

## Case

**Case 1: In the case of a driver who suffered from hypoglycemia, resulting in a collision, the Court of Appeals reversed the judgment of the trial court that excluded the primary cause of action (dangerous driving causing injury) and determined guilt for the preliminary cause of action (negligent driving causing injury).**

(Osaka Dist. Court, May 22, 2019; Hanrei-jihō No. 2463, p. 74)

**Case 2: In a case similar to the above, the defendant was found not guilty of either the primary cause of action or the preliminary cause of action.**

(Osaka Dist. Court, May 30, 2019; Hanrei-jihō No. 2463, p. 74)

**Keywords :** negligent driving causing injury, dangerous driving causing injury, determination of negligence, foreseeability, the elements of causation

### (Case 1)

#### [Facts]

The defendant had suffered from type 1 diabetes for a long time. Based on his doctor's instructions, he had been taking measures to lower his blood glucose level, such as measuring its level with a simple blood glucose meter and injecting insulin before each meal. The defendant, who had experienced loss of consciousness in the past due to hypoglycemia caused by the hypoglycemic effect of the insulin injected for treatment, was driving a car. When the defendant drove his car and left a coin-operated parking lot in Osaka City, he had injected himself with insulin before starting the car. However, he also had early symptoms of hypoglycemia, feeling an increase in body temperature. While in this condition, on a road in the same city near an intersection with a traffic light, he turned right and drove west at a speed of about 14 kilometers per hour, while in a state of significantly decreased consciousness due to hypoglycemia. After that, the defendant crashed the front left side of his car into the front of a car driven by A (46 years old then), which was stopped waiting for a traffic light on the road to her right. In addition, the defendant caused his vehicle to turn left and go backward in a southerly direction, then started and accelerated his vehicle in an easterly direction and ran out of control at a speed of approximately 48 kilometers per hour. The defendant crashed the front part of his vehicle into B (32 years old then), who was running in a southerly direction while pushing his bicycle on the crosswalk at the east end of the intersection in order to escape from the intersection, causing B to fall onto the road. The defendant then crashed the front part of his vehicle into the rear part of a standard freight vehicle parked on the south side of the road east of the crosswalk, pushing it out of the way, and crashed the front part of his

vehicle into C (58 years old then), who was standing in front of the vehicle, causing C to fall onto the road. A suffered injuries including a cervical sprain requiring approximately 23 days of medical treatment, B suffered multiple fractures of the right ribs requiring approximately three months of medical treatment, and C suffered a bruise of the left shoulder requiring approximately ten days of medical treatment.

### [Judgment]

Based on the defendant's measured blood glucose level in his testimony and the testimony of his doctor, the court concluded that it is admitted that the defendant was aware of the early symptoms of hypoglycemia before the start of the vehicle, but on the other hand, the defendant took measures to increase his blood glucose level by consuming a *dorayaki*<sup>1)</sup> and juice. The question is whether the defendant could have foreseen the possibility that he would fall into a state of severe hypoglycemia while driving. However, in general, in diabetes mellitus, the blood glucose level may not rise even after ingesting sugar (the defendant admitted this fact). In this case, the defendant was aware that after he injected himself with additional insulin to lower his blood glucose level, his blood glucose level dropped rapidly and drastically due to the effect of the additional insulin, and he felt the early symptoms of hypoglycemia. It was foreseeable that he might not be able to recover his blood glucose level only by consuming a *dorayaki* and juice.

"In addition, in light of the great danger to traffic posed by driving a car in a state of decreased consciousness, the defendant had a duty of care to refrain from driving unless he confirmed that he was not in a state of hypoglycemia by measuring his own blood glucose level with a simple blood glucose meter that he was carrying when he started the car. This is not an unrealistic way to treat diabetics."

Therefore, the accused had the above-mentioned duty of care at the time of the start of this vehicle, and the defendant was sentenced to one year and six months imprisonment (suspended for three years) under the preliminary cause of action (negligent driving causing injury).

