

The Structure and Substance of the Right of Self-Determination as a Protected Legal Interest under Japanese Tort Law

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Abstract

This article clarifies the doctrinal structure and substantive content of the right of self-determination in Japan. In medical malpractice litigation, Japanese courts have defined this right as the ability to make an informed choice based on an adequate explanation. The right of self-determination is analytically distinct from the primary legal interests it seeks to protect, and it functions as a protected legal interest, particularly in situations where infringement of these more concrete primary interests is not recognized. The scope of a physician's duty of explanation also depends on the nature of the underlying primary interest at stake. Furthermore, with respect to Supreme Court precedent that awarded compensation for emotional harm in transactional torts, this article argues that such cases should be regarded as exceptional. They represent circumstances in which infringement of self-determination regarding the acquisition of pecuniary benefits resulted in liability due to the egregious conduct of the tortfeasor.

Keywords:

tort; self-determination; autonomy; informed consent; medical malpractice law

1. INTRODUCTION

The phrase “right of self-determination” appears across diverse legal domains. In constitutional scholarship, it is often discussed in relation to reproductive autonomy,¹⁾ such as decisions concerning contraception and abortion. In private-law scholarship, it has been referenced in disputes involving lifestyle choices, including personal grooming and attire. In each of these contexts, tortious liability may arise where interference with autonomous decision-making is alleged.²⁾

For instance, in wrong-birth litigation, the claim may be framed as a violation of parental autonomy in deciding whether to continue a pregnancy where a serious congenital condition is expected. In Japanese tort law, however, the contexts in which self-determination has been explicitly recognized as a legally protected interest, distinct from bodily or proprietary interests, are more limited. The recognition has occurred primarily in (1) medical malpractice cases and, to a lesser extent, (2) *transactional torts* in which a business operator breaches a duty to provide essential information, thereby causing the consumer economic loss.

This article focuses on these two domains and seeks to clarify both the doctrinal framework and substantive meaning of the right of self-determination as a protected interest under Japanese tort law.³⁾ Sections 2 and 3 analyze how to examine medical malpractice cases. Section 2 analyzes how patient autonomy, understood as a type of personality interest, has been conceptualized within tort doctrine. Section 3 discusses how the scope of patient decision-making authority is shaped by the purposes for which autonomy is exercised, outlining the legal structure attributed to

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- 1) Koji Sato, *Kenpō* [Constitution] (Tokyo: Seirin Shoin, 1995), 459 ff. For example, the issue may arise where stringent statutory restrictions on abortion are argued to infringe a pregnant woman’s right of self-determination concerning whether to terminate her pregnancy.
 - 2) Takao Yamada, *Shiji to Jikokettei* [Privacy and Self-Determination] (Tokyo: Nihon Hyōronsha, 1987), 8 ff., 21 ff. For example, the issue may arise as to whether a school may dismiss a teacher for “disorderly attire,” where the teacher refuse to wear a necktie.
 - 3) Following the view that identifies an invasion of (social) privacy in the dissemination of interpretive “frames” that impose meanings unintended by the individual on the roles and impressions she has cultivated in society—see Ken Mizuno, “Puraibashī no Igi ni kansuru Joron-teki Kōsatsu” [Introductory Study on the Significance of Privacy], *Gakushuin Daigaku Hōgakkai Zasshi* 45, no. 2 (2010) :14—the spread of such frames can likewise be regarded as an infringement of the “right of informational self-determination.” A detailed examination of this issue must be left to another occasion.

self-determination. Section 4 then turns to transactional torts and evaluates the distinct substantive profile of the right of self-determination in that setting.

2. THE STRUCTURE OF THE RIGHT OF SELF-DETERMINATION AS A PROTECTED LEGAL INTEREST

(1) Two Possible Conceptions

In Japan—as appears also to be the case in Taiwan—patients who file medical malpractice claims frequently assert, in addition to bodily injury, a violation of the right of self-determination arising from inadequate explanation by the physician. Claims for non-pecuniary damages (*isharyō*) are based on the argument that the physician’s failure to provide sufficient information deprived the patient of the ability to decide, on an informed basis, whether to undergo a particular medical procedure.

