Initial Concept of Tortious Liability

In the Old Civil Code of Japan (1890), Prof. *Boissonade* adopted the French principle for the liability due to “Unlawful Acts” (tortious liability):

Art. 1382, French Civil Code
Every act whatever of man that causes damages to another, obliges him by whose fault it occurred to repair it.

Art. 370, Law on Properties, Civil Code of Japan (1890)
A person who causes intentionally or negligently damage to another person shall be bound to make compensation for it.

This concept required only three elements (requisites) for the tortious liablity; namely **Fault** (intention or negligence), **Damages**, and **Causation** between an act (or omission) and damages.

In the Commission for Revision of the Civil Code, Prof. *Hozumi* decided to maintain this French principle, however, he added one more requisite, namely "**Violation of Rights**". He considered that otherwise the scope of legal protection by tortious liability would be almost unlimited:

> **Art. 709†, Revised Civil Code of Japan (1896)**
> A person who violates intentionally or negligently *the rights of another person* shall be bound to make compensation for damages arising therefrom.

On the other side, he introduced the liability for non-pecuniary damages and broadened the scope of the legal protection with the tortious liability:

> **Art. 710, Revised Civil Code of Japan (1896)**
> A person who is liable in compensation for damages in accordance with the provision of the preceding Article shall make compensation therefor even in respect of a non-pecuniary damage, irrespective of whether such injury was to the person, liberty or reputation of another or to his property rights.

From “Violation of Rights” to “Unlawfulness”

In the first decade after the enactment of the Revised Civil Code, the Court maintained the rigid concept of Prof. *Hozumi* and acknowledged the tortious liability only to the cases where the absolute rights (life, body, hearth, freedom, property rights etc.) had been really infringed.

- In one case, an entertainer published a gramophone record of his popular songs. Somebody else made its copies and sold them without allowance of the entertainer. He sued the replicating person for tort. However, the Supreme Court rejected his claim on the ground that such a vulgar music was not included in the objectives of the legal protection by the copyright law (4 Jul. 1914).

Obviously, the Court had acknowledged only graceful, artistic works as targets of legal protection by the copyright law. From such an understanding, the Court rejected to offer legal protection for any popular arts which would not deserve protection for legal “Right”.

In the judgment of the “University Bath House” case (28 Nov. 1925), the Supreme Court changed this understanding:

- The father of the claimant had leased a bath house from the defendant and ran his “University Bath House”. This *brand name as a long-established business*, though unregistered, belonged to him. After the expiration of the lease contract, however, the owner let another person run the bath house business with the same name. The claimant sued them for tortious liability. The Courts of the 1st and 2nd instance held that the unregistered brand name of an established business was not a genuine “Right” in the sense of Art. 709. The Supreme Court overturned this ruling and held the defendants liable for violation of the property right. In the judgment, the Supreme Court acknowledged the widely accepted economic value of “brand name of a long-established business” as a genuine legal interest which the law has to offer proper protection.

Since this ruling, the Court has acknowledged many kinds of new interest as the objectives of legal protection by tortious liability. Accordingly, its 4th requisite is now called “**Unlawfulness**” instead of “Violation of Rights”. In the Amendment to the Civil Code (2004), the wording of Art. 709 was slightly changed:

> **Art. 709, Revised Civil Code of Japan (2004 ~)**
> A person who violates intentionally or negligently the rights or *legally protected interests* of another person shall be bound to make compensation for damages arising therefrom.

Expansion of Legal Protection (Unlawfulness)

According to the initial concept of Prof. *Hozumi*, the aim of tort law was to protect "existing rights". For this reason, it required the violation of "legally established rights". However, the Court began to broaden the scope of protection to many new types of "legal interests" when the Court considered that such interests deserve legal protection under the tort law. For example:

Protection of de-facto marriage (1911)
In a case, a man used a fraud act to persuade a woman to live together with him. They celebrated the wedding ceremony, but did not notify the authority of marriage. Several months later, the man ejected his de-facto wife without any reason. She sued him for defamation and demanded compensation for mental suffering. The Supreme Court held him liable for tortious act even though the de-facto wife had no legal position. In this judgment, the Supreme Court showed the concept that interests of women who were unreasonably ejected after the testing period could be legally protected insofar as the other side had used some unlawful methods.

