論　　説

Non-Economic Losses under Japanese Law from a Comparative Law Perspective (5)

Ruben E. Rodriguez Samudio

I. JAPANESE LAW FROM A COMPARATIVE PERSPECTIVE

This chapter analyzes the Japanese legal doctrines and ideas previously introduced, beginning with the societal background that led to the development of the Japanese Civil Code. The end of the chapter presents the conclusions and considerations of this paper.

The French *Code* was heavily influenced by the experience gained from the French Revolution; thus, it was designed as a document that the general population could read and understand. By contrast, the BGB was a product of the historical review of legal ideas, a tool for legal professionals to fulfill their profession without special consideration for non-specialists. The Japanese Civil Code does not squarely fit into either of these two models. Indeed, the code resulted from an immensely disadvantageous situation that affected the country during the 19th century. As such, it was a tool designed with a highly specific goal in mind: to demonstrate to the Western powers that Japan was a civilized nation under the Western ideals of the time. Therefore, the idea that the Japanese Civil Code was written with the ordinary Japanese individual in mind seems unfounded.

However, it cannot be said to have been thought of as a tool for legal professionals. The differences in background between Japan and Germany are far too drastic for that to be the case. The study of Roman law influenced the scholarly discussions in Germany during the 19th century. By contrast, the Japanese drafters were tasked with distilling the doctrines, case law, and ongoing European debates to introduce them to the Japanese public. Therefore, it is possible that, at the time, the average Japanese lawyer or judge would be reading some of these ideas for the first time.

Furthermore, the *ius naturalism* that marked the French legal thought of the time contrasts with the positivistic approach of German scholarship. While the top members of the committee wanted the codes to follow the Germanic model, the drafters were not necessarily bound by such ideas. Indeed, the inclusion of Article 710 dealing with non-economic losses can be better explained under the French and English influences, which further supports the argument that German ideas did not influence delictual liability and its elements under the Japanese Civil Code.

In France and Germany, the spirit of the law also influenced subsequent legal developments. For example, French scholars and courts were more receptive to developing the concept and ideas of non-economic losses in areas the German scholars and courts kept a limited interpretation of the law. By contrast, Japan faced the fact that through the years, the courts and scholars have opposed the drafters' intent on numerous occasions. Tomii was very critical of French law and exalted the virtues of the BGB. This endorsement has been used to support analysis of the BGB to import legal doctrines into Japanese legal thinking. However, the fact of the matter is that Tomii promoted the BGB many years after the enactment of the Japanese code and the BGB when the influence of the French school of legal thought had already waned. After the death of Ume, the counterbalance to the German school of thought wavered and the influx of German ideas increased, sometimes without an understanding of their background.

This disconnect caused scholars to seek to explain institutions that originated in social conventions of an era using modern theories that have long been removed from their roots.

How courts and scholars construe rights exemplify how time affected the interpretation of the Japanese Civil Code. For example, the transference of the victim's claims for non-economic losses, and non-economic losses of the victim's relatives. Particularly in the first case, the courts went from a strictly limited view of the concept of rights to expanding liability to cover the infringement of legal interests. As previously stated[1], this runs contrary to the drafters' ideas regarding the role of law and the meaning of the right infringement requirement. Hozumi, for example, was clear that the infringement requirement served to clarify the conduct that was expected from the parties.

However, by expanding liability to include legal interests, the courts recognize that such interests might have a basis that is not a legal right as specifically codified in a positivistic way. This stance is arguably more in line with a French view. Furthermore, even if the code was initially written for bureaucrats, the reforms that took place from 2004 to 2005 were made under the assumption that it exerted a great deal of influence on daily life and economic activities.[2]

Additionally, various legal theories introduced via precedent, such as the protection of legal interests not covered under a specific statute in the particular case of delictual liability, clearly suggest a different legal consciousness, one that is farther from the positivistic doctrines of the late 19th century. Therefore, in terms of delictual liability, the

1 Ruben Rodriguez Samudio, *Non-Economic Losses under Japanese Law from a Comparative Law Perspective (2)*, 73(3) The Hokkaido Law Review 17 (2022).

2 *Minpo Gendaikaan Hosoku Setsumei* available at: http://www.moj.go.jp/content/000071232.pdf.

Japanese Civil Code has long abandoned the ideas of its drafters and has become a more accessible text than initially intended. Though it is still mainly used by law professionals, the changes in the last reform have made it more accessible to most individuals who approach it.

Ⅱ. THE ELEMENTS OF LOSS UNDER JAPANESE LAW

While Article 709 of the Japanese Civil Code follows a model closer to the French *Code*, traditionally, there have been no discussions on the nuances of the word *songai*. When referring to the distinction between dommage and préjudice, Morita notes that the meaning given to the word *songai* under traditional Japanese scholarship corresponds with *préjudice, i.e.,* the abstract loss suffered by the victim as a result of the *dommage*.[3] However, he does not explain how this abstract concept fares when confronted with the amount difference theory or any other theories regarding loss in civil scholarship.

Following De Cupis's argument about formal and material elements of harm, the language in the first part of Article 709 is challenging to interpret, as it can be construed as representing both elements. In contrast, Article 1240 of the French *Code* inherently represents the formal element of harm, *i.e.*, the legal obligation of the aggressor to repair any loss suffered by the victim. By establishing no special requirements regarding harm and loss besides their emergence, the *Code* allows for a clear division of the material and formal elements and limits confusion. Furthermore, the monetary compensation element and emergence of harm and loss requirement are both structurally and linguistically unique elements under the French *Code*, which permits an analysis that treats them differently. Conversely, under the requirement of unlawfulness, the German BGB provides

[3] Hiroki Morita, *Joron –Songai Gainen ni tsuite–*, 86 Horitsu Jiho 55, 56 (2014) (Japan).

more formal elements to legal harms and losses but offers a list of losses that serve as limits to the material element, *i.e.*, not all losses or harmful events yield civil liability.

Furthermore, to analyze Article 709 of the Japanese code under the model presented by De Cupis, it is necessary to make a slight distinction concerning the 2004-2005 reforms. It can be argued that before the reforms, the formal and material elements of loss, *i.e.*, a legal rule that enshrines the loss and a legal event that causes it, were found within the concepts of *songai* and the infringement of rights. Indeed, if this view is adopted, the arguments and discussions the drafters had regarding the necessity of the violation of rights requirement are somewhat moot. Both the legal event and the legal result – or, under Italian terminology, *danno evento* and *danno conseguenza* – are necessary for a loss to be recognized.

However, regardless of any arguments among the drafters concerning the importance of these two elements, the stance taken by the code supports the view that the drafters understood that the fundamental difference between having a system in which both material and formal elements were confused into one figure and having one that made a distinction between the two.

