importance to think that the preliminary injunction of this case is "Manzokuteki Kari-shobun", this decision is "an" interpretation, not a legislation by the Supreme Court.

I think, however, that it is true that the preliminary injunction of this case is not just "preliminary injunction", but "Manzokuteki Kari-shobun". And if so, the hearing about the preliminary injunction of this case is similar to the trial about the merits of this case. That is the reason why I support the latter interpretation.

I guess that the Supreme Court is sending the message that we should consider the settlement of the dispute in a preliminary injunction procedure.

6. Criminal Law and Procedure

X v. Japan
Supreme Court 3rd P. B., September 28, 2009
2007 (A) No. 798
KEISHU Vol. 63, No. 7, p868

Summary:

In the case where the investigation authorities, with the aim of achieving the purpose of the investigation, inspect parcels that have been put into the delivery agent's transportation process upon the request of the consignors, without obtaining consent from the consignors or consignees, by irradiating these parcels with x-rays from outside and observing the projections of the items contained therein, such an act is regarded as a compulsory disposition that has the nature of an inspection in a criminal procedure, and it is illegal to conduct such an inspection without an inspection warrant.

Reference:

Article 197, paragraph (1) and Article 218, paragraph (1) of the Code of Criminal Procedure

Article 197, paragraph (1) of the Code of Criminal Procedure

With regard to an investigation, such examination as is necessary to achieve its objective may be conducted; provided, however, that compulsory dispositions shall not be applied unless special provisions have been established in this Code.

Article 218, paragraph (1) of the Code of Criminal Procedure

A public prosecutor, a public prosecutor's assistant officer or a judicial police official may, if necessary for the investigation of an offense, conduct search, seizure or inspection with a warrant issued by a judge. In such cases, the inspection and examination of a person shall be conducted with a warrant for physical examination.

Facts:

According to the findings of the judgment in the prior instance and of the judgment in the first instance affirmed by the former, as well as the case records, the outline of the facts of the case is as follows.

The police officials of the Community Safety Department of the Osaka Prefectural Police Headquarters had been carrying out a secret investigation since some time before, targeting a limited liability company located in Osaka City (hereinafter referred to as the "Company") on suspicion of smuggling stimulants. When the police officials had a suspicion that a person related to the Company had been purchasing stimulants from a person related to an organized crime group based in Tokyo and receiving them by parcel delivery service, they made inquiries, etc. to the service office of the delivery agent about the delivery status of the parcels addressed to the Company's office. Through such inquiries, the police officials found that a number of parcels had been delivered to the Company's office within a short period of time and some of the delivery slips of these parcels contained suspicious entries. The police officials thought that they needed to temporarily take possession of some suspicious parcels among those to be delivered to the Company's office and discover the contents thereof, and they asked the manager of the service office of the delivery agent for cooperation and obtained his consent. Then, on five occasions during the period from May 6 to July 2, 2004, the police officials temporarily took possession of from the said service office, the parcels to be delivered to the Company's office, taking one parcel on each occasion, and conducted X-ray inspections of these parcels at the

Osaka Customs within the Kansai Airport. As a result, they found nothing that appeared to be stimulants in the first inspection, but in the second and subsequent inspections, they observed projections of rectangular bags in which fine solid materials were packed evenly (these five inspections shall hereinafter be referred to as the "X-Ray Inspections"). Those parcels that had gone through the X-Ray Inspections were subsequently returned to the said service office and then put back into the ordinary transportation process, and finally delivered to the Company's office. The police officials had not obtained consent for the X-Ray Inspections from the consignors or consignees of these parcels.

Opinion:

The final appeal is dismissed.

We examine this argument based on the facts mentioned above. The X-Ray Inspections, which targeted the parcels that had been put into the delivery agent's transportation process upon the request of the consignors, were conducted by the investigation authorities with the aim of achieving the purpose of their investigation, without obtaining consent from the consignors or consignees, by irradiating these parcels with x-rays from outside and observing the projections of the items contained therein. By viewing these projections, it is possible to figure out the shape or material of the contents of the parcels, and it is also possible to identify the description, etc. of the contents specifically to a considerable degree, depending on the type of contents. In this respect, such inspections seriously infringe the privacy, etc. of the consignors or consignees in relation to the content of the parcels, and they can be regarded as a compulsory disposition that has the nature of an inspection in a criminal procedure. Since it was possible to obtain inspection warrants issued by a court before conducting the X-Ray Inspections, we should inevitably conclude that the X-Ray Inspections conducted without inspection warrants were illegal.