“After the Dinner Party” case (1964)

A famous writer published a novel entitled “After the Dinner Party”. It was a story of the rise and fall of a political leader modeled on a really existing person (claimant). The story was a fiction, however, its description was so realistic that its readers could have an impression as if it would be a true story of this person. The claimant sued the writer and the publisher for infringement of his privacy and demanded compensation for mental suffering. The writer argued that the freedom of expression was one of the highest human rights guaranteed by the Constitution (Art. 21). The Court held the defendants liable on the grounds that the freedom of expression could be guaranteed insofar as the dignity of individuals (Art. 13 of the Constitution) would be secured. According to the ruling, the principle of “**Dignity of Individuals**” constitutes the foundation of freedom and democracy, its value would be undermined if the **privacy of individuals** could not be sufficiently protected. In an advanced society with its widely developed network of mass-media, simple ethical sanctions would not be enough for protection of privacy. It should be rather acknowledged as **a legally sanctioned interest** of individuals.

Expansion of Legal Protection (Abuse of right)

The Court has applied also another method to expand the scope of legal protection; namely the "**Doctrine of Abuse of Right**". Even the exercise of an ordinary right could not be free from accusation of "unlawfulness" if it exceeds the normal extent and causes serious disturbance to other persons (public nuisance).

Pine Tree Case (1919)
The claimant possessed an old pine tree in his garden. In the neighboring area, however, Japan National Railway regularly operated the run of steam trains. The tree died of damages due to the smoke from trains. He sued the railway company for damages. The company contradicted the claim on the ground that the operation of steam trains was a proper exercise of its property right. The Supreme Court held the defendant liable for "**abuse of right**" by the reason that even the exercise of a firmly established right could be unlawful when the public nuisance caused by it exceeded the tolerable level for its victims.

“Access to Sunshine” case (1972)

The neighbor of the claimant constructed a house which massively violated the requirements of the administrative regulations (the Building Regulations). As a result, the sunshine and natural draft (airflow) on the side of the claimant was tremendously obstructed. He decided to move to another location and sold his land and house. However, he had to accept a quite lower sale price than its standard value because of the obstructed sunshine and natural draft. He sued the defendant for suffering the loss of the price. At that time, the access to sunshine and natural draft was not the objective of legal protection by the Building Regulations. Nevertheless, the Court held the defendant liable for “**abuse of right**”.

In this case, the defendant had breached administrative regulations. However, such a breach of an administrative regulation does not construe immediately any “unlawfulness” or “violation of public order”. In such a situation, this “**Doctrine of Abuse of Right**” opens the way of legal protection especially for the development of “Environmental Rights”.

In the similar cases of environmental troubles or public nuisance (noise, vibration, bad smells, smoke, air or water pollution etc.), the Japanese Court has also established the practice to issue injunctions (official order to stop the infringing conduct etc.) based on the doctrine of "**Maximum Permissible Limits**". According to this theory, even a lawful conduct may not be exempted from unlawfulness if it causes nuisance exceeding the tolerable limit for the victims. For the claim for injunction, the proof of fault is not required.

Causation

In cases where the **unlawfulness** of infringement is obvious and doubtless, the legal discussion focuses on the identification of tort-feasor (question of **Causation**) and the assessment of his responsibility (question of **Fault**) just like in a criminal case.

The discussion about “**Causation**” covers two different aspects of the tortous liability; firstly the question of the identification of the liable party, and secondly the question of the reach or scope of his liability.