In addition, discussions on the difference between *dommage* and *préjudice* were not part of Japan's legal scholarship, as no single concept could be used to replace *songai*. This is perhaps due to pervasive positivist ideas at the beginning of the century. Nevertheless, it is clear from the case law and the drafter's opinions that the concept of *songai* is not as simple as some scholarship has made it out to be. In particular, the formal element of loss is clearly established, *i.e.*, only losses resulting from infringing a legal right can be considered legally relevant.

The Japanese delictual liability system also grants a unique role to the concept of unlawfulness. The traditional view in comparative law is that unlawfulness is used to limit the extent of delictual liability.

Only unlawful acts, either through illegality or transgressing a social norm, are considered reproachable. The infringement requirement was included to prevent liability from expanding too much and to create a clear standard for the conduct of society's members. However, Japanese courts and scholars opposed such a limited view of rights and legal interests, and to escape the limitations set by the drafters, used the concept of unlawfulness to increase the number of legal interests that would give rise to delictual liability upon infringement. The result was that scholars and courts had to analyze the different requirement of unlawfulness to justify the expansion of the scope of liability beyond formal legal rights. Nevertheless, since the word used for unlawfulness, *iho*, can also be translated as illegal, there is confusion between these two terms.

Furthermore, the state of scholarship regarding loss has also influenced the concept of unlawfulness, as many scholars have approached the issue by examining the conduct of the wrongdoer without analyzing whether a particular loss should be considered recoverable and, if so, which elements permit a loss to be considered legally relevant beyond the requirement of causality.

Ⅲ. THE CONCEPT OF NON-ECONOMIC LOSSES

In Japan, though non-economic losses are usually studied under the figure of *isharyo*, some scholars have approached the issue of the protected legal interest. The most common type of loss recognized is emotional distress, followed by physical pain. However, since Article 710 has been construed as a guide rather than a list, the courts can protect new interests without much issue.

Regardless, the point made by Ito that Japanese lawyers tend not to concentrate too much on the concept of non-economic losses becomes more evident when trying to classify or define the system followed by the courts and scholars. Following the division presented by Dominguez, non-economic losses under Japanese scholarship are arguably closer to a positive concept than a negative one. For once, scholars have debated the existence of personality rights, or *jinkakuken*, since the early 20th century. However, since these are legal interests rather than losses, concerns arise regarding understanding them under Article 709 and Article 710. Furthermore, while it is true that legal interests, such as an individual's name, honor, and body, are traditionally included within personality rights, family rights are usually not provided with such denominations. Thus, Japan's law of non-economic losses is not limited to personality rights.

Even after the 2004-2005 reforms, delictual liability is based on the concept of infringement, at least at the statutory level. Therefore, at least in theory, the plaintiff must present evidence that convinces the court of the occurrence of a loss. However, case law clearly indicates that it is the judge who ultimately decides the matter, and that they need not explain how they reached their conclusions. Therefore, not all non-economic losses are viewed under the same prism. It can be argued that the Japanese courts have evolved a system similar to that of objective and subjective non-economic losses, even if the courts and scholars do not discuss it in such a manner.

The infringement of *jinkakuken* can be considered a type of subjective non-economic loss, i.e., the loss exists in res ipsa, in which case infringement and loss requirements merge into one, raising the question of whether it is necessary to meet both for the wrongdoer to be liable. The issue then shifts from any losses suffered by the victim to how to determine when a legal right has been infringed upon, which would result in the circumstances surrounding the defendant's conduct being granted even more importance.

An example is a 1988 case in which the Japanese Supreme Court[4]

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[4] Saiko Saibansho [Sup. Ct.] Feb. 16, 1988 Sho 58 (o) no. 1311 Minshu 42-2-27 (Japan).

ruled on an infringement of the right to a person's name, or *jinmeiken*. This suit was brought by a Korean individual whose name was mispronounced during a news broadcast. The Court began by explaining that a person's name is not only a means for society to identify its members but also one of the fundamental aspects of an individual's personality. Therefore, individuals have a right to be called by their name correctly. However, the Court denied the plaintiff's request for damages, explaining that, although such a legal interest warranted protection, it differed from cases of fraudulent name use since mispronunciation did not immediately meet the criteria to be considered one of the legal interests protected under delictual liability. Instead, the motivations and extent of the infringement, and the personal and societal relations between the defendant and plaintiff should be used to establish liability. Furthermore, since the pronunciation of Chinese characters in Japanese varied from that in Korean, the defendant's act could not be considered unlawful, as it had to be analyzed from the point of view of Japanese society and customs.

The Court's argument is sound, as it would be unreasonable to expect individuals to pronounce a name using sounds foreign to their mother tongue. However, in this case, the issue was with two different readings of Chinese characters, both of which exist in Japanese. The defendant did not mispronounce the name but used a completely different reading. Furthermore, the fact that the defendant was on a news show would support the idea that it had an obligation to check the basic facts, such as pronunciation. However, the biggest issue is that the Court did not follow the standard they set for themselves. In other words, while the Court talked about motivation, extent, and personal and social relations, it ultimately approached the issue from the cultural difference between the Japanese and Korean languages.

In addition, the Court did not mention which types of losses would arise if the infringement of the right was confirmed, *e.g.*, emotional distress, loss of status, etc. Therefore, arguably, the plaintiffs would only have to prove that their rights have been infringed upon, which would suffice to grant a remedy. However, it is unlikely that these issues will be revisited, since these cases are rare, perhaps due to the Supreme Court decision. Nevertheless, as subjective non-economic losses, the courts' presumptions about the loss could be classified as *iuris et de iure*, which would mean that defendants are liable the moment they infringe on a right or interest, without the possibility of presenting a legal defense.

Once the discussion leaves the realm of *jinkakuken*, the issue of the loss suffered by the victim becomes more subjective. For example, as public nuisance cases illustrate, courts in Japan might approach the issue of non-economic losses by focusing on the changes to a victim's life to establish liability. Therefore, courts address could address the issue either by recognizing the loss as proof that an infringement has occurred or by focusing only on the adverse situation of the victim. Early case law would seem to support the first approach. However, scholarly discussions led to the creation of the right of *heion no seikatsu*, and with it, a return to a more traditional interpretation of the law. Since many of these cases are managed by balancing the defendant's conduct's effects on the plaintiff's lifestyle, the mere infringement of a right is not adequate to grant a monetary award.

Claims arising from property damage also support the idea that in some cases dealing with non-economic losses, the loss of the victim must be considered, regardless of the infringed right. The fact that the courts require plaintiffs to prove an emotional connection to the damaged property is an example of how Japanese courts approach subjective non-economic losses.[5] However, these types of cases are

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[5] However, Japan is not alone in granting remedy for this type of loss by requiring an emotional connection between the property and the plaintiff.

