

# The Law of Liability in Contemporary in Japan to Third-Parties for Damages Caused by People with Dementia: A Review of the Tokai JR Supreme Court Case of March 1, 2016

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On March 1, 2016 the Supreme Court of Japan handed down a landmark decision related the liability of caregivers who are taking care of a person with dementia (Alzheimer).<sup>2)</sup> At first, the Court set forth the relevant statutes (see footnote below).<sup>3)</sup>

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2) Supreme Court Judgment 2016-03-01, Minshu Vol. 70. 3

3) Civil Code

Article 709

A person who has intentionally or negligently infringed any right of other, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.

Article 713

A person who has inflicted damages on others while he/she lacks the capacity to appreciate his/her liability for his/her own act due mental disability shall not be liable to compensate for the same; provided, however, that this shall not apply if he/she has temporarily invited that condition, intentional of negligently.

Article 714

(1) In cases where a person without capacity to assume liability is not liable in accordance with the provisions of the preceding two Articles, the person with the legal obligation to supervise the person without capacity to assume liability shall be liable to compensate for damages that the person without capacity to assume liability has inflicted on a third party; provided, however, that this shall not apply if the person who has the obligation to supervise did not fail to perform his/her obligation or if the damages could not have been avoided even if he/she had not failed to perform his/her obligation.

(2) A person who supervises a person without capacity to assume liability, on behalf ↗

## FACTS

A train accident occurred on the evening of December 7, 2007, when a 91-year old man wandered away from his home in Obu, Aichi Prefecture, while his wife (85) was dozing. Through he didn't have any money with him at the time he somehow managed to board a train at Obu Station and he got off at the next station, Kyowa Station. At that station he walked onto the tracks and was subsequently hit and killed by a train.

Central Japan Railway Co. (JR Tokai) sued the family of the deceased in

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of a person who has the obligation to supervise, shall also assume the liability under the preceding paragraph.

### Article 752

A husband and wife shall live together and provided mutual cooperation and assistance.

### Act on Mental Health and Welfare for the Mentally Disabled

#### Article 20

- (1) For mentally disabled persons, their guardians or curators, spouses, and persons with parental authority and person under duty to support them become their custodians; provided, however, that those who fall under any of the following items do not become custodians:
  - (i) a person whose whereabouts are unknown
  - (ii) a person who has brought or is bringing an action against the mentally disabled person, or spouse or lineal blood relative of such person;
  - (iii) a statutory agent, curator, assistant who has been replaced by the family court;
  - (iv) a bankrupt person;
  - (v) an adult ward or person under curatorship; and
  - (vi) a minor
- (2) If there are two or more custodians for a mentally disabled person, they are to perform their duty in the following order; provided, however, that the family court may, at the request of an interested person, change the order among these persons except for the guardian or curator, if it finds this to be particularly necessary for the protection of the mentally disabled person:
  - (i) a guardian or curator;
  - (ii) a spouse;
  - (iii) a person with parental authority; and
  - (iv) a person appointed by the family court from among persons under a duty to support other than those referred to in the preceding two items.

the amount 7.2 million yen for damages caused by the delay in train service.<sup>4)</sup>

## BACKGROUND

The husband (deceased-hereinafter P) was born in 1916, and the wife (hereinafter Y1) in 1922. They married in 1945 and lived together since then. They have four children, among whom Defendant Y2, was the oldest son. He had moved to Yokohama City in 1982 along with his wife (hereinafter Q).

P had run a real estate agency service until around 1998. P's residence was located in Aichi Prefecture and consisted of a living area and office area and had both a home entrance and an office entrance.

Around December 2000, P started to show strange signs and behavior. For example, he would say "When do we eat" after finishing his meal, was unable to distinguish whether it was day or night. Seeing such conditions, the defendants thought that P had become demented.

In 2002, P started displaying forgetful behavior, he had forgotten that he had taken a drink of alcohol, and would get up many times in the middle of the night to check to make sure the doors were locked.

