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ЮРИСТ АХБОРОТНОМАСИ ВЕСТНИК ЮРИСТА LAWYER HERALD

ҲУҚУҚИЙ АМАЛИЁТ ВА ХОРИЖИЙ ТАЖРИБА

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DAMAGES IN JAPANESE TORT LAW WITH REFERENCE TO THE COMPARATIVE ASPECT

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ANNOTATION

Throughout the human history, when a person violates a social order and causes damage to others, law takes some sort of sanction against it. Over time, criminal liability and civil liability became differentiated; and criminal law and tort law began to separate their functions. The basic function of tort law is to compensate for damages. As for the types of damages, common law countries have nominal damages and punitive damages. But in Japan, we do not have these. In Japan, the term “damages” refers exclusively to compensatory damages. Compensatory damages can be first divided into economic damages and non-economic damages. Economic damages are divided into two categories: positive damages (*damnum emergens*) and lost profits (*lucrum cessans*). In Japan, the heir can claim to have inherited damages of lost profits and non-economic damages from the decedent.

In Japanese judicial practice, it seems that the calculation of damages is categorized and standardized by referring to the Red Book, which is based on the practice of the Tokyo District Court. The Red Book is not a law nor a court rule. It is rather a guideline, so, with a reasonable explanation, judges can deviate from this. Each case is unique and must be judged according to its individuality. It is the judge’s conscience that will stand in the end.

Keywords. Compensatory damages, positive damages, *damnum emergens*, lost profits, *lucrum cessans*, non-economic damages, calculation of damages in Japanese practice.

I have been working as Professor of the International Cooperation Department (ICD) of the Ministry of Justice since April 2021. I am originally a judge and have 11 years of experience as a judge. I was mainly in charge of civil cases in district courts. In addition, from 2017 to 2018, I was a visiting scholar at Duke University School of Law in the U.S., where I audited the class on tort law.

ICD engages in legal technical assistance to Asian countries. It provides assistance in areas including drafting and amending basic laws, improving legal and judicial system, capacity-building of legal professionals, etc. As part of international cooperation activities, I have had several opportunities to give presentations on damages in Japanese tort law. Based on the contents of those presentations, this paper will introduce damages in Japanese tort law as follows:

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5. CONCLUSION

1. Introduction

Throughout the human history, when a person violates a social order and causes damage to others, law takes some sort of sanction against it. Over time, criminal liability and civil liability became differentiated; and criminal law and tort law began to separate their functions. The basic function of tort law is to compensate for damages.

The purpose of compensation for damages is to realize corrective justice, which is one of the basic principles of justice advocated by Aristotle, and to give compensation equal to the damage suffered. I believe this concept is universal. However, it is also true that the content of damages varies from country to country. Such difference is not only in theory but also in practice.

This paper provides an overview of damages in Japanese tort law by referring to articles of the Civil Code, types of damages, positive damages (damnum emergens), lost profits (lucrum cessans), non-economic damages and wrongful death with regard to the theory of compensatory damages, calculation of damages in practice based on fictitious cases, and conclusion. The opinions expressed in this paper are personal views of the author.

2. Overview of Damages in Tort Law**(1) Articles of the Civil Code**

Japan is a civil law (continental law) country, and there is a chapter on Torts in the Civil Code.

Article 709 of the Civil Code, with the title “Compensation for Loss or Damage in Torts”, states: “A person that has intentionally or negligently infringed the rights or legally protected interests of another person is liable to compensate for damage resulting in consequence”.

Article 710 of the Civil Code, with the title “Compensation for Loss or Damage to Close Relatives”,

stipulates: “A person liable for compensation for loss or damage pursuant to the provisions of the preceding Article must also compensate for loss or damage other than of property, regardless of whether that person infringed the body, liberty or reputation of another person, or infringed property rights of another person”.

Article 711 of the Civil Code, with the title “Compensation for Loss or Damage Other than of Property”, stipulates: “A person that has taken the life of another must compensate for loss or damage to the father, mother, spouse, and children of the victim, even if the property rights of the same have not been infringed”.

Article 722(1) of the Civil Code, with the title “Method of Compensation for Loss or Damage, Deduction of Interim Interest, and Comparative Negligence”, stipulates: “The provisions of Articles 417 and 417-2 apply mutatis mutandis to compensation for loss or damage caused by tort”. Article 417 of the Civil Code, with the title “Method of Compensation for Loss or Damage”, stipulates: “Unless a particular intention is manifested, the amount of the compensation for loss or damage is determined with reference to monetary value”. Article 417-2(1) of the Civil Code, with the title “Deduction of Interim Interest”, stipulates: “In the case of determining the amount of compensation for loss or damage in relation to profits to be acquired in the future and deducting an amount equivalent to interest that is to accrue until the time of acquiring the profits, the deduction is made by applying the statutory interest rate applicable as of the time when the claim for the compensation for loss or damage arises”.

