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A STUDY ON THE LIABILITY FOR TORTS

By MASAO ISHIMOTO.

I.

In modern countries "the principle of liability with fault" is principally adopted in laws on liability for torts. Article 709 of the Japanese Civil Law prescribes that "a person who violates another's rights intentionally or negligently, is liable to the compensation for any damage caused by his act", and the French Civil Law and German Civil Law, the mother laws of the Japanese Civil Law, are also essentially similar in principles, although slightly different in expressions: (1)

Under this principle, whether one is liable or not to the compensation entirely depends upon the fact whether or not the person perpetrated the illegal act intentionally or by fault and depends also upon the fact whether or not the cause of the damage was really due to this illegal act. However, with the development of modern society, the social life has become gradually complicated, and especially as a result of the rapid progress of large enterprises, cases have occurred where various damages had been inflicted to others through an act of person in a position which should be stated as faultless in previous concept of fault. Moreover, in the objective social norm-consciousness of modern society, when there is no reason to hold the person who infringed upon rights of others responsible by the fact that he is faultless, it has been acknowledged that it is not proper for victims to bear the damage always. As a result, theories which impose the liability to the compensation upon the person so-called faultless have been advocated. The so-called theory of absolute liability which has been advocated for this purpose may be divided into two categories, classified according to the theoretical construction. The first is to recognize an absolute

1) Art. 1382. (Code civil), § 823. (BGB).

liability substantially by the presumption of fault, with the purpose of introducing absolute liability under the form of the liability with fault from the standpoint of the interpretation of law. The second theory is to acknowledge an absolute liability from a different standpoint without adhering to the standpoint of the interpretation of law. Rather, the latter has been advocated as a legislative theory outside the interpretation of existing law, or to arrange the gap of the regulations or to amend a promising interpretation of laws adhering to the principle of liability with fault. The former, although based upon the tradition of the principle of liability with fault, modifies the concrete meaning of the concept of fault itself. This theory includes not only the case, in which one has been recognized as faulty by reason of negligence in taking precautions where the result of the act could have been foreseen and also could have been avoided if precautions had been taken, but also the case where the liability to the compensation shall be acknowledged immediately, without ascertaining whether or not there has been a negligence in taking precaution, by virtue of a presumption or a fiction of the existence of fault when a certain result of damage occurred. These theories belong to the former category.

Form the standpoint of the interpretation of law, this principle of presumption or fiction of faults is most interesting, and then I wish to discuss the fundamentals of absolute liability, reviewing the theoretical construction of this principle (1).

II

The fictional theory of fault had been already advocated in Germany, in the middle of the preceding century, and the judicial decision of the court of appeal in München on the April 16th, 1861 is the typical example, in which it was said that the railway business using a locomotives accompanies with inevitable and constant faulty acts, therefore, the occurrence of damages is always due to the fault in the management.

The law of Austria in 1869 on the responsibility of railway

1) This theme was discussed in details in the author's "Study on Civil Liability" (1948) (Nippon Hyōron sha's Edition), but the same theme is taken up here from a new viewpoint.

enterprise recognized the presumption of fault, and the Prussian law of 1838 was based on the principle of the risk theory. However, it is the renowned decision of the French supreme court in June 16th. 1896 that has had a great influence on present theories and has been the ignition-point of debates in the academic circles thereafter (I). The incident concerned with the claim of indemnity made by the widow of a technician against the owner of the steam ship, in which the technician was killed by an explosion of the boiler on the Loire river near Nantes. The court gave the widow a favorable decision applying Article 1386 of the French Civil Law, which is similar to Article 717 of the Japanese Civil Law, recognizing the responsibility of the proprietor of the building which has caused damage owing to the defects in the construction. The reason for the decision was that the cause of the explosion was due to a defect in the part of the boiler, although the proprietor of the ship was not aware of it and also was not in a position to acknowledge the defect, and then Article 1386 was applied.

However, an appeal to the upper court was made, claiming that the engine is not a construction and therefore it is a mistake in this case to apply Article 1386. Against this, the supreme court pointed the section 1 of Article 1384 of the Civil Law, stressing that this provision is not simply an exception of Article 1382, which is hitherto ordinarily presumed, as the principle of liability for torts, but rather we must interpret in it that a general rule, "a person is responsible not only for the damage caused by the act of himself but also for it caused by the act of the person for whom he is responsible or by object which is under his supervision" has been prescribed, and instead of Article 1386, this Article 1384 should be applied in this case. Thereby it was decided that the proprietor of the ship is responsible to the compensation.

