

# A Narrative Analysis of Judicial Attitudes towards Sexual Harassment in Japan

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## **Abstract**

*This study applies a narrative analysis of the first two judicial decisions on sexual harassment in Japan to test claims of a culture of gender bias in Japanese judicial attitudes towards victims of sexual violence. Although the results do not provide an unambiguous support or rebuttal of gendered justice in Japan, they do reveal some of the dangers of narrative analysis as a basis for making generalizable claims about how law functions in Japanese society.*

**Keywords:** sexual harassment; Japanese law; narrative analysis.

## **Introduction**

In her book *Sexual Violence and the Law in Japan*, Burns (2005) offers a damning assessment of the quality of justice women can expect from judges in sexual violence cases. Victims of sexual violence in Japan, Burns writes (2005: 16-18), can expect to be blamed for their own rapes unless their stories can fall within a narrowly-defined template of credibility. The empirical proof — 20 rape cases subjected to detailed narrative analysis and furnishing the heart of the book (Burns 2005:ch. 4, 5, 6) — make for bleak and disturbing reading.

But does the evidence Burns assembles about rape law justify her ambit claims of “hegemonic justice” (2005: 16) in *all* cases of sexual violence in Japan? In particular, do her insights extend to other forms of sexual violence such as stalking, domestic violence, sexual harassment and trafficking of women from Japan’s poorer Asian neighbours? There is good reason to be sceptical. Since 1997, all levels of government — the executive, the legislature *and* the judiciary — have actively promoted gender equity. For example, under the Basic Law for a Gender-Equal Society (Law No 78 of 1999), the Japanese government has promoted a campaign to educate the community about the importance of eradicating sex discrimination in Japan (Ministry of Foreign Affairs 2002). In 1997, the Japanese Diet passed amendments to the Equal Employment Opportunity Act, strengthening existing provisions and incorporating a new section regulating sexual harassment in the workplace (Wolff 2000, 2002, 2003). New legislation outlawing domestic violence and stalking soon followed in 2001. Further, studies have also shown that the women have successfully petitioned the courts on issues of employment-based sex discrimination and that judges have largely

supported female plaintiffs by insisting on the equality of the sexes as a fundamental principle of Japanese law (Upham 1987:ch. 3; Wolff 1996).

To be sure, this background is an insufficient basis for attacking the credibility of Burns's (2002, 2004, 2005) work. However, it does raise questions about whether Burns may have been intemperate in casting broader aspersions on the quality of justice in sexual violence cases in Japan based on her sample of rape trials alone. Therefore, my aim in this paper is to test the generalisability of Burns's claims about gendered justice in Japan. I should stress, however, that I am not attempting a comprehensive rebuttal: I do not seek to attack Burns's methods nor re-open the evidence upon which she constructs her thesis. Indeed, I have already reviewed Burns's work favourably elsewhere (Wolff 2006) and I do not intend to retract this assessment. Instead, I intend to explore whether Burns's ideas about a patriarchal Japanese judiciary apply in a different context of sexual violence. Thus, instead of rape cases, I will conduct a narrative analysis of two Japanese sexual harassment decisions.