Japan’s Civil Code, influenced primarily by German and French laws, came into effect in 1898. The text of the above Article 709 through 711 have basically remained unchanged to date. I will now refer to the theory and practice of damages in tort law, which was developed through scholarly theory and a series of judicial precedents, however, the basic article itself has not changed.

For reference, the basic article of German tort law states: “A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this” [1, Title 27 “Torts”, Section 823 “Liability in damages” (1)]. Also, the basic article of French tort law states: “Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it” [2, “Extra-contractual liability in general”, Art. 1240]. These articles are similar to Article 709 of the Japanese Civil Code.

(2) Types of Damages

As for the types of damages, compensatory damages can be first divided into economic damages and non-economic damages. Economic damages are divided into two categories: positive damages and lost profits. The theory and practice of each of these damages will be explained later in detail.

Common law countries have nominal damages and punitive damages. But in Japan, we do not have these. Punitive damages are damages imposed separately from compensatory damages for the purpose of punishing antisocial behavior and deterring similar behavior in the future. In Japan, there is no legal system that allows punitive damages.

Furthermore, the Supreme Court of Japan has held that “It is evident that the system of punitive damages as provided by the Civil Code of the State of California (hereinafter, ‘punitive damages’) is designed to impose sanctions on the culprit and prevent similar acts in the future by ordering the culprit who had effected malicious acts to pay additional damages on top of the damages for the actual loss, and judging from the purposes, is similar to criminal sanctions such as fines in Japan. In contrast, the system of damages based upon tort in Japan assesses the actual loss in a pecuniary manner, forces the culprit to compensate this amount, and thus enables the recovery of the disadvantage suffered by the victim and restores the status quo ante, and is not intended for sanctions on the culprit or prevention of similar acts in the future, i.e. general prevention. Admittedly, there may be an effect of sanctions on the culprit or prevention of similar acts in the future by imposing a duty of compensation on the culprit, but this is a reflective and secondary effect of imposing the duty of compensation on the culprit, and the system is fundamentally different from the system of punitive damages whose goals are the sanctioning of the culprit and general deterrence. In Japan, sanctioning of the culprit and general deterrence is left to criminal or administrative sanctions. Thus, the system in which in tort cases, the victim is paid damages for the purpose of imposing sanction on the culprit and general deterrence in addition to damages for the actual loss should be regarded as against the basic principles or basic ideas of the system of compensation based upon tort in Japan. Therefore, part of the foreign judgment in the present case which ordered the appellee company to pay punitive damages for the purpose of deterrence and sanction in addition to compensatory

damages and the cost is against public order of Japan; and therefore, has no effect. The portion of the judgment ordering the payment of money as punitive damages is against Japan's public policy and that the Japanese Court cannot enforce this portion of the judgment because its purpose is incompatible with the basic principles of the Japanese damage compensation system" [3].

Accordingly, punitive damages are considered against Japanese public order. In Japan, the term "damages" refers exclusively to compensatory damages.

2. Theory of Compensatory Damages

I will now give a concrete explanation of the damages through three examples to make it easier to understand.

(Case1)

Ms. A, 50 years old, was distracted driving in the parking lot of a supermarket. Mr. V, 35 years old, solo bread earner of the family of four, was walking in the parking lot, was run over by A's car and was seriously injured. V was hospitalized for three months, and was eventually left with functional disability in his knee joint. V was earning 5,000,000 yen per year in his company at the time of the accident.

How would you decide? What if V dies after three months of hospitalization?

(Case2)

Mr. B, 30 years old, was feeling hopeless in life and due to such despair and self-destructiveness, he ended up stabbing Ms. W, 12-year-old elementary school student, who happened to be passing by, repeatedly with a knife. W was hospitalized for 6 months. Although her injuries have healed, she has not regained consciousness and is in a vegetative state, so, her parents take care of her at home.

How would you decide? What if W dies instantly?

(Case3)

Mr. C was driving his car at a slow speed when he accidentally collided with a car driven by Mr. X, which was parked in front of his, due to not paying enough attention to the front. Fortunately, X was not injured, but his car was heavily dented and sent for repairs, which cost one million yen. The repairs took a month, and X used a replacement car during that time.

How would you decide? What if X works for Company Y, a carrier, and is involved in an accident while driving a truck amid transportation, and Company Y claims that the absence of the truck during the repair period has caused loss of profits of the transportation business?

(1) Positive Damages (*damnum emergens*)

Positive damages are damages that the victim has incurred because of the tort. For example, in case 1, the cost of medical expenses, and in case 3, the cost of repairs etc., fall under this category. It is my understanding that this type of positive damage is basically recognized as damage in any country.