Two distinct conceptions of the patient’s right of self-determination as a protected tort interest may be identified.

- Conception A: The right to decide among medically viable alternatives on the basis of adequate information.⁴⁾
- Conception B: The right to choose a different course of action than the one actually undertaken.⁵⁾

Under Conception A, a violation may be recognized even if the patient, when fully informed, would still have selected the treatment performed. The harm lies in the deprivation of the opportunity to decide autonomously. Under Conception B, however, no infringement is found unless it is shown that the patient would have made a different choice had proper information been provided.

In the Japanese case law, the question of what choice the patient

4) Tarō Kogayu, “Setsumei-gimu Ihan ni yoru Songai-baishō’ ni kansuru Ni, San no Oboega-ki” [Several Observations on “Damages for Breach of the Duty to Explain”], *Jiyū to Seigi* 47, no. 10 (1996): 46. Although writing on transactional torts, Kogayu contends that an infringement of self-determination consists in the loss of the opportunity to decide within a properly structured informational environment.

5) The alternative “will theory” (or “choice theory”) and “interest theory” of the nature of rights do not map mechanically onto the foregoing understandings of the right of self-determination. Adopting the interest theory, for example, does not necessarily lead to conception B; one could equally defend conception A on the basis of that same theory. See Yuki Asano, “Kenri to Hō-chitsujo” [Rights and the Legal Order], *Minshōhō Zasshi* 134, nos. 4-5 (2006): 22.

would hypothetically have made is not treated as part of defining whether the right of self-determination was infringed. Instead, it is handled as a causation issue,⁶⁾ specifically whether the physician's breach of the duty to explain caused the patient's injury (death or sequelae). Thus, even when a patient cannot prove that she would have chosen a different course of treatment, the infringement of the right of self-determination may still be recognized, and compensation for non-pecuniary harm may nonetheless be awarded.⁷⁾

(2) Core Protected Interests and the Right of Self-Determination

If the right of self-determination is understood not as the right to make a different choice than the one ultimately made, but simply as the right to decide based on adequate information, then in any tort case involving the infringement of a protected interest—for example, life, bodily integrity, or property—there will, in principle, also be an infringement of the victim's self-determination regarding that interest.⁸⁾ For instance, when a tortfeasor damages another person's property, the infringement of ownership simultaneously entails an infringement of the victim's self-determination, since the owner had the prerogative to use, enjoy, or dispose of the property as they saw fit.

However, in such contexts, the right of self-determination rarely appears as an independent basis for recovery. This is because the damages awarded for the infringement of the primary protected interest—such as the loss in market value of the property, or lost earnings and non-pecuniary damages in cases involving bodily harm—are generally understood to

6) Norio Higuchi, "Kanja no Jikoketteiken" [The Patient's Right of Self-Determination], in *Gendai no Hō 14: Jikoketteiken to Hō*, edited by Masahiko Iwamura et al. (Tokyo: Iwanami Shoten, 1998), 78 ff.; see also Seiji Hayashi, "Ishi no Setsumei-gimu Ihan o Riyū to suru Minji Sekinin no Kiseki Kōzō ni kansuru Ichi Kōsatsu," in *Gendai Doku-Futsu Minji Sekinin Hō no Shosō*, edited by Tarō Nakahara (Tokyo: Shōjihōmu, 2020), 290.

7) See Hayashi, *supra* note 6, 285 ff.; see also Hiroshima District Court, January 31, 2020, *Hanrei Taimuzu*, no. 1484: 184; Tokyo District Court, October 17, 2019, *Hanrei Jiho*, no. 2456: 65.

