

The Law of Criminal Negligence in Contemporary Japan—Part Two¹

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A) Introduction

The crime of criminal negligence in Japan is based on the concept of carelessness and the breach of a duty of care which results in foreseeable consequences.

As with the common law concept of criminal negligence, the Japanese have yet to completely resolve the issue of whether criminal negligence is an objective or subjective standard. The duty of care is defined as care given in daily life by the average person. The average doctor is compared with the defendant doctor and the actions of the average driver are used to judge the defendant driver.

The issue in Japanese law is whether the defendant should be judged by an objective/reasonable standard or a subjective standard, an issue that is further complicated by the tripartite system of criminality.³

As you may recall in Part One⁴, there are three elements in the Japanese criminal system, the compositional element, the element of illegality, and the element of responsibility. The objective reasonable man standard and its application to the defendant's conduct is part of the compositional element. The subjective requirement of criminal negligence which deals with the actual capacity of the individual defendant fulfills the requirement of responsibility.

The main area for our discussion deals with the objective element of criminal negligence. The objective duty of care is directly related to the prevention of injurious results. However, those results must have been foreseeable to the average reasonable person before liability can attach to the defendant. In the Japanese criminal law the defendant is not held liable for a consequence that was not foreseeable by the average person. This is what is known as the objective duty to foresee injurious results. This is the key point in determining whether the defendant should be held liable for criminal

1 This is the second part of a three-part series on the law of criminal negligence in Japan.

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3 Kosei Yoken (Tatbestand), Ihosei Yoken (Rechtswidrigkeit), and Sekinin Yoken (Schuld); see article in footnote 4 for a complete explanation of this system.

4 Cleary, William B., *The Law of Criminal Negligence in Contemporary Japan—Part One*; Artes Liberales No. 77, 2005, Pages 51 to 64.

negligence.

Where the results are not foreseeable there is no duty of care owed. However, foreseeability is a question of degree and there are those troubling cases where the defendant felt a sense of uneasiness about his conduct and thought that there existed some element of risk in what he was doing. This feeling of uneasiness constitutes foreseeability in many cases.

B) Foreseeable Consequences

The duty of care in Japanese law is composed of two duties. The first is the duty to foresee consequences, and the second is the duty to avoid the occurrence of the consequences. When there is no duty to foresee there can be no duty to avoid. In other words, when it is impossible to foresee the dangerous consequences, the duty to avoid the result does not exist.

In relation to the objective standard mentioned above, the duty to avoid is objective, and the question to be asked is whether the average person could have avoided the result? This question is premised on the early question of whether the average person would have been able to foresee the result.

The Supreme Court confirmed that in order to constitute the crime of criminal negligence the prosecution must establish the existence of foreseeability of the consequences and the duty to foresee, as well as the avoidability of the consequences and the duty to avoid.

The case originated in the Tokyo High Court and is known as the Iyahiko Shrine Case.⁵ On New Year's Day in 1956, a tragic accident occurred at a Shinto shrine where a large crowd had gathered in order to worship and welcome in the New Year. There were approximately 13,000 people on the premises when the accident occurred and this number reflected a 3000 person increase over the previous year. The accident occurred when 3000 people were descending the steps of the shrine and another 2000 people were attempting to ascend the same set of steps. A massive human collision occurred and 124 people were crushed to death.

Four people from the shrine were prosecuted for criminal negligence resulting in the death of another. Among the four defendants were the chief priest, a office clerk, the celebrant on the night in question, and the grounds keeper. In the first trial the defendants were acquitted on the ground that it was objectively impossible for them to have foreseen the accident. This decision was appealed by the prosecutor⁶ and the Tokyo High Court reversed.

The High Court held that while it may have been impossible to have specifically

⁵ Supreme Court Judgment, May 25, 1967, 21- 4 Keishu 713.

⁶ Article 351 of the Code of Criminal Procedure provides that "a public prosecutor or the accused may file an appeal. The right of the prosecutor to appeal has been a subject of much debate.

foreseen the type and manner of the accident, it was possible to have foreseen a “sense of danger”.

The Court held that whenever and wherever a large crowd gathers, there is always the sense of danger, and a variety of accidents are likely to occur.

This case can be distinguished from a typical automobile case wherein the driver knows that if he drives too fast he may lose control of the car.

In a crowd control case the sense of danger is more abstract. Nevertheless the organizers of such an event have the duty to foresee this sense of danger that is always inherent with crowds, and to take measures to prevent accidents.

The next case also deals with the element of foreseeability.⁷ The defendant was the manufacture of dry milk and was held responsible for the death and injuries which occurred when their product was tainted with poison.

The Morinaga Company had been purchasing a certain soda in conjunction with the manufacturing of its dry milk products used for feeding babies. The poisoning occurred in the summer of 1955 and affected a total of 12,000 babies in the western part of Japan killing 130 of them.

