Masthead Logo

Global Business & Development Law Journal

Volume 9 | Issue 2 Article 8

1-1-1996

Japan's New Product Liability Law: Making Strides or Business as Usual?

Wendy A. Green
University of the Pacific, McGeorge School of Law

Japan's New Product Liability Law: Making Strides or Business as Usual?

TABLE OF CONTENTS

I. INTRODUCTION

Product liability places legal liability on manufacturers and sellers to compensate consumers for personal injury or property damage caused by defects in goods purchased.[1] Primarily a U.S. concept,[2] product liability is also recognized in other parts of the world, including Canada,[3] Europe,[4] and Japan.[5] Significant differences between product liability systems include the social, economic, and judicial contexts in which they operate.[6] For example, the U.S. legal system as a whole developed largely as a means through which to solve disputes between citizens.[7] Conversely, Japanese law has traditionally been imple-

---

1. BLACK'S LAW DICTIONARY 1209 (6th ed. 1990) [hereinafter BLACK'S]. Although the ultimate responsibility for injury or damage usually rests with the manufacturer, liability may also be imposed upon a retailer, wholesaler or middleman, bailor or lessor, and less frequently, a certifier. *Id.* Under modern principles of product liability, recovery is no longer limited to the purchaser or user of a product, but may also extend to bystanders. *Id.* at 1210. *See* MacPherson v. Buick Motor Co. 111 N.E. 1050, 1053-55 (N.Y. 1916) (extending a manufacturer's duty of care for defective products to foreseeable users other than the purchaser, irrespective of contract, if the product is not dangerous when well-constructed but "imminently dangerous" when negligently constructed). The term product liability normally contemplates injury or damage caused by a defective product. *See* Wayne L. Pines, *Communications Strategies in Product Liability Crises*, 48 FOOD & DRUG L.J. 153, 153 (1993) (characterizing product liability cases as human interest cases where someone has alleged harm or corporate irresponsibility and the aggrieved person wants compensation). Product liability law has undergone fundamental changes during the last thirty years, most notably in the United States. Mark Behrens & Daniel Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, But Access to Recovery is Limited by Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669, 669 (1995).

2. *See generally* Frank A. Orban, III, *Product Liability: A Comparative Legal Restatement—Foreign National Law and the EEC Directive*, 8 GA. J. INT'L & COMP. L. 342 (1973) (describing the growth of product liability from the United States into certain European countries).

3. *See generally* David Cohen & Karen Martin, *Western Ideology, Japanese Product Safety Regulation and International Trade*, 19 U.B.C. L. REV. 315 (1985) (discussing Japanese product safety as it relates to international trade with Canada); Bruce A. Thomas & Lawrence G. Theall, *Product Liability and Innovation: A Canadian Perspective*, 21 CAN.-U.S. L.J. 313 (1995) (providing an analysis of Canada's product liability system).

4. *See* Catherine Dauvergne, *The Enactment of Japan's Product Liability Law*, 28 U.B.C. L. REV. 403, n.37 (1994) (stating Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal and the United Kingdom enacted harmonizing product liability laws as of 1993). *See generally* The Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 28 O.J. EUR. COMM. (No. L210) 29 (1985) [hereinafter EEC DIRECTIVE] (formulating a uniform product liability directive for the Member States of the European Economic Community); Sandra N. Hurd & Frances E. Zollers, *Product Liability in the European Community: Implications for United States Business*, 31 AM. BUS. L.J. 245 (1993) (discussing potential effects of the EEC Directive on U.S. business). Thirteen countries of the European Economic Community and Australia now operate under a uniform Product Liability Directive. Behrens & Raddock, *supra* note 1, at 669.

5. SEIZOBUTSU SEKININ HO (Law No. 85, July 1, 1994) (tentative translation) [hereinafter PRODUCT LIABILITY LAW] (on file with *The Transnational Lawyer*).

6. Marc S. Klein, *Megatrends in International Product Liability Law*, C949 ALI-ABA 113, 115 (1994).

7. George F. Parker, Note, *The Regulation of Insider Trading in Japan: Introducing a Private Right of Action*, 73 WASH. U. L.Q. 1399, 1412 (1995).

mented as a means for rulers to govern society.[8] More recently, Japanese law evolved as a result of influences and pressures from the West.[9]

Japan's current legal system is based on tradition,[10] civil law,[11] and U.S. common law influences.[12] In the area of product liability law, however, Japan has moved away from its traditional approaches.[13] In an effort to bring Japan up to the standards of the modern industrialized world,[14] the Japanese public and legal community molded this developing area of law.[15] Prior to 1994, Japan had no specific product liability system in place, while Western industrialized nations such as the United States, Canada, and the European Economic Community had enacted product liability laws.[16]

U.S. practitioners need to stay abreast of international product liability law as more and more business is conducted in the international arena.[17] As economic

---

8. *Id.*

9. *Id.* The United States seems to have provided the most influence in current Japanese law because of its occupation of Japan after World War II. *See infra* notes 37-43 and accompanying text (explaining Japan acquiesced to Western military power by opening its ports, infusing U.S. concepts into its legal system, and adopting a new constitution). For the purposes of this comment, reference to the West means the United States, Canada and western European countries which comprise the European Economic Community.

10. *See* Lucille M. Ponte, *Guilt by Association in United States Products Liability Cases: Are the European Community and Japan Likely to Develop Similar Cause-in-Fact Approaches to Defendant Identification?*, 15 LOY. L.A. INT'L & COMP. L.J. 629, 659-60 (1993) (asserting Japan's civil code system blends tradition with Western influences); *supra* notes 45-47 and accompanying text (defining the tradition of harmony in society, which commands deference to established order and authority and deems conflicts undesirable). *See generally* Anita Bernstein & Paul Fanning, *"Weightier Than a Mountain": Duty, Hierarchy, and the Consumer in Japan*, 29 VAND. J. TRANSNAT'L L. 45, 60-67 (1996) (providing a discussion of traditions surrounding the attitudes about the Japanese consumers' position in society, politics and law).

11. *See infra* notes 31-34 and accompanying text (discussing the civil law influences on the Japanese legal system).

12. Behrens & Raddock, *supra* note 1, at 671; Paul Lansing & Marlene Wechselblatt, *Doing Business in Japan: The Importance of the Unwritten Law*, 17 INT'L LAW. 647, 651 (1983); *see infra* notes 39-43 and accompanying text (describing the U.S. influences imposed on Japan after World War II).

13. Marcy Scheinwold, Comment, *International Products Liability Law*, 1 TOURO J. TRANSNAT'L L. 257, 258 (1988).

14. For example, the Japanese Federation of Bar Associations (JFBA) stated it would continue to make every effort for early realization of a product liability law. *Consumers Angry at Delay of Product Liability Law*, JAPAN ECON. NEWSWIRE, Oct. 19, 1992, *available in* LEXIS, Asiapc Library, Japan File.

15. Scheinwold, *supra* note 13, at 275.

16. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS, Ch. 17 (5th ed. 1984) [hereinafter PROSSER & KEETON] (explaining product liability in the United States); Thomas & Theall, *supra* note 3 (analyzing Canada's product liability system); EEC DIRECTIVE, *supra* note 4 (outlining a uniform product liability directive for Member States of the European Economic Community); *infra* note 60 and accompanying text (stating prior to the new Product Liability Law, Japan had no formal product liability system).