The decision of the supreme court made a wider recognition of absolute liability possible by highly weighing the meaning of Article 1384 of the French Civil Law from a view point different from previous theories. Concerning the reason why the law imposes the responsibility to the person who supervises the object

1) Planiol, *Traité élémentaire de droit civil*, tom. deuxième, Paris, 1905. p. 313.

which was the cause of the damage, irrespective of the existence or non-existence of fault, even in the French academic circles, there are, in general, two opposing explanations. One states that the existence of fault should be presumed, and the other states that it is a case of a liability for risk. This theory of risk stands on the opinion that the theory of presumption of fault is incomplete as an absolute liability, and it had been advocated chiefly by Saleilles (1) and Josserand (2). However, even among these two, they differ in opinions. They have been acknowledged generally, since, compared with the theory of presumption or fiction of fault, these theories are more complete and also agree with the legal sentiment of the society as principle of responsibility for the act of wrong which modern large enterprises accompany with. And since the Law of Liability of Labour Accident in 1898 adopted this principles, they have become a potent theory.

However, to harmonize this theory with the principle of the liability for torts in code civil which stands on the tradition of the liability with fault, it is very difficult to adopt the risk theory immediately as a result of law-interpretation. Therefore, it is believed that the tradition of liability with fault is barely sustained conventionally in the law-interpretation in the form of theory of fiction, and substantially the absolute liability is recognized (3).

As stated previously, the theory of absolute liability was introduced as the result of law-interpretation in the French academic circles. But it is due to the existence of the provision of Article 1384, i. e. the provision about the act of object (*le fait des choses*). However, there is no such provision in the Japanese Civil Law. Then it is not proper to apply the theory of the French law directly as the result of an interpretation of Japanese Civil Law, but the idea of fiction of fault or the idea of risk, stated in these theories, is very instructive as itself. So I wish to attempt a new interpretation of Article 709 of Japanese Civil Law.

1) Saleilles, *Les accidents du travail et la responsabilité civile*, Paris, 1897.

2) Josserand, *De la responsabilité du fait des choses inanimées*, Paris, 1897.

3) About this process of theoretical development, H. et L. Mazeaud, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* (4 éd. 1948-50, Paris.), very instructive.

III

It is well known that by the amendment of our civil code after the war, the following provisions were added into Article 1. Section 1: "Private rights shall submit to the public welfare" and section 3: "The abuse of rights shall not be tolerated". Since I have previously explained the significance of these provisions (1), I will limit discussion now to the present problem, giving consideration to the liability for torts in relation to these problems. The sentence "rights shall submit to the public welfare", may be explained simply as follows: The lawful use of rights does not mean that the formal execution of rights shall be always protected absolutely, but rather mean that, as the result of the execution of rights must agree with the intention of law or the contents of right recognized by the society, there are restrictions that rights must be used not to disturb the peace of the society and break the harmony of the general social life. And this recognition of rights within this restriction indeed signifies the submission to the public welfare. So, when a disharmony of the social life or a disturbance of the peace is produced by breaking these restrictions, there exists the abuse of right. It means that rights shall be and must be originally recognized only within these limits. Concerning the question of torts, in what state does the disturbance of peace and the disharmony exist? It is the case in which anyone, by the infringement of benefits of others protected by law, caused a "damage which is worthy of compensation" from the social viewpoint irrespective of the subjective state of his manner. Contrarily, if a damage is not caused, although the person responsible for the act may have had the intention to infringe rights of others, the civil liability is not formed, in other words, there is no blame from the viewpoint of the civil law.