See: Corte Suprema de Justicia (C.S.J) (Supreme Court) 26 de junio de 2008 (Pan.).

outliers. Traffic accident cases where remedy is granted for emotional distress, regardless of physical injuries, exemplify how fear is a non-economic loss that must be accompanied by actual danger. This stance is similar to some U.S. courts' zone of danger.

Furthermore, there is the issue of the legal defenses available to defendants. Traditionally, the courts of countries that recognize this distinction have established that the defendant can present evidence to prove that the plaintiff did not suffer the alleged emotional shock. It is possible to argue that Japanese courts are also willing to recognize that, in some instances, the presumption of the existence of non-economic losses can be overturned based on the facts of the case. However, the question remains regarding the possibility of expanding this theory to other instances. Cases dealing with extramarital affairs would support this idea, as the courts are willing to surpass the mere infringement of a right and assess the relationship between the parties.

Ⅳ. LOSS OF CHANCE IN MEDICAL MALPRACTICE CASES

In some countries, the loss of chance doctrine is an independent legal wrong. Its primary purpose is to strengthen the position of the victim in situations in which obtaining proof of a causal link might be difficult.[6] In France, the doctrine was recognized in 1889 and first applied to medical malpractice cases in 1961. Some countries consider the principle an independent head of loss, which refers to the victim's final loss.

Corte Suprema de Justicia (C.S.J)(Supreme Court) 1 de septiembre de 2008 (Pan.).

[6] *Causal Uncertainty and Damages Claims for Infringement of Competition Law in Europe*, CLES Research Paper Series 2/2015 Centre for Law, Economics and Society CLES Faculty of Laws, UCL 20 (Ioannis Lianos dir., 2015).

Ferreira explains that there are four positions regarding the victim's losses in these cases.[7] One position argues that the doctrine should be applied in cases where it is impossible to identify an autonomous loss, *i.e.*, the loss is independent of the injury suffered by the victim. Another position argues that there are no substantial differences between loss of chance in medical cases and other cases, but compensation should be decreased based on the risk. A third view argues that the doctrine should be applied to most medical malpractice cases. Finally, the fourth view posits that the doctrine does not constitute an autonomous loss but expresses the idea of partial causality.

In the U.S., the loss of chance doctrine has been employed in medical malpractice cases to overcome the difficulty of proving causation, where most plaintiffs lack the required technical knowledge or training to ascertain a more likely-than-not scenario.[8] There, the issue can be approached either as a matter of causation or as a valuation aspect of damages.[9] However, because both views address

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[7] Rui Cardona Ferreira, *The Loss of Chance in Civil Law Countries: A Comparative and Critical Analysis*, 20 Maastricht Journal 56, 61 (2013) (Port.).

[8] Steven R. Koch, *Whose Loss Is It Anyway? Effects of the "Lost-Chance" Doctrine on Civil Litigation and Medical Malpractice Insurance*,88 North Carolina Law Review 596, 603 (2010).

Robert J. Rhee, *Loss of Chance, Probabilistic Cause, and Damage Calculations: The Error in Matsuyama v. Birnbaum and the Majority Rule of Damages in Many Jurisdictions More Generally*, 1 Suffolk U. L. Rev. Online 39, 40 (2013), available at http://scholarship.law.ufl.edu/facultypub/470.

[9] For example, Fischer argued that: "*Loss of a chance becomes a theory of 'probabilistic causation' if we use it to hold the physician liable for the patient's harm but reduce any award by the chance that the harm would have occurred even with proper diagnosis and treatment. If, for example, the chance of a cure was 40 percent, under a 'probabilistic causation' rule, the physician would be liable for 40 percent of the patient's harm because the physician deprived the patient of a 40 percent 'chance' of avoiding the harm.*" David A. Fischer, *Tort*

this matter, some courts have struggled to define loss in cases regarding loss of chance.[10] Nevertheless, the challenge of ascertaining loss is traditionally approached in one of two ways[11]. The first allows victims to recover 100% of losses if their chances were initially over 50% or the practitioner's negligence is considered a substantial factor in hastening the loss.

The second approach grants the victim recovery only for a percentage of the loss, *i.e.*, courts will determine the rate of survival or recovery before and after the procedure and apply said percentage to the standard award in other cases. The loss, therefore, is not the infringement of chance but rather the actual loss suffered by the victim, albeit limited in some fashion. In contrast, there is no doubt that the doctrine is used to relax the requirement of causation, though the actual loss suffered by the victim is still the subject of discussion.

Terasawa considers that, at the very least, the reduction of the time left for the patient can be regarded as recoverable.[12] She states that there are various views on the matter.[13] One view argues that the matter should be approached based on a percentage of causation. Another view supports the idea that causation should be avoided altogether, and that the infringement of the expectation right causes a non-economic loss. A third view considers that the loss of chance is the loss, and that monetary awards should be percentage values. Furthermore, while most of the scholarship supports the idea that the

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Recovery for Loss of A Chance, 36 Wake Forest L. Rev. 605 (2001).

[10] George J. Zilich, *Cutting through the Confusion of the Loss-of-Chance Doctrine under Ohio Law: A New Cause of Action or a New Standard of Causation*, 51 Clev. St. L. Rev. 673, 678 (2002-2003).

[11] Edward Kionka, Torts in a Nutshell 43 (2015).

[12] Tomoko Terasawa, *Soto Teido no Kanosei Singai ni okeru Songai ni kansuru Ikkousatsu: Koi Gimu kara no Apurochi*, 43(2) Sangyo Hogaku 207, 207 (2009) (Japan)

[13] *Id. at* 208.

infringement of the expectation right is grounds for *isharyo*, a group of scholars has argued that it should also include economic losses.

In addition, Terasawa mentions that since substantial probability is an abstract concept, losses resulting from the infringement of said legal interest should also be considered abstract. Therefore, the issue of the nature of the loss persists.[14] This is particularly true if the issue is addressed under the traditional amount difference theory, as victims would not have suffered a loss in the sense that their situation would have been the same regardless of the defendant's acts. Hence, cases dealing with substantial probability, or *soto teido no kanosei*, usually exemplify the courts taking the approach of the real loss theory.[15]

Ishikawa and Ohba index and analyze 59 cases spanning from 2000 to 2012. Their results reveal that the lower courts do not approach substantial probability issues as a matter of loss, but rather as a matter of causal link between the conduct (fault) and the result (death) of the victim.[16] Furthermore, Ishikawa and Ohba classify the infringed interest into five classes: *kitaiken* (expectation right), *kyumei kanosei* (possibility of saving the life of the victim), *enmei kanosei* (possibility of extending the life of the victim), possibility, *iryo kikai* (opportunity to receive medical treatment), and finally, those cases with no quoted legal interest. This last heading was the most numerous (30 cases), followed by *iryo kikai* (11 cases), *enmei kanosei* (five cases), possibility (four cases), *kitaiken* (three cases), and

14 *Id. at* 210.