However, there are disputes as to the extent to which this should be allowed. For example, in Case 1, hospitalization expenses due to the accident are allowed without any problem, but would gratuity to doctors upon leaving the hospital also be included in the positive damages? Or for example, in Case 3, if a replacement car was used while the car was being repaired due to the accident, the replacement car fee can be considered as positive damage if the replacement was necessary. However, if the damaged car was a luxury foreign car, would it be also recognized as necessary to have a luxury foreign car replacement? This can be considered both a question of the scope of damages and a question of causation.

Furthermore, what the victim has to spend after the symptoms of the injury caused by the tort have been fixed is also considered as positive damages in Japan. In Case 2, the victim is required to bear future nursing care expenses over a long period of time. Other possible costs include the cost of future medical treatment, home remodeling, and the cost of items that will need to be replaced periodically, which, if causally related to the tort, can be also considered as positive damages.

In this regard, I have seen arguments in countries where we have been involved in legal technical assistance that such damages are not included in damages because they are future damages, since the tort clause in the civil code of the country states that "compensation shall be limited to the actual loss or damages". Certainly, there is no provision in the Japanese Civil Code that provides such a limitation on damages. In Japan, however, these damages are not recognized as future damages, but as actual damages. Opportunities for the victim to incur disadvantageous situations in the future are subject to compensation as actual damages that have already occurred to the victim in the present. In other words, these damages are considered to have already been actualized as

damages at the time of the tortious act.

In the U.S., future care needs are considered as special damages of personal injury damages in compensatory damages [4, at 370]. The American law dictionary definition of actual damages may be helpful. The Black's Law Dictionary defines that "actual damages are an amount awarded to a complainant to compensate for a proven injury or loss, damages that repay actual loss, and are also termed compensatory damages" [5]. Here, it can be seen that actual damages and compensatory damages are considered synonymous, and future care needs are also treated as actual damages in the U.S.

However, as will be explained later in the calculation of damages in practice, future nursing care costs are quite expensive in Japan, and whether or not to recognize them as damages is not simply a matter of logic, but also has much to do with the policies and insurance systems of the country; therefore, it is impossible to say what conclusion is correct.

(2) Lost Profits (*lucrum cessans*)

Lost profits are profits that would have been earned in the absence of the tortious act. For example, in Case 1, the lost earnings caused by absence from work due to hospitalization or hospital visits for treatment of the injury caused by the accident until the symptoms are fixed is called "lost earnings for missed work". Lost earnings for missed work are lost profits. In addition, a decrease in income that is recognized to occur in the future due to a decrease in loss of working capacity caused by the accident, which is called lost earnings due to impairment, are also lost profits. Furthermore, in the latter part of Case 3, there is a business profit lost because the business vehicle was sent for repair due to the accident and could not be used for business, which is also a lost profit.

While positive damages mean a decrease in property that existed, lost profits mean that the expected increase in property has been prevented. Since this expected profit is merely the hope of an increase in property in the future with some high probability, historically, it has been a question of whether or not to recognize this expected benefit as damage. In Japan, lost profits were not considered as damages in the Edo period, and even in the early 1900s, just after the current Civil Code was enacted, there were cases in which lost profits were not claimed as damages, or even if they were claimed, they were not recognized. At that time, the main focus was on compensation for tangible, concrete damages such as medical and funeral expenses.

Today, however, lost profits are recognized as damages in many countries without any special conditions. The recognition and awarding of compensation for lost profits, which are invisible to the eye, means that the protection for victims has been greatly expanded. In Japan, lost profits are recognized as a matter of course as damages. German law stipulates that the damage to be compensated for also comprises the lost profits and those profits are considered lost that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected [1, Sec. 252 "Lost profits"]. In the U.S., future lost wages are considered as special damages of personal injury damages in compensatory damages [4, at 370].

However, again, as with the issue of future nursing care costs mentioned earlier under positive damages, I have heard that some countries to which we provide legal technical assistance are operating under the belief that this is not actual damage. The word "lost profit" can be seen as a future loss. However, this is considered to be actual damage. It means that at the time of the tort, the opportunity for the victim to be disadvantaged in the future is incorporated into the process of the factual state of the victim caused by the tort, and is the subject of compensation as damage that has already occurred to the victim in the present. In this sense, the assessment of the present damage includes an objective prediction of the future situation. It is sometimes referred to as "future" lost wages, but in this context, it is only a question of actual damages. In other words, lost profits are the loss of the expected benefit of an increase in property that the victim had at the time of the tort. The problem of uncertainty in the calculation of future lost earnings is ultimately a question of degree of probability.

As will be explained later in the calculation of damages in practice, lost profits are sometimes quite expensive in Japan, and whether or not to recognize them as damages is not simply a matter of logic, but also has much to do with the policies and insurance systems of the country as I explained in positive damages; therefore, it is also impossible to say what conclusion is correct.