### (Case 2)

#### [Facts]

While the defendant was driving a heavy-duty truck on the expressway at a speed of approximately 95 kilometers per hour, he fell into a state of unconsciousness due to the effects of hypoglycemia and crashed the front of his car into the rear of a standard passenger car driven by E (35 years old then). E suffered injuries including a sprain of the cervical spine that required approximately 10 days of medical treatment. With regard to

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1) *Dorayaki* is a type of Japanese confection. It consists of two small pancake-like patties made from castella wrapped around a filling of sweet red bean paste.

this traffic accident, the primary cause of action (dangerous driving causing injury) was whether or not the driver was aware of the fact that he was in a state that might interfere with normal driving at the time he started driving. As for the preliminary cause of action (negligent driving causing injury), the issue was whether or not the defendant could foresee that he would fall into a state of unconsciousness due to the effects of hypoglycemia at the time he started driving, and that he would not be able to drive properly.

### **[Judgment]**

#### **(About the primary cause of action)**

The prosecutor argued that the defendant had this awareness because the defendant was aware of (1) the real possibility that hypoglycemia would worsen and lead to loss of consciousness if he did not properly manage his blood glucose levels, and (2) his initial symptoms.

However, even if the defendant had been aware of each of the above (1) and (2), it cannot be said that the defendant had this awareness when the defendant was aware that he was appropriately managing his blood glucose level.

Therefore, in this case, it was acknowledged that the defendant had recognition each of the above (1) and (2), but on the other hand, that the defendant had about 25 years of experience in blood glucose level management and never lost consciousness due to mismanagement. Based on his experience, the defendant increased the amount of low-sugar coffee he was drinking around the time he started driving, to replenish his sugar intake. On the day in question, he did not take any unusual medication or eat any unusual food, and there was no change in his physical condition.

In light of these circumstances, there was no reason to believe that the defendant should have found it difficult to properly control his blood glucose level at the time of the accident, and it was recognized that the defendant believed that he was properly controlling his blood glucose level when he started driving. Therefore, it was not possible to conclude that the defendant had an awareness of possible hypoglycemia.

#### **(About the preliminary cause of action)**

Applying the facts of this case, it is difficult to conclude that the defendant could have foreseen not only that he would not be able to effectively adjust his blood glucose level by taking measures based on his own experience when he started driving, but also that he might not have time to consider other measures after confirming the worsening of his symptoms. Thus, the foreseeability was difficult to determine in this case. Considering the great danger posed by driving a car while impaired, and the fact that the defendant's leg cramps occurred once or twice a month and he recovered within 30 minutes at the most after dealing with the problem, it is impractical for the defendant to refrain from driving each time. In light of these facts, it is difficult to say that the defendant should be

obligated to immediately refrain from driving, beyond imposing on him the duty to take appropriate measures to control his blood glucose level, such as sugar supplementation at the time of the start of the operation in question, and the duty to pay sufficient attention to any subsequent changes in his physical condition.

For these reasons, the defendant was found not guilty.

### [Comments]

In recognizing “negligence” in the crime of negligent driving, it must be possible for the accused to specifically foresee “the basic part of the causality” in the result of death or injury. Furthermore, the possibility of avoiding the result in question also constitutes a duty of care. The preliminary cause of action in Cases 1 and 2 were cases in which the existence of foreseeability was challenged in this requirement. What is the “basic part of causality” in each case?

In Case 1, the basic part of the causal relationship is “hypoglycemia causing loss of consciousness, making it difficult to continue driving, and thus creating a danger to traffic”. In this case, the only objectively admitted evidence was the defendant’s blood glucose level one hour before and immediately after the accident, and the evidence of eating a *dorayaki* and drinking juice. The defendant’s awareness of the precursor symptoms of losing consciousness was based on the defendant’s statement, and the fact of the defendant’s additional insulin injection was based on the defendant’s representation. It must be noted that the fact of the defendant’s additional insulin injection was inferred according to the opinion of a diabetologist, who was not the defendant’s doctor. Whether or not it was foreseeable that the defendant would fall into a state of unconsciousness seems to be a case in which the defendant’s treatment history, the guidance of his doctor, and the defendant’s unique circumstances, such as his blood glucose level control, must be taken into consideration. This is because if the defendant was aware of the possibility that he could become unconscious and have difficulty driving, it was reasonable for him to refrain from driving a car because of the possibility that he himself may suffer injury from an accident.