17. Terry W. Schackmann, *Reflections in a Rock Garden: A Civic Commitment to International Understanding?*, 42 U. KAN. L. REV. 531, 531 (1994); *see* Kenneth L. Port, *The Case for Teaching Japanese Law at American Law Schools*, 43 DEPAUL L. REV. 643, 643 (1994) (arguing real knowledge of, not just exposure to, the Japanese legal system will be an absolute necessity for any attorney engaged in a sophisticated practice, because of the increasingly complex relationship between the United States and Japan); Yoshimasa Furuta, *International Parallel Litigation: Disposition of Duplicative Civil Proceedings in the United States and*

expansion continues across Asia, disputes between international parties will increase.[18] Growth in the international trade market inevitably leads to defective products moving through international commerce, which results in injuries.[19] Because U.S. manufacturers increasingly depend upon foreign markets,[20] knowledge of international product liability law plays a critical role for attorneys advising clients involved in international trade.[21] Indeed, Japan is one of North America's leading trade partners.[22] As U.S. attorneys gain an understanding of the operation of the Japanese legal system, they will be better equipped to effectively represent U.S. litigants in Japan.[23]

This comment focuses on the new Product Liability Law in Japan and its effects on compensated injury.[24] Part II provides a historical review of Japan's legal system and its relevance to the new law.[25] Part III discusses the concept of product liability prior to enactment of the new law and the forces which influenced legal reform.[26] Part IV provides an overview and analysis of the new Product Liability Law, including its purpose, definitions, exemptions, and time limitations.[27] Part V focuses on the theoretical and practical implications of the new law on potential foreign litigants, including procedural barriers, pre-

---

Japan, 5 PAC. RIM L. & POL'Y J. 1, 2 (1995) (citing the recent explosion of transnational economic activities as a cause of an increase in the number of international business disputes); *see also supra* notes 3-5 (giving examples of other countries which have adopted product liability bills).

18. Dr. Thomas S. Mackey, *Litigation Involving Damages to U.S. Plaintiffs Caused by Private Corporate Japanese Defendants*, 5 TRANSNAT'L LAW. 131, 149 (1992); *see* Schackmann, *supra* note 17, at 531 (arguing even attorneys who are unfamiliar with international practice cannot ignore the imminence of their international participation and lawyers in the 1990s will become involved in international business disputes because their clients will require it).

19. Klein, *supra* note 6, at 115.

20. Scheinwold, *supra* note 13, at 259. Between 1977 and 1981, the value of Japanese imports into the United States increased roughly 20% each year. *Id.* at 274.

21. *Id.; see* Schackmann, *supra* note 17, at 531 (indicating lawyers must assist clients in recognizing the international implications of business transactions). Because Japan's economy is the second largest economy in the world, and the ten largest banks in the world are Japanese, U.S. clients engage in business transactions with more and more Japanese companies. David Broiles, *When Myths Collide: An Analysis of Conflicting U.S.-Japanese Views on Economics, Law, and Values*, 1 TEX. WESLEYAN L. REV. 109, 117 (1994). *See* Port, *supra* note 17, at 651-52 (verifying Japan as the second largest economy with the ten largest banks). Japan's economy is the first in Asia to challenge U.S. industries. Schackmann, *supra* note 17, at 534.

22. Cohen & Martin, *supra* note 3, at 315.

23. Port, *supra* note 17, at 654.

24. PRODUCT LIABILITY LAW, *supra* note 5. The Japanese Diet passed the bill in June 1994 and it became effective in July of 1995 after a one-year notification period. *Japan: Upper House Passes Product-Liability Law*, THE NIKKEI WKLY., June 27, 1994, *available in* LEXIS, Asiapc Library, Japan File; Behrens & Raddock, *supra* note 1, at 669. This legislation is the first of its kind in Japan. *Japan: Product Liability Bill Enacted in Japan*, JAPAN CHEMICAL WK., June 30, 1994, at P1-2, *available in* LEXIS, Asiapc Library, Japan File.

25. *See infra* notes 30-56 and accompanying text.

26. *See infra* notes 57-144 and accompanying text.

27. *See infra* notes 145-256 and accompanying text.

sumptions, damage awards, and dispute resolution alternatives.[28] Part VI concludes the Product Liability Law does not change the fundamental procedural obstacles faced by plaintiffs in Japan's legal system, but it does add manufacturers, producers, and processors to the list of parties potentially liable for defective products, which may lessen the burden on plaintiffs.[29]

II. JAPAN'S LEGAL SYSTEM: A HISTORICAL BACKGROUND[30]

Civil law provides the foundational basis for Japanese law.[31] While some historians argue Japan's legal development clearly derived from French law, most agree the German influence was stronger.[32] The Japanese civil and commercial codes were both originally based on German law.[33] These same codes have been amended and modernized, but they remain unaltered in basic form and structure.[34] Despite the similarities to other civil law systems, the Japanese codes apply within the country's historical and cultural structure.[35] For example, book law in

---

28. *See infra* notes 257-362 and accompanying text.

29. *See infra* notes 363-89 and accompanying text.

30. *See generally* Kenneth R. Redden, *The Legal System of Japan, in* 2 COMPARATIVE LEGAL SYSTEMS CYCLOPEDIA, Ch. 6, 2.70.7-.65 (Wm. S. Hein & Co., 1993) (providing a thorough chronology of events in the Japanese legal system).

31. Thomas H. Reynolds & Arturo A. Flores, *Japan, in* FOREIGN LAW: CURRENT SOURCES OF CODES AND LEGISLATION IN JURISDICTIONS OF THE WORLD III Japan 1, III Japan 5 (1994); *see* Yoichiro Hamabe, *Changing Antimonopoly Policy in the Japanese Legal System - An International Perspective*, 28 INT'L LAW. 903, 904 (1994) (confirming Japan adopted a continental or civil law system). Civil law differs from common law because it does not have jury trials, precedent is not binding, and discovery procedures are almost nonexistent. *Id. But see id.* (advocating the position that legal practice in Japan is similar to common law countries like the United States).

32. Reynolds & Flores, *supra* note 31, at III Japan 4; Behrens & Raddock, *supra* note 1, at 673-74 & n.22. Historians argue as to which country had the greater influence. Reynolds & Flores, *supra* note 31, at III Japan 4.

33. Reynolds & Flores, *supra* note 31, at III Japan 3-4; *see* Orban, *supra* note 2, at 358 (indicating the Japanese Civil Code is based on the German Civil Code).

34. Reynolds & Flores, *supra* note 31, at III Japan 3-4.

35. Younghee Jin Ottley & Bruce L. Ottley, *Product Liability in Japan: An Introduction to a Developing Area of Law*, 14 GA. J. INT'L & COMP. L. 29, 42 (1984). During the seventh century, Japan adopted the Chinese legal system as a means of centralizing the emperor's authority, minimizing the aristocracy's power, and nationalizing land ownership. Scheinwold, *supra* note 13, at 275; Behrens & Raddock, *supra* note 1, at 671. These Chinese ritsu-ryo codes were moralistic and heavily influenced by Confucianism. Behrens & Raddock, *supra* note 1, at 671. Gradually, the emperor lost power and a feudal system emerged. Scheinwold, *supra* note 13, at 276. Until the nineteenth century, the feudal system was characterized by its focus on the group. *Id.* An individual's membership within a group and social position defined a person, not individual attributes. *Id.* Additionally, Confucian philosophy stressed the importance of family in society. *Id.* Connected with this lack of individual rights in feudal Japan, the Confucian philosophy includes a sense of duty and loyalty to one's superiors. *Id.* Questioning authority was tantamount to questioning the entire social order, so conciliation was preferred and disagreements were settled by superiors. *Id.*; Behrens & Raddock, *supra* note 1, at 672. This emphasis on settlement without resort to litigation continues to influence Japanese behavior today. Behrens & Raddock, *supra* note 1, at 672; *see infra* notes 309-54 and accompanying text (discussing dispute resolution proceedings). *But see* Port, *supra* note 17, at 659 (stating many of the current Japanese laws

Japan does not accurately reflect social mechanisms which adjust tensions and resolve disputes, and may not adequately reflect the state of the living law.[36]

During the last century, Japanese attitudes changed in the face of Western trade and Western military strength.[37] Japan modernized its society after centuries of isolation left it unable to cope with the military power of the United States and Western Europe.[38] After World War II[39] and the adoption of the new Japanese Constitution,[40] the U.S. influence became apparent in Japanese law.[41] Japan's legal system infused U.S. concepts, including the affirmation of the peoples' sovereignty, guarantees of human rights, and creation of an independent judiciary.[42] Thus, modern Japanese society has introduced and accepted Western legal concepts.[43]

In addition to historical influences, a nation's culture sheds light on a society's patterns and themes of resolving disputes.[44] Culturally, the Japanese respect societal harmony,[45] which encompasses deference to established order,

---

were enacted with disregard for Japanese history and culture they were trying to impact).

