Foreigners under Japanese Delictual Liability Law

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I. INTRODUCTION

This paper aims to introduce western audiences to Japan's new migration system and to analyze under established case law the possible consequences of this system in situations where foreigners have incurred damages. Japan is a country with a comparatively homogenous population. According to statistics of the Ministry of Justice, as of December 2018 there were 2,637,251 foreigners living in Japan either as permanent residents or under another type of long-term visa, of which over two million are nationals of other Asian countries, with China and Korea leading the list, followed by the Philippines and Vietnam.[1] Furthermore, according to the Japan National Tourism Association, the number of tourists that visit Japan every year has increased from 4.7 million in 2000 to over 18 million in 2018.[2] By contrast, as of December 2018, the Japanese population stands at 126 million; however, there has been a steady decline since 2009, and the government expects the number to decrease to 100 million by 2053, with more than

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1 MINISTRY OF JUSTICE, *Zairyū Gaikoku'jin Tōkei* [Statistics on Foreign Residents], at *http://www.moj.go.jp/housei/toukei/toukei_ichiran_touroku.html*.

2 JAPAN NATIONAL TOURISM ORGANIZATION, Trends in Visitors Arrivals to Japan, last updated 27 August 2019, at *https://statistics.jnto.go.jp/en/graph/#graph—inbound--travelers--transition*.

37% over the age of 65.[3] The consequences of this aging population phenomena can be observed already today, with worker shortages in various sectors, such as retail, day care services, and hospices.

As a countermeasure to worker shortage, the Japanese government reformed the Immigration Control and Refugee Recognition Act[4] to allow for new categories of foreign workers as well as the institutional changes required for its implementation. The government foresees around 340 thousand new foreigners applying under the new visa system and being admitted to Japan by 2024.[5] Under the old system, foreigners could apply for a work permit under 17 categories. Japan has accepted blue-collar workers since 1993, but most of them had to come as trainees, and their stay was limited to three years.[6] The new system seeks to introduce two new visas, known as Designated Skills Visa or *tokutei ginō,* and it divides them it into two categories. Foreigners under the Designated Skill Category 1 Visa cannot bring their families to Japan, they must demonstrate a certain level of Japanese proficiency and be skilled in one of 14 vocational professions, and they can stay for a period of up to five years. The Designated Specified Skill Category 2 Visa is reserved for more skilled workers; it has no limit as to how long the worker can stay and allows them to bring their families.

One issue that looms over the new visa system is the Japanese work culture and the fact that foreigners that have arrived under the trainee programs have met with a number of abuses, including being sent to clean nuclear waste at Fukushima without being told of the danger.[7] There is no guarantee that foreign workers will move to Japan in the numbers that meet

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3 NATIONAL INSTITUTE OF POPULATION AND SOCIAL SECURITY RESEARCH, Population Projections for Japan – A Supplement to the 2017 Revision, Population Research Series No. 337, 31 March 2018, at *http://www.ipss.go.jp/pp-zenkoku/j/zenkoku2017/pp29suppl_reportALL.pdf.*

4 *Shutsunyū-koku kanri oyobi nanmin nintei-hō [Immigration Control and Refugee Recognition Act]*, Cabinet Order No. 319 of 1951.

5 *Gaikokujin rōdōsha ukeire [kihon hōshin] kettei chihō ni hairyō, 14 gyōshu de kei 345150 nin* ["Basic Policy" for Accepting Foreign Workers Decided, Considering Rural Regions, 345,150 people in 14 Professions], Mainichi Shinbun, 25 December 2018, at *https://mainichi.jp/articles/20181225/k00/00m/040/055000c*.

6 M. OBE, Five Things to Know About Japan's Foreign Worker Bill, Nikkei Asian Review, 28 November 2018, at *https://asia.nikkei.com/Spotlight/Japan-Immigration/Five-things-to-know-about-Japan-s-foreign-worker-bill.*

7 S. MURAI, At Least Four Firms used Foreign Trainees to Clean Up Radioactive Contamination from Fukushima Nuclear Plant: Ministry, The Japan Times, 13 July 2018, at *https://www.japantimes.co.jp/news/2018/07/13/national/least-four-firms-used-foreign-trainees-clean-radioactive-contamination-fukushima-nuclear-plant-ministry/#.XWjN_y35y8U.*

government expectations, with some reports pointing out that Japan might not be such an attractive destination.[8] However, the reality is that the number of foreigners, workers, or visitors that arrive at Japan every year has been steadily increasing. Thus, the risk of them being involved in accidents increases proportionally.

Similar to some other civil law jurisdictions, namely those from the Romanic legal family, Japan has a delictual liability system based on a general clause model, leaving, to a large extent, the assessment of damages to judges.[9] In cases of delictual liability, lower courts have adopted a standard that takes into account the victim's nationality, the victim's migratory status, and the living standards in the victim's or the next of kin's country when determining damages, in particular for non-economic damages such as pain and suffering or emotional distress. However, due to the fact that non-economic damages are not limited to one set of cases, usually being granted in anything from divorce to privacy infringement, this paper will focus mainly on cases that deal with physical injuries or the death of the victim.

II. Delictual Liability in the Japanese Civil Code

The Japanese delictual liability system is enshrined in Articles 709 to 724 of the *Minpō* (Civil Code, hereinafter: CivC)[10], with its main pillars being Articles 709, 710, and 711. Based on the French model of a general clause, Art. 709 CivC reads as follows: "A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence."[11] In the original Japanese text the word for damages is *songai* or loss; therefore the word damages as used by the reference translation does not have the same meaning as it does in normal legal English, i.e. it does not refer to monetary compensation but rather to the loss suffered by the victim. The language of the provision seems to allow for a construction that takes into account non-economic losses, such as pain and suffering. Indeed, the drafters of the Civil Code believed that loss or *songai* as written in the provision

8 "Japan Wants More Foreign Workers but They May Not Want Japan: Poll", The Japan Times, 15 December 2018, at *https://www.japantimes.co.jp/news/2018/12/15/national/japan-wants-foreign-workers-may-not-want-japan-poll/*.

9 For delicitual liability under Japanese law in general see: K. Yamamoto, Basic Features of Japanese Tort Law (Vienna 2019).