In March of 2002, the defendants and Q would meet at the residence and discuss how to take care of P in the future. They recognized the fact that Y1 was already over 80 years old and had difficulty taking care of P all by herself. They all agreed that Q would move from Yokohama to P's property in order to help Y1 care for P. Q began to go to P's residence every day and take care of P, and sometimes she would stay at his residence. Y2, who lived in Yokohama and worked in Tokyo, would return to his father's home twice a month to see how things were going.

The family decided to apply for long-term care insurance and asked their treating doctor to write an opinion for such application. P was given a certificate for Level 1 (there are five levels of need for long-term care, with Level 5 being the most severe level). In November 2002, P's level was

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4) It is quite common in Japan for families to be held liable for delay damages when a family member commits suicide by jumping in front of a moving train.

raised to Level 2.

P was admitted to a hospital in August 2002, and started to show symptoms that suggested his dementia was worsening. In March 2003, the doctors had determined that he had fallen ill with Alzheimer's dementia. As a result, he started to go to welfare facility once a week as an out-patient. However, at the time of his death he was going to the facility six times a week. On the day he didn't go there, Q would care for him at home from morning to night.

He started to confuse his wife with his mother and was unable to identify his children. P refused to stay at home in spite of Q's request to the contrary, and she was forced to accompany him when he went out.

In February 2004, his doctor diagnosed that P was suffering impairment in orientation and memory in terms of places and people and that his dementia was progressing from around a medium level to a severe level.

In the early morning of August 3, 2005, P went out alone and went missing. Then around 5:00 a.m., he was found due to a report to the police from the manager of a convenience store nearby.

By January 2006, Y1 had also obtained a certification for Level 1 for long-term care based on an investigation that she suffered paralysis and contracture of both legs, and could only sit up or walk if she held on to something.

At midnight on December 26, 2006, P went out alone and took a taxi. The driver noticed his dementia and let him out at a convenience store. P was taken into custody by the police and was returned to his home around 3:00 a.m.

After the incidents mentioned above, Q informed the local police about the situation and gave them her contact information, etc. And she sewed a piece of cloth on P's outerwear with his name and Q's cell phone number written on it. In addition, Y2 installed a door chime on the home entrance so that the sensor could detect if P tried to get out. A chime would ring at Y1's bedside so she would know if P was trying to leave.

The defendants and Q had once tried to lock the gate to prevent his departure but this proved to be dangerous because P would become irritated and shake the gate violently. Also, at times P was unable to recognize where he was and urinated wherever he happened to be at the particular moment.

By February 2007, P's condition deteriorated to the point that he was a Level 4 regarding need for long-term care. He frequently displayed symptoms and behavior during his daily activities. He had difficulty in communicating and could not understand where he was, and was in need of care all the time.

The family met to discuss how to proceed regarding P's care and considered putting him into an intensive care home for the elderly. However, his daughter suggested that P's condition would worsen due to his confusion at being at such a facility.

He had sufficient capability to stay at home provided that he was watched over by his family. Also, such care facilities were overcrowded and there was a long waiting list, and it would take a few years in order to be admitted to one. The family finally decided that he would remain at home.

P lost interest in money as his dementia progressed and at the time of the accident he had neither money nor a wallet with him. Daily shopping for P's necessities was done by Y1 and Q, and his overall finances were taken care of by Y1.

At the time of the accident, Q took care of P based on the following schedule. Q would go to his house every morning around 7 a.m., wake him up, change his clothes, make his breakfast and then take him to the welfare facility. In the late afternoon she would take him back home and chat with him for about 20 minutes, and wait for him to doze off so she could do some housework in the kitchen. After his nap, Q would take him for a walk once every three days. After dinner he would take a bath and go to bed. Q would return back to her own home once she confirmed that he was asleep.