36. Redden, *supra* note 30, at 2.80.5, § 1.1. *See generally id.* at 2.80.5-.23 (providing an overall view of the Japanese conception of law).

37. Scheinwold, *supra* note 13, at 276.

38. *Id.*

39. The United States occupied Japan to create a new democratic society through laws philosophically based on Western concepts of democracy and economic regulation. Lansing & Wechselblatt, *supra* note 12, at 651. The American occupation of Japan after the war helped introduce concepts addressing individual rights. Scheinwold, *supra* note 13, at 276.

40. *See generally* KENPO [the Constitution of 1947] (providing certain civil rights for all citizens of Japan). The Constitution of 1947 consists of 11 chapters and 13 articles. Redden, *supra* note 30, §2.2(E)(2). Chapter Three contains 31 articles which guarantee fundamental human rights and various social rights. *Id. See infra* note 42 and accompanying text (giving a few examples of rights contained in the Constitution of 1947).

41. The Constitution of 1947 was heavily influenced by U.S. political philosophy. Ponte, *supra* note 10, at 660 n.149. The Meiji government sought to import a Western system of law to end unfavorable treaties which had been imposed upon Japan by Western nations in the 1850s. Behrens & Raddock, *supra* note 1, at 673. It provides for numerous civil rights, including freedom of thought and conscience, free and equal education, and freedom of the press. *Country: Japan*, KCWD/KALEIDOSCOPE (ABC-Clio, Inc., 1995), *available in* LEXIS, Asiapc Library, Profil File.

42. Behrens & Raddock, *supra* note 1, at 674; Broiles, *supra* note 21, at 132. The framework of the Japanese court system is similar to the U.S. federal system. *Id.*

43. Lansing & Wechselblatt, *supra* note 12, at 651. Although the American occupation eliminated class distinctions and inequities based on law, the traditional focus on the group and the individual duties to the group still predominates Japanese legal thought. Scheinwold, *supra* note 13, at 277. *See* M. Scott Donahey, *Seeking Harmony - Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West?*, 50-JUN DISP. RESOL. J. 74, 74 (1995) (explaining the differences between Western and Asian cultures diminished as tourism and trade increased).

44. Bernstein & Fanning, *supra* note 10, at 51.

45. Hideo Tanaka, *The Role of Law in Japanese Society: Comparisons With the West*, 19 U.B.C. L. REV. 375, 379 (1985). According to Professor Kawashima, a professor at the University of Tokyo, the influence of Confucian ethics and the nurturing of harmony ("wa") are the primary reasons why the Japanese hesitate to bring disputes to court in favor of informal methods of dispute resolution. *Id.* at 380. Wa is not a created condition, but the recognition of the natural order and the satisfaction of taking one's proper position in it. Bernstein & Fanning, *supra* note 10, at 62. It is the condition of enlightened acceptance of one's

respect for authority, and a sense of obligation to members of the social unit.[46] This notion of harmony creates a strong tendency to avoid disagreements and judicial recourse.[47] The Japanese believe disputes should not arise, and if a dispute does occur, it should be resolved by mutual understanding.[48] Once a dispute

---

immutable place, surrounded by others who also take their proper position. *Id.* The importance and appeal of harmony has been described as "difficult to exaggerate." *Id.* at 48 n.18. An intellectual and social predisposition towards a natural hierarchy exists in Japan, which governs conduct in interpersonal relationships. Donahey, *supra* note 43, at 74. Close and harmonious relationships place emphasis on the group rather than the individual, and on national rather than personal welfare. Broiles, *supra* note 21, at 118-19. Relationships are based on cooperation and trust. Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 HARV. INT'L L.J. 3, 5 (1996). For example, among other things, the Japanese achieve goals by consensus-building, respect for elite bureaucracy, common ideology of values, close and harmonious relationships, positive cooperation, group values and behavior, and long term business relationships. Broiles, *supra* note 21, at 128. *But see* Interview with Tomoyuki Tobisawa, District Judge from Japan, in Sacramento, California (Dec. 30, 1995) (notes on file with *The Transnational Lawyer*) (stating harmony is still one factor which keeps Japanese people from pursuing litigation in court, but when the relationship between the parties is destroyed, or if the relationship was not close in the first place, people are more likely to resort to litigation). In answering questions relating to product liability, Mr. Tomoyuki relied on both his independent knowledge and on his primary source for information, COMMENTARY ON THE PRODUCTS LIABILITY LAW, 554 NBL 56 (1994), written and compiled by seven Japanese governmental agencies, including the Ministry of International Trade and Industry (MITI). *Id.* For a copy of the Guide to Product Liability Law for consumers or the Measures for Product Liability Law for businesses, contact the MITI's Consumer Affairs Division at 1-3-1 Kasumigaseki, Chiyoda-ku, Tokyo 100. Y. Ozaki, Japan-Product Liability Law, *in Market Reports,* 1995 NAT'L TRADE DATA BANK, Oct. 13, 1995, *available in* LEXIS, Asiapc Library, Japan File. Interested parties may also call 03-3501-1905 or communicate by facsimile to 03-3580-6407. *Id.*

46. Schackmann, *supra* note 17, at 535; *see* Ponte, *supra* note 10, at 664 n.177 (asserting the nature of Japanese society emphasizes social duties and relationships).

47. Tanaka, *supra* note 45, at 379; *see* Bernstein & Fanning, *supra* note 10, at 48 (describing the Japanese ideal of harmony as a cooperative, nonlitigious attitude which favors dispute resolution through mediation outside of court); Hamabe, *supra* note 31, at 904 (opining Japanese people prefer to resolve conflict through negotiation to the greatest extent possible). This community of thought has evolved from the nation's history, literature, political expression, aesthetic and artistic innovations, and philosophical, ideological or religious concepts. *Cf.* Bernstein & Fanning, *infra* note 10, at 51 (arguing a country's cultural uniqueness comes from these forces, which shape and modify law). Japanese society lacks a general notion of individual rights. Ponte, *supra* note 10, at 663-64. It is not unusual for a Japanese person to be ostracized from the community or neighborhood for being involved in a lawsuit. *Id.* Those who go to court are branded as eccentric, quarrelsome, or "litigation crazy." Behrens & Raddock, *supra* note 1, at 704 n.162. This "lack of legal consciousness" is an outgrowth of historical processes during which governments or rulers discouraged citizens from bringing lawsuits. Bernstein & Fanning, *supra* note 10, at 53 n.50. *But see* Tanaka, *supra* note 45, at 381 (citing Professor John Haley of the University of Washington, who concludes the myth that the Japanese are reluctant to litigate is one of the most widespread cultural misconceptions); Dauvergne, *supra* note 4, at 404 n.5 (stating some scholars attribute Japan's low litigation rate to "non-cultural" factors like manipulation and bureaucratic management); Bernstein & Fanning, *supra* note 10, at 52 (describing the reluctance to litigate in Japan as a "submissiveness to authority," "preference for paternalism," and a "tendency to revere the powerful").

48. Tanaka, *supra* note 45, at 379. It is often said Japan is an inherently non-litigious society because of its harmonious and homogeneous culture. Parker, *supra* note 7, at 1413. The nature of the relationship will have a significant impact on whether formal legal mechanisms are used. Milhaupt, *supra* note 45, at 13 n.36. For example, in a personal injury accident involving a Japanese company, a representative from the company normally visits the victim or the victim's family and apologizes. Lansing & Wechselblatt, *supra* note 12, at

arises all parties are considered culpable and harmony can only be restored by reconciling the dispute.[49]

Relative to other societies, the Japanese infrequently seek litigation as a means of recourse[50] because involvement in a lawsuit demonstrates a serious breakdown in an otherwise normal, orderly society.[51] They prefer extra-judicial, less formal avenues for settling disagreements.[52] Those who do seek resolution in a Japanese court usually encounter a long and delayed judicial process.[53]

---

653. The Japanese-style apology serves as a remedy to the belief that injury can be redressed monetarily and provides a source of psychological wholeness to the victim. Bernstein & Fanning, *supra* note 10, at 64 n.106. While an apology is not usually sufficient to resolve the dispute, this gesture of goodwill sometimes helps to settle the case later. Interview with Tomoyuki Tobisawa, *supra* note 45. *See* Discussion: The Japan Experience, *in International Workshop - Beyond Compensation: Dealing with Accidents in the 21st Century,* 15 U. HAW. L. REV. 757, 757 (1993) [hereinafter *The Japan Experience*] (explaining apology as a remedy plays an important role in the administration of Japanese tort law, but it seems practical only if there are no more than a limited number of tort claims). There are different types of apologies. *Id. See* Behrens & Raddock, *supra* note 1, at 714 n.203 (listing different types of apologies, including an apology in open court, a letter of apology, apology on television, notice of apology, and publication of apology in a newspaper). An apology may mean an acknowledgement by the morally guilty but, in most cases, it is necessary for the company or the person who injured another to express sincerity in dealing with the conflict. *Id.* Many major civil cases have been initiated or continued simply because the defendant would not apologize. Port, *supra* note 17, at 663.