In contrast, in Case 2, the court did not find the defendant’s loss of consciousness foreseeable when considering the defendant’s unique circumstances based on the defendant’s statement and the statement of the defendant’s doctor. Thus, to find the foreseeability of the defendant, it seems that it was necessary to consider not only the objective evidence but also the defendant’s unique circumstances, although the defendant’s behavior and statements were largely accepted as responsible.

(HIHARA Takuya)

**A Case of the Stalker Regulation Act**

(Supreme Court, July 30, 2020; Hanrei-Jiho No. 2478, p. 149)

**Keywords : GPS, Stalker, Monitoring, Surveillance, Electronic Devices**

**[Facts]**

The defendant was separated from his wife, A, when he secretly attached a GPS device to A's car in parking space rented by her. He obtained the car's location information many times. The defendant's purpose was to pursue his feelings of love, favor, and resentment for A, and he carefully monitored A near A's sister's house, where she frequently used to visit. As a result, he continuously followed A. He endangered the physical safety of A and the peace of her house and seriously undermined the freedom of action of A and made A uneasy. At a later date, she came suspect that the defendant might know where she is. A consulted the police. The officer investigated the car, and found the GPS device.

The Stalker Regulation Act Art. 2(1)(i) (the "Act") regulates actions that involve "monitoring near a person's house, workplace, school, etc., in the place of their usual location" and prohibits going to a victim's house and looking near the house for the victim without a reason. It was disputed in the trial whether the defendant's behavior violated the Act's prohibition of "monitoring near the house". The main issue in this case was the significance of the meaning of "monitoring" and location requirements.

**(1) On March 12, 2018, the Fukuoka District Court found the defendant guilty of stalking.**

The reasoning is as follows:

(a) "Monitoring" is understood mainly as the action which observes the movement of another party by sensory organs such as vision. The actions or methods, such as "following etc." listed in the text of the Act, evolve with changes in technology and society. So, it is not essential that the movement of the victim is directly observed. Also, observing motion through information obtained with electronic devices is included in the Act. In short, the observation of things that the other party usually uses, and the status and the circumstances of the other party's residence is "monitoring".

(b) Perceiving A's car with his eyes means that the defendant followed her motion and was able to "monitor" her.

(c) The Act describes "where you are actually located or where you are usually located" and prescribes location requirements. Because attaching the GPS to the car in itself has the nature of motion observation of A, and has strong relevance and unity with the further acquisition of location information, attaching a GPS device to the car is not just a preparatory action. When the attachment of the device and the acquisition of location

information are considered together, the location requirements are met as a whole.

The District Court held that “monitoring” includes the observation of the other party’s movement with electronic devices, considering the GPS device’s attachment, and the Act’s definition of “monitor” as a whole. Therefore, the defendant was found guilty.

**(2) On September 20, 2018, the Fukuoka High Court reversed the judgment of the first trial court.**

The reasoning is as follows:

(a) To “monitor” means inherently observation with the eyes. The dictionary defines “monitoring” as, “look with your eyes wide open” or “look carefully”. Lexically, no other meaning can be read. Observations by means other than the eyes are not “monitoring” naturally.

(b) With regard to the positioning of the “monitor”, the Act includes location requirements in “monitoring”, and the place is limited.

In other words, “monitoring” is punishable only when the location requirements are met, and the punishment depends on where the suspect is at the time of the crime. For the reason it is a natural premise that observations are made with the eyes, it is difficult to interpret that information acquired to follow the movement of the other party when the accused is not at the same location as the victim is “monitoring”.

(c) In consideration of the interests protected by law, the interpretation of punishment regulations must be reasonable. But as the interpretation is limited into the frame of the law’s text, punishment cannot expand beyond the limits of this text. The words “using sensory organs such as sense of sight” should be understood as a basic and an important factor of the word “monitoring”. When “monitoring” includes all normal behavioral surveillance that can be read, the contours of the concept become unclear, resulting in less predictability in its interpretation.