The stimulants, etc. were found during the seizure executed on July 2, 2004, based on the search and seizure warrants issued on June 25, 2004, from inside the parcels received by the person related to the Company after going through the fifth of the X-Ray Inspections and from the residence of the said person. It seems that these warrants were issued based

on, as part of the references, objects including the photographs of the projections obtained as a result of the X-Ray Inspections conducted until the fourth occasion, and in view of this, the stimulants, etc. can be deemed to be evidence which has relevance to the X-Ray Inspections, which are found to be illegal.

However, the circumstances concerned should be taken into consideration, including: (i) at the time when the X-Ray Inspections were conducted, there was a growing suspicion that the person related to the Company had committed the crime of receiving stimulants by parcel delivery service, and there was a substantial necessity to conduct the X-Ray Inspections in order to further unveil the case; (ii) the police officials conducted the X-Ray Inspections after obtaining consent from the delivery agent who actually had possession and control of the parcels themselves, and on these occasions, they gave consideration to limiting the subject of the investigation, and therefore they cannot be deemed to have had the intention to evade the relevant rules concerning the principle of requiring warrants for compulsory disposition; (iii) the stimulants, etc. were found during the seizure executed based on the search and seizure warrants that had been issued through judicial review, and upon the issue of these warrants, it seems that evidence other than the findings of the X-Ray Inspections had been provided to the court as references. In light of these circumstances, even though the stimulants, etc. have relevance to the X-Ray Inspections as explained above, we cannot go so far as to say that there was a material violation of law in the process of collecting the stimulants, etc. as evidence, and by comprehensively taking into account the importance of the stimulants, etc. as evidence and other circumstances concerned, it is appropriate to construe that the admissibility as evidence of stimulants, etc. can be acknowledged.

Consequently, the determination of the court of prior instance is justifiable for its conclusion in that it affirmed the proceedings by the court of first instance that had not excluded the stimulants from the proceedings but used them as evidence for finding facts.

Therefore, according to Article 414 and Article 386, paragraph (1), item (iii) 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:

According to the Supreme Court, the X-Ray Inspections, which targeted the parcels that had been put into the delivery agent's transportation process upon the request of the consignors, were conducted by the investigation authorities with the aim of achieving the purpose of their investigation, without obtaining consent from the consignors or consignees, by irradiating these parcels with x-rays from outside and observing the projections of the items contained therein. However, the two lower courts said that the X-Ray Inspections are not classified into one of the compulsory dispositions, because the Inspections infringe little privacy, while the Supreme Court took the opposite opinion.

Thus, X-Ray Inspections should be based upon a warrant issued by a judge, but in this case, because no warrant was issued, the problem arose whether the Inspections were illegal and the evidence could not be used for criminal trial.

The Supreme Court judged that the investigation was illegal but the findings taken from it could be used as evidence for a criminal trial, in line with to traditional opinions.

X v. Japan

Supreme Court 2rd P. B., December 07, 2009

2008 (A) No. 1678

Keishu Vol. 63, No. 11, p2641

Summary:

With regard to the accident in which, when the victim was running over a cavity, which had been created in the sand layer of the artificial sand beach as a result of the sand being drawn out into the sea due to the damaged sand-control fillers near the center of the east jetty, the said cavity collapsed because of the victim's weight and the victim fell into the subsidence sinkhole and then was buried in sand, given the facts of the case indicated in the judgment, e. g. (i) the accused persons who were engaged in the administration, etc. of the said sand beach had been aware that the south jetty and the east jetty have the same basic structure in which the

sand-control fillers prevent the sand from being drawn out into the sea, and that subsidence incidents had occurred repeatedly on the sand beach along the south jetty and the sand beach near the south end of the east jetty, and they had taken measures while considering that such subsidence incidents had been caused by the damaged sand-control fillers, and (ii) abnormal conditions similar to subsidence had actually occurred on the sand beach on the north side along the east jetty, the accused persons could have foreseen the possibility that subsidence incidents would occur on the sand beach along the east jetty, where the site of the accident is located, and in consequence, the occurrence of the accident in which the victim was buried in sand was foreseeable to the accused persons.
(There is a dissenting opinion.)

Reference:

First sentence of Article 211, paragraph (1) of the Penal Code (prior to the revision by Act No. 36 of 2006) (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. The same shall apply to a person who through gross negligence, causes the death or injury of another.