Around 4:30 p.m. on December 7, 2007, the day of the accident, P returned home by a courtesy car of the welfare facility. He went to the office area of the building and sat on chair and spent time with Y1 and Q. Before entering the house P urinated in a cardboard box near the entrance and Q went to clean it up. P and Y1 remained in the office alone. Y1 dozed off and P went out of the office area by himself. He went to the train station and boarded a train, getting off at the next station. He went to end of the platform and opened the gate of the fence and stepped down from the

platform in order to urinate. He was struck by a train around 5:47 p.m..

At the time of the accident P lacked legal capacity due his severe dementia and was not able to appreciate his liability to others.

### HIGH COURT DECISION<sup>5)</sup>

The trial court (court of first instance) had held that both Y1 and Y2 were liable to JR Tokai. However, the high court upheld the decision as to Y1, but dismissed the plaintiff's claim for damages against Y2.

The high court held that where a person, due to a mental disorder as prescribed in Article 5 of the Act on Mental Health and Welfare for the Mentally Disabled, the person's spouse who is living with the person assumes the obligation to supervise the person based on the duty of a married couple to live together and provide cooperation and assistance to each other, unless there are special circumstances which would make it impossible to legally expect the married couple to fulfill their duty.<sup>6)</sup>

In this respect, the high court relied on Article 714, paragraph (1) of the Civil Code and held that Y1 was a person with the obligation to supervise because she was the wife of P, and they lived together.<sup>7)</sup>

Even though Y1 recognized that P had a desire to go out despite his impaired condition and severe level of dementia, she failed to turn on the chime with a sensor installed in the office entrance which could have easily done.

In light of these facts and other factors, it can be said that Y1 did fail to perform her obligation to supervise. Moreover, it could not be said that the

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5) Nagoya High Court Decision April 24, 2014.

6) Article 752 of the Civil Code

7) Article 714

(3) In cases where a person without capacity to assume liability is not liable in accordance with the provisions of the preceding two Articles, the person with the legal obligation to supervise the person without capacity to assume liability shall be liable to compensate for damages that the person without capacity to assume liability has inflicted on a third party; provided, however, that this shall not apply if the person who has the obligation to supervise did not fail to perform his/her obligation or if the damages could not have been avoided even if he/she had not failed to perform his/her obligation.

damage would have occurred even if she had not failed said obligation.

As to Y2, the oldest son, the high court held that even though he provided financial support to P, he did not live with him, and did not assume the obligation to supervise his father. Y2 had lived in Yokohama for twenty years, and had not been appointed as P's guardian. In light of these facts, Y2 cannot be deemed to have assumed a legal obligation to consider every aspect of P's daily life and to care for his personal matters.

### SUPREME COURT DECISION

The Supreme Court determined that the high court had erred in holding Y1 liable for damages to the plaintiff.

Pursuant to Article 714(1) of the Civil Code “the person with the obligation to supervise” is liable for damages caused by the person they are to supervise. So the question in this case is whether Y1 and Y2 are persons with the meaning of the statute.

The law at the time in 2007 provided that guardians and custodians were not persons within the meaning of the statute simply based on their status as a guardian or a custodian.<sup>8)</sup> A guardian of an adult, in undertaking affairs related to the adult, must consider the adult's mental and physical condition and living circumstances. In light of the guardian's authority, etc., the guardian's obligation to perform juridical acts such as concluding contracts on behalf of the adult. However, it could not be understood as requiring the guardian to actually supervise the adult's behavior.

As to the duty of a married couple to cooperate and assist each other pursuant to Article 752, this does not place either of them under an obligation to do something in relation to a third party. Actually the court held that this duty was abstract in nature and that it was impossible to force either a husband or wife to fulfill the duty to live together. The duty to provide assistance to each other is interpreted as a duty to assure the livelihood of the other party, but does not lead to the obligation to supervise the other party in relation to a third party.