(3) Non-Economic Damages

Compensation for emotional damage is called non-economic damages or pain and suffering. It is believed that its origin was an ancient Roman era to satisfy the victim's retribution and to prohibit

revenge. In the Roman era, civil and criminal law were not yet separated, but in the modern law, criminal and civil liability are separated, and punishment is based on criminal procedure, while non-economic damages, a civil liability, is positioned as compensation for emotional damages caused to the victim.

As for whether to recognize non-economic damages, some countries we are involved in legal technical assistance used to deny. However, some countries now recognize it.

In Japan, Article 710 admits non-economic damages. In Germany, if damages are to be paid for an injury to the body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss [1, Sec. 253(2)]. In the U.S., every jurisdiction provides for compensation for the mental effects of physical injury, and some call these mental effects “pain and suffering,” others call them “mental anguish,” and still others describe them as “loss of enjoyment of life” [4, at 382]. As such, non-economic damages are recognized in many countries.

In principle, it is quite difficult to calculate the amount of compensation because the mental suffering caused by tortious acts differs from person to person. It is said that the standard is the pain and suffering caused to an ordinary person, and that it is determined from the standpoint of custom and fairness.

According to the Japanese precedents, in calculating the amount of compensation for mental and physical pain and suffering, the Court does not need to indicate the basis on which the amount was determined, nor does it need to explain each and every fact taken into consideration in the calculation. There is no limitation on the circumstances to be taken into consideration, so the Court can take into consideration not only the status and occupation of the victim, but also the social status and financial condition of the tortfeasor.

I will explain later how the amount of non-economic damages is calculated in practice in Japan, but the amount of non-economic damages has been categorized and standardized through a series of court cases. In the U.S., on the other hand, there is no such standardization.

(4) Wrongful Death

Each country has different conclusions on how to structure the theory if, in Case 1, V died after being hospitalized for three months, or if, in Case 2, W died immediately. This issue is known as wrongful death in common-law countries. In Japan, the issue is whether the heir can claim to have inherited damages of lost profits from the dead V/W, and whether they can claim to have inherited non-economic damages from the dead V/ W.

At the time of the enactment of the Civil Code in Japan, the prevailing theory was to deny both of them, however, later the theory moved toward affirmation, and the Supreme Court ruled that both are inherited; and thus this is now firmly established in practice. The strongest reason is that it would be unbalanced to award less compensation for the tort of death, which is far more serious than the tort of injury, and it is also in line with the public sentiment.

In Germany, in cases where death is caused, the person liable in damages must reimburse the costs of a funeral to the person under a duty to bear these costs [1, Sec. 844(1)]. If the person killed, at the time of the injury, stood in a relationship to a third party on the basis of which he was obliged or might become obliged by operation of law to provide maintenance for that person and if the third party has, as a result of the death, been deprived of his right to maintenance, then the person liable in damages must give the third party damages by payment of an annuity to the extent that the person killed would have been obliged to provide maintenance for the presumed duration of his life [1, Sec. 844(2)].

In the U.S., there are 2 causes of action to be considered wrongful death claim. The 1st is “survival action”: the decedent’s own claim for damages up to the time of his death. Such damages include, for example, medical bills and pain and suffering, just as they would have had the decedent survived. The 2nd is the wrongful death claim: the action for the losses of those other than the decedent caused by the decedent’s death. Many states in the US have survival statute and wrongful death statute, however the content varies from state to state. North Carolina enactment is quite broad in allowing for range of damages. Other states have quite severe limit, such as allowing only economic losses and nothing for the loss of the relationship with the decedent [4, at 399-400].

4. Calculation of Damages in Practice

(1) General Remarks

In Japan, the number of traffic accidents had been rapidly increasing since the early 1960s. In

1962, the Tokyo District Court established the 27th Civil Division, an exclusively specialized division for traffic accidents, in order to respond promptly to this trend. When it was first established, the judges of the 27th Division determined the amount of compensation for expenses such as funeral costs based on the amount actually spent by the plaintiff. However, this individual judgment in each case was complicated and there was also uncertainty calculation of compensation.

Therefore, the judges of the 27th Division began to follow certain rules for the calculation of damages; and judges began to attempt to compare their decisions with each other. In doing so, they refined their formulas, and the criteria for calculating damages became more detailed and specific. In 1967, "Hanrei Times" written by the judges of the 27th Division were published. This journal referred a commentary on the calculation standards for damages. In the process of developing the standard for calculating damages, there were discussions with the insurance industry and Bar Associations, and academic theories were also used as references. Even after the judge withdrew the publication, the Japan Federation of Bar Associations (JFBA) took over the task of periodically revising and publishing comprehensive calculation standards, which became the so-called "Red Book". The Red Book is published annually and provides standards for the amount of compensation based on the practice of the 27th Civil Division of the Tokyo District Court and includes judicial cases for reference [6].