According to theories which have long prevailed, Article 709 prescribes that a liability to the compensation exists only when a damage was caused by the intention or fault of a person responsible for the act. If a damage is caused without fault, then as for the doer, it is recognized as a result of a lawful execution of right, therefore he is not liable to any compensation. Consequently,

1) M. Ishimoto, Lecture on Civil Law. Vol. I. (1951, Kyoto) p. 88.

the victim must endure the damage. However, from the viewpoint of the victim, whether or not the damage inflicted upon him should be compensated entirely depends upon the subjective state of manner on the part of the doer. These facts place the protection of rights by law in a very unstable condition. This is nothing but an inevitable result of the prescribing of liability to the compensation by the present civil law from the viewpoint that whether the doer is faulty or not in his execution of right. But on the other hand, if it is considered on the right of victim, it must be the fundamental idea of the protection of properties by law, of the recognition of rights, that no person shall suffer damages caused by others without any reason. Then, when damage had been actually caused by a person, if it is over the degree of damage which must be naturally endured from the viewpoint of social life, it must be recognized that there has been an infringement of rights. However, when it is considered in connection with Article 709 of the Civil Law, the doer will be free from the liability to the compensation if the damage was not caused intentionally or faultily. Therefore, does it not appear that it is more favourable to the doer than to the sufferer when the protection of right is concerned?

The answer to this question is none other than the fundamental reason of the principles of liability with fault. The first reason is the recognition of the old idea involving a thought of punishment which is to focus the reprehension by law towards the subjective state of manner of the doer. It is said that it is the traditional ideology since the Roman Law that, similar to the criminal liability, such chastising characteristics should be basically recognized in the civil liability. Naturally, there is a great difference between the chastising character of Roman Law on torts and that of modern laws. The second reason is the capitalistic ideology which recognizes the freedom of an individual in modern society as much as possible. In such ideology, as long as there are no faults, to recognize the freedom of action without restriction as possible is the necessary order which is required for the progress of modern society. These two reasons constitute the basic idea of rights of modern times and also are the reason why the modern legal rights are said to be individualistic. Moreover,

it was believed that such modern legal order based on such idea of right is the order which realizes the public welfare of the modern society.

Though the infringement of profits of the victim is observed again from such standpoint, there still should be undoubtedly no reason why he should always bear any damage which had been inflicted on him, if there is no reprehension on the part of the victim. Just as there is no reason for the reprehension on the doer who had no intention or fault, there is also no reason why the victim without fault should bear the damage. If to tolerate an activity of a doer without limiting the individual freedom as much as possible should be the demand of modern legal order systematizing on the concept of rights, then analogically, to recognize a wide sphere of protection of rights of individuals as much as possible, in order to avoid infringement of profits which are protected by law, should also be the demand of modern legal order systematizing on the concept of rights. Observing from such standpoint, it is not appropriate to search for the fundamental ground of the principle of liability with fault within the legal idea itself, which is based on individual rights of modern law. It is because that, standing on the legal conception based on rights, the support of rights of the doer and that of the victim will be actually led into self-contradiction as stated above, and the more the right of the doer is defended the deeper the self-contradiction becomes. Therefore, if to give a protection only in favour of a doer is the ground for the realization of public welfare of modern society, then the so-called public welfare is only one-sided and not really public or social in nature.

The so-called public welfare in Article 1 in Civil Law naturally means not partial but total or social welfare. Therefore, each person must be fairly and equally protected under the law. So the rights of both, the doer and the victim, are essentially the same, and should be recognized as having the same value. The legal relation formed by the mutual combination of these rights should always be a relation of mutually harmonized peaceful order of each claimant. Therefore, only as long as the relation of this peaceful order is not broken, any execution of rights is the lawful execution, and when this order is broken, there exists

an abuse of right. Under the preceding civil law, such destroying of peace is nothing but the arising of "unbearable damage", and so, as long as such damage is caused, the abuse of right exists. It is indeed such state of rights that proclaims "rights shall submit to the public welfare".

The next problem is how Article 709 of Civil Law should be interpreted in connection with the provision of Article 1 of Civil Law, which prescribes the fore-mentioned state of rights and a prohibition of its abuse.

As mentioned previously, we may conclude that the right has been abused if the doer had caused an unbearable damage, in other word, a damage to be compensated. However, should the doer without fault, in such case, be free from a liability to the compensation in accordance with Article 709 of Civil Law? Because of being without fault, is the abuse of right itself recognized as a lawful execution of right? Or, though the abuse of right always exists in such case, is there an another reason for the exemption of the liability which is due to a non-existence of fault?

