

# Chapter 8

## The Meaning of Compensating Damages: Tort Law



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In law, when an individual case is under dispute, the key question to consider is how to resolve the case. In this situation, the interpretation of the purpose of tort law is actively debated using judicial precedents and theories. Traditionally, the purpose of tort law is thought to be the pursuit of its endemic function, that is, providing remedies for the victim (i.e., compensation for damages).

Conversely, in the study of economics, the main issues are the functions of tort law and ways to evaluate each of those functions. Moreover, rather than prioritizing the functional purpose of providing remedies for the victim (i.e., compensation for

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damages), economics prioritizes deterrence of the wrongful act, a function that is considered to be absolutely desirable above all else.

Although the basic perspectives of law and economics on tort law differ in this manner, the basic notion that in principle, the rules of negligence liability apply and, in exceptional cases, the rules of strict liability may apply, which has been established through legal discussions and debate, can be justified (through consideration of tort law's functions) from an economics perspective as well.

## 8.1 Introduction

### 8.1.1 *What is Tort Law?*

During the course of people's lives, countless accidents occur on a daily basis, generating various types of damages as a result. For example, a pedestrian may be hit by a car, a car may be damaged in an accident, or playground equipment in a park or school may break, injuring a child. In addition to these tangible types of damages involving a person's life, body, or property, intangible types of damage may occur as well. Examples include actions that damage a person's honor or invade a person's privacy, resulting in a loss in social standing or a disturbance in a person's life. In these cases, tort law helps to determine who is responsible for the damage caused to a victim in what situations and to what extent.

### 8.1.2 *This Chapter's Objective*

Although we are discussing tort law, there is not necessarily a specific law with that name. Many laws exist to compensate victims for damages that they have incurred, and the term "tort law" refers to the aggregation of all of such individual laws. In general, however, when we refer to tort law, we specifically mean the group of provisions (Arts. 709 to 724-2 of the Civil Code) regarding torts under the Civil Code, Part III, Chapter V. In this chapter, we examine Article 709 of the Civil Code (a general provision regarding tort law) to understand how it operates in real-world situations, and we consider and observe this rule from the perspectives of both law and economics.

#### **Column 12. The position of tort law within civil law**

Part III of the Civil Code provides for "claims." A claim is a right that allows a person to demand a certain action from another specific person. The causes of claims are divided into contracts (Chapter II) and other causes (Chapters III

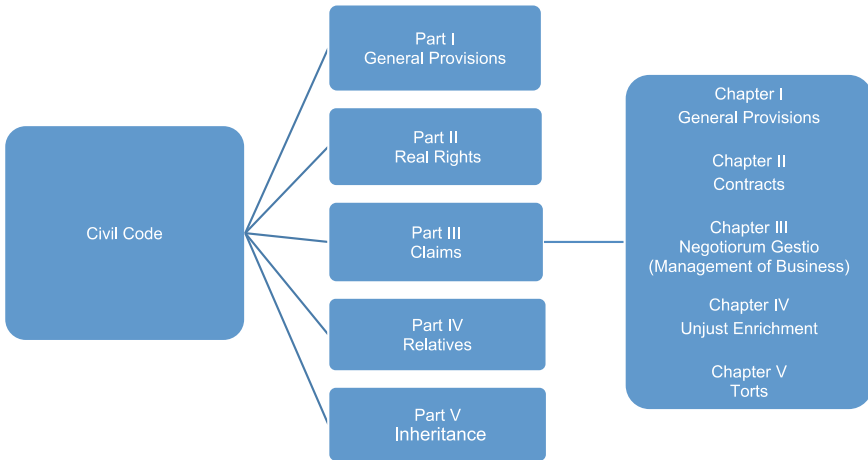


Fig. 8.1 The system of the Japanese Civil Code

to V), and torts are positioned within civil law as one of the causes of claims other than contracts (Chapter V), as Fig. 8.1 shows.

## 8.2 Summary of the Tort System

Tort law is a system in which a person (i.e., the victim) can seek compensation from another person (i.e., the perpetrator) for damages incurred as a result of the latter person’s actions. It is necessary to keep in mind, however, that tort law is not a system for restituting a victim’s damages under any circumstances. We begin by explaining this point in more detail.

For example, it is possible that although a person’s actions caused damages to someone, it was inevitable that those damages would occur no matter how careful that person was. In such cases, the Civil Code, in principle, does not order the person who committed the wrongful act to compensate the victim for the damages. This lack of compensation may be highly disturbing for the victim who incurred the damages. However, if people were held liable in any situation in which they caused any damage to another person, then they would hesitate before taking any action and they would not be able to lead a smooth social life. To strike a balance between the two important values of remedies for victims and freedom of action, the law holds a perpetrator liable for an action only when the action amounts to social blame.

Furthermore, in certain cases, a victim may be expected to cover some damages caused by another person’s actions. For example, assume that A lent money to B and

wants to get it back, but C also lent money to B and collected money from B's assets first. Because C collected on this claim, B's property is now gone and, as a result, A cannot collect money from B. In a formal sense, one can say that C infringed on A's property (claim). However, in this case, C's actions are not usually considered to constitute a tort. In a society based on the principle of free competition, C's efforts to collect money from B are rather justified. As such, let us say that company E, the rival of company D, expands into company D's business areas and take away its clients. Even if company D incurs damages (i.e., decreased sales) as a result of these actions, the actions are not a tort unless company E violated related laws and regulations. On the contrary, the forces of competition tend to reduce prices, which is ideal for customers and society.

When tort law is considered from this perspective, a highly challenging issue arises that we need to address. Specifically, it is important to determine under what circumstances a person who has caused damages to a victim can be held legally liable for compensating those damages in a tort. A criterion for understanding this issue is Article 709 of the Civil Code, which states:

A person that has intentionally or negligently infringed the rights or legally protected interests of another person is liable to compensate for damage resulting in consequence.

As a single reading shows, Article 709 is a very simple provision. In practice, however, this provision covers many tort issues that occur daily, and it is one of the most frequently used articles in the Civil Code.

This provision sets the ground for claims of compensation for damages. Moreover, it sets out the types of situations in which the perpetrator is liable to compensate for damages. We can clarify the content of this provision by examining the definition of each phrase.

First, for damages to be awarded based on a tort, the victim's rights or legally protected interests must be infringed. Rights include the rights to life, body, health, and property as well as other rights set out by the law. Legally protected interests are broader in interpretation than rights and refer to interests that should be protected legally. However, the scopes of these terms are not always clear. Some matters are already recognized by law, and the court also newly establishes rights and legally protected interests in some cases. These concepts are expected to change with the times. For example, the right to determine one's own way of being in society (i.e., the right of self-determination) is increasingly widely recognized as individuality in society is becoming more respected. New rights, such as privacy rights and environmental rights, are being recognized in similar ways. By creating and expanding rights and legally protected interests, tort law is required to protect victims within an appropriate scope.

