dent, the fact of death should not be taken into account in calculating the duration of working possible life when awarding the loss of future earnings which arose from subsequent complications of the first accident. This applies whenever the death has occurred from any cause, regardless of whether there exists a third party who should give compensation for the tort, or if there exists causation of the death due to the first traffic accident. When the victim dies from the second traffic accident, although the death was due to a third party's tort, the amount of damages which the first defendant has a duty to pay assumes that the victim's working ability has been lowered by subsequent complications from the first accident, and the recovery for total damages from both accidents is sufficient only if the fact of death is not been addressed in awarding the loss of future earnings.

It may be said that the position of the Supreme Court has been established.

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3. Law of Civil Procedure and Bankruptcy

1. A case in which the decision of the first appellate court was dismissed because of neglect to exercise the judge's power to clarify.

Decision by the First Petty Bench of the Supreme Court on February 22, 1996. Case No. (*o*) 2229 of 1995. A *jōkoku* appeal requesting retrial of a default judgment. 903 *Hanrei Taimuzu* 108: 1559 *Hanrei Jihō* 46.

[Reference: Code of Civil Procedure Articles 127, 301, 325, and 327.]

[Facts]

X (Plaintiff, *kōso* appellant, *jōkoku* respondent) and Y (defen-

dant, *kōso* respondent, *jōkoku* appellant) were mortgagees on the land in A's possession. X was the second mortgagee and Y was the third mortgagee. Afterwards, the change of order was registered. X filed a suit to cancel the registration of that change of the order of successive mortgagees. Y claimed that there had been an agreement concerning the change of order in the first instance, and submitted the "certificate of the contract to change the order of mortgage" as evidence. X denied that he had executed the portion which was nominally executed by X. Therefore, Y applied to analyze the signature and handwriting of B who is a representative of X. The trial court found that there had been execution of that portion without analyzing the handwriting of B, and dismissed the action. X appealed. The court of appeals held, without analyzing the handwriting of B, that the execution of that portion could not be admitted through testimony and set aside the judgment of the trial court upholding X's claim. Y appealed to the Supreme Court. Y claimed that he had stated in his pleading that, if the appellate court had some doubts about the execution of that portion, it was expected to consider the discretionary exercise of the judge's power to clarify by taking into account Y's application to analyze the handwriting in the first instance although Y did not apply again to the appellate court to analyze B's handwriting. Y argued that, in spite of that statement, the appellate court did not appropriately exercise the judge's power to clarify, so it is a breach of the duty of the judge's power to clarify and there was an inadequate hearing.

[Opinions of the Court]

Reversed and remanded.

Although Y, who had won the case in the first trial did not apply again to the appellate court for the analysis of B's handwriting in the pleading which was submitted at the second trial of the appellate court, he demanded that, when the appellate court had some doubts about the execution of the portion of the certificate of the contract to change the order of mortgagees, which was nominally executed by X, it should consider the exercise of the judge's power to clarify by taking into account his application to analyze B's hand-

writing filed in the court of first instance. Between the handwriting of the signature of "B" submitted into evidence at that time and the handwritten signature which B wrote on a written oath at the time of hearing of the representative of X in the court of first instance, no clear difference can be proven. Under these circumstances, the appellate court should have exercised the judge's power to clarify whether Y could apply again to analyze B's handwriting.

[Comment]

It is said that there are two types of judges' power to clarify. There is a passive one, that is, to inquire an unclear point or inconsistent point in a party's motion or claim. Another is a positive one, that is, to instruct the party to file a new motion, claim, or proof. The scope of the duty to exercise the judge's positive power to clarify on the application to introduce evidence was the issue in this case. The non-exercise of the judge's passive power to clarify is generally admitted to be a breach of judicial duty, but it is not clear how the scope of the breach of duty to exercise the judge's positive power to clarify is developed. On the application to introduce evidence, the Supreme Court was initially not eager to exercise the judge's positive power to clarify. It changed its attitude to a positive one after the decision of the Supreme Court on June 26, 1964 (18 *Minshū* 954).

There are two views about the judge's positive power to clarify. The negative view asserts that the excessive exercise of the judge's power to clarify may not be fair to the parties, while the positive view permits the judge's power to promote the filing of new evidence. Recently, there has been another view that is basically opposed to the judge's positive power to clarify. It advocates the position that, when the appellate court makes a finding of fact differently from the court of first instance, and it will become a surprise judgment, unless that is indicated to the party and the opportunity to introduce new evidence is given, as an exception to the general rule would become the duty of the court to promote the filing of new evidence.

This latter view follows the trend of Supreme Court decisions and adds an additional instance to the duty of the judge's positive power to clarify. We should, however, pay attention to the question

of whether the handwriting analysis was necessary to result in the opposite decision in the court of first instance after the presentation of this written evidence because, in general, handwriting analysis is not a decisive means of proof. It is possible enough to refuse to make a conclusion about written evidence from a basis other than handwriting. Rather, although the *jōkoku* appellant had demanded the exercise of the judge's power to clarify by applying for handwriting analysis when the appellate court would decide differently from the court of first instance, the court ignored that. That point could be the cause to admit a breach of the duty of the judge's power to clarify.

There is another view which asserts that there has been sufficient exercise of the judge's power to clarify to the extent that there has not been a judgment which takes the party by surprise. Generally, a court is not necessarily to be bound by the filing party to a restriction on the type of evidence to be reviewed, as in this case.

2. A case in which it was held that an offset is permissible even if a claim for a cancellation refund of an accident insurance contract, which was cancelled after the bankruptcy order, is the one to be offset.

Decision by the Fukuoka District Court on May 17, 1996. Case No. (*wa*) 4513 of 1995. 920 *Hanrei Taimuzu* 251; 1464 *Kinyū Hōmu Jijyō* 32.

