who has a certain close connection with the addressee to the addressee if the document is delivered to him. On the other hand, the latter reasons that the presence or absence of an authority to receive a document should be assessed objectively and clearly by appearance, but a virtual conflict of interest is not clear for a service institution and it is not appropriate that an effect of service is influenced by such circumstances because it lacks the stability of a procedure.

And, as discussed previously, this judgment held determinately to adopt the latter theory.

(3) About the availability of a retrial in the case of nullity of a service, the Supreme Court held that there was a ground for retrial in Art. 420 Para. 1 Item 3 of the Code of Civil Procedure (old code; now Art. 338 Para. 1 Item 3) when a complaint was not serviced validly and therefore a judgment was given without an opportunity of the person who was a defendant to be involved in the process, because there was no reason for different treatment from the case which a person who did an act of procedure as an agent of the party had no agency (Supreme Court 1st P.B., September 10, 1992. Case No. (o) 589 of 1991, 46 (6) MINSHU 553) and has taken a flexible stance on an expansive interpretation of the ground of retrial. This judgment brings forward a position of the judgment of the Supreme Court in 1992, which has substantiated the opportunity to be involved in the process that should be guaranteed to the party in terms of acknowledging the existence of a ground of retrial in Item 3, even in the case where there is no procedural defect, and this is very important and should be assessed affirmatively.

6. Criminal Law and Procedure

X v. Japan
Supreme Court 2nd P.B.,March 26,2007
Case No. 2003 (A) No. 1033
61 Keishu 2

Summary:

1. Under the circumstances where with regard to the confirmation of a patient, the hospital fails to establish an organization-wide system or to specify and have thoroughly informed the sharing of roles among the doctors and nurses engaged in medical services, the doctors, nurses, and other personnel involved in an operation are not allowed to consider it unnecessary to make a confirmation themselves, while trusting that other personnel have already made a confirmation; rather, depending on their own responsibilities and roles, they are independently obliged to confirm the patient's identity in an overlapping manner.
2. In the case of a medical accident where a mix-up of patients occurred upon performing operations, negligence can be found with regard to the doctor who took charge of anesthetization and the doctor cannot be deemed to have fulfilled the duty of care, even in the circumstances where other personnel involved in the operation did not take the doctor's suspicions seriously, when: (i) Before anesthesia induction, the doctor only took insufficient measures to confirm the patient's identity, e.g. calling the patient by his/her family name, and failed to make confirmation by checking the characteristics of the patient's facial and other appearance; and (ii) After anesthesia induction, when the doctor had a suspicion about the patient's identity because of the characteristics in appearance and the test findings, the doctor related his/her suspicions to other personnel involved in the operation and took some measures to confirm the patient's identity, but failed to take reliable measures for confirmation.

Reference:

The first sentence of Article 211 of the Penal Code (prior to the revision by Act No. 138 of 2001)

The first sentence of Article 211 of the Penal Code (prior to the revision by Act No. 138 of 2001) (Causing Death or Injury through Negligence in the Pursuit of Social Activities)

A person who fails to exercise due care required in the pursuit of social activities and thereby causes the death or injury of another shall be punished by imprisonment with or without work for not more than 5 years or a fine of not more than 500,000 yen.

Facts:

The accused served as a doctor of the anesthesiology department of the Yokohama City University Hospital and was engaged in anesthetic management for patients before operations.