49. Lansing & Wechselblatt, *supra* note 12, at 653.

50. Reynolds & Flores, *supra* note 31, at III Japan 9, n.5. For example, the Japanese values of duty, responsibility, and hard work create a posture that does not permit challenges to superiors, whether in business or government. Bernstein & Fanning, *supra* note 10, at 52. In the early 1970s, the per capita rate of civil cases in the United Kingdom was 10 times that of Japan, and West Germany's was 12 times greater. Scheinwold, *supra* note 13, at 277. *See infra* note 120 (pointing out in 1981-82, the state of California's per capita rate of civil lawsuits was more than 11 times greater than that of Japan).

51. Scheinwold, *supra* note 13, at 279 n.137. The Japanese do not have an interest in asserting abstract legal principles, and they appear to forego rights to avoid offending others. Port, *supra* note 17, at 662. Japan remains a homogeneous society with a high degree of social stratification; troublemakers are not tolerated. Lansing & Wechselblatt, *supra* note 12, at 653. *See* Cohen & Martin, *supra* note 3, at 326 (explaining Japanese attitudes about litigation are due in part to their preference for "harmonious reconciliation" rather than adversarial settlement). *But see id.* at 326 n.46 & 327 (offering other reasons for the Japanese aversion to litigation, such as the undersupply of judges and lawyers, delays, and inefficient appeals rules built into the legal system); Port, *supra* note 17, at 664 (providing the revisionist belief that the Japanese forego rights because their system is full of institutional disincentives to prosecuting a lawsuit). *See also The Japan Experience, supra* note 48, at 763 (adding it is extremely expensive to bring a tort action to court because of filing fees, which are related to claimed damages, and attorney's fees, some of which have to be paid up front); Port, *supra* note 17, at 664 (confirming litigation in Japan is extremely expensive).

52. Scheinwold, *supra* note 13, at 278; *see The Japan Experience, supra* note 48, at 761 (stating nonjudicial and informal dispute resolution is commonplace).

53. *See* Ottley & Ottley, *supra* note 35, at 39 (explaining courts encourage parties to reach a resolution by delaying the time between hearings for a month or longer); Jathon Sapsford, *Consumer Power: Japanese Proposal Promises More Product-Liability Suits,* ASIAN WALL ST. J., Mar. 1, 1994, at 1, *available in* WESTLAW, Japannews Database (stating consumer liability cases in Japan commonly lag for decades because court proceedings are saddled with cumbersome, time-consuming regulations); Yomiuri Shimbun, *Information Access Crucial to PL Law,* THE DAILY YOMIURI, Sept. 7, 1995, at 13, *available in* LEXIS, Asiapc Library, Japan File [hereinafter *Access Crucial*] (identifying procedural difficulties in a typical product liability suit as one reason it takes four or five years until a judgment is granted); Scheinwold, *supra* note 13, at 278 (characterizing Japanese trials as fraught with long delays: hearings spaced at one month intervals; simple trials taking one year from start to finish; the average trial taking two years; and appeals taking five years). Judges

Judicial decisions recognize the parties' disregard for the Japanese cultural preference for social harmony.[54] In addition, judicial decisions deprive the parties of participation in settlements, assign moral blame and therefore should be avoided.[55] Consequently, a product liability lawsuit challenges not only a product and its maker, but disrupts an ethos expressed in many elements of Japanese life.[56]

III. PRODUCT LIABILITY IN JAPAN BEFORE THE NEW LAW

Prior to enactment of the new Product Liability Law in 1994, Japanese product liability was underdeveloped in comparison to Western countries.[57] In the past, Japanese consumer protection focused on stringent regulation to prevent product defects rather than to compensate injured consumers after the fact.[58] Government legislation allowed a government minister to regulate the safety of consumer products,[59] but the courts did not offer a formal product liability system which compensated injured consumers.[60] This legislation only held manufacturers and government liable for injuries incurred from certain types of products.[61]

---

have no incentive to expedite a trial since the purpose of this practice is to encourage the parties to reach a resolution. Behrens & Raddock, *supra* note 1, at 705. *But see* Schackmann, *supra* note 17, at 544-45 (arguing although trials proceed piecemeal in Japan, they proceed immediately, and trials typically reach a judgment within one and a half or two years after the lawsuits are filed).

54. Scheinwold, *supra* note 13, at 278; Ponte, *supra* note 10, at 664.

55. Scheinwold, *supra* note 13, at 278; Ponte, *supra* note 10, at 664; *see* Toshishiro Mitsui, *Products Liability in Japan: A Review of Legal and Insurance Aspects,* 7 J. PRODUCT LIABILITY 197, 199 (1984) (explaining the Japanese people have a tendency to avoid disputes in court in favor of amicable compromise without recourse to litigation).

56. Bernstein & Fanning, *supra* note 10, at 52.

57. Cohen & Martin, *supra* note 3, at 325. Underdeveloped in this context means an available theoretical legal remedy exists, but it is an unattainable remedy because of procedural and evidentiary problems. *Id.* at 325 n.45. *See* Orban, *supra* note 2, at 344 (describing Japan's law with respect to product liability as "traditionalist," which places a heavy emphasis on proof of actual negligence by the manufacturer and on privity of contract).

58. Dauvergne, *supra* note 4, at 404. These regulations were formulated over many years, as the perceived need for monitoring arose in a specific industry, and governed that industry from enactment of the regulations until the new law passed. *See infra* note 95 and accompanying text (explaining consumer laws were passed in reaction to public needs).

59. THE CONSUMER PRODUCT SAFETY LAW (Law No. 33 of 1973).

60. Dauvergne, *supra* note 4, at 404; Behrens & Raddock, *supra* note 1, at 678; Ponte, *supra* note 10, at 631, 660. Special laws relating to tort liability incorporated quasi-strict liability principles. Behrens & Raddock, *supra* note 1, at 679 n.53. *See generally* LAW CONCERNING COMPENSATION FOR LOSS ARISING FROM ATOMIC ENERGY (Law No. 147 of 1961).

61. Akio Morishima, The Japan Scene and the Present Product Liability Proposal, *in International Workshop - Beyond Compensation: Dealing with Accidents in the 21st Century,* 15 HAW. L. REV. 717, 726 (1993) [hereinafter *The Japan Scene*]. Financed by manufacturers, importers, and government contributions, special compensation funds were created to provide for medical expenses, a disability allowance, benefits for raising disabled children, and death benefits according to a fixed payment schedule. Behrens & Raddock, *supra* note 1, at 681 n.67. Additionally, they were designed to ensure compensation for injuries only from specific products. Cohen & Martin, *supra* note 3, at 336. Legislation required manufacturers to pay money into

A. Product Liability Under the Japanese Civil Code

Under the Japanese Civil Code, consumers had two possible means through which to recover for injuries resulting from defective products, Article 415 and Article 709.[62] If there was a contractual relationship between the manufacturer and the injured person, the injured person could proceed under Article 415.[63] Article 415 provided for liability of the manufacturer under a breach of contract theory.[64] The privity requirement[65] in breach of contract is strictly observed by Japanese courts, making contract law merely a theoretical basis for recovery in product liability cases.[66] If no contractual relationship existed, a claimant could pursue liability of the manufacturer on a negligence theory under Article 709.[67] The complaining party was required to show: (1) the presence of a defect, (2) the defect resulted from the defendant's conduct, (3) the extent and type of injury, (4) causation, and (5) breach of a duty of care.[68] Generally, plaintiffs had little

---

compensation funds in the event of damage due to defective products, but the Japanese Civil Code did not provide any specific rules for product liability actions. Behrens & Raddock, *supra* note 1, at 678. The construction industry and manufacturers of household appliances and toys also established compensation funds. Dauvergne, *supra* note 4, at 406-07. Ms. Dauvergne argues these funds provided compensation for consumers more quickly and more predictably than product liability litigation and finds it "curious" that Japan enacted product liability legislation when it did. *Id.* at 404. *Cf.* Yomiuri Shimbun, *Makers of Pharmaceuticals Taking Steps to Prevent Improper Use of Medication*, THE DAILY YOMIURI, Aug. 24, 1995, at 13, *available in* LEXIS, Asiapc Library, Japan File [hereinafter *Makers Taking Steps*] (claiming the pharmaceutical industry considers the current system to be superior to the new product liability law in terms of relief measures). *But see* Hamabe, *supra* note 31, at 904 (claiming the Japanese judicial system has generally failed to protect consumers' interests).

