

# Understanding Tort Law in Korea\*

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## I. Introduction

The Korean legal system is a civil law system, which differs from the common law system. In Korea, the primary authority that legally binds court decisions is statutes, including the Korean Civil Code (CivC). Article 1 of the CivC articulates this point by stipulating that if there are no provisions applicable to certain civil affairs, customary law shall apply, and if no applicable customary law exists, sound reasoning shall apply. The provisions applicable to certain civil affairs are statutes, including the CivC.

It should be noted that the doctrine of stare decisis does not apply to civil law countries such as the Republic of Korea. However, precedents do affect a court's decision in a practical manner, since seminal decisions have persuasive authority.<sup>1)</sup> The Korean Supreme Court's decisions have a de facto binding effect on lower courts' judgments since lower courts generally follow the Korean Supreme Court's decisions. Practically, the Korean Supreme Court itself tends to stick to its past decisions. It has developed its core legal principles through a substantial number of decisions rendered over the six decades since the CivC came to effect in 1960; as a result, judges tend to rely on precedents. Thus, it is imperative to refer to not only statutes

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1) See Chun-soo Yang, *Pallyeui beobwonseong jaegomto - beobironui gwanjeomeseo* [The Problem of Judicial Precedent and Legal Source Revisited - From the Perspective of Legal Theory], 52 JURIS 431, 434 (2020) (In Korean) (regarding the issue of whether judicial precedent can be a legal source).

but also Supreme Court decisions to understand tort law in Korea.

CivC Articles 750-766 and other special statutes such as the Product Liability Act define tortious acts. Korea adopts a comprehensive approach to tort law, basing its tort law on a general clause: CivC Article 750 provides that any person who causes losses to or inflicts injuries on another person by an unlawful act, whether intentionally or negligently, shall be bound to make compensation for damages arising therefrom. This comprehensive approach originates in the French Civil Code, Article 1240 of which prescribes that any act whatsoever of a person that causes damage to another obliges the one by whose fault it occurred to compensate it. Through the influence of the French Civil Code, Japan has also adopted the comprehensive approach: Article 709 of the Japanese Civil Code prescribes that a person who has intentionally or negligently infringed any right or legally protected interest of others shall be liable to compensate any damages resulting as a consequence.<sup>2)</sup>

In contrast, the United Kingdom and the United States have adopted the categorical approach. Traditionally, the common law was organized around writs or forms of action, some of which were eventually classified as tort actions.<sup>3)</sup> To win a case, the plaintiff had to fit the case within one of the existing writs. Germany also adopted the categorical approach. Article 823(1) of the German Civil Code prescribes torts regarding injury to life, body, health, freedom, property, or right of another,<sup>4)</sup> Article 823(2) prescribes torts regarding the infringement of a statute,<sup>5)</sup> and Article 826

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2) See Emi Matsumoto, *Tort Law in Japan*, in *COMPARATIVE TORT LAW* 359, 359 (Mauro Bussani & Anthony J. Sebok eds., Edward Elgar Publishing 2015) (regarding Japanese tort law).

3) James Gordley, *The Architecture of the Common and Civil Law of Torts: An Historical Survey*, in *COMPARATIVE TORT LAW* 174, 174 (Mauro Bussani & Anthony J. Sebok eds., Edward Elgar Publishing 2015).

4) Article 823(1) of the German Civil Code stipulates that "A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising therefrom."

5) Article 823(2) of the German Civil Code stipulates that "The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault."

prescribes torts regarding intentional damage contrary to public policy.<sup>6)</sup> It must be noted that even though German tort law's approach differs from Korean tort law, the legal theory of German tort law has influenced the interpretation of the CivC, because a substantial number of Korean legal scholars have studied German law.

This article aims to describe Korean tort law. We first review the general clause, CivC Article 750 (II), co-tortfeasors' liability (III), employer liability (IV), liability of the possessor or owner of a structures (V), liability caused by an automobile accident (VI), and extinctive prescription (VII). After addressing product liability (VIII), the article concludes with a brief outlook on the future (IX).

## II. Tort Under Article 750 of Civil Code

### *A. Elements to Be a Tort Under Article 750*

As noted above, CivC Article 750 is a general clause defining the kinds of acts that constitute a tort. Under that article, there are four elements of a tort: a wrongdoer's intention or negligence, the unlawfulness of a wrongdoer's act, damages, and the causal relationship between a wrongdoer's act and the damages. The burden of proof concerning all four elements lies with the plaintiff.

#### *1. Wrongdoer's Intention or Negligence*

The first element under Article 750 is a wrongdoer's intention or negligence. Whether there is negligence is closely connected to the extent to which an ordinary person would have been cautious under the circumstances in question. The issue lies in what "ordinary person" means. According to prevailing authorities and Supreme Court decisions, it refers to an average person at the time of each specific situation. Factors such as

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6) Article 826 of the German Civil Code stipulates that "A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage."

the individual's occupation, social status, and the concrete circumstances at the time of the act are also considered in determining an ordinary person.<sup>7)</sup> For example, in a malpractice case, whether the doctor was negligent or not is judged in light of the medical knowledge and skills a typical or average doctor should have.

## 2. Unlawfulness of a Wrongdoer's Act

The second element under Article 750 is the unlawfulness (*Rechtswidrigkeit*) of a wrongdoer's act, which means that a person's act is against a statute, good morals, or the social order more generally. It refers to the infringement of not only a right such as a right in rem but also legally protected interests such as economic interests,<sup>8)</sup> the right to view, or the right to sunshine.<sup>9)</sup>

There are many perspectives on how to define unlawfulness.<sup>10)</sup> According to the theory of unlawfulness of conduct (*Verhaltensunrechtslehre*), assessing unlawfulness always relates to the human behavior involved and not to any damages that result. However, according to the theory of unlawfulness established by the result (*Erfolgsunrechtslehre*), whoever causes injury to an absolutely protected good or right (such as the right to bodily integrity or property rights) has acted unlawfully unless he or she had a special justification. The Korean Supreme Court held that in judging unlawfulness, it is not necessary to decide according to a unitary rule; rather, each act at issue should be judged individually and relatively.<sup>11)</sup> The court has thus taken a categorical

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7) Deok-su Song, CHAEGWONBEOPGANGNON [THE LAW OF OBLIGATION: PARTICULAR] 506 (4th ed. 2019) (In Korean); Young-joon Kwon, *Bulbeopaengwiui gwasil pandangwa sahoepyonggyunin* [Negligence in Tort Law and an "Average Person"], 68 J. COMPAR. PRIV. L. 91, 111 (2015) (In Korean); Daebeobwon [S. Ct.], Jan. 19, 2001, 2000Da12532 (S. Kor.).

8) Young-joon Kwon, *Pure Economic Loss: A Korean Perspective*, 10(2) J. KOR. L. 212, 225 (2011).

9) Daebeobwon [S. Ct.], Dec. 24, 2008, 2008Da41499 (S. Kor.) (regarding a right to sunshine); Daebeobwon [S. Ct.], Sept. 13, 2004, 2003Da64602 (S. Kor.) (regarding a right to view).

10) Helmut Koziol, BASIC QUESTIONS OF TORT LAW FROM A GERMANIC PERSPECTIVE 172-173 (2012).

11) Daebeobwon [S. Ct.], June 27, 2003, 2001Da734 (S. Kor.).

approach that establishes standards for judging unlawfulness according to type of conduct.

