

5. Criminal Law and Procedure

a. Criminal Law

1. **A case concerning “Minamata Disease” in which the accused was found guilty of homicide by negligence in the execution of business operation for improperly disposing of poisonous matter that later caused the victim to become sick during its fetal stage which led to the victim dying soon after birth.**

Decision by the Third Petty Bench of the Supreme Court on February 29, 1989. Case No. (a) 1555 of 1982. A case of homicide and infliction of injury by negligence in the execution of business operation. 42 *Keishū* 314.

[Reference: Criminal Code, Article 211.]

[Facts]

This case is about Minamata Disease, which is considered to be one of the four major diseases in Japan caused by pollution. The Shin Nihon Chisso Corporation (New Japan Nitrogen Corporation) has a factory in Minamata City, Kumamoto Prefecture, that manufactures chemotherapeutants (chemicals). The factory, which had been manufacturing acetaldehyde since 1932, had been draining its waste water, which contained methylmercury created during the manufacturing process, into the mouth of the Minamata River. The methylmercury then polluted the fish and shellfish. Consequently, many people in the Minamata area were afflicted with Minamata Disease and Minamata Fetal Disease; these people had been continuously eating the polluted fish and shellfish caught in the area. (Minamata Disease mainly shows symptoms such as numbness, trembling and motor impediments without any known cause; in very serious cases, death can occur. Minamata Fetal Disease is caused by a mother eating the polluted fish and shellfish during her pregnancy leading to an accumulation of the methylmercury in the fetus' brain; this

leads to the death of the newborn due to a toxic impediment in the newborn's brain.)

In this case, five patients with Minamata Disease and two with Minamata Fetal Disease sued the corporation's president and the manager of the Minamata Factory. The plaintiffs' contentions are as follows. By 1958, research by Kumamoto University and the Ministry of Welfare clearly showed that there was a possibility that the waste water drained from the factory contained methylmercury, which caused Minamata Disease. Therefore, the two defendants should have stopped draining the waste water from the factory until it was determined that it was safe to resume draining. Nevertheless, without regard for the potentially dangerous nature of their acts, the two defendants negligently continued to drain the waste water from the factory.

The court of first instance agreed with the prosecution's case (the facts constituting the offense charged) and found the two defendants guilty but only as against two of the seven plaintiffs, one Minamata Disease patient and one Minamata Fetal Disease patient. (The case of the five remaining plaintiffs was dismissed because of the statute of limitation.) The *koso* appellate court dismissed the defendants' appeal.

[Opinions of the Court]

Jokoku appeal dismissed.

The present Criminal Code defines the unborn child as follows. In a case involving a charge of abortion, the unborn child is viewed as the object of an act (i.e., the abortion) and as being independent of the mother's body; however, in all other crimes the unborn child is viewed as a part of the mother's body. Therefore, in a case where the issue is the application of a charge of homicide by negligence in the execution of business operation, causing the unborn child to become morbid is considered to be the same as causing a human being to become morbid. Thus, in this type of case, one can say that the disease has caused that part of the mother's body that is a person, i.e., the fetus, to become morbid; then after the fetus is born as a person, the person dies because (before birth) the disease had

caused it to become morbid. This is the same as saying that the disease caused a human being to become morbid and die. Therefore, it is not necessary to debate whether the object was a human being when the change to a morbid state took place.

[Comment]

The really significant issue in the current case was whether it was possible to have a charge of homicide by negligence in the execution of business operation when the patient suffering from Minamata Fetal Disease died after birth.

The reasons why the question became a problem are as follows. First, there is the concept of abortion as found in the present Criminal Code: Abortion is “the act of removing the fetus from the mother’s body before the time when childbirth would normally occur.” (The *mens legislatoris* for this is that if you remove the fetus before the time when childbirth would normally occur, you endanger both the fetus and the mother’s health.) Furthermore, there is the concept of injury as defined in the Criminal Code: Injury means “to harm the totality of the human body by using some means of force.” This concept is based on the premise that a living person exists. In other words, there is no injury if there is no living person. Thus, on the question of when a person comes into existence, the generally accepted view is that a person comes into existence “when the fetus has been partially exposed out of the mother’s body.” If we presuppose and literally apply these concepts of “abortion” and “injury” as defined above, it is conceivable that one could find that in this case there was neither a crime of abortion (because a baby was actually born) nor injury (because a fetus is not legally a person).

However, when considering the type of misery inflicted on the victims, surely no one can say that the defendants should not be punished for the crime of draining the noxious matter into the water. We can evaluate this decision by saying that the Court, in order to respond to the feelings of ordinary citizens, used certain legal techniques to find that the defendants caused the injuries that led to the victims’ death.

By the way, the academics, with the cases of the thalidomide-

deformed fetuses as a momentum, embarked upon the problem of “physical injury to the fetus.” In regard to the fact that some medical substance caused the fetus to become morbid and then, after a normal birth, the baby was dysfunctional, there have been developed two different theories: ① recognize physical injury to the baby after it is born; and ② hold that there is no crime.

Let us now study the bases for the two theories.

The basis of theory ① is as follows.

(1) A fetus normally becomes a “person”; it is in the fetus that we find the seeds that have the organic potential to become a person. Therefore, any attack against the fetus is sufficiently dangerous to injure the person.

(2) Legally speaking, an attack results in injury irrespective of whether the victim is a fetus or a person.