10 *Minpō*, Law No. 89/1896.

11 Unless indicated otherwise, English translations of laws and ordinances are taken from *http://www.japaneselawtranslation.go.jp/law/detail/?id=2057&vm=04&re=02*.

included losses without shape or *mukei songai*.[12] Nevertheless, they included Art. 710 as to not leave any doubt that non-economic losses fall within the purview of delictual liability.[13] By contrast, Art. 711 CivC grants the victim´s next of kin a claim for non-economic losses in cases where the victim died as a result of the delictual act. The drafters considered that if the victim had the obligation to support the next of kin, then the latter would have an independent claim for economic losses under Art. 709 CivC.[14] However, they also believed that since the next of kin had no right over the life of the deceased victim, they would not consequently be entitled to recover non-economic losses under Artcile 709 if they did not suffer an economic loss. This point was important since under the original construction of Art. 710 CivC, the victim's right to sue for non-economic losses was a personal right, and thus it perished with the victim. However, the drafters considered that relationships between parents, spouses, and children were of such a nature that it was appropriate to include Art. 711 CivC granting the next of kin a remedy for their emotional suffering.[15] Courts would later reject the drafter's position that claims under Art. 710 CivC were a personal right and ruled that they could be inherited by the next of kin. Thus, under current case law, in the event the victims dies, the next of kin have two sets of claims: one as heirs of the deceased, which allows claims under Articles 709 and 710 CivC to be inherited by the heirs of the victim; and an independent claim under Art. 711CivC which covers the next of kin's emotional suffering.

1. Consolation Money or Isha-ryō

One of the main characteristics of the compensation system for non-economic losses under Japanese law is the influence of the concept of consolation money or *isha-ryō*. For one, *isha-ryō* is not a legal term, but rather a term that has taken hold in the collective mind of the general Japanese population. Divorces, car accidents, defamation, causing a nuisance to another, all of these cases would evoke the image of *isha-ryō* in the mind of an average Japanese person. The drafters of the Civil Code, however, did not use the term; rather, it seems to have been introduced to the legal vocabulary around the end of the Meiji era under various names such as *ian-*

12 *Hōten chōsa-kai minpō giji sō-kiroku dai 40* [Drafting Comittee Records on the Civil Code Proceedings Vol. 40] at 148 ura [overleaf], at *http://dl.ndl.go.jp/info:ndljp/pid/1367567* (at 152).

13 *Idem* at 154 ura [overleaf], at 158.

14 *Idem* at 153 ura [overleaf], at 157–158.

15 *Idem* at 175 hyo [chart], at 179.

ryō or *isha kin*.[16] Nevertheless, *isha-ryō* has been an important element of Japanese legal scholarship since the promulgation of the Civil Code. Indeed, the concept of non-economic losses is still understood not under a general term such as *dommage moral*, as it appears in French jurisprudence, but rather under the term *isha-ryō*. Its influence can be observed in academic literature. There are very few books or papers on non-economic losses; instead, scholars and lawyers focus on two main points. The first is the nature and function of *isha-ryō*, with scholars discussing whether it fulfills a compensatory or a punitive role. This discussion is purely theoretical; the courts do not tend to analyze or express what their goal is when determining non-economic losses, though some courts may do so in passing.

2. Calculating Isha-ryō

The second, and the more practical issue discussed in the literature, is how to calculate *isha-ryō*, as neither the Civil Code nor the Code of Civil Procedure have any methods to that effect,[17] rendering the Supreme Court rulings on the matter as the *de facto* rules for determining the amount granted to the victims. Perhaps the most important power the courts have regarding *isha-ryō* is the discretionary power they possess to freely determine the amount to be set as non-economic damages, with the Supreme Court ruling that they are not required to explain how they decided on a specific amount.[18] Plaintiffs must still prove the existence of a non-economic loss,

16 See: Imperial Court, 10 November 1903, Case number, Meiji 36 (re) 2053 (1903 WLJPCA11106004): *ian-ryō*. Imperial Court, 16 October 1906, Case number Meijii 39 (o) 277 (1906WLJPCA10166001): *isha-kin*. Imperial Court, 26 March 1908, Case number Meijii 40 (o) 491 (1908WLJPCA03266002): *isha-ryō*.

17 Art. 416 CivC sets forth the general principle for assessing damages in the event of breach of contract. This principle is also applied *mutatis mutandis* to delictual liability cases.

"Art. 416 (1) The purpose of the demand for damages for failure to perform an obligation shall be to demand the compensation for damages which would ordinarily arise from such failure.

(2) The obligee may also demand compensation for damages arising from any special circumstances if the party did foresee, or should have foreseen, such circumstances."

Art. 248 Code of Civil Procedure (Law No. 109/1996) presents a general rule for non-quantifiable damages:

"If damage is found to have occurred, but, due to the nature of the damage, it is extremely difficult to prove the amount of damage that occurred, the court may reach a finding on the amount of damage that is reasonable, based on the entire import of oral arguments and the results of the examination of evidence."

18 Supreme Court, 5 April 1973, Case number Shōwa 43 (o) 943 (1973WLJPCA 04050001).

but not that the amount requested is appropriate.[19] However, there are some limits the courts must abide by; for example, if the amount deviates drastically from what is commonly deemed appropiate, it might be considered illegal.[20] Judges cannot grant more than the total amount requested by the plaintiff for economic and non-economic losses.[21]

Courts will consider certain factors when deciding on an amount. These factors can be divided into two categories: the circumstances of the victim and the circumstances of the defendant.[22] Within the first group is the extent of the physical and emotional disturbance suffered by the victim. The fact that the victim is not capable of experiencing those emotions, such as in the case of young infants[23] or when the victim is in a vegetative state,[24] does not hinder their claims. The courts will also consider the age, sex, marital status, health condition, social standing, occupation, material wealth, lifestyle, and negligence (if any) of the victim, as well as any kind of profit the victim might have otherwise obtained.[25]

In regards to the circumstances of a defendant, courts will take into account his or her state of mind, considering especially if the act was the result of intentional conduct or mere negligence.[26] The defendant's wealth is also a significant factor.[27] However, the Supreme Court has declined to consider the wealth of the victims.[28] Any kind of sympathy, apology, or care extended by a

19 Imperial Court, 20 December 1901, Case number Meijii 34 (re) 1688 (1901 WLJPCA12206001).

20 I. GOTŌ, *Saikin ni okeru isha-ryō no sho-mondai* [Recent Issues Regarding *isha-ryō*], Hō no Shihai 145 (2007) 31, 39.