The poisoning was caused by arsenic which was mistakenly mixed into Morinaga's powdered milk produced at the company's Tokushima plant. The soda was purchased from a certain supplier that the defendant had been doing business with for some time.

The first court to hear the case held the defendant not guilty of criminal negligence on the ground that it was impossible to have foreseen that a shipment of soda would have been tainted. The court reasoned that the company could have reasonably relied on the fact that previous shipments of the soda had been used without incident.

The High Court reversed holding that the defendant had the duty to ensure the safety of its product. The Court stated that, “whenever we are dealing with food products there always exists the possibility that someone may become ill due to a tainted product.”

In this case the shipments from April to July seemed some what different in appearance that the earlier deliveries even though the label was the same.

The Court held that the manufacture of food products has the duty to check and inspect the quality of his product whenever any doubt exist as to the quality of the product. This case makes it clear that whenever there exists a sense of uneasiness as to the safety of a product, the court will most likely find that the results were foreseeable.

The specific nature of the injurious result may be unknown and unforeseeable, but in a general sense, it is foreseeable that something evil could happen in the event a food product contains impurities.

In a similar case the defendant was found not guilty of criminal negligence by the trial court when the globefish (swellfish) he had caught off the shore of Vietnam proved to be poisonous. The court held that it was impossible to foresee that the fish would be tainted. The prosecution had argued that the globefish is inherently dangerous under

7 Takamatsu High Court Judgment, March 21, 1966, 19-2 Kouseishu 136.

normal conditions, and taking into account the fact that these fish were caught in tropical waters where a large portion of fish are poisonous, the results were foreseeable.⁸

The difference between the globefish case and the Morinaga dry milk case is that the defendant in the fish case had no reason to suspect that the fish were poisonous, despite the prosecution's argument. But with the Morinaga case, the defendant knew that the shipments which caused the injuries were different in appearance from previous shipment. This difference should have put the defendant on notice that he should confirm the purity of the product.

In an automobile case which occurred as a result of bad brakes, the defendant-mechanic was held liable.⁹ The case involved a 1962 Chevrolet Corvair with over 100,000 km registered on the odometer. The defendant, with knowledge of the weak brakes, drove the car to a place some 1.5 km. distance from his garage. During this short trip he came upon a stopped car in front of him, at the same time a pedestrian was crossing from left to right behind the stopped car. The defendant applied the brakes but to no avail, and the pedestrian was pinned between the two cars suffering a compound fracture of the legs.

The defendant was found guilty of criminal negligence even though he did not foresee a total and complete brake failure. The court held that since he was driving a car with bad brakes, he should have foreseen a risk of serious harm to others. The fact that the brakes gave out completely was something the defendant should have anticipated.

This case can be compared with the case wherein a bus overturned during a rain storm due to a hydroplaning effect which occurred when the driver applied the brakes. At the time of the accident the bus was traveling on a high-speed expressway at approximately 95.6km/h. One person died and six others were seriously injured. The prosecution argued that the accident was a case of a vehicle slipping on wet pavement and that the driver had a duty to reduce his speed under such conditions. The accident was foreseeable according to the prosecution.

However, both the trial court and the high court found that the slip was not a normal type of slip, but a rare hydroplaning type of slip which the driver was not under a duty to foresee.

This case can be viewed as requiring a specific result that is foreseeable before liability will be imposed. Even though it was foreseeable that the bus would slip on wet pavement, it was not foreseeable that it would actually hydroplane.

This case indicates a substantial difference which exists between it and the Morinaga case and the case of the overcrowded shrine. In those cases the court held that an abstract sense of danger was sufficient to establish foreseeability. However, in the hydroplaning case the court demanded a high degree of specificity as to the underlying risk.

In the Hokkaido University Hospital Electrical Mistake case a two-and-a-half year old patient was burned during the course of an operation.¹⁰ The patient was being

8 Fukuoka High Court Judgment, March 12, 1965, 5-1 Kakeishu 25.

9 Tokyo Dist. Court Judgment, June 24, 1972, 675 Hanji 107.

operated on to correct a hereditary defect of an artery.¹⁰ The operating team consisted of three surgeons, three nurses, two anesthesiologists, and one operating surgeon. The injury to the patient's right leg occurred as a result of the improper connection of the electrical cables leading to the scalpel. One of the nurses reversed the negative and positive terminals when she connected the cables to the power source. She and the operating surgeon were indicted for professional negligence.

The first court held the nurse guilty, but declared the surgeon to be innocent of any wrong doing. The nurse appealed her conviction claiming that the trial court used a vague standard of foreseeability.

The Sapporo High Court held that there was a sufficient degree of foreseeability due to the fact that electricity was being used. The Court reasoned that in this day and age there exists common knowledge as to the effects of electricity on the human body. The nurse should have foreseen that some injury may occur to the patient if she failed to properly connect the electrical cables.

