

ments, filed by the person whose rights or interests are violated or may be violated (Supreme Court 1st P.B., April 8, 2004).

In addition, Article 36(1) of the Trademark Act provides that the person who has the trademark rights or their exclusive use can claim the stop or the prevention of the infringements against the person who violates or may violate his trademark rights or their exclusive use.

Considering that meaning of the provision of Article 5, Item 6 of the Code of Civil Procedure, a suit for the stop or the prevention of infringements of the trademark rights based on Article 36(1) of the Trademark Act corresponds to the suit prescribed by Article 5, Item 6 of the Code of Civil Procedure.

Editorial Note:

We can think that this decision extends the judgment of the Supreme Court 1st P.B., April 8, 2004, which relates to the claim of an injunction (*sashitome*) based on Article 3(1) of the Unfair Competition Prevention Act, to the case of a suit for the injunction (*sashitome*) of infringements of the trademark rights prescribed by Article 5, Item 6 of the Code of Civil Procedure.

I guess this judgment may be applied to the cases for injunction (*sashitome*) relating to intellectual property in general.

6. Criminal Law and Procedure

X v. Japan

Supreme Court 1st P.B., April 14, 2005

Case No. (a) No. 1618 of 2004

59 (3) KEISHU 259

Summary:

Articles 157-3 and 157-4 of the Code of Criminal Procedure are not in violation of Article 82(1), and of Paragraph 1 and the first sentence of Paragraph 2 of Article 37 of the Constitution.

Reference:

Constitution, Article 37, Paragraph 1 and 2, and Article 82, Paragraph 1; Code of Criminal Procedure, Articles 157-3 and 157-4.

Facts:

The defendant for bodily injury and rape insisted that shielding measures taken upon the examination of a witness so as to prevent the witness from being seen by the defendant and using the video-link system, infringed the defendant's right to question a witness, because the defendant was unable to see the witness. But, the Second Court ignored his opinion. The defendant made an appeal because he thought that Articles 157-3 and 157-4 of the Code of the Criminal Procedure are not in violation of Paragraph 1 and of Paragraph 2 of Article 37 and Article 82(1) of the Constitution.

Opinion:*Dismissed.*

Article 157-3 of the Code of Criminal Procedure, with the objective of reducing the burden on the witness to be examined who might feel pressure or whose peace of mind might be substantially disturbed under the gaze of the defendant, provides that the court may take measures to prevent either the defendant or the witness from seeing the other party or prevent both parties from seeing each other in cases where the court finds such risk and considers it appropriate to take such measures, and may also take measures to prevent both the audience and the witness from seeing each other (these measures shall hereinafter be referred to as "shielding measures"). Article 157-4 of the said code provides that, when examining a victim of a sex-related crime as a witness, the court may, in order to prevent the witness from feeling mental pressure when forced to give a statement before the judges and other parties concerned in the case who are to examine the witness, examine the witness by using the method by which the witness may be seated in another place within the same premise and may be examined by audiovisual communication through the transmission of images and sounds (this method shall hereinafter be referred to as the "video-link system").

Even where, in a case that a witness is examined on a date fixed for trial, the court orders shielding measures between the audience and the witness or orders use of the video-link system in a manner that the witness is shielded from the audience, the trial remains open. Consequently, these provisions are not in violation of Article 82(1) or Article 37(1) of the Constitution.

Also, where shielding measures are taken upon the examination of a witness so as to prevent the witness from being seen by the defendant, the defendant cannot see the witness but can hear the witness giving a statement and can also question the witness by him/herself. Furthermore, since shielding measures may not be taken in the absence of the defense counsel, the defense counsel will not be prevented from observing the witness's attitude while giving a statement. Therefore, in light of the purport of the measures mentioned above, the defendant's right to question a witness is not infringed. Similarly, where the video-link system is used, the defendant can see and hear the witness giving a statement at the same time and can also question the witness by him/herself, although this is accomplished through the transmission of images and sounds, and therefore, the defendant's right to question a witness is not infringed. Even where the video-link system is used and the measures to prevent the defendant from seeing the witness are taken at the same time, the defendant still can hear the statement given by the witness and can also question the witness by him/herself, although this is accomplished through the transmission of images and sounds, and the defense counsel will not be prevented from observing the witness's attitude while giving a statement. Therefore, the defendant's right to question a witness is not infringed also in this case. Consequently, Articles 157-3 and 157-4 of the Code of the Criminal Procedure are not in violation of the first sentence of Paragraph 2 of Article 37 of the Constitution.

