

在日本刺青 是否屬於醫療行為之爭

Debate on Whether Tattoo
Is a Medical Practice in Japan

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平成29年(う)第1117號 醫師法違反被告事件
平成30年11月14日 大阪高等裁判所 破棄自判
大阪地方裁判所



摘要

由於厚生勞動省將刺青術視為醫療行為，本件被告即因施行刺青術而遭警方以違反醫師法第17條開罰。大阪地方法院認為，刺青乃損害皮膚表層、破壞真皮微血管網，而有出血、感染等衛生保健上危害，因此刺青為醫療行為而須由醫師施行；縱然對刺青業者有營業上限制，但要求其取得醫師執照已是最小手段，故無違憲。大阪高等法院卻駁斥這樣的見解，認為刺青術雖有使人體健康危害的風險，但依一般社會通念，其不具有醫學相關性故而非醫療行為；要求刺青業者取得醫師執照，也超過必要限度而侵害職業選擇自由。因此，高等法院判決被告無罪。

關鍵詞：刺青 (tattoo)、密醫 (quacksalver)、職業選擇自由 (freedom on occupational choice)、醫療行為 (medical practice)

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Since Ministry of Health, Labor and Welfare regards tattoo as a medical practice, the accused was fined by the police for violating paragraph 17 of Physician Act. Oosaka District Court held that tattoo is a hazard to the health care such as bleeding and infection because it would damage the surface of the skin and destroy the microvascular network of the dermis, and therefore it should be a medical practice practiced by a physician. Although it could be restrictions on the business of tattoo artists, the requirement to obtain a physician license is the minimum mean, so it is not unconstitutional. Oosaka Hight Court rejected this perspective, holding that tattoo could be a risk to human health, but it is not a medical practice, because it is not medically relevant according to common sense, and that it could exceed the necessary limits and infringes on freedom on occupational choice to require the tattoo artists to obtain the physician license. Oosaka Hight Court found the accused not guilty as the consequence.

壹、事實概要

一、事件概要

自從厚生勞動省於2001年規定「利用針頭將色素注入皮膚」屬於醫療行為，違者可依醫師法第31條判處3年監禁或最高100萬日圓的罰金，讓許多刺青師陸續遭到罰款。被告刺青師即於2015年，在開設於大阪的刺青店內，遭警方以違反醫師法第17條「非醫師身分不得執行醫療行為」罰款30萬日圓，嗣後被告不服而提起訴訟。本件爭點為醫師法第17條中「醫療行為」的內容、意義及判斷方法；刺青是否屬於「醫療行為」；以及刺青行為若適用醫師法第17條，是否違反憲法第13