On January 11, around 8:20 a.m., a ward nurse C (co-accused in the prior instance), carried X and Y all by herself from their rooms on the seventh floor of the ward to the exchange hall in front of the entrance of the operating rooms on the fourth floor, putting them on two stretchers respectively and taking the lift for conveyance. In front of the operating rooms, another nurse D (co-accused in the prior instance) received X and Y. Nurse C, having informed Nurse D of the names of both patients at a time, first attempted to hand over X to Nurse D. On this occasion, when Nurse D asked Nurse C about the patient's name in an unclear way, Nurse C misunderstood that Nurse D asked about the name of the next patient, and therefore Nurse C answered that the patient was Y. Because of this, Nurse D received X, mistaking him for Y, and handed him over to the nurse in charge of the lung operation. Nurse C then attempted to hand over X's medical records, etc. to Nurse D after handing over X's body, but next handed over Y to Nurse D as instructed by Nurse D, without handing over X's medical records, etc. On this occasion, since neither Nurse C nor Nurse D confirmed the patient's name, Nurse D received Y, mistaking him for X, and handed him over to the nurse in charge of the cardiac operation. Since the medical records of these patients were handed over to the respective nurses after the handing over of the patients' bodies, nobody noticed the mix-up of the patients.

Around 8:40 a.m. on the same day, the accused came in to the third operating room first of all the doctors assigned thereto, and talked to Y, who was lying on the surgical bed with a hair cap on his head and a cotton blanket covering his body. On this occasion, the accused said to Y, "Good morning, Mr. X," "I will remove your dropper. Mr. X. Which hand do you use to eat? It is the right hand, right?" Since Y nodded to all these words, the accused did not take any other positive measures to confirm whether the patient at hand was X, such as by checking the patient's facial and other physical characteristics or asking the patient about his condition. Around 8:45 a.m., the accused, with Doctor B, the second anesthetist who

next came in to the operating room, started to administer anesthesia to the patient by intravenous injection, while giving oxygen. When putting a pharyngoscope for endotracheal intubation into the patient's mouth, the accused noticed that the patient's teeth were all his own teeth. Since the accused had been informed by X that he had a denture, the accused pulled the patient's teeth and asked the nurse about this. However, the accused was unable to find out the reason for this difference and did not try to confirm it any more. Subsequently, while examining the patient's chest by auscultation, the accused did not pay attention to the existence or absence of heart murmur or chest hair, nor did he/she notice the difference in eyebrows when affixing eye-patches to the patient's eyes. The manager of the anesthesiology department present at the scene found that the patient's public hair and chest hair had not been shaved although the shaving should usually be done in cardiac operations, and instructed the nurse to conduct shaving. The accused had rarely experienced such an occurrence. When the accused removed the paper affixed to the patient's neck for insertion of a catheter, the patient's hair cap moved and his hair on the right side of the head was exposed which was gray and short and looked like downy hair. Since, when the accused saw X's hair before, it was black and thick for his age and was not so short, the accused asked Doctor B if he/she also thought the patient's hair was grayer and shorter than expected, but Doctor B did not clearly answer. Next, when the accused measured the patient's pulmonary arterial pressure, he/she was surprised to find that it was about 13, at the normal level. Therefore, the accused asked B why the patient's pulmonary arterial pressure was at the normal level, whether it was caused by an anesthetic effect or improvement in the patient's condition. Doctor B did not deny either of these possible causes. Furthermore, on the display screen showing transesophageal echocardiography, no mitral valve prolapse or rupture of chordae tendinae was discovered, and only a small quantity of backflow of blood was found from the joint surface of the anterior leaflet and the posterior leaflet. The level of backflow of blood was extremely minute and could be found in any elderly person, and did not need to be cured by operation. Until the accused implemented these procedures, the first assistant doctor E and the second assistant doctor F, both of whom were doctors in charge of X, and other personnel came in to the operating room. Doctor B and other