(3) In the crime of injury, it is not necessary that at the time of an injurious act being done the person (the object of the act) should actually exist. For example, where one injures another by setting a trap into which that other person later falls, it is not necessary that the other person should actually be existent when the trap is set.

The basis of theory ② is as follows.

(1) The Criminal Code does not punish abortions that occur due to negligence. That is to say, there would be no punishment even if a fetus during pregnancy happened to die due to the mother’s negligence. Thus, naturally, injury to a fetus due to negligence is not punished.

(2) Commonplace acts can often lead to an injury to a fetus. Therefore, if an injury to a fetus due to negligence were punished, it would follow that some commonplace acts would be punished as injurious acts.

(3) In the crime of injury, certainly it is not essential that a person should exist at the time of the injurious act being done; however, a person must exist when the effect of the act occurs. In the case of injury to a fetus, no person exists at the time the effect of the act occurs.

The decision of the current case is based fundamentally on theory ②: it denies that there can be an injury to the fetus itself. This

decision took the approach that there was an injurious act to the “person” who was the mother’s body including the fetus, and that the effect of the act occurred to the “person” whom the fetus became by being separated from the mother’s body that had been injured. Therefore, in sum, this approach is that there was an injurious act to a person and the effect of the act occurred to a person; thus, there is no problem in recognizing the crime of injury.

Academics have criticized this decision as being “somewhat unreasonable in its logic. It is problematic that the Court forcibly based its decision on its (irrational) interpretation of Criminal Code provisions (such as Article 211) in the case where, in view of the nature of things, punishment cannot be legally imposed without revising Article 211.”

2. A case in which a doctor who violated his duty to protect was charged with homicide for abandoning a premature baby after an abortion and leaving the baby to die.

Decision by the Third Petty Bench of the Supreme Court on January 19, 1988. Case No. (a) 588 of 1984. A case of abortion through professional conduct, homicide caused by abandonment by one with a duty to protect, and the abandonment of a corpse. 42 *Keishū* 1.

[Reference: Criminal Code, Articles 214, 218, 210, and 190.]

[Facts]

The accused had been operating an obstetrics/gynecology practice in Okinawa Prefecture since July 1979; he was a doctor authorized to perform abortions under the Eugenic Protection Act. In October 1980, the accused performed an abortion on Ms. A at her request. However, a premature baby in the 26th week of pregnancy was born. The accused neglected the baby leaving it lying in his clinic without providing any necessary medical care, e.g., placing the baby in the incubator. Consequently, the baby died 54 hours after its birth. After that, the doctor conspired with the baby’s father and buried the baby’s body on a farm.

[Opinions of the Court]

Jokoku appeal dismissed.

The accused, at Ms. A's request, attempted to abort the 26 week old fetus at his own clinic. The accused neglected the premature baby leaving it lying in his clinic even though he realized that the baby could have survived if the accused had gotten the baby to a hospital equipped with incubators and other medical equipment. Consequently, the premature baby died 54 hours later. Based on these facts, the original (*koso* appellate court) decision is appropriate in that the accused was found guilty of abortion through professional conduct and homicide through abandonment by one who had a duty to protect.

[Comment]

This decision is significant because it is a kind of leading case with typical facts, and the Supreme Court clarified its judgment regarding both the crimes of abortion and homicide through abandonment by one who has a duty to protect.

First, regarding whether the crime of an illegal abortion can be constituted, one must consider the relation between the abortion and the Eugenic Protection Act. Article 2(2) of the Act provides that an artificial interruption of pregnancy shall be legal so long as the fetus' life cannot be maintained outside of the mother's body. Once the guideline was that a fetus could survive after eight month pregnancy. (The reason was that in light of medical progress, it was impossible for a baby born at less than eight months to survive.) Whether it is possible for premature babies to survive when they are born may vary depending on medical progress and on the specific details of each situation. Therefore, we can only judge each case on its merit as the current decision has done.

Regarding the crime of homicide through abandonment by one who has a duty to protect, the important point is that the current decision has recognized that the doctor who performed the abortion has a duty toward the premature baby (a duty to protect). One problem is whether it is proper to recognize the doctor's responsibility to protect the baby even when there are the parents who have

the legal duty to supervise and raise their own child. However, the reasons why the Court recognized the doctor's responsibility to protect the baby were based on the following factors, which were unique to this case:

① The accused undertook to perform abortion when a viable baby might be born.

② The mother, who was only 16 at the time, had no medical knowledge at all. Therefore, the accused, as a doctor, had a duty to instruct her about the proper care of a premature baby.

③ Only the doctor can send a premature baby to a hospital that is well equipped to give the necessary treatment; in this case, only the accused could have done so.

④ The accused let the mother go home after the operation but kept the premature baby in his custody.

Therefore, the current decision does not consider that the responsibility to protect may arise exclusively from the status of the obstetrics/gynecology doctor who performed the abortion.

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b. Law of Criminal Procedure

1. A case in which it was disputed whether or not the competence of the evidence obtained through an illegal examination of personal effects and the proceeding of taking a urine sample was affirmed.

Decision by the Second Petty Bench of the Supreme Court on September 16, 1988. Case No. (a) 944 of 1987. A case of violation of the Stimulant Drug Control Act. 42 *Keishū* 1051.

[Reference: Constitution of Japan, Article 35; Police Duties Law Act, Article 2 (1) through (3); Code of Criminal Procedure, Articles 1, 218 (1) and 221.]