Comparative Tort Law

Global Perspectives

Edited by

Mauro Bussani

Professor, University of Trieste, Italy and Adjunct Professor, University of Macao, S.A.R. of the P.R. of China

Anthony J. Sebok

Professor, Cardozo School of Law, Yeshiva University, New York, USA and Distinguished Research Professor, College of Law, Swansea University, UK

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16. Tort law in Japan

Emi Matsumoto

1. INTRODUCTION

The last chapter of the Book of Obligations (Chapter 5, Book 3) of the Japanese Civil Code of 1898, which is in force today, concerns the law of torts.[1] While the Code adopts the Pandectist plan and was greatly influenced by the drafts of the BGB (Bürgerliches Gesetzbuch, German civil code of 1900), the rules laid down in the 16 articles (709–724) of the chapter include a healthy dose of French law.[2] Also, the common law was not entirely excluded as a model (Article 716).[3]

The compilers of the Code explicitly stated that the courts adjust the law in this area to the changing society. The contribution of the courts to the development of the law has been particularly important in this branch of law.[4] It is noteworthy that not only the Supreme Court, but also the lower courts have been creative in their judgments, and that the judges sometimes 'deviate from the wording of statutory law rather than adhering to the literal interpretation of the statutes'.[5]

The Japanese law of torts originally comprised various elements imported from different countries. These elements comprised the texts of the Code, and were thus much elaborated upon by the courts. In this chapter, the marked characteristics of the law of torts are examined from two perspectives: the mixed nature of the law, on the one hand, and some unique developments which may constitute a certain originality of Japanese tort law in comparative aspects, on the other. These two features are both related to how the modernisation of law was carried out in Japan.[6] Before reviewing the law of torts itself, I shall explore the historical background of the modernisation of Japanese law on these two points.

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[1] The chapter is entitled '*Fu-ho Koi*'. '*Ho*', meaning law, combined with the negative '*fu*', can designate something contrary to law. '*Koi*' represents act. All combined, it can mean 'act against law'. It is notable, however, that another expression, '*I-ho*' is the term normally used to express illegality in legal texts.

[2] Yoshio Hirai, 'Japanese Tort Law in Comparative Perspective', *The Japanese Annual of International Law*, No. 33, 90–94 (1990).

[3] Naoyuki Isogawa, 'The Influence of English Law upon Japanese Civil Law', in E. Hoshino and A. Morishima (eds), *Modern Society and Tendencies in Civil Law*, Yuhikaku (1992), 1–56 (in Japanese).

[4] Hiroshi Oda, *Japanese Law*, 3rd ed., OUP (2009), 42–45.

[5] Oda, (2009) 7. See also Emi Matsumoto, 'Adjusting an "Imported" (or "Received") Law – an Approach from the "Precedent" in Japanese Law', in Ewoud Hondius (ed.), *Precedent and the Law*, Bruylant (2007), 323–335.

[6] For an overview of the modernisation of Japanese law starting in the latter half of the 19th century, see Shiro Ishii, 'The Development of Japanese Law in the Meiji Period', in Id., *Beyond Paradoxology. Searching for the Logic of Japanese History*, Jigakusha (2007), 184–202.

2. THE MIXED NATURE OF JAPANESE LAW

Japanese law started to change dramatically after the Meiji Restoration in 1868, as a result of the United States' demand to open up the country. Japan had refused communication with foreign countries for more than two hundred years. The Tokugawa Shogunate government failed to control the crisis triggered by this external pressure and, after a civil war, rendered its power to the Emperor. Westernisation of the law was an urgent necessity for the Japanese who, not colonised by the Western powers, wished to be recognised as an independent and equal country to the Western countries. The treaties concluded in 1858, which provided for conventional tariffs on goods and for the subjugation of foreign residents to the law of their own consular courts, could be amended only when Japan was equipped with a sufficient legal system from the Western point of view.

The mixed nature of Japanese law has occurred from early times. Before becoming interested in Western law, Japan had long developed its law under the influence of the Chinese system. In the first days of the Meiji Restoration, legal reform by way of adoption of Chinese-styled codes was attempted to achieve the requirement of modernisation. This approach was soon abandoned and the introduction of Western law *en bloc* appeared to be more suitable.

Japan adopted its first written Constitution in 1889. The Civil Code enacted in 1898 and the Commercial Code in 1899 formed the essential part of the codified legal system. To prepare various types of codes, the Japanese government invited jurists of various national origins. For example, Gustave E. Boissonade was invited from France to help codify criminal law, criminal instruction and civil law; Hermann Roesler was invited from Germany to prepare the Commercial Code as well as the Constitutional Law. Not only concerned with codification, they also contributed to practice through their advice and their writings. Many came to help develop legal education. Among them, we should not forget that the first Professor of Law at Tokyo University, which means the first Professor of Law in Japan, was William Grigsby from Britain.[7] During the period before the Codes were enacted, many students were educated by these foreign experts and the judges read their lectures and their commentaries on the drafts of Codes. Their judgments sometimes seem to be based on such readings. In addition, students were sent from Japan to study in different countries in Europe and the United States.

The first Civil Code and the first Commercial Code, both promulgated in 1890, met with severe criticism, saw their enforcement postponed, and were finally replaced by newly 'amended' Codes. This postponement campaign and debates on the Codes had many facets. It represented the contestation by the protectionists of the old Japanese values and tradition, but also the competition among different law schools, especially between English and French. The confrontation included legal debates for and against codification, as well as examination of the coherence of the two Codes.

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[7] M.A. (Classics) Glasgow, B.C.L. (Balliol) Oxford, Called to the Bar (Inner Temple) 1881. He was in Japan between 1874 and 1878 and died in Cyprus as a judge there in 1899. His major academic works include the first English edition of *Story's Equity Jurisprudence* and English translation of the Ottoman Empire's Civil Code, *Medjellè*.

The development of law after the codification was equally complex because the foreign doctrines, especially those of Germany, were referred to in order to interpret texts which did not always follow the German model.[8] The phenomenon is sometimes explained as the 'reception of doctrines', to underline the characteristic of Japanese reception of Western law, which was not limited to the 'reception of codes', and which allowed a binary structure of law, arising from the distance between the sources inspiring the text of the Code and prevailing legal doctrines.[9] These legal doctrines interacted with the judgments of cases, with the latter sometimes adopting the former and sometimes not. In addition, the process was even more complicated, because the borrowing of a concept or a theory was not always direct. A German theory was brought via French doctrine, an English notion came in via German scholarly work, and so on, not without some distortions.[10]

Such historical background gives Japanese law a certain mixed nature. The study of this nature, however, has not been sufficiently developed. Although Japanese scholars have always been interested in comparative research, many confined themselves to the comparison of Japanese law with only the one law chosen by their interest – mostly German, French, or Anglo-American law to which we owe much of our modernisation –, implicitly expecting the accumulation of such comparative studies would amount to show the general state of Japanese law. The anticipation was perhaps too optimistic, and keeping this style of comparative study did not encourage any serious search for the methodology to analyse the mixed law. It is regrettable that few scholars in Japan have been interested in analysing the nature of the mixture itself, since it is not sufficient merely to enumerate the ingredients of the mixture.

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[8] Eiichi Hoshino, 'L'influence du Code civil au Japon', in Université Panthéon-Assas (ed.), *1804–2004. Le Code civil. Un passé, un présent, un avenir*, Dalloz (2004), 871-895. The author, who examines the influence of French Code in Japan, distinguishes the period of almost exclusive influence of the French Civil Code (1867–1890), the period of almost exclusive influence of German doctrines (1890–1920), that of continuing German dominance with some French influence (1920–1966), and the period of great change bringing more interest in French studies (1967–present). In his own article written in 1967, he revealed, through examining different institutions in detail, that the influence of the French Civil Code was at least as important as – and perhaps more important than – that of the German Code to the Japanese Civil Code.

[9] Zentaro Kitagawa, 'Development of Comparative Law in East Asia', in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, OUP (2006), 237–260, distinguishes three eras of the development of Japanese private law, subsequent to the codification in 1898: the era of commentaries (immediately following the enactment of the Civil Code), the era of imported doctrine (until the end of the First World War) and the comparative law era (beginning after the end of the First World War, though 'it was really only after World War II' that Japan entered what the author calls the comparative law era). In the second era, 'Japanese private law was shaped along the lines of the German system. I have coined this process "the reception of German civil law theory". And, indeed, it was in this period that the framework of present Japanese private law was formed and the now familiar style of textbook analysis and explanation of the system and its basic concepts was developed' (241).

[10] Emi Matsumoto, 'Lost in Translation: The Reception of German Law in Japan', *Hosei Riron (Journal of Law and Political Science)*, Law and Political Science Association, Niigata University, vol.42, no.3–4, 110–128 (2010).