For example, regarding the installation by Korea Electric Power Corporation's (KEPCO) of a power transmission line on land owned by an individual, the Supreme Court recognized that KEPCO was liable for infringing on the individual's right to property.<sup>12)</sup> Rights in rem, such as the right to property, are granted a strong degree of protection; therefore, the infringement itself constitutes unlawfulness in this case. On the other hand, regarding legally protected interests such as the right to view, mere infringement cannot be deemed unlawful. According to the Supreme Court, the extent to which one's interest has been harmed must exceed the limit of tolerance generally accepted according to society's norms in order for an infringement to be deemed unlawful.<sup>13)</sup> In the ruling, the determination of whether the limit of tolerance was exceeded considered many factors, including the overall scenery subject to the obstructed view, the location and structure of both the obstructing and obstructed building, the process of how the obstructing building was built, and whether there was malicious intent in obstructing the view at issue. Adopting a policy that emphasizes the protection of the right to view as a legally protected interest would limit the ability of a neighbor to exercise his or her right to property, and the level of protection of the right to view varies depending on the specific locations of the buildings at issue. Therefore, it cannot be said that a mere infringement of the right to view is a legally protected interest sufficient to find unlawfulness.<sup>14)</sup>

Unlawfulness is the key issue in determining whether privacy infringement constitutes a tortious act. Privacy must be protected, but that protection will inevitably conflict with other values. Thus, balancing is an important question in determining lawfulness.<sup>15)</sup> In a case where an

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12) Daebeobwon [S. Ct.], Mar. 25, 2005, 2003Da5498 (S. Kor.).

13) Daebeobwon [S. Ct.], Sept. 13, 2004, 2003Da64602 (S. Kor.).

14) Cheol-hong Yoon, *Jomanggwonui chimhaesi suinhandoui pandangijun* [A Study on the Endurance Limit of the Right to View], 9(2) NE. ASIAN L. J. 201, 201-225 (2015) (In Korean).

15) Young-joon Kwon, *Chosanggwon mit sasaenghwarui bimilgwa jayu, geurigo iikyeongnyangeul tonghan wibeopseong pandan* [Determining Unlawfulness Through Balance of Interests Regarding the Right to One's Image and the Right of Privacy], 31 J. PRIV. CASE L. STUD. 519, 535 (2009) (In Korean).

insurance company employee took photographs of a victim's daily activities for the purpose of collecting evidence against the victim's assertion regarding the seriousness of disability caused by an insured accident, the Supreme Court held that the final determination of unlawfulness should be made by balancing interests. The balancing test is to be a comprehensive examination of the overall circumstances in a concrete set of facts. First, factors regarding the infringing act must be considered, including the content and gravity of the interests pursued by the act, the necessity and effectiveness of the act, the urgency of the act, and the reasonableness of the method of infringement. Second, it is also necessary to consider factors regarding the infringed interests, including the content and gravity of the infringed legal interests, the degree of damage suffered by the infringing act, and the degree of protection of the infringed interests.<sup>16)</sup> The Supreme Court concluded that, considering the aforementioned factors, the acts committed by the defendant against the plaintiff were unlawful.

In addition, unlawfulness is the key issue in determining whether a media report can be a tortious act. The Supreme Court has held that, even when an expression of opinion or commentary based on a certain fact injures a person's reputation, the act is not unlawful if the act is related to the public interest, and the crucial parts of the aforementioned fact are true, or there are substantial grounds for media reporter to believe that the crucial parts can be true.<sup>17)</sup> This decision is significant in that it emphasizes the role of media companies and tries to determine a standard of evaluating unlawfulness for cases where the freedom of the press and the protection of a person's reputation were in conflict. The court also held that in achieving the delicate balance between ensuring freedom of press and protecting the reputation of an individual, the standard of evaluating unlawfulness should take into account whether the party whose reputation was damaged is a public or private figure, and whether the expression is in the public interest or belongs to a private, personal domain. It ruled that a greater degree of freedom of expression should be allowed if the expression concerns a media company, as the media company itself enjoys a wide

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16) Daebeobwon [S. Ct.], Oct. 13, 2006, 2004Da16280 (S. Kor.).

17) Daebeobwon [S. Ct.], Nov. 15, 2012, 2011Da86782 (S. Kor.).

degree of freedom of speech. In a decision where prosecutors filed suit against a broadcasting company on the grounds that the report injured the prosecutors' reputation, the Supreme Court held that a media company's ability to monitor or criticize public officials should not be easily restricted unless the report was made with actual malice or with reckless disregard for the truth.<sup>18)</sup> Unlike *New York Times Co. v. Sullivan*,<sup>19)</sup> in which the US Supreme Court held that a state is not liable to a public official for a defamatory falsehood relating to that official's conduct unless the official proves "actual malice", the Korean Supreme Court case referred to above does not find it necessary for the media to have "active malice" in order for a public figure to claim damages. Rather, a public figure can claim damages when there is a reckless disregard for truth in a media report.

### 3. Damages

The third element under Article 750 is damages, which refer to the harm caused by the fact that a right or legal interest was infringed; damages are essentially the gap between the state after the tortious act versus the state that would have existed if not for the tortious act. This is dealt with in depth later in this chapter, but for now it is enough to note that damages consist of actually incurred losses (positive losses), lost benefits (negative losses), and consolation.

The damages to be compensated must be definite damages that were actually suffered.<sup>20)</sup> For instance, if an injured party has to take on debt due to a tortious act inflicted by the tortfeasor, the injured party must show that the burden of the debt is definite and is therefore of a quality that should be paid to the obligee.<sup>21)</sup>

### 4. Causal Relationship between a Wrongdoer's Act and Damages

The fourth element of a tort is a causal relationship between the

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18) Daebeobwon [S. Ct.], Sept. 2, 2003, 2002Da63558 (S. Kor.).

19) *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

20) Daebeobwon [S. Ct.], Aug. 25, 1998, 97Da4760 (S. Kor.).

21) Daebeobwon [S. Ct.], Oct. 15, 2020, 2017Da278446 (S. Kor.).

wrongdoer's act and the damages. A causal relationship can be found when the wrongdoer's act is a proximate cause, considering the objective circumstances and the wrongdoer's subjective consciousness. Proximate cause is determined based on the standard of high probability barring contingency.<sup>22)</sup> In principle, the plaintiff bears the burden of proof concerning the existence of causation; thus, the plaintiff is obliged to produce evidence to establish causation.

In environmental lawsuits where plaintiffs file a suit for damages caused by water pollution, plaintiffs tend to find it difficult to collect evidence to prove the existence of causation since the damages in question can be caused by pollutants accumulated with the passage of time and because important evidence is controlled or managed by the defendant. Accordingly, requiring the victim to scientifically and strictly prove the existence of a causal relationship may lead to the denial of judicial relief from environmental pollution. On these grounds, the Supreme Court has adopted *res ipsa loquitur*, or the "new probability theory", to alleviate the burden of proof for plaintiffs. The Supreme Court holds defendants liable if the plaintiff can prove three things: first, that the defendant discharged the harmful substance; second, that the substance reached the damaged area or objects; and third, that damages actually occurred. In other words, the plaintiff's success in proving the aforementioned three things can make defendants liable unless defendants successfully prove that the substance in question is not actually innocuous.<sup>23)</sup> This tendency to alleviate the burden of proof for plaintiffs extends to malpractice lawsuits.<sup>24)</sup>

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22) Sun-goo Lee, *Proving Causation with Epidemiological Evidence in Tobacco Lawsuits*, 154 J. PREVENTIVE MEDICINE & PUB. HEALTH 80, 81 (2016).

23) Daebeobwon [S. Ct.], Oct. 11, 2013, 2012Da11661; Daebeobwon [S. Ct.], Nov. 28, 2019, 2016Da233538 & 233545 (S. Kor.); Daebeobwon [S. Ct.], June 25, 2020, 2019Da292026, 292033 & 292040 (S. Kor.).

24) Daebeobwon [S. Ct.] Sept. 30, 2005, 2004Da52576 (S. Kor.) (In this case, the Supreme Court held that when a medical accident occurs, if the victim proves, based on the general public's common sense, (1) that the patient did not have any health problem that could have caused the result before the medical practice, (2) that the patient came to suffer from the injury or harm after the medical practice at issue, and (3) that no cause other than the course of medical care could have led to the result, the existence of a causal relationship between medical malpractice and the result is presumed, unless the medical staff proves that the result was due to a completely different cause.).