8) Keizo Yamamoto, "Kihonken no Hogo to Fuhōkōi-hō no Yakuwari" [Protection of Fundamental Rights and the Role of Tort Law], in *Minpō Kenkyū* 5, edited by Toshio Hironaka (Tokyo: Shinzansha, 2008), 128. In the context of reconstructing tort law on the basis of constitutional fundamental rights, Yamamoto shifts from a "deterministic" view of rights to one that regards personality rights as the right of the subject to decide her own mode of being.

compensate the consequences of the lost opportunity to decide as well.⁹⁾ In this case, when the core protected interest is itself compensated, the infringement of self-determination becomes “transparent” or subsumed within the broader harm.¹⁰⁾

The right of self-determination becomes salient as a distinct protected interest primarily in cases where the tortious act is held not to have infringed the core interest itself. Even so, both in Japan and in other jurisdictions, recognition of self-determination as an independent interest depends on the degree to which the underlying interest is deemed worthy of legal protection. Where the protected value is particularly weighty, courts tend to “push the defensive line forward” (Yoshida, 1999, 274n4), recognizing the right of self-determination as independently compensable.

For example, in medical malpractice litigation, it is common for courts to deny liability with respect to the core interests of life or bodily integrity—such as where negligence is not proven regarding a surgical procedure—yet still award non-pecuniary damages solely for the physician’s failure to provide an adequate explanation. In such cases, the courts reason that the patient’s right to decide whether to undergo the invasive procedure itself has been infringed (Hayashi, 2020, 289).

By contrast, the Supreme Court’s 2003 judgment (“the 2003 Judgment”) rejected a claim for non-pecuniary damages for the loss of an opportunity to make an informed decision in a case involving insurance coverage following the 1995 Hanshin–Awaji Earthquake. The insurer had refused payment on the grounds that policyholders had inadvertently indicated, by seal placement, an intention not to purchase earthquake insurance. The Court held:

The decision whether to purchase earthquake insurance does not concern personal interests such as life or bodily integrity, but relates to pecuniary interests. Taking this into account, even if there was insufficiency or inappropriateness in the insurer’s explanation, absent special circumstances, this does not constitute an unlawful act giving rise to compensation for emotional distress.¹¹⁾

9) See Yoshio Shiomi, *Fuhōkōi-hō* [Tort Law] (Tokyo: Shinzansha, 1999), 260; see also Tokyo High Court, January 30 1996, *Hanrei Jiho*, no. 1580: 111 (transactional-tort case).

10) The expression is borrowed from Ernst Deutsch, “Schutzbereich und Tatbestand des unerlaubten Heileingriffs im Zivilrecht,” *Neue Juristische Wochenschrift* 1965, no. 43: 1989.

11) Supreme Court, Third Petty Bench, December 9, 2003, *Minshū* 57, no. 11: 1.

In other words, because the underlying interest was financial rather than personal, the Court concluded that the right of self-determination in this context did not merit independent protection (Shidahara, 2006, 767).

3. CORE INTERESTS AND THE SCOPE OF SELF-DETERMINATION

(1) Diversity of Core Interests

Returning to the patient's right of self-determination: even if this right is defined simply as the ability to decide among possible medical interventions based on adequate information, and even if it operates as an independently protected interest only when infringement of a core interest is not recognized, the nature of the core interest and the purpose underlying the patient's decision vary substantially across cases.

To illustrate, in a case involving a patient with an unruptured cerebral aneurysm, the Supreme Court held that physicians must provide not only an understandable explanation of the relative advantages and disadvantages of available surgical methods but also a concrete account of the procedures. The Court further emphasized the need to offer the patient a genuine opportunity to decide whether to undergo surgery or instead adopt a wait-and-see approach.¹²⁾ In this case, the self-determination the patient could have exercised with adequate explanation—choosing between surgery and observation—was fundamentally directed toward the preservation or restoration of health.

Conversely, in another case, the Supreme Court addressed circumstances in which physicians performed surgery without first disclosing that the hospital's policy permitted blood transfusions if necessary to save a patient's life, despite knowing that the patient objected to transfusions on religious grounds. The Court held that the physicians should have explained the policy and allowed the patient to decide whether to accept treatment under those conditions.¹³⁾ Here, the self-determination that adequate explanation would have enabled—deciding whether to undergo treatment at that hospital—concerned the realization of religious convictions, rather than the preservation of health itself.

