

One Procedural Aspect of Japanese Tort Litigation

— Quantification of Damages —

Hirotoishi Uchiumi*

1 Introductory Notes

2 Basic Understanding of Quantification of Damages

3 Difficulty and Solutions

3.1 Judges' Discretion on Quantification of Mental Damage

3.2 Presumptions by Legislation

3.3 Generous Application of Principles?

3.4 A New Procedural Article

4 Summary and Alternative to Conclusions

1 Introductory Notes

It may not seem unreasonable for me to write a paper under the title of 'Procedural aspects' of Japanese tort litigation, since I teach and research civil procedure. We currently have two separate codes, the Civil Code and the Code of Civil Procedure, under the civil Law system implemented in the late 19th century. In addition, we have a "common sense" of the distinction between matters of substantive law and procedural law, as a matter of scholarly works in general. However, particularly in the context of tort litigation, it may not necessarily be clear what aspects are 'procedural'. This concern would be particularly true when we are dealing with certain types of

* Associate Professor, College of Law and Politics, Rikkyo University. This essay is based on the script of the author's presentation at Cambridge Japanese and Comparative Law Seminar, held at 1 September 2015 under the subtitle of 'Japanese Tort Law from the Comparative Perspective.'

so-called ‘empty duty’ problems, which may be listed in typical difficulties likely faced in the area of torts.

On one hand, from procedural perspective, I may be able to attribute such concerns to the lack or inefficiency of procedural devices for litigants, typically plaintiffs, in collecting sufficient evidence of all the elements of tort claims. Some examples are, for instance, difficulty in finding proper expert witnesses or the expensive costs of hiring them, shortage of authority or enforcement power to require defendants to disclose all relevant documents, and so on. Although I do not consider that Japanese authorities would decide to implement systems such as disclosure or discovery in civil procedure in the near future, it may be true that we have been trying to improve our procedural tools constantly. To take a few examples, the availability of the order of the court to submit documents was to some extent expanded by the enactment of our present Code of Civil Procedure in 1996, and the case law under this new Code tends to interpret relevant articles towards the direction of enabling courts to issue orders to submit documents more easily and frequently, and a minor reform in 2003 allowed courts to employ some experts such as medical doctors as part-time (and presumably at lower prices than formal expert witnesses) Technical Advisers or Expert Commissioners (*Senmon-Iin*)¹⁾. These Technical Advisers are expected to provide ‘explanations’ from their professional perspectives to judges and parties mainly in pre-trial proceedings. In other words, they are distinguished from expert witnesses, literally regarded as a sort of evidence to be examined at public trials. However, the actual meaning of ‘explanations’ and the key differences between the two categories may not be so clear. While I think both phenomena are worth introducing in more detail, these issues must be skipped in this short essay.

On the other hand, we could also say that even if we have to take some uncertainties into account, the method of dealing with empty-duty problems

1) For more information about the Expert Commissioners, See, e.g., Carl F. Goodmann, *Japan's New Civil Procedure Code: Has It Fostered a Rule of Law Dispute Resolution Mechanism?*, 29 Book. J. Int'l L. 511, 598-598 (2004).

would be nothing more than a matter of societal distribution of substantive goods or costs, with which substantive law itself and various studies regarding such matters constantly concern. In fact, in Japan, we usually regard the distribution, and possible transfer, of the burden of proof of each relevant fact between plaintiffs and defendants in civil litigations, as matters regulated by statutes in the Civil Code or other legislations classified into topics in substantive law.

In addition, what is more confusing, several issues related to proof-making are treated as matters of procedural law, including the general threshold which determines the amount and quality of evidence under which judges may find an alleged fact as being true or false. It is said that this should be decided by the interpretation of the article 247²⁾ of Code of Civil Procedure, although we cannot easily construe any specific criteria from the language of the article since it simply states that judges should decide ‘based on free determination’. Nevertheless, we usually do not consider this merely as matter of judges’ free discretion, as can be seen in a famous Supreme Court decision in 1975³⁾ which stated that it requires “a high probability” or judges’ confidence to the extent that ‘normal people cannot call it into doubt’. It may mean that we have established a bar for proof of facts which is higher than that in the UK or the US. At any rate, this issue, which we may call “standard of proof (*Shoumei-do*)”, and the issue of the distribution and transfer of the burden of proof, likely overlap to some extent; however, we consider one issue as being substantive, and the other issue as being procedural. It may sound complicated.

