matter. And, the importance of emotional distress is weakened because it isn't insisted, and the amount of consolation money stay in the small amount. In addition, the judge followed the situation and the small amount of consolation money is not dared to be changed and caused the vicious circle, was resembled and the various circle.

Therefore, it is necessary to construct a theory necessary to re-examine such handling that can be actually put, and to decide the proper amount of consolation money.

The Legal Theory of Adjustment of Damages

A Study on the Introduction of the “Mitigation” Concept in Comparative Fault

Yoshihito HASEGAWA

In discussions on the reform of the Japanese Civil Code Law of Obligations, the Working Group on the Civil Code (Law of Obligations) in the Legislative Council of the Ministry of Justice and the Japanese Civil Code Reform Commission proposed the introduction of a “mitigation” concept as part of the substantive law rather than as a comparative “fault” concept in contract law. It was suggested that this would not have any influence on the related concept of comparative fault in tort law. However, the proposed revision raises a number of issues. First, introducing a duty to mitigate concept in contract law alone may lead to a different assessment framework between contract and tort law on issues of comparative fault. Second, if we begin with the premise that mitigation covers the assessment of what constitutes reasonable behavior on the part of the claimant after having been harmed by the defendant, a theoretical problem may develop when trying to assess damages based on what constitutes reasonable behavior on claimant’s part before claimant was actually harmed. Thus, if a duty to mitigate is to be considered for introduction into contract law, consideration should be given to the introduction of a similar duty to mitigate concept in tort law as well. We should also work to develop a legal theory to cover the adjustment of damages based on the “reasonableness” of claimant’s actions before suffering the damage.

In order to examine the points outlined above, this article shall note useful aspects of the English common law principles of “mitigation” and “contributory negligence” as they relate to the adjustment of damages. In English common law, these concepts are used to assess the reasonableness of claimant’s actions but their scope of coverage differs. In other words, “contributory negligence” covers adjustment of damages for acts by claimant which may have unreasonably caused or expanded the amount of damage suffered before the harm occurred. “Mitigation,” on the other hand, covers adjustment of damages for acts by claimant which may have unreasonably expanded the amount of damage suffered after the initial harm. Accordingly, as we consider introducing a duty to mitigate under comparative fault, it is worthwhile to consider the relationship between common law
contributory negligence and mitigation.

In considering the relationship between these concepts and their possible use in Japanese law, this article shall argue that the traditional approach used in adjusting the scope of damages is not appropriate. The reason for this is that it does not adequately position the legal concept of “mitigation”. This problem is evident even if comparative fault is used to distinguish between the scope of claimant’s role in causing and expanding the damage suffered. Therefore, this article shall propose that the appropriate scope of comparative fault should be based on a new approach related to the time of claimant’s acts. In other words, we should work to develop a legal theory of comparative fault which considers claimant’s degree of fault both before and after the harm occurs. In addition to addressing the theoretical problems which mitigation alone cannot cover, such a framework would offer a new theoretical approach to the adjustment of damage claims under the Law of Obligations.

Fondements et régimes juridiques de la responsabilité des « entrepreneurs »
— Contribution à l’étude de la responsabilité des commettants —

Taro NAKAHARA

Cette recherche a pour but de réexaminer les régimes juridiques japonais de la responsabilité de ceux qui font une activité par le biais de personnels et d’établissements (la responsabilité des « entrepreneurs »), à la lumière du droit français et du droit allemand.

Au Japon, c’est la responsabilité des commettants qui joue le rôle principal pour poursuivre la responsabilité des « entrepreneurs ». Cependant, sa nature juridique est très discutée depuis toujours : Bien que l’article 715 du Code civil japonais dispose la responsabilité pour faute personnelle des commettants (culpa in eligendo sive instruendo), les tribunaux et les doctrines japonais réalisent, au moyen des interprétations artificielles (presque contra legem) de cet article, la responsabilité de plein droit des commettants en cas de faute de ses préposés. D’autre part, on reconnaît aussi des désavantage de ce régime et essaie d’élaborer un régime complémentaire fondé sur la faute personnelle des commettants. A cause de ce développement complexe, l’ensemble des régimes juridiques japonais de la responsabilité des « entrepreneurs » est devenu extrêmement précaire et sans cohérence. Pour dissoudre cette obscurité du droit positif japonais, il faut éclaircir les fondements de chaque régime de responsabilité (responsabilité pour faute personnelle et responsabilité de plein droit en cas de faute d’autrui) et les arranger de manière pertinente.

Dans cette perspective, il est utile de consulter les développements du droit français et du droit allemand. En France, la responsabilité des commettants fondée sur l’article 1384, alinéa 5 du Code civil est considérée comme la responsabilité de plein droit en cas de faute des préposés depuis la fin du XIXe siècle ; Après