

【醫療刑事法】 專斷或選擇一卵巢切除案： 違反醫療選項同意 之刑事責任

Arbitrary or Choice-The Oophorectomy Case: Criminal
Liability for Breach of Consent for medical Options

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摘要

醫療法告知同意原則下，醫師應加以說明內容，原則上應以病人為中心之思考，即以理性病人角度為判斷，但有無關於合理之醫療選項即替代性治療方案如何決定，英國最高法院最新見解仍應交由醫療專業判斷確定有合理之醫療選項後，醫師即就建議治療及替代性治療之重大風險及預後告知病人，交由病人行使選擇同意權，疏未告知醫療選項，若認侵入性醫療行為為本質為傷害行為之前提下，醫師違反告知同意仍產生刑法上效果。

According to the principle of informed consent in Medical Law, the physician should explain the content in principle,

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關鍵詞：告知同意 (informed consent)、阻卻違法事由 (justification)、風險承擔 (assumption of risk)、病人自主決定權 (autonomy of patients)、理性病人 (rational patient)、醫療選項 (medical options)

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should be patient-centered thinking, i.e. to judge from the perspective of a rational patient, but regarding how to decide whether there is a reasonable medical option, i.e. an alternative treatment plan, the UK Supreme out has recently held that the decision should still be left to the medical profession's judgment to determine that there is. A reasonable medical option, and then the physician should immediately notify the patient of the significant risks and the prognosis for the proposed treatment and the alternative, and let the patient decide by him/herself. Failure to inform the patient of the medical options may still give rise to criminal liability if the invasive medical act is considered to be inherently injurious and the physician has violated the principle of informed consent.

壹、起訴事實、歷審判決及問題提出

一、起訴事實

告訴人於2014年7月14日至被告門診就診，主訴卵巢腫瘤，經被告檢查診斷為「右側卵巢子宮內膜異位瘤（巧克力囊腫）併子宮肌瘤」，應告知於雙側卵巢輸卵管摘除後，病人會進入更年期，更年期之早期症狀，包括有自律神經系統失調（嚴重者會有恐慌感）、情緒不穩、容易憂鬱、疲倦感或失眠，晚期會有骨質疏鬆症，竟疏未先替告訴人進行臨床藥物治療；有先採取腹腔鏡手術，並輔助以藥物治療；針對卵巢膿瘍之治療疏未採取膿瘍清除合併骨盆腔引流管置放及經靜脈抗生素治療；疏未告知告訴人於雙側卵巢輸卵管及子宮頸摘除後，可能產生之術後更年期障礙後遺症，於2014年7月18日非由意識清楚之告訴人簽署同意書，卻由告訴人之配偶簽署之手術同意書，僅載明：子宮肌瘤、右側卵巢囊腫，建議達文西輔