62. Scheinwold, *supra* note 13, at 280.

63. Mitsui, *supra* note 55, at 197; *see* Dauvergne, *supra* note 4, at 405 & n.10 (explaining product liability actions brought under a contract theory often proved difficult because plaintiffs could not establish privity of contract).

64. MINPO (Law No. 125 of 1957), art. 415 [hereinafter THE CIVIL CODE].

65. Privity of contract is the connection or relationship which exists between two or more contracting parties. BLACK'S, *supra* note 1, at 1199. Privity is a derivative interest growing out of a contract. *Id.*

66. Behrens & Raddock, *supra* note 1, at 685. Only one reported case did not apply the privity requirement. *Id.* at n.86. *See generally* Kanmaki v. Ohashi, 725 HANJI 19 (Gifu Dist. Ct., Dec. 27, 1993) (extending a retailer's contractual duty to the purchaser's family or household members who were reasonably expected to consume the food).

67. Dauvergne, *supra* note 4, at 405 & n.10. Negligence in Japan is defined as the failure to conform to a duty to prevent damage. Interview with Tomoyuki Tobisawa, *supra* note 45. This duty presupposes the foreseeability of risk. *Id. But see* Cohen & Martin, *supra* note 3, at 326 (stating products liability suits were almost nonexistent prior to 1960).

68. *Id.* at 329; *see* Dauvergne, *supra* note 4, at 406 (presenting the elements needed to establish a product liability case); Scheinwold, *supra* note 13, at 280 (describing the elements needed for a claim under Article 709 of the Civil Code). *See generally* THE CIVIL CODE, *supra* note 64, art. 709 (providing the provisions on negligence in Japan). Article 709 is predicated on the plaintiff proving these elements beyond a reasonable doubt. Behrens & Raddock, *supra* note 1, at 679. Under the Japanese Commercial Code, the plaintiff had the burden to prove the product was defective, the defect was caused by manufacturer error, and there was a causal relationship between the mistake and the damage done. *Japan: Responsibility for Defective Products Rightfully Rests with Manufacturers - Our View*, THE NIKKEI WKLY., Apr. 11, 1994, *available in* LEXIS, Asiapc Library, Japan File [hereinafter *Responsibility*]. *See Japan's Product Liability Law Poised to go into Effect*, JAPAN

difficulty establishing the injury, but they encountered evidentiary problems in establishing the four remaining elements of liability,[69] particularly in proving the existence of a defect.[70]

Under the first element of Article 709, the Japanese courts often applied a risk-utility analysis when determining whether a product was defective.[71] As articulated by Judge Learned Hand in *United States v. Carroll Towing,*[72] the risk-utility analysis consists of three variables: (1) the probability the accident will occur; (2) the gravity of the injury; and (3) the burden of adequate precautions.[73] According to Yoshio Hirai, professor at the University of Tokyo, the "Hand formula" in Japan is introduced by consideration of (1) the probability the alleged negligent act caused the damage, (2) the gravity of the damage, and (3) the interest sacrificed by imposing a duty of care.[74] Japanese defendants have all relevant documentation and without a discovery system in Japan by which plaintiffs can obtain these documents,[75] the individual plaintiff had considerable

---

ECON. NEWSWIRE, June 30, 1995, *available in* LEXIS, Asiapc Library, Japan File (stating consumers were required to prove negligence on the part of manufacturers). The plaintiff had to specifically identify the defect, which is determined according to the socially accepted standard for safety. Interview with Tomoyuki Tobisawa, *supra* note 45.

69. Cohen & Martin, *supra* note 3, at 329.

70. *Access Crucial, supra* note 53.

71. Cohen & Martin, *supra* note 3, at 330; *see id.* at 328, 330 (arguing the conceptually vague nature of tort liability permits the court to apply a risk-utility analysis). Under the risk-utility test, both manufacturer and consumer are protected: the manufacturer is not charged with creation of a completely safe product, but one that is reasonably safe; and the consumer can recover for any injury resulting from a dangerous product provided the utility of the product is outweighed by the danger it creates. Sperry-New Holland v. Prestage, 617 So.2d 248, 256 (Miss. 1993). The risk-utility analysis is not universal in the United States, but it is the trend. *Id.*

72. 159 F.2d 169 (2nd Cir. 1947). Used in the negligence context, Judge Learned Hand created the risk-utility formula (or the "Hand formula") to decide whether the owner of a barge should be held liable for injuries to other vessels when the barge broke loose from its moorings. Because every vessel would eventually break free, he reasoned, the probability of an accident increases or decreases depending upon varying circumstances (*i.e.,* storms, a crowded harbor). Likewise, the gravity of the injury will depend on the circumstances. Imposing liability may seem unfair in light of the circumstances, so Judge Hand created the risk-utility analysis to balance these interests.

73. United States v. Carroll Towing, 159 F.2d at 173. In algebraic terms, the formula is B<PL, where B is the burden, P is the probability, and L is the injury. *Id.* When balancing a product's utility against the risk of injury it creates, courts sometimes use seven factors: (1) the product's usefulness and desirability; (2) the safety aspects of the product; (3) the availability of a substitute product which would meet the same need and not be as unsafe; (4) the manufacturer's ability to eliminate the danger of injury without impairing the product's usefulness or making it too expensive to maintain its utility; (5) the user's ability to avoid the danger by exercising due care in the use of the product; (6) the user's anticipated awareness of the dangers inherent in the product and their avoidability (due to general public knowledge or suitable warnings); and (7) the feasibility of spreading the loss by setting the price of the product or carrying liability insurance. Sperry-New Holland v. Prestage, 617 So.2d at 256 n.3 (1993).

74. Interview with Tomoyuki Tobisawa, *supra* note 45. Many Japanese judges may not know the formula as articulated by Professor Hirai, but when deciding whether the defendant has a duty of care and what standard of care should be applied, they consider these same factors. *Id.*

75. *See infra* notes 270-76 (explaining the procedural barriers to Japanese lawsuits including the absence of a discovery system in Japan).

difficulty establishing the element of defect.[76] As a result, product liability lawsuits were extremely difficult to win.[77]

If establishing a defect was possible, many plaintiffs faced insurmountable obstacles when attempting to prove the fourth element of Article 709, a causal link between the injury and the defective product.[78] Proving a causal link is difficult because Japan does not have a formal discovery system to aid in the fact-gathering stage of the litigation.[79] Without any means to acquire data explaining the manufacturing process, most plaintiffs lacked sufficient knowledge of the relevant technology and the resources necessary to overcome the barrier of industrial secrecy.[80] Consumer centers, where complaints about industry products are lodged,[81] do not release any information.[82] Thus, plaintiffs typically do not have access to relevant evidence regarding the frequency and types of injuries related to a particular product's use.[83] As a result of these evidentiary problems,

---

76. Cohen & Martin, *supra* note 3, at 330.

77. *Access Crucial, supra* note 53; *see* Hamabe, *supra* note 31, at 904-05 (stating consumers in Japan face a difficult challenge when attempting to cure a social problem through litigation); *Cabinet Clears Japan's First Bill That Will Help Protect Consumers,* ASIAN WALL ST. J., April 13, 1994, at 4, *available in* WESTLAW, Wsj-Asia Database [hereinafter *Cabinet Clears First Bill*] (confirming consumers lost product liability actions in most cases).