This chapter explains Japanese tort law as a mixed law. It demonstrates how this law has been developed from different models from Western countries, how its mixed nature was reflected in its evolution, and how the courts managed the results of this fusion.

3. ORIGINALITY – MODERNISATION THROUGH TRANSLATION

One of the most notable characteristics of the modernisation of Japanese law is that it was done through the complete translation of everything needed from the Western system into the Japanese language. Western legal notions were all put into Japanese to construct a Western-styled legal system with its different institutions. All legal terms found a corresponding Japanese term, often newly invented through making a new combination of existing Chinese characters, which Japanese people had used for over a thousand years in their writing. Indeed, the success of overall translation owed much to the nature of ideograms – each character representing an idea can express a complex notion by being combined with another to form a word.[11]

Using the native language exclusively from the very early stage of modern Japanese law certainly greatly helped make the legal system work. The national legal system could be carried out totally in the national language, in legislation, in court practice, in administration, as well as in education. Translation was continued after the essential institutions had been established, to receive knowledge and theories from abroad to adapt the system to various needs. Translation has been the main means to transport Western ideas and Western laws.

We should not overlook, however, another function of translation. The 'translation work involves removing barriers – in other words, making those barriers transparent – that distance Japanese law from foreigners. However, this translation is simultaneously something which up to now has impeded the creation of transparency.'[12] Once translated, all Japanese legal arguments and legal activities are carried out exclusively in Japanese. There is scarce hope to have as intensive and voluminous translation of Japanese legal literature into other languages, as has been done in the opposite direction.

In this sense, the translation itself works as a barrier. It blocks direct intervention by foreign jurists to legal development inside Japan. When an important difference of languages comes into play, what is taking place in Japan not only refuses intervention from outside but even becomes almost invisible and inaccessible from outside. The mother law countries cannot tell what has become of their law received by Japan some

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[11] Modern translation can be said to be the result of a double reception by Japan, of Chinese culture for two thousand years and of the Western cultures which started before the 19th century. It is notable that Dutch people were permitted under Tokugawa Shogunate to come to trade in a small island in the south-west of Japan, and Dutch studies developed among Japanese intellectuals who used translated terms for European sciences, following Chinese intellectuals' examples.

[12] Yasunori Kasai, 'General Comments on the Symposium', Symposium 'Is Japanese Law a Strange Law?' *Journal of Japanese Law*, no.28, 230–235 (2009) (originally published in Japanese in *NBL*, No.900 (March 2009) 100–103).

time ago, because its examination is impossible without understanding most technically developed arguments in Japanese. The translation thus defies communication with outside, or 'censorship' from abroad.[13]

This legal environment created through translation also serves as an environment in which unique theories and practices grow. Japanese tort law is not an exception, giving birth to some unique theories and interpretations.

On the unique legal construction in Japanese law, it is necessary and worthwhile to search for its origins, the study of which is beyond the scope of this chapter. It should be noted that the 'uniqueness of Japanese law' has been much discussed from the point of view of 'legal consciousness' or 'legal mentality' of the Japanese. The common approach taken in this regard, examining the myth of 'the reluctant litigant', shows much interest in procedure (asking whether people go to the courts or not, whether they decide to litigate or resort to ADR (Alternative Dispute Resolution) such as conciliation, etc.). This chapter will stress the importance of a more substantive approach. As for possible future study on the substantive origins of the uniqueness, if any, of Japanese law, I just mention here promising sources which became accessible only recently and may aid in the understanding of Japanese legal history before the codification (Civil Court Rulings files (*Minji-Hanketsu-Genpon*)).[14]

4. MANAGING THE MIXED LAW – NOTIONS IN PARALLEL: 'INFRINGEMENT OF A RIGHT', 'UNLAWFULNESS' AND 'FAULT'

In this and the following sections (4 to 8), I shall discuss the general rule of Japanese tort law. The way it has been developed will show how the laws of different origins have been mixed and how Japanese lawyers have treated this mixed law. The general rule of liability for torts is given in Article 709 of the Japanese Civil Code. Article 709, Civil Code of 1898 (the original provision) says:[15] 'A person who has intentionally or negligently infringed any right of others shall be liable to compensate any damages resulting in consequence.'

The basis of this article was an article drafted by G.E. Boissonade for a preceding Civil Code, promulgated in 1890 but never put into force due to the Diet's decision to

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[13] Kasai (2009) 232.

[14] In 1992, the Supreme Court of Japan announced that all civil judgment files which had been kept longer than 50 years since the judgment was given should be destroyed. Soon after this announcement, lawyers, both academic and practising, both of legal history and positive law disciplines such as civil law and civil procedure, decided to make an appeal to the Supreme Court and, in the end, it was decided that all the files should be kept in the National Archives, which is now in the process of compiling a database. The documents hitherto hardly accessible are now open for research into law and legal practice in the early Meiji period, when Japan underwent modernisation. See db.nichibun.ac.jp/en/category/minji.html.

[15] See French translation given by two of the government committee members: 'Quiconque a, volontairement ou par faute, porté atteinte au droit d'autrui est tenu de réparer le dommage qui en résulte' (*Code civil de l'Empire du Japon* (1900)). The title of the chapter including the articles from 709 to 724 is translated as 'Des Actes Illicites'.

postpone its enforcement after intense debate inside and outside the Parliament. Article 370, Book II (Property in general) of Old Civil Code of 1890 says: 'Any person who by his fault or negligence causes injury to another is bound to repair it'.[16]

An important change from the provision of 1890 to that of 1898 was the requirement of the 'infringement of a right' of others to constitute a tort. The compilers of the 'revised' Civil Code thought necessary to add this requirement to limit tort liability to a proper extent. They justified this limitation, during government committee discussions, referring to the following examples. A student who had been taken care of benevolently, without any obligation, by a person, who came to be injured by a third person, cannot claim against the third person for his loss of support. While the old provision of 1890 may seem to allow this claim, Article 709 is clear enough in rejecting it because the student does not have a right to demand the support. Likewise, a merchant who lost his client due to another person's activity cannot claim for his loss, because he does not enjoy any 'right' to the client. Without this requirement of 'infringement of a right', a normal economic activity may risk bearing tort liability, which may discourage the sound development of society as a whole. The third example is the case where a person whose land had been protected by an artificial bank constructed by his neighbour subsequently claims damage to his flooded land due to the destruction of this bank by the negligent neighbour. Having no right to demand the construction of the bank, such claim should be rejected as failing to meet the requirement for 'infringement of a right'.

The rights to be protected were conceived as wide-ranging. They include, according to the compilers of the Code, not only rights regarding property, but also the right to life, the right to integrity of body, the right to freedom, the right to one's honour and other personal interests. The status of obligor is also considered as a right to be protected by way of civil liability. The provisions on torts do not create new rights, but protect already existing and acknowledged rights, the chief drafter added.

In this light, the compliers explained that Article 709, the general rule for torts, consists of three essential elements: (1) one's intention or negligence in wrongdoing; (2) infringement of the right of another person; and (3) the damages incurred by the latter.[17]

Two judgments of the Supreme Tribunal[18] were important in the development of the law on the 'infringement of a right'. At first, the courts followed the idea of the compilers of the Code in its application. Later, the limitation set through the interpretation of this notion was criticised as too strict. This led to the introduction of the notion of 'unlawfulness' to replace the notion of 'infringement of a right'.

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[16] *Draft Civil Code* (2003). The provision, originally written in French by Boissonade, is as follows: 'Celui qui cause à autrui un dommage, par sa faute ou sa négligence, est tenu de le réparer.' Alinéa 2 follows: 'Si le fait dommageable est volontaire, il constitue un délit civil; s'il est involontaire, il n'est qu'un quasi-délit.'

[17] In this enumeration, the compilers of the Code did not mention causality. Many scholars wondered if they had in mind only the case in which it was obvious who or what caused the damages.

[18] Taishin-in (or Daishin-in), the Supreme Tribunal, was established in 1876 to be replaced in 1947 by Saiko-Saibansho, the Supreme Court of today.

In 1914, the Supreme Tribunal rejected a claim of damage due to non-authorised copies made and sold of traditional story-telling. The court held that the author of the original record could not enjoy the protection of copyright law, because the story-telling, which did not have a fixed melody, did not constitute a right of author to be protected by the law.[19] This 'Kumoemon' case, named after the story-teller's stage name, was severely criticised as conceiving a 'right' too restrictively.