15 See: Kaoru Kamata, *Ishi no Shindan Gimu no Taiman to Kanja no Shibo tono Ingakankei, in* HORITSU JIHO BESSATSU「SHIHO HANNREI RIMA-KUSU 2000 (JO)」*20*, 73 (2000) (Japan), Tadashi Otsuka,「*Fusakui Iryo Kago ni yoru Kanja no Shibo to Songai・Ingakankeiron ― Futatsu no Saiko Saikosai Hanketsu wo Kiroku toshite*」, 1199 Jurist 11, 13 (2001) (Japan).

16 Hirotoshi Ishikawa and Megumi Ohba, *Iryo Sosho ni okeru「Soto Teido no Kanosei」no Hyouryu*, 61(3) The Journal of law & politics 81, 104 (2010) (Japan).

kyumei kanosei (two cases). In some cases, the courts referred to two legal interests.

Regarding victims' losses, a perusal of the data reveals that of the 53 lower court cases, the *isharyo* compensated for emotional distress in 28 of them. At the same time, there is no mention of emotional suffering in the other 25. The distribution of cases in which emotional distress was recognized was as follows: expectation rights, two cases; possibility of saving the life of the victim, two cases; possibility of extending the life of the victim, three cases; possibility, four cases; opportunity to receive medical treatment, five cases, with the remainder quoting no legal interest.

This sample supports the argument that victims' losses fall into one of two camps under the Japanese doctrine of substantial probability. Under the first, the courts follow the general rules of delictual liability under Article 709, *i.e.*, the loss is a result of the infringement of legal interests of the victim. In these cases, losses are limited to the emotional distress suffered by victims and their relatives. Furthermore, since the courts do not address the matter in terms of percentage, this emotional distress seems to be independent of that which results from the victim's death in other types of cases. Perhaps as a result of discussions regarding the transferability of a claim via *mortis causa*, scholarship does not seem interested in exploring the matter of whether or not the victim could actually have suffered any emotional distress.

Under the second camp, courts consider the infringement itself is enough to warrant a remedy. Analyses of cases based on this model can assume one of two perspectives. First, these cases could be thought of as examples of subjective non-economic losses, *i.e.*, the courts are compensating for a type of non-economic loss, such as emotional distress, that is so closely linked to the infringed right that the infringement itself becomes indistinguishable from the loss. The second perspective would be to consider these infringements in the same manner as the infringement of civil liberties, *i.e.*, the infringement itself suffices to grant the victim liability, regardless of any actual loss. Therefore, the loss under this doctrine is addressed from either the first or second perspective mentioned by Ferreira, with little to no relation to the doctrine of loss of chance as it is understood under common law.

V. EXTRAMARITAL AFFAIRS

Since marriage is a highly emotional legal relation that requires concrete steps to both begin and end, granting damages for emotional distress resulting from the extramarital affairs of one of the spouses is logical to a certain extent. However, Japanese courts grant remedy under the argument of protecting family ties. Therefore, the spouses' actual feelings are not considered when determining liability. This entails that even rights such as those arising from marriage, which have a clear beginning and end, are not absolute. Instead, liability for non-economic losses can adhere to the general rules of delictual liability set forth under Article 709.

These cases provide one of the most straightforward cases of subjective non-economic losses in Japanese law, while being a type of legal recovery that is particular to Japan. For example, Spanish courts have traditionally rejected claims for non-economic losses resulting from extramarital affairs. However, some lower courts have granted damages when a child is born from the affair.[17] In Argentina, the

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[17] S.A.P.de Barcelona Jan. 16, 2007 nº 27/2007 (Spain) Wife had an affair that resulted in pregnancy.

S.A.P. de Valencia Nov. 2, 2004 nº 597/2004 (Spain) The plaintiff found out that three of the four children born during marriage were not his. Court granted damages.

S.A.P. de Valencia Sep. 5, 2007 nº 466/2007 (Spain) Plaintiff discovered the child was not his.

courts had traditionally granted damages for these types of affairs in some instances. Still, the Civil and Commercial Code enacted in 2014 abolished the claims in the cases of infidelity, considering that fidelity is a mere moral obligation.[18] The courts in Chile have also rejected these types of claims based on the traditional separation of family law and civil law, the former maintaining its own unique rules.[19] More recently, the Colombian Supreme Court[20] ruled that a spouse could sue for non-economic losses, specifically pain and suffering and emotional distress, only when the other spouse's conduct infringed upon the plaintiff's physical and mental health. However, the court was referring to domestic violence cases and explicitly ruled that this claim could not apply to cases of infidelity.

Comparing the Japanese and Spanish approaches, it would seem that under Japanese law, non-economic losses from extramarital affairs are considered subjective losses. The courts presume that the affair is enough to prove the loss, except in cases where the defendant can provide evidence to the contrary. On the other hand, Spanish courts consider it an objective loss. Thus, the conduct of the defendant is not sufficient to establish liability. Instead, there must be another element

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S.A.P. de Cádiz Apr. 3, 2008 nº 125/2008 (Spain) In addition to granting damages for the emotional distress, the court also ordered the wife to return child support under the doctrine of unjust enrichment and to pay for half of the costs of the paternity test and the transportation costs the father had paid to be with the child.

18 Leonardo Marcelino, *¿Son resarcibles las consecuencias no patrimoniales derivadas de la infidelidad de uno de los cónyuges en el C.C.C.N.?* available at: https://jndcbahiablanca2015.com/wp-content/uploads/2015/09/Marcellino_SON-RESARCIBLES.pdf°

19 Corte Suprema de Justicia (C.S.J) (Supreme Court) 13 de junio de 2012 Nº 263-2010 (Chile).

20 Corte Suprema de Justicia (C.S.J) (Supreme Court) 30 de diciembre de 2014 rol de la causa: 10622/2014 (Chile).

that helps determine the emotional suffering endured by the victim. However, one aspect in which Japanese law is unique is that these claims can be brought against a spouse's lover, while most other countries tend to approach the matter as an issue between the spouses or former spouses. Even within Spanish cases, the defendant was always the former spouse and never the lover.