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8) Article 858, paragraph (1) of the Civil Code prior to the amendment by Act No. 149 of 1999. (the custodian system itself was later abolished by Act No. 47 of 2013)

Consequently, the Court held that a mentally disabled person's spouse who lives together with that person cannot be deemed to a "person with the legal obligation to supervise the person without legal capacity as referred to in Article 714 paragraph (1) of the Civil Code only because of such status.

Defendant Y1 was P's wife (and was P's custodian at the time of the accident.<sup>9)</sup> However, the Court held that she could not be deemed to "a person with legal obligation to supervise." As to the first son, Defendant Y2, the Court held that there were no legal grounds for considering that he was deemed to be a "person with the legal obligation to supervise."

However when special circumstances exist, such a person should held to have assumed the obligation to supervise in light of the personal relationship and the status of daily contact between them.

Whether or not a person is regarded as such a person who is equivalent to a person with such an obligation, the Court held that an objective standard and equity should be applied.

In this case, P started to show symptoms of dementia around 2000, and was diagnosed with Alzheimer's dementia by 2002. He started to show symptoms such as impairment in orientation and memory around 2004. He was a Level 4 regarding need for long-term care in February 2007. Leading up to the accident he had gone missing on two occasions, once in 2005, and another in 2006. Y1 was herself at Level 1, 85 years of age, and suffering paralysis and contracture of both lower limbs. She needed Q's help in taking care of P.

The Court held that in view of these matters that she should not be deemed to have been practically capable of supervising P to prevent him from harming a third party, nor could it be found that she assumed the obligation to supervise.

As to the first son, Y2, the Court also held that he could not be deemed to be a person with the obligation to supervise. He had lived in Yokohama for more than twenty years.

In conclusion, the Court determined that the High Court had erred by

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9) See Article 20 of the Act on Mental Health and Welfare for the Mentally Disabled prior to the amendment by Act 47 of 2013.

holding Y1 liable for damages under Article 714 of the Civil Code, and dismissed the Plaintiff's claim for damages. And held that the High Court was correct in dismissing the claim against Y2.

### CONCURRING OPINION OF JUSTICE MICHİYOSHI KIKUCHI

Justice Kikuchi agreed with the majority opinion and add further explanation as to the law in Japan regarding guardians, and custodians, and those person with the duty to supervise pursuant to Article 714 of the Civil Code. He set forth the history of the legislation in this matter and indicated what the law was before the 1999 amendment, and after it.

Prior to the 1999 amendment the Act on Mental Health and Welfare for the Mentally Disabled (hereinafter (Mental Health and Welfare Act) and the Civil Code respectively provided for a custodian and guardian as follows:

If a mentally disabled person who is adjudicated incompetent has spouse, the spouse automatically became the guardian of that person.<sup>10)</sup> A guardian had the obligation to give medical and nursing care to an incompetent person.<sup>11)</sup> And, this guardian had the authority to commit the incompetent to a mental hospital with the permission of the court.<sup>12)</sup> A guardian held the first rank in the order of the persons who would automatically become a custodian to supervise a mentally disable person to prevent him/her from injuring him/herself and harming others.<sup>13)</sup>

Justice Kikuchi explained that the conventional interpretation of these laws was that as long as the mentally disabled person had a spouse, the spouse shall automatically became the person's custodian and guardian, and would have the obligation to supervise within the provisions of Article 714.

This was the law from the enactment of the Mental Health Act in 1950, and remained so until the 1999 amendment. After the amendment, Article 858 paragraph (1) which had read that a guardian "must make efforts to give medical and nursing care," was revised to stipulate that "a guardian of an

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10) Article 840 of the Civil Code

11) Article 858, paragraph (1) of said Code

12) Id. Paragraph (2),

13) Article 20, paragraph (2), and Article 22, paragraph (1) of the Mental Health and Welfare Act.

adult, in undertaking affairs..., must consider the adult's mental and physical condition and living circumstances." Thus, as explained in the majority opinion, a guardian of an adult is not required to supervise the adult's behavior.

