The Price of a Tweet

Defamation and Social Media in Japan

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I. INTRODUCTION

This paper examines a case dealing with delictual liability for loss of social standing over a retweet on the social media service Twitter; also addressed is the question of how traditional rules for defamation over analogue media might not be suitable for a connected world. Particularly when the plaintiff is a public figure, such as a politician, defamation law might have the undesired effect of curtailing public discourse related to a societal interest. Hence, even if defamation law protects a person's reputation, in the case of public figures, it must be balanced against the general public's interests. Japanese defamation law centres around the concept of reputation, itself a

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part of what are termed personality rights[1] or *jinkakuteki na kenri,* also known as *jinkaku-ken*.[2] As with other civil law jurisdictions, Japanese defamation law recognizes two types of legal interests: an individual's social standing (*shakai meiyo*) and self-perceived sense of honour (*meiyo kanjō*).[3]

Arts. 710[4] and 723[5] of the Japanese Civil Code (*Minpō,* Civil Code, hereinafter: CivC)[6] provide for a remedy in the event of defamation (*meiyo kison*). These remedies consist of damages and, in some cases, the publication of an apology. In addition, Arts. 230[7] and 231[8] of the Criminal Code

1 T. UCHIDA [内田貴], 民法 II 債権各論 [Civil Code II Law of Credit] (3rd ed., 2011) 370.

2 The concept of personality rights was introduced to Japan in the early 20th century, influenced by German scholarship. Particularly, in 1920 Hideo HATOYAMA used the term to refer to either a comprehensive set of rights that aim to protect the personality of the individual (*Recht der Persönlichkeit*) or to each individual right used to protect personality interests (*Persönlichkeitsrechte*). Scholarship on the subject resurged during the 1960s and today infringements of these rights are considered a fundamental part of non-economic losses in Japanese law. However, there is a clear difference between *jinkaku-ken* and personality rights under common law, with the former being closer to *patrimoine moral* of French law. For more on this topic, see R. RODRIGUEZ SAMUDIO, Non-economic losses under Japanese law from a comparative law perspective (2017) 66–68.

3 While not limited to defamation, comparative law recognizes two types of non-economic losses: objective and subjective losses. The former, also known as social *dommage moral*, are losses that can be safely presumed to derive from a delictual conduct, *e.g.,* loss of reputation, honour, and privacy. By contrast, the latter refers to emotional distress within the affected individual, thus the term subjective, and include pain, emotional suffering, and loss of confidence amongst others. For additional details, see RODRIGUEZ SAMUDIO, *supra* note 2, 170–174.

4 Art. 710 CivC: Persons liable for damages under the provisions of the preceding Article must also compensate damages other than those to property, regardless of whether the body, liberty, or reputation of others have been infringed, or property rights of others have been infringed.

5 Art. 723 CivC: The court may, at the request of the victim, order a person who defamed others to effect appropriate measures to restore the reputation of the victim in lieu of, or in addition to, damages.

6 Law No. 89/1896. Unless indicated otherwise, English translations of laws and ordinances are taken from *http://www.japaneselawtranslation.go.jp/?re=02.*

7 Art. 230 CrimC: (1) A person who defames another by alleging facts in public shall, regardless of whether such facts are true or false, be punished by imprisonment with or without work for not more than 3 years or a fine of not more than 500,000 yen.

(2) A person who defames a dead person shall not be punished unless such defamation is based on a falsehood.

8 Art. 231 CrimC: A person who insults another in public, even if it does not allege facts, shall be punished by misdemeanour imprisonment without work or a petty fine.

(*Keihō*, Criminal Code, hereinafter: CrimC)[9] make it a crime to defame another person publicly. Therefore, it is not uncommon for scholars and courts to discuss civil and criminal liability.

Furthermore, in contrast to most common law jurisdictions, truth is not an absolute defence.[10] Instead, under Japanese law, the defendant must also prove that the statement has the public interest in mind.[11] Thus, some commentators have pointed out that since truth is not an absolute defence, Japanese defamation law can be considered as even more repressive of speech than old common law rules on libel.[12]

In addition, some scholars contend that, in most cases, Japanese courts tend to presume that the plaintiff suffered a loss of social standing.[13] Nevertheless, as one of the non-economic legal interests expressly recognized in the CivC, there is an extensive body of case law regulating the content of the right to reputation, possible infringements, and how to calculate damages.

With the rise of internet communications, these general rules had to be adapted to cases dealing with interactions over the internet. Indeed, Japan has a long tradition of internet social norms, with social networking services (SNS) being developed well before their western counterparts. Furthermore, Japan introduced 3G technology in the early 2000s, which enabled internet connection over portable devices, in particular mobile phones.[14]

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9 Law No. 45/ 1907.

10 Y. ARBEL / M. MUNGA, The Case Against Expanding Defamation Law, Alabama Law Review 71 (2019) 453, 467.

11 There is no provision in the CivC that grants the defendant any defences against defamation. By contrast, Art. 230-2 CrimC, does establishes several defences against prosecution.

Art. 230-2 CrimC: (1) When an act prescribed under paragraph (1) of the preceding Article is found to relate to matters of public interest and to have been conducted solely for the benefit of the public, the truth or falsity of the alleged facts shall be examined, and punishment shall not be imposed if they are proven to be true.

(2) In application of the preceding paragraph, matters concerning the criminal act of a person who has not been prosecuted shall be deemed to be matters of public interest.

(3) When the act prescribed under paragraph (1) of the preceding Article is made with regard to matters concerning a public officer or a candidate for election, punishment shall not be imposed if an inquiry into the truth or falsity of the alleged facts is made and they are proven to be true.

12 S. MATSUI [松井茂記], 表現の自由と名誉毀損 [Freedom of Expression and Defamation] (2013) 198.

13 H. ISHIIBASHI [石橋秀起], 名誉毀損と名誉感情の侵害 [Infringement of Reputation and Emotional Reputation], Ritsumeikan Law Review 5–6 (2016) 1315, 1316.

14 According to government statistics, 63% of polled individuals had a smartphone, 50% had a computer, and 23% had a tablet which they used to connect to the internet. MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS, *Reiwa gannen tsūshin ri-*

This early integration of SNS and mobile services profoundly influenced how the public and the courts approach public statements and comments over the internet. Moreover, while Japanese people are polite in their everyday interactions, the internet also brings out some darker aspects of society. For example, bullying incidents over the internet are on the rise,[15] with some leading to suicide, and diffusion of false or defamatory information is also an issue. Furthermore, until recently, identifying the aggressor was a long and arduous process independent of the main suit for damages.[16] Thus, while anonymity grants users an opportunity to express an opinion without the fear of retaliation, it also protects abusive behaviour. Under these circumstances, the question of how to balance freedom of expression and reputation is of paramount importance.

Japanese courts began to decide cases regarding defamation over the internet during the latter half of the 1990s, with a marked increase of lawsuits during the late 2000s. An early example was 2chan, currently known as 5chan, a bulletin board where users anonymously post comments and content.[17] The number of defamatory posts in 2chan and other similar bulletin boards eventually led to a limitation on the liability of service providers[18]

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yō dōkō chōsa no kekka [Results of the 2019 Survey on Communication Usage Trends], at *https://www.soumu.go.jp/johotsusintokei/statistics/data/200529_1.pdf.*

15 The Ministry of Education, Culture, Sports, Science and Technology publishes an annual report on various issues regarding bullying of students from elementary school to high school. In 2019, 17,924 students reported having been victims of bullying over the internet or via cell phone, up from 7,889 in 2014. *https://www.mext.go.jp/a_menu/shotou/seitoshidou/1302902.htm*.

16 Anonymity over the internet presents its own set of legal issues in Japan. See: T. MATSUO [松尾剛行] / Y. YAMADA [山田悠一郎], 最新判例にみるインターネット上の名誉毀損の理論と実務 [Defamation on the Internet: Theory and Practice Based on Case Law] (2nd ed., 2019) 455; K. TSUKUDA [佃克彦], 名誉毀損の法律実務 [Defamation Law in Practice] (2nd ed., 2008) 103, 143.

However, in April 2021, after cyberbullying resulted in the suicide of a popular actress, the Japanese parliament passed a new law which simplifies the steps required to identify and sue anonymous posters. Under the old law, plaintiffs had to first sue the media operators for the user information and then sue the user in another trial. "Japan enacts law to enable simpler court steps to find cyberbullies", Kyodo News, 21 April 2021. *https://english.kyodonews.net/news/2021/04/e0657850e73b-japan-enacts-law-to-enable-simpler-court-steps-to-find-cyberbullies.html.*

17 In 2020, the Supreme Court upheld a decision that granted damages for the retweet of a copyrighted image. (Supreme Court, 21 July 2020, 民集 Minshū 74, 1407). However, since the infringed legal interests are not comparable, *i.e.,* defamation vs copyright infringement, we will withhold comment on that case in this paper.

18 特定電気通信役務提供者の損害賠償責任の制限及び発信者情報の開示に関する法律 *Tokutei denki tsūshin yakumu teikyō-sha no songai baishō sekinin no seigen oyobi hasshin-sha jōhō no kaiji ni kansuru hōritsu* [Act on the Limitation of Liability for

and the development of ways to identify anonymous posters.[19] In recent years, the focus has shifted to interactions over social media services like Facebook and Twitter. Consequently, Japanese courts are beginning to deal with more cases regarding defamation and abuse over the internet.

II. DEFAMATION IN JAPAN

1. General Rules

a) Defamation and the Civil Code

Japanese law protects reputation under both criminal and civil law. Even though nowadays most defamation cases fall within civil law jurisdiction, the origin of the claim is found in the realm of criminal liability.[20] Therefore, to understand civil defamation, we will briefly describe criminal defamation rules.[21] Art. 230 CrimC establishes that defamation must consist of "alleging facts in public, regardless of whether such facts are true or false". Furthermore, criminal defamation has a set of defences under Art. 230-2 CrimC, namely the public interest defence, while the CivC has no clear rules on the matter. Thus, the courts had to adapt the criminal defamation rules to civil cases.

Art. 709 CivC,[22] which regulates delictual liability, does not explicitly protect reputation, as this falls within the purview of Arts. 710 and 723 CivC. However, since Japanese delictual liability follows a general clause model, all claims must meet the criteria set forth under Art. 709 CivC; namely, plaintiffs must prove that the defendant was negligent or acted

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Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders], Law No. 137/2001 (hereinafter: Service Provider Act).

However, as Art. 1 clearly establishes, this law was enacted to limit the liability of service providers and not to address defamation claims over the internet.