I believe that categorization and standardization of damages have the benefit of maintaining fairness and balance among victims by eliminating arbitrary decisions by judges among similar cases, contributing to the speedy processing of similar cases, and making it easier to predict the outcome. The Red Book is not a law nor a court rule. It is rather a guideline, so, with a reasonable explanation, judges can deviate from this. While the Red Book is about damages of traffic accidents, it is often referred to when calculating damages in other tort cases as well.

In this regard, I am aware that in the U.S., such categorization and standardization of damages are not made in judicial practice. I think the reason for this is, first of all, the individualistic way of thinking of Americans. Furthermore, in the U.S., the jury system is frequently used in civil cases, and the jury determines the amounts of damages. If a standard for the amounts of damages were to be made, jurors would be guided by it, which would unfairly deprive them of their right to determine the facts, which may not be appropriate.

(2) Case 1

(Case1)

Ms. A, 50 years old, was distracted driving in the parking lot of a supermarket. Mr. V, 35 years old, solo bread earner of the family of four, was walking in the parking lot, was run over by A's car and was seriously injured. V was hospitalized for three months, and was eventually left with functional disability in his knee joint. V was earning 5,000,000 yen per year in his company at the time of the accident.

How would you decide? What if V dies after three months of hospitalization?

A. The former part

a. Positive damages

Medical expenses are considered as damages if they are necessary and reasonable. Hospitalization expenses will be allowed, and if the victim visited an orthopedic surgeon after being discharged from the hospital, these expenses will also be allowed.

Next are the expenses incurred during hospitalization. During hospitalization, victims are forced to pay for daily necessities (bedding, clothing, toiletries, tableware, etc.), nutritional supplements, communication expenses (telephone bills, stamps), cultural expenses (newspapers and magazines, radio and TV rental fees, etc.), and transportation expenses for family members to visit the victim, etc. However, it is extremely complicated and unprofitable to prove each of these expenses individually and to judge the reasonableness of every single expense one by one, so it has been standardized. In the Red Book, the amount is set at 1,500 yen per day. This amount is accepted in practice even if it is not proven that the total of miscellaneous expenses reaches 1,500 yen per day.

If the patient needs an attendance during hospitalization, the hospital attendant expenses are also allowed. If his wife was attending him, the standard amount of 6,500 yen per day will be approved.

The actual cost of the patient's transportation to and from the hospital will be allowed, but in the case of a private car, the cost will be calculated as 15 yen per kilometer for gasoline.

There are differing opinions on the gratuity to doctors when leaving the hospital. However, in practice, only a socially acceptable amount will be approved, taking into consideration the duration

of hospitalization, symptoms, and treatment conditions. It is said that a review is necessary because the recent trend has been that more and more doctors do not accept gratuities from patients.

b. Lost profits

I will first explain about lost earnings for missed work. The formula is: daily amount of income before accident (basic income) \times number of days of absence from work – payment. Since X is a salaried worker, the basic income is the amount of his actual income before the accident. Lost earnings due to hospitalization = 5 million yen (annual income) \div 12 months \times 3 months = 1,250,000 yen

Next is the lost earnings due to impairment. In principle, the basic income is considered the same as that of lost earnings for missed work. If there is a probability that the income will be higher in the future, this may be considered. If there was a salary increase after the accident, this fact may be taken into consideration.

The formula for the worker is: basic income \times the rate of loss of working capacity \times Leibniz coefficient for the deduction of interim interest corresponding to the number of years of loss of working capacity (generally ending at age 67).

In practice, the rate of loss of working capacity is generally determined by referring the disability grade decided by the General Insurance Rating Organization of Japan. Victim usually makes a claim directly to the insurance company to receive payment of damages before litigation. In such cases, the victim must be certified by General Insurance Rating Organization of Japan as to under which grade of disability he falls. In principle, the grading is supposed to be done in accordance with the table published by the Labor Standard Bureau, as shown below. In the case of the knee joint, if it can be said that “the use of the joint has been abolished”, it would be 8th degree, and if it can be said that “significant impairment in the function of the joint remains”, it would be 10th degree. If the injury is considered to have “left an impairment in the function of the joint”, it will be classified as 12th degree. General Insurance Rating Organization of Japan is neutral and makes decisions professionally based on medical records. However, it is not binding on the court’s decision, and sometimes the plaintiff or defendant submits a doctor’s written opinion, claiming that he or she is not satisfied with the decision by General Insurance Rating Organization of Japan, which may lead to a medical dispute, however the decision in such cases is often difficult.