Ten years later, the Supreme Tribunal changed its position. It admitted the possibility of a tort damaging the entity of an old established enterprise (trademark and commerce established and exercised in a specific place), although the lower court had rejected the claim, holding that this kind of interest did not constitute a right. The Supreme Tribunal justified the application of Article 709, without mentioning any 'infringement of a right', but referring to 'one of the interests, against the violation of which an ordinary man should consider as necessary, according to his legal notion, a remedy predicated on tort'.[20]

5. INTRODUCTION OF THE NOTION OF 'UNLAWFULNESS'

The judgment of 1925 was welcomed by many academics and interpreted as a judgment sanctioning the notion of the 'unlawfulness' of an act in place of 'infringement of a right' as a prerequisite of a tort. Referring to the German notion of 'Rechtswidrigkeit', it was argued that the purpose of tort law was to protect victims against unlawful acts or omissions, and that the term 'infringement of a right' provided in Article 709 was to mean such 'unlawfulness'. The judgment of the Supreme Tribunal in 1925, not requiring the infringement of a right itself, recognised tort liability in violating a legally protected interest. The violation was not always of explicit statutes or regulations, but of *bon moeurs*, which was the case here. The 'infringement of a right' in Article 709 should not be read to limit protection only in the case literally of such infringement, but to protect equally the victims of the 'unlawful' conduct of another, even if it does not infringe any right.

The determination of 'unlawfulness' should be accomplished by considering concurrently the type and the nature of the infringed interest on one hand, and the manner of infringement on the other, as developed by the dominant theory.

The notion of 'unlawfulness' was well accepted by the courts as well as by academics. The following way of explaining and teaching the basic requirements which constitute torts in Japanese law was established. According to this view, there are four elements in a tort claim. First, the wrongdoer should be at fault; that is, he acted either with intent or negligently. Secondly, the act has to be unlawful. Thirdly, a causal link

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[19] Supreme Tribunal, 4 July 1914, *Supreme Tribunal Criminal Reporter (Keiroku)*, vol.20, 1360.

[20] Supreme Tribunal, 28 November 1925, *Supreme Tribunal Civil Reporter (Minroku)*, vol.4, 670.

should exist between the tortious act and the loss. Finally, loss should have been incurred.[21]

The legislature also showed itself favourable to the notion of 'unlawfulness'. When sovereign, or state, liability for torts was permitted for the first time as a fruit of legal reform after the Second World War, the first article gave its definition using the notion of 'unlawfulness':

> Article 1 (Paragraph 1), the State Redress Act, 1947:
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> When a public officer who exercises the public authority of the State or a public entity has, in the course of his/her duties, unlawfully inflicted damage on another person intentionally or negligently, the State or public entity shall assume the responsibility to compensate therefor.[22]

6. BACKGROUND FOR INTRODUCING THE NOTION OF 'UNLAWFULNESS'

The reason the notion of 'unlawfulness' was introduced is normally attributed to the strong influence of German doctrines in the period following the codification of 1898. The academic attitude, definitely Germanophile, went so far as to constitute a phenomenon which is often called the 'reception of doctrines'.[23] When many began considering the limitation of civil liability as too narrow in the case of 'infringement of a right', the notion of 'unlawfulness' could be helpful in expanding protection against torts.

Why the requirement of the 'infringement of a right' should have been replaced by that of the 'unlawfulness' seems to need, however, more explanation than that of 'German influence'. For, as some later opinions state, the extension of protection could have also been achieved through interpreting the 'right' in a wider sense, and not resorting to another notion. Here, we have to take into consideration the court system, that is, the mechanism of adjudicating civil liability cases of the period.

Until the post-war reform of the criminal procedure, civil liability could be pursued in *partie civile* accompanying a criminal suit. The victim could file his/her claim of damages in the same court where the public prosecutor charges the wrong-doer as a criminal. The system was first introduced in 1880 by the Code of Criminal Instruction drafted by G.E. Boissonade, following the French system, and maintained in later codifications, though in the German fashion, in the Code of Criminal Procedure of 1890 and the Code of Criminal Procedure of 1922.

The 'Kumoemon' case was the *partie civile* of a criminal case on infringement of the author's right under the Code of 1890. It is notable that such way of claiming damages was quite popular in those days because it was advantageous for the victim of the civil

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[21] Oda (2009) presents the traditional view as such (181). His presentation of Japanese tort law is one example of the standard version (180–200).

[22] Paragraph 1, Article 1 of the State Redress Act, Act No. 125 of 27 October 1947. See Katsuya Uga, 'The State Reparation Law', in E. Hondius (ed.), *Modern Trends in Tort Law. Dutch and Japanese Law Compared*, Kluwer Law International (1999), 195–201.

[23] Kitagawa (2006) 240-241.

(and criminal) wrong from the procedural point of view. The plaintiff in the civil part could benefit from the investigation by the public prosecutor or the *juge d'instruction* in criminal procedure, the former authorised to use all the evidence collected and examined by the latter.

At the same time, it is important to point out that the judgment in the criminal procedure tended to bind the judgment in the civil procedure. Theoretically, it was not impossible that the criminal judgment should not recognise the crime of violating Kumoemon's right of authorship, while the civil judgment adjudicate the damages for doing wrongs towards the same person. But, if both the criminal and the civil procedure put in question the infringement of the author's right, it would have been difficult to give different judgments by the same judge on the same question with the same evidence. When it comes to the question of what is meant by the 'right' of the author, the criminal interpretation should be strict according to the maxim *nullum crimen nulla poena sine lege*. The civil interpretation, given in the same court, can hardly separate itself from this rigidity, while in a separate procedure a more relaxed interpretation could be given. The argument based on the notion of 'right' comes easily under the spell of criminal rigidity, to prevent the expansion of the notion through a more flexible interpretation, needed in the civil sphere. The popularity of the procedure of *partie civile* contributed in this direction, and might work towards suggesting another way of deviating from the logic of 'right'.[24]

The *partie civile* also made it difficult to claim damages based on another right rather than the author's right, which was in question under criminal procedure. In Kumoemon's case, it was conceivable to claim civil liability for infringing the right of business instead of the right of authorship. When it comes to pursuing the *partie civile*, however, the law limits it to the damage 'caused by the crime'; hence by the criminal violation of the author's right. It is questionable if the infringement of the right of business could be sued as the damage caused by the crime against the author's right. If it were true that the court practice had some flexibility, there was certainly a limit. In Kumoemon's case, in fact, the civil plaintiff never tried arguing the right of business.[25]

7. CRITICISM AND RESTRUCTURING OF THE NOTIONS OF PREREQUISITES

A radical criticism of the notion of 'unlawfulness' appeared after some 40 years of its dominance.[26] It was argued that the usage of this notion was based on the false assumption that German law and Japanese law have essential points in common. Japanese Article 709 resembles German Article 823 (1) in appearance, but it definitely differs in constituting a single general rule for torts from the German system of establishing three general rules. In this respect, Article 709 should be considered as an adaptation of Article 1382 of the French Civil Code. The 'infringement of a right' in

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[24] Yoshihisa Nomi, 'Kumoemon Case and Tort Doctrines of Meiji-Taisho Era', *Gakushuin Review of Law and Politics*, vol.44, no.2, 183, 219 (2009) (in Japanese).

[25] Nomi (2009) 220, and also 214–217.

[26] Yoshio Hirai, *A Theory of Civil Liability*, Tokyo University Press (1971) (in Japanese).

Article 709 is interpreted in so wide a sense that it includes the infringement of the obligor's status, whereas the German 'infringement of a right' is restricted to absolute rights. Accordingly, the role played by the notion 'unlawfulness' has been different in the two countries. While German 'unlawfulness' worked to make clearer who should deserve legal sanction, the Japanese approach worked to expand the coverage of 'infringement of a right'. Now that this expansion is sufficiently achieved, as recognised by the courts as well as by academics, the mission is over in Japan regarding the notion of 'unlawfulness', the criticism concludes.

The critical theory goes on to restructure the basic notions of the tort law. Now the notion of 'unlawfulness', being unnecessary, should retreat from the scene, to yield to the differently constructed notion of fault (called *kashitsu* in Japanese law. *Kashitsu* is sometimes translated as 'negligence'). The classical understanding of 'intention or negligence' as a subjective element and 'unlawfulness' as an objective element corresponds to the German distinction between 'Verschulden' and 'Rechtswidrigkeit'. The 'negligence', however, should be 'objectified' and this is how we can better understand the court decisions:

> [I]nterests demanding legal protection through tort law are increasing more and more (right of privacy, for instance), judges have broadened the requirement of 'others' right' with the result that 'rights' do not mean concrete stipulated rights, but merely interests appropriate to be protected by tort law. Accordingly, this requirement has lost its function to restrict the universe which gives rise to tortious liability, and this function has been performed instead by the element of fault (especially negligence).[27]

According to this view, the concept of negligence is analogous to *faute* in French law. Negligence consists of two kinds of duty: the duty to avoid the consequences which will be caused by tortious conduct, and the duty to foresee these consequences; the latter required as the precondition of the former. The question of whether these duties are acknowledged and, if so, to what extent, is judged by reference to the conduct of the ordinary, prudent man in the circumstances in question. The courts established various rules in this regard.[28]

This theory had great impact, evidence of which is shown in the recent amendment of Article 709. The legislature, which adopted the concept of 'unlawfulness' in 1947, refrained from rewriting the article with the same requirement in 2004, but added the 'legally protected interest of others' to the 'infringement of a right'.

