issued case and the second liposuction performed by the accused was still an illegal intended injury.

壹、事實概要

一、事件概要

被告自1993年起，於哈勒（Halle）的診所擔任外科醫師（niedergelassener Chirurg）。於2001年起，被告亦接受美容外科之培訓，並施行門診美容外科手術（ambulante kosmetische chirurgische Eingriffe）。尤其是進行抽脂術（Fettabsaugungen/Liposuktionen）以去除脂肪裙（Fettschürzen/Fettschürzenplastik），而患者A也接受此種抽脂手術。於2002年5月初時，在麻醉師與護理師在場下，被告對其患者A施行第一次門診手術，並在術前患者A已被告知抽脂與麻醉的風險。被告首先在局部麻醉（lokaler Betäubung）下，從患者A