19 In recent years, the popularity of bulletin boards has been on the decline. In their place, a new type of site called *matome saito*, or summary sites, has become the centre of attention. These sites are used to compile information from various sources, usually bulletin boards but also SNS like Twitter and Facebook. MATSUO / YAMADA, *supra* note 16, 1.

20 The origins of Art. 230 of the CrimC can be found in the 1853 *Zanbō-ritsu* (讒謗率), a law aimed at quelling citizen rights movements and preventing criticism of the government. MATSUI, *supra* note 12, 2.

21 Unless explicitly stated, discussions and case law quoted in this paper deal with civil liability cases.

22 Art. 709 CivC: 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.

with intent. In addition, the defendant's actions must have caused reputational harm, and the plaintiff must establish a causal link between the act and the injury. Even though these general principles apply to defamation claims, in practice the courts have developed a set of rules and defences via case law to balance protection of reputation and the constitutional right to freedom of expression. Therefore, some commentators have called it a different class of delictual liability claims.[23]

Some commentators affirm that courts link the defendant's negligence with the infringement of the plaintiff's legal interest.[24] In other words, if plaintiffs can prove that their reputation was affected, courts will consider the defendant negligent, therefore combining both the negligence and legal injury requirements into one. While neither Art. 709 nor 710 CivC requires that the defendant's statements be public, the courts have adopted the rules set forth by Art. 230 CrimC to the realm of civil liability.[25] Therefore, for a defendant to be liable, the statement must be public (*kōzen-sei)*[26] or communicable (*denpan-sei)*.[27]

Publicity requires that the statement be made in a public manner and aimed at a large number of indeterminate people, regardless of the medium. On the other hand, communicability is a concept developed by the courts to address statements and comments that, while not public, can nevertheless be easily reproduced and transmitted.[28] Therefore, courts have ruled that letters sent to relatives[29] or landowners,[30] and faxes sent to workplaces[31] meet the aforementioned requirements. By contrast, in a case[32] dealing with politics in academia, the plaintiff, a professor, sued 26 members of the

23 T. MIYABE [建部雅], 不法行為法における名誉概念の変遷 [Changes in the Concept of Defamation in Delictual Liability]2014,14.

24 ISHIBASHI, *supra* note 13, 31.

25 An important distinction between criminal and civil liability is that the CrimC expressly requires the statement to be public, i.e., made in a public manner and aimed at a large number of indeterminate people.

26 Under criminal law, since the protected legal interest is the plaintiff's social standing, comments made only to the plaintiff in private are not defamatory regardless of their content, as they do not affect the perception society has on the plaintiff. See Supreme Court, 19 February 1959, 刑集 Keishū 13, 186.

27 TSUKUDA, *supra* note 16, 54.

28 Under criminal law, the communication requirement is used for statements that, while initially aimed at a small number of people, can nevertheless be later conveyed to a larger public, with scholars and courts agreeing that this requirement also applies to civil cases TSUKUDA, *supra* note 16, 57.

29 Tōkyō District Court, 23 January 1992, 判例タイムズ Hanrei Taimuzu 865 (1995) 247.

30 Tōkyō District Court, 31 August 1992, 判例タイムズ Hanrei Taimuzu 819 (1993) 167.

31 Tōkyō District Court, 21 April 1997, 判例タイムズ Hanrei Taimuzu 969 (1998) 223.

32 Tōkyō District Court, 22 August 2003, 判例時報 Hanrei Jihō 1838 (2004) 83.

university board (*riji-kai*) for a report describing him as unfit for the position of dean. The court sided with the defendants, holding that, while 26 was by no means a small number of people, the report itself was highly confidential and not subject to dissemination. Furthermore, this requirement has also led to rather curious decisions. For example, courts have granted damages arguing that documents produced at a trial were both public and communicable and thus defamatory.[33]

There is also the issue of determining the harm suffered by the plaintiff, mainly, what constitutes an individual "reputation". Civil liability case law has a long tradition of requiring that the defendant's statements refer to facts that would cause a loss of social standing.[34] This is known as *shakai meiyo* and is a non-economic interests recognized under Art. 710 and given special protection under Art. 723 CivC. By contrast, an "individual's subjective feeling of reputation", known as emotional reputation or *meiyo kanjō*, is also covered under the concept of reputation as an independent legal interest granted protection under the general rules of delictual liability. The publicity and communication requirements apply to *shakai meiyo* claims but not to *meiyo kanjō* claims.

While these interests are covered under reputation, they do not necessarily follow the same rules. For one, scholars and case law have made a distinction between statements and opinions when discussing how these interests are infringed. Infringement of *shakai meiyo* requires that plaintiffs make factual statements about the defendant as if they were true. At the same time, comments, in general, infringe *meiyo kanjō*, regardless whether they are based on factual information or not.[35] Therefore, *meiyo kanjō* is an emotional interest of the victim[36] related to comments that, while not necessarily causing a loss of social standing, affect the victim's emotional well-being. Scholars posit that *meiyo kanjō* claims are only feasible if the defendant's actions do not infringe the plaintiff's *shakai meiyo*.[37]

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33 Tōkyō District Court, 18 January 1990, 判例タイムズ Hanrei Taimuzu 723 (1990) 151. However, in this case the court ruled that the law required all related procedures to be carried out orally; therefore, the court decided that, by presenting a written document, the lawyer was liable since the information could be accessed by any third party.

34 Imperial Court, 19 February 1906, 民録 Minroku 12, 226, 230–231; Supreme Court, 9 September 1997, 民集 Minshū 51, 3804. However, as discussed in the next section, in practice Japanese courts will focus on the plaintiff's reputation loss, regardless of whether the statement points to a fact or is an opinion. TSUKUDA, *supra* note 16, 74.

35 ISHIBASHI, *supra* note 13, 28.

36 H. HIRANO [平野裕之] 民法総合6 不法行為 [Civil Law Synthesis 6 Delictual Liability] (3rd ed., 2013) 94–96.

37 ISHIBASHI, *supra* note 13, 44. In particular, ISHIBASHI argues that a claim for *meiyo kanjō* is viable if the defendant's comments fall within one of the following cases:

In addition, since *meiyo kanjō* claims do not require a reputation loss, the standard of liability is the tolerable social limit for a particular comment. These claims focus on the impact the defendant's words had on the plaintiff, to the point that private communications not made public that mainly affect the recipient's emotions might be actionable if they surpass tolerable limits under delictual liability.[38] Accordingly, courts have granted remedy for insults written down in a private letter sent to the plaintiff.[39] Since *meiyo kanjo* protects an emotional state, courts will focus not only on the comment's contents but also on the language and the relationship between the parties.

The last characteristic of defamation claims is that the defendant has access to a set of defences not available in other cases. Specifically, defendants can argue that their statements or comments were factual, constitute a fair comment, or are a counterargument. These defences will be analysed in detail in a later section.

b) Loss of social standing

As indicated above, *shakai meiyo protects* plaintiffs' social standing regardless of whether the comments or statements are true.[40] The Supreme Court[41] has expressly ruled that the main issue in defamation cases is whether the defendant's statements damage the plaintiff's reputation, character, honour, or trust, regardless of whether the information is accurate or merely an opinion or evaluation. Therefore, for a *shakai meiyo* claim to succeed, the defendant's language must have caused a loss of the plaintiff's objective social standing,[42] unless the defendant invokes and prevails with one of the defences discussed below.

Thus, there is the issue that in defamation cases, negligence is directly related to the loss suffered by the victim. Under Japanese law, defamation not only pursues the protection of the victim's personality rights but also maintains social order.[43] However, this focus on maintaining social order

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1. If the comment makes a factual statement that does not result in a loss of social standing; 2. If there is a previous fact not mentioned by the defendant; or 3. If no fact is referenced at all. Furthermore, ISHIBASHI posits that in any event, a *meiyo kanjō* infringement is barred if defendant's actions constitute a *shakai meiyo* infringement.

38 Supreme Court, 13 April 2010, 民集 Minshū 64, 758.

39 Ōsaka District Court, 28 August 2012 (2012WLJPCA08286001).

40 TSUKUDA, *supra* note 16, 5.

41 Supreme Court, *supra* note 34.

42 UCHIDA, *supra* note 1, 370. Supreme Court, 18 December 1970, 民集 Minshū 24, 2151.

43 TSUKUDA, *supra* note 16, 16.

sometimes clashes with freedom of expression as enshrined in the Constitution. Some scholars posit that a defamation claim should only be granted in cases dealing with false statements.[44]

Moreover, some commentators point out the tendency of Japanese courts to assume that the plaintiff has suffered a loss.[45] As a result, courts will focus on whether the statement might cause the alleged victim to lose social standing rather than the content of the words used. For example, courts have found that depicting someone as mentally disabled[46] or as gay[47] is defamatory. By contrast, some courts might decide that the defendant's words do not amount to defamation and instead choose to grant a remedy for privacy infringement.[48]

Statements or comments must refer to an identifiable individual to be actionable. Therefore, general affirmations such as "people from Ōsaka are loud" do not constitute defamation.[49] Thus, when the governor of Tōkyō insulted women who had lost the capacity to bear children, the court rejected a claim for damages since the defendant had not referred to a specific individual.[50] By contrast, when a news show reported that products from Tokorozawa in the Saitama prefecture contained high Dioxins levels, the court admitted 380 farmers as plaintiffs.[51]

Accusing a person of a crime[52], infidelity[53], sexual harassment[54], or workplace harassment[55] can be defamatory *per se.* Likewise, comments that affect the plaintiff's professional reputation will most likely meet the criteria for defamation. The police might also be liable for commenting on an investigation after a not guilty verdict.[56]

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44 MATSUI, *supra* note 12. MATSUI rejects defamation as a personality right, or at the very least considers it subordinate to freedom of expression as enshrined in the Constitution.

45 TSUKUDA, *supra* note 16, 66. ISHIBASHI, *supra* note 13, 28.

46 Uchinomiya District Court, 28 February 1958, 家月 Kagetsu 10, 28.

47 Tōkyō High Court, 18 October 2006, 判例時報 Hanrei Jihō 1946 (2007) 48.

48 Kōchi District Court, 30 March 1992, 判例時報 Hanrei Jihō 1456 (1993) 135.

49 TSUKUDA, *supra* note 16, 33.

50 Tōkyō District Court, 22 February 2005, 判例タイムズ Hanrei Taimuzu 1186 (2005) 175. However, the court did reprimand the defendant for making such comments.