> **Article 709, Civil Code (the current provision amended in 2004):**
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> 'A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence'.[29]

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[27] Hirai (1990) 92. Cf. Yoshio Hirai, *Special Part of the Law of Obligation II, Tort*, Kobundo, (1992) (in Japanese). According to Hirai, 'Thus negligence [came] to be objectified. It is no longer a subjective element and therefore the distinction of unlawfulness and fault has become meaningless.' Hirai (1990) 92.

[28] Hirai (1990) 92.

[29] I principally follow the translation by the Ministry of Justice, unless mentioned otherwise.

In this critical theory, the constitution of a tort is analysed differently from the classical construction. The 'infringement of a right' itself is not a prerequisite to constitute a tort. The elements constituting Article 709 are (1) intent or negligence, (2) damage and (3) a causal relation between the intentional or negligent act and damage.[30]

8. NOTIONS IN PARALLEL, NOT IN SERIES

Despite the view discussed in section 7, which found much support from academics, the courts continue to resort to the notion of 'unlawfulness' alongside the notion of 'infringement of a right', 'legally protected interest' and 'fault'. The judgments are often criticised in that the different elements they use are not clearly and sufficiently distinguished, and these elements overlap one another because judges keep using elements which should have been discarded.

It is observed, however, that these different notions are applied by the courts to different types of infringement.[31] This view suggests a totally different interpretation of the case law. The notion of fault is particularly used in judging cases of direct infringement of a material interest such as the human body. The usage of the notion of 'unlawfulness' and expanded protection through the notion of 'legally protected interest' are confirmed in cases of indirect infringement, which are accomplished through the victim's own act or some legal procedure. Infringement of a non-material interest particularly calls for the notion of the 'infringement of a right'.

It is important to note that when deciding these cases, the judges refer to and examine only the element which is crucial to decide the case and keep silent as regards the other elements. This style, in which the judges do not articulate all parts of subsumption in their judgments, is common to Japanese judges. It contributed indeed to mask how the judges relate the different elements in the tort law.[32] It has long been assumed by the majority of lawyers that 'fault' and 'unlawfulness' (or the 'infringement of a right') are both requirements to be met simultaneously. Not mentioning one of them in the judgment has been understood to mean that the judge thinks the requirement is too obviously met to be mentioned. A recent astute observation, by Professor Segawa, seems to suggest, on the contrary, that the judges have been carefully choosing each element which, they think, leads to the preferred conclusion in each case.

To establish a tort, either fault or infringement of a right, or unlawfulness should exist. The three elements are almost interchangeable – that was why the 'objectified' fault theory urged that the elements 'unlawfulness' and 'infringement of a right' should be discarded. But the courts recognise the difference in elements as useful to serve in different types of torts.

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[30] Hirai (1992) 23.

[31] Nobuhisa Segawa (1998), 'Article 709 of the Civil Code (The General Constitutive Requirements for the Torts)', in Toshio Hironaka and Eiichi Hoshino (eds), *Hundred Years of the Civil Code*, vol.III, Yuhikaku (1998), 559, 568–569 (in Japanese).

[32] Segawa (1998) 628 n.83.

A theoretical analysis follows this observation of the case law, which is worth citing *in extenso*:[33]

> Whether a tort be constituted is a complex consideration of different elements, including a) the need for protection of the interest in question, b) the avoidability of the infringement, c) eventual justification of the infringement, d) the possibility of recognition of this justification, etc. The 'right' (protected legal interest), the 'fault', and the 'unlawfulness' are all frameworks for taking these elements in consideration.

The author goes on to stress that the boundaries between these frameworks are however unclear and unfixed. As the author puts it,

> it would not be impossible to determine whether a tort be constituted just resorting to only one of these notions. If we conceive of the 'right' (or 'protected interest') as a status not to be violated by an unlawful act with fault, we would be able to judge referring only to the 'infringement of the right'. If we see 'fault' as an unlawful infringement of the right of others, we would be able to decide only according to the criterion of fault. If we understand 'unlawfulness' as the infringement of the right of others by fault, all could be determined judging from the 'unlawfulness' only.

Yet, as the author notes, courts tend not to interpret the notions both of 'right' and 'fault' in such an extensive manner:

> The 'right' or the 'legally protected interest' remains within the sphere of the interest of the victim. It does not take into consideration the foreseeability by the wrongdoer. The 'legally protected interest' is also playing a limitative function (for example, the claim from the child against his/her father's lover is denied, because the interest the child holds towards his/her father should be concrete; the tranquillity of religious life is not legally protected). On the other hand, when judging the 'fault', one asks whether the wrongdoer could have avoided the injury, whether he should have done so, and does not put in question whether one should legally protect the violated interest. (…) In contrast, the 'unlawfulness' widely includes a negative evaluation of an act and its result: it does not only take into account the avoidability of infringement but also the negative evaluation as a whole against wrongdoing.

Japanese courts use the notion of 'unlawfulness' as the most flexible criterion to cover those cases which are not suitable to judge by means of the notions of 'fault', 'infringement of a right' or 'legally protected interest'. In the court decisions, the notions of 'infringement of a right', 'unlawfulness' and 'fault' do not work in a cumulative manner to constitute a tort, that is, all of them need not be fulfilled in a case simultaneously, so that one of them should be sufficient to establish a tort claim.

Notice here that the courts show a very different attitude towards the mixed nature of Japanese law from the doctrines both classical and critical. Even though the 'objectified' fault theory is opposed to and tries to rewrite dramatically the classical theory with regards to the requirement for a tort action, it shares the same approach to conceive a single track of judging the tort action.[34] The attitude towards the notion of

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[33] The following excerpts are from Segawa (1998) 625–626.

[34] This critical theory was indeed born in the context of the mixed law. It starts with distinguishing elements of law according to their different origins and examines the original

'unlawfulness' is remarkable: the new theory of the objectified fault concludes that the grafted element was helpful for a certain purpose (expanding protection through civil liability) and a limited period of time, but, for the sake of the consistency of the system, it is preferable that the heterogeneous element should be expelled once its mission is over. The inconsistency was criticised in two ways: the notion of 'unlawfulness' was inconsistent with the Japanese original system of tort set by the Code, on the one hand, and the Japanese interpretation of 'unlawfulness' was inconsistent with the German original conception within the German system, on the other. To keep the rule consistent (for the Code itself comprises a single general rule for the tort law), it was suggested that the 'unnecessary', mixed (and heterogeneous) elements be eliminated. The courts, on the contrary, use plural tracks to decide tort claims – in spite of the single provision of the general rule in the Code. Yet in contrast to the German system of tort, it may be coming close to the common law approach to torts in setting different criteria for judging different types of torts.

If one compares this difference in legal construction to an electrical circuit, the Code and prevailing theories resemble a series circuit, where all the requirements must be met to turn the light on (i.e. to establish a tort), whereas the courts construct a parallel circuit, where meeting one of the requirements is enough to have the same effect. Putting the imported notions of different origin in parallel, this is indeed the peculiar way devised by the Japanese courts to manage the mixed law of tort.

9. AN INVENTION: SUCCESSION OF THE CLAIM OF THE DEAD

I have already noted that the 'infringement of a right' was an important requirement added by the compilers of the Code of 1898. Because they made it a necessary requirement for the establishment of a tort, an argument arose during the preparation of the Code regarding the right to life. The right to life was first recognised, but then excluded, after the discussions of the preparatory committee of the Code, from the enumeration of infringed interests which cause damages to be compensated. The question of compensation for a lost life was then long argued, and ended up generating a peculiar construction from the comparative legal point of view, and creating a prevailing standardised calculation method of damages, especially developed through traffic accidents and pollution cases.[35]

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system containing this element in the mother law to compare with the Japanese system. It evaluates the meaning and the role of the element in question in respective systems. It proceeds to point out the inconsistency of using the said element in the different system of Japan, though it does not always negate totally such use of the element (the temporary role – the mission – of the notion of 'unlawfulness' was well recognised). Accordingly, it suggests abandoning this element to avoid incoherence. This is one form of recognition of the disparate nature of Japanese law and an attitude towards the mixed law.

[35] The observations in this section owe much to Ryoichi Yoshimura, 'Articles 710 and 711 of the Civil Code (Compensation for the Non-pecuniary Damages)', in Toshio Hironaka and Eiichi Hoshino (eds), *Hundred Years of the Civil Code*, vol.III, Yuhikaku (1998), 631–672 (in Japanese).

Articles 710 and 711 provide for consolation money. They make clear to what extent, in what kind and to whom, compensation should be legally required. It is important to note that these articles were introduced by the authors of the Code who thought it indispensable in relation to the provision on the infringement of the 'right of others' in Article 709.