The choice of the narrative method is deliberate. Since my aim is to determine whether Burns's argument developed in the context of rape law also resonates in the context of sexual harassment, it is only fair that I apply the same methodology as Burns to examine an alternative data set. This parity in methodology will ensure that we are operating on the same epistemological and ontological assumptions. Admittedly, our data sets are not comparable on absolute figures. Whereas Burns (2005) analysed 20 rape cases, I am limiting myself to two sexual harassment cases. However, I defend my approach on two grounds. First, although Japanese judges have handed down over 100 sexual harassment cases since 1990, the two cases I intend to analyse— a decision by the Shizuoka District Court in 1990 (Judgment of 20 December 1990, Shizuoka District Court, (1991) 745 *HanreiTaimuzu* 238) and a judgment by the Fukuoka District Court in 1992 (Judgment of 16 April 1992, Fukuoka District Court, (1992) 783 *HanreiTaimuzu* 60) — are the first judicial statements on *quid pro quo* and *environment* harassment respectively in Japan (Wolff 1996, 2000, 2002, 2003, 2006). If not representative of the entire corpus of sexual harassment cases, their precedential value means that they have at least shaped the judicial approach to the types of cases that have followed. Second, my purpose in this paper is not to construct an alternative account of judicial attitudes towards sexual violence but to evaluate the extent to which Burns's ideas derived from rape law are applicable to the case of sexual harassment. Thus, although my data is limited, a narrative analysis of these two leading sexual harassment decisions will provide some important clues — albeit not definitive answers — as to whether Burns's ideas fairly describe judicial attitudes generally to sexual violence or are only valid for criminal sexual assault cases.

Even on a reading that is most favourable to Burns's thesis, my conclusion is that a narrative analysis of the two sexual harassment judgments provides only ambiguous support for Burns's views. Therefore, although Burns might be right to criticise the state of justice in rape trials, she does not have sufficient evidence to extrapolate those findings to sexual harassment cases. I structure my paper as follows. In the first part of this paper, I briefly outline Burns's claims about gendered justice in Japan in the context of rape law. In the second part, I try to "re-create" the method Burns uses to analyse rape trials. In the third part, I then apply this same method to analyse sexual harassment cases as part of testing the reach of her arguments. I then discuss the results of my narrative analysis of the sexual harassment cases and examine the implications this has for understanding judicial attitudes to sexual violence in Japan.

### 1. The Burns Thesis

Burns (2005 xviii) argues that “abnormal” sexual violence is a lens through we can extrapolate understandings about “normal” gender and sexual relations in Japan. She dismisses concerns that concentrating on sexual violence is somehow odd or misleading; rather, she submits, it discloses real insights into the way Japanese society discursively constructs and maintains normative ideas about masculinity and femininity.

So what are these insights? The story of rape in Japan, according to Burns, is precisely that — a story, or, more accurately, a series of stories. Burns’ thesis is that narrative theory can help us unlock why some rape cases are successful and others not. Her conclusion is that rape cases that go according to “script” are more likely to result in convictions; those that do not will be deemed unusual or unnatural and therefore strain credibility. In the first two substantive chapters, Burns explains her approach and methods. In chapter one, she justifies the narrative approach to her subject. Trials, she claims, are more often about the judicial interpretation of the facts rather than the law, and such interpretations are not necessarily rational but imagined. Stories, therefore, provide the reference points for how judges understand the real world, against which they evaluate the evidence. These stories may be *scripts* (conventional stories or benchmark cases) or *narratives* (stories that go against conventional understandings). In chapter two, she expands upon this framework to examine the “discursive constructions of sexuality and gender in Japan ... and [how] these constructions shape and structure judges’ ‘hunches’ ...” (2005:19). She describes a “dominant culture of eroticised violence” (2005:17) in Japan, where “male sexuality is constructed as natural, hydraulic and uncontrollable” (2005:33) and the “feminine body is constructed as vulnerable, rapable or sexually accessible” (2005:35). This culture is institutionalised and normalised by a range of formal and informal controls and cultural practices. It is also maintained, according to chapter three, by specific features of the criminal justice system in Japan.

The empirical proof is outlined in a careful analysis of twenty case studies of rape trials. Thus, in chapter four, Burns demonstrates that accounts of rape that meet with stereotypical assumptions about masculinity and femininity will invariably result in a rape conviction — such as where a virginal victim struggles valiantly to fight off an assault by a stranger. However, as Burns shows in chapter five, accounts that diverge from the “stock story” — the alleged assaulter is known to the complainant, the complainant does not resist the attack, or the complainant is drinking or otherwise acting “provocatively” — are likely to attract judicial scepticism. Burns then sifts through the results to identify, in chapter six, the key “indicators of blame and blameworthiness” in rape and violent sexual assault cases. (These are summarised in Table 1 below.) Ultimately, Burns concludes, it is the presentation of the facts, not the interpretation of the law, that influences judicial decisions (2005:ch. 8).