doctors discussed the findings in the test performed in the operating room, arguing the possibility that the cause of the decrease in the backflow of blood might be the decline in pulmonary arterial pressure, and the cause of the decline in pulmonary arterial pressure might be an anesthetic effect. The accused, from the difference in appearance (e.g. dentures, hair) as well as a significant difference in the test findings, had a suspicion that the patient in front of his/her eyes was not X. The accused suggested his/her suspicion to Doctor B and also told Doctor E and Doctor F, who were in charge of X, that the patient's hair was shorter and had a different color compared with X's hair. However, the accused was unable to hear any reply from the doctors, except that Doctor F said that X might have had his hair cut. The accused requested Doctor B to ask the doctors in charge to take a look at the patient carefully once again, and in response to this request, Doctor B asked Doctor E, et al. to carefully check the patient's body from the foot, but the doctors did not give any clear answer. Having remembered that there was a notice alerting the existence of more than one patient having the same name, the accused had the nurse in charge of assistance make a telephone call to the ward nurse. By this call, it was confirmed that X had already been sent to the operating room. Furthermore, Doctor F said that the patient's chest looked or felt like X's chest. Therefore, the accused made no more efforts for confirmation. Doctor B, as a specialist in transesophageal cardiac catheterization, had never seen such a dramatic decline in pulmonary arterial pressure due to an anesthetic effect, and therefore felt that it could not be explained only because of an anesthetic effect. However, Doctor B did not tell this view to other doctors.

Then, Doctor E and Doctor F started to perform median sternotomy for the patient. The operating surgeon A came in late to the operating room, and after hearing the findings in transesophageal echocardiography, etc. and seeing the display screen showing such findings, Doctor A had a question about the drastic changes in symptoms which he/she had never experienced. However, Doctor A decided to continue the operation, considering that the cause of the changes in symptoms could be explained by an anesthetic effect, etc. Doctor A switched to an artificial heart-lung machine for blood circulation, and sutured the mitral valve that had no prolapse two times, despite the fact that cardiac hypertrophy, etc. were not

found, and stopped the very small quantity of backflow of blood. The operation ended around 3:45 p.m.

In the 12th operating room, around 8:40 a.m., the first anesthetist G (co-accused in the prior instance), a doctor of the anesthesiology department, came in to the operating room first of all doctors assigned thereto, and talked to X, saying "Good morning, Mr. Y." On this occasion, X answered "Good morning." Doctor G, who had met Y on the occasion of the preoperative visit three days ago, did not take any positive measure to confirm the identity of the patient, and without noticing the mix-up, Doctor G started to administer anesthesia to the patient with the second anesthetist H. Then, finding the Frandol Tape affixed to X's back, Doctor G thought it would be an obstacle to insertion of a catheter, and removed it without knowing what it was. Doctor G did not informed Doctor H, et al. of the removal. Further, although Doctor G could not find a post-surgical scar of spinal canal stenosis on Y's back which the doctor had been informed of by Y, Doctor H said that the patient might have not undergone operation but only received a test, and Doctor G agreed with Doctor H without having a second thought about this. Then, the operating surgeon, Doctor I (co-accused in the prior instance) who was one of the doctors in charge of Y, came in to the operating room. Doctor I started to open the right chest without confirming the identity of the patient. In the course of performing the operation, Doctor I saw several phenomena by which he/she should have noticed the mix-up of the patients, such as the difference between the patient's oxygen saturation and other conditions and Y's conditions seen in the preoperative tests, and the discovery of pulmonary emphysema, etc. that were not seen in the preoperative X-ray test. Despite these phenomena, Doctor I did not think of the possibility of a mix-up, and examined the patient's body by touch with the first assistant doctor, placing top priority on the discovery of the tumor. In the end, Doctor I was unable to find the tumor, and cut off the cyst found on the backside of the lung and conducted plication. The operation ended around 1:48 p.m.

Opinion:

The final appeal is dismissed.

When performing a medical act, confirming the identity of the subject

patient is the basic prerequisite for justifying the medical act, and it is also a primary and basic duty of care required for medical personnel. Therefore, in order to ensure confirmation of patient identification, it is desirable for each hospital to establish an organization-wide system, and specify and have thoroughly informed the sharing of roles among the doctors and nurses engaged in medical services. Based on the facts of this case showing that these measures were not taken at all, the doctors, nurses, and other personnel involved in an operation are not allowed to consider it unnecessary to make confirmation themselves while trusting that other personnel have already made confirmation. Rather, depending on their own responsibilities and roles, they are independently obliged to confirm the patient's identity in an overlapping manner. Confirmation of the patient's identity should be made, at the latest, before anesthesia induction which is an invasion into the patient's body, and even after anesthesia induction has been performed, if any circumstance occurs that invites suspicion about the patient's identity, the personnel involved in the operation are obliged to reconfirm the identity by canceling the operation or stopping the progress of the operation unless the operation has progressed to the stage where it is difficult to cancel or suspend it.