21 *Supra* note 18.

22 H. UEBAYASHI, *Seishinteki songai ni taisuru isha-ryō* [*Isha-ryō* for Emotional Distress] in: Katō (ed.) *Chūshaku minpō (19) saiken (20) fuhō kōi* [Commentary of the Civil Code (19) Obligations (20) Delictual Liability] (1965) 193, 203–211. H. ITŌ, *Isha-ryō no seishitsu o meguru giron ni tsuite* [Regarding Discussions on the Nature of *isha-ryō*] Bulletin of Toyohashi Sōzō College 7 (2003) 141, 167.

23 Imperial Court, 13 May 1936, Case number Shōwa 10 (o) 2183 (1936WLJPCA 05136003).

24 Yokohama District Court, 20 June 2003, Case number Heisei 11 (wa) no. 3642 (2003WLJPCA06200001).

25 Art. 722 CivC establishes a system of comparative negligence in delictual liability cases. Under this provision, the negligence of the victim has to be taken into account when calculating the amount. In a 1915 case, the Supreme Court ruled that in the case of victims with a disability, the negligence of the guardian should not be considered when determining damages. Imperial Court, 15 June 1915, Case number Taishō 3 (o) 688 (1915WLJPCA06156001).

26 ITŌ, *supra* note 22, at 164.

27 *Ibid.*

28 Imperial Court, 7 July 1933, Case number Shōwa 7 (o) 2838 (1933WLJPCA0707 6002). The defendant hit the plaintiff with a brazier in the head during a party, caus-

defendant towards the victim, as well as the motives and reasons behind the defendant's actions, might affect the amount granted as damages.[29]

Regardless of this discretionary power, Japanese awards for non-economic losses tend to be rather low, with scholars pointing out that since judges can freely determine the amount, lawyers do not know if their request is going to be granted even if they advocate for it. And even if their request is granted, the amount is usually low and the burden on the lawyer is very heavy. Consequently, they do not press for the emotional pain of the victim too strongly. Because of this, their understanding of this type of pain diminishes, and as a result the amount awarded in non-economic losses cases has stayed low, the dynamic thus becoming a vicious circle. Nevertheless, there have been attempts to standardize the assessment of damages. For example, the Japan Federation of Bar Associations has compiled two handbooks that deal with the quantification of damages in traffic accidents. These books, informally called the Red Book[30] and the Blue Book,[31] establish a standard for reparations in three cases: death, injuries, and in the event of a disability as a result of the accident. While the courts usually adhere to these standards, they are not legally bound by them, and there are cases in which damages have been awarded without consulting the handbooks.[32]

The judiciary has also attempted to standardize damages assessments in defamation cases. Japanese courts would usually grant low amounts as damages, usually around one million Yen (around ten thousand USD) in defamation cases. In 1999, the Justice System Reform Council was established to analyze the "fundamental measures necessary for justice reform and justice infrastructure arrangement by defining the role of the Japanese administration of justice in the 21st century". Its agenda was geared towards how to achieve "a more accessible and user-friendly justice system, public participation in the justice system, the redefinition of the legal profession and reinforcement of its function."[33] The council arrived at the con-

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ing a laceration and affecting his eyesight. However, the defendant passed away before the appeal proceedings were completed, and his heirs continued in his place. The Supreme Court overturned the ruling of the lower court that considered the wealth of the heirs when determining the amount of damages.

29 ITŌ *supra* note 22, at 164.

30 NICHIBENREN TRAFFIC ACCIDENT CONSULTATION CENTER (ed.), *Minji kōtsū jiko soshō songai baishō-gaku santei kijun* [Standards for Calculating Damages Amount in Civil Traffic Accident Cases] (2019 ed.).

31 NICHIBENREN TRAFFIC ACCIDENT CONSULTATION CENTER – TŌKYŌ BRANCH (ed.), *Kōtsū jiko songai baishō santei kijun* [Standard for Calculating Damages in Traffic Accident Cases], (26th ed., 2018).

32 H. HIRANO, *Minpō sōgō 6 fuhō kōi* [Synthesis of the Civil Law Vol. 6 Delictual Liability] (3rd ed., Tōkyō 2013) 320.

clusion that, overall, the amounts awarded for damages were too low and that the determination of damages should be made without being bound by the so-called "market rate" of past cases.[34] Later the same year, the Tōkyō District Court held a symposium where it proposed that the standard for damages in cases of mass media defamation be raised to four or five million Yen.[35]

Thus, while they cannot be considered definitive guides, there are certain standards that help Japanese courts determine how to calculate *isha-ryō;* nevertheless, the facts of each case will play an important role in guiding the judge when granting a certain amount. In particular, Japanese courts have determined that the victim's nationality or, as referred to in some cases, the living standard of the victim's country plays a role in the assessment of damages.

III. FOREIGNERS AND DAMAGES

1. The Importance of Migratory Status

According to the data provided by the Bureau of Statistics, in 1947 there were 639,368 foreigners in Japan living either as permanent residents or under other types of long-term visas.[36] This number has increased to 2,637,251 as of December 2018.[37] By contrast, the number of visitors has increased from 352,832 in 1964[38] to over 18 million as of December 2018.[39] The increase in the number of long-term residents and visitors translates into an increased risk that they will suffer an accident or become involved in litigation. Thus, in recent years the courts have met with a slowly rising number of cases where foreign nationals have suffered accidents or lost their lives while in Japan.

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33 Art. 2 Law concerning Establishment of Justice System Reform Council, *Shihō seido kaisei kaikaku shingi-kai setchi-hō,* Law No. 68/1999.