Editorial Note:

The amendment of a part of Code of Criminal Procedure in 2000 has produced the protection for victims and witnesses as follows;

(Article 157-3 of the Code of Criminal Procedure)

1. When examining a witness, the court may, based on opinions of the prosecutor and the defendant or the defense counsel, take measures to

prevent either the defendant or the witness from seeing the other party or prevent both parties from seeing each other in cases where the court considers that the witness might feel pressure or his/her peace of mind might be substantially disturbed, due to the nature of the crime, the age and physical and/or mental conditions of the witness, the relationship between the witness and the defendant, and other circumstances concerned, if the witness is forced to give a statement in the presence of the defendant (including cases where the methods set forth in the first paragraph of the next article are used), and believes it appropriate to take such measures. However, such measures to prevent the defendant from seeing the witness shall not be taken in the absence of the defense counsel.

2. When examining a witness, the court may, based on the opinions of the prosecutor and the defendant or the defense counsel, take measures to prevent both the audience and the witness from seeing each other in cases where the court considers it appropriate to take such measures in light of the nature of the crime, the age and physical and/or mental conditions of the witness, the impact on the witness's reputation, and other circumstances concerned.

(Article 157-4 of the Code of Criminal Procedure)

1. When examining any of the following persons as a witness, the court may, based on opinions of the prosecutor and the defendant or the defense counsel, examine the witness by using the method by which the witness may be seated in a place other than the place where the judges and other parties concerned in the case are seated in order to examine the witness (within the same premise where these persons are seated) and may be examined by audiovisual communication through the transmission of images and sounds.

But the system this amendment has produced can be in violation of the Constitution, especially Article 82(1) and Paragraph 1 and the first sentence of Paragraph 2 of Article 37. The problem is the constitutionality of the system, concretely the shielding and video-link system. This judgment is very important because the Supreme Court first declared on the constitutionality of the system, concretely the shielding and video-link system.

The first sentence of Paragraph 2 of Article 37 of the Constitution

says that the accused shall be permitted full opportunity to examine all witnesses. These rights to examine all witnesses generally involve not only the right to question a witness, but also the right to confront a witness physically and directly. Since the video-link system does not give identical space to defendants, victims and witnesses, the right to confront a witness physically and directly may be infringed. But the Supreme Court declared that the right to confront a witness physically and directly is not infringed even if the video-link system is used, since the defendant can see and hear the witness giving a statement at the same time and can also question the witness by him/herself, although this is accomplished through the transmission of images and sounds.

Paragraph 1 of Article 37 of the Constitution says that in all criminal cases, the accused shall enjoy the right to a speedy and public trial by an impartial tribunal. In addition, Article 82(1) of the Constitution says that trials shall be conducted and judgment declared publicly. The Constitution secures open court for general citizens. But shielding measures between the audience and the witness can damage the principle of the open court. About this point, the Supreme Court declared that even if, in a case that a witness is examined on a date fixed for trial, the court orders shielding measures between the audience and the witness or orders use of the video-link system in a manner that the witness is shielded from the audience, the trial remains open.

But there is a big problem. It is the weakness of the justification for using shielding measures between the audience and the witness. Thus, improving such justification is a problem requiring further consideration.

X v. Japan

Supreme Court 1st P.B., July 4, 2005

Case No. (a) No. 1468 of 2003

1906 HANREI JIHO 174; 1188 HANREI TAIMUZU 239

Summary:

Under the facts that a person, in response to the request from relatives of a seriously ill patient to provide “Shakti treatment” for the patient, had the patient taken out of the hospital where he/she was staying, and with willful negligence, left the patient to die without having him/her receive

the necessary medical treatment for keeping him/her alive, the person's act constitutes homicide by omission.

References:

Penal Code, Article 199.

Facts:

The defendant, in response to the request from relatives of a seriously ill patient to provide the patient with "Shakti treatment," which gives the seriously ill patient a special power to provide unique medical treatment by patting the diseased areas of patients' bodies with the palm of his hand to give energy to the patients, thereby increasing their self-healing ability, had the patient taken out of the hospital where he/she was staying and left the patient to die by not having him receive necessary medical treatment. The case revolved around the question, whether the defendant's act constitute homicide by omission with willful negligence (*dolus eventualis*).

Opinion:

Dismissed.

Among the grounds for the *jokoku* appeal argued by the attorney and by the defendant, the one alleging violation of Article 21 of the Constitution lacks a premise because the public prosecution and trial of this case cannot be deemed to have been filed or carried out based on prejudice to the defendant and his groups; other grounds for the *jokoku* appeal argued by the defendant's attorney, including the ones alleging violation of the Constitution or a judicial precedent, are in effect claims of mere violation of law or errors in fact-finding; among the grounds for the *jokoku* appeal argued by the defendant, the one alleging violation of a judicial precedent lacks a premise because the cited judicial precedent addresses a different type of facts or does not have the same purport as argued by the defendant; and other grounds, including the one alleging violation of the Constitution, are in effect claims of mere violation of law or errors in fact-finding, and none of these arguments can be regarded as a legal ground for *jokoku* appeal.

After considering those arguments, however, we decide to make

judgment *ex officio* regarding homicide by omission.