The recent Supreme Court ruling on the liability of third parties in the event of divorce appears to have expanded the liability for non-economic losses. Particularly, the Court's criteria, i.e., (1) intent to cause the divorce; (2) unjustifiable intervention; and (3) completion of a divorce, are broad enough to include not only lovers but family and friends. While no cases have dealt with the issue so far, it would most likely be a unique claim to Japan if admitted.[21]

Ⅵ. CLAIMS FOR WRONGFUL DEATH

Article 711 of the Japanese Civil Code is rather unique among countries that follow the French model in that it explicitly regulates the rights of a victim's relatives. The drafters of the Japanese Civil Code did not consider relatives to have any rights concerning the life of the deceased victim. Nevertheless, they established Article 711 to prevent wrongdoers from completely evading liability in cases where the victim died without suing, as they held that the deceased victim could no longer be considered to have any legal rights.

However, while the Japanese Civil Code recognizes these types of claims, it is by no means the only one. Indeed, early 20th-century case law regarding this issue exists in Spain[22] and Chile.[23] French courts

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[21] See Ruben E. Rodriguez Samudio, *Interference with Spousal Rights*, 50 Journal of Japanese Law 151 (2020).

[22] S.T.S. Oct. 19, 1909 (Spain).

[23] Corte de Apelaciones de Santiago (C. Apel) (Santiago court of appeals) 27

have also recognized non-economic losses for the deaths of parents and children. The language of Article 1644-a of the Panamanian Civil Code allows explicitly for any individual to sue for direct losses. Moreover, while it denies the possibility of transferring the claim via *mortis causa*, the courts have allowed parents to sue for injuries and deaths of their children.[24] Meanwhile, Article 1078 of the old Argentinian Civil Code granted a claim to only the legal heirs of a victim, which Articles 3565 to 3570 dictate are the victims' children, parents, or spouse. Finally, article 1741 of the new Civil and Commercial Code establishes that in cases where the victim died or suffered a significant disability, the parents, children, or spouse of that victim who hold a family bond are entitled to claim non-economic losses, depending on the circumstances.[25]

Claims for the non-economic losses suffered by the relatives of a victim because of the death of the latter are not rare in comparative law. The U.S. courts followed the common law rule under which tort

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de julio de 1907, R.D.J. T. 4, sec. 2ª p. 139 (Chile).

[24] Corte Suprema de Justicia (C.S.J) (Supreme Court) 15 de junio de 1998 (Pan.).

Corte Suprema de Justicia (C.S.J) (Supreme Court) 14 de septiembre de 2012 (Pan.).

Corte Suprema de Justicia (C.S.J) (Supreme Court) 31 de Julio de 2000 (Pan.).

Corte Suprema de Justicia (C.S.J) (Supreme Court) 24 de octubre de 2006 (Pan.).

Corte Suprema de Justicia (C.S.J) (Supreme Court) 14 de Junio de 1999 (Pan.) (injury).

[25] Article 1741: Compensation for non-economic losses. The victim has a claim for non-economic losses. If the act results in the death or great disability of the victim, the ascendants, descendants, spouse, and those who live together (with the victim) are evidently treated as family and also have a personal claim (for non-economic losse). Translation by the author.

claims perish with the victim,[26] but this rule was considered inadequate, as the tortfeasor would ultimately pay less in cases where the victim had died. Two causes of action emerged to address this issue: wrongful death and survival claims.

However, the most striking difference between Japan and other civil law countries is not the willingness to recognize these types of claims but rather how the courts have addressed the issue of who can bring the suit. Japanese courts have extended this right to siblings, common law partners, and illegitimate children of the victim, dependent on the relation between the victim and the plaintiff-claimant. For example, in Colombia, courts have construed that since the relationship between parents and children is a type of subjective non-economic interest,[27] a plaintiff does not need to prove a loss has occurred, as its existence is presumed from the death of the victim. However, this presumption is not absolute, as the defendant can present evidence to prove that the relationship between the victim and claimant lacks the necessary elements to be considered legally protected.[28]

Colombian courts have also recognized the claims of children born after the death of their father under the argument that a father's lack of support, guidance, and love can negatively influence the child.[29] Furthermore, the courts have also granted remedy to "*hijos de*

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26 DAN B. DOBBS, The Law of Torts 803 (2000).

27 Case law in Panamá also follows this approach. Corte Suprema de Justicia (C.S.J) (Supreme Court) 26 de enero de 1998 (Pan.).

28 Corte Suprema de Justicia (C.S.J) (Supreme Court) Sala. Cas. Civil 28 de febrero de 1990. Gaceta judicial T. 200. p. 79 (Colom.).

Consejo de Estado (C.E.) Sala de lo Contencioso Administrativo, Sección Tercera, 17 de julio de 1992 Radicado 6750 (Colom.).

29 Corte Suprema de Justicia (C.S.J) (Supreme Court) Sala. Cas. Civil 21 de febrero de 2002 Expediente No. 6063 (Colom.).

crianza,"[30] a social phenomenon in Colombia where an individual raises a child as their own, despite no legal relationship between them.[31] By contrast, the courts have denied remedy to siblings born after the victim's death because the suffering is not the same as in cases where the father has died, as fathers support and are present in all stages of development for an individual. Meanwhile, in the case of the death of a sibling who the plaintiff has never met cannot be said to have the same influence.[32]

Japanese courts do not examine if claims under Article 711 can be opposed based on the relation between the victim and his or her relatives, which raises the question of the nature of the claim under Japanese law. In other words, the question becomes whether the claim under Section 711 and the absolute right for the relatives of the victim can be exercised regardless of the particular circumstances of each case, or if the courts can hear evidence to prove that there was no sentimental relation between the victim and relative.

For example, in 2016, a child was abandoned by his parents in the mountains after he failed to behave properly.[33] The child survived for six days and was found inside a Japanese Self-Defense Force base. Public opinion on the matter was divided between those who believed the father was well within his rights to discipline his son and those who thought the father's conduct constituted child endangerment. For

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[30] Consejo de Estado (C.E.) Sala de lo Contencioso Administrativo, Sección Tercera, 26 de marzo del 2008, Expediente 18846 (Colom.).

[31] The child is not adopted, nor are they related by blood. It is an act performed out of the good will of the person.

[32] Consejo de Estado (C.E.) Sala de lo Contencioso Administrativo, Sección Tercera, 6 de 1994 Expediente 7834 (Colom.).

[33] Danielle Demetriou, Japanese boy abandoned in bear-infested woods 'as punishment' is reunited with parents. http://www.telegraph.co.uk/news/2016/06/03/japanese-boy-found-alive-in-mountains-having-been-left-in-forest/.

the sake of argument, consider the scenario where the child was run over by another vehicle. Should the parents have a right to claim non-economic losses under Article 711? Other countries that have developed the issue further would likely deny the claim, as their conduct could be used as evidence against the legal presumption that there is a familial relation that should be protected. However, the issue would not be as clear-cut in present-day Japan.

