Journal of Korean Law | Vol. 14, 213-224, June 2015

Notable Supreme Court Cases: Civil Law*

1. Supreme Court Decision 2012Da72582 Decided May 16, 2014【Sale Payment Return, Etc.】[1)]

【FACT】[2)]

Plaintiff purchased a 2010 BMW 520d automobile from KolongGlotech. Five days after the car was delivered to Plaintiff, it was discovered that the speedometer on the car's dashboard was not working, which was confirmed to be mechanical failure of the dashboard upon inspection. The defect was that the speedometer's needle failed to move. However, the car at issue was equipped with the head-up display function, which shows the car's speed through the screen on the windshield, allowing the driver to check speed while driving focused on the front, without having to look at the speedometer. Even Plaintiff was driving this car by using the head-up display without fixing the defect. Meanwhile, the aforementioned car is designed so that even if the dashboard is partially defected, the entire "dashboard module" may be replaced. Such maintenance is not complicated, is relatively cheap, and the entire dashboard would function normally following the maintenance. KolongGlotech offered a "warranty

* In this section, several notable Korean Supreme Court cases are excerpted, with a short comment for each case. For the current issue, Professor Kye Joung Lee prepared the comments, edited the excerpts, and supervised the work of student editors. These cases were initially translated by the Supreme Court Library of Korea, and the Journal's student editors further modified and edited the excerpted translations. Full texts of the cases are *available at* https://library.scourt.go.kr/Eng/main.jsp. Used with the permission of the Supreme Court Library.

1) The translation of the entire decision is *available at* http://eng.scourt.go.kr/eng/crtdcsns/NewDecisionsView.work?seq=877&currentPage=4&mode=6&searchWord=.

2) The Fact constitutes no part of the opinion of the Supreme Court.

repair of replacing the dashboard," but Plaintiff refused this offer, and demanded a newly assembled car in exchange for the car that Plaintiff initially received.

【Main Issue】

In a sale in kind where the duty to exercise defect liability contradicts the principle of fairness, whether the buyer's right to claim for defectless property may be limited,and, if so,what the standards should be for determining the limitations.

【Holdings】

[1] Civil Act provisions on defect liability were prepared based on the principle of fairness - the guiding ideology of the Civil Act - in order to maintain equivalence relation between the benefits and consideration by the onerous bilateral contract of trade. However, when the buyer's right to claim for defectless property is acknowledged without limits in a sale in kind, the seller may suffer excessive disadvantages and losses, thus destroying the equivalence relation. Therefore, it is reasonable to limit the right to claim for defectless property when exercising defect liability contradicts the principle of fairness, such as cases where excessive disadvantage is caused to the seller compared to other remedies if the seller is burdened with the duty to deliver non-defective goods, because the defect of the subject good is slight enough to the extent that there is little to hinder the contract's goal from being accomplished with repair and other means.

And whether to limit exercising the buyer's right to claim for defectless property should be individually and specifically determined upon considering various circumstances such as the extent of the defect in the subject good, how easy the repair is, the possibility the defect can be mended, and the extent of the disadvantages the seller will suffer by exercising delivery of a completely defectless good, in light of social norms.

[2] In a case where A, who purchased an automobile from B corporation, sought exchange for a new car against B corporation based on a defect which occurred 5 days after the car was delivered to A, the case held that A is not permitted to exercise his claim for defectless property.

【Reasoning】

According to Articles 581(1), 581(2), 580(1), and 575(1) of the Civil Act, when the subject matter of a sale has been specified in kind, if any defects exist in the specified subject matter, the buyer may rescind the contract only if the objective of the contract is not unattainable due to the defect. If the defect is not severe to such degrees, the buyer may only claim damages, and also has the right to demand the non-defective item without rescinding a contract or claiming for damages ("claim for defectless property").

Such Civil Act provisions on defect liability were prepared based on the principle of fairness - the guiding ideology of the Civil Act - in order to maintain equivalence relation between the benefits and consideration by the onerous·bilateral contract of trade (see Supreme Court Decision 94Da23920, Jun. 30, 1995, etc.). However, when the buyer's right to claim for defectless property is acknowledged without limits in a sale in kind, the seller may suffer excessive disadvantages and losses, thus destroying the equivalence relation. Therefore, it is reasonable to limit the right to claim for defectless property when exercising defect liability contradicts the principle of fairness, such as cases where excessive disadvantage is caused to the seller compared to other remedies if the seller is burdened with the duty to deliver non-defective goods, because the defect of the subject good is slight enough to the extent that there is little to hinder the contract's goal from being accomplished with repair and other means.