78. Cohen & Martin, *supra* note 3, at 330. The availability of alternative dispute resolution (*see infra* notes 309-362 and accompanying text), government regulatory authority and responsibility, as well as public insurance and compensation funds, suggests traditional approaches to causation are likely to remain. Ponte, *supra* note 10, at 631.

79. Toshio Shinmura, *New Rules on Product Liability Approach: Changes Take Effect Next Month; Awareness Modest,* THE NIKKEI WKLY., June 5, 1994, at 3, *available in* LEXIS, Asiapc Library, Japan File; *see* Mitsuru Mabuchi, *Japanese Lack Protection Against Defective Products,* JAPAN ECON. NEWSWIRE, Oct. 17, 1990, *available in* LEXIS, Asiapc Library, Japan File (stating one grave flaw in the Japanese system is the lack of a system for ensuring consumer access to information); Behrens & Raddock, *supra* note 1, at 706 (stating the various forms of pre-trial discovery in the United States do not generally exist in Japan); Bernstein & Fanning, *supra* note 10, at 69 n.139 (claiming American-style discovery is absent in Japan); *see also* Interview with Tomoyuki Tobisawa, *supra* note 45 (confirming Japan does not have a discovery system like the United States but, at the judge's request, defendants often submit evidence about the facts on which they bear the burden of proof).

80. Mabuchi, *supra* note 79. For example, some Japanese manufacturers have copyrighted testing and safety documents to prevent plaintiffs from exchanging information in the unlikely event they acquire information crucial to help prove a product defect. Paul M. Barratt, *Firms Use Copyright Law to Keep Documents Secret,* WALL ST. J., Aug. 31, 1988, *available in* LEXIS, WSJ Library.

81. Consumer centers are usually industry-specific organizations designed to ameliorate and conciliate grievances outside of court. Bernstein & Fanning, *supra* note 10, at 70. They are heavily administered, largely consisting of informal interfaces between manufacturers and consumers. Milhaupt, *supra* note 45, at 61.

82. *See Japan's Product Liability Law Poised to Go Into Effect,* JAPAN ECON. NEWSWIRE, June 30, 1995, *available in* LEXIS, Asiapc Library, Japan File (citing experts as saying the prefectural bodies do not typically release information they have gathered). Information relating to design and production stays in the manufacturer's control. *Responsibility, supra* note 68.

83. Cohen & Martin, *supra* note 3, at 331.

relatively few injured plaintiffs recovered from manufacturers of defective products.[84]

Recognizing the obstacles faced by product liability plaintiffs,[85] Japanese courts gradually began to adopt techniques to help plaintiffs meet their burdens of proof.[86] Manufacturers were, and still are, obligated to use the utmost care in producing reasonably safe products and give the highest regard to scientific investigation.[87] In cases of food and automobile manufacturing, Japanese courts imposed an absolute duty on the manufacturer to produce a safe product.[88] In other cases, where claims of personal injury resulted from the use of medicines[89] or from pollution,[90] courts permitted inferential proof[91] through statistical and epidemiological data.[92] However, these efforts by Japanese courts still did not

---

84. For example, Japanese appliance manufacturers receive about one million consumer complaints a year, many of which pertain to defective products, but there have only been about 150 product liability-related lawsuits in the last 50 years. *Makers Move to Adopt Product Liability Guidelines*, DAILY NEWS TOKYO FIN. WIRE, Mar. 31, 1994, at 12, *available in* LEXIS, Asiapc Library, Japan File; Ponte, *supra* note 10, at 663. It is virtually impossible for an individual consumer to win such a case because of the cultural belief in harmony and the procedural barriers plaintiffs face, including the inability to obtain vital information relating to the defective product. Mabuchi, *supra* note 79.

85. In addition to the evidentiary problems discussed above, consumers' and other individuals' interests were not protected because of the additional absence of jury trials and punitive damages. Hamabe, *supra* note 31, at 904. Few consumers have been victorious in civil litigation against companies in the area of product liability. *Id.* at 905.

86. Scheinwold, *supra* note 13, at 280. Japanese trial courts started relaxing the burden of proof primarily in serious multi-plaintiff products liability cases regarding food products and pharmaceuticals, due to their concern for consumer health and safety. Mitsui, *supra* note 55, at 197.

87. Ponte, *supra* note 10, at 662. *But see generally* Bernstein & Fanning, *supra* note 10 (arguing a new law could not create a strict liability system in Japan like the United States because the unique cultural preference discourages the use of the legal process to advance consumer interests).

88. Cohen & Martin, *supra* note 3, at 332; *see id.* at 329 (reiterating the manufacturer's standard of care as near-absolute).

89. Behrens & Raddock, *supra* note 1, at 680; Dauvergne, *supra* note 4, at 406; Scheinwold, *supra* note 13, at 280.

90. Ponte, *supra* note 10, at 662. In pollution cases, courts permit statistical and epidemiological proof to counteract the problems created by wealthy and uncooperative defendants, multiple injuries, and elusive evidence of causation. *Id.* at 662 n.164. This judicial tendency is particularly helpful when the defendant controls access to information. Scheinwold, *supra* note 13, at 280. *But see* Dauvergne, *supra* note 4, at 406 (explaining plaintiffs still faced difficult burdens because, often times, statistical evidence was not available to individual plaintiffs).

91. Under the principle of *res ipsa loquitur*, courts allowed an inference of negligence to ease the plaintiff'sburden of proof. Ponte, *supra* note 10, at 662. The theory of *res ipsa loquitur* allows negligence of an alleged wrongdoer to be inferred from the mere fact that the accident happened if the circumstances lead to the reasonable belief the accident would not have occurred in the absence of negligence. BLACK'S, *supra* note 1, at 1305. *See* PROSSER & KEETON, *supra* note 16, Ch. 6, sec. 39 (explaining the principle of *res ipsa loquitur*).

92. Ponte, *supra* note 10, at 662. Epidemiology deals with the scientific study of the incidence, distribution and control of disease in a population. WEBSTER'S THIRD NEW INT'L DICTIONARY 762 (1971) [hereinafter WEBSTER'S].

make plaintiffs more likely to succeed in product liability actions because they could not prove where the defect occurred in a sophisticated production process.[93]

As of 1993, the Japanese government had made various attempts to ensure compensation for injured consumers.[94] Government programs were sporadic, piecemeal, and formulated in reaction to public needs at the time.[95] As a result, an extensive network of administrative compensation plans, product testing requirements, and industry-funded insurance schemes developed to address product liability issues.[96] These mechanisms were frequently inconsistent in scope of coverage and benefits.[97] For example, the Japanese government enacted the Automobile Compensation Law[98] to address injuries from increased traffic accidents on unpaved roads after World War II.[99] Even though the law imposed additional liability, very few car owners who were held liable could afford to pay damages.[100] The government did *not* pass legislation, however, in response to increased medical malpractice litigation.[101] Instead, the courts held physicians to a higher standard of care.[102] These are two examples of piecemeal government reactions to public needs which are inconsistent: one provides a compensation fund; one creates a higher standard of care. Prior to 1994, Japanese product liability consisted of pieced-together provisions of the Japanese Civil Code pertaining to contractual and tort liability.[103] A new product liability system would enable the government to acknowledge consumer pressure while providing protection against defective foreign products not subject to Japanese regulation.[104]

---

93. Dauvergne, *supra* note 4, at 406.

94. As exemplars, the Consumer Daily Life Appliances Safety Law was passed in 1973, and the Act Concerning the Fund for Relief of Drugs' Side Effects was enacted in 1979. Mihoko Iida, *Informal Procedures Deterring Defective Products, OECD Says*, THE NIKKEI WKLY., Aug. 1, 1992, at 3, *available in* LEXIS, Asiapc Library, Japan File; Dauvergne, *supra* note 4, at 407 nn.16-17. Each of these laws created compensation funds to pay expenses and medical bills for injured consumers. *Id.*

95. *The Japan Scene*, *supra* note 61, at 726; *see supra* notes 59-61 and accompanying text (discussing the creation of compensation funds to provide for disability and death benefits). By creating specific laws which created industry-wide compensation funds, consumers injured by products in certain industries could recover money damages. *Id.*

96. Milhaupt, *supra* note 45, at 61.

97. *The Japan Scene*, *supra* note 61, at 726.