One of the reasons for providing Article 710 was, the chief author of torts explained, to clarify the extent of the 'infringement of a right' requirement in the general rule which would otherwise be unclear. Thus, the original draft (Article 731, paragraph 1) provided: 'The court can award compensation for injuries other than those to property, regardless of whether the life, body, liberty or reputation of others has been harmed, or property of others has been violated.'

In the government committee examining the general rule,[36] in fact, especially on the 'infringement of a right', an argument was raised that no one dead could claim in court the infringement of his own life, and others could not enjoy the 'right to life' of this person, even if they could claim their own injury because of his death. Though the argument on this point was not furthered in the discussion on the following article, the authors eliminated the term 'life' from the enumeration in the final draft of this article to be presented to Parliament.[37] Instead, they created a new provision on compensation for the infringement of a life, which was inserted as Article 711.[38]

The intention of the authors of the Code was clear in that damage should be claimed, in principle, by the one whose own right was infringed; that in the case of a death, the close family members of the dead person can claim only the infringement of their own rights; that these rights include the right to have support for their everyday life, but hardly cover their mental consolation; thus, Article 711 comes in to provide an exceptional rule for immediate members to claim consolation for the non-pecuniary damage caused by the loss of a life. This attitude became that of the legislature, as well as of the early court judgments.

The courts in early times confirmed the basic idea of the drafters of the Code and decided in a general manner on the damage, judging on three elements: actually incurred losses (positive loss), lost benefits (negative loss) and consolation. Each element was evaluated separately, calculated and finally added together. The resulting sum became the amount of the 'damage' to be compensated. This way of calculation of damages has taken root in practice.

Another rule made clear by the judges in the early period, following the idea of the original authors of the law, was that the compensation of a lost life should be claimed by the family members of the victim based on their own rights, and not by way of the right of the deceased.

The courts, however, started to construct a very different way of determining compensation for a death case, which would later form an original system, from a

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[36] Article 719 of the original draft, which became present Article 709.
[37] Article 720 of the original draft, which will finally be Article 710 of the Code.
[38] Article 732 in the amended draft.

comparative legal aspect, for compensation in torts.[39] The basic idea of the system lies in the notion that the victim has his own right to claim all the loss, and his claim, now taking the form of a pecuniary right, is to be succeeded by his heirs. The very beginning of this legal construction is found in cases from the 1910s. The anticipated income during the lifetime of the victim was calculated according to the statistically expected lifetime on average, and the claim for this sum was passed on to the heirs on his death. This kind of compensation was first accorded to the victim of an injury resulting in death, then to those who suffered instantaneous death.[40] The consolation money to be claimed by the victim himself was also to be inherited by the heirs. It was first granted only in cases where the victim had expressed his intention to claim such consolation,[41] but the courts finally came to accord the same to a person who died without expressing himself.[42]

The courts distanced themselves from the original intention of the legislator on other points as well. They came to grant consolation money to family members other than the parents, the children or the spouse of the victim to whom Article 711 limited the claim of consolation. A partner who lived as if she had been the wife of the victim[43] or a sister who took care of the victim in place of his parents[44] could be compensated for their non-pecuniary damages. Finally, it was formulated by the Supreme Court that 'one who has a relation with victim substantially equal to those enumerated in Article 711 and who suffered seriously mental damages from the death of the victim' should be allowed to claim consolation money for such damage.[45]

Another deviation of the courts from the legislator's intention consists in the granting of consolation money to close family members in cases other than the death of the victim. When a young man, 18 years of age, had his arms cut off in the factory where he worked, the court granted consolation money to his father.[46] A mother could receive consolation money for her daughter's injury because the degradation of the victim's

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[39] Hideki Kojima, 'Calculation of Damages and "Lost Profits" under Japanese Law – A Comparison with German and United States Law', *Journal of Japanese Law*, No.31, 61–116 (2011).

[40] The Supreme Tribunal showed hesitation with an affirmative judgment for the succession construction (16 February 1926, *Supreme Tribunal Civil Reporter (Minroku)*, vol.5, 150) and a negative judgment (10 March 1928, *Supreme Tribunal Civil Reporter (Minroku)*, vol.7, 152), but the former prevailed to form precedents (27 December 1941, *Supreme Tribunal Civil Reporter (Minroku)*, vol.20, 1479, etc.).

[41] 3 October 1910, *Supreme Tribunal Civil Reporter (Minroku)*, vol.16, 621.

[42] Supreme Court, 1 November 1967, *Supreme Court Civil Reporter (Minshu)*, vol.21, no.9, 2249.

[43] Tokyo District Court, 25 April 1961, *Lower Courts Civil Reporter (Kaminshu)*, vol.12, no.4, 866.

[44] Tokyo District Court, 19 January 1972, *Hanrei Jiho*, No.6664, 57.

[45] Supreme Court, 17 December 1974, *Supreme Court Civil Reporter (Minshu)*, vol.28, no.10, 2040.

[46] Fukuoka High Court, 9 April 1952, *Lower Courts Civil Reporter (Kaminshu)*, vol.3, no.4, p. 482.

appearance 'caused her an enormous suffering which should be comparable to that in the case of the child's death'.[47]

This attitude of the courts, expanding the extent of the claim for consolation even against the original idea of the Civil Code, is not contrary to the prevalence of the notion of 'unlawfulness' as we have seen above. Once 'unlawfulness' took the place of 'infringement of a right' as a constituent element of the civil wrong, and the latter notion lost its controlling role of limiting the extent of the consolation claim, the question was re-formulated to ask if there is an adequate causation between the non-pecuniary damage of the family member and the act of wrong-doer.

The reason why the courts shifted their views towards the idea of the 'succession of the victim's right' including his consolation claim may be explained by the merits of this method of compensation. It is relatively easy to calculate the amount of money to be paid in compensation; it is also easy to prove this amount; it tends to accord a sum relatively generous to the claimant; and it is easy to determine who has a right to claim. In this manner of compensation, the family members left after the death of the victim can normally obtain compensation greater in amount than claiming their own right. It is thought that there is some 'judicial policy' taking into consideration such merits.[48]

The fiction of the succession of claim for compensation necessarily raises the question of the calculation of anticipated earnings during the lifetime of the victim, to be repaid as his negative loss.[49] Most debatable is how to calculate young children's expected gains in the future, as well as how to evaluate housewives' potential earnings. As early as 1932, the Supreme Tribunal judged that the anticipated earnings of a three-year-old boy, as well as of a housewife, should be calculated according to the average salary of someone of the same sex for an average workable period.[50] Many district courts, before and after the Second World War, applied the same rule, elaborating which statistical data and standard should be adopted.[51] Nonetheless, there were conflicting judgments holding that a housewife's contribution could not be calculated as positive income, and that a young girl's anticipated income should be computed for the workable period until her marriage, for the average woman stopped receiving a salary at that time.[52] For a nine-year-old boy, when the anticipated net income of a certain amount per year for 30 years was claimed, it was rejected by the

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[47] Supreme Court, 5 August 1958, *Supreme Court Civil Reporter (Minshu)*, vol.12, no.12, 1901.

[48] Judge Yoshioka expressed this view in the annual conference of the Association of Private Law, 1966.

[49] Of course, the question is not limited to the case where the victim is dead, but is raised also when the injury could cause decrease in income.

[50] Supreme Court, 23 December 1932, *Horitsu Shinbun*, no.3517, 14.

[51] Hakodate District Court, 16 December 1932, *Horitsu Shinbun*, no.3519, 8; Miyazaki District Court, 25 June 1957, *Lower Courts Civil Reporter (Kaminshu)*, vol.8, no.6, 1154; Sapporo District Court, 16 May 1961, *Lower Courts Civil Reporter (Kaminshu)*, vol.12, no.5, 1132.

[52] Tokyo High Court, 22 April 1936; Hiroshima District Court (Kure Division), 8 July 1940, *Horitsu Shinbun*, no.3999, 12.

court, which thought there was no proof that this amount could have been gained for certain.[53]

Traffic accident cases, sharply increasing since the 1960s, helped settle this point and refine a special system of compensation. The basic idea underlying this method of compensation was then put through a severe re-examination with the significant pollution cases from the 1970s onwards.

10. TRAFFIC ACCIDENT CASES

The increase in traffic accidents brought in new systems in the law of torts.[54] Special legislation imposed liability for the owner or possessor of an automobile ('a person operating an automobile for his/her benefit') regardless of his fault,[55] and introduced a compulsory insurance system to accompany this strict liability to compensate for death or bodily harm caused in car accidents.[56] It is notable that the remaining questions on the compensation of anticipated earnings were settled through judgments involving deaths in car accidents, and the systematisation of the calculation of damages was promoted due to the considerable number of injuries and deaths in a motorised society.