In a third case, involving a breast cancer patient who had expressed

12) Supreme Court, Second Petty Bench, October 27, 2006, *Hanrei Jiho*, no. 1951: 59.

13) Supreme Court, Third Petty Bench, February 29, 2000, *Minshū* 54, no. 2: 582.

interest in breast-conserving therapy—then not yet a standard approach—the Supreme Court held that the surgeon was obliged to explain, to the extent of available knowledge, the possibility of breast-conserving treatment and where it might be obtained. This would have allowed the patient to seriously consider whether to proceed with a mastectomy or to seek breast-conserving treatment elsewhere.¹⁴⁾ In this context, the self-determination at issue, while connected to the preservation of life, primarily concerned the patient's quality of life and her personal identity as someone who wished to retain her breasts.

(2) Variation in the Scope of Self-Determination According to the Diversity of Core Interests

As demonstrated above, even within the medical context alone, the purposes motivating a patient's decision may differ greatly. Correspondingly, the scope of self-determination that must be respected also varies. This variation is reflected in the breadth of the explanatory duty imposed on physicians.

To begin, in medical settings, it is widely accepted that physicians—who possess superior information regarding the patient's condition and available treatments—bear a duty to explain such information to enable the patient to choose among medical options on an adequate informational basis. However, the content and extent of this duty differ depending on the nature of the underlying core interest. Where the patient's decision implicates religious convictions or a quality of life that touches upon identity and dignity, the scope of the explanatory duty becomes broader than in cases where the decision concerns only preservation of life or physical health.

This can be seen by comparing the three cases discussed previously:

- (A) Cerebral Aneurysm Case:
The duty to explain required physicians to outline the advantages and disadvantages of each medically recognized surgical method and to present observation as an alternative. The duty was limited to treatments consistent with prevailing medical standards.
- (B) Refusal-of-Transfusion Case:
Because the patient's decision involved religious belief, the physi-

14) Supreme Court, Third Petty Bench, November 27, 2001, *Minshū* 56, no. 6: 1154.

cians were required to disclose the hospital's policy permitting blood transfusion if necessary to save life—information that would ordinarily not need to be emphasized for most patients.

- (C) Breast Cancer/Breast-Conserving Therapy Case:
Once the physician knew the patient valued preserving her breast as part of her identity and quality of life, the duty extended to explaining the possibility of breast-conserving therapy and identifying facilities where such treatment could be pursued—even though the therapy had not yet become standard medical practice.

Reframed in terms of the scope of decision-making entrusted to the patient:

- In (A), the patient's decision-making authority was confined to alternatives within the medically accepted range, leaving other judgments to medical expertise.
- In (B) and (C), by contrast, the patient was entitled to decide even among options outside the recognized medical standard. This is because decisions shaped by religious convictions (B) and by deeply personal evaluations of quality of life (C) are ones that only the patient herself is uniquely positioned to make.

However, the scope of self-determination is not unlimited, even when the decision touches upon religious belief or a fundamental sense of self. Paternalistic boundaries remain. For example, if a patient who is neither terminally ill nor experiencing intolerable suffering were to request active euthanasia because her illness is a divine signal that her life is no longer worth living, such a decision would not be recognized as falling within the scope of protected self-determination. Determining where this boundary lies and how it should be justified remains an open doctrinal question requiring further analysis beyond the scope of this article.¹⁵⁾

15) Yoshio Shiomi, "Setsumei-gimu, Jōhō-teikyō-gimu to Jikokettei" [The Duty to Explain, the Duty to Provide Information, and Self-Determination], *Hanrei Taimuzu*, no. 1178 (2005): 13. Shiomi further argues that if the right of self-determination were taken to encompass an unfettered "general freedom of action" (lifestyle choices), thereby according the unrestrained development of personality the status of a right, it would unduly restrict the freedom of other members of the community—most immediately, in medical cases, the physician. Even if such general freedom were included, the corresponding explanatory duty would necessarily be subject to external limits, because it impose an excessive burden on medical institutions and, ultimately, on the health-care system.