The expression "violation of rights" in Article 709, as already stated professor Suekawa, ought to be understood as the "symbol of unlawfulness". Unlawfulness (violation of law) may be grasped only objectively as a violation of a legal order. Then, the concrete realization of such violation of law is, in sphere of the civil law, the arising of an unbearable damage, as stated previously. So the execution of right which caused such damage, i. e. the abuse of right, can not be exempted of its character of abusiveness because of the state of mind of the doer. Then, though the existence of the abuse of rights itself may be recognized, should the liability to the compensation be exempted because of reasons other than a non-existence of fault? If so, in a system of Civil Law which does not permit the abuse of rights, there must be another principle to protect the doer when rights is abused, but in the Civil Law or theoretically the existence of such principles can not be recognized, and therefore such interpretation is not pertinent. If it is so, when we consider an interpretation of Article 709 in relation to Article 1, even if the doer may be without intention or fault, once such unbearable damage is caused, there

is no theoretical ground for the exemption of liability to the compensation. However, is it appropriate as an interpretation of Article 709 with reference to its literary expressions? How is it possible to obtain an interpretation which is not contradictory between Articles 1 and 709? In this respect the first possible interpretation is that, although a damage has been caused, if the doer is without fault, there is not an abuse of right and such understanding about rights is the theoretical conception of rights agreeing with the public welfare. And there is no formal logical contradiction in such interpretation, but on the other hand, on the side of the victim who is also a member of civil society just as the doer is, such interpretation is contradictory to the recognition of right that prohibits an infringement upon profits, belonging to a person, without reason. For, whether the victim ought to endure the damage or is able to claim a compensation depends solely upon the subjective state of manner on the side of the doer. When the society recognizes equal rights for each individual, the scope and limit of rights may be determined objectively. Then the determination of it by the subjective state of manner on the side of others is contrary to the significance of social recognition of equal rights for each individual. Therefore, at least, it seems that, the exemption from liability to the compensation by reason that it is an inevitable result of the lawful execution of rights to cause a damage without fault, does not agree with the nature of rights which submits to the true public welfare.

Then, the second interpretation may be considered. It is to recognize relatively and not absolutely the legality or the possibility of exemption from liability for the fore-mentioned act of a doer without fault.

It is the basis of this opinion that, in complicated modern society, there are cases in which the execution of rights of an individual inevitably collides with the rights of others owing to the competitive existence of individual right, so an infliction of damage of some degree is unavoidable. And, if the damage is caused by the execution of rights by a person within a bearable degree judged from the "public order or good moral and custom" in the modern social life, there is no abuse of rights, but if the degree of damage exceeds such limit, there is it. It is necessary to

discuss this opinion from two sides. At first, in tort which is caused by an execution of right, without fault, in the modern social life, there is an objective limit concerning whether the act is lawful or unlawful (or abuse). If this is so, within this objective limit, although the infringement is caused not only without fault but also with intention, this act should not be an unlawful execution of rights and consequently without liability to the compensation. Therefore, this is no more a problem of absolute liability but only a problem of the limit of abuse of right. And since this limit is determined objectively from social norm-consciousness, the conclusion has no relation with the existence or non-existence of doer's fault, so this gives no solution to the present problem. Secondly, if the limit is not to be determined objectively, and if there is a difference in the scope of legality in the execution of rights, owing to the existence or non-existence of an intention or a fault, then compared with to the preceding interpretation which recognizes in principle an absolute exemption from liability in case without fault, there is after all the difference only in degree. The existence or non-existence of an abuse of right is exclusively determined by the subjective conditions of the doer, similarly in both cases. It must be said that this interpretation is, therefore, unsuitable.