## *B. The Scope of Compensation*

### *1. The Principle of Pecuniary Compensation and Succession*

The victim is entitled to be compensated once he or she has established the four elements of a tortious claim. The principle of pecuniary compensation means that harm inflicted by a tortious act will be compensated by money (CivC Article 763, 394).

The victim is entitled to compensation for actually incurred losses (positive losses), lost benefits (negative losses), and consolation. Some examples of actually incurred losses are medical expenses and nursing care fees that the victim has already paid due to the act. Lost benefits could be a victim's anticipated earnings, which can be calculated by examining the average salary of people in the same career as the victim during the average workable period. Finally, the victim is entitled to consolation. The scope of consolation in case of death of a car accident victim is approximately ₩50,000,000–₩80,000,000 (~ US\$41,290–\$66,050). The right to damages that a victim may claim succeeds to his or her heirs. Since the victim's right to damages is a pecuniary right, it is not just that individual alone who may claim this right; in the case of an individual's death, the heirs can also make a claim. Even in a case where the victim suffered instantaneous death, the consolation money to be claimed by the victim succeeds to his or her heirs. Note that in a case where a tort causes the death of the victim, the victim's spouse, lineal descendants, and lineal ascendants may claim their own consolation, separate from that of the victim (CivC Article 752).

In calculating consolation, damage to property that is difficult to estimate and thus cannot be easily compensated can be taken into account.<sup>25)</sup> In these cases, consolation plays a complementary role.<sup>26)</sup> Under certain circumstances, it may be difficult to provide a concrete estimate of damages even though it is clear that the injured party's property was

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25) Daebeobwon [S. Ct.], Nov. 13, 1984, 84Daka722 (S. Kor.); Daebeobwon [S. Ct.], Apr. 12, 2018, 2017Da229536 (S. Kor.).

26) CHANG SOO YANG & YOUNG-JOON KWON, MINBEOB II: GWOLLJUI BYEONDONGGWA GUJE [CIVIL LAW II: CHANGE AND RELIEF OF RIGHTS] 683 (4th ed. 2021) (In Korean).

damaged. Thanks to the complementary role of consolation, the injured party is allowed to receive appropriate compensation. However, the complementary function of compensation is limited in its application. Even in the absence of clear evidence, the court may fix the amount of damages to property to a reasonable degree by taking into consideration all circumstances based on the pleadings and by examining all evidence.<sup>27)</sup> As such, courts have wide discretion in determining the amount of damages to property to be awarded to an injured party, which can make it often unnecessary to apply the complementary function of damages.

Whether the injured party can obtain an injunction is also a key issue. Unlike monetary compensation, an injunction requires a tortious act to be ceased or reverses the result of the tortious act. Currently, prevailing authorities and court precedents do not accept injunctions as a remedy for tortious acts, unless otherwise indicated by a provision of law.<sup>28)</sup> However, if a report defames an individual's reputation, courts may still order the wrongdoer to release a corrected report and the holding of the court's decision containing this order. According to Article 764 of the CivC, courts may order a wrongdoer who has defamed another's reputation to take measures appropriate for repairing that party's reputation. In addition, in a case where there are acts infringing on another person's economic interests by taking advantage of his or her achievements obtained through substantial efforts—without permission and in a manner contrary to fair commercial practices—the court may grant an injunction.<sup>29)</sup> There are many voices in favor of generally allowing the use of injunctions for injured parties, since they may allow them to efficiently prevent further damages caused by tortious acts.<sup>30)</sup> At present, however, this expansion of the role of injunctions has not received legislative approval.

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27) Minsasosongbeop [Civil Procedure Act] art. 202-2 (S. Kor.).

28) Daebeobwon [S. Ct.], Mar. 28, 1997, 96Da10638 (S. Kor.).

29) Bujeonggyeongjaengbangji mit yeongeopbimilbohoe gwanhan beomnyul [Unfair Competition Prevention and Trade Secret Protection Act] art. 2 para. 1 item (l) & art. 4.

30) Sang-joong Kim, *Bulbeopaengwie daehan geumjicheonggugwon gyujeongui sinseol jeon* [Suggestion for the Establishment of the Injunction Provision for Tortious Acts], 55 Kor. J. Civ. L. 177, 177-233 (2011) (In Korean).

## 2. *Punitive Damages?*

Punitive damages are damages intended to deter the defendant and others from engaging in intentional torts by forcing the defendant to compensate in excess of the plaintiff's provable injuries. Punitive damages are usually imposed on wrongdoers who commit intentional, malicious, or antisocial torts. The concept is that repetitive wrongdoings and torts would be prevented in the same way that penal punishment prevents illegal behavior.

In principle, punitive damages are not acknowledged in Korea, so injured parties can only recover the actual harms they have suffered. However, punitive damages are exceptionally acknowledged by special acts such as the Product Liability Act and the Fair Transactions in Subcontracting Act. There are voices in favor of imposing punitive damages on media outlets that commit defamation with malicious intent, but that has not been enacted.

## 3. *Comparative Negligence*

According to the rule of contributory negligence, if the victim was partially at fault for his or her injury in an accident, the other party who caused the injury is not liable for it, and the victim would not be able to recover damages. By contrast, under the rule of comparative negligence, if the victim is partially at fault for his or her injury, the amount the victim can recover in damages is reduced proportionally. As such, if a court finds the victim 20% responsible for an injury, the amount the victim would be able to recover will be reduced by 20%, Korea follows the comparative negligence rule (CivC Articles 763, 396).

Comparative negligence plays a conciliatory role by flexibly considering all details of the circumstances of an individual case, thereby allowing losses to be shared impartially among all relevant parties. Here, "negligence" takes on a different meaning from negligence as an element of a tortious act (see above). Negligence, in the context of comparative negligence, includes disregarding the level of attention required by social norms in conducting one's own affairs. For instance, the failure to put on a

seatbelt has to do with an individual's own safety and therefore cannot constitute "negligence" as one of the four elements of a tortious act. However, the failure to put on a seatbelt can still constitute grounds for comparative negligence if it caused additional harm that could otherwise have been avoided.

The fundamental principle is that a person who intentionally commits a tortious act by taking advantage of a victim's carelessness cannot then ask for reduced liability on the basis of that carelessness.<sup>31)</sup> If the wrongdoer commits fraud or embezzlement by taking advantage of a victim's carelessness, he or she may not claim that there was comparative negligence, because finding comparative negligence in such a context would ultimately undermine fairness by tipping the scale to allow wrongdoers to benefit from tortious acts.

### III. Co-tortfeasor Liability

#### *A. Elements Required for Co-tortfeasor Liability Under Article 760*

Article 760 of the CivC governs the liability of co-tortfeasors. According to this provision, if two or more persons have caused damages to the victim by their joint unlawful acts, they shall be jointly and severally liable to compensate such damages. The victim must prove that (1) each act of the co-tortfeasors satisfies the elements of a tort as described in Article 750 of the CivC and that (2) co-tortfeasors' respective acts are objectively related to each other in causing damages.<sup>32)</sup> Item (1) means that the victim must prove (a) each person's intention or negligence, (b) the unlawfulness of each person's act, (c) actual damages, and (d) a causal relationship between each person's act and those damages. Item (2) requires that each person's act contributes to damages not subjectively but objectively. Accordingly, the victim does not need to prove collusion or conspiracy among co-tortfeasors.<sup>33)</sup>

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31) Daebeobwon [S. Ct.], Oct. 7, 2005, 2005Da32197 (S. Kor.).

32) Daebeobwon [S. Ct.], Aug. 29, 1997, 96Da46903 (S. Kor.).

33) Daebeobwon [S. Ct.], Apr. 12, 1988, 87Daka2951 (S. Kor.).