So far, Japanese courts have been expanding the number of claimants without addressing this issue, leaving many questions unanswered: Are individuals entitled to receive damages in cases where relations with their parents were strained? What about spouses who are living separately and have yet to divorce? In the latter case, would the precedent regarding extramarital affairs apply? Could defendants present evidence of an extramarital affair to claim that the marriage was already strained as a defense against claims under Section 711? If these questions ever emerge, the courts might find a solution by following the Argentinean model and utilizing inheritance rules. In particular, Article 891 of the Japanese Civil Code could provide some guidance, as it regulates cases in which an individual loses the right to inherit and establishes in which circumstances an heir can be disqualified.[34]

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[34] Article 891 reads:

"The following persons may not become an heir:

(i) a person who has received punishment for intentionally causing, or attempting to cause, the death of a decedent or a person of equal or prior rank in relation to inheritance;

(ii) a person who is aware that the decedent was killed by someone but made no accusation or complaint about this; provided that this shall not apply if that person cannot discern right from wrong, or if the killer was that person's spouse or lineal relative;

(iii) a person who prevented a decedent from making, revoking, rescinding, or changing a will relating to inheritance through fraud or duress;

Each conduct above affects the body and freedom of the descendant. An application via analogy would result in relatives who cause bodily injury to the victim resulting in disabilities being barred from recovering under Article 711. However, if bodily injury is used as a criterion, logic dictates that it would be limited to cases of grievous injury or injury resulting in disability, *e.g.*, domestic violence, etc.

Ⅶ. NON-ECONOMIC LOSSES IN CROSS-BORDER CASES

From the cases presented in this paper, it is apparent that some courts demonstrate a clear inclination towards conduct that is arguably discriminatory against certain nationalities, particularly those of Asia. No cases were found in which the defendant was found liable, and the victim was a national of a wealthy nation. While some courts recognize this as an untenable stance, the development of theories that allow the courts to grant fewer damages reveals a deeper issue unrelated to the law. This is particularly evident when the fact that Japanese judges are usually highly trained in the application of the law is taken into account.

However, the phenomenon of courts granting different amounts depending on the nationality of victims or their heirs is one that requires more profound research. In particular, quantitative analysis would help determine whether the arguments made by the courts that apply this double standard are only to make a distinction or if they also have an observable effect on the amount. Since these types of

(iv) a person who forced a decedent to make, revoke, rescind, or change a will relating to inheritance through fraud or duress; or

(v) a person who has forged, altered, destroyed, or concealed a decedent's will relating to inheritance."

Translation from: http://www.japaneselawtranslation.go.jp/law/detail/?id=2252&vm=04&re=02.

cases are rare, and since most of the victims are usually individuals without the means to pursue the issue to the Supreme Court level, a unified standard seems improbable. Furthermore, even within the legal community of Japan, these types of cases are often the subject of study.

In a purely legal sense, the issue might seem to be one of applicable law. Nevertheless, in cases where one of the parties is foreign, the courts must first determine whether it has jurisdiction and then decide on the issue of the applicable law. In the case of personal injuries resulting in the death of a victim, Japanese courts do not deviate from this custom. Furthermore, personal jurisdiction is not an issue since the acts are committed in Japan by either Japanese nationals or corporate defendants. Both parties have agreed to bring the proceedings to the Japanese court, and there is no reason for that court to remove itself from the controversy. Thus, the only issue remaining is that of the applicable law.

In some cases, the issue of applicable law is sometimes encountered in inheritance cases, with the courts deciding on using Japanese law when the applicable law is either unknown or is contrary to the Japanese *ordre public*. However, courts have recognized that based on Section 17 of the Act on General Rules for Application of Laws, the applicable law in delictual liability is Japanese law.[35]

Concerning private international law, the doctrine of lex locus delicti has served as the governing principle for the conflict of laws in many countries since the beginning of the 20th century.[36] However,

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[35] Article 17　The formation and effect of a claim arising from a tort shall be governed by the law of the place where the result of the wrongful act occurred; provided, however, that if the occurrence of the result at said place was ordinarily unforeseeable, the law of the place where the wrongful act was committed shall govern. Available at http://www.japaneselawtranslation.go.jp/law/detail/?id=1970&vm=&re=.

[36] Symeon C. Symeonides, *Tort and Conflicts of Law* in Comparative Tort

since the 1960s, it has lost ground to the principle of *favor laesi*, *i.e.*, the law most favorable to the victim.[37]

At the European level, Article 4 of the Rome II statute states:

General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Furthermore, in regards to the assessment of damages, Article 15 states:

Scope of the law applicable

The law applicable to non-contractual obligations under this

Law: Global Perspectives 39,39 (Mauro Bussani, Anthony J. Sebok eds., 2015).

[37] *Id*. at 48.

Regulation shall govern in particular:…

(c) the existence, the nature and the assessment of damage or the remedy claimed;

A key concern in these matters is whether the assessment of damages is an issue of substantive or procedural law, as the applicable law usually falls within the purview of substantive law. In the English case of Harding v. Wealands,[38] Lord Hoffmann addressed the issue by explaining:

As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether there is liability for the damage in question. On the other hand, whether the claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy.[39]

The matter is even more apparent in the U.S., as a jury executes the assessment of damages, and the amount that victims receives has nothing to do with their nationality.[40]

Thus, a distinction on basis of the plaintiff's nationality in cases

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38 Harding v Wealands [2006] UKHL 32.

39 Harding v Wealands [2006] UKHL 32. para 24.

40 This is one of the reasons U.S. courts are sought after in cross-border litigations. See: Patrick J. Borchers, Punitive Damages, Forum Shopping, and the Conflict of Laws, 70 La. L. Rev. 529 (2010).

where the victim was not a permanent resident of Japan cannot be supported in the application of foreign law. Calculating damages is and has always been an issue of procedural law dealing with the facts of the case. Furthermore, the courts have recognized that the emotional suffering of a plaintiff or their relatives remains consistent regardless of the individual's nationality.

Only plaintiffs who are nationals of countries with lower economic levels than Japan have been involved in these cases. Therefore, there is no data to support the idea that Japanese courts would apply the same principle in cases where the plaintiffs or their families are nationals of a country with a higher living standard than Japan. If anything, based on experiences concerning punitive damages, the courts might apply the notion of *ordre public* to reduce the awards the plaintiff might have otherwise received.

In contrast with Japanese courts, the issue of comparative law has always been how to prevent the plaintiff from frivolously using forum shopping. Once a court has asserted jurisdiction and confirmed that the applicable law is the *lex fori*, damages are awarded according to the rules and customs established in that particular system. It is for this reason the U.S. is such an attractive jurisdiction for foreigners and why many lawyers attempt to try their cases in the U.S. using the doctrine of personal jurisdiction.