Table 1: Key Indicators of Blame and Blameworthiness in Rape and Violent Sexual Assault Cases

Believable Stories	Suspicious Stories
Purity and innocence of victim	Victim is sexually experienced Victim dressed or behaved provocatively Victim consumed alcohol before the incident
Evidence of significant shock	Victim was friends with or in a personal relationships with her attacker
Victim strongly resisted the attack (physically resistance only; unheard screams or pleas to stop are insufficient)	Victim endured the attack
Promptness of reporting the incident	Victim does not confide to anyone about the attack

## 2. The Narrative Method

The narrative method is central to Burns's argument. As she explains (2006: 16):

Narrative is ... employed as the method of inquiry... [S]cholars may collect and examine narratives as a way of accessing or revealing some other aspect of social life. This method is based on the assumption that narrative can be approached as a window through which social life can be analysed. The aspect of social life that is central to this book is the intersection between gendered power relations and sexuality. Judicial narratives of rape and sexual assault are used to analyse and illustrate the way in which gender, sex and sexuality are produced through Japanese legal discourses. I suggest that particular gendered assumptions and convention that have achieved considerable social currency in Japan constitute the 'pool' of 'common sense from which judges draw in order to interpret 'facts', come to their conclusions and construct their 'hegemonic tales'.

However, to assert the centrality of the narrative method is not the same as explicating it. And Burns is surprisingly reticent about explaining her methodology and documenting how she applied it to her data. This lack of transparency, some would argue, represents a serious failure of method (eg, Elliott 2005: 22; Fade 2003; Mays & Pope 2000; Merych 2006; Reissman 1993: 65-66). I, however, do not intend to lay this charge myself. First, the reluctance to elucidate her methodology is, in part, understandable. Despite its growing popularity in social research and critical legal studies, much about narrative analysis — what it is and what it entails — is uncertain. As Abell (2004: 288) notes, “[a]lthough the term narrative and cognate concepts ... are widely used ... no settled definition is yet established.” Second, my purpose is not to *rebut* but to *test* the generalisability of Burns's conclusions. Rather than uncover the methodological problems in her work, my interest is to re-construct a method that appears consistent with the one Burns uses in her work. I will then use that method to read the sexual harassment cases, attempting, as far as possible, to apply an interpretation that is as favourable to Burns's case as possible in order to make comparatively meaningful findings.

This is not as easy as it sounds. The reason for this is that there are not any established procedures for analysing and interpreting narratives. Researchers agree that narrative “imposes order on a flow of experiences” and its analysis involves mapping out “how it is put together, the linguistic and cultural resources it draws on and how it persuades a listener of authenticity” (Reissman 1993: 2); they differ, however, on how to do this (Czarniawska 2004: 660). Techniques range from formal analytic narrative, narrative explanation, narrative structural analysis and sequence analysis to poetics, hermeneutic triad and

deconstruction. Some, such as Czarniawska (2004: 660), even go so far as to submit that narrative analysis is not a method at all:

In my rendition, narrative analysis does not have a ‘method’; neither does it have a ‘paradigm’, a set of procedures to check the correctness of its results. It gives access to an ample bag of tricks — from traditional criticism through formalists to deconstruction — but it steers away from the idea that a ‘rigorously’ applied procedure would render ‘testable’ results.