98. LAW GUARANTEEING COMPENSATION FOR DAMAGE CAUSED BY AUTOMOBILES (Law No. 97 of 1955).

99. *The Japan Scene*, *supra* note 61, at 718. The Automobile Compensation Law, the first real tort legislation in the history of Japan, relieved the victim from proving negligence and introduced compulsory insurance to provide a minimum amount of relief to traffic accident victims. *Id.* at 719.

100. *Id.*

101. *Id.* at 720. The increase in medical malpractice litigation resulted from a national health insurance scheme which caused the deterioration of the doctor-patient relationship. *Id.*

102. *Id.*

103. Ponte, *supra* note 10, at 660.

104. Dauvergne, *supra* note 4, at 411.

B. Discussions Leading to Legal Reform

In 1975, a group of scholars, led by the late Sakae Wagatsuma,[105] began studying product liability after a series of widely publicized cases involving widespread injuries between the 1950s and the 1970s.[106] By 1978, some scholars viewed Japanese product liability law as the least progressive of any civil law country.[107] As of 1981, less than 150 cases involving suits by injured consumers against manufacturers had been reported.[108]

---

105. At the time, Sakae Wagatsuma was a leading and influential civil law professor at the University of Tokyo. Interview with Tomoyuki Tobisawa, *supra* note 45. In 1975, he created a model product liability law and released it to the public. *Id.*

106. *Id.; see* Dauvergne, *supra* note 4, at 407 (stating these scholars published a draft law calling for strict liability for product defects and for procedural reforms). Over 1700 cases involving hundreds of parents and children injured by thalidomide, a pregnancy drug used to help prevent miscarriage, made headlines in 1963. *Id.* at 403; *Makers Taking Steps, supra* note 61. As of the end of the 1994 fiscal year, 4.7 billion yen in medical expenses and disability pensions had been paid. *Makers Taking Steps, supra* note 61. The government was held responsible for one-third of the damage awards. Cohen & Martin, *supra* note 3, at 319 n.21. More than 12,000 children became ill and 131 died of arsenic poisoning after consuming Morinaga powdered milk. Dauvergne, *supra* note 4, at 403; Behrens & Raddock, *supra* note 1, at 687 n.90. The amount of settlement per deceased was 250,000 yen. Mitsui, *supra* note 55, at 201. In the Kanemi Rice Oil cases, a thermal medium (PCB) leaked from a decayed pipe into Kanemi's cooking oil during manufacture. Kubota v. Kanemi Soko K.K., 866 HANJI 21 (Fukuoka Dist. Ct., Oct. 5, 1977); Interview with Tomoyuki Tobisawa, *supra* note 45, Behrens & Raddock, *supra* note 1, at 681; Mitsui, *supra* note 55, at 202. Lawsuits were brought by more than 14,000 individuals who allegedly suffered poisoning from eating foods cooked with contaminated oil. Behrens & Raddock, *supra* note 1, at 681-82. Negligence was prima facie inferred, and the court reached its decision in 1977 in favor of the plaintiffs. Interview with Tomoyuki Tobisawa, *supra* note 45; Behrens & Raddock, *supra* note 1, at 681. *See generally* M.R. Reich, *Public and Private Responses to a Chemical Disaster in Japan: The Case of Kanemi Yusho, in* LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES (Kendall/Hunt, 1988) (discussing the Kanemi Rice Oil cases in detail). Clioquinol, a chemical in medication used to alleviate diarrhea, caused a nervous system disorder called subacute myelo optico-neuropathy (SMON). Behrens & Raddock, *supra* note 1, at 680; Ponte, *supra* note 10, at 669. *But see* Redden, *supra* note 30, § 2.8(B) (claiming a drug called chinoform causes SMON). Symptoms of SMON include numbness in the lower limbs which develops into paralysis, and deteriorating vision which sometimes leads to complete blindness. *Id.* A series of lawsuits were filed in Japan when an element of a drug caused SMON in persons who ingested it. Interview with Tomoyuki Tobisawa, *supra* note 45. SMON had been in existence since the 1950s but it was not until 1970 that its cause was discovered. *Id.* Approximately 5000 plaintiffs filed suit in 27 district courts and sought a total of 110 billion yen from three pharmaceutical companies and the Ministry of Health and Welfare. Behrens & Raddock, *supra* note 1, at 680-81. A total of 68.3 billion yen was paid in fines and damages. *Makers Taking Steps, supra* note 61. The Kanazawa District Court handed down the first decision in 1978 with plaintiffs prevailing. Behrens & Raddock, *supra* note 1, at 681; Interview with Tomoyuki Tobisawa, *supra* note 45. Again, the government was responsible for one-third of the damage awards. Cohen & Martin, *supra* note 3, at 341 n.121. By 1982, over 7000 plaintiffs in 32 districts claimed damages amounting to 278,196.5 million yen. Redden, *supra* note 30, §2.8(B).

107. Scheinwold, *supra* note 13, at 274 (citing studies discussed in Orban, *supra* note 2).

108. *See* Scheinwold, *supra* note 13, at 275 (claiming only 50 cases had been reported); Bernstein & Fanning, *supra* note 10, at 49-50 n.23 (listing various numbers of product liability lawsuits and judgments in Japanese courts: 150 judgments; "about 140" cases, according to Professor Akio Morishima; and 127 cases between 1949 and 1991, as reported by the Japanese MITI); Dauvergne, *supra* note 4, at 404 (citing 145 product liability suits between 1946 and 1993); Behrens & Raddock, *supra* note 1, at 679 n.54 (stating the number as 141, according to the Japanese EPA's First Consumer Affairs Division); *see also* Cohen & Martin,

The Japanese government began studying product liability after the decisions in the Kanemi Rice Oil and the SMON cases cost private companies and the Japanese government billions of yen in damages.[109] Prior to that time, the Japanese government claimed enacting a product liability law would be premature and cautioned rapid changes would disrupt the delicate balance between consumer and business interests.[110] Critics of the Japanese government, however, claimed this resistance came from a desire to maintain an international competitive edge in product innovation and costs.[111]

Public studies and discussions about a product liability law diminished until the late 1980s.[112] This declining interest may have been caused by the imposition of a higher standard of care on product makers, compensation laws for victims of certain types of accidents, and the lack of new serious product liability cases being initiated in Japanese courts.[113] Ultimately, a shift of opinion among bureaucrats and business leaders nudged formulation of the new law.[114]

Administrative authorities who permeate Japan's government agencies (bureaucratic elites)[115] sought to ensure Japanese consumers would recover damages from foreign manufacturers as Japan began accepting more imports.[116] Merchants and business leaders (business elites),[117] on the other hand, supported product liability legislation out of fear the "litigation explosion" in the United States[118] would spread to Japan if Japan did not enact its own law.[119] Thus, the

---

supra note 3, at 343 (claiming *no* product liability lawsuits against Japanese retailers and wholesalers).

109. *See supra* note 106 (briefly describing the Kanemi Rice Oil case and the SMON cases).

110. Ponte, *supra* note 10, at 660. The government was concerned *strict* liability would lead to judicial system abuses and consumer price increases. *Id.*

111. *Id.* at 660-61 n.155.

112. Interview with Tomoyuki Tobisawa, *supra* note 45; *see supra* notes 59-60, 90, 98 and accompanying text (providing specific examples of some of the compensation laws passed by the Japanese Diet).

113. Interview with Tomoyuki Tobisawa, *supra* note 45.

114. *See infra* notes 115-121 and accompanying text (explaining the consensus-building among business elites and bureaucrats to enact a product liability system and the development of product liability in Europe). The modern triumvirate of manufacturers, bureaucrats, and elected politicians forms the hierarchy of power in Japan. Bernstein & Fanning, *supra* note 10, at 65-67.