Next, the perpetrator's actions must be performed intentionally or negligently. "Intentional" and "negligent" colloquially mean "on purpose" and "careless," respectively, but the legal definitions of these terms are slightly stricter. We describe this point in more detail later on. Here, we confirm that the Civil Code is based on the principle of negligence liability. As the phrase "no liability without negligence" shows,

unless the perpetrator acted with negligence (i.e., carelessness), it is not possible to hold the perpetrator liable for compensation for damages.

Third, the victim must incur some kind of damage. Even when rights are infringed, if no “damage” has been incurred, tort law provides no protection. In this context, damage includes damages against life, body, or property (i.e., proprietary damages) and intangible damages, such as mental anguish (i.e., non-proprietary damages). Non-proprietary damages are evaluated monetarily in the form of consolation money.

Finally, the wrongful act and the damages must have a causal relationship. The phrase “resulting in consequence” in Article 709 indicates that a legal relevance between the wrongful act and the damages needs to be established. Consider the following case as an example. A driver of a car carelessly causes an accident involving a company worker, F. As a result, F loses a vital business opportunity, causing enormous damage to the company. In this case, the company incurs damages because of the driver’s actions. In other words, the accident and the damages to the company have a genuine causal relationship. However, holding the perpetrator liable for the damages to the company would be too severe. Thus, one perspective is that the perpetrator is liable for compensation to the extent that protection is needed according to the law. A causal relationship is necessary within the limited scope of legal relevance. Thus, in the above case, the perpetrator is only liable to provide compensation for the treatment and medical fees that F pays at the hospital, F’s mental anguish, and similar damages.

An understanding of these four essential points can help to determine who is liable to what degree and in what situations from a legal perspective. In the following sections, we also present an approach from an economics perspectives and analyze the tort law system in terms of both law and economics.

## 8.3 Legal and Economic Perspectives on Tort Law

We now consider the legal and economic perspectives on the tort law that was explained in Sect. 8.2. In law, the main point of discussion is the purpose of the tort law system. In contrast, economics mainly considers the functions of tort laws and whether those functions are desirable. This section explains the underlying thinking behind each of these questions and the processes of reaching conclusions and then compares the two.

### 8.3.1 *Legal Perspectives*

#### 8.3.1.1 Purpose of the Tort Law System

Why does tort law exist? In law, discussions on the purpose of the tort law system generally focus on remedies for victims (i.e., compensation for damages). Here, we

introduce a Supreme Court judgment in 1997 that clearly stated this purpose. The issue in the case, called the *Mansei Kogyo* case, was the validity of a foreign judgment in Japan. Based on the Civil Code of California regarding punitive compensation for damages, the foreign judgment ordered the defendant to pay compensation. Punitive compensation for damages in a claim litigation for compensation for damages based on a tort means that if the perpetrator's actions amount to substantial blame, the court orders the perpetrator to pay compensation beyond the actual damages. Punitive damages are mainly recognized in Anglo-American law. Thus, the issue in this case was the validity of punitive damages in Japan.

***Mansei Kogyo* case (Supreme Court Judgement, July, 11, 1997, 51 Minshū 2573)**

The case can be summarized as follows. When a lease contract was concluded, a Japanese company (*Mansei Kogyo*) conducted a fraudulent practice against plaintiff X. Based on the Civil Code of California, *Mansei Kogyo* was ordered to pay not only the actual damages but also punitive compensation for damages of 1,125,000 USD. X filed suit in the Tokyo District Court to enforce this foreign judgment. The Tokyo District court, however, ruled in a February 18, 1991, judgment that the foreign judgment's order to pay massive punitive compensation for damages was counter to public order. Thus, it ruled against enforcing the judgement. In an appeal to the Tokyo High Court, the court upheld the verdict of the first hearing in a June 28, 1993, judgment and did not recognize the enforcement of this foreign judgment in Japan. X then appealed the case.

The Supreme Court made the following statement:

It is evident that the system of punitive damages as provided by the Civil Code of the State of California (hereinafter, 'punitive damages') is designed to impose sanctions on the culprit and prevent similar acts in the future by ordering the culprit who had effected malicious acts to pay additional damages on top of the damages for the actual loss and, judging from the purposes, is similar to criminal sanctions such as fines in Japan. In contrast, the system of damages based upon tort in Japan assesses the actual loss in a pecuniary manner, forces the culprit to compensate this amount, and thus enables the recovery of the disadvantage suffered by the victim and restores the status quo ante (Judgment of the Supreme Court, 1988 (O) Case No.1749, Judgment of the Grand Bench, March 24, 1993, Minshū 47-4-3039), and is not intended for sanctions on the culprit or prevention of similar acts in the future, i.e. general prevention.

Then, the Supreme Court stated that it is not necessary to consider sanctions and the deterrence of torts as the purpose of the tort law system for the following reason:

In Japan, sanctioning of the culprit and general deterrence is left to criminal or administrative sanctions. Thus, the system in which in tort cases, the victim is paid damages for the purpose of imposing sanction on the culprit and general deterrence in addition to damages for the actual loss should be regarded as against the basic principles or basic ideas of the system of compensation based upon tort in Japan.

The philosophy of strictly separating civil compensation for damages from criminal or administrative sanctions is called the theory of distinction between civil and criminal liability. This philosophy places the satisfaction of revenge and retaliation through sanctions under the state's jurisdiction (as punishments or administrative

sanctions) and distills the central role of civil liability to just compensation for damages. In this way, the purpose of the tort law system is separated from deterrence and sanctions, and tort law is viewed as providing remedies for victims (i.e., compensation for damages). Of course, this perspective does not mean that paying compensation does not have a deterrent or sanctioning effect. However, when considering the primary purpose of the system, the basic idea of the distinction between civil and criminal liability is to prioritize remedies for victims (i.e., compensation for damages).

### 8.3.1.2 Characteristics of Legal Approaches

The characteristics of legal approaches are clear from the traditional notion of distinguishing between civil and criminal liability, which views compensation for damages as the central function of tort law and deterrence and sanctions as secondary functions. Thus, when legal disputes occur, the laws are applied and interpreted with the primary purpose of achieving an appropriate solution for each case.

We consider in more detail the court's process for applying and interpreting the law and making a final judgment in an *ex post* situation. First, the application of the law is the process of applying the legal norms that are related to the case. As stated in Sect. 8.2, when there is a legal dispute, the court applies legal norms (in this case, Article 709 of the Civil Code) to the case and examines, in turn, whether an infringement of rights or legally protected interests has occurred, whether the requirement of intention or negligence is recognized, whether damages have occurred, and whether a causal relationship exists. When all of these criteria are met, the court decides to hold the perpetrator liable to pay compensation for damages.

