

生命權在醫療疏失 過失致死案中扮演的角色*

The Role of the Right to Life in Respect of Deaths
Caused by Negligence in the Healthcare Context

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摘要

本文將會探討以下問題：在醫療衛生情境下，因過失所導致的死亡是否侵犯「歐洲人權公約」第2條的生命權？該條約向締約國規範了廣泛的積極義務，其中

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包含了採取合理措施來挽救處於已知或應知風險中的生命之執行義務。本文探討了這類職責何時會產生，特別是在醫療衛生領域中，醫療疏失致死所造成的死亡，傳統上認為並不構成對生命權的侵犯。本文認為，要確定是否存在挽救生命的執行義務，必須兩個因素來判斷：責任的承擔與風險的判斷。此外，我們也應將環境因素納入考量，並更多地利用生命權來讓公共機構為過失致死的案例負責。

This article investigates the question of whether a death caused by negligence in the healthcare context is capable of violating the right to life under Article 2 of the European Convention on Human Rights. This provision imposes extensive positive obligations upon Contracting States, including an operational duty to take reasonable steps to save a life that they know, or ought to know, is at risk. This article addresses the question of exactly when such an operational duty arises, with particular focus on the healthcare context in which deaths caused by medical negligence have not traditionally been regarded as amounting to violations of the right to life. This article argues that two key factors in determining the existence of an operational duty to save life are the assumption of responsibility and nature of risk. It also argues for the need to take surrounding circumstances into account and for an increased use of the right to life in holding public bodies to account for deaths caused by negligence in the healthcare context.

壹、引言

以人權為重點來處理醫療衛生議題的方法現已得到廣泛的認可¹，但有個醫療法的特定面向卻經常迴避人權焦點：醫療疏失²。當診斷和治療的注意義務仍受傳統侵權法管轄時，依據博拉姆標準（*Bolam test*）（或甚至更細化的準則），這代表醫師應肩負起責任的執行義務，故而繼續強調的是醫師職責，而非病人權利³。醫療疏失與人權法之間存在鴻溝，其中一個重要的因素是 *Powell v. United Kingdom* 對於醫療疏失可否被受理形成的問題⁴，在該判決中，歐洲人權法院認為，因醫療疏失造成的死亡一般不構成「歐洲人權公約」第2條的違反生命權。近期大法院在 *Lopes de Sousa Fernandes v. Portugal* 案中的判決⁵中重申了這一論點。與監獄或刑事司法程序等其他環境相比，該判決試圖限制生命權在醫療衛生環境下的可適用性，因而導致其備受批評。本文將試圖釐清生命權在醫療疏失

1 即是現如今的最高法院也認同，規範醫療衛生的法律應當著重病人權益，將其作為有行為能力且能負責的成人，而非用傳統的家長式模式。（*Montgomery v. Lanarkshire Health Board* [2015] UKSC 11.）See E WICKS, *Human Rights and Healthcare* (Hart 2007); M Grodin (ed), *HEALTH AND HUMAN RIGHTS IN A CHANGING WORLD* (Routledge 2013); T MURPHY, *HEALTH AND HUMAN RIGHTS* (Hart 2014).

2 雖然現今「臨床過失」（*clinical negligence*）一詞在英格蘭（*England*）及威爾士（*Wales*）的實務領域較為常用，但本文使用「醫療疏失」是因為在史特拉斯堡判例法第2條（*Strasbourg Art 2 caselaw*）中較為常用這一詞彙。

3 *Bolam v. Friern Hospital Management Committee* 2 All ER 118 (1951); *Bolitho v. City & Hackney Health Authority* AC 232; *McCulloch v Forth Valley Health Board* [2023] UKSC 26 (1998).

4 *Powell v. United Kingdom* (App 45305/99), admissibility decision of 4 May 2000.

5 *Lopes de Sousa Fernandes v. Portugal* (App 56080/13) 19 December 2017 [GC].