51 Saitama District Court, 15 May 2001, 判例タイムズ Hanrei Taimuzu 1063 (2001) 277.

52 Supreme Court, 23 March 2012, 判例タイムズ Hanrei Taimuzu 1369 (2012) 121.

53 Tōkyō District Court, 17 October 2016 (2016WLJPCA10178011).

54 Tōkyō District Court, 12 June 2012, 判例時報 Hanrei Jihō 2165 (2012) 99.

55 Tōkyō District Court, 15 September 2017 (2017WLJPCA09158020).

56 Aomori District Court, 16 February 1993, 判例時報 Hanrei Jihō 1482 (1994) 144. The official in charge of the investigation told a magazine that he was sure that the plaintiff was the murderer even after being acquitted.

However, courts will not grant damages if they consider that the plaintiff's reputation loss is insignificant.[57] Some courts will consider a plaintiff's previous reputation to deny a claim. For example, in 2002 the Tōkyō High Court rejected a claim for damages from the Aleph cult (previously known as Aum Shinrikyo), arguing that the plaintiff's previous participation in terrorist attacks had already lowered its social standing to such a degree that the defendant's publication did not cause a loss.[58]

Moreover, courts will not award damages if the information is already public. For example, in a 2004 case the plaintiff, a dentist who had his license revoked, sued a newspaper for casting doubt on his professional practice.[59] The Nagoya High Court rejected the claim for damages, pointing out that the notice of the license revocation had been posted on the Ministry of Health web page and reported by multiple newspapers by the time the defendant had published the article. Nevertheless, some courts have recognized that even if the plaintiff's social reputation is already low, the defendant is liable if the comment causes a further loss.[60]

While the reputation of deceased individuals is not directly protected, the feelings of respect and remembrance (*keiai tsuibo no jō)* held by their next-of-kin are.[61] Regarding the latter, lower courts have granted damages to the next-of-kin when their reputation is affected.[62] For example, in a

57 Tōkyō District Court, 27 July 1998, 判例タイムズ Hanrei Taimuzu 991 (1999) 200. Tōkyō District Court, 27 November 1998, 判例時報 Hanrei Jihō 1682 (1999) 70.

58 Tōkyō High Court, 25 September 2002, 判例時報 Hanrei Jihō 1813 (2003) 86.

59 Nagoya High Court, 16 September 2004, (2004WLJPCA09169004).

60 Tōkyō High Court, 29 September 1993, 判例タイムズ Hanrei Taimuzu 853 (1994) 243.

61 The "Raku Jitsu Moyu" novel case is the leading case on the subject. In the novel, a late former member of the Japanese cabinet was described as having an affair, for which his next-of-kin sued the author. The Tōkyō High Court had to decide upon two points of law: whether defamation could affect dead individuals; and whether the next-of-kin had a remedy against the author. Regarding the first point, the court ruled that since both the Criminal Code and the Copyright Act recognized the reputation of dead individuals, there was no reason to divert from these general principles, even if there was no explicit private law rule that granted the same right. Nevertheless, the Court rejected the claim since the law did not specify who could bring the claim. Regarding the second issue, the court ruled that the defamation of the deceased had caused emotional distress. However, the court also concluded that these feelings were the strongest immediately after death and diminished over time; consequently, the court rejected the next-of-kin feelings claim based on the reasoning that their feelings had not been infringed to such a degree as to make the defamation actionable. Tōkyō High Court, 14 March 1979, 判例タイムズ Hanrei Taimuzu 387 (1979) 63. Also, Ōsaka District Court, 27 December 1989 判例時報 Hanrei Jihō 1341 (1999) 53.

62 Scholarship is divided on the issue. The direct protection theory or *chokusetsu hogo-setsu* posits that a remedy should be granted in three cases: when the defendant's alleged defamatory actions affect the deceased reputation directly, when it affects the

case[63] where a newspaper misreported on the deceased's romantic relations in the context of a murder, the court granted damages under the argument that the defendant's coverage had caused a loss of social standing to the mother. In another case, the court[64] ruled that the defendant's conduct had caused the plaintiff (the deceased's son) to suffer reputational damage and infringed upon his feelings of respect and remembrance, for which it granted damages and ordered a public apology.[65] Claims are limited to next-of-kin and cannot be brought forth by third parties, even if they had a significant relationship with the deceased.[66]

While not the subject of personality rights, the Supreme Court[67] has recognized that Art. 710 CivC also protects a juridical person's reputation, and later case law extended this protection to public entities.[68] For juridical persons, the courts consider that reputation is the trust that the general public deposits in the business.

Courts use a "general public" standard when the defendant's words or actions cannot *prima facie* be construed as defamatory, adapting it to the media at hand. Under this standard, the defendant's conduct will be defamatory if it causes a loss when viewed from the general public's perspective. *i.e.,* the ordinary attention and manner of reading or viewing the information.[69]

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next-of-kin reputation, and when it affects the feelings of respect and remembrance of the next-of-kin. However, this theory recognizes the limitations of current law regarding who can bring the suit and proposes an amendment to allow the next-of-kin to exercise the right. By contrast, the indirect protection theory *or kansetsu hogo-setsu* rejects a direct claim from the deceased and the recognition of feelings of respect and remembrance as protected interests, leaving the next-of-kin with a claim only when their own reputation is affected. HIRANO, *supra* 36, 104–105.

63 Shizuoka District Court, 27 December 1989, 判例タイムズ Hanrei Taimuzu 447 (1981) 104. Comparing the defendant's conduct to other newspapers, the court concluded that the defendant's reporting hinted at a murder motive while other newspaper had been more measured in reporting the facts.

64 Ōsaka District Court, 3 March 1983, 判例タイムズ Hanrei Taimuzu 492 (1983) 180.

65 However, the Court rejected the plaintiff's request for a public apology directed towards the deceased.

66 Tōkyō District Court, 9 November 1989, 判例時報 Hanrei Jihō 1334 (1990) 209. The court rejected the claim for an apology brought forth by a former student of the deceased.

67 Supreme Court, 28 January 1964, Hanrei Jihō 363 (1964) 10.

68 Tōkyō High Court, 19 February 2003, 判例時時 Hanrei Jihō 1825 (2003) 75. The High Court went into a detailed discussion of the need to balance the public's right to know and the public function local entities perform versus the need to protect said entities' social standing. While recognizing in principle that the reputation of public entities is protected under Art. 710 CivC, the court nevertheless sided with the defendant and rejected damages.

Nevertheless, while this is the current legal standard, it is not without its critics. For one, some scholars argue that, in contrast to physical injuries, it is not possible to readily ascertain the plaintiff's loss.[70] In a case where the defendant conducted a public poll to prove that the plaintiff had not suffered any reputation loss,[71] the court ruled that the ordinary reader standard did not refer to the general opinion of the readers, but rather the perspective of the *ideal ordinary reader* (あるべき一般読者).

There is also the issue of comments or statements regarding public figures. While other jurisdictions afford fewer protections to public figures because of their position, Japanese courts and scholars do not make such distinctions.[72]

There is, however, a case that deals with the reputation of public figures. The case, known as the North Journal case (北方ジャーナル事件),[73] dealt with a plaintiff, a former mayor of the city of Asahikawa in Hokkaidō and a candidate for the governorship of the same prefecture, who sought an injunction to prevent the publication of an article in the North Journal Magazine. Strictly speaking, the case did not deal with defamation but rather with the issue of whether plaintiffs could seek an injunction on the ground of defamation and how to balance freedom of speech and reputation since the Constitution protects both interests.

Regarding the injunction question, the Supreme Court held that plaintiffs could seek injunctive relief against defamatory publication. However, the Court then discussed the importance and role of freedom of expression in a democracy, particularly regarding matters of public interest. Expressly, an injunction seeking to prevent the publication of articles regarding public figures should be granted only when the information is false, or does not deal with matters related to the public interests, and the victim is in danger of suffering irreversible harm.

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69 This means an ordinary reader in the case of newspapers (Supreme Court, 20 July 1956, 民集 Minshū 10, 1059), and an ordinary viewer in the case of broadcasted media (Supreme Court, 16 October 20 July 2003, 判例タイムズ Hanrei Taimuzu 1140 (2004) 58. However, in the case of periodical dedicating multiple issues to the same topic, courts have ruled that every issue must be taken as a single publication. Tōkyō High Court, 27 September 1993, 判例タイムズ Hanrei Taimuzu 853 (1994) 245.

70 ISHIIBASHI, *supra* note 13, 28.

71 Tōkyō District Court, 24 August 2004, 判例時報 Hanrei Jihō 1871 (2004) 90.

72 TSUKUDA, *supra* note 16, 298. However, some of the defences in the next section do consider whether the plaintiff is a public figure.

73 Supreme Court, 11 June 1986, 判例タイムズ Hanrei Taimuzu 605 (1986) 42.

2. Defences

Regardless of the emphasis Japanese case law puts on a plaintiff's reputation, the law and courts recognize a series of defences against defamation claims. These defences can be divided into special defences, granted to ordinary acts that fall within a specific profession's purview, and general defences available to all defendants. The best example of a special defence is the case of public officials, who are given a certain degree of leeway regarding their statements. Art. 51 of the Japanese Constitution exempts members of the National Diet from liability regarding their acts as a representative of the public, a stance supported by the Supreme Court.[74] Local assembly members are not afforded the same protections enshrined in Art. 51 of the Constitution. Liability in these cases is controlled not by the CivC but by the State Redress Act,[75] and since public officials are not liable if they harm another person when performing their duties, in practice the plaintiff will face more obstacles when pursuing redress.[76]

Lawyers are generally awarded protection regarding acts performed in the representation of a client.[77] Nevertheless, courts will grant damages against a lawyer acting in a trial in certain circumstances. However, the standard under which a lawyer's conduct is judged is not uniform amongst the courts.[78] Some courts will focus on whether the behaviour was necessary, adequate, and related to the trial at hand.[79] Other courts will try to determine the intent, truthfulness, and relation of the conduct at the trial.[80] Some courts will judge the lawyer's behaviour based on its intent, necessity, and adequacy.[81] In some cases, courts will take the lawyer's act as a

74 Supreme Court, *supra* note 34. The Court also ruled that even if the diet member did defame someone, that by itself would not grant the victim a claim under Art. 1 of the State Redress Law. However, if the diet member's goal is illegal or unlawful, then this protection does not apply.

75 国家賠償法 *Kokka baishō-hō* [State Redress Law] Law No. 125/ 1947. In contrast to the CivC, the State Redress Law requires that the public official's conduct be illegal (違法).