Of course, many cases cannot be solved merely by applying laws. For example, for a perpetrator's liability for compensation for damages to be recognized, the victim's rights or legally protected interests must have been infringed. In practice, however, it may not be clear whether the disadvantages incurred by victims can be categorized as infringements of rights or legally protected interests. Example of this uncertainty include whether the right to enjoy a good view (the right to a view) or the right to be free from the cigarette smoke of others (the right to live free from smoke) is covered under "rights" (or "legally protected interests") in Article 709. If a building is constructed in front of an apartment building at a height that blocks residents' views, have the apartment residents' rights (or legally protected interests) been infringed? Smoke from a cigarette may annoy non-smokers, but does it infringe upon non-smokers' rights (or legally protected interests)? When the rights are not yet established and therefore it is not clear whether or not the perpetrator is liable for damages, it is necessary to interpret and judge whether the rights in question (e.g., the right to a view or the right to live free from smoke) should be considered rights (or legally protected interests) under Article 709. This process is called "legal interpretation" (here, the interpretation of the wording of Article 709). When the court interprets the terms "rights" or "legally protected interests" broadly, rights and interests that were not conventionally protected under the law gradually start to

be recognized. For example, the issue of workplace sexual harassment was simply dealt with as an uncomfortable feeling in the past. Now, however, there is almost a consensus that it should be dealt with in courts as a tort for personal rights infringement. This evolution is an example of the court's legal interpretation creating a new category of rights infringement. Thus, through the trial process, tort law also has the function of creating new categories of torts.

### **8.3.2 *Perspective of Economics***

#### **8.3.2.1 Characteristics of an Economics Approach**

Evaluating a particular law from the perspective of economics means considering how the system regulated by that law affects the actions of members of society and the consequences of these actions and evaluating these outcomes. Analyses of the former type are called positive analyses, and those of the latter type are called normative analyses.

Positive analysis does not just analyze the effects on parties involved in disputes during dispute resolutions. Usually, it also analyzes the effects on pre-dispute behaviors by anyone who may be involved in the dispute. The first perspective is called the ex post perspective, and the second perspective is called the ex ante perspective.

In a normative analysis, the criterion for a decision is the desirability of the possible options for all members of society. The indicator of the degree of this desirability is generally called social welfare. Social welfare can be thought of in many different ways, but people typically consider that unless other people's personal satisfaction changes, social welfare is greater when individuals are more satisfied. Here, we call the degree of personal satisfaction "utility." Note that the term "social surplus" (or "total surplus") may be used as an indicator of social welfare depending on the purpose or needs of an analysis.

Next, we review the functions of the tort law system before and after certain disputes occur and how they can be evaluated from a social welfare standpoint.

#### **8.3.2.2 Evaluating Ex Post Functions: Remedies, Sanctions, and Income Redistribution**

As discussed in Sect. 8.2, the tort law system is designed to require a perpetrator to compensate a victim based on the value of the damages incurred by the victim to resolve a dispute if the case meets certain requirements. In this discussion, to simplify the explanation, we assume that the requirements set by Article 709 have been essentially fulfilled. We investigate the requirement of intention or negligence in somewhat more detail in Sect. 8.4.

This compensation mechanism can be divided into two aspects: the aspect of the victim receiving a payment and the aspect of the perpetrator making a payment.



As explained below, these two aspects of this mechanism actually have different functions. The aspect of the victim receiving a payment serves to compensate for damages and provide a remedy for the victim. By receiving this payment, the victim can recover from the utility reduction caused by the damages. For example, a victim of a traffic accident can collect the money spent to receive medical treatment and can be compensated for the lost salary caused by time in the hospital and doctor visits. Through these payments, the lost utility as a result of the accident can be recovered. Thus, a function of tort law is providing remedies for victims (i.e., compensation for damages).

Conversely, the aspect of the perpetrator making a payment serves to impose sanctions against a perpetrator regardless of the legal discussions. Making a payment decreases the perpetrator's utility by reducing his or her assets. Thus, it can be said that another function of tort law is imposing sanctions against perpetrators. The Supreme Court decision described earlier in this chapter seems to have stated that tort law has such a function only when punitive damages are applied. However, as we explain here, tort law can still have this function even when the standard compensation for damages is applied.

Remedies for victims have the effect of increasing victims' utilities, and they improve social welfare in that sense. However, the function of sanctioning perpetrators lowers perpetrator' utilities, decreasing social welfare. Thus, it is necessary to investigate in more detail whether tort law improves social welfare overall.

The tort law system, which requires a perpetrator to pay for the appraised damages incurred by a victim, has the overall function of decreasing the perpetrator's assets and simultaneously increasing the victim's assets. Thus, it simultaneously reduces the perpetrator's utility and improves the victim's utility. The tort law system can therefore be said to have an income redistribution function. This function has almost no effect on total social welfare if the perpetrator and the victim initially have similar amounts of assets and the amount of compensation is small relative to both parties' assets. The only change is that a high utility subject is replaced with a low utility subject. However, if one side has fewer assets than the other or if the compensation amount is large relative to both parties' assets, then the impact on social welfare may be significant. Usually, a person who owns fewer assets experiences a more significant utility improvement from an asset increase, and reducing inequality in assets translates into higher social welfare. Thus, if the victim has fewer assets, then tort law's income redistribution function can improve social welfare. However, if the perpetrator has fewer assets, then the income redistribution function may reduce social welfare. Because either the perpetrator or the victim may have more assets, it is possible to conclude that tort law's income redistribution function can either improve or reduce social welfare depending on the circumstances; in other words, the effect is indeterminate.

Tort law's function of sanctioning perpetrators may also serve to improve social welfare. When a person dies or become severely disabled owing to pollution, a medical injury, or a traffic accident, the victim and those related to the victim often have the desire to punish the perpetrator (i.e., the desire for revenge and retaliation). In these cases, fulfilling these desires improves these people's utility. In such cases,

the function of sanctioning the perpetrator reduces the perpetrator's utility, thereby reducing social welfare, as mentioned before. However, it has the conflicting effect of improving social welfare by improving the utilities of the victim and the victim's relatives. Thus, it is again not clear whether this function improves overall social welfare.

### 8.3.2.3 Evaluating Ex Ante Functions: Deterrence and Risk Allocation

The tort law system's function is not only to resolve disputes *ex post* but also to influence decision-making of those who may be a perpetrator (i.e., a potential perpetrator) and those who may be a victim (i.e., a potential victim) before an incident occurs. For example, sanctioning a perpetrator may cause a potential perpetrator to rethink taking a wrongful action or be more careful to prevent a wrongful act. This effect is called the "wrongful act deterrence function." This function works even when punitive compensation for damages is not applied, as previously explained in the case of the function of sanctioning the perpetrator.