Table published by the Labor Standards Bureau

| disability grade | rate of loss of working capacity | disability grade | rate of loss of working capacity |
|------------------------|----------------------------------|-------------------------|----------------------------------|
| 1 st degree | 100/100 | 8 th degree | 45/100 |
| 2 nd degree | 100/100 | 9 th degree | 35/100 |
| 3 rd degree | 100/100 | 10 th degree | 27/100 |
| 4 th degree | 92/100 | 11 th degree | 20/100 |
| 5 th degree | 79/100 | 12 th degree | 14/100 |
| 6 th degree | 67/100 | 13 th degree | 9/100 |
| 7 th degree | 56/100 | 14 th degree | 5/100 |

The reason why the period of incapacity to work ends at age 67 is that the average life expectancy in Japan is 84 years, and companies are currently extending the retirement age, so it is natural to assume that one can work until approximately age 67.

Lost earnings due to impairment are calculated by deducting interim interest, since it is a lump sum payment in the present for earnings that would have been acquired over a long period of time in the future. In practice, this is calculated using the Leibniz method. Leibniz is the name of a German scholar. For example, if a person who could have worked for another 10 years is disabled to work due to an accident, the calculation is not income at the time of the accident \times 10, but income at the time of the accident \times 8.530.

In this case, assuming that X’s impairment was determined to be 10th degree for leaving significant impairment of joint functions by General Insurance Rating Organization of Japan, and assuming that there is no dispute between the parties on this point, the amount of lost earnings would be 27,525,150 yen calculated as follows: 5,000,000 yen (annual income) \times 27% (the rate of loss of working capacity) \times 20.389 (the Leibniz coefficient at 32 years).

Leibnitz coefficient

| period | Leibnitz coefficient | period | Leibnitz coefficient |
|----------|----------------------|----------|----------------------|
| 1 year | 0.971 | 35 years | 21.487 |
| 5 years | 4.580 | 40 years | 23.115 |
| 10 years | 8.530 | 45 years | 24.519 |
| 15 years | 11.938 | 50 years | 25.730 |
| 20 years | 14.877 | 55 years | 26.774 |
| 25 years | 17.413 | 60 years | 27.676 |
| 30 years | 19.600 | 65 years | 28.453 |

In the U.S., the damages are awarded for loss of earning power, not simply loss of earnings. The proper focus is what the injured plaintiff could have earned over the course of his/ her life without the injury versus what he or she will earn, not what he or she earned or will earn in any given year. Testimony regarding what an injured plaintiff could have earned should take into account factors such as the plaintiff's age, employment record, training, education, ability to work, and opportunities for advancement [4, at 371]. The basic concept is similar in Japan, but in the U.S., it seems to be more individualized.

c. Non-economic damages

In Japan, pain and suffering damages for traffic accidents is categorized and standardized. In the Red Book, as shown in the table below, pain and suffering damages are divided into pain and suffering damages of impairment, pain and suffering damages of injury, and pain and suffering damages of death. The amount of pain and suffering damages of impairment is standardized according to the disability grade. The pain and suffering damages of injury varies depending on whether or not there are objective findings. There is a table in the Red Book for each of these, which is based on the number of days of hospitalization and hospital visits. The amount of pain and suffering damages of death is standardized according to whether the person is the bread earner in the family, the spouse, or others. Of course, these are only a rough guide, and in determining the specific amount of compensation, if there are circumstances that cause the bereaved family to suffer particularly great emotional distress, the amount of pain and suffering damages may be higher than the standard amount, taking various circumstances into consideration.

This case is divided into two parts: the pain and suffering damages of injury and pain and suffering damages of impairment. According to the table with objective findings in the Red Book, the approved amount of the pain and suffering damages of injury is 1,450,000 yen for 3 months of hospitalization. As for the pain and suffering damages of impairment, according to the Red Book, the amount is 8.3 million yen for 8th degree, 5.5 million yen for 10th degree, and 2.9 million yen for 12th degree. The amount will increase if the negligence of the tortfeasor is serious, if the manner of the accident is malicious, or if the attitude of the tortfeasor after the accident is extremely insincere.

Pain and Suffering Damages (“Red Book”)

Pain and Suffering Damages of Impairment

- 1st degree : 28M yen • 8th degree : 8.3M yen • 10th degree: 5.5M yen etc..

Pain and Suffering Damages of Injury

- There is a table that separates cases with and without objective symptoms based on the duration of hospitalization or hospital visits.

Pain and Suffering Damages of Death

- Bread earner in the family : 28M yen • Spouse : 24M yen • Other :20M yen~

B. The latter part**a. Positive damages**

Medical expenses, expenses incurred during hospitalization, and hospital attendant expenses are the same.