The Court held that the injury to the patient was more than abstractly foreseeable.

C) Duty

Once foreseeability is established the next issue to deal with in Japanese criminal law is the element of duty. Until recently it was assumed that where foreseeability was established a corresponding duty could also be established. However, in light of the evolving concept of the duty to avoid, this may no longer be true. There are cases wherein the results were foreseeable, but unavoidable. In such cases deeper consideration must be given to determine who is liable.

The duty of care is divided into two parts. The first is the duty to foresee, and the second is the duty to avoid. The old theory of negligence was concerned with the foreseeability of the injurious results, while the new theory of negligence considers avoidability as the more important factor.

There are at times two conflicting duties from which the defendant must select a proper course of action. For instance, the regulations regarding the operation of an automobile requires the driver of any vehicle to proceed in the proper lane.

However, the defendant is under a general duty of care, that requires him to avoid any accident. Therefore, priority is given to the general duty of care over the specific duty provided for in the traffic regulations. When confronted with some obstacle in his lane of traffic which could result in an accident if struck by a car, the defendant is permitted to violate one duty by safely swerving into the oncoming lane to avoid an accident.

¹⁰ Sapporo High Court Judgment, March 9, 1976, 29-1 Kokeshu 78.

D) Causation

When there is a series of acts all of which could be considered to be negligent, the court must apply either the totality of the circumstances theory (Heizon teki kashitsu ron) or the step-by-step theory (Dankai teki kashitsu ron) to arrive at a just conclusion. For example, if the defendant is driving too fast with his lights on low beam and thereby hits a pedestrian, there are two theories which could be applied to the case.

The court could consider that both the act of driving too fast and the failure to use high beams both contributed to the collision. But, the court could also, by using the step-by-step theory, conclude that it was the failure to use high beams which was the last negligent act which directly contributed to the collision. The act of driving too fast would be considered as too remote for it to have a significant bearing on the determination of negligence.

Both theories have been used depending on the facts of the case. The step-by-step theory is used to limit the liability of the defendant to the last negligent act.

E) Overseers

The term "overseers" refers to those persons who are in charge of others and occupy a position of responsibility. Under Japanese case law the executives of certain companies have been held criminally liable when one of their employees make a mistake which caused serious injuries. This concept is to be distinguished from the doctrine of respondeat superior, which holds that an employer is held accountable for the acts of his employees because of the relationship which exists between the two.

Originally, the Japanese concept of overseers' responsibility was not based on a notion of vicarious responsibility, but on the negligent conduct of the employer.

For example, an employer was under a duty to supervise and train the employees in order to prevent accidents, any failure to do so could result in criminal penalties being imposed against him.

There has been a recent rethinking of this concept in Japan which has resulted in more high ranking officials being held accountable for a low ranking employee's error.

The first case to be introduced deals with an explosion at a chemical factory.¹¹ One of the workers was in the process of cleaning a strainer connected to a large container of liquefied gas when he noticed a leakage of the intake valve. In attempting to close the valve in order to stop the leak, he applied too much pressure to the handle which resulted in four tons of liquefied gas being dispersed into the air. A spark from an electric freezer ignited the gas creating an explosion that killed one worker and injured seventeen neighboring residents.

¹¹ Nigata High Court Judgment, March 9, 1978, 893 Hanji 106.

The head of the factory and the section chief of the area where the explosion occurred were both found guilty of professional negligence resulting in death and given a one-year suspended sentence.

The Niigata District Court held that the defendants failed to utilize all possible means to avoid accidents of this nature. The Court stressed the point that they had a duty to properly educate their employees as to the dangers that they might encounter while working at the factory, and the need to take necessary safety precautions. This case is a good example of the harshness of the Japanese criminal law which, at times, borders on strict liability.

In Japan the division of duties and responsibilities within a factory is a complicated matter. The problem is further complicated by the interest of the company in production and profit, on the one hand, and the need for consumer protection and public safety, on the other.

F) Criminal Nuisance

In the first case to apply the criminal nuisance law (*Kogai zai ho*) the district court held top officials of a company liable when gas leaked from their factory into the air resulting in severe throat irritation for the surrounding residents.¹² The court also fined the company two million yen and imposed a four month suspended sentence on each of the defendants.

The Court held that the line system of command within a company is very efficient when it comes to production, but that is no reason to limit liability for accidents that occur as the result of a worker's negligence. The duty to use all possible means to prevent danger can not be delegated to lower ranking workers within a company. The Company has a duty to properly train and supervise all employees and to ensure the non-occurrence of accidents. The court held it was unreasonable for the company to try to escape criminal liability by putting all the blame on the shoulders of the worker who directly caused the accident. The liability of overseers extends to the negligence of the employees.