In 1964, the Supreme Court held for an eight-year-old boy killed in a traffic accident that, even if it is extremely difficult to calculate the anticipated earnings for such a young person, the court should not deny compensation because of this difficulty. The holding stated that the court should try to fix a sum as probable as possible, based on all the evidence shown by the plaintiff. If a doubt is cast on the probability, the court should adopt the more modest amount for the victim, the Supreme Court said.[57]

In 1974, the same court decided the question of calculating a housewife's anticipated profits, in order to evaluate the negative loss for a seven-year-old girl who was killed in a car accident. On the anticipation that the girl might have become a housewife, like the majority of married women in those days, the court made clear its method of calculation for a housewife's loss. According to the court, even though a housewife did

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[53] Tokyo District Court, 28 November 1955, *Lower Courts Civil Reporter (Kaminshu)*, vol.6, no.11, 2490.

[54] Ota (1999) 79–93.

[55] Automobile Liability Security Act, No.97, 1955, Article 3: 'If a person operating an automobile for his/her benefit causes death of or bodily injury to any other person through such operation, such person shall be liable to compensate for damage to the victim. However, he/she shall not be liable if he/she proves that neither he/she nor the driver failed to exercise due diligence in operating the automobile and that there was an intention or negligence on the part of the victim or a third party other than the driver and that there was no structural defect or functional disorder in the automobile' (copyright 2011 by General Insurance Rating Organisation of Japan), at http://www.giroj.or.jp/disclosure/pdf/eibunjibaihou201309.pdf (accessed 17/o5/2015 13:32).

[56] Article 5: 'No automobile shall be operated unless a contract for automobile liability insurance (hereinafter referred to as "liability insurance") or a contract for automobile liability mutual aid (hereinafter referred to as "liability mutual aid") as provided in this Act has been concluded.' Compulsory insurance for automobile liability was newly created due to this special law.

[57] Supreme Court, 24 June 1964, *Supreme Court Civil Reporter (Minshu)*, vol.18, no.5, 874.

not then – and still does not – receive money in return for her domestic work, most of such work can be valued as labour in Japanese society. The court held that if it is difficult to evaluate a concrete case, it is suitable to assume, considering the actual state of society, that she should gain as much as an average female employee earns for an average workable period.

Tort doctrine has become stable based on these two judgments, though these precedents have been criticised by many scholars: the dominant opinion, which had supported the idea of inheriting the claim of a dead person and indeed influenced these judgments, ironically shifted about the same time as these judgments, to abandon the basic idea.[58] One criticism, among others, was that the parents should not receive the equivalent earnings for the lifetime of their child, who should have normally survived them.

After the first judgment, some inferior courts as well as the Traffic Accident Consultation Centre organised by the Bar[59] started to establish a calculation standard for various types of damage caused in accidents.[60] When the person killed had no positive income, all sorts of statistical data such as average salary are utilised. In the case of injury, a table was established to give an amount of compensation according to the grade of seriousness of the injury and the duration of hospitalisation or of medical treatment. Even for consolation money, a table indicating a standard was established. The amount is calculated as a function of the victim's role in his/her family (if he or she is the breadwinner or not, and so on). Moreover, for the positive loss also, some standardisation took place, in order to avoid the need of resorting to evidence of each expense (e.g. the expense of hospitalisation is readily recognised as a function of the symptoms and the period of hospitalisation).

These tables of standards for compensation have been well utilised inside and outside the court.[61] They contributed to achieve rapid resolution of an enormous number of disputes. They helped to minimise the gaps in results of similar cases judged by different courts, to assure the victims of being treated equally. The standards made it easy to link the compensation with the system of insurance. Recognition of certain

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[58] Tamotsu Isomura, 'The Development of the Civil Law in Japan – the Role of the Doctrine', in Toshio Hironaka and Eiichi Hoshino (eds), *Hundred Years of the Civil Code*, vol.I, Yuhikaku, (1998), 505, 514–515 (in Japanese).

[59] The Japan Federation of Bar Associations inaugurated the Traffic Accident Consultation Centre in 1967 'in order to quickly and appropriately resolve damage compensation issues caused by traffic accidents'.

[60] It is about the function of this Centre and the relevant behaviour of the victims that Professor Oda opposes Zweigert and Kötz's interpretation of seeing here 'the traditional attitude of the Japanese in avoiding litigation and resorting to "internal procedures"' (Oda (2009) 5, n.16; Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts*, dritte Auflage, (1996), 294–296; Konrad Zweigert and Hein Kötz, T. Weir (tr.), *An Introduction to Comparative Law*, 3rd ed., OUP (1998) 300–302). According to Oda, because court practice is highly standardised in this area, the parties agree to have the dispute settled in a quicker and less expensive way. It should then be asked why the court practice has become so standardised and why using the calculation standard is so popular.

[61] See the contrast in attitude towards such standardisation in French law and Japanese law. Jean-Louis Halpérin and Naoki Kanayama, *Droit japonais et droit français au miroir de la modernité*, Dalloz (2007) 264–265.

common patterns in traffic accidents promoted this mechanism of compensation. It also means, however, that the particular aspects of each loss of each victim are neglected, which can naturally invite the dissatisfaction of the victim or the people left by him.[62]

It is important to note that the court often uses consolation money to fill the gap between the standardised amount of compensation and the suitable amount taking into consideration the particularity of individual cases. The adjusting and supplementary role of consolation money towards the compensation of pecuniary loss is all the more necessary to properly settle personal injury cases, where the anticipated income occupies the greater part in evaluation, and where this part now comes to be calculated according to the standard. Moreover, some inferior courts make use, deliberately, of the supplementary function of consolation money when the calculation of pecuniary losses meets many difficulties.[63] Indeed, pecuniary damage, which the plaintiff must prove, should be proved as highly probable, while non-pecuniary loss need not be proved according to this standard, with judges having discretionary power to decide it.[64]

11. POLLUTION CASES

Rapid industrialisation since the late 19th century, especially since the 1950s, caused serious pollution by factories, sacrificing even the lives of inhabitants in the surrounding areas. The victims and their families filed their cases for personal injuries around 1970.[65] Successive pollution cases led to the development of the law of torts.[66] Reforms were prompted by the specific character of the pollution cases. As the judgment by the Niigata District Court points out,[67] the pollution cases are peculiar in that:

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[62] Yoshimura (1998) 662–663; Yasunori Kasai, 'Avoidance of Persuasion in Japanese Dispute Resolution', *Hosei Riron (Journal of Law and Political Science)*, Law and Political Science Association, Niigata University, vol.32, no.3–4, 59, 61 (2000).

[63] Tokyo District Court, 18 October 1967, *Hanrei Jiho*, no.496, 15. This was the case where the victim suffering from the aftereffects of a traffic accident, fired from the original company, managed with much effort to earn the same salary in a new workplace. There is no positive pecuniary loss, but the court granted more consolation money than claimed (2,000,000 yen instead of 500,000 yen), taking into consideration the economic loss for the plaintiff, who had lost his stable position in the former workplace to be resigned to work in an unstable status with his disability.

[64] Yoshihisa Nomi, 'Mass Torts in Japanese Law', Japanese Committee of the International Academy of Comparative Law, *Japanese Reports for the XIVth International Congress of Comparative Law (Athens, July 31st–August 6th 1994)*, International Centre for Comparative Law and Politics, University of Tokyo (1995), 73, 77–78.

[65] The four major pollution cases – Yokkaichi Air Pollution case, Kumamoto Minamata Disease case, Niigata Minamata Disease case and the Itai-Itai Disease case – were all filed between 1967 and 1969, and were judged in the first instance between 1971 and 1973.

[66] Julian Gresser, Koichiro Fujikura and Akio Morishima, *Environmental Law in Japan*, MIT Press (1981); Akio Morishima, 'Environmental Liability in Japan', in Ewoud Hondius (ed.), *Modern Trends in Tort Law. Dutch and Japanese Law Compared*, Kluwer Law International (1999), 183–194.

[67] Niigata Minamata Disease case: Niigata District Court, 29 September 1971, 162, *Hanrei Jiho*, no.642, 96.

1) there is no eventual interchangeability of the plaintiff and the defendant: the victim would never take the position of manufacturer-polluter in society;
2) there is no chance for the neighbouring inhabitants to escape from the harm;
3) the harm affects a large number of inhabitants in the area;
4) the neighbouring inhabitants are equally affected, even to different degrees; consequently the whole family, or most of them suffer the harm, and this could lead to the total destruction of the family;
5) while the enterprise gains profit through its production, the victim inhabitants in the neighbouring area have no direct interest in the same activity.

Facing these new types of problem, fundamental new ideas were proposed, tried, and some of them were integrated into practice. Most of them aimed at speeding up the procedure, supporting the victims structurally disadvantaged vis-à-vis the defendants who are companies,[68] and maintaining equality among the victims.[69] The idea of comprehensive damage also reflects a concern for the procedural difficulties,[70] but it is meant for more: the fundamental reconstruction of the notion of loss and damages.