34 For more information in English see: JUSTICE SYSTEM REFORM COUNCIL, Recommendation of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century at *http://japan.kantei.go.jp/policy/sihou/singikai/index_e.html.*

35 TŌKYŌ CHIHŌ SAIBANSHO SONGAI BAISHŌ SOSHŌ KENKYŪ-KAI [Research Group of the Tōkyō District Court on Damages], *Masu media ni yoru meiyo kison soshō no kenkyū to teigen* [Research and Proposal on Defamation Cases by Mass Media], Jurisuto 1209 (2001) 63.

36 MINISTRY OF JUSTICE, Registered Aliens by Nationality and Status of Residence (Permanent Residents, Non-permanent Residents) (1948-2009), at *https://www.stat.go.jp/data/chouki/zuhyou/02-12.xls.*

37 *Supra* note 1.

38 JAPAN NATIONAL TOURISM ORGANIZATION, Visitor Arrivals, Japanese Overseas Travelers, at: *https://www.jnto.go.jp/jpn/statistics/marketingdata_outbound.pdf.*

39 *Supra* note 2.

Depending on the purposes and length of their stay, foreigners can be divided into three groups: permanent residents, workers, and visitors.[40] Under this standard, when the victim is a foreign national having permanent Japanese residence, damages are calculated in the same manner as if the victim had been a Japanese national. However, when the victim is a foreign worker or tourist, the courts have adopted an approach that first looks at the migratory status of the victim before deciding the amount to grant as damages. To be clear, these cases are but a fraction of the civil litigation that occurs in Japanese courts every year, but they do reveal an issue with the way the courts approach cases and calculate damages based on the nationality of the parties.

Since the issue is one of delictual liability based on civil law provisions, the question of the applicable law becomes an important factor to determine. The governing provisions are found in the Act on General Rules for Application of Laws.[41] Art. 17 provides that

> "[T]he 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".

Furthermore, Art. 36 establishes that "inheritance shall be governed by the national law of the decedent". Based on Art. 17, the applicable law for the purposes of determining liability in cases where a foreign victim dies while in Japan is Japanese law, in particular, Art. 709 CivC. However, the courts have adopted a standard to determine damages based on the migratory status of the victim at the time the injury occurred.

2. Economic Damages

In normal cases, Japanese courts will vary the manner in which they calculate economic losses, in particular for lost wages and future income, based on whether the victim died or was injured, and if injured whether the victim suffered any disabilities as a result. If the victim survives and does not suffer sequalae, damages are calculated based on the period the person did not work as well as other expenses that resulted from the delictual act. If, however, the victim is left with a disability, the courts will calculate damages based on a reduction of labor capacity *(rōdō nōryoku sōshitsu)*.[42] By

40 H. NAKAYAMA, *Gaikoku-jin* [Foreigners] in: Imura (ed.), *Gendai saiban-hō taikei dai 6 maki* [Modern Case Law System, Vol. 6] 203, 204.

41 *Hō no tekiyō ni kansuru tsūsoku-hō*, [Law on the Application of Laws] Law No. 78/2006.

42 However, it is not necessary for the victim to suffer an actual reduction of labor capacity as related to his or her current profession. For example, a Fukushima court

contrast, if the victim dies, courts will calculate damages for future losses. The courts will base damages on a legal fiction, using the data provided by the national census; the same applies even if the victim was a small child.[43]

Since economic losses can be determined based on evidence introduced during the trial, courts will base their decision on the facts as presented by the parties. Early lower court case law was divided on how to calculate economic damages in the case of foreigners. For example, in a 1990 case, a 60-year-old Chinese national died as a result of a traffic accident while visiting Japan under a tourist visa.[44] The Komatsu High Court ruled that, even though the income of the victim was low under Japanese standards, when taking into account the fact that most of her expenses were covered by the Chinese government, the standard of living of both countries could be said to be the same. Therefore damages should be calculated based on the information provided by the Japanese census. In 1993, the plaintiff, a Chinese national, suffered injuries from a traffic accident which also resulted in a permanent disability.[45] After the accident, the plaintiff changed her migratory status from a short-stay visa to a status that allowed her to work in Japan. The defendant argued that economic losses for future income should be based on the Chinese living standard. However, both the district courts and the high courts rejected this argument and granted damages for loss of labor capacity under the Japanese standard of living.

By contrast, in a 1992 case where an Iranian national had suffered a job-related injury, the Tōkyō District Court found that although lost wages for the period of the contract could be calculated based on the Japanese standard, there was no method to calculate future wages, and thus any damages related to them had to be based on the Iranian standard.[46] In a 1993 case involving a Korean national studying in Japan, the same court rejected the application of the Japanese census data under the argument that there was no evidence that would point to the victim working in Japan in the future.[47]

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granted damages for a reduction in labor capacity to a dental assistant even though the injury and disability she suffered did not affect her ability to perform her job. Fukushima District Court, 29 May 1992, Case number Heisei 3 (wa) 758 (1992WLJPCA05290010).

43 T. UCHIDA, *Minpō II* [Civil Law II] (3rd ed., Tōkyō 2011) 419.

44 Komatsu High Court, 25 June 1991, Case number Heisei 2 (ne) 282 (1991WLJPCA 06250002).

45 Nagoya High Court, 5 May 1993, Case number Heisei 4 (ne) 882 (1993WLJPCA 05256001).

46 Tōkyō District Court, 25 November 1992, Case number Heisei 3 (wa) 1283 (1992WLJPCA11250006).

47 Tōkyō District Court, 28 November 1993, Case number Heisei Gan (wa) 10931 (1993WLJPCA01280002).

Furthermore, there is also the issue of foreign spouses. Foreigners who marry a national and enter Japan under a spousal visa can work without restriction, while those who enter as a dependent of a foreign national might be limited as to the number of hours and types of jobs they can perform. Though rare, spouses do sometimes meet with accidents that have to be resolved in the courts. In 1997 the Gifu District Court heard a case concerning a Brazilian national who suffered an injury that resulted in disability. The plaintiff had originally entered Japan under a tourist visa but later married a Japanese individual and started working at a Japanese company. The plaintiff´s parents and sister then moved to Japan and began working at another Japanese company in Okayama. The court admitted all these facts. Nevertheless, in assessing damages for future wages, the court said that since (i) the plaintiff had plans to open a convenience store in Brazil with the money obtained working in Japan, (ii) some of the companions that came from Brazil with the plaintiff had already returned to Brazil, and (iii) two of the plaintiff´s sisters were married and living in Brazil, damages should be assessed under two standards: for the five years that the visa would allow the plaintiff to live in Japan, damages were calculated under the Japanese standard; the remaining 34 years subject to compensation were calculated under the Brazilian standard.[48]

The Supreme Court addressed the issue in 1997 when it heard a case regarding the future income of a foreign victim. The victim was a Pakistani national who suffered a work-related injury while working illegally after having entered Japan under a tourist visa. The Court ruled that the Japanese standard was to be applied to the three years following the day of the accident and the Pakistani standard for the remaining years.[49] The lower courts have since adopted a similar standard, using the Japanese census data for the time period the victim would have worked in Japan and the victim's country of origin standard for the time period afterward.