Given this complexity and confusion, I draw on Elliott’s (2005: 37-50) useful tripartite classification of narrative approaches as my starting point to “re-construct” Burns’s own narrative method. Elliott argues that narrative analysis can have three different focal points: (i) a focus on content, (ii) a focus on structure and (iii) a focus on coherence. The first type is close to content analysis and is therefore not common in narrative studies. The second, by contrast, is very popular. It embraces oft-cited formalist approaches such as those of Labov (1972, 1982; Labov & Waletzky 1967, cited in Riessman 1993: 18-19) who argues that narratives are best understood in terms of their structural properties of abstract, orientation, complication action, evaluation and resolution; Burke (1945: cited in Riessman 1993: 19) who understands narratives by reference to the grammatical resources that narrators draw on to shape their stories; and yet others (eg, Miles & Huberman 1994: 287) who rely on lexical techniques — especially the figurative and tropological use of language — to interpret narratives. It also incorporates studies of oral speech that analyse pitch and pauses, and use poetic units, stanzas and strophes to examine the structure, organization and meaningfulness of talk (Riessman 1993: 19).

Burns’s approach, however, I would argue, approximates the third type: a focus on coherence (Agar & Hobbs: 1982). According to Baeger and McAdams (1999: 74-75), an emphasis on coherence is about locating how the narrative “imparts information in an *integrated* manner, ultimately communicating the meaning of the experiences described within the context of the larger ... story.” By identifying the “markers” (2005: ch. 3) of plausible and suspicious narratives in rape, Burns, I suggest, is locating the “gendered assumptions and conventions” (2005: 16) that give coherence to judicial decisions in Japanese rape cases.

### 3. A Narrative Analysis of Sexual Harassment Cases

In this part, I apply Burns’s “coherence” approach to narrative analysis to analyse my own data set of sexual harassment cases. I do so with a twist. Since I am testing Burns’s claims about gendered justice in the alternative context of sexual harassment, not generating my own theory of judicial attitudes to sexual harassment, my approach is to explore the extent to which Burns’s “key indicators of blame and blameworthiness” identified in Table 1 above can be located within the two sexual harassment cases. (In short, I will not be conducting *my own* reading of the cases.) Thus, since both sexual harassment cases found in favour of the female plaintiff, Burns’s thesis will be confirmed if the indicators of “believable stories” are present (or mostly present) in the judgments and/or if the indicators of “suspicious stories” are absent (or largely absent). Only then we will be able to conclude that Burns’s concerns about gender-based stereotypical justice may ring true for sexual harassment and are not restricted to rape trials only.

In Tables 2 and 3, I provide summary translations of both cases. Where I find evidence of any of Burns’s indicators of believability or suspicion (see Table 1), I underline the relevant text and insert in bold and all-caps ([**BOLD AND ALL-CAPS**]) the relevant indicator. Because I am testing Burns’s claims, not challenging them, I interpret the two cases as far as possible in a manner that would be most favourable to

Burns's thesis. Because I am studying the texts on Burns's terms and not constructing my own theory of judicial attitudes to sexual violence, I do not interpolate any of my own "indicators" or "markers" of coherence.

Table 2: Narrative Analysis of Judgment of 20 December 1990, Shizuoka District Court, (1991) 745 HanreiTaimuzu 238

### **Facts**

1. The Plaintiff (23 years old and single woman)[**PURITY AND INNOCENCE OF VICTIM**] was working for N Hotel in Atami. She was working as an accounts clerk at the front desk. The Defendant was Head of Accounts (section chief) and her superior.[**VICTIM WAS NOT FRIENDS WITH OR IN A PERSONAL RELATIONSHIP WITH HER ATTACKER**]

2. In the middle of November, 1987, about eight months after joining the company, the Defendant asked the Plaintiff out for dinner. Since the Defendant was her boss, she felt that she could not refuse and accepted his invitation

After the meal and on the way home in the Defendant's car, the defendant proposed to the Plaintiff, "Let's go to a motel. Show me your body." Although the Plaintiff made it clear that she did not want to do this, the Defendant drove the car to a hotel and stopped in front of the entrance. Rubbing her waist, he persisted with his invitation by saying to her, "Let's go in, it will be a good learning experience for you." When the Plaintiff continued to refuse to accede, the Defendant threatened that if she did not kiss him he would not start up the car. The Plaintiff still expressed her refusal several times.[**VICTIM RESISTED THE ATTACK**]