The comprehensive damage claim eliminates the division between pecuniary loss and non-pecuniary loss, integrating all the damages into the consolation money. It criticises the long-used method of damage compensation, adding up the different types of loss, in which total loss of earnings occupies a larger proportion for the case of personal injury or death. The plaintiffs of the Kumamoto Minamata case claimed for 'the totality of the harm suffered by the victims socially, economically as well as mentally'. In other words, 'the totality of the destruction of a human-being, including the destruction of his environment' was claimed comprehensively as the only damage. This claim was based

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[68] One of the most important developments through the pollution cases is causation in torts. Regarding causation in fact, new ways of determining liability to alleviate the burden of proof for the plaintiff were introduced and admitted in court. If the victim establishes the causal link between the act and the loss by circumstantial evidence, no longer are they required to offer further evidence (Niigata Minamata Disease case: Niigata District Court, 29 September 1971, 96, *Hanrei Jiho*, no.642, 96); the epidemiological proof is adopted to establish causality between the damage to the health of plaintiffs and the discharge of toxic substances by the defendant factory (Itai-Itai Disease case: Toyama District Court, 30 June 1971, 1, *Lower Courts Civil Reporter (Kaminshu)*, vol.22, no.5–6, 1; Yokkaichi Air Pollution case: Tsu District Court, Yokkaichi Division, 24 July 1972, 30, *Hanrei Jiho*, no.672, 30); the idea of probabilistic causation is acknowledged to award proportionate compensation of damage (Minamata Disease cases: Tokyo District Court, 7 February 1992, 168, *Hanrei Jiho*, Special edition of 25 April 1992, 168; Osaka District Court, 7 November 1994, 5, *Hanrei Jiho*, no.1506, 5). See Yoshihisa Nomi, 'Proportionality in Tort and Contract Law', in Ewoud Hondius (ed.), *Modern Trends in Tort Law*, Kluwer Law International (1999), 209, esp. 212–214.

[69] Nomi (1995) 73–88.

[70] The standard of proof for pecuniary damage is close to, but lower than, the standard of 'beyond all reasonable doubt'. In contrast, non-pecuniary damage for mental distress does not need to be proved with high probability. Nomi (1995) 77–79.

on the theory that personal injury should be regarded as damage to the personality, and should constitute as a whole, a non-pecuniary damage.[71]

The early cases treated this kind of claim only by taking into account the suffering indicated in the claim to evaluate non-pecuniary loss, maintaining, however, the tri-partite calculation of damages. In 1978, the Fukuoka District Court decided a pharmaceutical case by accepting for the first time the idea itself of the comprehensive claim.[72] Later, in 1991, the Osaka District Court held, in an air pollution case, that a plaintiff should be allowed to claim a comprehensive consolation award which integrates consolation money in the proper sense and pecuniary damages, that is, those caused by business interruption, loss of earnings, and so on. As air pollution has long-lasting effects, the symptoms and their development are different from victim to victim and damages include both pecuniary losses and non-pecuniary losses, the court judged that it was not only possible, but necessary and appropriate, not to subdivide the damages and to award these as comprehensive consolation money.[73] The Supreme Court was not hostile to the idea in 1994 when it said 'the claim for consolation money with which the plaintiff declares clearly that he/she intends not to submit any other claim for damages' should be judged with less discretionary power by the lower courts than 'pure consolation money'. It adopted a different way of calculation of damages from the traditional way. As a result, the plaintiff is able to sue the defendant in either way.[74]

The notion of comprehensive damages also enabled what is called a 'standardised damage claim', which was allowed by the court.[75] In the Niigata Minamata Disease case, the plaintiffs, 76 in number, claimed damages classified in a limited number of categories: every surviving partner of the deceased claimed damages of 15,000,000 yen; the injured plaintiffs, classified into three categories according to the seriousness of injury, claimed in such a standardised manner as 10,000,000 yen for category A, 7,000,000 yen for category B and 5,000,000 yen for category C. Only by resorting to the notion of comprehensive damages, the amount of which can be determined by the discretionary power of the court, does such standardisation become possible. It is observed that this way of adjudication answers the new demand of justice born in mass tort cases: collective justice emphasising fairness among plaintiffs, who should maintain solidarity through litigation, and who should share the common limited fund of the defendant for compensation of damages.[76]

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[71] Michio Nishihara, 'Damages for Wrongful Death and Personal Injury', *Shiho (Journal of Private Law)*, Nihon Shiho Gakkai (Japan Association of Private Law), no.27, 1965, pp. 107–115 (pp. 159–160 for the English summary) (1965); Isomura (1998) 529–530.

[72] SMON (Subacute Myelo-Optico-Neuropathy) case, Fukuoka District Court, 14 November 1978, 33, *Hanrei Jiho*, no.910, 33.

[73] Osaka District Court, 29 March 1991, 22, *Hanrei Jiho*, no.1383, 22.

[74] Supreme Court, 22 February 1994, 441, *Supreme Court Civil Reporter (Minshu)*, vol.48, no.2, 441, at http://www.courts.go.jp/english/judgments/text/1994.02.22-1989.-O-.No.1667.html (accessed on 17/05/2015 13:40)

[75] Niigata Minamata Disease case: Niigata District Court, 29 September 1971, 96, *Hanrei Jiho*, no.642, 96.

[76] Nomi (1995) 79–80.

As a consequence of the development through the cases cited above, Japanese law now offers two systems of compensation for personal injury. The first system adopts the traffic accident method, to evaluate separately three types of damages – positive pecuniary damage, negative pecuniary damage (loss of earnings) and non-pecuniary damage –, with much use of a standardised scale for the amount of money to be paid for different sub-categories of damages. The first method's greatest concern is how to evaluate the loss of earnings. In contrast, the second system adopts the pollution case method, choosing to aggregate all the damages and not argue independently the loss of earnings. It is notable that in both systems, it is construed that the consolation money for the victim himself is passed on to his heirs in the case of his death.

12. CONCLUSION

With all the measures which have been developed in tort law for more than a century, Japan is now facing its hardest case: compensation for damages caused by the nuclear power plant in Fukushima, following the earthquake and tsunami on 11 March 2011.[77] What is going on about Fukushima, which attracts interest from abroad in the Japanese law of torts, will only be understandable when sufficient basic knowledge of the Japanese system for nuclear damage compensation[78] is supplied.[79] Much will be reported, for sure, of the organisations specially established for this compensation (the Dispute Reconciliation Committee for Nuclear Damage Compensation (DRC)[80] and the

[77] Report of Japanese Government to the IAEA Ministerial Conference on Nuclear Safety – The Accident at TEPCO's Fukushima Nuclear Power Stations -, at japan.kantei.go.jp/kan/topics/201106/iaea_houkokusho_e.html (accessed on 17/05/2015 16:16).

[78] Act on Compensation for Nuclear Damage (No.147 of 1961) as amended by Act No.19 of 17 April 2009. See the critical presentation by the Law Professor involved in the legislative preparation: Sakae Wagatsuma, 'Japanese System of Compensation for Damages Caused by Nuclear Industry', *Law in Japan*, vol.2, 173–179 (1968).

[79] OECD/Nuclear Energy Agency (2011), 'Regulatory and Institutional Framework in Japan against the Background of Fukushima', *Nuclear Law Bulletin*, no.87 (2011/1), at dx.doi.org/10.1787/nuclear_law-2011-5kg1zqxh695f (accessed on 17/05/2015 13:44); Toyohiro Nomura, Taro Hokugo and Chihiro Takenaka, 'Japan's Nuclear Liability System', in OECD/NEA, *Japan's Compensation System for Nuclear Damage, As related to the TEPCO Fukushima Daiichi Nuclear Accident*, (2012), at dx.doi.org/10.1787/9789264992009-en (accessed on 17/05/2015 14:02) 15–27; Ximena Vasquez-Maignan, 'Fukushima: Liability and Compensation', *Nuclear Law Bulletin*, no.88, 61–64 (2011/2) at dx.doi.org/10.1787/nuclear_law-2011-5k9gw8kmb321 (accessed on 17/05/2015 14:10); Ximena Vasquez-Maignan, 'The Japanese Nuclear Liability Regime in the Context of the International Nuclear Liability Principles', in OECD/NEA, *Japan's Compensation System for Nuclear Damage, As related to the TEPCO Fukushima Daiichi Nuclear Accident* (2012), 9–14; Julius Weitzdörfer, 'Die Haftung für Nuklearschäden nach japanischem Atomrecht – Rechtsprobleme der Reaktorkatastrophe von Fukushima I' (Liability for Nuclear Damages Pursuant to Japanese Atomic Law – Legal Problems Arising from the Fukushima I Nuclear Accident), *Zeitschrift für Japanisches Recht/Journal of Japanese Law*, no.31, 61–115 (2011).

[80] Six out of ten members of the Committee are legal specialists: three scholars in civil law, one in environmental law and one in administrative law, as well as one practising lawyer who is a former judge of the High Court.