76 TSUKUDA, *supra* note 16, 363.

77 Tōkyō District Court, 5 November 1956, 下民 Kamin 7, 3129.

78 TSUKUDA, *supra* note 16, 369.

79 Tōkyō High Court, 25 February 2004, 判例時報 Hanrei Jihō 1856 (2004) 99. Tōkyō District Court, 27 November 1998, 判例時報 Hanrei Jihō 1682 (1999) 70.

80 Ōsaka High Court, 26 June 1985, 判例時報 Hanrei Jihō 1162 (1985) 73. Tōkyō District Court, 8 July 1993, 判例時報 Hanrei Jihō 1479 (1994) 53. Tōkyō District Court, 23 August 2004, 判例時報 Hanrei Jihō 1865 (2004) 92.

81 Tōkyō District Court, 20 March 2006, 判例時報 Hanrei Jihō 1934 (2006) 65.

whole before deciding.[82] Lastly, some courts have used some elements of the general defences discussed below.[83]

a) Truth Defence

The truth defence, known in Japanese as the *shinjitsu sōtō-sei no hōri*, is one of the general defences available to all defendants. The Supreme Court first recognized this defence in a 1966 case[84] when it ruled that if the statements at the centre of the trial are related to a matter of public interest, were made with the sole intention of benefiting said public interest, and are accurate, then the defendant is not liable for defamation. Furthermore, even if the defendant's statements were not factual, if he or she had a valid reason to believe them to be accurate, then the truth defence still applies.

This standard applies whether the plaintiff is a public figure or a private individual, since Japanese courts consider the crucial factor to be whether the information refers to the public interest.[85] The Supreme Court did not set a criterion for what constitutes public interest; nevertheless, the North Journal case discussed above has influenced how lower courts approach the issue.[86] Lower courts have ruled that for comments to be related to the public interest, the mere fact that a large number of people are concerned about the issue is not enough; the statements must refer to interests that attract the attention of the public.[87] Regarding the statement's accuracy, the Supreme Court has ruled that defendants do not have to prove that every single element of the information is true; the defence will prevail if they can prove that the material facts are accurate.[88]

In a 1981 criminal case, the Supreme Court ruled that private acts of public figures can be considered related to the public interest, depending on the nature of the conduct and the influence the individual has on society.[89] Under this argument, civil courts have ruled that the private acts of a for-

82 Kyōto District Court, 18 January 1990, 判例タイムズ Hanrei Taimuzu 723 (1990) 151.

83 Tōkyō District Court, 17 July 1970, 判例タイムズ Hanrei Taimuzu 256 (1971) 229. The court ruled that the mere fact that the lawyer's argument could defame one of the parties was not enough to grant damages if the lawyer had a logical reason to believe them to be true.

84 Supreme Court, 23 June 1966, 民集 Minshū 20, 1118.

85 TSUKUDA, *supra* note 16, 298.

86 TSUKUDA, *supra* note 16, 82.

87 Tōkyō High Court, 5 July 2001, 判例時報 Hanrei Jihō 1760 (2001) 93.

88 Supreme Court, 20 October 1983, 判例時報 Hanrei Jihō 1112 (1984) 44. Fukuoka High Court, 14 August 1985, 判例時報 Hanrei Jihō 1183 (1986) 99. Ōsaka High Court, 14 November 1986, 判例タイムズ Hanrei Taimuzu 641 (1987) 166.

89 Supreme Court, 16 April 1981, 刑集 Keishū 35, 84.

mer boxing world champion coach are matters of public interest.[90] By contrast, in a case where an actress was involved in a neighbourhood quarrel, the court judged that such behaviour was not related to the public interest.[91]

Even if the statements are judged to be closely related to the public interest, defendants must also prove that they had said interest in mind when they divulged the information. The courts' default position is to consider that the publication was made with the public interest in mind if the information is valuable to the public, *i.e.,* it meets the criteria discussed above.[92] Regardless, a court can recognize that the information is valuable to the public but reject the defendant's defence based on how it was released.[93]

b) Fair Comment Defence

The Supreme Court adopted a version of the common law's fair comment doctrine in a 1989 case,[94] known as the fair comment defence or *kōsei-na ronpyō no hōri.* In contrast to the truth defence, which protects statements that present true facts related to the public interest, this defence aims to protect comments that express an opinion. Hence the defendant's comments do not represent a fact; instead they are a personal appreciation of a specific person, situation, or topic. For a defendant to succeed, the plaintiff must be a public figure, the statement had to be made with the public interest in mind, the information must be accurate, and the comments must not be a personal attack on the plaintiff. Furthermore, while not necessarily fulfilling the first requirement, legal opinions, particularly those made by professionals during a trial, are usually considered fair comments unless they constitute an evident personal attack.[95]

The defendant's words must be interpreted based not only on their plain meaning but also considering the parties' interactions and the matter discussed.[96] Furthermore, accusations are considered defamatory *per se*, even

90 Tōkyō District Court, 29 January 1985, 判例時報 Hanrei Jihō 1160 (1985) 97.

91 Tōkyō High Court, 5 July 2001, 判例時報 Hanrei Jihō 1760 (2001) 93.

92 Kyōtō District Court, 25 June 2004, 判例時報 Hanrei Jihō 1799 (2002) 135.
Nagoya High Court, 12 May 2004, 判例タイムズ Hanrei Taimuzu 1198 (2006) 220.
The defendant used a pseudonym to discuss an ongoing criminal trial in which the plaintiff was being charged.

93 Nagasaki District Court, 28 March 1983, 判例時報 Hanrei Jihō 1121 (1984) 160.
The defendant distributed a pamphlet discussing the acts of the plaintiff during his tenure as a public-school principal. In siding with the plaintiff, the court recognized that the public had an interest in the plaintiff's actions, but rejected the defendant's defence since the pamphlet discussing his tenure as principal was insulting.

94 Supreme Court, 21 December 1989, 民集 Minshū 43, 2252.

95 Supreme Court, 15 July 2004, 民集 Minshū 58, 1615.

96 Tōkyō District Court, 28 February 1996, 判例時報 Hanrei Jihō 1570 (1996) 3.

if they are based on a verifiable fact. For example, in a 1996 case,[97] the defendant questioned whether the plaintiff had intentionally caused a traffic accident. The Sapporo District Court rejected the fair comment defence, pointing out that such comments were an accusation and could not be considered reasonable.

Lastly, the courts have not set a standard as to what constitutes a personal attack. In matters such as politics and academia, where criticism and argument are part of the regular interactions, this issue becomes paramount. In such a case, courts will consider the content of the comment and the specific words used by the defendant. For example, in a case[98] dealing with the edition of an English-Japanese dictionary, the plaintiff pointed out that the dictionary editors had made severe mistakes and cast doubts, using very strong language, as to their capacity as English language scholars. In siding with the plaintiff, the court held that, while the defendant's comments were partially true when considering the nature and scale of the project, the number of people involved, and the academic effort involved, the defendant's words did not meet the standard so as to allow them to be considered fair.

c) Counter-speech Defence

Lastly, scholars and courts recognize that parties might be participants in a discussion or argument on a specific topic, either as part of regular social interactions or as part of their profession. Unfortunately, it is also not uncommon for some interactions to end up as heated discussions in which both parties might make comments that can be considered defamatory under normal circumstances. Therefore, courts have created a haven, known as counter-speech (*taikō genron* or *genron no taiō*), to protect both parties against liability.

In contrast to the truth defence or the fair comment defence, which seek to protect the defendant's speech by focusing on the public interest, the counter-speech defence is based on a balancing of private interests, with some scholars arguing that it might even be granted under Art. 720 CivC,[99] which establishes the principle of self-defence or *seitō bōei* as an exception to liability.[100]

97 Sapporo District Court, 20 December 1996, 判例時報 Hanrei Jihō 1626 (1998) 125.

98 Tōkyō District Court, 28 February 1996, 判例時報 Hanrei Jihō 1570 (1996) 3.

99 Art. 720 CivC: (1) A person who, in response to the tortious act of another, unavoidably commits a harmful act to protect himself/herself, the rights of a third party, or any legally protected interest, shall not be liable for damages; provided, however, that the victim shall not be precluded from claiming damages against the person who committed the tortious act.

Defendants must prove that the comments were made to protect their legal interests and are proportionate to the other party's conduct.[101] Since this defence is based on the behaviour of all involved parties, courts will analyse the words, acts, medium of expression, and other intervening factors.[102] Moreover, while in principle, this defence aims to protect the legal interests of a party to the original discussion, some courts have recognized that the protection can extend to comments made to defend the legal interests of "close" third parties.[103]

3. Defamation on the Internet

With the advent of the internet, courts began adapting the general rule to fit the new medium better. The first issues came around the end of the millennium, with the popularity of bulletin boards such as 2chan (currently known as 5chan). These bulletin boards allowed users to post anonymous comments that, in some cases, were personal attacks against specified individuals. Since the posts were anonymous, victims had difficulties bringing a suit, and the liability of service providers consequently became a contentious issue. This led to the promulgation in 2001 of the Service Provider Act, which shields service providers and gives victims the tools to identify posters.

One of the first steps taken by the courts was to adapt the ordinary reader or viewer standard to online browsing, and courts created the ordinary user (*ippan etsuran-sha*)[104] standard.[105] Courts had traditionally focused on whether the plaintiff's social standing had been harmed in cases dealing with analogue media. However, lower courts analysing the nature of bulletin boards and web pages began to take a more in-depth look at the interactions as a whole, considering the posted content and background as well as

(2) The provisions of the preceding paragraph shall apply mutatis mutandis to cases where a thing belonging to others is damaged to avoid imminent danger arising from that thing.

100 TSUKUDA, *supra* note 16, 354. However, TSUKUDA recognizes that this argument can only be used if the invoking party has already been the victim of defamatory comments.

101 Supreme Court, 16 April 1963, 民集 Minshū 17, 476.

102 Yokohama District Court, 1 February 1994, 判例時報 Hanrei Jihō 1521 (1995) 100.

103 Tōkyō District Court, 29 May 1972, 判例タイムズ Hanrei Taimuzu 298 (1973) 387.

104 Courts coined this term during a time when web browsers were the main tool for internet interactions, thus a more literal translation would be "ordinary viewer" or "ordinary browser". However, since the courts use this term for web browsers and social media services, we have decided to use the term ordinary user to avoid confusion.