However, what really matters is whether we have managed to appropriately deal with each individual problem on this dividing line. To be honest, we do not

2) (Principle of Free Determination)

Art.247 When making a judgment, the court, in light of the entire import of the oral argument and the result of the examination of evidence, and based on its free determination, shall decide whether or not the allegations on facts are true.

Translation released tentatively by Ministry of Justice, Japan in <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=1&re=01&dn=1&x=0&y=0&co=01&ia=03&ky=民事訴訟法&page=55&vm=02> (last visited December 3, 2015).

3) Supreme Court, Judgment, October 24, 1975 : 29 Minshu 1417.

always seem to be successful. In the following, I would like to pick just one example among such cases where we have faced longstanding issues. This example is, namely, quantification of damages. Specifically, at first I would like to introduce our basic understanding (2), and then present its limitations and multiple countermeasures (3). Thereafter, I would like to add a brief comment on the depicted situations (4).

2 Basic Understanding of Quantification of Damages

First of all, I would like to confirm that, in accordance with the article 709 of Civil Code⁴⁾, which is the most important statute in our tort law, the concept of damage has significance in at least two ways. Firstly, the existence of damage (and as mentioned later, according to our Supreme court⁵⁾, the amount of damages as it also seems) is clearly one of the essential elements of tort claims, which include negligence or intention, infringement of interests, and causation. At the same time, damages are what the statute requires defendants to compensate for when they lose the case. In other words, judges have to estimate or quantify damages suffered by plaintiffs in terms of Yen-amount and this amount has to be equal to the amount defendants should pay when the court accepts claims for compensation. In addition, I would like to introduce '*Sagaku-setsu*' or theory of difference, which is a traditional common formula defining the damages suffered by a person. There are, especially in recent days, varied understandings among supporters of the theory; however, tentatively, according to an explanation by a Supreme Court decision in 1964⁶⁾, this theory defines damages as the monetary evaluation of the difference between the hypothetical state of the plaintiff which would have been reality had it not been for the tortious conduct (a), and the actual state of the plaintiff after the

4) "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."

5) Supreme Court, Judgment, November 20, 1953 : 7 Minshu 1229.

6) Supreme Court, Judgment, January 28, 1964 : 18 Minshu 136.

tortious conduct (b). Although I cannot decisively identify the entire implications of this formula, it may be certain that under this theory, we should include not only positive expenses such as the cost of medical treatment but also lost profits which could be expected by the claimant in the future, while we should exclude punitive damages at least in its literally sense, and in principle all types of damages (mental, physical or economic etc.) can be equally compensated for.

Yet at least two questions would remain. One is whether or not under these circumstances we should understand or treat the amount of damages as being a provable fact before the court, and the other is, if so, whether plaintiffs should bear the burden of proof of as mentioned before, even though the general standard of proof in Japan is said to be higher than that in the UK.

As far as I know, traditionally⁷⁾ most Japanese lawyers considered that the answers to both questions were “YES”, which is, I think, what the Supreme Court indicated in 1953⁸⁾. In this judgment the Supreme Court says “*Obviously a plaintiff who demands compensation is required to prove not only the existence, but also the amount, of damages. The court should therefore determine whether these attempts are successful or not in light of the evidence submitted by the plaintiff. If the court determines that the proof of the amount of the damages fails, the court should dismiss the claim.*”

In short, at least theoretically, we have been inclined to consider that in tort litigation, plaintiffs are required to prove the amount of damages as a fact, which is defined as the monetary evaluation of the difference between the present status of claimants, and the status of claimants had the tortious events not happened, and that if the plaintiffs fail in their proof, then they simply lose the case as the parties bearing the burden of proof. Up to now, neither the

7) More precisely, it was true roughly until the 1960s; however, then Prof. Hirai created a well-known counter-theory, criticizing traditional theories in tort law, including those at that time, in his famous *Theory of Tort Law* (1963). Prof. Hirai's theory has been highly influential for about 50 years thereafter, so the present situation may not be the same as before Hirai. However, in a general sense, our case law has not adopted his theory yet.

8) 7 Minshu 1229.