3. Non-economic Damages

While economic losses can be assessed based on a verifiable standard such as average wages or census information, non-economic losses by their very nature defy such valuation. Nevertheless, a court might create guidelines to calculate these types of damages, as it happens in Japan with the Red Book and the Blue Book or with the standard set by the courts for defamation cases. However, the goal of these guidelines is not to tell the victims that

48 Gifu District Court, 17 March 1997, Case number Heisei 7 (wa) 79 (1997WLJPCA 03170005).

49 Supreme Court, 28 January 1997 Case number Heisei 5 (o) 2132 (1997WLJPCA 01280004).

their physical pain or emotional suffering has a determinate value, but rather to standardize the application of the law in an area where such standards are difficult. Regardless, some Japanese courts will grant a lower amount for *isha-ryō* in cases where the victim is a foreign national based on two elements: the migratory status of the victim, i.e. whether the victim is a permanent resident of Japan or just a temporary visitor, and the economic situation of the victim's country of origin.

As with economic damages, when the victim is a permanent resident of Japan, damages are assessed in the same manner as they would be for a Japanese national. However, and also in the same manner as with economic damages, the courts are divided on how to calculate damages when the victim is a temporary visitor, with some courts basing the amount on the victim's country and, where its economic situation is worse than Japan's, adjusting non-economic damages to reflect that reality. In a case where a police officer was liable for shooting a Chinese suspect while the latter was trying to run away. The court considered that the price for food items in China was 10% of that in Japan when assessing the *isha-ryō* for emotional distress caused by the disability, and the *isha-ryō* for the injury.[50] In the case of a 26-year-old Chinese trainee who lost his right arm, the district court held that Chinese prices should set the standard since the amount granted as damages would be spent in China.[51] At least one high court has upheld the difference in the standard that the lower court originally employed to determine damages. A national from Sri Lanka died in a traffic accident and the next of kin was claiming both *isha-ryō* for the deceased and for themselves based on articles 710 and 711 CivC. In upholding the lower court argument regarding the *isha-ryō* for the deceased victim, the Tōkyō High Court ruled that even though the law did not allow for a differentiation between Japanese nationals and foreigners, there was a difference in the economic situation between the countries which, if ignored, would result in creating a difference between the losses of both Japanese and foreigners. Thus, the price of goods and the living standard of the victim's country must be taken into account when calculating *isha-ryō*. Furthermore, in determining the amount for the next of kin, the court argued that the distinction was not based on the nationality of the next of kin, but rather on the economic differences between their countries.[52] Some courts will reach

50 Tōkyō District Court, 27 January 2004, Case number Heisei 14 (wa) 28270 (2004 WLJPCA01270006).

51 Tokushima District Court, 21 January 2011, Case number Heisei 21 (wa) 69 (2011 WLJPCA01217001).

52 Tōkyō High Court, 25 January 2001, Case number Heisei 12 (ne) 5097 (2001 WLJPCA01250005).

their decision by comparing the census data of Japan and the victim's country and assessing the damages amount, taking into account the difference.[53] In 2006, a district court took a more nuanced approach. In assessing damages for emotional distress for the disability suffered by a Chinese exchange student involved in a traffic accident, the court considered the fact that the tuition fee paid by the plaintiff had been wasted but also that there was no guarantee that the victim would continue to live in Japan.[54]

Some courts also consider the nationality of the victim's next of kin when determining damages under Art. 711 CivC. In one such case, a Chinese technical intern trainee died because of injuries from an assault by a co-worker. Regarding the applicable law, the court held that for the matter of inheritance, Chinese law would be applied. In regard to delictual liability, however, it ruled that the applicable law was the Japanese Civil Code. The court recognized the emotional distress of the plaintiffs (the victim's father and mother), particularly the fact that the victim's mother had been diagnosed with depression and the father had to quit his job to take care of her. Nevertheless, the court ruled that the difference in living standards between Japan and China had to be considered when deciding on the damages amount.[55]

Other courts have expressly rejected the argument that the economic situation of the victim's country is a factor to consider when determining *isha-ryō*, or they will assess damages without discussing the issue, as they would normally do in the case of a Japanese national. For example, the Kōfu District Court handled a case in which the victim was a Taiwanese national who was kidnapped, raped, and subsequently killed while traveling as a tourist in Japan. The defense argued that the non-economic damages should be granted based on the Taiwanese prices, as using the Japanese standard would result in the victims profiting from their emotional suffering. However, the court rejected the defense's argument based on the hideousness of the crime and the conduct of the defendant.[56] In the case of a 23-year-old Chinese exchange student who died as a result of a traffic

53 Tōkyō District Court, 9 September 2007, Case number Heisei 17 (wa) 3677 (2007WLJPCA09209003). The victim was a Korean national. The court rejected the next of kin's claims for funeral expenses, arguing that the ceremony employed was not recognized in Japan. Furthermore, the court also rejected claims for travel expenses to attend the criminal trial as not being related to the case. However, under a 1974 Supreme Court case, the next of kin's claims for travel expenses can be granted when the victim has been injured, even if the next of kin resides abroad. Supreme Court, 25 April 1974, Case number Shōwa 48 (o) 234 (1974WLJPCA04250002).