Principally, the victims of a tortious act of somebody else bear the burden of proof to show who is a tort-feasor. The alleged tort-feasor normally denies the accusation from the victims. Then, the victims have to provide a clear evidence for the causation of their suffering. However, this task is often quite difficult for them especially in environmental pollution cases where victims suffer unknown diseases. There are several famous cases in Japan:

“Itai-Itai Disease” case (1912 –)

In 1910, “Mitsui Mining and Smelting Company” began to discharge ***cadmium*** (toxic heavy metal) into the Jintsugawa River. The cadmium poisoned the river and the local source of the drinking water. The local residences drank the contaminated water and ate food which was grown with such water. They began to suffer serious symptoms and disorders.

“Minamata Disease” case (1956 –)

The first report of “Minamata Disease” originated in the city Minamata in 1956. After an extensive investigation, it was identified as a methyl-mercury poisoning. The substance was transmitted by the ingestion of contaminated fish from the Minamata Bay. The cause of the contamination was traced back to “Chisso Corporation” which operated the production of acetic acid and vinyl chloride at the Minamata Bay. Methyl-mercury was a by-product of the production.

“Niigata Minamata Disease” case (1965 –)
The second outbreak of the same disease was reported along the Agano River in the Niigata Prefecture in 1965. There were several plants in this area which used mercury in the production. The Niigata University undertook the investigation of its cause. In 1966, the research team determined the most likely cause to the discharge of methyl-mercury from “Showa Denko Corporation” factory located upstream of the Agano River.

“Yokka-Ichi Asthoma” case (1961 –)
The city Yokka-Ichi was a “town of petroleum”. In 1955, the first oil refinery plant was constructed in the city, and a large-scale chemical industry complex developed. The air in this area was massively polluted with the sulfur dioxide emission from several plants in the industry complex. In the early 1960s, bronchial diseases called “**Yokka-Ichi Asthoma**” began to emerge among the wide range of the population of the city.

In such environmental pollution cases as well as medical malpractice or product liability cases, the victims lack the highly technical expertise and experience and have no authority to intrude into the “black box” behind business secrets. Faced with this tremendously unfair situation, the Court developed theories to make the proof of causation easier for such victims.

In the “**Niigata Minamata Desease**” case, the Court ruled in 1971 that the causation would be ***virtually presumed*** if the victims could prove the following two points:

(1) the outbreak of the disease was caused by a specific substance (methyl-mercury);

(2) the substance was transmitted from the defendant’s plant into the water.

The burden of proof then sifted to the defendant to show that it had not emitted the substance into the water.

In the “**Itai-Itai Disease**” case, the Court ruled that it was sufficient for the victims to prove an “***epidemiological causality***”. According to the ruling in 1971, the victims bear the burden of proof only for the following four points:

(1) the discharge of the toxic substance (cadmium) preceded the outbreak of the disease;

(2) Increased exposure to the substance resulted in increased occurrence of the disease;

(3) Areas with lower pollution associated with lower occurrence of the disease;

(4) Epidemiological research data corresponded with the clinical or experimental evidence.

However, there was no clear legal ground which could justify such an alleviation (shift) of the burden of proof. The Supreme Court then declared its doctrine in regard with the proof of causation; according to this doctrine, it would be satisfactory if the victim could prove the causation between the act and damages to the extent that no ordinary person would cast doubt on it. In other words, the causation would be established if there is ***a high probability of causation in light of experience***, unless the defendant could effectively set up a counter-proof against it.

Moreover, in the "**Yokka-Ichi Asthoma**" case, the defendant was not a single company. In the industrial complex, there were several chemical plants which operated in a close connection among each other. They polluted the air together. It was not possible to establish the causation between the act of each plant and the outbreak of bronchial diseases. Nevertheless, the Court ruled in 1967 that all of the companies were ***jointly and severally liable*** for the outbreak of the diseases.