. . .

[T]his case's defect can be easily repaired for a non-excessive cost by replacing the dashboard module; even if repaired, the defect does not particularly obstruct the purpose of this case's contract, which was purchasing a new car; and even if Plaintiff continued to own the car, there is scant possibility that the car's price will be decreased due to the repair; however, if the seller (KolongGlotech) is burdened with the obligation to deliver a new, defectless car, it will cause an excessively large disadvantage to KolongGlotech, compared to other means of relief.

Thus, . . . Plaintiff's exercise of this case's claim for defectless property should not be permitted. . . .

【COMMENTS】

Article 581 of the Korean Civil Act[3] stipulates that if any defect existsregarding sales in which the subject matter has been specified in kind (sales of generic goods), the buyer may claim damages against the seller (and rescind the contact only if the objective of the contract is unattainable due to the defect), or claim a non-defective item without rescinding a contract or claiming damages. Thus, Article 581 places no limitation on a buyer's right to claima non-defective item.

Nonetheless, the Supreme Court, on the basis that the seller's liability for warranty against defect is based on the principal of fairness, decided that it is reasonable to limit the right to claim for defectless property when the performance of this liability goes against the rule of fairness in individual cases, which gives this case its significance.

2. Supreme Court en banc Decision 2010Da92438 Decided August 21, 2014【Damages】[4]

【FACT】[5]

From April 13, 2003 to November 29, 2006, Plaintiff entered the casino

3) Article 581 of the Civil Act (Sale in Kind and Seller's Liability for Warranty) (1)Even where the subject matter of a sale has been specified in kind, if any defects exist in the specified subject matter, the provisions of the preceding Article (Article 580) shall apply mutatis mutandis.(2)In the cases of the preceding paragraph, the buyer may demand the non-defectiveitem without rescinding a contract or claiming for damages.

Article 580 of the Civil Act (Seller's Liability for Warranty Against Defect) (1) If any defects exist in the subject-matter of a sale, the provisions of Article 575 (1) shall apply mutatis mutandis: Provided, That if the buyer was aware of or was not aware of such defects due to his negligence, this shall not apply. (2) The preceding paragraph shall not apply to the cases of a sale by auction.

Article 575 of the Civil Act (Case Where Restricted Real Rights Exist in Contract and Seller's Liability for Warranty) (1) Where the subject matter of a sale is subject to a superficies, servitude, chonsegwon, right of retention, or pledge and the buyer was unaware thereof, the buyer may rescind the contract only if the objective of the contract is not unattainable thereby. In other cases the buyer may only claim damages.

4) The translation of the entire decision is *available at* http://eng.scourt.go.kr/eng/crtdcsns/NewDecisionsView.work?seq=910&currentPage=2&mode=6&searchWord=.

5) The Fact constitutes no part of the opinion of the Supreme Court.

operated by Defendant[6] for 333 times, played casino games, and lost a total sum of 23,100,000,000 won. On Jul. 19, 2006, Nonparty 1 (Plaintiff's son) sent to Defendant a letter requesting imposition of casino-entry restriction, detailing that "Plaintiff is suspected of gambling addiction, so ban Plaintiff from entering the casino," and the letter was received by Defendant. The next day, Nonparty 1 contacted Defendant's employee via telephone, said that he intends to withdraw the aforementioned request, and asked that the employee return the letter when it arrives. Defendant returned the letter to Nonparty 1, and allowed Plaintiff to enter the casino.

Plaintiff filed a lawsuit seeking damages payment from Defendant, alleging that ① Defendant permitted Plaintiff to enter the casino, against the entry restriction provision, and that ② Plaintiff committed the tort of being aware of yet condoning betting which exceeds the table limit.

【Main Issues】

[1] Whether the principle of "self-responsibility" is applicable in the legal relation surrounding casino use between a casino operator and a casino customer.