*B. Joint and Several Liability of Co-tortfeasors and Right of Contribution Among Co-tortfeasors*

Co-tortfeasors are held jointly and severally liable to the victim. There are two kinds of joint and several liability: statutory and non-statutory joint and several liability. Generally, a subjective co-relationship is required for the former but is not required for the latter.<sup>34)</sup> According to Article 419 of the CivC, which lays out the legal doctrine regarding statutory joint and several liability, if two obligors (A and B) bear statutory joint and several liability, an exemption from obligation granted to one obligor (A) shall be effective in favor of the other obligor (B) only to the extent of A's share of the obligation. In other words, an exemption granted to A by a creditor reduces the amount of debt owed by B.

However, the Supreme Court and prevailing authorities have concluded that Article 419 of the CivC does not apply to non-statutory joint and several liability. Since it is unjust to allow a co-tortfeasor to enjoy the benefit of an exemption granted to the other co-tortfeasor and there is no subjective relationship among co-tortfeasors, as explained above,<sup>35)</sup> the Korean Supreme Court concluded that co-tortfeasors bear non-statutory joint and several liability.<sup>36)</sup> As a result, an exemption granted to one co-tortfeasor does not affect the victim's claim for damages against another co-tortfeasor.<sup>37)</sup> The non-statutory joint and several liability approach thus provides stronger protections for victims.

However, statutory and non-statutory joint and several liability do have several similarities. Both produce an identical legal result if one obligor makes payments to the creditor or victim. In such a case, the other obligors are relieved of the obligation to make payment to the creditor or the victim.

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34) Daebeobwon [S. Ct.], Aug. 20, 2009, 2009Da32409 (S. Kor.); Daebeobwon [S. Ct.], Aug. 20, 2014, 2012Da97420 & 97437 (S. Kor.).

35) As noted above, each co-tortfeasor's act is required to contribute to the damages not subjectively but objectively to find liability of co-tortfeasors; the victim does not need to prove collusion or conspiracy among co-tortfeasors.

36) Daebeobwon [S. Ct.], Aug. 20, 2009, 2009Da32409 (S. Kor.); Daebeobwon [S. Ct.], Aug. 20, 2014, 2012Da97420 & 97437 (S. Kor.).

37) Daebeobwon [S. Ct.], Jan. 27, 2006, 2005Da19378 (S. Kor.).

In addition, the right of contribution is legally recognized in both kinds of liability. Thus, the Korean Supreme Court ruled that Article 425 of the CivC, which governs the right of contribution in the context of statutory joint and several liability, is applicable to the right of contribution of co-tortfeasors.<sup>38)</sup>

In order to exercise the right of contribution in a joint tort, the following elements need to be established: i) there must exist a joint unlawful act by co-tortfeasors, and ii) the co-tortfeasor must have paid more than his or her share of joint liability to the victim.<sup>39)</sup>

Assuming the above elements are met, one co-tortfeasor can claim the right of contribution against another co-tortfeasor up to the extent of the other co-tortfeasor's share of joint liability. For example, if A and B as co-tortfeasors caused damages of US\$10,000, each is liable to pay the full amount to the victim. Assuming A pays US\$10,000 to the victim and that B's share of the joint liability is four times higher than A's share,<sup>40)</sup> A has a right to claim a contribution of US\$8,000 against B.

The majority of the Supreme Court's decisions have held that the pro rata shares for respective co-tortfeasors should be determined by the degree of negligence of each tortfeasor.<sup>41)</sup> In other words, the court should first determine the degree of negligence of each co-tortfeasor in damaging the victim or which co-tortfeasor's negligence was the main cause of the

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38) Daebeobwon [S. Ct.], Oct. 22, 1991, 90Da20244 (S. Kor.); Daebeobwon [S. Ct.], Oct. 11, 2007, 2005Da7085 (S. Kor.).

39) Daebeobwon [S. Ct.], Sept. 24, 2002, 2000Da69712 (S. Kor.).

40) In other words, the ratio of A's pro rata share to B's pro rata share is 1:4.

41) Daebeobwon [S. Ct.], Feb. 26, 1999, 98Da52469; Daebeobwon [S. Ct.], Aug. 22, 2000, 2000Da29028 (S. Kor.); Daebeobwon [S. Ct.], May 24, 2002, 2002Da14112 (S. Kor.); Daebeobwon [S. Ct.], Sept. 24, 2002, 2000Da69712 (S. Kor.); Daebeobwon [S. Ct.], July 8, 2005, 2005Da8125 (S. Kor.); Daebeobwon [S. Ct.], Feb. 26, 98Da52469 (S. Kor.) ("[C]o-tortfeasors are held jointly and severally liable to the victim. Each co-tortfeasor has his or her pro rata share of a joint liability, and his or her share depends on the degree of his negligence. A co-tortfeasor who has paid more damage than his or her share to the victim can claim the right of contribution against another co-tortfeasor on a pro-rata basis. Where the plaintiff and the defendants are co-tortfeasors regarding the death of the deceased, and the defendants seek the right of contribution to the plaintiff after making compensation to the victim, the court should first find out what negligence each of the plaintiff and defendants respectively committed for the damage of the victim and apportion the pro rata shares based on those findings.").

damage and then apportion the pro rata shares based on those findings.

## IV. Employer Liability

Employer liability is a form of vicarious liability. The employer is alleged to be held liable not because of its own wrongdoing but because of an employee's wrongdoing. The idea is that an employer who earns profits through the activity of its employees should be responsible for any losses caused by the tortious acts of those employees.

CivC Article 756 states the following on employer liability:

- (1) A person who employs another to perform a specific affair is liable for compensating for any loss inflicted on a third person by the employee in the course of performing the specific affair: this shall not apply where the employer has exercised due care in appointing the employee, and in supervising the performance of the specific affair, or where the loss has been inflicted even if the employer has exercised due care.
- (2) A person who supervises the performance of a specific affair on behalf of the employer shall also assume the same liability as prescribed in (1).
- (3) In cases falling under (1) and (2), the employer or the supervisor may claim reimbursement from the employee.

### *A. Elements of Employer Liability*

The first element of employer liability is the existence of an employment relationship. The second element is that the tortious act must be "related to the employee's execution of the undertaking". In other words, if a particular act can be seen "apparently and objectively" as a part of (or related to) the employer's business activity, the unlawful act will be seen as an act related to the employee's execution of the undertaking, without considering the employee's subjective state of mind. For example, if a bank employee accepts money from a customer and uses it for personal purposes, then the employee's subjective state of mind is not taken into

consideration, and the act is deemed to be related to the execution of the undertaking. The rationale under the second element is to protect a victim to whom it reasonably appeared that the employee's act was related to the employer's business activity. Conversely, if a victim who transacted with the employee knew that the employee's act was not related to the execution of the business activity or was grossly negligent, the second element is not satisfied.<sup>42)</sup> Under such a circumstance, there would be no reason to take measures to protect victims' trust in the appearance of employees.<sup>43)</sup>

Sexual harassment during a banquet after work can be seen as related to an employee's execution of the undertaking. In a case where A, the head of welfare facilities, committed sexual misconduct against the victim (an employee under A) just after a banquet ended, the Supreme Court determined that A's acts of sexual misconduct constituted an unlawful act of invasion of the plaintiff's right to self-decision that took advantage of his status and power as the head of welfare facilities.<sup>44)</sup> In addition, the court held that if an employee commits intentional sexual harassment against another employee, employer liability can be established, given that the harmful act is closely connected to the employer's business in terms of time and place.

The third element is that the employee's act must constitute a tort under Article 750. In other words, negligence or intention on the part of the employee, the unlawfulness of the employee's act, the existence of actual damages, and a causal relationship between the employee's act and the damages are all needed.

The fourth element is that the employer was not successful in establishing a defense. If the employer successfully establishes a defense that it had exercised due care in appointing the employee and supervising the performance of the specific affair or that the loss would have been inflicted even if the employer had exercised due care, the employer will not

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42) Daebeobwon [S. Ct.], June 28, 1983, 83Da217 (S. Kor.).