In another well known case, two top executives were both given two-year suspended sentences for polluting fish.¹³ The case is known as the Minamata Mercury Poisoning Case which arose in 1956 when several people in the Minamata area became ill after eating fish containing mercury. It was discovered by health officials that the fish in the area had been contaminated by mercury discharged from the defendant's factory. The health officials gave notice to the defendants of their findings, but the defendants ignored the warning and continued to discharge waste water which contained mercury.

The president of the company as well as the person in charge of the factory were

12 Tsu District Court Judgment, March 7, 1979, 382 Hanta 75.

13 Kumamoto District Court Judgment, March 22, 1979, 931 Hanji 6.

both held responsible for the sickness suffered by many of the surrounding residents. Their negligence is different from the type found in the Morinaga case because in the Morinaga case the officials of the company were held accountable for an accident which they did not directly cause, but was caused by the mistake of one of their workers. In the Minamata case the top officials were held responsible for their own negligence in failing to heed the warning given by the health officials.

G) Medical Malpractice

The doctor in Japan is given much discretion in the treatment and care of his patients. While the doctor is under a duty of care to provide the best available care to his patient, courts are reluctant to impose punishment in the absence of a clear act of negligence.

For example, a doctor was found guilty of criminal negligence in the death of his patient when he mistakenly cut her small intestines, thinking them to be the baby's umbilical cord during a Caesarean section.¹⁴

This case can be compared with the one where a doctor was injecting into the breasts of a female patient a substance intended to enlarge them.¹⁵ He didn't know when to quit and inject too much of the fluid into the breasts resulting in the death of his patient. The court, in finding the defendant not guilty, reasoned that since he had performed many operations of this kind before and without incident, there was no way he could be held accountable this time.

H) Criminal and Civil Negligence Compared

It has been said that there is little difference between the standard applied in cases of criminal negligence and civil negligence in Japan. However, this is misleading. By examining and comparing three cases dealing with both the criminal negligence and civil negligence we can see that there is in fact a substantial difference between the standard applied in criminal and civil cases.

Japanese courts are reluctant to specifically declare a difference in the standard of care, but one does exist. In both America and England, courts have held that there is a big difference between criminal and civil negligence. And, they have no hesitation in saying so.

To support an indictment for manslaughter the prosecution must prove the matters necessary to establish civil liability, and in addition must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation

14 Great Court of Judicature Judgment, July 8, 1930, 3178 Shimpun 4.

15 Tokyo District Court Judgment, May 19, 1972, 280 Hanta 355.

and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.¹⁶

The term 'criminal negligence does not mean merely the failure to exercise ordinary care, or that degree of care which an ordinarily prudent person would exercise under like circumstances. It means gross negligence. It is such negligence as amounts to a reckless disregard of consequence and the rights of others.¹⁷

While Japanese courts fail to approach such a definitive expression on the question of criminal and civil negligence, we can nevertheless observe a more subtle distinction between the two.

Three cases will be discussed that will show that a difference does exist between civil and criminal negligence in Japan. The first two cases deal children drowning and the liability of the adults in charge. The last case deals with a policeman who mistakenly fires his pistol and kills a waitress in a pub. With each case we will review both the civil and criminal judgments.

Case One

The first case is the most recent of the three and was handed down on April 21, 1983, by the Tsu District Court.¹⁸ That court awarded over \$350,000 to the parents of a nine year old boy who drown during a hike. The three defendants were Makiko, a female volunteer, Mr. Ueda, the president of the organization, and Mr. Komoda, a clerk of the organization.

A group of about thirty children ranging in age from six to eleven, and eleven adults went for a hike at a pre-planned destination. The group had decided to stop for lunch on the bank of a river. After lunch the children were allowed to enter the river for wading purposes only, not for swimming.

Makiko had been the one to designate the area for wading and she told the children not to go beyond two rocks which were approximately forty feet apart.

The area where the children entered the river was shallow, about 12 to 18 inches in depth. However, just down river about twenty feet the river became over six feet deep. In the deep area there were large boulders covered with slippery moss. The victim, Tomoyuki, and five other children went down river into this deep area. Tomoyuki stood on one the boulders and then slipped off into the deep water. He drown despite attempts to revive him by artificial respiration.

The Court held the three defendants liable for damages to the parents because Makiko knew of the dangerous area yet failed to observe the children's activity up and down the river. Ueda and Komoda were also held liable as organizers of the hike and for failing to inspect the area before allowing the children to enter the water and for failing

16 Bateman (1925) 28 Cox 33, 19 C. A. R. 8.

17 State v. Baublits, 324 Mo. 1199, 27 S. W. 2d 16, 21.

18 Tsu district Court Judgment, April 21, 1983, 1083 Hanrei Jiho 134.

to properly supervise them.