105 Supreme Court, 16 October 2003, 判例タイムズ Hanrei Taimuzu 1140 (2004) 58.

any counterarguments from the victim, all from the perspective of the ordinary user of the service.[106]

Another issue was the degree courts should presume that ordinary users believe the information presented on websites, particularly those used by independent journalists. While there are few rulings on this matter, the Supreme Court did observe, in passing, that the fact the website belonged to an independent journalist was not enough to assume that users would doubt its veracity.[107]

Courts have also become more open to accepting a counter argument as a defence. Further, in contrast to face-to-face interactions and those over traditional media, online communication lacks the same level of civility. Accordingly, strong language will not immediately lead to a ruling against the defendant; it is, however, nevertheless frowned upon by the courts.[108]

The publicity and communicability requirements were also re-examined. In some cases, such as unrestricted-access webpages or social media services, the information's publicity can be presumed.[109] However, in cases where the information is behind an access wall, *e.g.,* membership websites[110] or private social media accounts, the courts had to decide on a case-by-case basis. Thus, in a case dealing with defamatory posts on a private social media service, the court ruled that the posts were public since access was granted by the administrator, and the information within could be copied and pasted with relative ease.[111] By contrast, in a case dealing with the social media service Mixi, the court held that since the account was limited to members the user had allowed, the post was not public.[112]

The publicity and communicability of communication services such as email or social media services are also hard to establish. Therefore, courts have adopted a broad approach, focusing on the possibility of forwarding the information to third parties. In the case of emails, courts will focus on the number of recipients.[113] Therefore, company-level emails that are freely

106 Tōkyō District Court, 27 August 2001, 判例タイムズ Hanrei Taimuzu 1086 (2002) 181.

107 Supreme Court, 23 March 2012, 判例タイムズ Hanrei Taimuzu 1369 (2012) 121.

108 Tōkyō District Court, 5 September 2001, 判例タイムズ Hanrei Taimuzu 1088 (2002) 94.

109 MATSUO / YAMADA, *supra* note 16, 149.

110 In the case of pay-to-access services, courts will focus on who can become a user. MATSUO / YAMADA, *supra* note 16, 151. Thus, the information contained in a website that required a monthly subscription of 1,000 yen was ruled to be public. Tōkyō District Court, 30 October 2012 (2012WLJPCA10308002).

111 Tōkyō District Court, 17 February 2015 (2015WLJPCA02178005).

112 Tōkyō District Court, 24 December 2014 (2014WLJPCA12248028). The court did consider chat logs to be public.

113 MATSUO / YAMADA, *supra* note 16, 150.

accessible to employees and directors[114] and email newsletters are considered public.[115] However, even if the recipient is a company, communications will be considered private if there is a duty owed to the sender.[116] Courts have also ruled that comments over business communications platforms such as Slack might give the victim a claim for damages.[117]

The defences available to the defendant have also evolved to keep up with communication technologies. For example, while the Supreme Court is reluctant to relax the requirements of the counter-speech defence regarding online interactions,[118] lower courts have abandoned the focus on reputation loss in favour of an analysis of the parties' interactions.[119]

Generally, posts that express frustration over certain situations, individuals, or events are considered personal impressions and are therefore granted a certain degree of protection. Thus, accusing a user of hiding the truth,[120] comments over a person's appearance,[121] or opinions over job performance have been ruled to be nothing more than personal impressions. Furthermore, courts are not likely to award damages for heated email exchanges if they do not go beyond what is socially acceptable.[122]

However, this protection is based on the premise that both parties are equals, thus having the same opportunity to argue and counter-argue. For example, in a case where the plaintiff had never used the bulletin board on which the defamatory comments were posted, the court rejected the defendant's counter-speech defence.[123] Likewise, courts will not admit a counter-speech defence if a bulletin board thread is used by a large number of users to

114 Tōkyō District Court, 13 February 2017 (2017WLJPCA02138002).
115 Tōkyō District Court. 9 December 2014 (2014WLJPCA12098005).
116 Tōkyō District Court, 7 September 2017 (2017WLJPCA09078024). The recipient was a company that performed secretary services for the defendant. The court ruled that the company had to a duty to keep the information received a secret; thus, while defamatory, the emails could not be considered public.
117 Tōkyō District Court, 28 December 2016 (2016WLJPCA12288001).
118 Supreme Court, 15 March 2010, 刑集 Keishū 64, 1. According to the West Law Japan data base, and in contrast to other Supreme Court decisions, this ruling has been invoked as precedent in only three other cases, perhaps indicating a reluctance of lower courts to follow the Court's decision.
119 Tōkyō High Court, 17 May 2018 (2018WLJPCA05176003). The High Court rejected the plaintiff's petition to obtain the poster's information after considering that the original post was not defamatory.
120 Tōkyō District Court, 12 April 2017 (2017WLJPCA04126010).
121 Tōkyō District Court, 23 March 2017 (2017WLJPCA03238028).
122 Tōkyō District Court, 12 October 2010 (2010WLJPCA10128003).
123 Tōkyō High Court, 25 December 2002, 判例時報 Hanrei Jihō 1816 (2003) 52.

attack an individual or group of individuals.[124] The same applies to cases where the plaintiff creates a webpage to dispute the defamatory statements.[125]

An essential difference between the internet and analogue media is the users' role in creating and disseminating content. Particularly in the latter case, case law is divided on the issue of liability for linking a website or post. Some courts consider that if the link and the information therein is used to justify an opinion, then the conduct is defamatory.[126] Similarly, linking a newspaper or magazine article might be defamatory depending on the headlines and comments attached to the link.[127] Likewise, questioning a website's contents might be defamatory, depending on the circumstances.[128]

By contrast, there is a clear tendency not to punish merely pointing out the existence of certain information. Therefore, as a rule, linking to newspapers or magazine articles reporting a crime[129] or otherwise potentially containing information that might defame the plaintiff[130] is not defamatory *per se*.

III. Liability for Tweets

The general rules for defamation claims also apply to tweets that infringe on an individual's reputation. For example, tweets falsely accusing the plaintiff of destroying a third party's property are defamatory.[131] By contrast, while scarce, cases dealing with retweets have become a point of contention between the courts, scholars, and professionals. In a 2014 case, the Tōkyō District Court held that plaintiffs had a claim against users who retweet a post, independent of the original poster's liability.[132] In a 2015

124 Tōkyō District Court, 17 July 2003, 判例時報 Hanrei Jihō 1869 (2004) 46.

125 Tōkyō District Court, 31 May 2007 (2007WLJPCA05318008). The court considered that there was no certainty that users of the defendant's webpage would visit the site created by the plaintiff.

126 Tōkyō District Court, 3 February 2016 (2016WLJPCA02038008).

127 Tōkyō District Court, 27 February 2008 (2008WLJPCA02278011). However, the court sided with the defendant since he had established a logical reason to believe that the information was true.

128 Tōkyō District Court, 13 October 2015 (2015WLJPCA10138017). The plaintiff sued the internet service provider (ISP) to obtain the data of a user in order to sue them for defamation. The potential defendant had posted a link to a site, asked whether the information within was true, and acknowledged that if it was speculation, it would probably be defamation. The court considered that the user had linked the site with the intent of making it visible to a large number of people and ordered the ISP to provide the requested information.

129 Tōkyō District Court, 29 January 2015 (2015WLJPCA01298028).

130 Tōkyō District Court, 26 January 2016 (2016WLJPCA01266019).

131 Ōsaka High Court, 9 June 2017 (2017WLJPCA06199002).

132 Tōkyō District Court, 24 December 2014 (2014WLJPCA12248028). Section 5-7-(2).

case, it again held that retweets are a separate form of expression quoting the original tweet.[133]

By contrast, courts consider liking a tweet a mere expression of support, for which the user cannot be held liable for defamation, though the logic for this argument is not clear.[134] In addition, some scholars oppose the view that a mere retweet can be construed in the same manner as the original post, as there is a possibility that the user might be pointing to the existence of the original tweet.[135]

1. The 2020 Retweet Case – Background

In September 2017, the plaintiff, a former governor and former mayor of Ōsaka, launched a series of insulting tweets against a member of the House of Representatives, who was not a party to the suit.[136] In response, an anonymous Twitter user, also not a party to the lawsuit, posted the following message linking a website to the plaintiff's previous conduct: "(Plaintiff) when you were governor of Ōsaka, you verbally abused officials 20 years your senior, driving (someone) to suicide. Did you forget? Have you no shame?"[137] The defendant, a journalist, retweeted the above post to his account having over 180,000 followers at the time. The retweeted post was deleted two months later, in December 2017.

The plaintiff sued the defendant in 2018 for damages, arguing that the assertion that he had caused a person to commit suicide was defamatory *per se*, and that by retweeting the original post, the defendant was making the same claim. Furthermore, the plaintiff posited that as a journalist with over 180,000 followers, the defendant had a strong influence and could broadly

133 Tōkyō District Court, 25 November 2015 (2015WLJPCA11258016). Section 3-1-(2)-エ.

134 Tōkyō District Court, 20 March 2014 (2014WLJPCA03208009).

135 MATSUO / YAMADA, *supra* note 16, 350.

136 The plaintiff repeatedly called the politician an idiot (ボケ) amongst other insults.

137 The language of the tweet is not entirely clear. On the one hand, it points out that the plaintiff had verbally abused public officials (plural), but it does not specifically say how many officials committed suicide. Regardless, a government official did commit suicide in 2010, and there were indications that the demands and work schedule requested by the plaintiff might have contributed to the incident. The plaintiff did publicly apologize to the family and admitted that he had put too much pressure on public officials. Specifically, the plaintiff said "I put too much pressure on those in the field, I was careless. I apologize to the next-of-kin". At the time, multiple news sources reported on the incident and the plaintiff's apologies as well as on the connection between the plaintiff's actions and the suicide. Furthermore, the Ōsaka Prefectural Assembly discussed the issue on 14 December 2010.

spread the original tweet, thus causing him harm; moreover, far from repenting, the defendant had continued to attack him via Twitter repeatedly.

In response, the defendant countered that a retweet was nothing more than presenting the original poster's opinion and thus only amounted to presenting available information. Furthermore, the defendant contended that the court should consider as the determining factors the short nature of tweets, the information available via news outlets, and the linked newspaper article, as well as the plaintiff's past conduct, including his interactions with the member of the House of Representatives. In addition, the defendant argued that the first part of the tweet was fact-based, making the latter part of the tweet, *i.e.*, "Did you forget? Have you no shame?", the controlling part of the post and that it did not constitute defamation as it was a critical opinion. The defendant also pointed out that the incident and the plaintiff's conduct and apology had been reported at a national level.

In the matter of defences, the defendant invoked the fair comment defence and argued that the plaintiff, as a former governor and mayor, was a public figure known nationwide; therefore, the public had an interest in his actions. Moreover, this type of discourse regarding public figures' conduct was necessary for democratic government, and thus the tweet was in the public interest. Finally, the defendant concluded by pointing out that the information presented in the tweet was fact-based; further, even if it was not, the defendant had sufficient reason to believe it was as several news outlets had reported it.