[2] Whether the casino operator's duty to protect or duty to exercise due care to the casino customer is acknowledged.

【Holdings】

[Majority Opinion] The "principle of self-responsibility"- in which the individual acts in accordance with his/her free choice and decision, and must bear the consequences without attributing or imputing it to another person - applies to legal relations of individuals. Thus in legal relations surrounding contracts, a party only bears the profit or losses caused by the contract it signed in accordance with the party's own free choice and decision. In principle, a party does not bear general duties of protecting or be considerate of the other party's interests, such as preventing one party

6) The casino operated by Defendant is the only casino in Korea where Korean citizens are permitted to enter. The casino was established to develop the declining economy of abandoned mine areas. 51% of the defendant's shares are owned by the central government and local governments. In essence this case deals with the issue whether the state which established and operates the casino, bears the duty to pay damages.

from causing the other party's losses. Even when considering the uniqueness of the casino business . . . the aforementioned principle of self-responsibility naturally applies to the legal relation surrounding casino use between the party who acquired approval to operate a casino business . . . and the casino customer.

[Dissenting Opinion] If the state attempts to achieve the policy objective of promoting the economy of abandoned mine areas not through legitimate execution of public finance, but by opening the casino business to its people, then uses the funds gained from the casino to achieve the objective, it is also necessary that the state prepare means to protect the people from the harm of the casino industry. In particular, many casino customers who show signs of pathological gambling are incapable of controlling their impulse with willpower, and excessively absorb themselves in casino gaming by increasing the bet amount or the number of rounds/time playing the games. Unlike normal individuals, they lack the ability to control and moderate casino gaming, and will be driven to financial and social ruin by using the casino, so there is no reason to reject their protection by merely alleging the principle of self-responsibility.

【Reasoning】

Our judicial order is based upon, among others, the principle of private autonomy and the principle of fault liability (hereinafter "fault principle"). The principle of private autonomy means that an individual may form legal relations in accordance with his/her own free will, while the fault principle means that an individual bears responsibility for acts which are attributed to him/her, and does not bear responsibility for the acts of other individuals.

Accordingly, the "principle of self-responsibility"- in which the individual acts in accordance with his/her free choice and decision, and must bear the consequences without attributing or imputing it to another person - applies to legal relations of individuals. Thus in legal relations surrounding contracts, a party only bears the profit or losses caused by the contract it signed in accordance with the party's own free choice and decision. In principle, a party does not bear general duties of protecting or be considerate of the other party's interests, such as preventing one party from causing the other party's losses. Even when considering the

uniqueness of the casino business . . . the aforementioned principle of self-responsibility naturally applies to the legal relation surrounding casino use between the party who acquired approval to operate a casino business . . . and the casino customer.

As long as the customer him/herself decided whether to visit and play games at the casino business run by the casino operator, and played casino games while being aware and taking the risk of losing money depending on the outcome of the games, it is only proper that the resulting consequences are attributed to the customer him/herself.

Although the casino operator is subject to comprehensive business restrictions for public welfare when operating the casino, the fact cannot serve as a basis for rashly acknowledging that the casino operator bears a duty to care for the benefit of the customer's interests, barring special circumstances. A casino operator is only responsible for operating the casino in accordance with related statutes, while following the gaming rules and providing necessary services for proceeding the games. Unless evident statutes related provide otherwise, it is difficult to view that the casino operator should place the interests of the customer — who is struggling to gain property profit by gambling against the operator through casino games — above the operator's own interests, nor that the casino operator bears the duty to protect its customers from suffering excessive property losses by gambling at the casino.

[T]he lower court determined that Defendant is obliged to pay damages to Plaintiff in accordance with Article 756 of the Civil Act,[7] as employer of its employees who committed tort.

This determination was erroneous for misapprehending the legal nature of provisions restricting casino operation or the legal principles on casino operators' duty of protection regarding casino customers, and compelling such misapprehension to affect the judgment. Defendant's allegation in the

---

7)Article 756 of the Civil Act is related to the common law theory of respondeat superior.

