

學習式判解評析

【醫療刑事法】
實驗性檢測方法
違反醫師法案：
非醫事機構檢測結果
VS. 執行醫療業務的界線

A Case in Violation of Physician Act:
Examination Result from Private Laboratory
without the Examination Slip Issued by a Physician

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摘要

本案被告開設公司，以自行開發之「嗅癌犬檢測法」，除曾與某國立大學附設醫院簽訂臨床試驗計畫協議書，於一定期間內進行人體試驗外，又於該人體試驗計畫外向數名受測者以收費方式進行該檢測法之大腸癌「罹癌風險評估」，檢測後出具「檢驗報告」並由被告向受測者說明是否罹患癌症、後續是否應進一步進行檢測等內容，經法院認定已違反醫師法非法

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關鍵詞：密醫（fake doctors）、檢驗報告（medical inspection report）、醫事檢驗（medical examination）、醫療行為（medical practice）

DOI：10.53106/241553062022070069006

執行醫療業務罪（另涉犯未繳納股款罪部分未納入本文評析之範圍），於二審判決處以6個月有期徒刑，得易科罰金。本文擇非法執行醫療業務罪中，判斷專屬醫師執行之醫療核心業務，及實驗性檢測方法與醫學檢驗師法所指檢驗業務間之差異進行評析。

In this case review, the defendant, hereafter referred to as he, set up a company to operate the medical examination business, which was called “Canine detection of the human cancer VOC” (volatile organic compounds, VOC). The clinical trial was conducted in a collaborative manner with one national university hospital. Besides, he recruited a few healthy human subjects out of the trial and even charged them to estimate the risk of having cancer. He then delivered the documentations named “medical test report” to those individuals with the information about the probability of developing cancers and the needs for further medical intervention. The defendant was convicted of violation of article 28, Physician Act, and was sentenced to 6 months in prison, which could be commuted to a fine. This article analyzed part of the case about how to distinguish the differences between experimental examination methods, medical functions performed by medical technologists and the practicing of physicians.

壹、案件概述

一、案件事實¹

被告A於臺南市某處設立甲公司，於一定之期間內向張○○、翟○○、郭○○等3名受檢測之對象（下稱受測者）收取費用，以蒐集尿液檢體，並將該檢體提供予該公司飼養、訓練之「嗅癌犬」，以嗅聞辨別尿液檢體氣味指數之方式，為前開受測者等人進行大腸癌之罹癌風險評估，並由被告A向受測者說明其罹癌風險，及給予後續是否應進一步檢測等屬專業醫療判斷範疇之建議，經一審法院認定上開行為係屬醫療專業判斷，應由醫師親自進行，故以被告A涉犯醫師法第28條第1項非法執行醫療業務罪，判處有期徒刑10個月。

被告A於一審曾主張辯稱其所實行之檢測，於我國並無法律規範，並辯稱已與衛生福利部（下稱衛福部）確認及取得同意，並提出衛生福利部之函文辯稱氣味指數報告表、蒐集尿液非屬醫療行為，且其僅提供指數之高低，是否確診仍由醫事機構判斷云云，否認其違反醫師法第28條規定之違法從事醫療行為。後於二審被告A於審理時即坦承認罪，二審法院認定被告之自白與證人即受測者等人於地檢署偵查中所證述之情節相符，並有各項證物可證（即甲公司內之自費名單影本、嗅測結果「SHARP BIOTECH」嗅測報告影本及免費名單影本等文件），維持原一審之判決認定，惟將判決之刑度降至有期徒刑6個月，並得易科罰金。

1 容僅載與本件評析新型醫檢方法觸犯密醫罪相關之事實。