The argument that plaintiffs might receive more damages in one court than in another has never been held as a valid defense. If the matter of the amount is considered central to the issue of loss, and not part of procedural law, then the question the Japanese courts should ask is not whether the plaintiff's home country is in a better or worse economic situation than Japan, but instead which awards are given under such jurisdiction. However, if this were the case, courts would benefit from applying the law of the plaintiff's home country, as they could use precedents of that jurisdiction to find an amount that would be in line with the standard of living. As the issue stands today, Japanese courts usually refer to the matter by acknowledging that the standard of living or price index is different but failing to present any evidence of the parameters of this difference, a result of the discretion they have under the law when deciding the amount for non-economic losses.

Moreover, suppose the issue is a matter of procedural law. In that case, the arguments of the Japanese courts have no legal basis, as both parties and the court have recognized that Japanese procedural law applies. It would defy logic and reason to argue that the trial should be conducted according to Japanese law only to change that rule to assess damages. Perhaps the sharpest criticism of this approach is that Japanese courts do not apply it to their nationals. In other words, if a national tourist suffers an accident or dies in a different prefecture, the courts will not consider the price index or standard of living of the area where the victim lived.

Arguably, since Japan does not follow a federal model of government, it would be impossible to have different laws governing the issue for each prefecture. However, this argument is founded on the assumption that this is a matter of applicable law, which the Japanese courts have already said is not the case. Another issue is that although Japan the economic situation is not uniform. Areas like Tokyo tend to have higher prices, while more rural areas tend towards the lower end. In those cases, the question arises whether the Japanese courts should consider the victim's place of residence when determining the amount of non-economic damages.[41] For example, if a tourist from Hokkaido died due to a traffic accident in Tokyo, should the standard be Tokyo or Hokkaido?

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41 According to the Shohisha Bukka Chiiki Sashisu no Gaijo published by the Bureau Statistics in 2021, the price index can differ up to almost 10% between prefectures. Available at: https://www.stat.go.jp/data/kouri/kouzou/pdf/g_2021.pdf.

Ⅷ. DEFAMATION AND PRIVACY

Broadly speaking, Japanese privacy and defamation laws do not differ from other civil law countries. However, certain cultural influences guide their application. While truth is an absolute defense in common law jurisdictions, civil law countries recognize the *exceptio veritatis* that serves a similar purpose. While the exact rules vary depending on the jurisdiction, there is a clear tendency to accept its application when the statements refer to political figures. However, the Japanese courts' approach to the *exceptio veritatis*, particular the public interest requirement, is perhaps founded in cultural rules rather that legal ones. Nevertheless, it has the effect of chilling public discourse on specific topics, as evidenced by the case law.

Concerning privacy, Japanese law mostly follows the European approach, focusing on human dignity and protecting individuals from unwanted intrusions on their private matters. Particularly, social mores have influenced legal norms in regards as to what is considered private information, to the point that it can be said that Japanese people in general are very privacy conscious, at least regarding revealing private information via traditional means and to a large extent on the internet. The most recent Personal Data Protection Law reform aims to adapt the law to better protect against automated processing and streamline obtaining the information of users who defame other online. Whether it achieves this goal is yet to be seen.

Ⅸ. FINAL CONSIDERATIONS

Hereafters are summaries of the findings and arguments of this paper.

1. The Japanese approach to the concept of loss resulted from a German influence on scholars that began during the early 20th century. Influxes of foreign ideas have depended on the

historical periods in which they took place. During the drafting of both the Bossonaide code and the Japanese Civil Code, new ideas were limited to those introduced by the scholarly and political elite, who had access to both the economic and linguistic means to obtain knowledge directly from its source. As a result, studies were limited to only those the government wished to advance, which in turn restricted the knowledge pool to those countries admired by the leading politicians of the time. This changed after the Second World War, when the Allied troops landed in Japan, and the subsequent opening of the country to a new flow of ideas that were not limited to those selected by elites, but rather by the scholars who introduced them. However, old customs are persistent, and even today, scholarship regarding German law overshadows other comparative law studies, even if this contradicts the express wishes of Ume and Hozumi.

2. The confusion of terminology, which began even during the Bossonaide draft, has been in the background of discussions and led to difficulties conceptualizing the terms harm and loss. However, there is no evidence that the drafters were or could have been influenced to the degree they would have adopted a restrictive approach to the concept of harm and loss. Rather, records from the drafting committee indicate that Article 709 of the Civil Code was influenced by French and English legal thought, at least to the extent loss is concerned. The confusion has been further augmented by the fact that the Japanese term *songai* is used to convey both the event that causes the liability and the abstract or concrete loss of the victim. The issue then becomes whether traditional theories can overcome these semantic and practical setbacks. However, Japanese scholars have addressed some of the issues that usually regard loss under the figure of right infringement, or *kenri shingai*.

Nevertheless, initial discussions were limited to the nature and meaning of the concept of right, rather than the loss suffered by the victim.

At a more fundamental level, the point of inquiry is whether the Japanese courts and scholars can or should use the legal thinking of a casuistic system, such as that of Germany, or rather apply abstract concepts to a more significant degree in accordance with other French tradition countries. At a comparative law level, the use of the word *songai* mirrors the challenges faced by Italian scholars. Therefore, if their example is any guide, rethinking the various meanings ascribed to the term *songai* will help clarify the current situation.

3. Overreliance on concrete concepts for harm, such as that presented by German legal scholars, ignores the fact that, unlike Article 823 of the BGB, the Japanese Civil Code follows a different legal tradition. However, this is not to say that German theories are entirely incompatible with the Japanese Civil Code. On the contrary, many countries have adopted the *diffenztheorie* to calculate economic damages without affecting discussions about non-economic damages. However, abstract concepts are generally unwelcome in casuistic countries, such as Germany and England. Therefore, these countries do not need to develop general legal theories that address the issue of harm or loss, as they are either already defined within the rights established by statute or incorporated into the damages claims themselves.
4. The first part of Article 709 has been traditionally approached as an issue of infringement or unlawfulness. However, if the language is perceived as referring only to a harmful event without regard to its consequences, it would help direct the discussion towards a more general concept of harm and loss, which does not require a concrete monetary valuation for establishing liability. Under this premise, theories such as the

amount difference theory cannot be utilized to define harm abstractly, as that was never their function. On the other hand, at least as far as the distinction between the harmful event and its consequences is concerned, the real loss theory does provide a more fertile ground for discussion. Nevertheless, this discussion centered on the causal link, again shying away from a more abstract construction of the concept of *songai*.