According to judicial precedents, funeral expenses are allowable to the extent that they are deemed reasonable under socially accepted norms. In the Red Book, the amount is set at 1.5 million yen in principle. Even if the actual funeral expenses exceed 1.5 million yen, only 1.5 million yen is admitted in practice. The reasons for this are: it is not easy to determine an objective amount of funeral expenses that are considered necessary and reasonable in terms of socially accepted norms for each victim; it is possible that the scale of the funeral service differs depending on the social status of the victim; etc., but allowing such a disparity based on social status may cause unfairness. In addition, the amount to be paid by the bereaved family can be close to 1.5 million yen in the end because of the income from condolence money. However, there is room to admit more than 1.5 million yen if the funeral has special characteristics.

b. Lost profits

Lost earnings due to hospitalization are the same.

The amount of lost earnings of death is 71,361,500 yen. The formula is: 5 million yen (annual income) \times 100% (rate of loss of working capacity) \times 20.389 (Leibniz coefficient for 32 years) \times 70% (deduction for living expenses).

When V dies, he is exempted from paying cost of living to earn the income that he would have earned if he had lived, so the victim's own living expenses after his death are deducted when calculating lost earnings. According to the Red Book, when the victim is the breadwinner of the family and has two or more dependents, 30% of the living expenses are deducted.

c. Non-economic damages

As explained earlier, the amount of pain and suffering of death is also categorized and standardized, and according to the Red Book, 28 million yen is for the family bread earner.

According to the Red Book, the amount of pain and suffering of injury is 1,450,000 yen.

(3) Case 2

(Case2)

Mr. B, 30 years old, was feeling hopeless in life and due to such despair and self-destructiveness, he ended up stabbing Ms. W, 12-year-old elementary school student, who happened to be passing by, repeatedly with a knife. W was hospitalized for 6 months. Although her injuries have healed, she has not regained consciousness and is in a vegetative state, so, her parents take care of her at home.

How would you decide? What if W dies instantly?

A. The former part**a. Positive damages**

Medical expenses, expenses incurred during hospitalization, and attendant expenses are the same as in Case 1.

In this case, the issue is future nursing care expenses. Future nursing care expenses are not recognized as damages unless there is a need for nursing care. 1st degree and 2nd degree of disability are explicitly defined as disabilities that require nursing care. However, in practice, even for other disabilities, if the necessity for nursing care is recognized after examining of the evidence, future nursing care expenses will be recognized as damages.

The formula is: daily amount \times 365 days \times Leibniz coefficient corresponding to the number of years of nursing care.

The period of nursing care is meant to be the period during which the victim is expected to survive in the future, which is, in principle, the average life expectancy of Japanese people in the year in which the symptoms are fixed. There is an argument that the period of nursing care for a victim in a vegetative state should be limited to a shorter period than the average life expectancy. However, recent court decisions have the tendency that even if statistical data or epidemiological studies exist, they are not sufficient data for determining the lifetime, and therefore, unless special circumstances are found that deny the probability of survival to the average life expectancy of the Japanese people, the average life expectancy of the Japanese people is recognized as the period of viability even if the patient is in vegetative state.

The specific daily amount differs depending on whether the caregiver is a professional caregiver or a close relative providing care at home. In the latter case, the amount is standardized at 8,000 yen per day.

$8,000 \text{ yen (daily amount)} \times 365 \text{ days} \times 29.365 \text{ (Leibniz coefficient for a life expectancy of 72 years)} = 85,745,800 \text{ yen.}$

However, as can be seen, future nursing care expenses are more likely to be subject to change in circumstances and are more familiar with periodic installment payments than lump-sum payments. Although there are arguments such as whether a judgment can be entered for periodic payments when the plaintiff is claiming lump-sum payments, there are growing calls for more use of periodic payments.

b. Lost profits

Regarding lost earnings, this 12-year-old girl was an elementary school student and had no income. When the victim is a child, until around 1960, there were judgments dismissing claims for lost earnings as unquantifiable.

In 1964, the Supreme Court held that it was not permissible to deny damages for lost earnings to an 8-year-old boy who died as a result of an accident on the grounds that they were unquantifiable, and that the amount should be calculated as objectively as possible based on statistical tables and other data, and that this should be allowed as damages for lost earnings [7].

In 1974, the Supreme Court ruled that a 7-year-old girl who died in the accident should be awarded damages for lost earnings based on the assumption that she would marry at age 25, the average age of first marriage for women, and that her domestic work after marriage should be calculated as generating earnings equivalent to the average wage of a female worker until she reached the average age of incapacity for work [8].

However, the average wage of women is lower than that of men, which leads to a disparity, and criticism is raised against this. They say that it is gender discrimination to have a disparity in the amount of compensation for children, even though the future possibilities are completely unknown for both boys and girls. Therefore, for younger women, the average wage at the time of death is now used as the basic income, taking future possibilities into consideration and with a view to eliminating gender difference as much as possible.