43) See Hyoung Seok Kim, *Sayongjachaegimeseo samujipaenggwallyeonseongui pandan – bigyobeopjeok yeongurubuteoui sisa* [The Functional Limitation of the Employer's Vicarious Liability – a Comparative Approach], 53(2) SEOUL L. J. 351, 351-418 (2012) (In Korean) (for a detailed analysis of the second element of the employer's liability).

44) Daebeobwon [S. Ct.], Feb. 26, 2009, 2008Da89712 (S. Kor.).



be held liable. In practice, this defense is very rarely accepted by the court.

### *B. Effects of Employer Liability*

The employer and employee are held jointly and severally liable to the victim. The employer can bring a contribution claim against the employee after compensating the victim, although the amount claimed by the employer against the employee is often reduced by the court under the principle of good faith.<sup>45)</sup>

### *C. State Compensation Act*

In cases where the government, whether national or local, is the employer, it is responsible for compensating for any harm caused by its employees (i.e., civil servants). According to Article 2 of the State Compensation Act, when public officials inflict damage, whether intentionally or negligently, on other persons in violation of statutes in performing their official duties, the government in question shall compensate such damages. Therefore, in situations where the national or local government is the employer, the State Compensation Act will apply instead of Article 756 of the CivC, which is discussed above.

## **V. Liability of Possessor or Owner of a Structure**

In cases where a victim has suffered damage due to a defective structure, the possessor (occupant) of the structure will bear primary responsibility, while the owner of the structure will bear secondary responsibility. Article 758(1) of the CivC states that “if any damages have been caused to another person by any defect in the construction or maintenance of a structure, the person in possession of the structure shall be liable for such damages: if the person in possession has exercised due care in order to prevent the occurrence of such damages, compensation for

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45) Daebeobwon [S. Ct.], May 10, 1991, 91Da7255 (S. Kor.).

the damage shall be made by the owner”.

The rationale of the above provision is the principle of risk responsibility, which is the idea that a person who manages or owns a high-risk structure should take sufficient precautions; if a risk materializes and causes damage, it is appropriate for that person to bear responsibility.

#### *A. Elements of Liability of Possessor or Owner of A Structure*

The first element is that what caused damage must be a structure, which is a thing that was made through artificial work, including buildings, telephone poles, advertisement towers, and elevators.

The second element is the existence of a defect in the construction or maintenance of a structure. Defect in this context means that the structure is in a condition that lacks the safety normally required for its use.<sup>46)</sup> Whether this standard for safety has been met is judged on the basis of whether the party that built or preserved the structure has fulfilled its duty to take the protective measures typically required by social norms.<sup>47)</sup> The existence of a defect is judged by an objective standard; no consideration is given as to whether the defect was caused intentionally or negligently by the party that built or preserved the structure.

The third element is that the defect of the structure must have caused the damage suffered by the victim. When the cause of the damage is force majeure, a defect in the structure will not make the builder or preserver of the structure liable for a tort since causality between the defect of the structure and the damage cannot be established.

The fourth element is that the possessor (occupant) of the structure must fail to establish that he or she exercised due care in order to prevent the occurrence. Unlike torts under Article 750, where the victim bears the burden of proof in establishing the negligence of the wrongdoer, the possessor of the structure bears the burden of proof in establishing his or her exercise of due care. Once again, the principle of risk responsibility is reflected in this fourth element, which holds possessors liable for a tort in the event that danger in a high-risk structure materializes, with damage

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46) Daebeobwon [S. Ct.], Jan. 26, 2006, 2004Da21053 (S. Kor.).

47) Daebeobwon [S. Ct.], July 12, 2018, 2015Da68348 (S. Kor.).

occurring as a result. If the possessor is successful in establishing that he or she exercised due care, the owner rather than the possessor of the structure is liable for damages. The owner of the structure bears strict liability since he or she is not entitled to raise the defense of having exercised due care.

### *B. Effects of Liability of Possessor or Owner of a Structure*

The possessor (occupant) of the structure bears primary liability in terms of compensating damages, but if the possessor is successful in establishing his exercise of due care, the owner of the structure is liable for damages. Furthermore, if there is an indirect possessor among several possessors, the direct possessor will first bear responsibility, after which the indirect possessor will bear responsibility if the direct possessor cannot be held liable.<sup>48)</sup> For example, if a lessor leases a building and the lessee uses the whole building, then the lessee is the direct occupant. If the victim suffers damage due to a defect in the building, the direct possessor (i.e., the lessee) shall bear primary responsibility.

If a victim suffers damage as a result of a defect in a structure managed or owned by the national or local government, that government is responsible for compensating the victim. Article 5 of the State Compensation Act provides that in cases where any damages have been inflicted on another person due to the defective construction or management of a road, river, or any other public structures, the appropriate level of government shall redress such damage. Therefore, when defects in structures managed or owned by the national or local government are at issue, the State Compensation Act will be applied in place of CivC Article 758.

## **VI. Liability Caused by an Automobile Accident**

Korea enacted a special act called the Guarantee of Automobile Accident Compensation Act (GAAC Act) to deal with torts resulting from

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48) Daebeobwon [S. Ct.], Mar. 26, 1993, 92Da10081 (S. Kor.).

automobile accidents. The gist of the GAAC Act is to broaden the liability of the owner or possessor of an automobile and to mandate that all owners or possessors are appropriately insured. Thanks to the positive effect of the GAAC Act, victims of automobile accidents can be compensated without much difficulty. The passage of the act has made an enormous contribution to expediting car purchases without fear of involvement in civil or even criminal trials.

### *A. Elements of Liability*

The first element of liability in the GAAC Act is that a person "operates an automobile for his or her sake". In order to be a person that operates an automobile for his or her sake, a person should control the operation of an automobile and enjoy the benefit therefrom.<sup>49)</sup> The concept of a person that operates an automobile for his or her sake is different from that of the automobile owner. For example, when the automobile owner entrusts his or her automobile to a repair shop, the automobile owner temporarily loses control over the vehicle and during that period is not a person that operates an automobile for his or her sake. Therefore, if a repair shop mechanic causes an accident while driving the car, the automobile owner will not be responsible for that accident. On the other hand, the concept of a person that operates an automobile for his or her sake is not simply the equivalent of the person driving the automobile. If an individual or company employs a chauffeur who causes a car accident, then that individual or company will be liable under the GAAC Act, since in this situation the employer is the person operating the automobile for his or her sake.<sup>50)</sup> In this regard, the GAAC Act is a special provision of employer liability prescribed in CivC Article 765.

The second element of liability is that a victim has been killed or injured by the "operation of an automobile", which refers to the use or management

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49) Daebeobwon [S. Ct.], Dec. 23, 1986, 86Daka556 (S. Kor.); Daebeobwon [S. Ct.], Oct. 15, 2009, 2009Da42703 & 42710 (S. Kor.).

50) The automobile driver who is employed is also supposed to be liable for car accident based on CivC Article 750. As a result, the automobile driver and the employer shall be jointly and severally liable to compensate damages.

of automobiles. This means the accident occurred by using various devices with which an automobile is structurally equipped according to the purpose of each device. If the driver of a car falls asleep after parking the car on a sloped lawn next to the road, and the car slides and falls into a pond, the accident did not occur while the car's devices were being used for their intended purpose. In this situation, the second element is not satisfied.<sup>51)</sup>

The third element of liability is that a defendant is not successful in making a defense. The defendant must show the following: (1) the person who operated the motor vehicle was not negligent in its operation, that there were no structural defects or functional issues in the motor vehicle, or that a victim or a third party committed an intentional or negligent act; or (2) the victim died or was injured due to his or her intentional or even suicidal act. In reality, it is very difficult to demonstrate the above, so liability under the GAAC Act can be seen as *de facto* strict liability.