In the criminal trial only Makiko was indicted for criminal negligence. The trial court found her guilty of criminal negligence. The high court reversed the conviction due to factual and legal errors.

The Court said the following five duties were important issues: 1) the duty to select an appropriate swimming area, 2) a duty to adequately warn the children of the dangers of the area, 3) a duty to assign other adults to supervise the activity of the children, 4) a duty on the part of Makiko to supervise the children herself, and 5) a duty to observe the activity of the children both in and out of the water.

The High Court held that the trial court erred when it declared that Makiko had duties 3 and 4 above. The Court said that her duty was limited to the case where she actually sees the children outside the designated area.¹⁹

The High Court, in holding Makiko not guilty of criminal negligence, said that while volunteers are not immune from liability they serve an important societal interest. The Court also said that it was unfair to place all the blame on one volunteer and that the trial court had erred when it found the defendant to be the person with the most responsibility.

Ueda and Komoda, as official of the organization, must also share responsibility for the death of the boy, nevertheless, they had not been prosecuted. Even though Makiko was an active leader and was the one who suggested that the children be allowed to enter the river, she was not the person with the most authority. The Court found that she could not have had more authority than the officials of the organization. She was asked to help and everyone trusted her judgment, but she was not entrusted with sole responsibility for the event. Finally, the Court said it would be too harsh to find a breach of duty under these circumstances.

One can reach the conclusion that, without expressly stating so, the Court applied a different standard in the criminal case. The Court found the defendant was negligent, but not to such a serious degree as to be guilty of a crime.

This result is similar to ones reached by common law courts. The distinction between the Japanese concept of criminal negligence and the common law are not as great as previously thought to be.

Professor Masaharu Inoue, in an article on the difference between criminal and civil negligence, stated that negligence is basically the same for both.²⁰ Negligence consists of a duty of care and a breach of that duty. It takes into consideration the best way to prevent accidents and utilizes a reasonable man standard. But, the objectives of the criminal law differ from those of the civil law. The function of damages in a civil suit is to compensate the victim for sustained losses. In this case an objective standard is applied to the defendant's conduct to determine if he breached the duty of care.

In criminal cases the additional requirement that the defendant had the ability to

19 Nagoya High Court Judgment, February 28, 1984, 1114 Hanrei Jiho 134.

20 Inoue, Masaharu, Civil Negligence and Criminal Negligence (April 1964, 39 Horitsu Jiho 4.

foresee the result supplies the subjective element necessary for conviction.

But, according to Professor Inoue, the reasonable man standard is the same for both.²¹

Case Two

In the second case, thirty-six students drowned when they went swimming at a beach.²² A junior high school principal along with twenty teachers escorted approximately 650 students to the local beach for swimming lessons. The accident occurred when a ship which was passing by created a large wake which also produced a strong tide along the beach. The victims floated out of the designated swimming area and drowned.

Similar to the hiking case above, the defendants were required to pay compensation to the victims' family. In the criminal trial they were originally found guilty by the trial court, but were acquitted by the appellate court.²³

In the criminal case the Court held that it was not foreseeable that the waves from the passing ship would result in any drowning.

The city had designated the area as a safe swimming area and there had never been any similar accidents in the area before. On the other hand, the civil court held that sending 200 children into the water at one time was too many. The court said the appropriate number would have been about 50 at a time. The teachers should have foreseen that the victims, most of whom were girls, were weak swimmers and should have taken some precautions.

For example, the court suggested that they should have had a row of male teachers in the water who could have protected the girls from drifting into danger.

It is obvious from the result in this case that the civil court had a different concept of negligence than the criminal court. While no Japanese court has ever admitted to the existence of two different standards one does exist. The difference can be described in terms of the degree of grossness.

Case Three

The third case deals with a drunk at a bar who becomes violent. The police are called in to help, and when they arrive at the bar a fight occurs between the police and the drunk. One of the officers draws his pistol which accidentally misfires and a stray bullet hits a waitress in the abdomen causing her death. The prosecution did not bring criminal charges against the policeman, yet a civil court awarded compensatory damages to the victim's family. The court held that the policeman was negligent in the handling of his firearm.

21 Ibid.

22 Nagoya High Court Judgment, January 24, 1961, 156 Hanrei Jiho 11; and, Tsu District Court Judgment, April 15, 1965, 446 Hanrei Jiho 23.

23 Ibid.

This is the final example of the difference between criminal and civil negligence in Japan. Courts are more likely to impose civil liability in cases of negligence rather than criminal sanctions. If the standard was the same for both criminal and civil negligence than all three of the defendants in the above cases would have been found guilty of criminal negligence.