[Reference: Bankruptcy Act, Articles 99, and 104 (1).]

[Facts]

A bankrupt company, A, made an accident insurance contract with an indemnity insurance company, Y, in March 1992. On March 3, 1994. A received a bankruptcy order and X was assigned to be the trustee in bankruptcy. X gave a notice of intent to Y that he would cancel this insurance contract, and claimed the cancellation refund, which was about 4,790,000 yen in all, on January 10, 1996. Y gave a notice of intent to X at trial on February 7, 1996, that Y would offset Y's other claim against the bankrupt company, which was about 16,050,000 yen, with the claim on this insurance contract, which had an equal value.

A summary of X's position is as follows: (1) the purpose of the latter part of Article 99 of the Bankruptcy Act is to permit offset when it means the abandonment of one benefit of the creditor in bankruptcy when another claim's condition or claim is beneficial to the creditor in bankruptcy. Therefore, when the creditor in bankruptcy does not have the right conditions to offset through his unilateral intention, as in this case, this Article cannot be applied. (2) Since X employed the employees of A (insured persons) after the bankruptcy order was granted on behalf of A, and had them work for X, the risk of occurrence of an accident which would require insurance continued. Therefore, the rational expectation of offset on the cancellation refund debt did not exist at the time of the bankruptcy order. A summary of Y's position is as follows: (1) the right interpretation of the latter part of Article 99 of the Bankruptcy Act is that, when the other party's claim is the one with the condition precedent, with the fulfillment of the condition the offset is permissible even under a bankruptcy proceeding. (2) If the rational expectation of offset is permissible in relation to the other party's claim, Article 104 (1) of the Bankruptcy Act is not applicable. (3) As the percentage of an accident occurrence insured is low in an accident insurance contract, there is a high probability that Y would be required to pay either the expiration refund or a cancellation refund. Therefore, it is obvious that there is a rational expectation of offset in this case.

[Opinions of the Court]

If the rational expectation of offset exists at the time of a bankruptcy, an offset under the provisions Article 104 (1) of the Bankruptcy Act is not prohibited, even if the condition precedent of the other party's claim is fulfilled after the bankruptcy order. The offset is permissible under Article 99 of the Bankruptcy Act. The following is the opinion of the court as to whether the rational expectation existed in Y at the time of the bankruptcy order in this case. Reserve insurance, which is a kind of loss insurance as in this case, is available when the percentage of occurrence of an insured type of accident is low and there is a high probability that the expiration refund or the cancellation refund will be paid. Because the

insurance companies anticipate that, they establish systems such as automatic transfer loans or loans for contractors, which have the function of providing financing. It is obvious that the insurance contractors also understand it to be a kind of a deposit. Therefore, the insurance company expects to offset against any claim which is possibly acquired by the insurance company. In the same way, a bank expects to offset with a deposit repayment claim when it receives a deposit, even if there is a difference in degree. Such an insurance company's expectation could be reasonable.

[Comment]

Under the latter part of Article 99 of the Bankruptcy Act, it is permissible for a creditor in bankruptcy to give up the possibility of non-fulfillment of condition and offset against the other party's claim on a condition precedent; however, since Article 104 (1) of the Bankruptcy Act prohibits offset against a claim which was raised after the bankruptcy order, two opposite views arise as to the propriety of offset after the fulfillment of a condition precedent. The negative view is one which denies the rationality of the expectation of offset against the other party's claim with a condition precedent in principle. Proponents of this view argue that to assert the right of offset even by giving up the possibility of non-fulfillment of condition is the only evidence of the "rationality" of the expectation of offset, and that it is difficult to find the criteria to estimate the "rationality" in the other way. The main bases of the positive view are that, (1) under the negative view, the aim of the latter part of the Article 99 of the Bankruptcy Act is likely to be lost, or (2) that there is no limit on the term to assert the right of offset under the Bankruptcy Act, unlike that of in the Corporate Reorganization Act (cf. Article 162 of the Corporate Reorganization Act). The negative view was the common view before, but recently rather the positive view has turned out to be the majority view. This decision sides with recent major doctrine on a claim for cancellation refund and permits the offset. Because the Court gave detailed reasons for its ruling on the issue, for which there were no decisions before and no opposing decisions, it seems that it would be a good reference for future

practice.

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4. Criminal Law

A case to determine whether the defense of necessity is allowed with respect to the act of killing under duress.

Decision by the Ninth Criminal Division of the Tokyo District Court on August 26, 1996. Case No. (*wa*) 186 of 1995. A case of homicide. 1578 *Hanrei Jihō* 39; 921 *Hanrei Taimuzu* 93.

[Reference: Criminal Code, Articles 37, 60 and 199.]

[Facts]

The accused X had once been a follower of the AUM Shinrikyo religious cult, whose founder was Y. X resigned from the cult and had no contact with it. Since X's mother M suffered from Parkinson's disease, she had been receiving treatment in the hospital affiliated with the cult, which was located in an establishment administered by AUM. X became acquainted with Z, who had once been a follower of AUM and had worked as a pharmacist in the hospital. Z insisted that the treatment methods of the hospital would make M's illness worsen. Z exhorted X to remove M from the hospital.

At about 3:00 a.m. on January 30, 1994, X and Z stole into the building administered by the AUM cult for the purpose of rescuing M. They tried to take M out, carrying her in their arms. But they were unfortunately detected by devotees of the cult on their way. Though X and Z resisted the devotees by using tear gas spray, etc., both of them were ultimately taken captive. With handcuffs on their wrists and with packing tape on their mouths, X and Z were taken to a meditation room the construction of which was suitable for keep-