### *B. Actual Compensation by Insurance Companies*

Under the GAAC Act, all motor vehicle owners are to purchase liability insurance that covers the amount prescribed by presidential decree that shall be paid to a third party who has died or been injured due to the operation of a motor vehicle (GAAC Act Article 5). If a motor vehicle owner purchases comprehensive insurance, a driver who caused traffic accident and thus committed a crime by inflicting bodily injury due to occupational or gross negligence shall not be prosecuted in principle.<sup>52)</sup> For this reason, most motor vehicle owners tend to purchase comprehensive insurance so that the victim can be easily compensated by the insurance company.

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51) Daebeobwon [S. Ct.], Apr. 29, 1994, 93Da55180 (S. Kor.).

52) See Gytongsagocheoriteungnyebeop [Act on Special Cases Concerning the Settlement of Traffic Accidents], art. 4 para. 1 (S. Kor.) (concerning reasons for being exceptionally prosecuted).

## VII. Extinctive Prescription

The right to claim damages resulting from a tort lapses if not exercised within three years from the date on which the victim or his or her legal representative becomes aware of such damage and of the identity of the person who caused the damage (CivC Article 766(1)). The statute of limitations is triggered only if either the victim or his or her legal representative is aware not only of the injury but also that the defendant's conduct was tortious. In case of new damage unforeseen at the time of the act, the statute of limitations is triggered only after the cause of the additional damage is clearly confirmed.<sup>53)</sup>

In addition, the right to claim damages resulting from a tort will expire if ten years have elapsed from "the time the unlawful act was committed" (CivC Article 766(2)). Here, "the time" does not refer to when that the unlawful act happened but rather the date on which the actual damage occurred.<sup>54)</sup> Therefore, in claims for damages in which there is a time gap between the unlawful act and actual damage resulting from it, the time the unlawful act was committed actually means the time when a harmful result occurred.<sup>55)</sup> In a case where a victim claimed he had contracted HIV from a blood product manufactured and supplied by the defendant, the Supreme Court ruled that in cases where the latency period of infection is long, or when it is difficult to predict how far the illness will progress, it would be wrong to have the statute of limitations begin to run on the date of the infection. Rather, it would be right to find the starting point for extinctive prescription run from the date when symptoms began to manifest or the illness progressed.<sup>56)</sup> In one case, a victim was sexually assaulted by her tennis coach during elementary school and ran into the assailant fifteen years later. This triggered memories of the sexual violence and caused the victim to be diagnosed with post-traumatic stress disorder, after which the

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53) Daebeobwon [S. Ct.], Sept. 14, 2001, 99Da42797 (S. Kor.); Daebeobwon [S. Ct.], Apr. 29, 2010, 2009Da99105 (S. Kor.).

54) Daebeobwon [S. Ct.], Aug. 30, 2012, 2010Da54566 (S. Kor.).

55) Daebeobwon [S. Ct.], Nov. 16, 2007, 2005Da55312 (S. Kor.).

56) Daebeobwon [S. Ct.], Sep. 29, 2011, 2008Da16776 (S. Kor.).

victim claimed damages against the assailant. The court held that the point at which the victim received a diagnosis was the point at which the actual damage resulting from the sexual violence occurred and that the statute of limitations should only start then, under CivC Article 766(2).<sup>57)</sup>

Even if the statute of limitations on a victim's right to claim damages for tortious acts has expired, asserting it may be against the principle of good faith. For example, if the wrongdoer obstructs the victim's exercise of right to a significant degree, it can be said that it is a violation of good faith to deny the victim's exercise of right just because ten years have passed since the time the unlawful act was committed. The Supreme Court has recognized the doctrine of abuse of extinctive prescription. As such, the Supreme Court applies this doctrine, where the debtor makes it remarkably difficult or even impossible for the creditor (victim) to exercise his or her right; where the debtor performs actions that make the creditor (victim) believe that his or her exercise of right is unnecessary; where the creditor (victim) is obstructed from exercising his or her right due to objective impediment; where the debtor acts in a manner that makes the creditor believe that the debtor will not invoke extinctive prescription.<sup>58)</sup>

In one case, plaintiffs filed suit against Nippon Steel Corporation (defendant), maintaining that they were forced by the defendant and the Japanese government to provide labor while they were deprived of their freedom.<sup>59)</sup> The plaintiffs maintained that the defendant was liable for damages stemming from mental harm incurred by forced labor in the 1940s, during Japanese colonial rule. The Supreme Court found that the defendant's argument that extinctive prescription should block the plaintiffs from seeking damages contradicted the principle of good faith.<sup>60)</sup>

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57) Daebeobwon [S. Ct.], Aug. 19, 2021, 2019Da297137 (S. Kor.).

58) Daebeobwon [S. Ct.], Jan. 13, 2011, 2009Da103950 (S. Kor.); see also Jinsu Yune, *Somyeolsihyo namyongnonui jeongae* [The Development of the Doctrine on the Abuse of Extinctive Prescription], 93 KOR. J. CIV. L. 3 (2020) (In Korean) (regarding the doctrine on the abuse of extinctive prescription in Korea).

59) See Kye Joung Lee, *The Supreme Court Decision on the Liability of Japanese Company for Forced Labor During the Japanese Colonial Era and Its Implications*, 36 J. KOR. L. 335, 336 (2019) (for a general analysis of the liability of Japanese companies for forced labor during the Japanese colonial era).

60) Daebeobwon [S. Ct.], May 24, 2012, 2009Da68620 (S. Kor.); see also Hyo Soon Nam, *Iljejingyongsi ilbongieobui bulbeopaengwiro inhan sonhaebaesangcheonggugwonui*

During the Korean War and South Korea's dictatorship period, there were cases in which human rights were violated by the government. As Korea democratized after 1987, victims of human rights violations filed claims for damages against the government on the basis of tortious acts. Defenses of extinctive prescription against such claims were often denied on the basis of good faith, but there were circumstances under which that defense was accepted. For this reason, the Constitutional Court was called on to decide whether it was constitutional to apply the 10-year statute of limitations under CivC Article 766(2) to "civilian massacres" and "grave human rights abuses". The Korean constitutional court ruled that applying extinctive prescription of 10 years to the right to claim damages suffered in these massacres and abuses would infringe the victims' rights and thus violate the constitution.<sup>61)</sup> Since this ruling, victims of civilian massacres and grave human rights abuses do not need to defend themselves against extinctive prescription, since the government (defendant) are not allowed to raise the defense of extinctive prescription. If a lower court were to apply CivC Article 766(2) to incidents concerning civilian massacres and grave human rights abuses, it would commit an error in applying the law.<sup>62)</sup>

A new paragraph, CivC Article 766(3), was recently added to protect minors in 2020; it states that when a minor suffers from sexual violence, sexual molestation, sexual harassment, or other sexual infringement, the extinctive prescription of the right to claim compensation for damages shall not begin until such a minor becomes an adult, which in Korea means age

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*somyeolsihyonamyonge gwanhan yeongu - Daebeobwon 2012. 5. 24. seongo 2009Da68620 pangyeol [A Study on the Abuse of Extinctive Prescription Regarding Claim for Damages Due to Tortious Acts of the Japanese Companies During the Japanese Colonial Era - the Supreme Court Decision 2009Da68620 Decided May 24, 2012], 168 SEOUL L. J. 393, 394 (2013) (In Korean); Eunkyung Lee, Gangjejingyong baesangpangyeoreseo natanan daeilminganincheonggugwongwa somyeolsihyo - Daebeobwon 2012. 05. 24. seongo 2009Da68620 pangyeoreul jungsimeuro [The Right of Civilian Claim to Japan and Extinctive Prescription in Forced Enforcement], 41(2) HUFS L. REV. 291, 292 (2017) (In Korean); Hong-ryeol Lee, Gangjejingyongpihaewa sonhaebaesangchaegim - Daepan 2012. 5. 24. 2009Da22549reul jungsimeuro [A Study on the Forced Labor Victims and Compensation for Damage], 10 KOR. AGGREGATE BLDG. L. 189, 190 (2012) (In Korean) (concerning the issue of whether a defendant's argument based on the statute of limitations is barred by the principle of good faith).*

61) Hunbeobjaepanso [Const. Ct.], Aug. 30, 2018, 2014Hunba148, 162, 219, 223, 290 & 466, 2015Hunba50 & 440, 2016Hunba419 (consol.) (Hunjip 30-2, 237) (S. Kor.).