The Defendant drove the car again towards Atami, but at a parking area near a toll booth for the Atsuhako Highway, the Defendant once again pulled up the car and demanded the Plaintiff to kiss him and to lay down the car seat so that they could talk intimately together. Then, after exiting the Atsuhako Tunnel and on a lonely part of the road surrounded by a golf course, the Defendant once again demanded that the Plaintiff kiss him: "If you don't," he threatened, "we'll go down this dark, lonely street if you don't want that, then we'll return to the motel." The Plaintiff at last was forced to give in.[**VICTIM RESISTED THE ATTACK UNTIL SHE FELT COMPELED TO ACCEDE FOR PHYSICAL SAFETY**]

The Defendant kissed the Plaintiff several times. Stopping at the roadside, he kissed the Plaintiff some more. This time he tried to put his hand on her chest, which the Plaintiff strongly resisted.[**VICTIM STRONGLY RESISTED THE ATTACK**]The Defendant replied with the following insulting words: "Stingy, aren't you? OK, I'll pay you 10,000 yen for this."

The next day, the Plaintiff confronted the Defendant, objecting strongly to his shocking actions the previous night and demanding an apology. [**EVIDENCE OF SIGNIFICANT SHOCK**]The Defendant acted as if he could not understand the Plaintiff's anger, and lightly answered: "So sorry. Did it shock you?" He then said he wanted to give something to the Plaintiff, invited her to his car and attempted to give her earrings. The Plaintiff refused the gift, thinking that if she were to accept the Defendant would perceive that she consented in his actions the previous night — she did not want to be fooled.

The Plaintiff endured attacks as a result of the Defendant's actions and suffered physical ill health and psychological suffering. [EVIDENCE OF SIGNIFICANT SHOCK] Despite this, she continued working. At a loss what to do, she consulted with another employee. [PROMPTNESS OF REPORTING INCIDENT] However, rumours spread and the Plaintiff suffered even more pain. Finally, unable to endure working under the Defendant any longer. [EVIDENCE OF SIGNIFICANT SHOCK] she tendered her resignation at the end of January, 1988, three months after the incident in question.

She sued, seeking 5 million yen in damages on the basis that the defendant's offensive behaviour violated her sexual freedom; further, by making it unavoidable that she would resign, this also infringed her sexual freedom, personal honour/dignity, and right to work. All this led to psychological damage, difficult to compensate in money.

### **Judgment**

The Plaintiff's claims were upheld: "The Defendant unilaterally touched the Plaintiff's waist and kissed the Plaintiff [PURITY AND INNOCENCE OF VICTIM] against her will. These actions by the Defendant — from their nature, mode, method and means — clearly constitute unlawful acts under article 709 of the Civil Code."

According to the evidence:

- \* the Plaintiff experienced physiological discomfort from being kissed by the Defendant against her will and was affronted by being forced into a position of having to silently accede to the Defendant's demands and having her personal rights violated [EVIDENCE OF SIGNIFICANT SHOCK]
- \* as a result, the Plaintiff suffered psychological attacks leading to physical health problems such as loss of appetite, insomnia, and discomfort [EVIDENCE OF SIGNIFICANT SHOCK] in the mouth (which continue to this date)
- \* Forced to work in a physiologically threatening work environment with the Defendant as her superior and with her fellow employees aware of the incident (including some who drummed up the gossip), the Plaintiff was placed in a difficult/bitter work environment
- \* the Defendant failed to recognize his wrongdoing and made no effort to apologize, angering the Plaintiff