We consider this function in more detail using an economics approach. Typically, an economics perspective considers that people make decisions regarding their actions to maximize their utilities. If a potential perpetrator determines that conducting a wrongful act will increase his or her utility, then the perpetrator will decide to conduct the tort. Otherwise, the perpetrator will decide not to carry out the wrongful act. Furthermore, a perpetrator will only take care to prevent a wrongful act if doing so ultimately improves his or her utility; otherwise, the perpetrator will not try to prevent the act. When a wrongful act is committed to fulfill specific interests, not committing the act means forgoing an improvement in utility. Not taking care to avoid wrongful acts is less tiring and allows a potential perpetrator to focus on more enjoyable matters; thus, taking care to avoid wrongful acts also reduces utility. A potential perpetrator therefore chooses to commit wrongful acts or to not take care to avoid wrongful acts unless the adverse effects (or costs) cancel out the positive effects (or benefits).

Tort law provides the benefit that not conducting a wrongful act or taking care to deter wrongful acts allows a person to avoid utility reductions caused by having to pay compensation for damages. If this benefit exceeds the costs explained above, then a potential perpetrator chooses to not commit wrongful acts and chooses to take care to avoid wrongful acts. As a result, wrongful acts are prevented from occurring. For this reason, tort law has the function of deterring wrongful acts.

This function can be evaluated by investigating its impact on social welfare *ex ante*. We use the following hypothetical situation to explain the essence of the discussion clearly. This explanation is a prerequisite for understanding the explanations of negligence in Sect. 8.4, so please pay close attention when reading this discussion. In this example, potential perpetrator decides whether to take care. If the perpetrator takes care, no wrongful act ever occurs, and if the perpetrator does not take care, a wrongful act always occurs. Additionally, we define the utilities of potential perpetrators and victims as constant values from which the effective cost burden is

subtracted. In addition, we determine social welfare by the social surplus, or the sum of the utilities of both parties.

In this hypothetical situation, we first check what results are desirable for society. When the utilities of the involved parties and the social welfare are determined as described above, the social welfare can be calculated by subtracting the social cost, or the sum of each involved party's effective cost burden, from a constant value. Additionally, if the potential perpetrator chooses to take care, then the social cost is the cost of taking care. If the potential perpetrator does not take care, then the social cost is the amount of damages. Thus, from a social welfare perspective, it is ideal to take care when the cost of taking care is less than the potential damages; otherwise, it is ideal not to take care. Thus, deterrence is preferable in the first case and not in the second case.

Next, we explain the results that actually occur. A potential perpetrator makes decisions to maximize his or her utility without considering whether the consequences of those decisions are desirable for society. In the current situation, because the perpetrator pays compensation for any damages caused to the victim, he or she either incurs the cost of taking care or chooses not to take care and pays the amount of damages. Thus, if the cost of taking care is less than the amount of damages, the perpetrator chooses to take care. Otherwise, the perpetrator chooses not to take care.

The above discussion implies that tort law's function of deterring a wrongful act is desirable from a social welfare perspective. This implication is because when a potential perpetrator takes care and a wrongful act is deterred, social welfare improves. Additionally, this discussion shows that the tort law system does not always prevent wrongful acts. When the amount of damages is less than the cost of taking care, the potential perpetrator does not take care, and a wrongful act occurs. As stated before, however, this result is desirable from a social welfare perspective. Taking this fact into consideration, the function of deterring wrongful acts should be called "the function of optimally deterring wrongful acts."

Finally, we check the mechanism of how this function works. The social cost of taking care is the individual cost of taking care. This cost is incurred by a potential perpetrator. Conversely, the social benefit of taking care is the prevention of damages. This benefit, however, is enjoyed not by the potential perpetrator but rather by the potential victim. Potential perpetrators will not consider any benefits that they do not personally enjoy (i.e., benefits that others receive in the case of external economies, called external benefits) when making decisions. Thus, in the absence of tort law, perpetrators will choose not to take care even when it is socially desirable to do so. In these situations, tort law works to change an external benefit into a personal benefit for a potential perpetrator, that is, the ability to avoid paying compensation for damages. Such changes are generally called the "internalization of external benefits." By internalizing an external benefit, as in the above example, potential perpetrators both incur the social costs and receive the social benefits of taking care. As a result, the social benefit of taking care begins to match the potential perpetrator's benefit of taking care, and the perpetrator's decision on whether to take care becomes socially desirable (see Sect. 6 of the Appendix for details on externalities).

Notably, this explanation omits the possibility that the occurrence of the wrongful act may be uncertain and the fact that a person can take care to different degrees. Even when considering these possibilities, however, the same conclusions apply. We briefly explain this result in Sect. 8.4.

One additional point about the function of deterring wrongful acts is important to make. This point relates to the distinction between civil and criminal liability in Sect. 8.3.1. It is evident that criminal law has the function of deterring wrongful acts. However, this fact alone is not grounds to deny that tort law serves to deter wrongful acts, and this function is socially desirable.

Conversely, tort law may also affect a potential victim's ex ante decision-making based on the aspect that the victim receives compensation for damages. First, if in addition to a potential perpetrator taking care, a potential victim taking care can also affect whether damages occur, tort law also affects a potential victim's decision to take care. This effect has an important role when considering the significance of negligence, and, thus, we explain this point again in Sect. 8.4.

In other ways, tort law's function of providing remedies for victims can affect potential victims' decisions regarding the creation or maintenance of property. If the law restores a potential victim's property when a wrongful act damages it, then a potential victim will build property more assertively and try to maintain it more appropriately relative to the case in which no remedy is provided. As a result, social welfare improves. The content in Chap. 2 is also a useful reference for these effects.

As explained before, compensation for damages is an ex post system to shift the burden of damages caused by wrongful acts from victims to perpetrators. Here, considering a situation in which the occurrence of damages is uncertain from an ex ante perspective, compensation for damages can be seen as a system for transferring the risk of damages from potential victims to potential perpetrators. Thus, tort law can also be said to have a risk allocation function.

The existence and contents of risk affect the ex ante satisfaction levels (or expected utilities) of each subject, and the allocation of risk affects social welfare. This affect is because attitudes toward risk differ among subjects who could bear the burden of risk. If one subject strongly dislikes risks and the other subject does not care very much about (or even likes) risks, it is clear that having the latter subject take risks rather than the former subject improves social welfare (Sect. 2 of the Appendix provides more details on risk and risk preference). Thus, for example, if subjects with few assets tend to dislike risks more than subjects with more assets do, and if individuals dislike risks more than corporations do, then it is more desirable from a social welfare perspective to allocate risks to subjects with more assets rather than to subjects with few assets and to allocate risks to corporations rather than to individuals. Because the tort law system places the burden of risk on potential perpetrators, the risk allocation function improves social welfare if the potential perpetrators have more risk tolerance. However, social welfare decreases if the potential perpetrators are more risk averse. Because many different subjects can be either perpetrators or victims, it is not possible to make a general statement regarding whether potential perpetrators or potential victims are more risk averse. Thus, it is not clear if this function improves social welfare.