It is my opinion, since whether there is an abuse of right or not must be considered by the conception of rights which I have stated above, it does not depend upon the subjective state of manner of the doer but upon the objective result, the arising of an unbearable damage or the actual uneasiness of this arising. And then the liability should also be determined objectively. Then, "intention" or "fault (negligence)" in Article 709, as an element of responsibility, should not be acknowledged as a pure subjective element but also as an objective one. The term "fault" may be defined thus: when a person executes his rights and an unbearable damage is caused, although he had taken a precaution to avoid an infliction of damage upon others, it should be judged that there is a "fault". Therefore, the term, "the case, in which lawfully protected profits of others has been damaged with intention or fault (i.e. the case of violation of rights as in Article 709)", may be properly understood not as the case in which a damage

is inflicted upon others by force overpowering the control of the doer's will, in other words by "force majeure", but as the case in which an "unbearable damage" is inflicted through the act selected and determined by the doer's own will. If in case the doer executes his own rights, he has the responsibility to be cautious and to attempt not to inflict damage on others, and when an "unbearable damage" is caused in despite of the precautions, then it may be recognized that, in the legal sense, there is the "fault". The reason to acknowledge the existence of "fault" (a cause of the legal reprehension) in this case lies in the fact that generally a person, the doer, is able to always control his own act or manner freely by his own will. Therefore, to place himself in a position inflicting damages on others may be considered none other than the result of the selection and determination of his own will. On the other hand, since the act or manner pressed by the "force majeure" is that which was not determined by one's own will, it may be interpreted that damages caused by it may not be recognized as a result of an act of the doer, which is due to the intention or fault of the person responsible for the act. Consequently, if the case of "force majeure" or "fault of the victim" is put aside, it is possible to extract the following terms from Article 709. That is "the fault of the doer always exists when an unbearable damage has been caused".

In civil responsibility, unlike criminal responsibility, if a fault does not cause damages, it can not be an object of reprehension, so a fault may become an object of reprehension only when the damage has been caused as a result of the act or manner of the person responsible for the act. Thus, it is appropriate to interpret the concept of fault as such objective matter, and it is unnecessary to look upon it as subjective matter as that the precaution which should have been taken was neglected, and now, it must be interpreted only in this manner in relation to Article 1.

There is an old saying of Roman Law that "person who executes his right does not harm any person" or "does not act unlawfully to any person". This saying at first meant that, as long as it is the execution of rights, it will not be an infringement to others, so there can be no torts. But naturally, it is possible to do an infringement of rights or unlawful doing or torts on the

process of execution of rights. Therefore, it does not necessarily produce lawful results alone through the formal execution of rights. So Capitant interpreted the meaning of this saying as such, "the person who executes his rights with much precaution does not infringe anyone". (1). However, he seems to have interpreted, that if rights are executed with much precaution, even though it may cause unbearable damages on others, such doing should not be reprehensible and everybody should endure the damage, and therefore it is not unlawful. He recognized that it is unlawful when the execution of rights breaks a certain limit, and the mark of the limit is found such in a subjective element, as that "whether the precaution has been taken or not". He seems to think, ultimately, that the reprehension of law should be focussed on the manner of the person responsible for the act. But, for instance, if a precaution had not been taken, as long as there is no resulting unbearable damage, there is no ascription of liability to the compensation as a civil liability. What does this mean? It means that, in the reprehension of law as the ascription of civil liability, the carefulness or the carelessness is not the first criterion at least. If it is so, similar to the case of an infringement by carelessness, in the case of an infringement by very prudent acts, if the damage is so large that it trespasses the social unbearable limits, it is natural that for the moment such infringement is considered as an object of the reprehension as a civil liability, as long as it is not a case especially to be denied of its unlawfulness by law. So the preceding Roman saying should be interpreted such as, "only a person who executes his rights without inflicting damages, which are socially unbearable, does not infringe upon others, in other words, does not act unlawfully". However, even in such case, there still remains the problem whether "without fault" is or is not a condition of an exemption of the liability.

In my opinion, it is believed that whether the damage is bearable or unbearable must be determined objectively and socially. This limit is simultaneously the limit of whether the execution of rights is lawful or not, the latter case is that of an abuse of rights. It is the fundamental principle of our present civil law that, as

1) Colin et Capitant, Cours élémentaire, p. 383.