In making these findings of facts, the Defendant's unlawful acts subjected the Plaintiff to not inconsiderable psychological trauma [EVIDENCE OF SIGNIFICANT SHOCK]. "The nature and extent of the Plaintiff's suffering can be extrapolated from the undisputed facts, especially the nature and type of the Defendant's actions and how he used his position as the Plaintiff's superior. [VICTIM WAS NOT FRIENDS WITH OR IN A PERSONAL RELATIONSHIP WITH HER ATTACKER ] to take advantage of the Plaintiff. It is also clear from the way the Defendant, through his actions, perceived women as mere objects of pleasure, playthings, rather than as people with personal rights [PURITY AND INNOCENCE OF VICTIM]— from the plaintiff's perspective, this attitude caused her psychological suffering and anger to persist despite the passage of time [EVIDENCE OF SIGNIFICANT SHOCK]. Taking into account all these various circumstances, a damages award of 1 million yen is a just assessment of the Plaintiff's psychological suffering.

Since the defendant did not enter an appearance, this must be taken as a confession of all of the claims made by the plaintiff (Civil Procedure Code article 140(3), (1)).

*Table 3: Narrative Analysis of Judgment of 16 April 1992, Fukuoka District Court, (1992) 783 HanreiTaimuzu 60*

### **Facts**

The plaintiff, an unmarried woman[PURITY AND INNOCENCE OF VICTIM], joined the second defendant company (Y2) as a casual employee in November 1985. In January the next year, she became a full-time employee. She was involved with researching, writing and editing under the supervision of the defendant Editor-in-Chief (Y1).

The plaintiff was well regarded for her work; the defendant, by contrast, felt isolated at work and did not view favourably the activities of the plaintiff. For over two years, he engaged in sexual innuendo about the plaintiff with a view to damaging her reputation.

The plaintiff's role in editing magazines expanded following the necessity for the first defendant to focus on business matters. Further, when the first defendant was hospitalized for a period of time, a bureau chief in a subsidiary who was chiefly responsible for the operation of that company was seconded to the second defendant company. This also impacted on the plaintiff's work, and both the plaintiff and the bureau chief determined business policy on most matters. The first defendant began to feel isolated.

During this time, the defendant told employees and outside people both inside and outside the company that the plaintiff had flamboyant relationships with men and that she was involved in relationships with the bureau chief and the cover designer.

In August of 1987, a senior officer joined the defendant company to oversee the general business of the company as part of a restructuring plan. The senior officer and the defendant became the key figures in managing the company. The defendant reported to the senior officer that the plaintiff's affairs with men had interfered with the performance of her duties based on nothing more than his own conjecture. He spread rumours about the plaintiff's "promiscuous" relationships to employees and outside people, and generally harassed the plaintiff herself.

When the defendant suggested to the plaintiff that she change jobs when she was being recruited by another company, their relationship worsened [EVIDENCE OF STRONG WILL, NOT PURITY AND INNOCENCE] [VICTIM ENDURED ATTACK]The defendant now wanted the plaintiff to resign and told the plaintiff as much. In March of 1988, he referred to her relationships and demanded that she resign.

The plaintiff approached the senior officer and another company representative for relief [EVIDENCE OF ANGER BUT NOT SHOCK; EVIDENCE OF STRONG WILL, NOT PURITY AND INNOCENCE; EVIDENCE OF FORMAL REPORTING OF INCIDENT BUT NOT PROMPT CONFIDING ABOUT THE ATTACK TO FRIENDS, FAMILY OR TRUSTED COLLEAGUES],

but they interpreted the matter as a private problem between the defendant and the plaintiff; they did nothing to resolve the issue between them but, to ease the plaintiff's dissatisfaction, put into effect a wage rise for the plaintiff.

In May of the same year, the Board of Directors informed the senior officer that if the parties did not resolve the matter between themselves voluntarily, then one of them would be forced to resign. The senior officer called the plaintiff and explored the possibility of finding a compromise, but the plaintiff remained steadfast in her demands for an apology from the defendant [**EVIDENCE OF STRONG WILL, NOT PURITY AND INNOCENCE**]. The senior officer then informed the plaintiff that if negotiations failed, he would fire the plaintiff, the plaintiff then indicated her intention to resign [**EVIDENCE OF STRONG WILL, NOT PURITY AND INNOCENCE**]. On the other hand, the defendant was punished by a three day home detention and reduction in salary.