We also note two related discussion points regarding the risk allocation function. The first point is the relationship with the social security system (see Chap. 5 for more details on the social security system). Under a social security system in which the government uses tax (or social insurance) revenue as funds to provide payment to victims, the burden of risk is thinly and widely distributed across all taxpayers. On the contrary, in tort law, the burden of risk is placed solely on the perpetrator. If society is composed only of people who dislike risks, then the social security system's risk allocation is less likely to lower social welfare owing to risk than tort law's risk allocation is. Thus, from a risk allocation perspective, it would be more desirable for the social security system to provide remedies for victims than for tort law to do so. The second point is related to the existence of damage and liability insurance. When people anticipate the possibility of having to pay damages, they can prepare for the risk by joining an insurance plan. Potential victims can obtain damage insurance, and potential perpetrators can obtain liability insurance. When appropriate insurance is available, the risk is thinly and widely distributed among members, and the tort law system ceases to affect the risk allocation. Furthermore, the existence of insurance not only affects tort law's risk allocation functions but also affects its function of deterring wrongful acts. However, the explanation of this effect is beyond the scope of this book and is therefore omitted.

### ***8.3.3 Legal and Economic Perspectives***

Viewing tort law through the perspectives of law and economics leads to several conclusions. From a legal perspective, the critical aim is to determine the purpose of the tort law system. The answer is that the main purpose of tort law is to provide remedies to victims. In contrast, from an economics perspective, it is important to understand what functions tort law serves and whether each of these functions is desirable. The answer to this question is that the other conceivable functions of tort law each have their merits and demerits, but tort law's ability to deter wrongful acts is socially desirable. It is important to note here that this reasoning does not inherently lead to the conclusion that the purpose of tort law is to deter wrongful acts. Instead, it merely illustrates the differences in the subjects and themes discussed by law and economics, which naturally lead to contrasting conclusions.

In law, the issue of realistically applying the current system to individual and specific cases under dispute is unavoidable. In principle, law tries to derive a more universal understanding by examining the courts' solutions to this problem. A major key to this process is ways of comprehending the purpose of tort law. In law, people other than the two parties (the perpetrator and the victim) are basically excluded from consideration because any discussion starts from an individual and specific dispute. Furthermore, the law must resolve disputes in a way that is consistent with other existing laws (e.g., criminal law). As a result, the perspective of deterring wrongful acts, which is taken into account in criminal law, does not need to be taken into account in tort law (i.e., civil law).

In contrast, from an economics perspective, every discussion starts with the debate as to whether the current tort law system (or, perhaps, its very existence) is desirable to society. This debate comes before any argument about whether tort law should be used to resolve an individual and specific dispute. To answer this question, it is necessary to specify and evaluate tort law's functions. Examining whether the system itself is desirable for society necessarily brings not only the parties to an individual and specific dispute under scrutiny but also considers all subjects and constituents who could be perpetrators and victims, any possible effects that may result from a dispute, and any possible effects preceding that dispute as well. When making such considerations, the function of deterring torts is not excluded from the evaluation as a matter of course just because it should be the role of criminal law. Furthermore, as a supplementary note, although some people view the *ex ante* viewpoint as more important than the *ex post* viewpoint in economics, this way of thinking is not necessarily always correct. Nonetheless, the reason that the *ex ante* deterrence of torts is prioritized in discussions is simply because evaluating any other functions with certainty is very difficult.

The aforementioned issues illustrate the contrast between the fundamental perspectives of law and economics. As previously indicated, this discussion is not intended to suggest that the two disciplines are always in opposition over this issue, nor is this issue so contentious that the disciplines are completely unable to engage in discussion. In fact, without such distinct lines of thinking from both disciplines, it is more difficult to adequately comprehend tort law's actual role in society. So concludes the discussion of this issue in this chapter, but we recommend that readers interested in this discussion review the references.<sup>1</sup> Even in the legal field, in fact, the significance of emphasizing the deterrence aspect of tort law to eliminate the incentives for perpetrators to engage in wrongful acts has been discussed in relation to torts in which the perpetrator aims to gain profits (Kubota 2007). In addition, some argue that the main institutional purpose of tort law should be shifted from compensation for damages to deterrence of wrongful acts (Morita and Kozuka 2008).

Thus, we conclude the discussion in Sect. 8.3. In the next section, we examine perhaps the most controversial aspect of tort law, negligence.

## 8.4 Principle of Negligence Liability

The opening phrase of Article 709 states, "A person that has intentionally or negligently infringed ...". Civil law is based on the idea that liability for damages cannot be imposed in a tort unless the perpetrator is at least negligent. This idea is called the "principle of negligence liability." In this context, the specific meanings of the words "intentionally" and "negligently" are controversial. The term "intentionally" is generally understood to mean acting in a way that causes an infringement of rights with an awareness of the consequences and a willingness to do so. Conversely, the

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<sup>1</sup> See, for example, Morishima (1987), Hirai (1992), and Uchida (2011).

actual meaning of “negligently” has been hotly debated. In this section, we examine what negligence is and why negligence liability is a principle from the perspectives of both law and economics.

### **8.4.1 What is Negligence?**

According to legal studies, negligence was traditionally understood as a psychological condition lacking in appropriate tension (i.e., a subjective psychological state) in which a subject could have foreseen a consequence but did not exercise appropriate caution or care to avoid it. However, with the rise in cases involving tort lawsuits in the 1960s and 1970s, the tendency to evaluate negligence based on the standards of objective acts (the so-called “objectifying of negligence”) rather than based on a subjective psychological state became prominent. On this basis, negligence was no longer seen as a psychological state in which the person committing the act lacked appropriate psychological tension. Instead, perpetrators’ acts were being judged from an objective standard according to whether these actions met the required standard of care. In recent years, it has become generally accepted that negligence is defined in these terms and that the criteria for negligence are specified according to the following formulation. Specifically, negligence is a violation of the duty to act (i.e., the duty to avoid consequences) even though the perpetrator could foresee the risk of damage (i.e., foreseeability) and was obligated to act to avoid the occurrence of this damage (i.e., the duty to avoid consequences).

Judicial precedents are traditionally based on the premise of objective negligence. In the case of a chemical company in Osaka (Great Court of Judicature Judgment, December 22, 1916 – “Osaka Alkali”) that was accused of damaging the plaintiff’s crops with the emissions produced by its factory, the court determined that if the chemical plant had carried out reasonable precautions according to the nature of its business to prevent the occurrence of damages arising from its normal business objectives, then it could not be found liable for damages. Thus, the court made its judgment based not on the presence or absence of a subjective psychological state of negligence on the part of the defendant (i.e., the Osaka Alkaline company) but rather on whether the company had made reasonable precautions in accordance with the nature of its business. In other words, the judgement was based on whether it had fulfilled its objective duty to act (i.e., the duty to avoid consequences).