Article 756 of the Civil Act (Employer's Liability for Damages) (1)A person who employs another to carry out an undertaking shall be bound to make compensation for damages done to a third person by the employee in the course of the execution of the undertaking: Provided, That this shall not be the case, if the employer has exercised due care in the appointment of the employee, and the supervision of the undertaking, or if the damage would have resulted even if due care had been exercised.

ground of appeal which assigns this error is with merit.

Therefore, the judgment of the lower court is reversed while omitting determination on Plaintiff's grounds of appeal and Defendant's remaining grounds of appeal, the case is remanded to the court below for further proceedings consistent with this opinion.

The following is the dissenting opinion

If the state attempts to achieve the policy objective of promoting the economy of abandoned mine areas not through legitimate execution of public finance, but by opening the casino business to its people then use the funds gained from the casino to achieve the objective, it is also necessary that the state prepare means to protect the people from the harms of the casino industry. In particular, many casino customers who show signs of pathological gambling are incapable of controlling their impulse with willpower, and excessively absorb themselves in casino gaming by increasing the bet amount or the number of rounds/time playing the games. Unlike normal individuals, they lack the ability to control and moderate casino gaming, and will be driven to financial and social ruin by using the casino, so there is no reason to reject their protection by merely alleging the principle of self-responsibility.

The lower court was just in acknowledging that Defendant bears the obligation to pay damages based on the ground that Defendant's employees' act of violating the duty to ban Plaintiff and allowing Plaintiff to enter the casino is a violation of the duty to protect Plaintiff. Contrary to the allegation in the grounds of appeal, there were no errors by misapprehending the legal principles on the withdrawal of an expression of intent and the date when an expression of intent becomes effective, the legal nature and effectiveness of the "casino admission management rules," and the proximate legal relation concerning violation of the entry restriction provision. Therefore, it is just to dismiss this portion of Defendant's appeal.

【Comments】

This case reflects two different points of view on how to treat casino customers who have fallen into gambling addiction by using state-owned casinos. The majority opinion highlights that the state should follow "the principle of self-responsibility" which obliges individuals to act upon one's

free choice and decision. Thus, the state should refrain from intervening into the results and consequences followed by those choices. The dissenting opinion, on the other hand, argues that the state is justified in interfering with individual's formation of legal relations, and that the state's paternalistic attitude is especially called for in casino businesses when considering its devastating problems. It is also notable that the dissenting opinion maliciously condemns the problems ofgambling addiction by describing that "[F]or gambling addicts and their families, the casino is more dismal than the dead end of a mining tunnel."

3. Supreme Court Decision 2011Da22092 Decided April 10, 2014【Damages】<Tobacco Lawsuit Case>[8)]

【Main Issues】

Where A with a history of more than 30 pack-years and B with a history of more than 40 pack-years were diagnosed with non-small cell lung cancer and bronchioloalveolar carcinoma (both types of lung cancer), and sought damages against the state for manufacturing and selling cigarettes, whether causation between A and B's smoking habits and lung cancer can be established.

【Holdings】

Where A with a history of more than 30 pack-years and B with a history of more than 40 pack-years were diagnosed with non-small cell lung cancer and bronchioloalveolar carcinoma (both types of lung cancer), and sought damages against the state for manufacturing and selling cigarettes, the case affirmed the lower court's judgment that the causation between A and B's smoking habits and lung cancer cannot be acknowledged, based on the following grounds: in light of the fact that lung cancer is not a specific disease solely caused by smoking, but a non-specific disease which can be caused by the combination of external factors such as physical, biological, chemical characteristics and internal factors in the body; non-small cell lung

8) The translation of the entire decision is *available at* http://eng.scourt.go.kr/eng/crtdcsns/NewDecisionsView.work?seq=863&currentPage=5&mode=6&searchWord=

cancer also includes lung cancer which have no or extremely low correlation with smoking; bronchioloalveolar carcinoma is a type of adenocarcinoma which has substantially lower correlation with smoking compared to squamous cell cancer or small cell cancer compared to squamous cell cancer or small-cell cancer, and has a higher incidence rate among non-smokers as well, which indicates that pollution and other factors may be the causes rather than smoking; even if epidemiological causation between smoking and the non-specific diseases non-small cell cancer and bronchioloalveolar carcinoma is acknowledged, it is difficult to conclude that the mere fact that an individual's smoking habits and his/her development of the aforementioned non-specific diseases are proven is sufficient to acknowledge probability of causation between the two factors.

