

KÜRZERE ABHANDLUNGEN
SHORT ARTICLES AND COMMENTS

**Pursuing Criminal Liability for Accidents in Japan:
A Practitioner's Call for Reform***

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How to minimise accidents and deal with their consequences is a pressing concern in Japan, particularly in the context of a series of corporate scandals over recent years.¹ This paper briefly outlines how criminal liability is pursued in accident cases, from the viewpoint of a former prosecutor presently engaged in academic research into compliance issues.

If, in Japan, an accident occurs in the course of corporate activities of a company, criminal liability can only be pursued against individuals involved in the accident, not the company. Article 211 of the Criminal Code,² dealing with “death or bodily injury caused by negligence in the conduct of business”, may be applied. However, there is no provision punishing a company, so only individuals can be punished even if the accident had occurred in the course of corporate activities.³ Article 221 sets three requirements: (i) a result, being death or bodily injury of a victim, (ii) negligence of the wrongdoer, being neglect of the obligation to prevent death or bodily injury of others, and (iii) a causal link between the negligence and the result. To establish negligence, foreseeability of the death or injury must be confirmed. One argument is that if we determine whether the person should be punished or not depending on the existence of foreseeability, a person who is sensitive to risks of accident and had partly – but insufficiently – attempted to prevent it will be punished, whereas a person who is not sensitive to such risks and had been unaware of them will not be punished. A counter-argument is that foreseeability does not mean “whether the person had actually foreseen

* This is a revised version of a presentation at the conference on “Legal System Design for Securing Safety” hosted by RISTEX (Research Institute of Science and Technology for Society) at the University of Tokyo on 14-15 February 2006.

1 See e.g. ZADAN-KAI [Colloquium], *Jiko chōsa to anzen kakuho no tame no hō shisutemu* [Accident Investigations and a Legal System to Secure Safety], in: *Jurisuto* 1307 (2006) 8-100 (special issue); COMPLIANCE RESEARCH CENTER, Compliance Case Research Report (Toin Yokohama University 2006; and NOTTAGE, in this issue.

2 *Keihō*, Law No 456/1907.

3 Compare e.g. the draft Corporate Manslaughter Bill in the United Kingdom: <http://www.parliament.uk/parliamentary_committees/home_affairs_committee/draft_corporate_manslaughter_bill.cfm>.

or not” but “whether the person ought to have foreseen or not”, and thus an insensitive person cannot avoid criminal liability. However, in Japanese legal practice, a person’s “confession” is very important in proving foreseeability.⁴ The fact that the person had been actually aware of the risk of accident and had attempted to prevent it can be the key to making him admit the foreseeability. If the person was not actually aware of the risk, it may be difficult to get such a confession. This is a serious problem in the legal practice of pursuing criminal liability in Japan.

When an accident occurs, the initial stage of criminal investigation involves the police conducting a thorough on-the-spot inspection at the scene, and preserving evidence at the accident scene. If necessary when the accident occurs in the course of corporate activities, they conduct a search of the company’s premises and seize evidence that shows the company’s chain of command and its business operations. Through these two routes, evidence both of a scientific nature, and as to human or organisational causes of the accident, are directed towards the investigating authorities.

Then begins the process of identifying the objective cause of the accident. Usually, after the investigating authorities roughly infer the cause of the accident, they request an expert opinion. For a serious accident (e.g. for aircraft, railways or nuclear plants), an Accident Investigation Commission (*jiko chōsa i’inkai*) usually becomes involved. The criminal investigation authorities refer to the conclusions set out in the final report by the Commission, and eventually use this as evidence in the criminal trial. Sometimes the police also ask members of this Commission for advice.

In attempting to identify the objective cause of the accident, the police interview relevant persons. Many are interviewed, and there are many conflicting statements. Through this process, thorough interrogation of the key target persons begins. For serious accidents, the police usually consult in advance the prosecutor about the investigation policy and possibility of prosecution. Then the prosecutor explores who should be punished in the company and for what kind of negligence.⁵

Finally, after determining target persons who should be liable and roughly inferring the material facts, the police interrogate the target persons – the suspects. In this process, the most important point is the existence of the foreseeability, i.e., whether the person could foresee the accident or not. If the suspect confesses that he or she had foreseen the accident, it will be easy to prove the factor of foreseeability. So the police

4 See generally D.T. JOHNSON, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York 2002).

5 On the role and functions of the police in Japan, see generally e.g. D.H. BAYLEY, *Forces of Order: Policing Modern Japan* (2nd edn., Berkeley 1991); S. MIYAZAWA, *Policing in Japan: A Study on Making Crime* (Albany 1992); L.C. PARKER, *The Japanese Police System Today: A Comparative Study* (new edn, Armonk, N.Y.; London 2001); and D. JOHNSON, *Justice System Reform in Japan: Where are the Police and Why Does It Matter*, at <http://www.law.usyd.edu.au/anjel/content/anjel_research_pub.html> (a draft in English for *Nihon ni okeru shihō seido kaikaku*, in: *Hōritsu Jihō* 76(2) (2004) 8-15).