Conversely, we can consider an economist’s view of negligence. As we have already explained, the economics field evaluates social situations based on the standards of social welfare. Thus, the level of precaution that maximizes social welfare *ex ante* is considered to be due care, and perpetrators are considered to be negligent when their chosen precaution levels are below the due care level. Although this line of thinking is based on the premise of maximizing social welfare, which is unique to economics, it is not remiss to say that this perspective is practically identical to the legal viewpoint regarding objective negligence. As it stands, in practical terms, the

legal perspective uses a formula known as the “Hand rule” to determine the presence or absence of negligence, which is similar to the approach taken by economics.

Three variables are said to be particularly important in determining the existence of negligence: the probability of breaking away, the gravity of the resulting injury, and the burden of adequate precautions (see *United States v. Carroll Towing Co.*—159 F.2d 169). Based on these determining variables, Judge Learned Hand created the following formula for negligence:

the burden of taking precautions (B) < the probability of loss (P) × the gravity of loss (L).

When the above relationship is established, then negligence exists. The burden of precaution in this formula corresponds to the cost of precaution in the explanation from an economics perspective.

For example, consider a situation in which a person (i.e., a victim) suffers damages of 100 million JPY with a probability of 15% if a different person (i.e., a perpetrator) performs a certain act. In this case, the important issue is how diligently the perpetrator committed to installing measures to prevent damages according to the expected amount of damages. In this example, if the perpetrator spends 10 million JPY to install measures to prevent damages, then those costs do not exceed the amount of expected damages of 15 million JPY (100 million JPY × 0.15). Thus, the measures taken by the perpetrator to prevent damages are insufficient, and the perpetrator is therefore negligent.

On the one hand, determining negligence according to the Hand rule does not necessarily entirely line up with the standard for negligence from an economics perspective, which aims to maximize social welfare (i.e., minimize social costs).<sup>2</sup> On the other hand, even in law, critics argue that this formula is not an all-purpose tool that can indiscriminately apply to any kind of case. The conclusion that the perpetrator is not liable simply because the costs of any precautions slightly exceed the expected cost of damages does not fit with the sense of justice. However, this formula is very important in that it enables a discussion from both law and economics perspectives.

## 8.4.2 *Why is Liability for Negligence a Principle?*

### 8.4.2.1 **Principle of Negligence Liability and Its Exceptions: A Legal Perspective**

The principle of negligence liability has been adopted with regard to tort law mainly for historical reasons. As stated at the beginning of Sect. 8.2, the various forms of economic activity include actions that inflict damages or losses on others. If people were held liable for any damages or losses to any victims that occurred as a result

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<sup>2</sup> See, for example, Cooter and Ulen (2011) for more information on this issue.



of these economic activities, social activity would be hindered, and it would be impossible to smoothly carry out economic activities within society. Systematically introducing the principle of no liability without negligence into the Civil Code guarantees the freedom of movement and activity in social life. Accordingly, the principle of negligence liability is not self-evident but rather can be seen as being supported by the economic policy of developing one's own industry.

Moreover, this elementary proposition of tort law, which states that a perpetrator shall be held responsible for compensating a victim for damages only when the damage is caused by intentional or negligent behavior, was compelled to undergo modifications by virtue of social and economic development. In particular, a series of legislative acts have recognized a perpetrator's liability for damages without raising the question of the perpetrator's negligence (see, for example, Art. 25 of the Antimonopoly Law, Art. 3 of the Act on Compensation for Nuclear Damage, and Art. 3 of the Product Liability Act).

The development of the idea of strict liability raises a fundamental issue regarding the basis for the grounds of tort liability. Under the principle of negligence liability, the basis for attributing blame to the perpetrator is established when the perpetrator is found to have lacked appropriate psychological tension (the subjective negligence theory) or to have violated the duty to avoid consequences (the objective negligence theory). In any case, the notion of requiring the perpetrator pay for the costs of these damages is consistent with the ideals of fairness because the blameworthiness of the perpetrator's negligence is recognized. However, if a perpetrator is forced to bear responsibility for an action even in the absence of negligence, then the basis for attributing this responsibility cannot be explained from the perspective of negligence theory. It is therefore important to understand which perspective supports the standard of strict liability. The two general bases for assigning responsibility as it pertains to strict liability are risk liability (i.e., the person who creates, controls, or administrates a source of hazardous risk must be liable for any damages that arise from that risk) and profit liability (i.e., if the responsible party's actions generate profits for themselves, they are responsible for any damages arising from these actions).

#### **8.4.2.2 Comparison of the Strict and Negligence Liability Rules: An Economics Perspective**

One may ask whether the negligence liability rule, which is held as a guiding principle, is truly desirable from an economics perspective. Perhaps the strict liability rule, which is incorporated in the law as an exception, is more desirable. Because we did not consider the presence or absence of negligence in the analysis in Sect. 8.3, the results are the same if the strict liability rule is applied instead. Thus, we start by explaining how the results in Sect. 8.3 change when the negligence liability rule is applied.

First, we consider the matter from an ex post perspective. Under the negligence liability rule, if there is no evidence of negligence, then no income is redistributed from the perpetrator to the victim. Although this outcome may affect social welfare,

it is impossible to say with certainty whether it would improve social welfare. For example, consider a tort case in which the perpetrator is a corporation with numerous assets and the victim is an individual with very few assets. In this case, the desirable outcome is for the law to find the corporation liable for compensating the victim even if it is not found to be negligent. Exceptions allowing the strict liability rule to be applied to certain types of tort laws, such as the product liability law, can be justified from an economics perspective for reasons like those in this example.

Furthermore, with regard to tort law's function of punishing perpetrators, under the negligence liability rule, no practical punishment is handed down against the perpetrator if no negligence is found. However, for the most part, the desire to punish the perpetrator is most likely to occur when the perpetrator is actually negligent. Thus, we can ignore any effect of this viewpoint on social welfare in almost all instances.

Next, we can consider the matter from an *ex ante* perspective. Here, unlike in Sect. 8.3, we assume that a potential perpetrator is able to select a level of precaution. Based on the aforementioned economics perspective on negligence, we define the level of precaution that maximizes social welfare as "due care." Perpetrators with a precaution level below due care are considered to be negligent, and those with a precaution level at or above due care are not negligent.