【Reasoning】

. . .

4. Regarding the ground of appeal on the causal relation between smoking and lung cancer occurrence

Epidemiology is the study of analyzing the incidence, distribution, extinction, and etc. of diseases as a group phenomenon and elements which influence the above factors, thereby investigating their relationship with environmental and social causes through statistical means for the purpose of discovering methods to prevent and reducing the risk of diseases. Epidemiology investigates and examines diseases as a group phenomenon, and its purpose does not lie in identifying the cause of a disease suffered by an individual of the group. Therefore, even if an epidemiological causation between a risk factor and a disease is acknowledged, it does not necessarily identify the cause of the disease carried by an individual of the group. What epidemiology can do in a case where the incidence rate of a certain group exposed to a certain risk factor is higher than that of another group which is not exposed to the risk factor is deducing the possibility that a risk factor caused the disorder in an individual in the group from the extent of the incidence rate, depending on the extent of the incidence rate.

Meanwhile, in contrast with "specific diseases" which have specific causes and clearly corresponding cause and effect, "non-specific diseases" have complicated and numerous causes and mechanisms and result from combinations of innate factors such as genes and bodily constitution, and

acquired factors such as drinking, smoking, age, eating habits, occupational or environmental factors, and etc. Even if an epidemiological correlation between a specific risk factor and the non-specific disease is acknowledged, the correlation simply means that exposure to the risk factor means the existence or increase of the risk of developing the disease and does not necessarily lead to the conclusion that the risk factor is the cause of the disease, as long as there is the possibility that the individual or group exposed to the risk factor is regularly exposed another risk factor.

Therefore, even if an epidemiological correlation between a specific risk factor and the non-specific disease is acknowledged, proving that an individual was exposed to the risk factor and also developed the non-specific disease is not sufficient proof for verifying the probability for acknowledging the causal relationship between the risk factor and the disease. In such cases, the incidence rate of the group exposed to the risk factor must be proven to be substantially higher than that of the non-exposed group by an epidemiological examination comparing the group exposed to the risk factor and the non-exposed group, then the probability that the risk factor caused the non-specific disease must be proven by the time and extent of the exposure, time of the incidence, health conditions before the exposure, everyday habits, progress of the disease, and family health history (see Supreme Court Decision 2006Da17539, Jul, 12, 2013)

According to the reasoning of the judgment below, the following facts are acknowledged: lung cancer is not a specific disease solely caused by smoking, but a non-specific disease which can be caused by the combination of external factors such as physical, biological, chemical characteristics and internal factors in the body; lung cancer is largely divided into small cell cancer and non-small cell cancer depending on the tissue type, and varies widely from cancer which has high correlation with smoking and those which lack any evidence related to smoking; non-small cell cancer does not refer to a certain type of cancer, but refers to all cancer that are not small cell cancer, and includes lung cancer which have no or extremely low correlation with smoking; in medical circles, it is generally understood that among small cell cancer and non-small cell cancer, lung cancer related to smoking are squamous cell cancer and adenocarcinoma, and while small cell cancer and squamous cell cancer have high correlation with smoking, adenocarcinoma has a substantially lower correlation with

smoking; reports indicate that bronchioloalveolar carcinoma is a type of adenocarcinoma caused by tuberculosis, pneumonia, and viruses, has substantially lower correlation with smoking compared to squamous cell cancer or small cell cancer, and has a higher incidence rate among non-smokers as well, which indicates that pollution and other factors may be the causes rather than smoking.

According to the above factual relations, even if epidemiological causation between smoking and the non-specific diseases non-small cell cancer and bronchioloalveolar carcinoma is acknowledged, it is difficult to conclude that the mere fact that an individual's smoking habits and his/her development of the aforementioned non-specific diseases are proven is sufficient to acknowledge probability of causation between the two factors.

【Comments】

The Supreme Court in this case has placed emphasis on the need to distinguish epidemiological causation from individual causation. The decision clarifies the point that even though the statistical correlation between smoking habits and lung cancer is acknowledged, this does not necessarily prove that the plaintiffs' diseases were caused by smoking.

***

***