Fault (Responsibility, Negligence)

In cases of tortious liability, the victims would at first concentrate their attention on the unacceptability and their suffering of damages resulting from the act of someone else. In this sense, "**Unlawfulness**" of such an act and "**Damages** (Losses)" they suffers would be focal points of legal discussion.

When the "**Unlawfulness**" and the "**Damages**" are established, then the discussion would focus on the determining of "**Causation**"; firstly, the tort-feasor must be identified. When the tort-feasor has been identified, then eventually the question of his "**Fault**" would be discussed.

In the initial period where the Japanese Court construed the requisite "**Violation of Rights**" quite narrowly, the another requisite "**Fault**" consisted in the defendant's ***failure to recognize the illegality or unlawfulness of own act***.

When the Court began to broaden the scope of legal protection even over other interests, the discussion focused on the question of "**Unlawfulness**" of rather ordinary acts or exercise of rights. Consequently, the "**Fault**" of the tort-feasor consisted in ***his failure to recognize the unlawfulness of his own acts*** (especially in cases of "Abuse of Rights").

Such an understanding could be called "subjective" approach to the meaning of "**Fault**". According to this concept, the tort-feasor's fault consists in the ***failure to foresee or anticipate harmful results*** when he acted.

However, there is another "objective" approach to the meaning of "**Fault**"; this concept understands "**Fault**" rather as "***Breach of duty***". This approach is today prevailing in Japan. According to this concept, the tort-feasor's fault consists in his ***failure to take appropriate measure to prevent harmful result of his own acts***. The Supreme Court has adopted the second concept in the following case:

“Osaka Alkali Corporation” case (1916)

The company produced sulfuric acid and emitted sulfurous acid gas. The polluted air harmed the crops in the surrounding area. The farmers sued the company for damages. The Appellate Court acknowledged the causation between the acid gas and the harm. The defendant argued that it was technically impossible to completely prevent such harmful result. However, the Court held the defendant at fault solely because the company had or should have known the harmful result of the acid gas emission from its plant.

The company appealed to the Supreme Court. The Supreme Court rejected the judgment and sent the case back to the Appellate Court on the ground that the company could not be at fault insofar as it had installed in advance suitable and reasonable facilities for the prevention of the harm. Above all, the Appellate Court held the company liable again because it had failed to take appropriate measures to prevent foreseeable harm.

Indeed, the objective approach would be reasonable because it is quite difficult for us to investigate the subjective state of someone else. However, this subjective approach to the meaning of “Fault” has not been abandoned jet. In the following case, the Japanese Court returned to the initial understanding of the meaning of “Fault”:

“Tokyo SMON (Subacute myelo-optic neuropathy)” case (1978)
This is a disease of the nervous system caused by the medicine called “Clioquinol” which was produced and distributed by a pharmaceutical company Ciba-Geigy. Its first outbreak was reported in 1955. However, its cause could not be identified for a long time.

During 1960s, this disease widely spread also in Japan, and at least 10,000 victims were affected. In 1966, a Swedish scientist has already identified the cause of the disease and began to fight for a ban of this medicine. In 1970, the Japanese government officially prohibited its distribution and application. The victims sued the manufacturers for damages, however, the manufacturers rejected the accusation.

> The Court held the manufacturers at fault and liable because a scientific report on the side effect of the medicine in Spanish language had been already available in a library of a provincial university in the North Japan as the manufacturers began with the distribution of the medicine.

In this case, the Japanese Court had adopted the traditional condemnation of negligence:“The tort-feasor had known or should have known the harm”. This understanding results in rather higher and harder requirement of the social responsibility for the business or industrial entities.

In case of highly developed and large-scale industrial enterprises in modern society, their high risks of harmful results are inherent in the operation of industry entities themselves. For this reason, ***a business or industry entity would be at fault and liable*** if it failed to prevent harmful results of its business operation. If it would be technically impossible to completely prevent such harms, then the operation itself should be curtailed or even completely terminated.