### **Judgment**

1. The court upheld 12 of the plaintiff's 15 allegations of facts (excepting allegations 3,4 and 5. [**NOT EVIDENCE OF PURITY AND INNOCENCE OF VICTIM**]) Five of these allegations were upheld on the basis of the direct evidence or the defendant's own admissions; the remainder could be inferred from the defendant's character and his view of women and like remarks he made or had the proclivity to make, which became clear as the litigation proceeded.

2. (a) The court held that the defendant was liable under 709 of the civil code:

"Both in the work place itself and in business-related circumstances, the defendant made remarks about the plaintiff's personal relationships and her character to the plaintiff herself and to people associated with the business of the company. As a result of these remarks, the defendant fostered an inhospitable working environment for the plaintiff. This result was either intentional or foreseeable, and harmed the plaintiff's feelings by violating her personal rights and infringed her right to work in a hospitable working environment. Accordingly, the defendant is liable for unlawful acts under article 709 of the Civil Code."

2. (b) The defendant's conduct was "focused on the plaintiff's personal life, such as her relationships with men, and lowered the plaintiff's reputation as a working women. Further, by reporting this to the senior officer as if it were fact, the defendant ultimately caused the plaintiff to resign her position." This "was against the plaintiff's will and damaged her reputation as well as her other personal rights" and "was a cause of the worsening relationship between the plaintiff and the defendant." This result was clearly foreseeable by the defendant. However, the plaintiff also contributed to the worsening work environment with her character, attitude and behaviour forcing the two parties into a stand-off[**NOT EVIDENCE OF PURITY AND INNOCENCE; VICTIM BEHAVED PROVOCATIVELY; NOT EVIDENCE OF SIGNIFICANT SHOCK**]. However, "in light of the position of working women and the view of women held by men occupying managerial posts[**NOT EVIDENCE OF PURITY AND INNOCENCE, BUT RATHER A LACK OF POWER VIS A VIS THE DEFENDANT**], it is undeniable that the defendant, by criticizing the plaintiff's personal relationships to resolve their conflict and as his main means and ends of ousting the plaintiff from the company, committed unlawful acts."

3. Vicarious Liability

3. (a) The defendant company was vicariously liable for the defendant's unlawful acts because the

- (i) "the defendant's acts constituted an aspect of his job or were connected with his position as a supervisor in the company" and because
- ii) "the people he targeted included the plaintiff herself, his superiors and subordinates, and employees of client companies.

Accordingly, the acts were conducted "in the course of his employment" and the defendant company was vicariously liable for the defendant's unlawful acts.

3. (b) The defendant company was also vicariously liable for the senior officers' failure to ensure a hospitable working environment.

"It is a matter of public policy that employers, in their relationship with their employees, owe a duty of care to ensure that the working environment does not harm the employees' safety or health when they perform their duties[**PROTECT HEALTH AND SAFETY, NOT PURITY AND INNOCENCE**]. However, in addition, employers also owe a duty of care to prevent any violation of the employee's respect as a person, to break down any barriers affecting the employee's ability to provide labor services and to take steps to ensure that the work environment is hospitable for the individual employee. Neglect of these duties by persons charged with supervising employees may constitute unlawful acts. The employer will also be vicariously liable under article 715 for such unlawful acts. Both the senior officer and the representative director owed such a duty to the plaintiff as her superiors to ensure a favourable working environment. The senior officer and representative failed in their duty because of their inadequate efforts to identify as early as possible the true facts, find a solution for an appropriate working environment, and to identify a strategy that would avoid the worst-case-scenario of forcing either one to resign. Further, there was a discrepancy in the way the senior officer handled the matter as between the plaintiff and the defendant: the senior officer brought negotiations to a close by threatening her resignation, whereas he did not even hold discussions with the defendant but merely ordered a home detention. From both the way the matter was handled and the result of the action, the senior officer attempted to resolve the conflict by forcing the plaintiff's resignation. Accordingly, the senior officer's acts were unlawful because he failed in his duty of care and attempted to resolve the problem by forcing the plaintiff, the female, to be the sacrificial lamb, in contravention of the constitution and other statutes which mandate equality of the sexes. The defendant company was vicariously liable for these unlawful acts."