54 Kōbe District Court, 11 November 2006, Case number Heisei 17 (wa) 1139 (2006 WLJPCA11246002).

55 Chiba District Court, 30 September 2014, Case number Heisei 24 (wa) 2950 (2014 WLJPCA09309003).

accident, the district court did not address the issue of the victim's nationality.[57] In another case, an Iranian short-stay exchange student lost four fingers on the left hand in a work-related accident; the court considered his migratory status in Japan when determining future income, but it assessed non-economic damages without mentioning his nationality, focusing instead on the injury.[58]

As of December 2018, there has been no Supreme Court case that addresses the issue. In the aforementioned 1997 case, the court limited its opinion to upholding the lower court amount under the justification that there was no reason to grant a higher amount than that which would have been awarded to a Japanese national. Furthermore, in 2016 the Supreme Court declined to hear the case of a foreigner from Ghana who had been residing illegally in Japan for 20 years and who died in the process of being deported to his country of origin.[59] The victim was fluent in Japanese, had a Japanese spouse and a stable source of income, and was an upstanding citizen in all aspects, apart from his lack of documents. In 2014, the authorities located him; later, when during deportation procedures the victim resisted, an officer restrained him, ending with death by suffocation. In finding for the next of kin, the victim's wife and mother, the trial court made no distinction based on nationality. However, the Tōkyō High Court later overturned the lower court's ruling under the argument that the police department's actions did not meet the criteria to be considered unlawful, and therefore it was not liable for the death.

IV. The Principle of Equal Protection under the Law in the Japanese Constitution.

The difference in the standard, particularly for non-economic damages, would seem to go against the principle of equal protection under the law. The Japanese Constitution does not clearly prescribe the status of foreigners in regard to the application of constitutional protections. The English translation of Art. 14 provides that "all of the people are equal under the law and there shall be no discrimination in political, economic or

56 Kōfu District Court, 5 February 2008, Case number Heisei 16 (wa) 405 (2008 WLJPCA02059001).

57 Tōkyō District Court, 24 December 1997, Case number Heisei 8 (wa) 12582 (1997 WLJPCA12246001).

58 Tōkyō District Court, 25 November 1992, Case number Heisei 3 (wa) 1283 (1992 WLJPCA11250006).

59 Tōkyō High Court, 18 January 2016, Case number Heisei 26 (ne) 2195 (2016 WLJPCA01186017). Supreme Court, 9 November 2016, Case number Heisei 28 (o) 890 (2016WLJPCA11096005).

social relations because of race, creed, sex, social status or family origin". However, the original Japanese text does not use the term "all people" or *"nanbitomo"* as found in other constitutional provisions, but rather the term "nationals" or *"kokumin"*. Discussions on the use of the terms "all people" and "nationals" go back to the drafting process of the Constitution. The text of Art. 16 of the original draft of the Japanese Constitution, as presented by Supreme Commander for the Allied Powers (GHQ as it is known in Japan) included a provision that made it clear that the constitutional rights and protection were applicable to foreign nationals. However, the Japanese authorities rejected this provision and changed any provision that included the text "all people" to "nationals", which led to further discussions with the GHQ and ended with the text returning to its original form of using "all people" in some cases and "nationals" in others.[60]

Scholarly opinion on the matter can be divided into two groups:[61] those who reject the application of constitutional protections to foreigners, under the argument that the protection of human rights as enshrined in the Constitution is found within the chapter called "Rights and Duties of the People" or *"kokumin no kenri oyobi gimu";* and those other scholars who posit that foreigners are covered by constitutional protections. However, this latter group of scholars divides itself into two fronts. The first group considers that a foreigner's right is protected if the constitutional provision uses the term "all people" with those rights reserved for "nationals" not being applicable to foreigners. Since this theory makes use of the meaning of the words, it has come to be known as the wording theory or *"mongen-setsu"*. In contrast, the nature theory, or *"seishitsu-setsu"*, posits that the nature of the right is the determining factor when considering if a particular right is granted to foreigners.

The leading case on the matter is the 1978 McLean case, which deals with the authority of the government to renew the status of a foreigner in Japan and the application of constitutional protections to foreigners. The plaintiff, an American professor named Ronald McLean, participated in an anti-Vietnam war protest that took place in Tōkyō in 1973, after which a request to renew his status in Japan was rejected by the government. The trial court found for the plaintiff, but the case advanced to the Supreme

60 A. KONDŌ, *Nihon zaijū gaikoku-jin ni kansuru hō-seido* [The Law System for Foreigners Residing in Japan], Gakujutsu no Dōki [Motifs for Science] Vol. 15 No. 4 (2009) 20, 21.

61 N. TOTSUKI, *Kenpō to gaikoku-jin* [The Constitution and Foreigners] in: *Jinkō genshō shakai no gaikoku-jin mondai: sōgō chōsa hōkoku-sho* [Problems of Immigrant Policy and Foreign Workers Policy in a Depopulation Society] (Tōkyō 2008) 155, 155–157.

Court, where the plaintiff's claims were rejected. In regard to the application of fundamental constitutional rights in the case of foreigners, the Court held:

"It should be understood that the guarantee of fundamental rights included in Chapter Three of the Constitution extends also to foreign nationals staying in Japan except for those rights, which by their nature, are understood to address Japanese nationals only. This applies to political activities, except for those activities which are considered to be inappropriate by taking into account the status of the person as a foreign national, such as activities which have an influence on the political decision-making and its implementation in Japan".[62]

Thus, under the Supreme Court's case law, the nature of the constitutional right will determine whether it applies to foreigners or if it is reserved exclusively to Japanese nationals.

This leads to the question as to who is considered a Japanese national. In contrast to other countries, the Japanese Constitution does not set out the requirements for obtaining Japanese nationality, leaving it to the Diet to pass a law to such effect. This has led to situations like the one that occurred with Korean citizens taken to Japan during the Japanese occupation of the Korean peninsula in 1910 to be used for manual labor purposes. They were considered as Japanese subjects, hence granting their children and grandchildren the Japanese nationality, and by 1945 more than two million Koreans or people of Korean descent lived in Japan. However, after World War II, and as a result of the Treaty of San Francisco, those who decided not to return to Korea found themselves losing their Japanese nationality.[63]

There are some doubts as to how to apply the standard set by the McLean case in the assessment of damages since the judges have ample discretionary power when analyzing the evidence presented at trial. Furthermore, since the courts are not rejecting claims based on the nationality of the plaintiff, it cannot be considered a blatant discriminatory behavior.