The plaintiff did not deny that the public was interested in his conduct but refuted the claim that the retweet was in the public interest or that the information presented was fact-based. He pointed out that the original user had repeatedly posted inflammatory comments against him, and thus the original tweet did not have the public interest in mind. Furthermore, the plaintiff posited that the original tweet's insinuation that his actions had driven a person to suicide was false.

The defendant also contended that the retweet had been posted for a short time and had been deleted by the time the trial began; also, judging from the numbers of replies and comments to the retweet, it was difficult to ascertain that he had helped spread it. Furthermore, the defendant claimed that by deliberately summarizing the retweet and bringing the lawsuit, the plaintiff himself had caused his loss of social standing.

Lastly, the defendant contended that the lawsuit was abusive to the point it amounted to a SLAPP suit[138] and countersued for damages under Art. 709

138 SLAPP stands for Strategic Lawsuits Against Public Participation. First described by George Pring and Penelope Canan in 1989, these lawsuits aim to prevent individuals from exercising political rights or punish them for having done so. G. W. PRING,

CivC, a claim that the plaintiff rejected. Thus, to summarize, the court had to rule upon five questions of law: 1. Can a retweet be defamatory; 2. What defences are available to the defendant; 3. What harm did the plaintiff suffer?; 4. Was the plaintiff's lawsuit frivolous; and if it was, 5. Did the defendant suffer any injury?

2. The District Court's Ruling[139]

The court began by analysing the legal nature of tweets and retweets, explicitly distinguishing between a simple retweet and one with a comment attached. The court considered that, notwithstanding any circumstances which would allow users to grasp the intent behind the retweet, to an ordinary user a retweet without comment was a statement that the user agreed with the contents of the original post. Therefore, the court sided with the plaintiff and concluded that a retweet without comment represented the defendant's opinion, for which he was liable.

The court then turned to whether the original tweet, and thus the retweet, was defamatory. Quoting precedent, the court restated that reputation loss should be judged from the perspective of an ordinary user, regardless of whether the statement represents a fact or an opinion. It then rejected the defendant's argument that the plaintiff's conduct and apology had been reported nationwide. Yet remarkably, while admitting that details over the incident could be easily accessed via a simple web search, the court concluded that since over five years had passed since the incident, an ordinary user would not be aware of said information and could not discern the intent of the retweet.[140]

In addition, the court recognized that the original tweet had a link to a website reporting the incident and that the plaintiff had, on various occasions, insulted a member of the House of Representative. Nevertheless, it concluded that it was not certain that an ordinary user would access the newspaper article or read the plaintiff's insulting tweets. Lastly, the court

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SLAAPs: Strategic Lawsuits against Public Participation, Pace Environmental Law Review 7 (1989) 5–6.

A study published by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs found that these lawsuits routinely target journalists, independent media outlets, academics, civil society, and human rights NGOs and are filed by corporations, wealthy individuals, and even governmental bodies. The study proposes the adoption of robust legislative measures to limit threats to suppress public scrutiny in matters of public interest. J. BORGH-BARTHET / B. LOBINA / M. ZABROCKA, The Use of SLAPPs to Silence Journalists, NGOs and Civil Society (2021).

139 Ōsaka District Court, 12 September 2019, (2019WLJPCA09129002), section 3-1-(1).

140 *Supra* note 139, section 3-1-(2)-(イ).

ruled that the first part of the post was the controlling part, representing the plaintiff's conduct as a fact, and that it could not be considered an opinion.[141] Consequently, the court agreed with the plaintiff's argument that describing him as someone who would harass his subordinates was defamatory *per se*, and thus it found that the tweet and the retweet had caused the plaintiff a loss of social standing.

Next, the court, while recognizing that the defendant invoked the fair comment defence, nevertheless decided to analyse the claim under a truth defence argument.[142] Siding with the plaintiff, it considered that there was no evidence to support the claim that the plaintiff had driven someone to suicide, and it concluded that the defendant had no valid reason to believe otherwise.

Regarding the plaintiff's harm, the court ruled that, as a journalist with over 180,000 followers, the defendant's social influence surpassed that of an ordinary person. In addition, considering that completely deleting something from the internet was impossible and that the post had been visible for over a month, the defendant's conduct had caused the plaintiff emotional harm regardless of the defendant's later actions, such as deleting the tweet.[143]

Lastly, the court ruled that since the defendant was liable, the suit did not amount to a SLAPP suit, and it summarily rejected the countersuit in three lines.[144]

3. The High Court's Ruling[145]

On appeal, the defendant and plaintiff's arguments did not differ significantly from those presented during the district court trial. While emphasizing the plaintiff's position as a public figure, the defendant argued that interactions over Twitter were not the same as merely reading the news, as the parties actively participated in a public debate; thus, the original tweet should be considered counter-speech. In addition, the defendant also pointed to various actions of the plaintiff aimed at supporting his SLAPP argument.

In upholding the original ruling, the court begins its analysis by describing in detail the service provided by Twitter, particularly the difference be-

141 *Ibidem*.

142 *Supra* note 139, section 3-2-(2). The court did not offer an explanation as to why it did not analyse the fair comment defence. Rather, it limited itself to writing that, considering the parties' allegations, it would analyse whether the defendant's arguments meet the elements of a truth defence "just in case" (念のため).

143 *Id.* at section 3-3-(1).

144 *Id.* at section 3-4.

145 Ōsaka High Court, 23 June 2020 (2020WLJPCA06239004).

tween a tweet and a retweet.[146] It then proceeds to recount the events that led to the lawsuit, beginning with the insulting tweets posted by the plaintiff.[147]

The court affirms that both the general principles of defamation claims and the ordinary reader doctrine apply to tweets, rejecting the defendant's claim that tweets should be held to a different standard than other forms of expression.[148]

Following the District Court's conclusion, the High Court held that from the perspective of an ordinary user and, absent exceptional circumstances allowing a contrary inference, a retweet amounted to putting the information in a place where followers can read it. Nevertheless, it went a step further and ruled that if users are aware that they are making the information accessible to their followers, they are liable regardless of the background, intent, objective, or motive of the tweet, subject to any defences. In other words, unless he had a valid defence, the defendant was responsible for the mere fact of having retweeted the original post.[149]

The court admitted that information regarding the suicide was available in various public sources, as well as being accessible via a simple web search. Nevertheless, it upheld the District Court's decision that, considering five years had passed since the incident, it was not common knowledge amongst ordinary users, even if they knew about the plaintiff's past political career and current career as a political commentator.[150]

The court concluded that the mere fact of pointing out that the plaintiff's behaviour might have contributed to the suicide of the public official was defamatory *per se*. Moreover, the court determined that, even in the light of the plaintiff's insulting comments regarding a member of the House of Representatives, it could not rule that he had taken any actions that would pressure his subordinates during his time in office.[151]

In rejecting the defences invoked by the defendant, the court held that, while it was possible to conclude that the defendant had a reason to believe the original post based on the available information, when viewed from a general user's perspective, the post painted the plaintiff as someone who had caused a suicide.[152] In addition, the court focused on the nature of Twitter, in particular, the fact that users can share information almost instantly with an indeterminate and large number of people, a feature which

146 *Id.* at section 3-1-(1).
147 *Id.* at section 3-1-(2). For reasons that are not clear to the author, the court decided to self-censor certain dates, particularly those regarding the suicide incident.
148 *Id.* at section 3-2-(1).
149 *Id.* at section 3-2-(2).
150 *Id.* at section 3-2-(3)-イ-(ウ)- c .
151 *Id.* at section 3-2-(3)-イ-(エ)- c .
152 *Id.* at section 3-3-(2).

the court considered dangerous. Therefore, to the court, Twitter users, both those posting their original comments as well as those retweeting, must be careful and understand that their tweet's content might affect an individual's reputation, character, honour, or trust. Consequently, the court determined that the defendant had not established any defences.[153]

Finally, the High Court upheld the District Court ruling and rejected the defendant's argument that the suit constituted a SLAPP suit.[154]

IV. THE PRICE OF A TWEET

The rulings illustrate the difficulties and dangers of adapting traditional case law to online media. While the defendant initially announced he was studying the possibility of appealing to the Supreme Court, he ultimately decided against it.[155] Social media users and technology experts decried the High Court's ruling, with some calling it an alarm bell.[156] On the other hand, the two cases have received only a few reviews in legal circles, with one paper discussing the dispute as reflecting the legal issues associated with SNS posts.[157] The authors concede that the High Court stance of not analysing the background of the case presents a clear approach to assessing liability. Regardless, they argue that, in the case of retweets, the District Court's opinion (*i.e.*, analysing the comments attached to the retweet, the users' intentions, and other background elements) should be routinely considered in assessing liability.

The latter approach addresses these rulings as mere defamation claims instead of focusing on freedom of expression and the accountability of public officers during and after their time in office. Furthermore, in contrast to the two previous cases dealing with retweets,[158] these cases involve a public figure who had been a public official holding two significant offices within Japan. Therefore, reducing the discussions to a simple matter of defamation over the internet ignores deeper issues involved in this litigation.

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153 *Ibidem*.

154 *Supra* note 145, section 3-5.

155 K. UWAKAMI, 上告断念のお知らせ [Notice on the Decision to Appeal]. Independent Web Journal. 8 July 2020. *https://iwj.co.jp/wj/open/archives/47786.*

156 その「リツイート」大丈夫？削除済み、炎上なしでも名誉毀損に "Is that retweet safe? Defamation for a deleted tweet that did not cause controversy", The Sankei News, 30 June 2020. *https://www.sankei.com/premium/news/200630/prm2006300001-n1.html*.

157 O. IIDA [飯田直久] *et al.,* リツイートを中心とするSNS投稿の法律問題 [Legal Issues of SNS Posting in particular with regard to Retweets], 専門実務研究 = Research on specialty practice 15 (2021) 5, 11 et seq.

158 *Supra* notes 132 and 133.

1. The Original Tweet

The first issue is whether the original tweet can be considered defamatory *per se* as the plaintiff argued and both courts agreed. At first glance, the language of the original tweet does paint the plaintiff as someone who, at the very least, verbally abused his subordinates, which would undoubtedly cause a loss of social standing. However, both courts focused solely on the plaintiff's reputation loss at an abstract level. The High Court spends a good portion of its 35-page ruling emphasizing that causing a reputation loss should be punished. By contrast, it could be argued that the plaintiff's social standing had already been affected at the time of the suicide and that any further comments would have not caused him a further loss or that said loss would not be significant enough to warrant damages.