62) Daebeobwon [S. Ct.], May 14, 2020, 2019Da220380 (S. Kor.).



19. Before this revision, if a 15-year-old minor was sexually assaulted, and his or her parents did not file a lawsuit for three years—even after knowing who the perpetrator was—any claim for damages would expire before the minor reached adulthood due to the statute of limitations. This was a problem since minor victims would be denied the right to claim damages if their parents decided not to file a lawsuit, which they might do to avoid the harm that a lawsuit might cause their children or in consideration of their relationship with the perpetrator. Accordingly, the law was amended to include CivC Article 766(3), which ensures that minors who have been sexually assaulted have the right to claim damages once they reach the age of majority.

## VIII. Product Liability

Product liability is a type of liability in tort law whereby manufacturers, suppliers, and the like are liable if the products they make available to the public are defective and cause injuries. Courts in common law jurisdictions developed the idea of product liability to counteract a common defense in contract law regarding a lack of privity in cases where plaintiffs had not directly transacted with the manufacturer.<sup>63</sup> Recognizing the hurdles in the existing system with regard to protecting consumers, Korea also enacted the Product Liability Act (PL Act) in 2002; it adopted the common law jurisprudence of product liability.<sup>64</sup>

### A. Elements of Product Liability

The PL Act is applied in relation to movables that are industrially manufactured or processed; it does not cover immovables such as condominiums. A “manufacturer” refers to a legal person engaged in the

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63) Mathias Reimann, *Product Liability*, in *COMPARATIVE TORT LAW* 251, 251 (Mauro Bussani & Anthony J. Sebok eds., Edward Elgar Publishing 2015).

64) See Dong-jin Park, *Hyeonhaeng jejomulchaegimbeobui munjejeomgwa gaejeongbanghyang [Study on the Issues of the Amendment to the Product Liability Act]*, 57 *ADVANCED COMM. L. REV.* 121, 136 (2012) (In Korean) (for a general analysis of the Product Liability Act).

business of manufacturing, processing, or importing products. The manufacturer is held primarily liable; suppliers of products may become secondarily liable if the manufacturer cannot be identified (PL Act Article 3(3)).

### *1. First Element: Defect in Product*

“Defect in product” means that a product does not satisfy the ordinarily expected level of safety. The key in determining whether a defect in a product exists has to do with its safety. There are three kinds of defects: defect in manufacturing, defect in design, and defect in indication.

#### *a. Defect in Manufacturing*

In order to determine whether there is a defect in manufacturing, it is pivotal to find out whether the product in question deviates from the originally intended design. A defect in manufacturing is a lack of safety caused by the failure to conform with the originally intended design of the product, regardless of whether the manufacturer faithfully carried out its duty of care with respect to the manufacturing or processing of the product.

#### *b. Defect in Design*

Defect in design refers to a lack of safety caused by the failure of a manufacturer to adopt a reasonable alternative design. Determining whether there is a defect in design takes into account a number of factors, including the characteristics and usage of the product, users’ expectations of the product, the expected risk associated with the product, users’ perceptions of that risk, the possibility of risk avoidance by users, the feasibility of a reasonable alternative design and its financial costs, and the relative merits and demerits of the adopted and reasonable alternative designs.<sup>65)</sup> Considering these factors, the Hand rule may serve as a model to decide whether a defect in design exists. According to the Hand rule, it is

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65) Daebeobwon [S. Ct.], Apr. 10, 2014, 2011Da22092 (S. Kor.).

necessary to compare three factors: the costs of taking precautions (B), the probability of loss (P), and the damage caused by the incident (L). If  $B < (P \times L)$ , one can infer that there is a defect in design, since possible preventive measures were not taken.

In so-called *Agent Orange* case, Vietnam War veterans sought damages, alleging that various diseases had been caused due to the US military's practice of spraying the defoliant Agent Orange. The Korean Supreme Court recognized a defect in design;<sup>66)</sup> the court held that if a manufacturer designs and manufactures a chemical product containing toxic substances harmful to the human body, it is possible that users of that product or people around those users may be continually and repeatedly exposed to the toxic substance, given its intended use. If the functional utility of the toxic substance is absent or extremely insignificant, and the risk that repeated and continuous exposure to the substance will cause harm to the body is present, then the manufacturer has a high level of obligation to prevent that risk from materializing. Furthermore, the Supreme Court held that in such a case, the manufacturer must minimize or eliminate the risk of the harmful substance by thoroughly verifying the safety of the product with the most advanced technology available at the time of manufacture. No chemical product should be distributed unless it is confirmed that the risk has been eliminated or minimized to a level that verifies the safety of the product. If a manufacturer violates this obligation and manufactures and sells a product that has a risk of causing harm to human health, then the product will be viewed as having a defect in design.

Meanwhile, the Supreme Court did not affirm that there was a defect in design in a tobacco case in which plaintiffs with a history of more than 30 years of smoking were diagnosed with lung cancer and sought damages against the manufacturers and sellers of cigarettes. The Supreme Court affirmed the judgment below, which refused to acknowledge a defect in design in tobacco products. The Supreme Court held that the taste of tobacco varies depending on the quantity of nicotine and tar contained in tobacco smoke. Consumers of tobacco choose and smoke tobacco products with the taste and smell they prefer and with nicotine's pharmacological

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66) Daebeobwon [S. Ct.], July 12, 2013, 2006Da17553 (S. Kor.).

effect in mind. In light of these factors, a failure to eliminate nicotine by itself cannot be deemed to constitute a defect in design.<sup>67)</sup>

Demonstrating a defect in a product can be difficult, since the plaintiff has to present an alternative design that would have been reasonable at the time of the manufacture and distribution of the product.

### c. Defect in Indication

Defect in indication refers to cases where damages or risks caused by a product could have been reduced or avoided if the manufacturer had provided a reasonable explanation, warnings, or other indications on the product. In determining whether a defect in indication exists, factors such as product characteristics, conventional form of usage, users' expectation of the product, expected risks, users' perception of those risks, and the possibility of risk avoidance by users should all be taken into account.<sup>68)</sup>

In a case in which a person who took the cold medication Contac 600, an over-the-counter medication containing phenylpropanolamine, died of a hemorrhagic stroke, the Korean Supreme Court did not find a defect in indication. The cold medication packaging indicated hemorrhagic stroke as a potential side effect and added that Contac 600 should not be taken by patients with a history of hemorrhagic strokes.<sup>69)</sup>

In the tobacco lawsuit, one of the key issues was whether there was a defect in indication. Interestingly, the Korean tobacco company used to put mild warnings like "moderate smoking for your health" on its products in the 1970s. As more scientific reports cited the serious diseases caused by smoking, the company intensified its warnings around 1989, stating that smoking could lead to lung cancer and was especially harmful to the health of pregnant women and young people. The Supreme Court refused to recognize a defect in indication in tobacco products, holding that media reports and statutes had raised awareness among the general public of the

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67) Daebeobwon [S. Ct.], Apr. 10, 2014, 2011Da22092 (S. Kor.); *see also* Kye Joung Lee, *Notable Supreme Court Cases: Civil Law*, 28 J. KOR. L. 213, 221 (2015) (for a general introduction to the tobacco case in Korea).

68) Daebeobwon [S. Ct.], Sept. 5, 2003, 2002Da17333 (S. Kor.).

69) Daebeobwon [S. Ct.], Feb. 28, 2008, 2007Da52287 (S. Kor.).

fact that tobacco consumption can cause various respiratory diseases, including lung cancer. In addition, the Supreme Court noted that a determination of whether to continue smoking was a matter of personal choice based on each individual's free will; furthermore, it was widely known among cigarette smokers that it might be difficult to quit smoking once one starts.