long as there is an abuse of rights, there is an unlawfulness and a liability for torts. And so, as Article 709 is not an exceptional regulation of the civil law concerning the fundamental principle of an ascription of responsibility, the article must be interpreted to agree with this principle. Therefore, the concept of fault should be built so that in such case there is always the fault. On the contrary, it seems possible to take the attitude to defend to the end the tradition of the principle of "liability with fault", by recognition of Article 709 as an exceptional regulation, but there are no rational and theoretical grounds why faultless act should be the cause of the exemption of liability, while there is an abuse of rights. Naturally, in this case, whatever be the rational grounds, the fact that "intention" and "negligence" or "fault" is given as the condition for the liability in Article 709 itself may be considered as a potent ground for the claim. But, in my opinion, the sentence that if there is no "intention" or "fault" there is no liability means at least there are no ground for the legal reprehension. It does not mean that even when there is some unlawfulness or the ground of the legal reprehension the liability should be exempted as long as there is no fault, but it means that, in case of faultless, there is no ground for legal reprehension or the illegality. This does not, however, agree with the present theory of abuse of rights. Under the principles of civil law, prohibiting the abuse of rights, it is natural to recognize a liability to compensation, when there is an unlawful (unbearable) damage. Therefore, it is still weak in its reason to admit that the traditional principle on the liability for torts, recognizing no liability as long as there is no fault, should be considered as a special rule of this principle. Historically, however, there were times when such interpretations was held to have been in harmony with the idea of the abuse of rights. This is true under the conception that the abuse of rights does not exist if the person with right executes his right without an intention to inflict others. But it does not harmonize with the present conception of the abuse of rights, because the concept of rights itself have made progress and historical changes. Thus, considered from the standpoint of historical development, it must be understood that Article 709 should be subordinate to Article 1 and not Article 1 to Article 709. It is appropriate to believe

that, ultimately, "person with fault" in Article 709 is "one who acted under the selection and determination by his free will, and has inflicted an unbearable damage to others. Therefore, the concept of fault, set previously, should not be thought as a permanent immovable, but rather, in Article 709, the concept of fault must be interpreted in harmony with the whole system of civil law, especially with Article 1, and with the fundamental principles of social order. By such interpretation, we can understand the civil liability as the pure independent civil liability free from the character of punishment as in the criminal liability which focusses a reprehension to the mental attitude (1). The preceding Roman saying has also been and is concretely interpreted in various ways with historical changes. But to decide whether there was an unlawfulness or not, and then whether a liability exists or not in relation with the execution of rights, is a proper way of dealing with the problem of civil liability, as a compensation of damage. It is, therefore, the correct method, logically, to understand an unlawfulness or a liability according to the changes of the concept of right, and it is believed that the principle of liability with faults itself, should be understood also in connection with the historical changes of the concept of rights.

If we see in such manner, although Article 709 of the Civil Law shows formally the traditional principle of liability with fault since the Roman law, the interpretation that there must also be the liability for the damage which may be caused without fault, may be introduced from no other than the provision of Article 709 itself, in relation to Article 1. And it seems that while such interpretation was already possible theoretically (2), the appropriateness of this interpretation has become decisive by the introduction of Article 1 after the war. And it is a progressive interpretation in response to the request for the recognition of liability without fault, which has risen rapidly with the development of modern enterprises. It is also the concrete realization, within the law of torts, of the amendment of the civil law, which is to clarify at present the scope and limits of personal

1) On the relation of the civil liability and unlawfulness, see my "Theory of Torts" (1950, Tokyo).

2) M. Ishimoto, Study on Civil Liability (1948, Tokyo).

rights and is to prohibit an abuse of rights especially through Article 1 of the Civil Law. It is definitely not a dogmatism nor a caprice on the part of the interpreter to interpret Article 709 consequently contrary to the interpretation, which has traditionally considered Article 709 as the principle of liability with fault, standing on the tradition of the Roman principle, but rather, it is an inevitable result of the introduction of Article 1 of the Civil Law. Methodically, the interpretation of law should always be to clarify the historical significance of the text of the law and to agree as much as possible with the objective norm-consciousness of the society, which has been discerned (1). In that case, the will of the legislator shall naturally be referential, but we should not be restricted by it, because the law, as a norm, can be maintained only by the objective will of the society, which seeks to secure and assist the peace and harmony of the society under the historical conditions of the period in which the law exists. It means that law should always be the method by which the realization of the social purposes of the era is gained, and the human should not be the method at all for the law itself. It may be explained as following. With the development of modern society, the liability with fault had been the guiding principle of the liability for torts. But with development of modern large enterprises we have been led to recognize the great exception to the principle. And from the social norm-consciousness, it seems that, as long as one had caused a damage by an act or manner determined by his own will, although the act of infringement may be without fault, he should bear to some extent the damage which is due to the result of the act, or at least bear a part of damage, as the party concerned, considering the degree of precautions taken by the victim. There are, naturally, many cases, which can not be decided equally, in the actual society of transactions, in which a body of enterprise used to give some sort of indemnity to victims for damages, caused by the enterprise without fault, and many examples of cases in which individuals used to give some sort of indemnity to victims for damages, caused by him without fault. Moreover, it is not merely the individual but social norm-consciousness to