#### 4. Damages

4. The court upheld the plaintiff's claim for damages for mental pain and suffering in light of her loss of a hospitable working environment and breach of her personal rights including her right to be respected as a woman and her rights to be treated equally. However, since the plaintiff also contributed to the worsening working relationship, the damages amount should be halved[**NOT EVIDENCE OF PURITY AND INNOCENCE**]. The judge therefore awarded 1,500,000 yen in damages and legal costs of 150,000 yen, a total of 1,650,000 yen.

The results in the above tables provide mixed support for Burns's views. The analysis of the Shizuoka District Court decision, for example, falls neatly within Burns's theory of what constitutes a "believable" plaintiff: the victim was young and single; she was not in a personal relationship with or otherwise intimately familiar with her attacker (he was her boss); and she strongly resisted the acts of physical

harassment until, as a matter of personal safety, she was forced to submit. Furthermore, she promptly reported the incident and confided in her friends about the attack. Burns would submit that her case was successful because her story fitted within the stereotypical case of a credible female victim.

But this conclusion misses some important context. First, since the defendant in that case did not enter a defence in this case, the judge issued a default judgment upholding the plaintiff's claims. This suggests that her success at trial was probably more due to a straightforward application of the rules of civil procedure than due to the probative strength of her allegations. Further, even though the plaintiff was handed a comprehensive victory since her allegations were uncontested, the judge nevertheless awarded her less than half the damages she had requested. The judge offered no reasons for this decision.

Burns would have an even harder time explaining the Fukuoka District Court decision. Even though the court found overwhelmingly in the plaintiff's favour, the plaintiff herself was not the stereotypical victim. The evidence in the case was that she was ambitious, wilful, argumentative, and prepared to stand up for herself, hardly the indicators of a "pure and innocent" victim. Further, she reported the incident to senior management only once the rumours got out of hand; she did not report the incident promptly to authorities nor did she confide about the defendant's verbal harassment to her family, friends or trusted colleagues. Even more interesting is the evidence in the judgment that the judge was prepared to believe the plaintiff's account on the basis of "the position of working women and the view of women held by men occupying managerial posts" in Japanese society. This suggests that the judge ruled in her favour by taking judicial notice of the different positions of power that existed between the female plaintiff and her male defendants. If anything, this directly cuts against the implicit assumption that Burns makes that judges are unaware of the reality of women's lived experiences and tend to replicate male privilege.

#### **4. Conclusion**

The ambiguous results of this narrative analysis neither rebut nor lend support to Burns's arguments about gendered justice in Japan. The data set is too limited for a rebuttal, but nor can the analysis be dismissed out of hand given the legal significance of both judgments. The analysis in this paper, however, does highlight one of the key weaknesses of the narrative approach — the lack of generalisability of its findings. As Neuman (2006: 475) writes, "the narrative plot is embedded in a complex constellation of particular details, making universal generalizations difficult."

But even this conclusion is too convenient. As Elliott rightly counters (2005: 26-27), narrative research will degenerate into mere description unless researchers are allowed to draw broader inferences from their work. If so, though, to determine more conclusively whether judicial attitudes in rape cases are also evident in sexual harassment cases, a more extensive narrative study of sexual harassment cases is clearly warranted. And to make broader claims about sexual violence in Japan, similar studies should also be conducted on stalking, domestic violence and trafficking cases.

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