First, we explain that perpetrators choose to take due care under the strict liability rule. This explanation implies that optimal deterrence can be achieved even when a perpetrator has the ability to choose a precaution level, whereas we refrained from providing such an explanation in Sect. 8.3. As illustrated in Sect. 8.3, when the perpetrator bears responsibility, the costs borne by the perpetrator are identical to the social costs. Thus, a potential perpetrator's decision on whether to take additional precautions is in line with social desirability. For this reason, under the strict liability rule, the potential perpetrator necessarily chooses to take due care.

Now, we consider whether the level of due care is selected under the negligence liability rule. If the perpetrator choose a level of precaution below the due care level, then the perpetrator is liable for damages under either rule. As such, under the negligence liability rule, the costs borne by the perpetrator are the same as those for which they would be liable under the strict liability rule. If the perpetrator chooses the due care level, then the perpetrator is not liable for damages and, thus, the costs borne by the perpetrator under the negligence liability rule are lower than those under the strict liability rule. Considering that the potential perpetrator voluntarily chooses to take due care under the strict liability rule, the negligence liability rule, which lowers the cost burden of a perpetrator taking due care, never results in the perpetrator paying for a lower level of precaution than that of due care. Furthermore, because paying for any level of precaution at or above the level of due care ensures that a perpetrator will not be held liable for damages, paying for any levels of precaution beyond the due care level only increases the perpetrator's cost burden. For this reason, under the negligence liability rule, levels of precaution above due care are never selected. Thus, even under the negligence liability rule, due care is still chosen.

This result indicates that torts are optimally deterred under both the strict and negligence liability rules. This finding does not mean that the negligence liability rule should be held as the guiding principle from the perspective of deterring the

occurrence of damages. However, the negligence liability rule provides benefits that the strict liability rule cannot provide, as follows. As mentioned in Sect. 8.3, the tort law system has the potential to affect the decision-making processes of not only potential perpetrators but also potential victims. These possible effects become an issue when both the potential perpetrators' and the potential victims' precaution levels affect the occurrence of damages. When the strict liability rule is applied in such situations, potential victims will likely choose to take only the minimal level of precautions among the choices available. Because victims are guaranteed to be compensated for any damages that occur, taking a higher level of precaution only results in higher costs for potential victims.

Conversely, if the negligence liability rule is applied to this situation, potential victims have an incentive to take some additional precautions. This result is because even if a potential victim suffers damages, he or she will not receive any compensation as long as the perpetrator has paid due care. Thus, potential victims prefer to voluntarily take some precautions to prevent the occurrence of damages. Explaining this result in detail is complicated, and, thus, we refer readers to the appendix at the end of this chapter for more details. In brief, under the negligence liability rule, both the potential perpetrator and the potential victim end up choosing levels of precaution that maximize social welfare because for both parties, this choice is the best response to the other party's choice (this situation is called a Nash equilibrium, as described in Sect. 8.4 of the Appendix).

As this comparison shows, if the level of precaution selected by the potential victim affects the occurrence of damages, the negligence liability rule can be considered the more desirable option because it incentivizes potential victims to choose the optimal deterrence level. Normally, from a legal perspective, the deterrence of a tort is not the systematic objective of tort law. However, from an economics perspective, the negligence liability rule's deterrence function is an important justification for the principle of negligence liability, which is one of the pillars of the tort law system.

Next, we compare the negligence and strict liability rules from the perspective of risk allocation. As mentioned earlier, because potential perpetrators voluntarily choose to take due care under the negligence liability rule, perpetrators are not liable to pay any compensation even if damages do occur. For this reason, potential victims end up bearing the risks of any possible damages. Conversely, when damages occur under the strict liability rule, the responsibility for compensation always rests with the perpetrator, meaning that the risk is borne by potential perpetrators. Consequently, the allocation of risk differs depending on which rule is adopted. However, because we cannot determine with certainty whether potential victims or potential perpetrators should bear the risk, we cannot determine which rule is more desirable based on their different risk allocations. However, in a tort in which a corporation is the perpetrator and an individual person is the victim, for example, rules that compel the perpetrator to bear the risks are preferable from a risk allocation perspective. Furthermore, the application of the strict liability rule to such laws as the product liability law are justifiable based on the risk allocation function in addition to the income redistribution function.

## 8.5 Conclusion

In this chapter, we discussed Article 709 of the Civil Code, which is a general rule regarding tort law. We first explained the system, and we then discussed the basic lines of thinking about tort law from both law and economics perspectives and compared the two perspectives.

Tort law serves the functions of providing a remedy to victims (i.e., compensation for damages), imposing sanctions on perpetrators, redistributing income, deterring damages, and allocating risks, among others. The function of providing a remedy to victims (i.e., compensation for damages) means that victims can receive compensation for their damages. The function of imposing sanctions on perpetrators means that perpetrators are compelled to pay for damages that they cause. The function of income redistribution is a comprehensive function in which compensation for damages is transferred from perpetrators to victims. All of these functions operate after a dispute, called a tort, arises. The function of deterring wrongful acts works by using the fear of paying compensation to induce potential perpetrators to avoid causing damages, and the function of risk allocation transfers the risk of damages occurring through a tort from potential victims to potential perpetrators. These functions operate before any such disputes arise. In addition, from a legal perspective, we can also identify other functions, such as the creation of previously unrecognized types of torts through court judgments.

Law examines what the main institutional purpose of tort law (among all these possible functions) is. It asks this question to gain an essential foothold in providing a universal solution that can be used to resolve individual and specific disputes involving torts. The answer to this question is that the major purpose of tort law is to provide remedies to victims. Conversely, economists start by debating whether the system (or perhaps the very existence) of tort law is desirable for society. To answer that question, they first examine the kinds of functions that tort law has and then examine whether each of those functions is desirable. The answer to this question is that setting aside the other functions, the function of deterring wrongful acts by perpetrators, which is part of tort law, is desirable for society.

As we can see here, although the legal and economics perspectives comprehend tort law fundamentally differently, both perspectives are important for adequately understanding its role in practical social settings. Furthermore, in many legal circles, the economics perspective has been incorporated into debates and discussions of tort law.

In this chapter, we further explained the topic of negligence, the most debated issue in all of tort law, in detail from both law and economics perspectives. From a legal perspective, the presence or absence of negligence is thought of as being objectively determined by whether the perpetrator's actions are consistent with taking the necessary level of precaution. Conversely, from an economics perspective, a perpetrator is considered to be negligent only when the perpetrator's precaution level is below the socially optimal precaution level. It is not remiss to say that both perspectives are fundamentally the same.

In general, tort law uses the principle of negligence liability, under which liability for damages occurs only when the perpetrator is found to be negligent. In law, this principle is thought to have been adopted in response to the needs to ensure people's freedom of action and to stimulate economic activity whenever possible. However, a growing trend in relatively recent history is the enactment of laws imposing liability for damages regardless of whether negligence is present.