4. The Substance of Infringements of the Right of Self-Determination in Transactional Torts

In cases involving patient autonomy, whether the right of self-determination relates to the preservation or restoration of health, to religious convictions, or to maintaining a “quality of life that goes to the very core of one’s existence,” the violation is understood as infringing a personality that merits strong legal protection. Accordingly, courts have generally found it comparatively easy to award compensation for non-pecuniary damages arising from resulting mental distress. In the context of transactional torts, however, the alleged infringement concerns the exercise of self-determination in pursuit of economic benefit. As noted above, the 2003 Judgment held, in principle, that non-pecuniary damages are not compensable for mental harm arising solely from such infringements.

Even so, the Supreme Court has issued decisions that recognize non-pecuniary damage arising from the infringement of the right of self-determination in transactional settings. Using one such judgment as a point of departure, the next section examines the substantive content of the right of self-determination as a protectable interest within transactional torts.

(1) Supreme Court Precedent Recognizing Infringement of the Right of Self-Determination in a Transactional Tort

The Supreme Court judgment of 18 November 2004¹⁶⁾ (hereinafter “the 2004 Judgment”), one of the few cases to award non-pecuniary damages for infringement of self-determination in a transactional context, concerned the following circumstances. The residents of a housing complex entered into a “priority-purchase clause” agreement with the Urban Development Corporation A. Under this clause, A agreed to allocate newly rebuilt housing units to X ahead of the general public, provided that (i) any remaining units would later be offered to the general public, and (ii) the purchase price offered to X would not exceed the price offered in the subsequent public sale. X purchased the rebuilt units from Y, the successor entity to A. However, no public sale was conducted for approximately three to four years after allocation to X, and when the sale eventually occurred, the listed sale price was roughly 25–29% lower than the price paid

16) Supreme Court, First Petty Bench, November 18, 2004, *Minshū* 58, no. 8: 2225.

by X.

X sued Y, seeking (1) the difference in purchase price based on non-performance by A, and (2) compensation for non-pecuniary damage due to A's breach of its duty to explain. The Supreme Court upheld the lower court's award of non-pecuniary damages, reasoning that the residents had been deprived of the opportunity to decide, after fully considering the appropriateness of the pricing set by A, whether to enter into the contracts. The Court specifically stated that this conclusion did not conflict with the principles expressed in the 2003 Judgment. The 2004 Judgment therefore recognizes that the right of self-determination can be infringed within the context of transactional torts, and that such infringement may warrant compensation for non-pecuniary harm.

(2) The Substance of the Right of Self-Determination in Transactional Torts

In the 2004 Judgment, the Court determined that, at the time of contracting, A was aware that the transfer price offered to X was excessively high and that the units would not sell at that price. A also had no intention of offering the units to the general public immediately after allocating them to X and could readily have understood that X believed such a public offering would occur without delay. Despite this, A failed to disclose its intention to postpone the offering. The Court held that this conduct was grossly inconsistent with the principle of good faith. It then ruled that although X's decision to conclude the purchase contracts concerned pecuniary interests, A's conduct gave rise to a claim for compensation for non-pecuniary damage.

