# 2. Law of Property and Obligations

**1. Death of a Self Defense Force member in an automobile accident caused by a fellow serviceman and the "safety liability" of the State.**

Decision by the Second Petty Bench of the Supreme Court on May 21, 1983. Case No. (*o*) 579 of 1980, a claim for damages. 37 *Minshū* 477.

[Reference: Civil Code; Art. 1(2), "The exercise of rights and performance of duties must be carried out faithfully and in accordance with the principles of trust."]

***[Facts]***

The Tokyo High Court found the following facts:

A, a member of the Ground Self Defense Force, drove an automobile of the Self Defense Force (hereinafter referred to as SDF) to return another serviceman, C, to the latter's unit. At that time A was accompanied by his subordinate B. On the way back from C's unit, A allowed the automobile to slip in the rain by negligence; the car collided with another car in the opposite lane, and in the result in accident B was killed.

Thus X, B's surviving family, filed a claim for damages based on non-performance of an obligation against Y, the State of Japan, alleging Y's negligence in failing to maintain a high standard of care toward its employee. The court of first instance, the Tokyo District Court, awarded damages to X; however, the Tokyo High Court rejected the district court's decision and dismissed X's claim. Then X submitted a *jokoku* appeal.

***[Opinions of the Court]***

*Jokoku* appeal dismissed.

First the Supreme Court ruled on the "safety liability" owed by the State:

"The State is liable to protect a public service employee from hazards to his life or health in establishing and administering a place, facility, instrument or anything else that the State ought to establish for execution of official business, as well as in administering official business that a public service employee executes under directions of the State or of his superior official" (Case No. (*o*) 383 of 1983. Decision by the Third Petty Bench of the Supreme Court on Feb. 25, 1975. 29 *Minshū* 143).

Secondly, the Court ruled on the relationship between the "safety liability" of the State and the negligence of an SDF serviceman when he, as a national public service employee, operated an SDF vehicle. With respect to the operator of an SDF vehicle, his duty of ordinary care is naturally derived from the Road Traffic Act (1960. Ch. 105) and other regulations. However, his duty is not related to the duties owed by the State to an SDF serviceman riding an SDF vehicle on official business.

Lastly the Court concluded as follows: It is evident that the accident in which B was killed was caused by A's negligence in his failure to observe ordinary care. Thus A naturally should bear liability as a vehicle operator according to the road traffic law. Nonperformance by the State of its own duties may not be deduced from this or any other findings. Thus the judgement of the original court, which denied any negligence by the State, is correct in its conclusion.

***[Comment]***

For the first time in its 1975 decision mentioned above, the Supreme Court acknowledged "safety liability" derived from contract principles and different from "protection liability" which was based on tort doctrine. The Court stated that "safety liability is that which is generally acknowledged to arise from an obligation, which one of the parties or both bear(s) to the other based on fair and equitable principles, concomitant to a principal juridical relation between the two parties who have entered into a special social contact based on this juridical relation." Since this 1975 decision, an increasing number of negligence claims have

been filed for damages based on safety liability concerning a public employment contract, *locatio operis*, lease, sale, accidents in school, etc.

The advantage of pursuing negligence claims based on theories of "safety liability" as nonperfomance of contract obligations, instead of on tort liability, lies in the fact that the plaintiff does not bear the burden of proving that the defendant is liable for the injury. Further, the period required for extinctive prescription is longer. ("A claim" such as one based on a contract "shall lapse if it is not exercised for ten years," whereas "a claim for damages caused by tort shall lapse by prescription if not exercised within three years from the time when the injured party or his legal representative became aware of the damage and of the identity of the person who caused it; the same shall apply if twenty years have elapsed from the time when the tort was committed." (Arts. 167 and 724 respectively of the Civil Code))

The 1983 case in question here was filed just before the end of the ten year term for extinctive prescription of a claim based on a contract. In this case, the cause of B's death had been found to be the negligence of A, who was a public service employee (SDF serviceman). X would have been able to sue Y for damages based on the State Redress Act (1947. Ch. 125) if the three year period for extinctive prescription had not passed as provided by Art. 724 of the Civil Code, which is applied in accordance with Art. 5 of the State Redress Act (if a person employed in public services of the State or a public corporation intentionally or negligently causes injury to another person in executing his official business, the State or the public corporation is bound to pay compensation for the damage).

The Supreme Court decision of 1983 discussed here points out the necessity to closely examine the contents of the "safety liability" doctrine on the basis of which an increasing number of suits have been filed since the 1975 decision.

**2. Litigation between neighbors over drowning of a child.**

Decision by the Tsu District Court on February 25, 1983.

Case of a claim for damages. Case No. (*wa*) 190 of 1977; Case No. (*wa*) 147 of 1979. 495 *Hanrei Taimuzu* 64.

[Reference: Civil Code; Art. 709, "A person who violates a right of another intentionally or negligently is bound to make compensation for damage arising therefrom."; Art. 719, "If two or more persons have by their joint tort caused injury to another, they are jointly and severally liable to make compensation for the damage; the same shall apply if it is impossible to ascertain which of the joint participants has caused the damage...."]

***[Facts]***

Plaintiffs X1 and his wife X2 (hereinafter referred to as X jointly) as well as defendants Y1 and his wife Y2 (hereinafter referred to as Y jointly) resided in a housing area developed by a private developer. A, X's son, and B, Y's son, were going to the same kindergarten; A and B often played together, and X and Y were on friendly terms with each other.