From an economics perspective, when we consider tort law's function of deterring wrongful acts, potential perpetrators choose to take the socially optimal level of precaution to deter the occurrence of damages regardless of whether the negligence or strict liability rule is applied. However, when the aim is to incentivize potential victims to take socially optimal levels of precaution as well, the negligence liability rule is preferable to the strict liability rule. This result can justify the fact that the negligence liability rule is the guiding principle in tort law. Conversely, in specific cases of torts, the strict liability rule is more desirable from the perspectives of income redistribution and risk allocation. This result can justify the fact that product liability legislation adheres to the strict liability rule.

## **Appendix: Optimal Deterrence in the Case of Bilateral Precaution**

When the levels of precaution of the potential perpetrator and the potential victim both influence the occurrence of damage, the situation is called a "bilateral precaution case." In this appendix, we explain in greater detail the contrast between the strict and negligence liability rules in the bilateral precaution case briefly mentioned in Sect. 8.4.2.2.

To simplify this discussion, we make a minor revision to the situation described in Sect. 8.4.2.2. In this situation, both the potential perpetrator and the potential victim can choose whether to take certain levels of precaution; absolutely no damage occurs when both parties take the precautions, but certain damage absolutely occurs otherwise.

First, we discuss the socially optimal result, that is, the pattern of precautions that minimizes the social cost. In this situation, the level of social cost is one of four levels depending on whether the related parties take the precautions. If neither party chooses to take precautions, then the social cost is just the amount of damages. If only one party takes precautions, then the social cost is the cost of the precautions taken by that party plus the amount of damages. We can immediately see that the social costs are not minimized if only one party takes precautions. Thus, the socially optimal result is either for both parties to take precautions, deterring the occurrence of damages, or for neither party to take precautions, in which case the damages are not deterred. If the total cost of the precautions taken by both parties is less than the amount of damages, then the former result is socially optimal. If the reverse is true (i.e., the

total cost exceeds the amount of damages), then the latter result is socially optimal. We call the former situation “the situation in which deterrence is desirable” and the latter situation “the situation in which deterrence is not desirable.” We examine each situation under the strict and negligence liability rules and determine whether potential perpetrators and victims choose to take precautions.

First, when the strict liability rule is applied, any damages that occur are always compensated by the perpetrator regardless of the potential perpetrator’s decision. Thus, taking precautions only increases potential victims’ cost burden. For this reason, potential victims choose not to take precautions. Potential perpetrators predict this behavior by potential victims and similarly choose not to take precautions. This result is because when damages occur, perpetrators are held liable for compensation regardless of whether they took precautions. Thus, taking precautions only increases their burden. We can see that in this situation, both parties choose not to take precautions.

Next, we discuss the situation in which the negligence liability rule is applied. If deterrence is desirable, perpetrators are not found negligent if they have taken precautions, but they are found negligent if they have not taken precautions. Thus, if potential perpetrators choose to take precautions, they bear the costs of these precaution, and if they do not take precautions, they bear the amount of damages. In this situation, because the amount of damages exceeds the costs of precautions, potential perpetrators choose to take precautions. The potential victims predict this behavior of the potential perpetrators and are faced with the choice of either paying the precaution costs or not paying the precaution costs and bearing the costs of the damages instead. In this case, because the amount of damages exceeds the precaution costs for potential victims, the potential victims choose to take the precautions. Thus, both parties will choose to take the precautions and, as a result, can deter the occurrence of damages.

Conversely, in a situation in which deterrence is not desirable, potential perpetrators are not found negligent even if they do not take precautions, and they are never found liable for compensation. Under this circumstance, taking precautions only increases their burden. For this reason, the potential perpetrators choose not to take precautions. The potential victims predict this behavior on the part of the potential perpetrators and also choose not to take precautions. This result is because the victims bear the costs of any damages regardless of whether they take precautions, meaning that taking precautions only increases their burden. Thus, both parties choose not to take precautions and, as a result, cannot deter the occurrence of damages.

As these results show, the optimal outcome cannot be achieved when deterrence is desirable and the strict liability rule is applied. Conversely, it can be achieved when the negligence liability rule is applied regardless of whether deterrence is desirable. These results hold even in situations in which levels of precaution can be chosen or the occurrence of damages is not entirely certain (concerning this result, see, for example, Shavell 1987).

### **Column 13. “How false and irresponsible a lawyer is”: law and interpretation (2)**

I admit that column 10 was written using some rather sentimental brushstrokes. Thus, I will settle down here and explain methods for interpreting the law in more detail.

In introductory texts on the study of law, the typical legal interpretation methods are often exemplified and enumerated as “literal interpretation” (following the wording of the law as literally as possible), “extended interpretation” (extending the meaning beyond the exact wording of the law), “analogical interpretation” (examining the effects of laws and regulations that stipulate certain facts and interpreting their effects on similar facts), and “contrary argument interpretation” (when multiple facts can be considered similar but the law provides only for specific facts, one may interpret that other similar facts do not have the effects stipulated by the relevant laws).

In practice, various factors, such as the positions of specific articles within each law, articles’ relationships with other articles, the accumulation of judicial precedents and trends in academic debates, the status of discussions at the time of the legislation, and the aims and purposes of the law must all be narrowed down and considered comprehensively to arrive at interpretations (and conclusions). Thus, when faced with a specific concrete legal problem, legal practitioners and scholars do not always agree on which interpretation method is most appropriate. Additionally, if problems arise when a certain legal interpretation is actually provided, it may be that the logical process is not persuasively presented to readers of the interpretation. Certainly, it can be difficult to understand actual interpretations of the law through independent study because the technique of selecting the methods with which to interpret the law (and draw conclusions) requires extensive experience and awareness of new developments. Those within the legal world certainly hope that those outside of this world who encounter the realm of legal interpretation should understand how it is approached. However, if lawyers cannot persuasively explain why a certain interpretation or conclusion is reached, those outside the world of law, including the general public, will tend to view legal interpretation as arbitrary and unreliable (The title of this column is taken from page 82 of Kurusu S (2004) *Hō no kaishaku to hōritsuka* (Interpretation of law and lawyers). In: Kurusu S, *Kurusu Saburō chosakushū* I (Works of Saburo Kurusu I). Shinzansha Publisher, Tokyo (first published in 1954). The phrase “somehow trying to hide the subjective behind the objective” follows the quotation used in this title. Kurusu (1912–1998) was an outstanding legal scholar who worked on interpretations of civil law in the postwar era in Japan).

### **Study Questions**

1. Explain the main institutional purpose of tort law from a legal perspective.

2. From an economics perspective, explain how tort law functions both ex post and ex ante.
3. Explain the basis for the principle of negligence liability from a legal perspective. Then, explain the criteria for judging negligence in detail.
4. How do the differences in the strict and negligence liability rules lead to different outcomes ex ante and ex post? How can these differences be evaluated?

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