1) The Rule of Reliance

The next area of Japanese criminal law relating to negligence that will be covered in detail is known as "the rule of reliance". This rule is an important one used by the defense to avoid liability. The rule is based on the idea that one may rely on the victim or a third person to act appropriately in order to avoid danger. It is usually applied to cases involving automobile accidents, but its application is not limited to only those types of cases.

When one sits down behind the wheel of an automobile and begins to drive he should be able to rely on the other drivers to operate their cars in an appropriate manner and to obey traffic regulations.

In addition, the driver should be able to rely on the accuracy of road signs, traffic signals, and other equipment designed to control the free flow of traffic.

If another driver operates his car in an inappropriate manner which causes a collision, the defendant can not be held accountable under such circumstances.

In the common law there is the concept of contributory negligence and assumption of the risk, and in Japan the rule of reliance is a principle of law which allocates the risk between the defendant and either the victim or a third person.

Contributory negligence and assumption of the risk are not allowed as defenses to crimes, but the rule of reliance is allowed. Its roots are firmly established in Japanese criminal law.

In order to take advantage of the rule the defendant, himself, must have been in substantial compliance with the traffic regulations.

Case One

In an early case not dealing with an automobile, a conductor of train was charged with professional negligence when a drunk passenger fell off the platform and was crushed to death when the train pulled out.²⁴ The train had arrived at its final destination on the evening in question and the passengers began to disembark. The defendant was in charge of seeing to it that all passengers had gotten off the train safely. The victim, a 29 year old man, was drunk and had fallen asleep by the time the train reached the station. The defendant went over to the man and tapped him on the shoulder three or

24 Supreme Court Judgment, June 14, 1966, 20-keishu 1212.

four times. The man woke up and staggered off the train. After getting out of the train car the man stumbled and fell off the platform between cars No. 3 and 4. The defendant exited the No. 3 car and did not see the drunk. He gave the go ahead to the engineer to pull out, and the train began to move killing the passenger.

Both the trial and appellate courts held the defendant guilty of professional negligence resulting in death. The courts held that the defendant had a duty to ensure the safety of the passengers and that he should have escorted the drunk to a safe area prior to giving any signal to the driver of the train.

The Supreme Court reversed the conviction holding that the conductor was not negligent under the circumstances. The Court stated that if one discovers a drunk passenger he should pay special attention to the action and mannerism of that person in order to ensure his safety. But, the Court also held that trains are dangerous and that passengers have a duty to be careful, even if they are intoxicated.

In this case the victim was able to walk off the train by himself and the defendant was justified in relying on the man to take care of himself. The Court also held that it was unreasonable to impose a duty on the conductor to look between each car before allowing the driver to move the train from the platform. This is too much to expect under normal conditions. Even though there was sufficient time for the defendant to make such an inspection.

Case Two

The next case is considered a landmark dealing with the rule of reliance and traffic accidents. In this case the defendant was attempting to make a right turn (a turn across a lane of oncoming traffic similar to a left turn in the United States) when his engine stalled.

The victim in this case was coming from behind on a 50cc motorbike and decided to pass the defendant on the right, a prohibited maneuver. At the time the victim was passing, the defendant began to execute a his turn at a speed of 5 km/h. A collision occurred and the rider of the bike sustained injuries requiring one hundred days of treatment.

Both the trial and appellate court found the defendant guilty of criminal negligence for failing to look to his right-rear before making a right-hand turn.

The Supreme Court reversed the judgment and applied the rule of reliance and held that in the absence of special circumstances one can rely on other drivers not to pass on the right in an intersection and to conform their behavior to the traffic regulations.

The Supreme Court declared that there is no duty to prevent accidents before they happen by looking to the right-rear before making right-hand turn.

Case Three

In the third case, the defendant was entering an intersection from a narrow road and

couldn't see if any cars were coming from the right due to the nature of the intersection.²⁵ The defendant did notice that there were stop signs as well as a white line indicating where cars should stop. The defendant didn't see any cars at the stop line and proceeded slowly out into the intersection. Another car disregarded the stop sign and entered the intersection at a speed of more than 30km/h. A collision occurred causing damage to the vehicles.

The defendant was convicted of criminal negligence and ordered to pay a fine of 30,000 yen. The trial court held that the defendant had a duty to confirm the safety of the situation before entering the intersection. The High Court affirmed the conviction holding that in spite of the stop signs for the cross traffic, the defendant should have only proceeded through the intersection after confirming the non-existence of other vehicles.

The Supreme Court reversed the conviction and applied the rule of reliance holding that the defendant was justified in relying on the cross traffic to stop at the stop sign as required by law.

Case Four

In a similar case the defendant was driving his truck through an intersection at a speed of 50km/h and didn't stop because he saw a flagman waving a red flag which indicated to the cross traffic to stop.²⁶ However, the driver of a cross traffic vehicle, ignored the red flag and proceeded into the intersection colliding with the defendant.