1. Economic Damages

Particularly in regard to future wages, it could be argued that since the assessment is made on a legal fiction such as the census data, the courts do

62 Supreme Court, 4 October 1978, Case number Shōwa 50 (Gyo-Tsu) 120 (1978 WLJPCA10040003). Translation from *http://www.courts.go.jp/app/hanrei_en/detail?id=56*.

63 M. GOTŌ, *Nihon-koku kenpō seitei-shi ni okeru 「nihon kokumin」 to 「gaikoku-jin」 –... beikoku no jinken seisaku to nihon seifu to no hazama de* [Japanese and Foreigners during the Enactment of the Japanese Constitution – From the Threshold between U.S.A Human Rights Policy and the Japanese Government] Hikaku Hōgaku [Comparative Jurisprudence] Vol. 45 No. 3 (2012) 1, 2.

not necessarily infringe upon the principle of equal protection under the law in trying to apply various standards for different time periods. Regardless, the manner in which some courts decide upon the period raises some questions as to the application of a double standard. For one, it is not clear on what legal basis the distinction rests, since it is clearly not an issue of applicable law, as strictly speaking, the courts determine liability based on the provisions found within the Japanese Civil Code. Perhaps there is room to argue that it is a matter of procedural law; hence even if liability is determined under Japanese law, the authority granted to judges allows them to freely evaluate the evidence presented. However, a stronger arugment can be made for it to be considered as a part of the factual circumstances of the case, since it is an issue of determining the amount for damages.

Nevertheless, some of the arguments used by the courts to assess damages under the foreign standard are not clear. For example, in the Gifu District Court dealing with a foreign spouse, the court considered that wanting to open a business abroad, as well as other circumstances unrelated to the plaintiff, were enough to apply the Brazilian standard for a period of 34 years. The court seems to have forgotten that businesses can be administered via a juridical person or that physical presence is not a *sine qua non* requirement for opening or administering a store. If that were the case, international business would become an impossible endeavor. The Komatsu High Court case[64] took into account the social benefits granted to the victim by the Chinese government and came to the conclusion that the standard of living between the two countries could be equated, which can be argued to be a more sensible method of determining damages in these types of cases. After all, if the courts are going to use economic indicators, they should at least endeavor to make use of all the available data.

Another question is whether the courts would be willing to apply a higher standard of living. We could find no cases in the Westlaw Japan database where the victim or the victim's family were nationals from a developed country with a higher standard of living than Japan. That is not to say that there are no accidents involving people from those countries, but since insurance companies take care of most of the process, it could merely be that they did not feel the need to sue. Demographics also play a role in this issue, since most visitors and long-stay foreign residents hail from an Asian country.

Furthermore, whereas using the Japanese standard for cases where the victim's period of stay in Japan is clear appears a logical solution to the issue, such method is far less convincing in cases where the victims are not permanent residents but nevertheless do not have an upper limit as to the number of times their permit can be renewed. For example, in the cases of

64 Komatsu High Court, 25 June 1991, *supra* note 44.

Japanese nationals' spouses, courts might be forced to decide whether victims will apply for a permanent resident permit in the future and thus should be considered as permanent residents for the purposes of assessing damages. Or should they instead garner a guess as to the possibility of divorce before that happens? Moreover, the new visa system for foreign workers introduces a new variable into the equation. Under the Designated Skill Category 2 Visa, foreigners who meet certain criteria can live in Japan with their families while working at a Japanese company. In contrast with Designated Skill Category 1 Visa workers, those who obtain the Category 2 permit do not face an upper limit on the number of times they can renew their permit. Thus, they can potentially live in Japan until retirement without ever having to return to their countries, perhaps becoming a permanent resident in the process. How will the courts address this in cases where these individuals are involved in an accident? If they suffer a disability that impedes them from performing the job they were hired for, thus rendering them ineligible for a renewal of their permit, would the courts be willing to assess the damages for that disability under the Japanese standard? Specified skill visa workers do not have to leave the country immediately if they lose their jobs; rather, they are given a grace period to find another one and thus to stay in Japan. Nevertheless, even if victims do find a new job, it is still not clear how the courts would approach the issue.

2. Non-economic Damages

Even though economic damages are calculated on the base of a legal fiction such as the census data, once the focus is shifted to non-economic damages the position of the courts becomes even more difficult to defend. For one, the courts do not have to explain how they arrive at a certain amount; thus the courts could have granted any amount for *isha-ryō* and most likely no one would have noticed. In most cases mentioned in this paper in which the courts made use of living standards to calculate *isha-ryō*, the amounts were not necessarily low enough to warrant any special attention. Using economic indicators to calculate non-economic damages is troublesome. The argument that the money is going to be used in a certain country is not very convincing. For one the courts are guessing whether the victim or their families will live in their home country their whole life. There is nothing stopping a plaintiff from moving to another country, or even to a different province, prefecture, or state in the same country. Furthermore, it is difficult to support the argument that granting the victims, or their families, damages based on the Japanese standard would be akin to them profiting from their damages. If victims are partly responsible for the accident that causes the injury, there is always the element of comparative negligence to

address the issue. It is frivolous to argue that a person who might live with a permanent disability the rest of his or her life somehow stands to profit based on the amount of money received; the same is true regarding the grief of the next of kin.

Moreover, a sharp criticism of this approach is that Japanese courts do not consider the economic differences between prefectures when calculating *isha-ryō* in the case of Japanese nationals. The same as any other country, the economic situation throughout Japan is not uniform. Areas like Tōkyō tend to have higher prices, while rural areas tend towards the lower end. According to a 2018 report by the Ministry of Internal and Communications, in 2017 the price index differed up to almost 8% between prefectures, which is by no means insignificant.[65] In defending the disparate approach, some courts, like the Tōkyō High Court, argue that the distinction is not based on the victim's nationality but rather the standard of living of their home country, thus sidestepping the issue of equal protection under the law. Frankly, we fail to see the difference since the standard used is based upon the plaintiff's or the next of kin's home country, which is in turn based on their nationality.