5. The infringement of right requirement is not absolute, particularly after the 2004-2005 reforms. Furthermore, while the courts have tended to approach the issue of delictual liability under the process set by the drafters – *i.e.*, grant damages when there is a loss that results from the infringement of a legal right – there are cases with respect to non-economic losses where this process has not been followed. For example, in cases involving substantial probability, the courts sometimes grant damages for an infringement of the right of the victim, while in other cases, they focus on the emotional distress of the victim. In cases of public nuisance, the courts decide on the right infringement issue after analyzing the nuisance's actual effect on the lifestyle of the plaintiff.
6. The concept of unlawfulness also plays a crucial role in discussions regarding loss and harm. Since the idea has been used to refer to both a requirement for liability and a way to expand the range of protected interests, it is not surprising that even today, Japanese courts base their arguments on whether or not conduct is unlawful. However, as the Italian example illustrates, even explicitly requiring unlawfulness leaves the issue of whether it should apply to the conduct or the loss suffered by the victim. The latter case better explains the contraposition of legal interests that characterizes delictual liability. Especially in constitutional and civil rights cases, wherein the rights themselves are granted such a status that

liability results from their infringement regardless of any loss, unlawfulness cannot refer to the conduct. Instead, it refers either to the infringed interest or any hypothetical losses arising from it.

7. The approach of equating harm and loss to some form of monetary quantification, supposedly based on the principle of monetary compensation or *kinsen baisho gensoku*, has influenced legal thinking to the point that returning to such abstract concepts might not be possible or desirable. The system fulfills its role from a pragmatic standpoint. Still, combining French and German schools of thought augments the confusion and difficulty inherent to non-economic losses. Strictly speaking, the reason German influences permeate civil law scholarship can be traced to a sense of admiration for the country's legal method during the early 20th century. However, the German legal method includes studying the legal roots, such as Roman law, which differs from the situation in Japan. This difference in approach has led to scholars' blind decrees that the *kinsen baisho gensoku* is a mandate to treat losses from a monetary perspective without fully understanding the background and historical evolution of the figure.
8. Furthermore, the fact that Japan was never greatly influenced by the *ius naturalism* movement resulting from Christian moralism supports the idea that development of a concept such as *dommage moral* in Japan has been a much more challenging endeavor than in other civil law countries. While Article 710 of the Japanese Civil Code provides a list of rights, it is not *numerus clausus*. Therefore, the courts and scholars do not encounter the same limitations that German and common law lawyers must navigate to recognize these types of claims. After all, Article 710 was included as a straightforward means to recognize non-economic losses, which had been rejected by the

Bossonaide code and were still a subject of debate in comparative law during the 19th century.

However, the development of a concept such as moral interests (*patrimonies moral*) does not seem likely under current circumstances – particularly if the law's development is considered. The concept of *jinkakuken* advanced by the courts and scholars since the beginning of the 20th century, is still not part of the central discourse surrounding delictual liability. Thus, the possibility that an idea even more global and abstract than moral interest can be developed in the future seems highly unlikely.

Claims such as the breakdown of marital relations are grounded more in legal obligation than a moral one. Regardless, courts provide exceptions that do appear to indicate a certain level of moral or societal considerations.

9. Although Japan has had neither doctrinal nor historical issues with recognizing non-economic losses under the civil code, the discussion has been impacted by the monetary concept that permeates the general approach to the concepts of harm and loss. To a certain degree, the scholarly approach to non-economic losses has more closely resembled that of a common law country. Research and discussions regarding the remedy have overshadowed the concept of loss itself. With emphasis on the nature, function, and role of the remedies, even empirical discussions tend not to address doctrinal issues, such as the characteristics of non-economic losses. Clear examples of this are cases of non-economic losses for foreigners. Discussions in courts centers on whether or not the Japanese standard of living should be applied to liquidating the damages of the victim, suggesting an explicit economic consideration of a much deeper issue. Furthermore, on a more practical level, the issue remains that since the traditional Japanese views on harm and loss do

not address non-economic losses, the development of concepts such as objective and subjective non-economic losses have been passively recognized but not explored.

10. Regarding the nature, function, and role of damages for non-economic losses (*isharyo*), there is no apparent reason why these discussions should be separated from the general theory of the function and role of delictual liability. Whether the amount granted to the victim is compensatory, punitive, or otherwise an issue that cannot be resolved through legal discourse. Any theory that attempts to provide an answer will prove unsatisfactory for the simple reason that compensation, reparation, and punishment are subjective feelings of both the wrongdoer and the victim.

    This focus on the nature and function of *isharyo* can be envisioned as a means to criticize the Japanese delictual liability system in an indirect manner. Since the system generally is well-received and widely used by lawyers and courts, direct criticism might be much harder to support. However, by highlighting these issues in the realm of non-economic losses, scholars can make them known without much risk of opposing the system.

11. In this regard, the Supreme Court precedent allowing non-close relatives with a special relationship with the victim to claim emotional distress under Article 711 would seem to enable possibilities for a deeper understanding of the concept of objective and subjective non-economic losses. However, the issue is whether these claims are viable, which derives from the statute or a more profound sense of social relations. In the case of the former, any limitations towards these claims, such as the cases of violence, could be resolved under the code's rules for inheritance. Support for this exists because traditional ideas of familial relations and their associated obligations have been

evolving in recent years. For example, the awareness and protection given to victims of domestic violence or child abuse have increased to the extent that old ideas regarding the relationship between parents and children are being called into question

12. In other claims, such as the loss of chance, the lack of the concepts of harm and loss makes it difficult to fully comprehend the ramifications of precedents. If the non-economic loss, *e.g.*, emotional distress, results from the infringement of a type of expectation right, then the courts are addressing a case of subjective losses. Hence, violation of the right itself would evidence the existence of subjective suffering sensations from it. On the other hand, if the harmful event is medical malpractice that produces a physical injury and the emotional distress and pain of the victim is the loss, the need for such an instrument is unclear.

    Furthermore, in the latter case, the issue of the actual suffering of the victim would emerge, as in most cases, victims are already aware that their illness is untreatable. Since the courts are not granted a percentage of damages based on a lost chance, as is the case in other jurisdictions, it can be argued that the courts consider the emotional distress from death and the emotional distress from being unable to survive longer to embody two distinct types of losses.

13. The system has been working for over 100 years and has adapted accordingly to changing times. However, the limited scope of research also suggests a deeper issue of understanding. Over a century of scholarship has favored legal transplants of theories and institutions in a manner that differs from their intended purpose. As a result, any rethinking that does not occur at a statutory level must engage with the doctrinal approach to the concept of non-economic losses. There is no

reason or necessity to reduce the existence of these losses to a discussion of their quantification, which is by no means simple or without merit. However, a more holistic perspective and a new approach can translate into further developments of the law that, in turn, could allow for the introduction of new losses, perhaps at a faster and more comprehensive rate.