The defendant had previously passed through the same intersection several times on the day of the accident. He knew the flagman was there to stop the cross traffic and relied on his signal and the observance thereof by the other drivers.

The trial court found the defendant guilty of criminal negligence for failing to reduce his speed prior to entering the intersection. The court found that the road on which the defendant was traveling was not significantly wider than the cross road.

Also, the defendant did not have a superior right of way. Moreover, the court stated that the flagman was not a professional traffic controller and his activity had no special legal status.

The defendant had a duty to reduce his speed and look to the right before proceeding through the intersection according to the court's decision.

The Supreme Court reversed the conviction and applied the rule of reliance to the defendant's conduct. The defendant was justified in relying on the cross traffic to stop when they saw the red flag. The defendant saw the flagman approximately 45 feet prior to entering the intersection. He coasted through the intersection in the same way he had done on the previous occasions.

This case is another example of the Japanese Supreme Court's tendency to correct harsh judgments. In American tort law this case would have been decided on the simple

²⁵ Supreme Court Judgment, December 17, 1968, 22-13 Keishu 1525.

²⁶ Supreme Court Judgment, March 22, 1973, 27-2 Keishu 240.

principles of causation and foreseeability. The cause of the accident was the driver who failed to heed the flagman's signal to stop. In addition, it was not foreseeable that a driver of the cross traffic would ignore the signal and proceed through the intersection.

The defendant in this case simply was not negligent. His conduct did not drop below that of the reasonable man. In this sense the rule of reliance is closely related to the reasonable man standard indicating that the reliance must be reasonable.

Case Five

In another a case the defendant was driving his car at about 11:45 p. m. when he came to blind intersection.²⁷ He stopped his car at the stopline as required by law and then proceeded through the intersection at a speed of 10 km/h. There were no stop signs for the cross traffic, but there were signs which indicated that speed should be reduced.

Another driver was traveling at a speed of 50km/h on the cross-road and a collision occurred in the intersection. The defendant was found guilty of professional negligence by the trial court for failure to confirm the safety of the situation by looking to the left before proceeding through the intersection.

The Supreme Court reversed the conviction holding that the defendant was in compliance with the regulations when he stopped his car prior to entering the intersection. The Court applied the rule of reliance and concluded that the defendant was reasonable in relying on drivers of the cross traffic to slow down when approaching a blind intersection.

Case Six

The next case deals with the situation where one car attempts to pass another which is making a right-hand turn (similar to a left-hand turn in the U. S.).²⁸ The interesting thing about this case is that the trial court found the driver of the front car not guilty, but the appellate court reversed agreeing with the prosecution. However in the final instance, the Supreme Court reversed and declared the defendant to be not guilty.

A motor cycle driven by the defendant collided with a smaller motor-driven cycle which was driven by an unlicensed high school student who was carrying a passenger on the rear part of the frame. The defendant was making a right turn from a major road on to a small narrow alley at a T-shape intersection. He was traveling at a speed of 40km/h. At a distance of 32 meters from the intersection he reduced his speed to 25km/h.

After confirming that there were no cars approaching from the rear the defendant moved closer to the center of the lane in order to execute the turn. His right blinker was

²⁷ Supreme Court Judgment, December 25, 1973, 304 Hanta 262. (Note: Christmas is not a legal holiday in Japan, yet.)

²⁸ Supreme Court Judgment, September 24, 1970, 24-10 Keishu 1380.

on. At a speed of 8 to 10km/h the defendant began to turn. The small bike approached from the rear at a speed of 80km/h. and attempted to pass on the right. A collision occurred killing the passenger and injuring the high school student who needed 37 days of treatment.

The trial court held that the defendant did not have a duty to anticipate that a vehicle would approach from the rear at a high rate of speed and attempt to pass on the right. He was found not guilty.

The appellate court reversed holding that the defendant did in fact have a duty to confirm whether other vehicles were approaching from the rear.

The Supreme Court reversed the decision holding that the defendant was not guilty and that he did not have a duty to insure the traffic conditions to the rear. According to the usual manner of driving a car it is necessary to check to the rear before making a turn. But, undivided attention to the rear is also dangerous and drivers must be concerned with the traffic to the front and sides as well. The drivers to the rear have a duty to be aware of the traffic conditions in front of them. According to the traffic regulations a driver attempting a right turn must signal and get as close to the center of the road as possible. But, cars following to the rear must not interfere with a driver in front who is making a turn. And, all drivers must pass on the left and in a safe manner.

In addition, the general road conditions must always be considered. The Court said that the defendant was reasonable in relying on drivers to the rear to drive in a safe manner.

An Anglo-American lawyer would have been decided the case on the issue of causation. The rear driver was the sole cause of the accident because he was traveling at an excessive rate of speed and attempted to pass on the right.