As a result, the act of watching a mentally disabled persons daily activities and supervising the person to prevent him/her from harming others is not a function to be performed by the guardian, and therefore, a guardian cannot be deemed to have been designated by law as a person with the legal obligation to supervise as prescribed in Article 714 of the Civil Code only because of such status.

As a result of the 1999 amendment, an adult's spouse or other relative would no longer be appointed as a guardian only because of their legal status. In other words, the kinship-based system was abolished.

Now, even when an adult's spouse, parent, or child is appointed as his/her guardian, it is not because of the familial connection, but because of the person's suitability to serve as a guardian pursuant to the requirements prescribed in Article 843, paragraph (4) of the Civil Code. There is no reason for an adult's relative to come first as the candidate for the appointment of the guardian of the adult.

With regard to a custodian, the 1999 amendment introduced a provision that reads, "a custodian must enable a mentally disabled person...to receive medical treatment and protect the mentally disabled person's economic benefits," and deleted the provision pertaining to the obligation to supervise a mentally disabled person to prevent him/her from injuring him/herself or harming others.

The obligation to assist a person to get medical treatment means nothing more than having the person get to the hospital, and the obligation to protect economic benefits means nothing more than providing practical protection by keeping an eye on the person's personal property.

In this case Y1 was P's custodian, but she did not have the obligation to assist him to get medical care because he was already under the care of doctors. Finally, it was held that a custodian cannot be deemed to fall within the category of person with the obligation to supervise only because of such status.

In other words, the guardian's obligation to give medical and nursing care, and the custodian's obligation to supervise, which provided the basis of the guardian's status as a person with the obligation to supervise as designated by law, no longer existed as a result of the 1999 amendment.

Justice Kikuchi went on to explain about the legal incapacity system. He said that it is a system to protect persons who lack the ability to make value judgments in legal terms. If the system held the supervisor responsible for what the person did, the supervisor would be motivated to restrict the activities of the person, to their detriment.

The custodian's and guardian's obligation to supervise has been abolished because these obligations impose too heavy a burden on them. They would have to accompany the person at all times and the burden would be too heavy.

#### CONCURRING OPINION OF JUSTICE KIYOKO OKABE

Justice Okabe agreed with result of the majority, but took issue with the status of Y2, the first son. She held that he did in fact come with the category of persons with the obligation to supervise, but that he had not failed in that obligation. He had lived with P until 1982 when he was transferred to Tokyo for his job. He had built his residence on the property of P, and when P became ill, he sent his wife, Q, to go and take care of P. She lived in the house next door and would go to P's house every day to care for P, and would sometimes even stay overnight there.

Y2 went to visit his father three times a month and would get frequent information concerning his father's condition from his wife. The overall administration of P's property, including the management and renewal of lease contracts was conducted exclusively by Y1. Y2 had been involved in decisions regarding P's situation throughout the entire process. Using the reasonable person standard, an objective standard, she held that Y2 was not liable because he had done everything any reasonable would have done. Justice Takehiko Otani also wrote a concurring opinion and agreed with Justice Okabe. They both felt that Y2 was a person with the obligation to supervise, and that he had not failed in that obligation. Therefore, he was not liable to the plaintiff.

## CONCLUSION

Dementia is an illness that affects millions of people world-wide. The care for family members with this is illness is a struggle for all concerned. How the courts deal with the issue of liability to third-parties for damages cause by such patients is a current topic of discussion.

In Japan, the courts and the legislators have begun to see the issue in contemporary ways, and have abandoned the old notion that family members be held liable under any circumstance. Such a burden would restrict the activities of such patients to their detriment.

This decision will impact families across the country and will come as a sense of relief. Caring for a loved one is difficult in and of itself, and the additional risk of financial ruin would be too heavy of a burden to impose on family members.

The compassion shown by the Supreme Court in this case is a wonderful development in elder law and I am sure there will be many academic articles written on the subject in the future.