Scholarly commentary generally offers two interpretations of this decision (Yoshida, 2013, 197ff.). The first interpretation understands the Court as focusing on the nature of A's conduct. Because the conduct significantly violated the duty of good faith, the Court is seen as exceptionally recognizing within an infringement of self-determination aimed at economic gain and an invasion of a personality interest worthy of tort-law protection, thus justifying compensation for mental suffering (Shidahara, 2007, 709ff.; Yasunaga, 2006, 36; Iwamoto, 2007, 479; Yoshida, 2013, 197ff.). The second interpretation reads the decision as, in substance, awarding compensation for pecuniary loss under the formal designation of compensation for non-pecuniary damage associated with infringement of

self-determination.¹⁷⁾

The first interpretation aligns with the conventional understanding of non-pecuniary damages because it treats the award as compensation for the mental distress resulting from the infringement of self-determination, intensified by the particularly egregious mode of conduct. It, therefore, fits within the established framework of tort law.¹⁸⁾ The second interpretation, by contrast, is a difficulty. Even if the “supplementary” function of non-pecuniary damages could, in principle, allow pecuniary losses to be compensated under that category, one must still consider whether such recovery is appropriate when the underlying interest—pecuniary gain—is comparatively less central to personality protection.

Some scholars who adopt the first interpretation nonetheless support the notion of compensating pecuniary loss through awards labeled as non-pecuniary damages (Yoshida, 2013, 200). However, courts routinely award substantial sums for lost earnings in medical cases, often ranging from tens to more than one hundred million yen. By contrast, in cases concerning infringement of self-determination, many decisions limit compensation for non-pecuniary damage to less than several hundred thousand yen, and rarely exceed two million yen (Hayashi, 2020, 290). The case law, therefore, appears cautious about employing the right of self-determination as a basis for awarding compensation equivalent to pecuniary loss.

Moreover, even in medical cases where large awards for infringement of self-determination are made, such awards may still reflect, at their core, the value of life and bodily integrity—interests that lack a direct basis for objective financial calculation.¹⁹⁾ These cases may simply expand the protective boundary surrounding life and bodily integrity, rather than

17) Atsumi Kubota, “Torihiki Kankei ni okeru Fuhōkōi,” *Hōritsu Jiho* 78, no. 8 (2006): 70; see also Seishi Nishigori, “Torihiki-teki Fuhōkōi ni okeru Jikokettei Ken Shingai,” *Jurisuto* no. 1086 (1996): 90 (while critical of the use of the right of self-determination in transactional torts, he recognizes that its infringement in such as operates to protect pecuniary interests), and Tarō Kogayu, *supra* note 4, 46 (understanding the loss of an opportunity to decide in an adequately informed environment as having a pecuniary dimension).

18) Even where only pecuniary interests are infringed, compensation for non-pecuniary damages may in some circumstances be awarded under the traditional view; see Atsumi Kubota, *Fuhōkōi-hō* [Tort Law] (Tokyo: Yūhikaku, 2018), 394 ff.

19) Nishigori (*supra* note 17), at 86, contends that the fact that pecuniary loss can arise from the infringement of personality interests is readily understood simply by recalling the lost earnings recoverable for bodily injury; however, from the standpoint adopted in the present text, a different conclusion can be drawn.

redefine self-determination itself. Given that an excessive expansion of the right of self-determination would also be problematic, the question of whether pecuniary loss should generally be recoverable under the label of non-pecuniary damages requires further examination. At the very least, there is no need to adopt the second interpretation of the 2004 Judgment.

5. Conclusion

Even if the right of self-determination is understood as the right to make one's own choice based on sufficient information, any attempt to conceptualize that right as a protected interest in tort law must take into account the underlying core interest that the exercise of self-determination is intended to advance. In the constitutional context, the "intrinsic value" theory—which ascribes inherent worth to autonomy itself—may appropriately serve as a principle of resistance against state interference (Sato, 1988, 11). By contrast, tort law is concerned with the protection of the rights and interests of private individuals in specific relationships. Accordingly, in the tort context, it becomes necessary to clarify what the individual sought to realize through the act of self-determination at issue. It is doubtful that the right of self-determination can meaningfully be examined apart from the substantive interest that the decision is intended to protect.

Recognizing this connection is essential to determining whether and when the law should extend protection beyond traditional personality interests—in other words, whether an "advance of the defensive line" is warranted. Only by identifying the core interest at stake and assessing its relative level of protection can one appropriately evaluate the legitimacy and limits of recognizing an infringement of the right of self-determination in tort law.

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