The above cases indicates the fact that in Japan drivers involved in traffic accidents can be assured that their conduct will be meticulously securitized by the authorities to see if even the slightest flaw can be found. The rule of reliance is their main source of defense and they need to prove that the other guy was to blame.

It may also appear to some people that the Japanese concept of criminal negligence borders on strict liability with an absolute duty to make safe. This is an overstatement as illustrated by the following case. However, before getting to it we need to notice that the previous cases were involving accidents between two vehicles. How does this compare with an accident between a vehicle and a pedestrian? Naturally, the driver has more responsibility than the pedestrian.

Case Seven

In the next case the defendant was proceeding west and following a street car going in the same direction.²⁹ The street car stopped to pick up and let off passengers in the center of the road at a small platform designed for such purposes. The defendant reduced

29 Osaka High Court Judgment, October 7, 1967, 9-10 Kakeishu 1239.

his speed and passed the street car on the south side. The light was green. A seventeen year old girl got off the street car and quickly stepped out from behind the street car. The light was red at the time and she should have waited. The defendant hit her and she sustained injuries requiring three months of treatment.

The trial court, in its harshness, found the defendant guilty of criminal negligence. The court held that the defendant should have expected and anticipated that someone might jump out from behind the street car. The court boldly said that a driver has a duty to drive at a rate of speed which would allow him to stop at any moment in order to avoid an accident.

The Osaka High Court reversed the conviction. It held that we can never say that it is totally unforeseeable that someone exiting a streetcar may jump out from behind it and against a red light. Nevertheless, in the case at hand, the intersection was regulated by traffic lights and, at the time of the accident the south-north street had the red light while the east-west had the green light. The defendant did not have a duty to anticipate that someone would jump out from behind the streetcar, for such is rare happening, indeed. The trial court erred when it imposed a harsh standard in this case. The High Court reasoned that it would be unreasonable to require all drivers to reduce their speed to such a slow rate so that they could avoid all collision. The function of the traffic light is to insure the smooth flow of traffic. If drivers were required to drive so slow, it would create another danger by obstructing the free flow of traffic.

The interesting thing about the rule of reliance in Japanese criminal law is that the conduct of the victim or third party is taken into consideration when determining the guilt or innocence of the defendant.

We have seen several examples which held that the defendant was not guilty based upon the application of the rule of reliance.

This is in direct contrast to the American notion that the conduct of the victim is no defense to a crime, including criminal negligence.

If an act of the deceased was a contributory cause of his death the problem is usually, though not necessarily, one of contributory negligence. Such negligence on the part of the deceased may be considered by the judge, together with all the other facts, in fixing the sentence in a particular case, but it has no bearing upon either responsibility in the determination of guilt or innocence. As said by an Alabama court: "the rule concerning contributory negligence is applicable in actions for damages for personal injuries and has no application in criminal cases." Hence, in a manslaughter prosecution the judge commits no error by his refusal to permit the jury to consider the contributory negligence of the deceased. This is true, moreover, whether the contributory negligence preceded or followed the act of the person accused of criminal homicide.

One, for example, whose criminal negligence has caused a fire which resulted in the loss of life is the proximate cause of the death even if the deceased was negligent in his efforts to escape from the burning building. . . . "It is enough to say," said the Iowa court, "that contributory negligence if shown, is never a defense or excuse for crime, nor can it in any degree serve to purge an act otherwise constituting a public offense of its criminal

character.³⁰

On this point, Professor Masaharu Inoue claims that the principle of allocating the risk (Kiken bumpai no hori) in Japanese criminal law is the same thing as assumption of the risk (Kiken hiki ukeru) in Anglo-American law. However, contributory negligence and assumption of the risk are concepts confined to tort law and have no application in the Anglo-American criminal law.

From a legal standpoint, this is what makes rule of reliance such an interesting concept from the viewpoint of the American lawyer.³¹

In reality, the rule of reliance is a sub-unit of the reasonable man standard. In order to use the rule the defendant's reliance on the conduct of others must have been reasonable. In Anglo-American law reasonableness is included in the more general concept of the reasonable man. Most of the above cases would have been decided by American courts in the same way and reaching the same result, but without the use of the rule of reliance. The defendant, in the above cases, did not breach the general requirement to conform his conduct to that of the reasonable man.

After reviewing many cases dealing with automobile accidents one may get the impression that the Japanese concept of criminal negligence is a harsh one. This impression, while being accurate, should not be extended beyond automobile cases.

Conclusion

In Part-Two of this three-part series on criminal negligence a variety of cases and principles were introduced. In Part-Three a final look at this interesting subject will be provided.

30 R.M> Perkins and R.W. Boyce, *Criminal Law* (Mineola, New York: The Foundation Press, Inc., 1982) p. 785.

31 Inoue, Masaharu, 456 *Hanrei Jiho* 122.