V. CONCLUSION

Currently, the number of foreign visitors to Japan continues to increase every year. Though Japan is a very safe country by international standards, the possibility that visitors suffer an accident will only increase in accordance with their numbers in Japan. Thus, it is likely that the current approach used by the courts will be challenged in the future. A significant problem with this view is that it does not address people who live in federal countries, such as the U.S., or people with multiple nationalities. Imagine for example an individual born in a high-income state, such as California or New York, but raised in a rural state, and who works in different areas of the U.S. What standard would the court apply if this person was injured in Japan? For that matter, how would a court tackle the issue of individuals who can freely move within Europe's Schengen Area, such as a Greek national residing and working in Germany during the Greek debt crisis? Would Japanese courts apply the German standard of living or the Greek one? Would the courts just average the living standard of Europe and use it to assess the amount? Furthermore, just how much information must the courts consider when determining the standard of living? Should they con-

65 SŌMU-SHŌ TŌKEI-KYOKU [Ministry of Internal Affairs and Communications, Statistics Bureau], *Ko'uri bukka tōkei chōsa* [Survey on Retail Prices], 26 June 2018, at *http://www.stat.go.jp/data/kouri/kouzou/pdf/g_2017.pdf*.

sider any social benefits the victim would receive or has received in their home country?

It also raises the question of what to do when dealing with refugees. Would the courts take into account the refugee status of a foreign plaintiff and decide against using his or her home country living standard as a guide? Furthermore, since traffic accidents claims are usually resolved by insurance companies before reaching the courts, it is likely that the reduced amount granted to foreigners because of their home country will influence the insurance payments for *isha-ryō,* thus creating a vicious circle. Furthermore, in extreme cases, such as the Vietnamese trainees allegedly sent to clean up nuclear waste at the Fukushima plant, the use of a different standard based on the nationality of the plaintiff to justify a lower amount of damages for services that could be considered heroic would, in most likelihood, negatively affect the image of the Japanese legal system abroad. Thus, at least in regard to *isha-ryō,* the use of a different standard does not seem to be desirable under the principle of equal protection under the law.

SUMMARY

Japan, like most countries following the Civil Law model of delictual liability, grants remedy to a broad range of civil wrongs. In particular, non-economic losses have been part of the Japanese delictual liability system since its inception in the late 19th century. Both the victim and the next-of-kin have a claim under articles 710 and 711 of the Japanese Civil Code. However, judges have considerable freedom when quantifying the damage amount, to the point they can grant almost any amount without offering justification.

In general, the Japanese system for quantifying non-economic losses in cases where the victim suffers a physical injury follows certain patterns developed via case law. While there are no legal caps imposed on the amount, there are certain soft caps that have been established by the courts.

One of these caps can be seen when the victim or the next-of-kin is a short-term stay foreigner in Japan. Lower courts have developed a standard that takes into account the "economic level" of the victim or next-of-kin's home country. However, our research reveals that this standard is only applied to countries considered to have a lower level of economic development than Japan. This treatment contrasts with the efforts of the Japanese government to increase the number of visitors and foreign labor that come to Japan.

Often, courts that engage in this practice will offer no evidence on this disparity and seem to approach the issue as an evident matter. They also make no consideration for economic realities within the victim's country. Some courts

have rejected this approach under the basis of equality-under-the-law principle, but this appears to be a minority view.

Furthermore, Japanese courts do not apply this principle to cases dealing with Japanese nationals. This is particularly telling since, according to government reports, there is up to a 10% difference in economic development between various regions in Japan.

ZUSAMMENFASSUNG

Wie die meisten Civil Law Rechtsordnungen sieht auch das japanische Recht Schadensersatzansprüche im Rahmen einer deliktischen Haftung für eine Vielzahl erlittener Nachteile vor. Dabei wird bereits seit Einführung der deliktischen Haftung in Japan im späten 19. Jahrhundert Ersatz auch für immaterielle Schäden gewährt. Als Anspruchsgrundlagen für das Opfer und auch für nahe Angehörige dienen dabei Artt. 710 und 711 des japanischen Zivilgesetzes. Bei der Bemessung der Höhe des Anspruchs sind die Richter nach dem Zivilgesetz grundsätzlich frei und können ohne nähere Begründung fast jeden Betrag festsetzen.

Für Verletzungen von Körper und Leben wurden durch Richterrecht Grundsätze für die Bezifferung immaterieller Schäden entwickelt. Das Gesetz sieht auch insoweit keine starren Höchstgrenzen vor, allerdings haben japanische Gerichte zumindest Richtwerte aufgestellt.

Solche Richtwerte greifen insbesondere auch dann, wenn sich das Opfer oder der nahe Angehörige nur kurzzeitig in Japan aufhält. Erstinstanzliche Gerichte berücksichtigten in diesen Fällen den Lebensstandard im Heimatland der Anspruchsteller. Allerdings zeigt eine Recherche, dass eine solche Betrachtung auch nur dann erfolgte, wenn es sich um Länder handelte, die im Vergleich zu Japan einen niedrigeren Lebensstandard aufwiesen. Eine solche Vorgehensweise läuft den Bemühungen der japanischen Regierung zuwider, mehr Besucher und ausländische Arbeitskräfte für Japan gewinnen zu können.

Diese Gerichte verschleiern die Ungleichbehandlung oft und scheinen die Berücksichtigung des niedrigeren Lebensstandards als Selbstverständlichkeit abtun zu wollen. Erschwerend kommt hinzu, dass die tatsächlichen wirtschaftlichen Gegebenheiten des Heimatlandes des Opfers nicht gewürdigt werden. Es gibt auch Gerichte, die eine derartige Vorgehensweise im Hinblick auf den Gleichheitssatz insgesamt ablehnen. Dies scheint jedoch eine Minderheit unter den Gerichten zu sein.

Außerdem wenden japanische Gerichte diese Grundsätze nicht auch auf Opfer mit japanischer Staatsangehörigkeit an. Dies erscheint bemerkenswert, zumal auch zwischen verschiedenen Regionen innerhalb Japans beim Lebensstandard nach offiziellen Berichten Unterschiede von bis zu 10 % bestehen.

(Die Redaktion)