(d) The judgment of the first trial as to (c) above was unacceptable because it made location requirements meaningless materially.

The High Court held that acquisition of location information using a GPS device is not “monitoring” under the Act. In contrast, the prosecutor objected to the judgment of the Fukuoka High Court and appealed to the Supreme Court.

**[Judgment]**

The appeal was dismissed by the Supreme Court. The defendant was not guilty of stalking.

Considering the content and purpose of the Act, to fall under “monitoring near the house”, even if a suspect uses electronic devices, the suspect must observe a specific person who is the victim or a specific person who is closely related to the victim’s social life near the victim’s house. According to the decision of the first trial, the acquisition of

location information using a GPS device was not conducted near the parking space rented by A. Because the acquisition of the location information using GPS does not meet location requirements of the Act, the location information of the movement of A's car is not information about A's movement.

The Supreme Court affirmed the High Court's decision. Consequently, the defendant's behavior was not a violation of the Act's prohibition of "monitoring near the house".

### **[Comments]**

The Act regulates "monitoring near the house, workplace, school, etc., or in the place of usual location". The main issue in this case is whether the acquisition of location information is only limited to an individual's sensory system or not. The meaning of "monitoring" had been understood as "watching the movement continuously for a certain period of time". At the time of enactment of the Stalker Regulation Act, 2000, it was assumed that a stalker is close to the victim and directly gets information about the victim's movement. But, with the recent development of information technology, tracking the movement of a victim has become possible by using electronic devices, even if the stalker is not observing a person directly. Thus, the meaning of "monitoring" became problematic.

Many cases involving dynamic observation by a GPS device already exist. High Court cases affirmed the interpretation of "monitoring" several times so far. On the other hand, lower courts have disagreed several times before now. Unification of judgment by the Supreme Court was expected.

In contrast to the lower court trial, the Supreme Court did not address whether motion observation is required to be made directly by an individual's sensory organs or not. Specifically, the court did not mention whether motion observation with electronic devices is applicable to "monitoring" or not. The court used the phrase "even if an actor uses electronic devices" in the text of its judgment. Nevertheless, it was explained that "monitoring near the house" can also be approved, even when the suspect uses some mechanical tools or apparatus. Therefore, the Supreme Court did not resolve whether motion observation with electronics falls under "monitoring", and left the issue open for future consideration.

Finally, the Supreme Court held that not all acquisition of location information with a GPS device falls under "monitoring". However, it is expected that the legal positioning for the acquisition of location information with electronic devices should be made clear. This judgment has important practical significance. That is because, so far, judgments were divided among the different High Courts, but eventually the Supreme Court resolved this matter. This issue has also been examined theoretically, but with the distinction between "monitoring" and "surveillance" as the main issue. Regarding this problem, does dynamic observation using electronic devices include "monitoring"? Supporters interpreted the attachment of electronic devices for surveillance as "monitoring", as the distinction from

“surveillance” gradually eroded over time. On the other hand, the opposing theory clearly distinguishes between “monitoring” and “surveillance”, and the terms are not synonymous. Opponents interpret that to “see with the eyes” is “monitoring” and to “see secretly with electronic devices” is “surveillance”. It is a turning point of judgment of both theories regarding the installation of electronic devices.

Whether motion observation using not just GPS devices, but a wide variety of electronic systems, meets the definition of “monitoring” or not, is left to future judgment. The District Court held that obtaining a victim’s location information to follow their movement is generally interpreted as “monitoring”. Because the problem is difficult, the Supreme Court left this decision open to future consideration, rather than trying to make a final determination at that time. Recently, as it has become easier for people to place GPS devices and track others without the target’s permission, this judgment generated increased public scrutiny. In response, an amendment to the law was passed, to regulate secret motion observation with electronics (Stalker Regulation Act Art. 3, 4 (1), effective as of August 26, 2021). But punishing every motion observation could cause an encroachment on personal privacy. Careful consideration is required.

(KANNO Tsugumi)