Supreme Court nor other public authorities have officially abandoned such traditional understandings regarding quantification of damages.

3 Difficulty and Solutions

Now let's move on to the problems resulting from these traditional understandings. To keep a long story short, the problem is the possibility that some plaintiffs who have evidently suffered material damages are not able to receive any compensation because of the lack of reliable standards for quantification.

Doesn't this appear to be contradictory to what our (substantive) law really intends? And it has not been just an imaginary fear, for we have been facing difficulties in quantification of damages in various types of cases and damages. Here I would like to introduce some well-known types of cases and countermeasures which we have attempted to implement without making fatal contradiction to what the traditional theory would direct.

3.1 Judges' Discretion on Quantification of non-pecuniary Damage

At first, as you can imagine, it is not easy for judges to evaluate in Yen terms the extent of the mental pain suffered by a claimant. However, our case law has granted judges considerable leeway in quantification of mental or non-pecuniary damages since a fairly early period, i.e. the end of 19th century, and generally speaking, most people are in favor of this because of its practical validity⁹⁾.

In addition, one interesting fact is that in some cases plaintiffs try to benefit from this exception even though they suffer physical or economic damages as well. You can often see this attempt in so-called mass tort cases, where many plaintiffs desire equal remedies in the name of compensation for mental suffering in disregard of the individual status of each member, in order to

9) On the other hand, as far as I know, both Supreme Court and its predecessor (Daishin-in) have never made specific or persuasive justification for this.

reduce the costs of quantification or to maintain their solidarity. Although some court decisions are said to have approved, I am not convinced that this is accepted broadly, for, at least as I understand it, the decisions of judges in such judgments may be open to multiple interpretations¹⁰⁾. At any rate, the scope of such discretion of judges is basically limited to non-pecuniary damages.

3.2 Presumptions by Legislation

Secondly, with respect to economic losses, plaintiffs also often struggle in convincing judges that if the defendants had not performed illegal conducts the plaintiffs could have made specific amounts of money. However, the above-mentioned discretion of judges is not generally considered to be available here, because it is basically limited to non-pecuniary damages as mentioned above.

Instead, legislations have played an active role in this area. Specifically, since the enactment of Paragraph 2¹¹⁾ of Art.102 of Patent Act¹²⁾ in 1959, various acts, typically in the area of substantive law, have implemented articles to establish rebuttable ‘presumption’ of the amount of damages, usually together with statutes facilitating proof of other elements of tort liability. However, if we might hesitate in being satisfied with the explanations like ‘the statute made by the Diet is our law as long as constitutional’, We can’t help how we could questioning justify such statutes as forming a part of our

10) For example, it may be possible for us to perceive them as one type of attempt to apply basic principles generously, as introduced infra 3.3.

11) Confusingly, originally it was Paragraph 1 of the article; however, due to the implementation of new Paragraph 1 in 1998, it is currently set forth as Paragraph 2.

12) (Presumption of Amount of Damage, etc.)

Article 102

(2) Where a patentee or an exclusive licensee claims against an infringer compensation for damage sustained as a result of the intentional or negligent infringement of the patent right or exclusive license, and the infringer earned profits from the act of infringement, the amount of profits earned by the infringer shall be presumed to be the amount of damage sustained by the patentee or exclusive licensee.

Translation released by Ministry of Justice, Japan in <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&re=01&dn=1&x=0&y=0&co=1&ia=03&yo=&gn=&sy=&ht=&no=&bu=&ta=&ky=特許法 &page=25&vm=02> (last visited December 3, 2015).

consistent tort law system. One preferred explanation here is that these statutes simply transfer the burden of proof of the amount of damages to defendants under certain conditions, which indicates that these statutes have established some exceptional rules to the basic understandings, without undermining them. However, in some cases there is no guarantee that the presumed amount would approximate the amount of damages in the meaning of 'the difference' : therefore, some scholars say these legislation indicate that the difference addressed above should no longer be a general definition of damages, or simply, law can control quantification, if necessary.

At any rate, as a practical matter, as long as these legal presumptions are applicable, plaintiffs are, at least to some extent, likely able to avoid the difficulties of quantification. On the other hand, where these legal presumptions are not applicable, according to the general principles¹³⁾, plaintiffs remain required to prove the monetary amount of physical or economic damages suffered. If they fail, they would be able to receive compensation for mental suffering at most.