Editorial Note:

Principle of trust means as follows; in collective acts, you have no criminal liability even if any criminal result happens in case of the fact that you can trust your colleague's activities. It is well known that the principle of trust is recognized as just since the division of labor is essential for contemporary medical service. But in this case, the Supreme Court said that the principle of trust should be denied if in order to confirm the identity of subject patient, establishing an organization—wide system and thoroughly informing the sharing of roles among the doctors and nurses engaged in medical services are not completed. This judgment is thought to be very remarkable for Japan's future medical services.

X v. Japan
Supreme Court 3rd P.B.,April 9, 2007
2003 (A) No. 279
Keishu Vol. 61, No. 3

Summary:

Where the accused, after receiving the service of a written notice of petition for appeal regarding the appeal filed by the public prosecutor against the judgment of not guilty rendered by the court of the first instance, failed to notify the court of second instance of his/her residence, etc. as required under Article 62, para. 1 of the Rules of Criminal Procedure, and received, without making any objections, the documents served to the place where he/she lived at that time, and then went missing, the service by registered mail of the writ of summons for the trial date, etc. to that place executed by the court of the second instance is valid.

Reference:

Article 54 of the Code of Criminal Procedure, Article 62, para. 1 of the Rules of Criminal Procedure, Article 63, para. 1 of the Rules of Criminal Procedure (prior to the revision by Supreme Court Rule No. 7 of 2003)

Article 54 of the Code of Criminal Procedure (Service of Documents)

Except as otherwise provided by the Rules of Court, the provisions of laws and regulations concerning the Civil Procedure (excluding the provisions concerning service by publication) shall apply mutatis mutandis to the service of documents.

Article 62, para. 1 of the Rules of Criminal Procedure (Notification for Service)

The accused or his/her representative, defense counsel or assistant in court shall, for the purpose of receiving service of documents, notify the relevant court of their residence or office in writing. Where any residence or office does not exist in the jurisdictional district of the court, they shall appoint a person who has his/her residence or office in the said district as the person who will receive service of documents, and notify the court to that effect by means of a document signed jointly with such person.

Article 63, para. 1 of the Rules of Criminal Procedure (prior to the revision by Supreme Court Rule No. 7 of 2003) (Service by Registered Mail: Article 54 of the Act)

Where a person who must notify the court of his/her residence or office or the person who will receive service of documents fails to make

such a notification, the court clerk may serve the relevant documents by registered mail; provided, however, that this shall not apply to the service of a charge sheet or authenticated copy of summary order.

Facts:

According to the records, the following facts can be found.

(1) Since 1979, the accused had lived in the temporary living quarters for civil engineering and construction workers located in Kusatsu City, Shiga Prefecture. In November 1987, the accused was prosecuted without detention for the charges of causing injury through negligence in the pursuit of social activities and violation of the Road Traffic Act. Throughout the investigation process and the trial procedure in the first instance, the accused stated that his/her residence was the said temporary living quarters, and therefore all documents addressed to the accused were served to that quarters during the time of the first instance. The public prosecutor filed an appeal against the judgment of not guilty rendered by the court of the first instance in August 1988, and a written notice of petition for appeal was served to the accused. However, as in the procedure of the first instance, the accused failed to notify the court of second instance of his/her residence, etc. as required under Article 62, para. 1 of the Rules of Criminal Procedure. Also in the procedure of the second instance, the relevant documents addressed to the accused (e.g. a written notice on appointment of defense counsel, transcript of the public prosecutor's statement of reasons for appeal, writ of summons for the trial date, etc.) were served to the temporary living quarters. All documents addressed to the accused, of which the writ of summons for the second trial date in the second instance (June 23, 1989) came last, were received by the accused, and during the period until the last service received, the accused made no objection to the services.