1) M. Ishimoto, *Logic in Law* (1947, Tokyo).

support such acts as rational. Such actual circumstances demanded the liability of enterprises, and even in the academic circles its appropriateness has been recognized; and various legislations have been produced on this principle. However, the traditional consciousness on the principle of liability with fault in the academic circles also hesitated to urge the establishment of the theory which will move the principle of Article 709 of the Civil Law. But in the interpretation of law, not only the literal and logical but also the historical interpretation of its significance which always lead to find the actual social norm-consciousness, is needed. And such an actual norm-consciousness and the modern concept of rights becomes a powerful guide in the interpretation of Article 709. Such demands, existing heretofore, have been induced not only theoretically but also positively to construct such theory by the introduction of Article 1. Such interpretation is indeed superficially contradictory to the legislative mind of Article 709. But the fact that it must be recognized, is due to the introduction of Article 1. There is a gap of 50 years in the history of Civil Law between Article 709 and Article 1, and it is indeed this gap which makes it possible for Article 1 to define the modern significance of Article 709 as above.

For such conclusion, the following question may be given from a different standpoint. It is the question that to expand and recognize the meaning of the liability without fault may be at present contrary to the progress of culture. Observed from the view-point of the historical progress of the civil liability, since the liability without fault had developed gradually into the liability with fault, it is inferable that a refined concept of "fault" may be a product of legal cultural progress. Then, such thought may be true, viewed from the development of the concept of the so-called "fault" itself. It may be appropriate to reveal the characteristics of both principles, by saying that the principles of ancient times are principles without fault and those of modern times are principles with fault. However, it is able to be said that the old principle was also the principle with fault. In the old liability without fault, if there are acts of infringement, they are all misconducts by which the responsibility should be ascribed to the doer, and in the act of infringement the evil intention had been

presumed. In this respect, the act of infringement itself was an infringement with intention, and at least had been reprehended as an infringement with fault. However, the reason for the exemption of the liability which has been recognized since old time, is "force majeure". Therefore it can be said that the liability without fault of ancient period was not a liability for an infringement without fault but rather the strict liability with fault. The present concept of fault is the result of the solidification of such wide liability with fault, in the process of the gradual expanding of the scope of the exemption of responsibility. This process is also that of a discriminating by law of the scope in which all result can be controlled by the action of persons from the scope in which it can not be controlled, in short the scope responding to the "force majeure". If conceived in this manner, to define the concept of fault as such, does not contradict at all with the history of culture. The wide recognition of the liability without fault is merely the result of the consideration on the premise of the fault, which is understood today. The essence of this problem is consequently a problem of how the fault is to be legally idealized. The principle of the liability with fault has not developed from the principle of the liability without fault, but the concept of fault itself has developed within the principle of the liability with fault. And I have, at present, attempted to interpret this concept of fault as given above.

On the other hand, the method of the legal determination of the ascription of liability by the determination of the existence and non-existence of fault under the supposition of "reasonable man" or "standard man" since the school of Roman law, may be considered as the most excellent form of the legal thought on the civil liability, because it clarifies the meaning of the scope of the control by personal acts as above. My opinion on this point is as following. Originally, concerning the act of infringement, there is the civil liability and the criminal liability. These are absolutely different, but are common as the legal reprehension. And, since the essence of, civil liability is the compensation for damage, if damage is to be compensated in some way, there is no reason why the assailant must always necessarily bear all of the compensation by himself. When the damage is insured, and the liability