3.3 Generous Application of Principles?

However, in some, but not all cases, precedents have applied these principles generously to plaintiffs. The most conspicuous example among such precedents is the lost lifetime earnings of injured or killed infants. Though it may not be readily believable that 'normal people cannot call it into doubt' that an injured or dead infant would have made average income constantly but for defendants' conducts, lower court judges have granted the sum of their lost profits for 40-50 years calculated mainly based on public wage statistics with little exception since the mid-1960s. The Supreme Court also approved these attempts more than once, possibly on the grounds that it was a matter of fact-finding, due to the general principle that the Supreme Court is only basically able to review only on legal issues and not factual ones. Curiously, plaintiffs benefited from the notion that the quantification of damages is fact-

13) *Infra* para.2.

finding.

However, in other cases, such as consumer actions toward cartel of paraffin oil sellers¹⁴⁾ or cases involving misrepresentation in selling variable insurance¹⁵⁾, courts are said to have showed a more conservative attitude, which implies the extent of generosity may have possibly been limited.

3.4 A New Article in Procedural Code

Finally, I would like to introduce Article 248¹⁶⁾ of Code of Civil Procedure. This Article, which was newly implemented in 1996, allows courts to determine a reasonable amount of damages, only in the case in which the existence of damage is successfully proved but it is extremely difficult from the nature of the damage to prove the amount thereof. While the *raison-d'être* of this article is debatable among commentators, an active interpretation of the language of this article may allow courts to expand their generous attitudes to almost all cases where plaintiffs have severe troubles in persuading judges about the quantification of damages; however, we also can understand that this statute merely authorizes or restates the preexistent practices described above. At the present, I cannot identify the direction towards which our case law is heading.

On the other hand, a recent Supreme Court decision¹⁷⁾, namely, a case involving the misrepresentation of Security reports of a company, may possibly indicate that, in our case law, statutes of substantive law or statutes with

14) Supreme Court, judgment, December 8, 1989 : 43 Minshu 1259.

15) Supreme Court, judgment, March 17, 2000 : 1589 Kinyu Houmu Jijo 45.

16) (Determination of Amount of Damage)

Article 248 : Where it is found that any damage has occurred, if it is extremely difficult, from the nature of the damage, to prove the amount thereof, the court, based on the entire import of the oral argument and the result of the examination of evidence, may determine a reasonable amount of damage.

Translation released tentatively by Ministry of Justice, Japan in <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=1&re=01&dn=1&x=0&y=0&co=01&ia=03&ky=民事訴訟法&page=55&vm=02> (last visited December 3, 2015).

17) Supreme Court, judgment, September 13, 2011 : 65 Minshu 2511, which was about the misrepresentation of Securities reports of a company.

underlying policy considerations have far more significance than Art.248 of Code of Civil Procedure in the process of quantification even without specific statutes like presumptions (3.2). This is because that the Supreme Court in this decision appeared to attempt to strictly control quantifications by lower courts, utilizing the concept of ‘properness’ of causation, rather than simply entrusting lower courts with such tasks on the grounds of Art.247 or 248 of Code of Civil Procedure.

4 Summary and Alternative to Conclusions

Although our traditional understanding of quantification may appear tough to plaintiffs or tort claimants, at least practically, there are several exceptional measures to help them avoid losing cases due to difficulties in quantification as proof of facts, each of which has its own limited scope. Now, new Art.248 of Code of Civil Procedure may potentially function as a universal solution by handing over to lower court judges broader discretion in quantification of damages, at least on the condition that the existence of damages would be convincible.

On the other hand, some recent precedents regarding quantification view that quantification should be controlled by considerations relating to law or policy, rather than leaving it to the discretion of the lower court judges. However, viewed from another perspective, exceptional measures may already have been developed as the result of such considerations before the enactment of Art. 248, which could have been the reason why each scope was limited. If that should be the case, it would be more difficult Art. 248 to function as a magic bullet beyond such legal or policy considerations, than as stated in its language. However, if so, was it correct to understand quantification as fact-finding from the start? Regardless of the long history of discussions regarding quantification in Japan, the only thing seems sure is we do not yet have a clear-cut, decisive understanding of the matter.