(2) The accused did not appear in the court of second instance, saying that he/she did not need to attend the trial procedure in the second instance. Around June 20, 1989, the accused left the temporary living quarters without telling others where he/she was going or notifying the court of second instance of his/her new residence, etc. Since then, the accused went missing despite repeated investigation under the court's own authority by the court of second instance to find where he/she was.

(3) In October 2002 and thereafter, the court of second instance served the writs of summons and other documents addressed to the accused to the said temporary living quarters by registered mail (this method of service shall hereinafter be referred to as "service by registered mail"). The court of second instance held the trial without the appearance of the accused. In January 2003, by quashing the judgment of the first instance based on the evidence examined in the trial procedure in the first instance and on the second trial date in the second instance, the court of second instance found the accused guilty for the charged crimes, and sentenced him/her to imprisonment with work for 18 months, while suspending the execution of the sentence for four years.

Opinion:

The final appeal is dismissed.

The accused argues that in this case, since it is the public prosecutor that filed an appeal against the judgment of not guilty rendered by the court of the first instance, the accused is not obliged to notify the court of his/her residence, etc., and because there are no reasons to consider that the accused should accept disadvantage from use of service by registered mail, the service by registered mail mentioned in 1(3) above cannot be deemed to be valid.

However, according to the facts mentioned above, since the accused became aware of the public prosecutor's filing of the appeal upon receiving the written notice of petition for appeal, the accused was obliged to notify the court of second instance of his/her residence, the person who will receive service of the relevant documents, etc. as required under Article 62, para. 1 of the Rules of Criminal Procedure, but neglected this obligation. Therefore, it can be construed that the court of second instance was allowed to make service by registered mail under Article 63, para. 1 of the Rules of Criminal Procedure (prior to the revision by Supreme Court Rule No. 7 of 2003). Furthermore, since the accused had received, without making any objection, the documents served to the temporary living quarters by the court of second instance, he/she can be deemed to have manifested to the court the intention to receive services at the temporary living quarters. Only after doing so, the accused him/herself went missing, without manifesting any different intention. This leads

to the conclusion that, even if the accused cannot receive the documents served to the temporary living quarters, he/she should accept the disadvantage derived from it. Consequently, it is appropriate to construe that the service by registered mail to the temporary living quarters executed by the court of second instance is valid.

Therefore, according to Article 414 and Article 386, para. 1, item 3, and the proviso of Article 181, para. 1 of the Code of Criminal Procedure, the decision has been rendered in the form of the main text by the unanimous consent of the Justices.

Editorial Note:

Article 54 of the Code of Criminal Procedure says about the delivery service of documents by registered mail, that the provisions of the Code of Civil Procedure, except the ones for registered mail of public announcements, can be applied unless there are some special provisions of delivery service of documents. Article 62, para. 1 of the Rules of Criminal Procedure says that the accused should report his/her own address by document in order to receive documents and according to Article 63, para. 1, the accused who fails to report his/her own address by document is subject to registered mail. There are two important points about this judgment. One point is whether according to Article 54 of Code of Criminal Procedure, the Article 107 of Code of Civil Procedure can be applied. The other is whether registered mail for the accused whose address is uncertain is possible. The Supreme Court has always taken the positive stance about both discussion points. This judgment can be said to reconfirm the Supreme Court's traditional opinions.

7. Commercial Law

Bull-Dog Sauce C. Ltd. v. U.S. Steal-Partners
Supreme Court 2nd P.B., August 7, 2007
Case No. (kyo) 30 of 2007
61 (5) Minshu 2205; 1983 Hnrei Jiho 56