Facts:

According to the findings by the judgment in the prior instance, the outline of the facts of the case is as follows. The accused persons were engaged in businesses including the administration of the artificial sand beach where the accident occurred. This sand beach forms a sand layer of about 2.5 meters in thickness, which shares borders with L-shaped jetties on the east and south sides. Both the east jetty of about 157 meters in total length and the south jetty of about 100 meters in total length are built by laying concrete caissons and structured so that the sand-control fillers made of rubber affixed at the joints in the gaps between the caissons would prevent sand from being drawn out of the sand layer into the sea. When the victim was running over a cavity of about 2 meters in depth and about 1 meter in diameter, which had been created and expanded in the

sand layer as a result of the sand being drawn out into the sea due to the damaged sand-control fillers affixed at the joints between the caissons near the center of the east jetty, the cavity collapsed because of the victim's weight and the victim fell into the subsidence sinkhole and then was buried in sand. This is how the accident occurred. The accused persons, since before the accident occurred, had been aware that subsidence incidents had occurred repeatedly on the sand beach along the south jetty and the sand beach near the south end of the east jetty, and had taken measures while considering that such subsidence incidents had been caused by the sand drawn out into the sea due to the damaged sand-control fillers. As for the south jetty and the east jetty, both of which have the same basic structure, in which the sand-control fillers affixed at the joints between the caissons prevent the sand from being drawn out into the sea, it had been revealed that these sand-control fillers had been damaged after a few years, although their expected life was about 30 years. What is more, multiple abnormal conditions similar to subsidence had actually occurred since before the accident occurred, not only at places near the south end of the sand beach along the east jetty but also at places a little to the north.

Opinion:

The final appeal is dismissed.

Given the facts mentioned above, we should conclude that the accused persons could have foreseen the possibility that on the sand beach along the east jetty, where the site of the accident is located, subsidence incidents would occur as a result of the sand being drawn out into the sea due to the damaged sand-control fillers. Consequently, the judgment in the prior instance is appropriate in that it acknowledged that the occurrence of the accident was foreseeable to the accused persons.

…

The dissenting opinion by Justice IMAI Isao is as follows.

In my opinion, the judgment in prior instance which acknowledged the foreseeability of the occurrence of the accident made a material error in finding facts, and it would bring about a considerable injustice if it were not quashed. The reasons for my opinion are as follows.

1. The biggest point at issue in this case is whether or not the occur-

rence of the accident was foreseeable, or more specifically, whether or not it was foreseeable that subsidence or other incidents that would cause harm to people's life or body would occur near the sand beach where the accident in question occurred (the sand beach inside the caissons near the center of the north side of the east jetty). The judgment in the first instance denied the foreseeability and found the accused persons to be not guilty, whereas the judgment in the prior instance acknowledged the foreseeability, quashed the judgment in first instance, and remanded the case to the court of the first instance.

2. I agree with the majority opinion with regard to the circumstances where the accident occurred and the cause thereof. I also agree with the majority opinion with regard to the fact that the accused persons had been aware that subsidence incidents had repeatedly occurred on the sand beach along the south jetty and the sand beach near the south end of the east jetty, and had taken measures while considering that such subsidence incidents had been caused by the sand drawn out into the sea due to the damaged sand-control fillers.

Affirming these facts, the majority opinion states that given other facts found by the judgment in the prior instance, i. e. (i) as for the south jetty and the east jetty, both of which have the same basic structure in which the sand-control fillers affixed at the joints between the caissons prevent the sand from being drawn out into the sea, it had been revealed that these sand-control fillers had been damaged after a few years, although their expected life was about 30 years, and (ii) multiple abnormal conditions similar to subsidence had actually occurred since before the accident occurred, not only at places near the south end of the sand beach along the east jetty but also at places a little to the north, it should be concluded that the accused persons could have foreseen the possibility that on the sand beach along the east jetty, where the site of the accident is located, subsidence incidents would occur as a result of the sand being drawn out into the sea due to the damaged sand-control fillers.

3. I examine these facts on which the majority opinion is premised.

The fact mentioned in (i) is obvious from the evidence of the case, and the accused persons have not argued against it. However, as for the fact mentioned in (ii), I believe that the finding made by the judgment in the prior instance cannot be affirmed, on the following grounds.

According to the finding of the judgment in the first instance, it is a common view among civil engineers that the phenomenon where no abnormality is found on the surface even when there is a large cavity in the sand layer underneath cannot be regarded as an ordinary phenomenon that was familiar to civil engineers at the time before the accident. The judgment in the prior instance did not deny this finding, and there is not enough evidence to deny it. Assuming so, whether or not subsidence had occurred near the site of the accident before the accident is a critical point when determining the foreseeability of the occurrence of the accident. Needless to say, the term "subsidence" mentioned here means subsidence to the level where ordinary people would feel danger when seeing it, and the term also has such meaning when it is mentioned in the section below.