## *2. Second Element: Damages Due to Defect (Causation)*

One of the difficulties a victim faces in seeking damages for product liability is the establishment of causation. Due to the structural maldistribution of evidence, victims often find it difficult to collect enough evidence to establish causation between the defect and the damages. Previously, the Supreme Court adopted the *de facto* presumption legal approach in a case in which a television exploded while the victim was watching it.<sup>70)</sup> The Supreme Court clarified the theory of *de facto* presumption by stating that the good is presumed to be defective and the accident is presumed to have occurred due to the defect if the following conditions are met: first, the accident occurred in the normal process of use of the good by the consumer; second, the consumer proves that the accident occurred in a realm under the manufacturer's exclusive control; and third, it seems that the accident normally would not have occurred without manufacturer's fault. An exception applies if the manufacturer can prove that the accident resulted from causes other than the defect. Such an alleviation of the burden of proof for injured parties complies with an ideal underlying the system of the tort law, which is to apportion damage equitably.

*De facto* presumption was codified in 2017 following the above precedent. PL Act Article 3(2) prescribes that when an injured person demonstrates the following, it shall be presumed that the product had a defect at the time it was supplied and that the damage was caused due to the defect: first, that the damage was incurred during the product's normal use; second, that the damage was attributable to a cause substantially under

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70) Daebeobwon [S. Ct.], Feb. 25, 2000, 98Da15934 (S. Kor.).

the manufacturer's management; and third, that the damage would not ordinarily have occurred if it were not for the relevant defect of the product. However, this provision does not apply to cases where the manufacturer has proven that the damage is attributable to causes other than the defect.

Another issue concerning causation is whether epidemiological causation can be used to determine legal causation. Epidemiology is a method used to study causes of health outcomes and diseases in populations. Epidemiology has also been defined as the study of the distribution (frequencies and/or patterns) and determinants (e.g., causes and risk factors) of health-related circumstances or phenomena in specified populations.<sup>71)</sup> Thus, epidemiological causation can be defined as a statistically determined correlation between exposure to certain materials and the occurrence of certain diseases and the quantification of the degree of such a correlation. The key question is whether epidemiological causation can be used to support legal causation. Since epidemiological causation only deals with the factors that may have caused the disease in question rather than the factors that *actually* resulted in a given plaintiff's disease, it is difficult to conclude that epidemiological causation can be used to establish legal causation. The Korean Supreme Court holds this view. In the tobacco case, the Supreme Court affirmed the lower court's judgment that refused to acknowledge a causal link between plaintiffs' smoking and lung cancer, holding that even if epidemiological causation between smoking and cellular cancer is acknowledged, this alone does not prove causation between a given individual's smoking and the disease, particularly as cellular cancer is a non-specific disease.<sup>72)</sup>

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71) EPIDEMIOLOGY, <https://www.cdc.gov/careerpaths/k12teacherroadmap/epidemiology.html> (last visited Feb. 4, 2022).

72) Daebeobwon [S. Ct.], Apr. 10, 2014, 2011Da22092 (S. Kor.); *see also* Sun-goo Lee, *Proving Causation with Epidemiological Evidence in Tobacco Lawsuits*, 154 J. PREVENTIVE MED. & PUB. HEALTH 80, 87 (2016) (concerning the assertion that the probability of causation calculated by epidemiological study can show a high degree of probability so that the determination of epidemiological causation can equate proof of causation).

### 3. *Third Element: Lack of Grounds for Exemption*

Where a manufacturer or supplier that is liable for damages proves any of the following facts, it is exempt from any liability for damages: first, the manufacturer did not supply the product; second, the existence of the defect could not be identified by the scientific or technical knowledge of the time when the manufacturer supplied the product (this is known as the development risks defense); or third, the defect is attributable to the fact that the manufacturer complied with standards prescribed by an act or a subordinate statute in force at the time when it supplied the product (this is known as the defense of compliance to regulation).

The development risks defense is often the key issue in litigation; it is accepted in order not to curb technological development, since burdening manufacturers with the responsibility of development risk could hinder future technological advances. In judging whether a development risks defense is valid, courts are to apply the standard in force when the manufacturer supplied the product—judges should not decide based on the time of the lawsuit or based on hindsight.

In reality, these grounds for exemption are hard to establish, and thus product liability can be seen as strict liability.

### *B. Effects of Product Liability, Including Punitive Damages*

Under the PL Act, a victim can claim compensation limited to consequential damages. A victim shall be compensated for damages to a person's life, body, or property caused by a defect of a product. This means the victim cannot be compensated for damages to the product itself under the PL Act; those can be sought under the general tort law in CivC Article 750.

One of the characteristics of the PL Act is that, exceptionally, it introduced punitive damages.<sup>73)</sup> If an unspecified number of people are harmed by a defective product, and if manufacturers are only obliged to

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<sup>73)</sup> Chang-hyun Lee, *Jejomulchaegingwa jingbeoljeok sonhaebaesang* [Product Liability and Punitive Damages], 172 JUSTICE 5, 5-37 (2019) (In Korean).

compensate damages suffered by those who file suit (and not for damages suffered by others who did not take legal action), then the overall result is that the manufacturer would gain a net profit from the distribution of defective goods. In order to correct this unreasonable and unfair result, punitive damages are introduced.

If a manufacturer, despite its knowledge of a defect of a product, causes serious damage to a person's life or body as a result of not taking necessary measures against the defect, the manufacturer shall be liable for up to three times the actual damages sustained by victims (PL Act Article 3(2)). The court shall consider the following factors when determining punitive damages: the degree of malice in the intention, the extent of damages caused by the defect, the financial gains obtained by the manufacturer by supplying the product, the degree of criminal punishment or administrative measures inflicted on the manufacturer due to the defect, the period during which the product was supplied and the scale of such supply, the financial status of the manufacturer, and finally any endeavor by the manufacturer to compensate victims' damages. If a victim shows that the defendant intentionally or recklessly disregarded the defect and caused grave injury, he or she is likely to be entitled to punitive damages.

### *C. Extinctive Prescription*

The right of claim for damages under the PL Act expires three years from the date on which the injured person or his or her legal representative becomes aware of both the damage and the person liable for the damage (PL Act Article 7(1)).

In addition, the right of claim for damages under the PL Act shall expire ten years from the date on which the manufacturer supplied the product which caused the relevant damages (PL Act Article 7(2)). With respect to damages by substances such as asbestos or medicines that accumulate in the human body and damage a person's health, or any other damages whose symptoms appear after a significant latency period, extinctive prescription shall run from the date on which the actual damages occur (PL Act Article 7(2)). In case lawsuits were filed by patients whose illnesses had a latency period due to a defect of a product, extinctive prescription shall run from the date on which the victim was diagnosed by a doctor.<sup>74)</sup> This



makes extinctive prescription similar to the discovery rule, a rule of common law indicating that the statute of limitations on bringing a claim does not begin until the date on which a claimant actually discovers or should have discovered an injury or loss.<sup>75)</sup>

## IX. Conclusion

Korea has surprised the world by simultaneously establishing a solid and stable democratic system and achieving remarkable economic development. This achievement can be attributed to the dynamic aspects of Korean society and the country's ability to cope with new circumstances and phenomena. As this article has detailed, the legal theory behind torts and the practice of tort law also show these characteristics; they demonstrate flexibility in terms of handling new social problems as they emerge. However, it remains to be seen how tort law in Korea will progress to deal with new challenges such as artificial intelligence and the fourth industrial revolution. Based on this examination of the historical path that Korean tort law has traversed thus far, it is reasonable to have an optimistic outlook.

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74) Daebeobwon [S. Ct.], Aug. 19, 2021, 2019Da297137 (S. Kor.).

75) Naomi Berkowitz, *Balancing the Statute of Limitations and the Discovery Rule: Victims of Incestuous Abuse Are Denied Access to Washington Courts – Tyson v. Tyson*, 10 SEATTLE UNIV. L. REV. 721, 747-757 (1987).