However, neither court delved into the plaintiff's conduct and interactions with people during and after his time as a mayor and governor. Furthermore, they brushed aside the fact that the plaintiff's conduct, as described in the original post, had been part of the national news cycle, with the plaintiff himself partially admitting to the facts. Thus, the courts were too focused on whether the original tweet, and thus the retweet, was defamatory *per se*, to the extent that neither court was open to discussing the background.

The original tweet did indeed contain information that would cause reputation loss to the plaintiff – in particular the assertion that the plaintiff's actions had driven someone to the suicide. Nevertheless, the background of the case does not allow for such *prima facie* findings. At the very least, the plaintiff had made public declarations in which he admitted a certain degree of involvement, and the original post was in response to insulting comments towards a third party.

We must concede that both courts were in a difficult position regarding the plaintiff's involvement with the incident of suicide. They could not presume that the plaintiff had driven a public official to commit suicide, as that would probably give the next-of-kin enough grounds to sue under Art. 711 CivC.[159]

The courts could have side-stepped the issue by limiting liability to the original user. They could also have construed the issue as being a discussion on past news, which would not require judging the plaintiff's past actions. Both courts decided not to directly address the defendant's fair comment defence, going so far as to analyse a different defence not invoked by the parties. If they had indeed focused on the fair comment defence, the courts would have had to consider case law on online interactions, which would

159 Art. 711 CivC: A person who has taken the life of another must compensate for damages to the father, mother, spouse and children of the victim, even in cases where the property rights of the same have not been infringed.

have forced them to consider the plaintiff's conduct and other background elements, a task which they did not seem eager to engage in.

Nevertheless, and for the sake of argument, let us agree with the courts and consider that the original tweet was indeed defamatory and that no defence covered the statements contained within the tweet. While it is true that the original user did not use his or her real name, the plaintiff had the legal recourse to request an order from the court to obtain the information necessary to identify the user. The plaintiff does not explain why he did not do so, and both courts seem content with not having called the original user into the trial. The plaintiff, a trained lawyer, must have been aware that he had a remedy via requesting the courts to order the internet service provider (ISP) and tweeter to provide the necessary information to locate the original poster and sue him or her. Therefore, if the original post was defamatory, the courts should have pointed that out and advised the plaintiff to sue the original poster instead of admitting liability over a retweet. Why neither court did so and why the plaintiff declined to ask for this remedy is a mystery.

It could be argued, however, that the plaintiff sued the defendant because he had a larger number of followers than the original user. However, this point of view is unsatisfactory for the following reasons: First, even if the defendant had the most followers as an individual, it is still possible that the number of total followers of other users was even greater. Suppose the defendant had one hundred followers, but the original tweet was retweeted by one hundred people, each having an average of ten followers. This would mean that 1099 people might have seen the retweets, of which only 100 views can be attributed to the defendant. Accordingly, if we accept the argument that the number of followers should be determinative in ascertaining who is liable, this would mean that the defendant would be liable even if he did not created the majority of the views.

Second, the original tweet continued to be defamatory regardless of the number of retweets. Hence, it makes no sense to disregard the original user and to sue only a third party to the conversation.

Lastly, there is the issue of the defendant's SLAPP claim. Both courts dismissed this claim on the argument that, since the defendant was liable, the suit did not meet the criteria to be considered a SLAPP suit. Nevertheless, we believe that there is at least enough indication that the defendant was singled out amongst others. For one, the plaintiff appears to have made no effort in locating the original user, even though the plaintiff, as a lawyer, should be aware that there are legal means to do so. Secondly, to the best of our knowledge, the plaintiff only sued the defendant, ignoring all the users who retweeted the original post. Lastly, the plaintiff admits that he sued the defendant because of his number of followers as a journalist. Thus, the defendant's claims would have merited at least a more detailed analysis.

2. The Retweet

The second issue with the rulings is the threshold for liability created by the courts. Specifically, the High Court's assertion that a tweet or retweet's intent, objective, or motive are irrelevant is dangerous when applied to online services. Even if we accept the court's argument at face value, it is unclear why it should extend beyond the original user. While there is no record of how many times the original post was retweeted, it seems unlikely that the defendant was the only user to share the original tweet.

Following the court logic, every person who retweeted the original post would be liable to the plaintiff, regardless of the circumstances, thus potentially granting a claim against thousands or millions of people. Neither court explained why only this particular defendant could be sued other than that the plaintiff chose him amongst all the users that retweeted the post. It could be argued that, from the point of view of the loss of social standing, the defendant caused a greater loss than other users. However, the onus to prove that must fall on the plaintiff, and since we do not know how many users retweeted the original tweet, and consequently we do not know how many followers they had, this is not an adequate criterion.

Indeed, it just falls back to the point we made a above: having the threshold for liability depend on the number of users would not be a desirable element of a claim under most circumstances, and particularly in respect of retweets. Suppose that the plaintiff chose a defendant based on the number of followers. Would the defendant escape liability if he or she can prove that other users had a larger following at the time of the retweet, even if by one? Must the plaintiff include statistical analysis of the number of followers of other users to prove that the defendant caused him the larger loss of social standing? What happens in the case we described above, where the defendant has the most followers as an individual, but contributes relatively little to the total number of people that saw the retweet? In the event that one of the followers of the retweeter has an even larger number of followers and retweets the original tweet after seeing the defendant's retweet (or retweets the defendant's retweet itself for that matter), would the new user then become the defendant? Using followers as a determinative criterion turns liability into a game of hot potato, a game that can best be avoided by limiting liability to the original user, barring exceptional circumstances.

Moreover, equating a retweet to supporting the original tweet requires that courts attempt to discern the inner thoughts of a defendant to an unfeasible degree. Since the user can add additional comments to a tweet, inferring intent from silence is not a good approach. If the user added his or her comments, then the court could apply the general rules discussed in section two, *i.e.*, if the language supports a view or affirms a fact, the user could be liable.

It also goes against previous case law requiring that links to web pages or posts justify an opinion,[160] which the defendant did not do in this case. The courts' arguments also fail to explain why retweets without comments and likes should be treated differently. At an interface level, retweets without comments and likes are displayed similarly, the main difference being whether the accompanying text reads "retweeted" or "liked".

Regarding this point, we admit we disagree with the courts and a large portion of scholars in holding that a retweet is not the same as the original tweet, particularly if it has no comment whatsoever. Twitter makes it evidently clear when a post is either a retweet or a like, and we argue that most users are aware of that fact. Thus, a retweet, particularly one without any sort of comments, can be construed as nothing more than pointing out that a certain user has a particular view on a particular subject. We do agree, however, that the issue is considerably more nuanced. For example, there could be some cases of gross negligence where the defendant was aware that the original tweet is false and nevertheless decides to retweet it. Regardless, this is a question that courts, both in Japan and elsewhere, will have to address in the future.

From this perspective, the defendant's claim that a retweet without a comment is nothing more than an act providing information seems more logical and in tune with the realities of a platform such as Twitter. A user might decide to share a tweet for many reasons: *e.g.*, because it is cute, interesting, funny, amusing, or informative, and none of those indicate support for the information provided. Holding otherwise would open users everywhere at a global level to Japanese defamation rules. Thus, following the High Court's logic, users might be targets of defamations claims merely because they have retweeted links to newspapers articles that are later ruled to be defamatory. Either court's logic leads to the same conclusion: a plaintiff can sue the original poster and enjoin every single user that retweeted the injurious post, which is not good law. This standard of liability is dangerous when discussing public figures' conduct, particularly those regarding politics and acts during their time in office.

Second, we must also criticize the courts' seeming lack of interest in entering a nuanced discussion of the case's background. Both courts focused on whether the original tweet caused a reputation loss at an abstract level. As mentioned before, we concede that the original post was defamatory for the sake of advancing the argument. From that starting point, the next step should have been a more in-depth analysis of the plaintiff's conduct as a whole. However, as previously mentioned, Japanese courts tend to infer

160 *Supra* notes 126, 127 and 128.

loss of reputation and ignore other elements such as negligence or intent.[161] The implications of the plaintiff's status as a well-known public figure will be discussed later. At this point, we argue that since both courts recognized that the plaintiff was indeed a public figure, the background elements of the case, including the plaintiff's personality and previous public interactions, should have been addressed more comprehensively.

3. The Ordinary User Standard

In contrast to analogue media, internet users, particularly those on social media, actively engage with each other, shaping the content they produce and consume. Thus, it is not clear what the courts consider as "ordinary" in this sense. In other words, it is not clear whether ordinary users of Twitter and other social media should be considered average passive consumers, like television viewers or newspaper readers, or whether they are a new type of user with a more active participation, such that a certain degree of caution and prudence is to be expected.

Moreover, before the age of social media, ordinary readers, listeners, and viewers had no tools to confirm the accuracy of information they were receiving. In addition, the victims had no direct way of intervening or countering the information as presented. Thus, in the past a defamatory statement in a news article had a more substantial impact. Currently, even if a media outlet breaks a news story, the readers, viewers, or listeners will have many more tools at their disposal to corroborate or refute the story. In some cases, users will point out discrepancies with any reports presented by news outlets.

Legally speaking, a more significant issue is that neither court attempted to define an ordinary user. Twitter and other social media platforms have millions of active users of different ages, genders, ethnic groups, religions, etc., each producing, commenting, and sharing content. To lump such a broad group into a single standard category is not practical nor based on reality. For example, an ordinary newspaper reader is most likely an adult, interested in current events, and the attributes of an ordinary television viewer can to a greater extent be inferred from the content and timeslot of the respective show. By contrast, a Twitter user can be anyone from a teenager following his favourite artist to a senior using it to keep track of his or her acquaintances.

The courts could have, for example, proposed a standard based on the ordinary user following political figures or engaged in political discussions. While not perfect, it would have limited the range to a more recognizable

161 *Supra* note 13.

and manageable size. However, this standard would probably not support the courts' ruling, as users interested in politics and following the plaintiff's comments would most likely be aware of background information on the case. Therefore, this case required a re-examination of the ordinary user standard rather than a patchwork adaption of the principle.

In such an interactive environment, users can be expected to have a minimum degree of tech-savviness that would allow them to look up this information, especially if they are interested in politics. Nevertheless, both courts considered that the original tweet might mislead users and brushed aside the fact that it included a link to a news article. Even if we entertain the courts' assumption that not all users would click on the link, it is not clear why the original user, or at the very least the user who retweeted the post, should be liable for the laziness of another user who has been provided with the means to confirm the information. To the courts, an ordinary user is experienced enough to capably engage in discussion over Twitter but is so unsophisticated as to believe every post without bothering to look up additional sources for confirmation.