Nuclear Damage Compensation Resolution Centre (so-called "ADR" Centre)) and the role of the guidelines issued by the former as well as the importance of ADR (Alternative Dispute Resolution) in this matter.[81]

At the same time, one should take into consideration the specific features of Japanese tort law discussed in this chapter. The kind of legal arguments Japanese lawyers use is notable. In the discussion of the DRC to establish guidelines for compensation, the definition given in Article 2 of the Act on Compensation for Nuclear Damage[82] was not in question and the committee members simply discussed if there was an adequate causal link between the nuclear accident and the damage in question.[83] Our observation in the sections 4 to 8 might be suggestive as to the notions and criteria used in the legal construction and their relation to one another.

The guidelines[84] opt for the traffic accident method rather than the pollution case method for the calculation of damages. The consolation money to be paid for being forced to live as a refugee is also calculated according to the table established for traffic accidents. To evaluate this option, we should take into account the system of proof in Japanese court procedure, the arbitrary power of judges to evaluate consolation money, and so on. We should even better take into consideration the fundamental thoughts working behind Japanese tort law so as to have invented the legal construction such as the succession of the claim of the dead. How we treat the life in the question of compensation should inevitably shape how we face the complications of the nuclear damage compensation, which continue to develop as time passes.[85]

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[81] The number of people who were forced to move their residence and deprived of financial sources and other necessities of living, amounts to around one hundred thousand. The number of matters to compensate is estimated to amount to one million and several hundred thousand, within which tens to a hundred thousand might be disputed. As for the JCO (orinigally founded as "Japan nuclear fuel Conversion Office") accident in 1999, only two cases were brought to the DRC, whereas about six thousand cases were resolved amicably through direct negotiation between the victim and the JCO. The total amount of compensation is estimated to be approximately 15 billion yen (Hiroshi Noyama, 'Practice of Mediation of Reconciliation at Nuclear Damage Compensation Dispute Resolution Center (1)', *Hanrei Jiho*, no.2140, 3, 4 (2012) – in Japanese).

[82] Article 2 (2) of the Act defines nuclear damage as 'any damage caused by the effects of the fission process of nuclear fuel, or the radiation from nuclear fuel etc., or of the toxic nature of such materials (which means effects that give rise to toxicity or its secondary effects on the human body by ingesting or inhaling such materials)'.

[83] Toyohiro Nomura, 'The Mechanism of Compensation for the Nuclear Accident and the Accident of Fukushima Daiichi', *Jurist*, no.1427, 118, 120 (2011) (in Japanese); Yoshihisa Nomi, 'Japan', in Vernon Palmer and Mauro Bussani (eds), *Pure Economic Loss. New Horizons in Comparative Law*, Routledge-Cavendish (2009), 71–87.

[84] Interim Guidelines on Determination of the Scope of Nuclear Damage resulting from the Accident at the Tokyo Electric Power Company Fukushima Daiichi and Daini Nuclear Power Plants. English translation in OECD/Nuclear Energy Agency, *Japan's Compensation System for Nuclear Damage. As related to the TEPCO Fukushima Daiichi Nuclear Accident* (2012), at oecd-nea.org/law/fukushima/7089-fukushima-compensation-system-pp.pdf (accessed on 17/05/2015 14:17).

[85] My special thanks are due, first, to Professor Mauro Bussani, who presented me with an opportunity to contribute this chapter; secondly, to Professor Toyohiro Nomura, the President of

APPENDIX: LIST OF PROVISIONS ON TORT LAW IN THE JAPANESE CIVIL CODE

Japanese Civil Code

Article 709 A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.

Article 710 Persons liable for damages under the provisions of the preceding Article must also compensate for damages other than those to property, regardless of whether the body, liberty or reputation of others have been infringed, or property rights of others have been infringed.

Article 711 A person who has taken the life of another must compensate for damages to the father, mother, spouse and children of the victim, even in cases where the property rights of the same have not been infringed.

Article 712 In cases where a minor has inflicted damages on others, if the minor does not have sufficient intellectual capacity to appreciate his/her liability for his/her own act, the minor shall not be liable to compensate for that act.

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

Article 715 (1) A person who employs others for a certain business shall be liable for damages inflicted on a third party by his/her employees with respect to the execution of that business; provided, however, that this shall not apply if the employer exercised reasonable care in appointing the employee or in supervising the business, or if the damages could not have been avoided even if he/she had exercised reasonable care.

(2) A person who supervises the business on behalf of the employer shall also assume the liability under the preceding paragraph.

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the Japan Society of Comparative Law, who kindly offered detailed information about nuclear damage compensation; and finally, to Professor Leonardo Ciano, for checking my English at short notice.

(3) The provisions of the preceding two paragraphs shall not preclude the employer or supervisor from exercising their right to obtain reimbursement against the employee.

Article 716 A party ordering work shall not be liable for the damages a contractor inflicted on a third party with respect to his/her work; provided, however, that this shall not apply if the party ordering work is negligent in his/her order or instructions.

Article 717 (1) If any defect in the installation or preservation of any structure on land causes damages to others, the possessor of such structure shall be liable to the victims to compensate for those damages; provided, however, that, if the possessor has used necessary care to prevent the damages arising, the owner must compensate for the damages.

(2) The provisions of the preceding paragraph shall apply mutatis mutandis to cases where there is any defect in the planting or support of bamboos and trees.

(3) In the cases of the preceding two paragraphs, if there is another person who is liable for the cause of the damages, the possessor or owner may exercise their right to obtain reimbursement against such person.

Article 718 (1) A possessor of an animal shall be liable to compensate for the damages that the animal has inflicted on others; provided, however, that this shall not apply if he/she managed the animal with reasonable care according to the kind and nature of the animal.

(2) A person who manages the animal on behalf of the possessor shall also assume the liability under the preceding paragraph.

Article 719 (1) If more than one person has inflicted damages on others by their joint tortious acts, each of them shall be jointly and severally liable to compensate for those damages. The same shall apply if it cannot be ascertained which of the joint tortfeasors inflicted the damages.

(2) The provisions of the preceding paragraph shall apply to any person who incited or was an accessory to the perpetrator, by deeming him/her to be one of the joint tortfeasors.

Article 720 (1) A person who, in response to the tortious act of another, unavoidably commits a harmful act to protect himself/herself, the rights of a third party, or any legally protected interest, shall not be liable for damages; provided, however, that the victim shall not be precluded from claiming damages against the person who committed the tortious act.

(2) The provisions of the preceding paragraph shall apply mutatis mutandis to cases where a Thing belonging to others is damaged to avoid imminent danger arising from that Thing.

Article 721 An unborn child shall be deemed to have been already born with respect to the right to demand compensation for damages.

Article 722 (1) The provisions of Article 417 shall apply mutatis mutandis to compensation for damages in tort.

(2) If a victim is negligent, the court may determine the amount of compensation by taking that factor into consideration.

Article 723 The court may, at the request of the victim, order a person who defamed others, to effect appropriate measures to restore the reputation of the victim in lieu of, or in addition to, damages.

Article 724 The right to demand compensation for damages in tort shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative within three years from the time when he/she comes to know of the damages and the identity of the perpetrator. The same shall apply when twenty years have elapsed from the time of the tortious act.

Annex II: Translation of Japanese Statutes in Western Languages

Japanese Law Translation Database System (Ministry of Justice)
japaneselawtranslation.go.jp/?re=02 (accessed on 17/05/2015 14:27)
Transparency of Japanese Law Project
tomeika.jur.kyushu-u.ac.jp/index.html (accessed on 17/05/2015 14:27)
Japan Legal Information Institute
jalii.law.nagoya-u.ac.jp/enindex (accessed on 17/05/2015 14:28)
Code civil de l'Empire du Japon accompagné d'un exposé des motifs. Traduction officielle, 4 tomes, Kokubunsha, Tokio (1891)
The Civil Code of Japan, Ludwig Loenholm (tr.), Max Nossler, Bremen; Maruya, Tokyo, (1898)
Code civil de l'Empire du Japon: Livres I, II & III, I. Motono and M. Tomii (tr.), Maruzen, Tokio (1900)
Code civil de l'Empire du Japon: Livres IV & V: famille et successions, L.H. Loenholm and Jules Adam, Maruya, Tokio (1902)
G. Boissonade, *Projet de Code civil pour l'Empire du Japon, accompagné d'un commentaire*, nouvelle éd. 4 vols, Kokubunsha; Tokio, 1890–1891 (première éd. 2 vols, 1880–1882 ; rééd. Yushodo, Tokyo, 2005)
[Gustave Boissonade] *Draft Civil Code* (English translation by W.M.H. Kirkwood), Yushodo, Tokyo (rep. 2003)
giroj.or.jp (General Insurance Rating Organization of Japan (formerly "Non-Life Insurance Rating Organisation of Japan")) (accessed 17/o5/2015 13:32).