There is some debate as to whether or not to deduct living expenses since the victim is in a vegetative state, however, since such victims have the same expenses as normal persons, we generally do not deduct living expenses.

In this case, the amount is as follows

$4,872,900 \text{ yen (average wage of all workers in 2020)} \times 100\% \text{ (rate of loss of working capacity)} \times \{26.774 \text{ (Leibniz coefficient corresponding to 55 years, the number of years until age 67)} - 5.417 \text{ (Leibniz coefficient for the six years up to age 18, the age at which employment begins)}\} = 104,070,525 \text{ yen}$

c. Non-economic damages

The pain and suffering damages of injury is 2,440,000 yen for 6 months according to the Red Book.

According to the Red Book, the pain and suffering damages of impairment is 28 million yen for the 1st grade, but this is the standard for traffic accidents, so the mental anguish caused by the extremely malicious tort in this case is not covered by the standard. The amount will be increased because the mental pain caused by the extremely malicious tort in this case is higher than that of a traffic accident.

B. The latter part

a. Positive damages

The positive damages are funeral expenses in the amount of 1.5 million yen.

b. Lost profits

When the average wage of all workers is adopted for younger women, the practice is to use a cost-of-living deduction rate of 45 percent.

The lost earnings due to death is 57,238,788 yen. The formula is $4,872,900 \text{ yen (average wage of all workers in 2020)} \times 100\% \text{ (rate of loss of working capacity)} \times 26.774 \text{ (Leibniz coefficient corresponding to 55 years, the number of years until age 67)} - 5.417 \text{ (Leibniz coefficient for 6 years, which is the age at which the worker begins working, up to age 18)} \times 55\% \text{ (cost-of-living deduction rate)}$

The above lost earnings will be received by the heirs, the parents of the victim girl.

In Germany and the U.S., the surviving family members can basically only make a claim for loss of maintenance, so in this case where there is no such loss of benefits, the surviving family members cannot claim for lost earnings. This is where Japan differs from other countries in its conclusions.

c. Non-economic damages

According to the Red Book, the amount of pain and suffering damages of death ranges from 20 million yen to 22 million yen. But the amount is expected to be increased because of the brutality of the murder.

(4) Case 3

(Case3)

Mr. C was driving his car at a slow speed when he accidentally collided with a car driven by Mr. X, which was parked in front of his, due to not paying enough attention to the front. Fortunately, X was not injured, but his car was heavily dented and sent for repairs, which cost one million yen. The repairs took a month, and X used a replacement car during that time.

How would you decide? What if X works for Company Y, a carrier, and is involved in an accident while driving a truck amid transportation, and Company Y claims that the absence of the truck during the repair period has caused loss of profits of the transportation business?

A. The former part

The repair cost of 1,000,000 yen is recognized as positive damages. However, if this exceeds the objective value of the vehicle at the time of the accident and the replacement cost, the objective value of the vehicle at the time of the accident and the replacement cost will be admitted. The reason for this is that if more compensation is awarded, the victim will benefit from the accident.

Replacement car fees are not allowed unless there is a need for a replacement car. If the car was used for commuting to work or school, it is allowed, but if this car was only used for leisure or hobbies, it is controversial.

The period of use of a replacement car is limited to the reasonable period required for repairs. As a general rule, it is considered to be approximately two weeks for repairs. Depending on the reason for the prolonged period, it will be decided whether or not to allow a replacement car fee for the excess period.

In the case of an accident in which only the vehicle is damaged, as a general rule, non-economic damages are not admitted.

B. The latter part

This is an issue of business profits lost due to the inability to use the business vehicle for business purposes because it was sent for repairs due to the accident.

If replacement vehicle fees are allowed, business damages are not allowed. In addition, it is also necessary to consider whether there were any idle vehicles. Since it is not uncommon for a person who operates a business using vehicles to own several vehicles of the same type, even if a vehicle is unusable due to an accident, the damage may be avoided by using another vehicle. If the idle vehicle could be easily utilized, business profit lost would not be admitted as damages.

The formula is (operating income per day of the vehicle involved in the accident - variable expenses) × number of days accident vehicle was unusable.

5. Conclusion

As described above, I have explained the theory and practice of Japanese tort law, and the latter half of this paper described how to calculate damages in practice in particular. The purpose of this paper is not explain the details of the theory of Japanese tort law.

In Japan, it seems that the calculation of damages is categorized and standardized, but I hope there is no misunderstanding. Each case is unique and must be judged according to its individuality. As for the calculations for the fictitious cases mentioned, please note that it is just one example, and the conclusion can differ from case to case. I believe that the role of the judge is to pay careful attention to the individuality of each case and make flexible judgments. The Red Book is a reference material, neither a law nor a rule. It is the judge's conscience that will stand in the end.

I would like to extend my sincere gratitude to all those who have assisted me in publishing this paper.

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