According to the evidence of the case, it is clear that before the accident occurred, subsidence incidents had occurred intensively on the sand beach inside the south jetty, and a number of articles of evidence have been submitted to prove the occurrence of subsidence incidents on the sand beach inside the south jetty. For these subsidence incidents, the Akashi City Office and the Himeji Construction Office of the Kinki Regional Development Bureau of the Ministry of Land, Infrastructure and Transport held discussions many times and took measures such as repairing sinkholes and keeping people out of the subsidence areas. More specifically, the personnel of the Seacoast and River Improvement and Management Division of the city's Civil Engineering Department patrolled the sand beach in question regularly and reported any abnormality they found to the city's departments or divisions in charge. In addition, the city entrusted the Akashi City Green and Park Association with the daily administrative work for the sand beach in question. The Park Association deployed security personnel and notified the Seacoast and River Improvement and Management Division of any abnormality reported by the security personnel. The personnel of the Seacoast and River Improvement and Management Division in the charge of regular patrol and the Park Association reported subsidence incidents on the sand beach inside the south jetty many times and the relevant authorities held discussions about how to deal with these incidents whenever they received reports, whereas such an abnormality was not reported with regard to the

sand beach inside the east jetty, except for its part near the south end.

On the other hand, there is unexpectedly little evidence to prove the occurrence of subsidence on the north side of the east jetty (on the sand beach near the site of the accident) before the accident occurred. In this respect, before the court of the first instance, five witnesses testified that they had seen subsidence on the north side of the east jetty before the accident occurred. The judgment in the first instance concluded that these testimonies were not enough to find the fact that subsidence had occurred on the north side of the east jetty before the accident occurred, because there was an interval of three or four years after the witnesses saw subsidence incidents until they testified to it, and their testimonies were unclear about the exact time when they saw the subsidence and the place where the subsidence occurred. On the other hand, the judgment in the prior instance determined that from their testimonies, it can be presumed that abnormal conditions similar to subsidence had occurred on the sand beach on the north side of the east jetty during the period from around the summer of 2000 to around October 2001, and concluded that there was an error in the finding of the fact by the judgment in the first instance that contravened such a presumption.

Thus, there is a difference between the finding of the judgment in the first instance and that of the judgment in the prior instance. Since such a difference arises from how to evaluate evidence, this court must be careful about intervening in finding facts. However, I would say that it is hard to imagine that even though there was subsidence to the level where ordinary people who happened to visit the sand beach in question were able to find it, the personnel of the city, the Park Association, and the construction office which were engaged in the administration of the sand beach at all times had been overlooking such a condition over a long period of time. The court of prior instance, without examining evidence on this point, concluded the case by holding a trial only once, and reversed the finding of the judgment in the first instance. I consider the judgment in the first instance to be reasonable in that it determined that the aforementioned testimonies were not enough to find the fact that subsidence had occurred on the north side of the east jetty before the accident occurred, and therefore I cannot affirm the determination of the judgment in the prior instance.

4. On the premise of the findings explained above, it cannot be found that subsidence had occurred on the sand beach on the north side of the east jetty, near the site of the accident, before the accident occurred, and for this reason, it should be said that there are reasonable grounds for the determination that denied the foreseeability of the occurrence of the accident.

Editorial Note:

There is no discussion in theory and practice about the requirement of foreseeability for the crime of negligence. But when it comes to the degree of foreseeability, the majority of the theories require concrete foreseeability, while the Supreme Court's place is not established. Traditionally there was a sketch of a theory's objection to the Supreme Court's judgement, but in this case the Supreme Court took a different position; because there is no perfect agreement inside the Supreme Court, this decision will be important in the future.

7. Commercial Law

X v. Y
Supreme Court 3rd P. B., May 22, 2009
Case No. (ra) 80 of 2008
1326 KINYU SHOJI HANREI 35

Summary:

In this case, Y issued share classes with the provision to acquire all of its shares for the purpose of a management buyout (MBO) and resolved to acquire them at a shareholder meeting. X, who was Y's shareholder, vetoed the resolution and filed a decision about acquisition price of the share classes. The Tokyo High Court held that the acquisition price per share was 396,966 yen, which consisted of the average share price for six months by the day before November 10, 2006 and expected rising price by the MBO. Y appealed to the Supreme Court against the decision by the Tokyo High Court. The Supreme Court held that the decision by the