On the day of the incident, A and B were playing between the houses of X and Y until they moved to the front area of Y's residence when Y2 gave them snacks. Shortly X2 visited Y to take A with her for shopping. But A refused to leave. As Y1 offered to keep A, X2 asked Y2 to take care of A. Y2 accepted it saying there would be no problem because the two children were playing by themselves. According to the court's findings, Y1 and Y2 were busier than usual with a thorough cleaning of their house, and X2 knew of or should have known of this fact.

After X2 went shopping, Y2 worked outside the house for ten or fifteen minutes. She then noticed that A and B were playing with a bicycle at a place adjacent to the irrigation pond in question in this case. Seven or eight minutes later, after Y2 had entered the house, B came back saying that A had gone to swim in the pond and had not returned after diving in. Y1 and Y2 rushed with B to the pond and searched for A in it with others who also came in haste. As a result, A was found sunk in water three to four meters deep and four to five meters from the edge of the pond. When brought out, he had already drowned to

death. He was three years and four months old and 105 cm tall.

X then sued Y for damages claiming that Y's liability arose as follows:

(1) X commissioned Y to supervise A in their behalf, and Y consented to it; thus a quasi-mandate contract took effect between X and Y. Nevertheless, Y1 and Y2 acted negligently in managing the affairs entrusted to them, i.e. to supervise A with the care of a good manager in accordance with the tenor of the contract, resulting in A's death.

(2) Even if the aforementioned contract is found not to be effective, Y still had a duty derived from *naturalis ratio* or fair and equitable principles to supervise A properly and acted negligently in performing this duty; thus Y may not evade their tort obligations under Arts. 709 and 719 of the Civil Code.

Simultaneously X sued the Municipality of Suzuka, the Prefecture of Mie and the State of Japan for damages arising from their alleged duty of care in management; X also claimed damages based on Art. 709 against Z, who dug the irrigation pond. Both these claims were dismissed and will not be discussed here.

***[Opinions of the Court]***

The court did not accept the claim of Y's contract liability. According to the court, the conversation between X2 and Y2 was a sign of their friendship as neighbors and was not expressed as the intention to enter into a contractual relationship in which X would commission all the supervising responsibility to Y, who then would accept it. Thus X's assertion of a quasi-mandate contract does not stand.

The court, however, did find Y's tort liability on the following grounds: Y2, at the time she noticed that A and B were playing at a place adjacent to the pond after X2 left, should have taken proper measures so that the children would not go close to the water's edge. Since Y did not take such measures and left A and B to play at the place, Y are liable for the result caused by their negligence in accordance with Arts. 709 and 719 of the Civil Code.

The court, however, limited the scope of Y's liability. Y consented to supervise A as a favor as X's neighbors, even though they themselves were busy cleaning their house; Y's liability arising from their negligence of duty is thus much less than in the case of an onerous mandate. On the other hand, X also was at fault in neglecting the daily discipline of A. Thus an analogy to comparative negligence shall be made to apply to this case. In proportion, it is appropriate to attribute seventy percent of the damages to X and thirty percent to Y.

The court ordered Y to pay to X thirty percent of the total pecuniary loss, i.e. 2,865,922 yen out of the total 9,553,075 yen, two million yen for the pain and suffering, and legal fees of four hundred thousand yen.

***[Comment]***

After the court's decision was widely reported through the mass media, it created a nationwide sensation. Particularly, the X family received a flood of letters and phone calls of condemnation and calumny; their children, A's siblings were maltreated by their peers in school; X1 suffered rejection of his former business customers and so on. As a result, X were forced to waive the action despite their partial victory in the first instance. Now that the news was circulated of harassment inflicted on X, it was Y's turn to receive letters and phone calls of condemnation. Y also waived a *koso* appeal; the dispute was settled, and all legal proceedings were terminated.

Under these circumstances, the Ministry of Justice, after it investigated the case as a possible violation of the right of legal action guaranteed by the Constitution (Art. 32), issued an extraordinary comment: "The situation is extremely regrettable from the viewpoint of the protection of human rights. As a citizen of Japan, each of us must take this opportunity to renew our understanding of the importance of the right of legal action in a state ruled by law. The Ministry strongly urges the Nation to act prudently not to induce such situations any more."

Of the many factors contributing to the response from the

nation, the most important is that it may be contrary to the common sense of our society to award damages through legal action arising from an act of a favor between neighbors, i.e. having a neighbor's child under one's care. Within the legal profession, this case gave an impetus to research on the "law-consciousness" of the Japanese, and the role of the court in settling disputes in society as well as similar cases in other countries.

**By Prof. KATSUICHI UCHIDA**
**NAOYA SUZUKI**
**NARUMI HASEGAWA**

## 3. Family Law

***De facto* divorce and a "spouse" in the Agricultural, Forestry and Fishing Employees' Mutual Benefits Association Law.**

Decision by the First Petty Bench of the Supreme Court, on April 14, 1983. Case No. (*gyo tsu*) 109 of 1979. 37 *Minshū* 270.

***[Facts]***

A woman, X, (plaintiff, appellant, *jokoku* appellant) married a man, A, in 1930. They had four children. Their marital relationship deteriorated after 1952, mainly because of A's infidelity. A decided to leave their matrimonial home in November 1956, and X had no objection to the separation. They discussed and came to an agreement on the amount of maintenance X might receive for their children. A actually left home that month, and submitted to X a paper which expressed his desire to divorce, along with a written consent for X to receive A's pension directly until November 1964. A also promised to pay maintenance for the children up to the age of eighteen. In due course A entered into a *de facto* marriage with another