Furthermore, both courts referenced the defendant's followers when liquidating damages. However, no evidence was presented to determine the number of followers the original user had at the time of the post. Therefore, it is not possible to determine whether the retweet had in fact caused a more severe legal injury to the plaintiff than the original tweet. Whether this will become a new standard in calculating damages remains to be seen.

4. Lack of Analysis of the Defendant's Claims

The defendant and his legal team must have been aware that proving a link between the suicide and the plaintiff's acts would be extremely difficult, if not impossible. Therefore, their strategy was to base their defence on fair comments and counter-speech, arguments that the courts ignored without any explanation. Had the courts analysed these defences, they would have had to consider all the elements of the parties' interactions, a task that, as mentioned before, they appeared eager to avoid. Yet even if the courts had decided to address the defendant's claims, he would still have faced several obstacles in succeeding.

For one, the fair comment defence would have required that the original tweet could not be construed as an accusation or a personal attack, either of which would have barred the defendant from invoking the defence. As for the first of these potential barriers, there is some leeway that prevents the language from being understood as a direct accusation, specifically, the fact that the plaintiff had in part admitted his involvement in the original incident. The personal attack obstacle, however, is more nuanced. At first

glance, the original post was a reaction to a comment aimed at a third party; thus, the original user was not part of the discussion. Regardless, case law on the matter shows that courts are more willing to consider the interactions of all the parties involved to a broader degree when dealing with comments and statements made over the internet, which would have forced the courts to consider the plaintiff's conduct.

However, we concede that there is the possibility that the involved courts could have found the language of the original post to be a personal attack, which would bar the defence, at least for the original user. If that were the case, the courts should have said so and then explained why it would also bar the defendant from invoking the fair comment defence. As it stands, it is not clear why the courts rejected the fair comment defence, other than the fact that the plaintiff suffered a loss of social standing.

Regarding the counter-speech defence, it is not immediately clear if the defendant would have prevailed even if the courts had addressed his claims, since the counter-speech defence is usually reserved for parties directly involved. The original post responded to an argument between a third party and the plaintiff, and the retweet did not even refer to that. Consequently, the courts might have concluded that the counter-speech defence did not cover the defendant since he was not part of the original discussion. Whether that logic should apply to a service such as Twitter and particularly regarding the acts of a public figure is debatable. However, as we argue in the next section, the plaintiff's status as a public figure, and as a former politician, should be considered when analysing any interactions between the parties and, if anything, should result in a more rigorous standard of liability than that adopted in a mere defamation case.

5. The Plaintiff's Status as a Public Figure

Lastly, we address the issue of the plaintiff's status as a public figure. Both courts opted to summarily reject the defendant's fair comment and counter-speech defences and instead focused on the loss of social standing. We argue that this approach is dangerous in a connected society, mainly when it deals with acts of public officials or former public officials. There is no denying that the plaintiff is a public figure; he was a public figure when the incident took place and continues to be a public figure actively involved in political discussions as a pundit on national television at the time of writing.

We begin by rejecting the courts' argument that a five-year period meant that the suicide incident was no longer in the readers' mind, as the courts themselves confirmed that a simple search returned various articles regarding the incident. This position is untenable because it diminished the importance of accountability of public officials as one of the pillars of the rule

of law in a democratic society. Five years is not a long enough period to consider that the acts of a former governor are no longer part of the public discourse. Even if the passage of time means that specific actions fade from public memory, the information contained within public records and news outlets becomes a part of the political history of a society. Therefore, the argument that it is not in the public interest is not a sound one, as it would mean that discussing or providing information on the acts of previous administrations is defamatory. Furthermore, it also goes against the established precedent that information presented in public sources cannot be considered defamatory.[162]

By focusing only on the loss of social standing, the courts decided to ignore these issues. Limiting citizens' freedom to criticize public officials and hold them accountable. The rules on defamation claims cannot serve to limit citizens' freedom to criticize public officials and hold them accountable. This would mean a return to the early days of defamation law, focused on censoring criticism lodged against the government. While we have agreed that the original post contains defamatory elements, responsibility should have been placed upon the original user and not a third party such as the defendant. Furthermore, by refusing to address the case's background, both courts decided to ignore the plaintiff's personality, particularly his brash style of dealing with political opponents and critics.

This case did not deal with matters related to the plaintiff's private life; nor was it a fictional story depicting him as a heartless villain. The plaintiff did not invoke a right to be forgotten. However, we suspect that this argument would have been rejected based on precedent[163] and the fact that the plaintiff continues to be active as a political commentator. Rather, it dealt with discussions regarding actions during his tenure as one of Japan's most important political figures. This fact alone distinguishes this case from a simple defamation lawsuit and elevates it to one touching upon the fundamental right of freedom of expression and the liberty of citizens to know about the acts of their representatives.

V. CONCLUSION

These rulings illustrate a paradigm shift in the way courts perceive defamation in the digital age. Traditional rules were established under the premise that very few actors had control over information capable of affecting an individual's reputation nationwide or worldwide. Therefore, there was little incentive to protect speech if it was disruptive, even if the contents were

162 See *supra* note 59.

163 Supreme Court, 31 January 2017, 民集 Minshū 71, 63.

accurate. Undoubtedly, as interactions over the internet continue to grow and replace face-to-face communication, these rules must change to better suit the times.

The court rulings in this case set a dangerous precedent for the future of online discourse regarding public figures. As the defendant claimed, public discussion on public officials' acts is one of the pillars of a democratic society. Such arguments have moved from public forums to the online world, and the courts should recognize that fact. The public interest in a public figure's behaviour, not least one who had occupied such high positions as mayor and governor, does not wane so easily, especially if it is related to current behaviour or deals with social issues such as workplace harassment.

From a procedural point of view, under current case law it is unclear if a third party, such as a Twitter user not part of the original discussion, can invoke the counter-speech defence. Personally, we believe they should be allowed to do so. We advocate recognizing such contributions as part of the natural discourse in online interactions, particularly if they bring information unknown to the original users, even if that information negatively affects one party. At the very least, courts should be prepared to expand the protection of the fair comment defence when dealing with cases regarding current or past public officials.

SUMMARY

The rise of social media presents a unique challenge for long-standing legal doctrines regarding defamation and privacy. Japanese defamation law has traditionally protected two legal interests: a person's social standing (shakai meiyo) and their emotional state (meiyo kanjō). In the case of the former, courts have established a series of requirements and legal defences that apply mainly to analogue media such as books, newspapers, radio, or tv. However, in contrast to common law principles and some civil law jurisdictions, Japanese courts do not consider truth an absolute defence for defamation claims. Thus, courts will grant damages based primarily on whether the plaintiff's social standing was affected by the defendant's statements.

Furthermore, the standards used to determine whether a statement is defamatory are based on the idea of an ordinary viewer, reader, or listener, depending on the medium. Japanese courts changed the standard for social media under the name of an ordinary user (ippan etsuran-sha). However, current case law does not seem to consider that in social media services, the concept of an ordinary user is not easily defined.

Usually, delictual liability falls upon the individual or institution that made defamatory statements. However, Japanese courts have granted damages

against defendants that have only retweeted information over Twitter in recent years. This approach is dangerous as the courts have yet to determine a limit to who can be sued. Furthermore, in the case of public figures, following the traditional standard of loss of social standing and granting damages to users retweeting specific comments might limit public scrutiny of public officials.

As an example, in 2020, the Osaka High Court upheld a lower court ruling that found an independent journalist liable for retweeting a post accusing the plaintiff, a former politician, of driving a public official to suicide. The court held so even though newspaper articles had been published earlier on the matter.

ZUSAMMENFASSUNG

Der Aufstieg der sozialen Medien stellt überkommene Prinzipien zum Schutz der persönlichen Ehre vor einzigartige Herausforderungen. Traditionell schützen die japanischen Regeln zu Ehrverletzungen zwei verschiedene rechtliche Interessen: das soziale Ansehen einer Person (shakai meiyo) und das persönliche Ehrgefühl (meiyo kanjō). Für erstere haben Gerichte eine Reihe von Voraussetzungen und Gegenrechte entwickelt, die hauptsächlich für analoge Medien wie Bücher, Zeitungen, Radio oder Fernsehen gelten. Im Gegensatz zu den Grundsätzen des Common Law und einigen kontinentaleuropäischen Rechtsordnungen ist nach der Rechtsprechung der japanischen Gerichte ein Schadensersatzanspruch wegen Ehrverletzung nicht von vornherein ausgeschlossen, wenn die behauptete Tatsache wahr ist. Entscheidend ist für die Gerichte vielmehr, ob die Äußerung des Beklagten das soziale Ansehen des Klägers beeinträchtigt.

Darüber hinaus basieren die Maßstäbe, die verwendet werden, um festzustellen, ob eine Äußerung ehrverletzend ist, je nach Medium auf der Vorstellung eines gewöhnlichen Zuschauers, Lesers oder Zuhörers. Japanische Gerichte haben diesen Standard für soziale Medien angepasst und den Standard des gewöhnlichen Benutzers (ippan etsuran-sha) entwickelt. Die aktuelle Rechtsprechung scheint jedoch nicht zu berücksichtigen, dass der Begriff des gewöhnlichen Nutzers bei Social-Media-Diensten nicht einfach zu definieren ist.

Üblicherweise trifft die deliktische Haftung die Person oder Institution, die ehrverletzende Aussagen gemacht hat. Japanische Gerichte haben in den letzten Jahren jedoch auch Personen für haftbar erklärt, die Informationen nur über Twitter geteilt hatten. Diese Herangehensweise birgt Risiken, da die Gerichte den Kreis möglicher Beklagten erst noch definieren müssen. Im Falle von Persönlichkeiten des öffentlichen Lebens kann das Festhalten an traditionellen Standards des Ehrschutzes und die Annahme einer Haftung von Nutzern, die Informationen lediglich geteilt haben, die öffentliche Kontrolle von Amtsträgern einschränken.

Beispielsweise bestätigte das Obergericht Ōsaka im Jahre 2020 ein Urteil der Vorinstanz, in dem ein unabhängiger Journalist für das Teilen eines Beitrags über Twitter haftbar gemacht wurde. In dem Artikel wurde der Kläger, ein ehemaliger Politiker, beschuldigt, einen Beamten in den Selbstmord getrieben zu haben. Die Gerichte bejahten eine Haftung, obwohl schon zuvor Medienberichte diese Anschuldigung öffentlich gemacht hatten.

(Die Redaktion)