of the assailant, which is a legal reprehension towards the assailant, actually diminished, there is no irrationality. Therefore, in a society which is not under such a system, the reprehension is focussed completely on the assailant and the liability lies on him. Also the allotment of damage between the assailant and the victim, based on the impartial social opinion for the compensation of the damage, becomes a problem. Contrarily, the legal reprehension is focussed on the state of manner of the assailant in the criminal liability. In the civil liability, the fact or result which has caused an unbearable damage is reprehended, but in the criminal liability the act of person is reprehended; In the former, as long as no damage is caused, even the intentional act is not reprehended, but in the latter, even an unaccomplished offence is reprehended. It may also be considered that, in civil liability, once an unbearable damage has been caused, the attitude of the doer is simultaneously reprehended together with it, but if a third person bears the liability to compensation for the damage, then the assailant is free from any reprehension by law. This means that in the civil liability the reprehension by law is not turned towards the attitude of the doer, but essentially it is turned only to the fact of damage. On the contrary, in the criminal liability, it is impossible for a third person to bear the punishment in place of the assailant. As it is well known, the liability for torts developed as a civil liability including the element of criminal liability and entangling with it, and the concept of fault have developed belonging to the side of the criminal liability. The fact that the fault is still an element of the modern civil liability is due to the fact that the separation of the two has not reached to the final stage, and also due to the constitution of modern civil law in which the compensation for damage is realized in the form of the direct relation, from wrongdoer to victim. In this sense, the tint of criminal liability still remains in the civil liability, and only by the removal of this tint, that is, by removal of the previous concept of fault, it is possible to develop a pure independent civil liability, and simultaneously the fault should be interpreted as it was explained in the preceding sections. This is also an inevitable result in the development of civil liability. Only in this way, it is possible that the proper liability, the liability of enterprise which is greatly in need of the

liability without fault, shall be systematized as a civil liability and shall be explained that it is not essentially different from liability for torts in civil law.

IV.

The interpretation of Article 709 of the Civil Law, as given above, may seem to be very queer from the legal idea of the principle of liability with fault, which has been cultivated for half a century since the establishment of the Civil Law Code and has become a tradition. In this respect, such interpretation may be considered to be very revolutionary, but if there is no absurdity in its logical treatment and if the conclusion obtained is logically an inevitable result, such an interpretation of law may not be concluded as being revolutionary in an academic sense. Moreover, such an interpretation has been recognized in Europe for more than half a century, and is also supported by the norm-consciousness of modern society. Now, as many years have passed since our society entered into the group of modern societies, such an interpretation is not an attempt going too far ahead, but rather seems to be an attempt too slow in coming. What hindered the appearance of such an interpretation? It was, of course, the thoughts of absolutism of rights. It is natural that the legislative thought of the Meiji era, in which a modern nation was born by crushing the feudalism, had acknowledged the absoluteness of the right of the citizens as the ground and central pillar of social structure. Based on this idea, it is also natural that the principle of the liability with fault was recognized as the guiding principle of the civil law. And the development of society and the backwardness of civil law in this country are the cause of the attempt of this new interpretation as given above. But the introduction of Article 1 of the Civil Law means that the thought of the relativity of rights, which developed in the background of our science of civil law, has now gained, as a principle, the initiative position. It is most pertinent at this moment to renew the reflection and understanding toward the whole system of civil law and to attempt further theoretical development.

The fore-mentioned theory is a new interpretation to myself, but it is also, on the other hand, an inevitable result of the development of my previous theory. My attitude maintained

throughout the development of such theory was not only the interpretation of law on the basis of the already established also principles, but also the interpretation based on the spirit of law. It is conceivable to me that the spirit is always much more living and developable and historical than mere principles. The true spirit to respect old traditions is simultaneously the spirit to develop and revolutionize the tradition. If the spirit is confined within traditions, and the traditional is suppressing the spirit itself, then to live on tradition is believed to be leaning on the lifeless corpse of the past. And we can not expect the development of the tradition any more, and the historical aspect, which is the most essential factor in tradition, shall be denied. Then consequently, it is no more a living tradition. However, the living spirit always lives within the tradition and creates a new tradition itself. It seems to me, of course, that there are many points to be criticized in the details of my interpretation mentioned above, but I have made clear that, if the problem is grasped in a most fundamental form, and be consolidated theoretically from all sides, such conclusion shall be inevitably attained. And I believe that by pursuing such method of thinking, at least a path to a new theoretical structure shall be opened, while sufficiently giving respect to the old theoretical inheritance.

THE END