strive to make him or her admit that he or she had actually foreseen it. Also, if the suspect admits that he or she had foreseen it, that the negligence had caused the accident, and that he or she should be liable, the facts will not be disputed in the trial and the trial will be concluded quickly. In the case of a large-scale accident, if the suspect denies his or her negligence, the trial will take several years. This makes a prosecutor rather cautious about prosecuting. By contrast, if the suspect completely admits the relevant facts and negligence, he or she can be prosecuted easily. Hence, an irony: if a person denies negligence, it is difficult to prosecute; but a person showing contrition can be prosecuted easily.

There are also other problems with the current Japanese legal system and practice regarding criminal investigation and prevention of accidents. First, the criminal investigation often does not really contribute to identifying causes of accidents. The prosecutor tends to rely on the report by the Accident Investigation Commission, as the investigating authorities lack expertise to investigate and identify the causes of accidents.

For accidents caused in the course of corporate activities, human and organisational factors which caused the accident are often not uncovered through the criminal investigation. The investigating authorities determine target persons, exploring the range of liable persons in the company. So the investigating authorities start their interrogations with an employee directly involved in the accident, who is usually at a rather lower level within the company. Then, after the negligence of the employee is made clear, the criminal investigating authorities make him or her admit the negligence of his or her immediate supervisor, making the supervisor the target. It seems to be impossible to identify the true causes of accidents cause through such a process. To do so, there should be an exploration of the organizational structure, the activities and the policy of the company, and to elaborate the relation between those and the outcomes. However, the investigation is seldom carried out in such a way because it is unnecessary in a system in which, as mentioned, criminal liability is only pursued against individuals, not the organisation itself.

Further, interrogation of the suspects does not really help obtain accurate factual findings. In fact, the investigating authority and a suspect often argue about the existence of foreseeability, and few new factual findings emerge about the accident. In contrast to cases of homicide and the like, one can hardly expect a suspect to confess tearfully to having actually committed the crime. Even if the suspect admits negligence, usually this is only because he or she has become weary of arguing and so reluctantly signs the written statements. So we cannot expect to uncover all the facts through interrogation of the suspects.

Restriction on use of materials collected through criminal investigations is another problem. One can only access the evidence submitted in the criminal trial through inspection or copy of records from the final adjudication. The records cannot be accessed until the final adjudication is completed. As mentioned, if the suspect argues negligence, the case will take several years before final adjudication, which means that the

evidence can only be accessed years later. In addition, those materials not submitted to the court at the trial are not accessible. In the case of non-prosecution, the materials collected through criminal investigation cannot be accessed at all. Because the prosecutor prosecutes only when virtually sure of conviction, the findings cannot be used at all in many cases.

Under these circumstances, in cases of accidents in the course of corporate activities, the criminal investigations may lead to the persons who are truly liable for the accidents not being punished; and, conversely, to obstruction of identification of the accidents' causes. Therefore, some experts in accident investigation suggest that investigation for accident cause identification should precede the pursuit of criminal liability. Others respond that the pursuit of the criminal liability is essential because it has the effect of calming down the public. However, as illustrated by the following statement from a bereaved from such accidents who participated in a symposium held on the best ways for a legal system to prevent accidents: "I am very sad that some experts in the legal field insist that the public will be calmed down through pursuing criminal liability, and that the victims and the bereaved will be satisfied. The public may be calmed down through the pursuit of the criminal liability because people believe that it will contribute to future accident prevention. But after I lost my family member, I have learned that the present law and systems are insufficient to identify the causes of accidents, prevent future accidents, and provide remedies for victims and the bereaved".⁶ In sum, therefore, Japan needs substantial reform.

ZUSAMMENFASSUNG

Die Frage, wie die Zahl von Unfällen auf ein Minimum reduziert werden kann und wie mit Unfallfolgen umzugehen ist, ist von großer Relevanz in Japan, insbesondere angesichts einer Reihe von Skandalen in Unternehmen in den letzten Jahren. Der Beitrag gibt einen kurzen Überblick über die strafrechtliche Verfolgung bei Unfällen und zeigt Probleme auf, die die derzeitige japanische Praxis und Rechtslage bei der strafrechtlichen Verfolgung und Prävention von Unfällen hervorrufen.

(Zusammenfassung durch d. Red.)

⁶ See SINPOJIUMU [Symposium] (2005), *Jūdai jiko to konpuraiansu* [Serious Accident and Compliance] Corporate Compliance Vol. 6 (Toin Yokohama University; 2006).