1. According to the fact-finding of the judgment of the second instance, the outline of the case is as follows.

(1) The defendant claimed that he had a special power to provide unique medical treatment by patting the diseased areas of patients' bodies with the palm of his hand to give energy to the patients, thereby increasing their self-healing ability. The defendant called this treatment method as "Shakti Pat" (hereinafter referred to as "Shakti treatment") and gained believers.

(2) Patient A was a believer of the defendant. A contracted a brain hemorrhage and was taken into a hospital in Hyogo Prefecture. Due to impaired consciousness, A needed assistance for removing sputum and an intravenous drip for hydration, and although there was no threat to life, A needed medical treatment for several weeks and was expected to suffer aftereffects. B, A's son, who was also a believer of the defendant, requested the defendant to provide Shakti treatment for A, hoping that A would recover from disease without aftereffects.

(3) The defendant accepted B's request, although he had never provided Shakti treatment for such a seriously ill patient as a patient suffering a brain hemorrhage. The defendant planned to provide the said treatment for A at a hotel in Chiba Prefecture where he was staying, and with the knowledge of the warning of the doctor in charge of A that it was impossible for a certain time to discharge A from hospital and of the intention of A's relatives, including B, to obtain the doctor's permission before taking A to the defendant, the defendant instructed B and other relatives to take A out of the hospital to the hotel, saying, "The intravenous drip is dangerous. A will reach a critical point today or tomorrow. You must bring A by the end of tomorrow," despite the fact that A was still in need of medical treatment such as an intravenous drip, and caused a concrete threat to A's life.

(4) The defendant was entrusted by B to perform Shakti treatment for A who was taken into the hotel. Viewing A's condition, the defendant became aware that A would die if left untreated, but in order to avoid the defendant's instruction mentioned in (3) above being revealed to be improper, the defendant only provided Shakti treatment for A, and with willful negligence, left A for about a whole day without providing the

necessary medical treatment for keeping him alive, such as assistance for removing sputum and an intravenous drip for hydration, thereby causing A to die due to suffocation through airway obstruction by sputum.

2. According to the facts mentioned above, the defendant caused a concrete threat to the patient's life due to reasons within his control, despite the fact that in the hotel into which the patient was taken, the defendant was fully entrusted by the patient's relatives, who were believers of the defendant, to perform treatment for the patient suffering from a serious illness. Considering that at that time, the defendant was aware of the patient's serious condition and had no reason to believe that he was able to save the patient's life, the defendant was responsible for having the patient immediately receive necessary medical treatment for keeping him alive. Nevertheless, with willful negligence, the defendant left the patient to die without having him receive necessary medical treatment. Therefore, it is reasonable to construe that the defendant committed homicide by omission, and also caused death through aggravated abandonment as a co-principal with the patient's relatives, who lacked murderous intent.

The judgment of the second instance that goes along with this reasoning is justifiable.

Editorial Note:

This judgment is very important because the Supreme Court first recognized the homicide by omission with willful negligence.

The Supreme Court has traditionally given judgments of the abandonment causing death by omission with willful negligence, but has never recognized such a case as a case of homicide; there has been a great gap between the abandonment causing death by omission and the homicide by omission.

Several lower courts have produced judgments about homicide by omission. These judgments are generally classified into two types; the defendant has the place of having a duty to protect a victim's life; the defendant causes a dangerous situation toward a victim's life by the defendant's own previous act and once undertakes the victim's relief. This judgment is applicable to the latter type.

When the person produces a danger to a victim's life by the defen-

dant's own previous act and intentionally abandons the change of such danger into the result of death, he/she is liable for the homicide by omission. In this case, what matters is "the intent after omission."

In this judgment, this intent after omission is recognized as follows: the defendant caused a concrete threat to the patient's life due to reasons within his control, despite the fact that in the hotel into which the patient was taken, the defendant was fully entrusted by the patient's relatives, who were believers of the defendant, to perform treatment for the patient suffering from a serious illness. Considering that at that time, the defendant was aware of the patient's serious condition and had no reason to believe that he was able to save the patient's life, the defendant was responsible for having the patient immediately receive the necessary medical treatment for keeping him alive. Nevertheless, with willful negligence, the defendant left the patient to die without having him receive the necessary medical treatment. Therefore, it is reasonable to construe that the defendant committed homicide by omission, and also caused death through aggravated abandonment as a co-principal with the patient's relatives, who lacked murderous intent.

This recognition has a serious fault. It is the lack of clarity as to whether the defendant foresaw the victim's death at the time of the abandonment of the necessary medical treatment for keeping him alive. If such unclarity is one of the requirements for homicide by omission, you cannot distinguish homicide by omission from the abandonment causing death by omission. Thus, the subjective element for homicide by omission should be as strict as possible.

7. Commercial Law

Live door v. Nippon Broadcasting System

Tokyo High Court, March 23, 2005

Case No. (*ra*) 429 of 2005

1899 HANREI JIHO 56; 1173 HANREI TAIMUZU 125;

1214 KINYU SHOJI HANREI 6