115. The state bureaucracy is a continuation of those who orchestrated the current centralized government and the constitution. *Id.* at 66. Government social agencies, such as the planning, police, and education ministries, remain permeated with prewar Imperial officials. *Id.* Admission to the bureaucratic elite is still carefully controlled and carries generous rewards in prestige, power and wealth. *Id.* Most are graduates of the Law Faculty of Tokyo University, the nation's most prestigious school. Parker, *supra* note 7, at 1412. The bureaucracy in Japan is respected and intelligent. Broiles, *supra* note 21, at 116.

116. Dauvergne, *supra* note 4, at 405.

117. Bernstein & Fanning, *supra* note 10, at 65-66. Today's business elite are descendants of nobles and samurai who used government compensation, for their loss of feudal privileges, to buy into enterprises which brought prosperity. *Id.* at 65. The prewar financial oligarchy created by the merchant-samurai alliance continues to prosper in modern Japan. *Id.* at 66.

118. The number of product liability suits filed in U.S federal courts increased 861% between 1974 and 1986. Dauvergne, *supra* note 4, at 407-08 n.23 (citing Ponte, *supra* note 10, at 629 n.1). Between 1978 and 1983, the number of product liability cases filed in U.S. courts jumped from 4300 to 9200. Scheinwold, *supra*

U.S. litigation explosion strongly influenced Japan's move to product liability discussions by providing a scenario to be avoided.[120] The development of a model product liability directive by Europe also rekindled interest in product liability and provided a model to follow.[121]

Initially in opposition to the new law, business elites shifted their position largely as part of a strategic reassessment: adoption of a European-style law would end tentative moves toward the U.S. version of product liability and a potential litigation explosion.[122] As a result of reports that U.S. businesses filed bankruptcy because of litigation, Japanese industries feared the possibility of increased damages if a law similar to the U.S. strict liability system were enacted in Japan.[123] During this time, consumer advocacy groups and lawyers' assoc

---

note 13, at 260. About 42,000 product liability cases were filed in U.S. state courts in 1992 alone. Behrens & Raddock, *supra* note 1, at 679 n.54. *See* RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 5 (2d ed. 1992):

> The latter half of the twentieth century has witnessed a virtual explosion in the frequency and number of lawsuits filed to redress injuries caused by a single product manufactured for use on a national level.

(quoting Judge Williams in In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 892 (N.D. Ca. 1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171, 103 S. Ct. 817, 74 L. Ed. 2d 1015 (1983)). Part of this increase includes a growing number of claims initiated by foreigners injured outside the United States by products distributed and manufactured abroad by U.S. companies. Scheinwold, *supra* note 13, at 260. *But see* Robert A. Prentice & Mark E. Roszkowski, *"Tort Reform" and the Liability "Revolution": Defending Strict Liability in Tort for Defective Products*, 27 GONZ. L. REV. 251, 255-56 (1992) (arguing the claims of an "explosion" are inflated).

119. Dauvergne, *supra* note 4, at 405, 412. In 1993, a survey indicated 80% of large Japanese corporations expected a product liability law to be enacted within five years, largely because of public opinion and international trade pressures. Ponte, *supra* note 10, at 660-61 n.155. *But see* Dauvergne, *supra* note 4, at 407, 412 (claiming business staunchly opposed new legislation until a shift in political leadership in 1990).

120. Dauvergne, *supra* note 4, at 407-08. The U.S. product liability laws contributed to the increase in civil litigation. *Id.* For example, 1,238,405 civil cases were initiated in California in 1981. Scheinwold, *supra* note 13, at 277. By comparison, only 542,825 cases were filed in similar Japanese courts in 1982, a per capita rate 11 times less than the per capita rate in the state of California. *Id.*

121. Dauvergne, *supra* note 4, at 409-10. The Japanese government formed a committee to study the issue, following the European model. *Cabinet Clears First Bill*, *supra* note 77.

122. Dauvergne, *supra* note 4, at 412; *see* Sapsford, *supra* note 53 (claiming this law represents a tremendous concession by business to other interest groups).

123. *The Japan Scene*, *supra* note 61, at 726; Ottley & Ottley, *supra* note 35, at 38; *see* Ai Nakajima, *Products Liability: How Tough a Law; Consumer Advocates Press for Endorsement in Planned Interim Report to Prime Minister*, THE NIKKEI WKLY., Aug. 31, 1991, at 4, *available in* LEXIS, Asiapc Library, Japan File (claiming manufacturers' main fear of product liability legislation was strict liability); Mihoko Iida, *Foreign Access Linked to Product-Liability Law: Tougher Statute Coupled With Easing of Regulations Suggested in New Government Report*, THE NIKKEI WKLY., July 11, 1992, at 3, *available in* LEXIS, Asiapc Library, Japan File [hereinafter *Foreign Access*] (crediting corporate officials with the fear a tougher product liability law would stimulate lawsuits); Sapsford, *supra* note 53 (quoting a corporate vice president as saying he has no doubt the number of lawsuits in Japan will increase because of this law). *But see* Noriko Sato, *Product Liability Law to Debut in Japan*, JAPAN ECON. NEWSWIRE, June 28, 1995, *available in* LEXIS, Asiapc Library, Japan File (claiming it is unlikely the number of product liability suits will increase dramatically after the new law because litigation in Japan takes too much time and money); *Access Crucial*, *supra* note 53 (arguing an increase in the number of lawsuits is unlikely because the Japanese have a tendency to dislike lawsuits); Ottley

iations took advantage of the opportunity to increase public awareness of the need for legislation.[124] Key consumer groups held lectures, lobbied government officials, and sponsored signature-collecting drives to pressure the government into passing a consumer protection law.[125] Momentum for product liability reform within Japan developed slowly over the next decade.[126] As the number of both Japanese and foreign products on the international market grew, the Japanese public demanded greater compensation for injuries caused by defective products.[127] For example, the Japanese Federation of Bar Associations (JFBA) operates a consumer hotline which is open four days each year to receive complaints about defective products.[128] The hotline reported 715 claims in 1990; over 500 claims in 1991; and 1044 claims in 1992.[129] In February 1993 alone, more than 900 calls were registered from consumers, complaining about faulty products and about being ignored by retailers and makers.[130] Moreover, in 1993, consumer union members held a rally in Tokyo demanding new product liability laws and collected 3.2 million signatures on a petition.[131]

Encouraged by the enactment of product liability laws in the United States[132] and Europe,[133] by 1989 active discussions about product liability in Japan began

---

& Ottley, *supra* note 35, at 38 (asserting much of the U.S. litigation may have resulted from the manufacturers' unwillingness to acknowledge their product was defective and their willingness to incur litigation costs to avoid future claims).

124. Behrens & Raddock, *supra* note 1, at 687 n.94.

125. Yomiuri Shimbun, *Consumer Groups Led Fight for PL Law*, THE DAILY YOMIURI, Aug. 30, 1995, at 15, *available in* LEXIS, Asiapc Library, Japan File.

126. Behrens & Raddock, *supra* note 1, at 687.

127. *The Japan Scene*, *supra* note 61, at 727. *But see Access Crucial*, *supra* note 53 (claiming 471 out of 1500 allegations of defective products did not proceed to lawsuits although lawyers were consulted). Of that 471, about 40% gave up because they could not prove key allegations. *Id.*

128. *Hotline Response Shows Need for Product Liability Law*, JAPAN ECON. NEWSWIRE, Mar. 14, 1993, *available in* LEXIS, Asiapc Library, Japan File [hereinafter *Hotline Response*].

129. *Id.*

130. *Id.* More than two-thirds of the callers had filed complaints with the manufacturer directly, but did not get acknowledgement. *Id.*

131. Kate McIlwaine, *Australia: Product Liability Law a Growing Concern for Japanese Firms*, BUS. INS. (Reuter Textline), Dec. 20, 1993, *available in* LEXIS, Asiapc Library, Japan File.

132. The U.S. product liability experience generated calls from consumers to formulate a Japanese product liability law in the same general direction. Dauvergne, *supra* note 4, at 409. *See also* Nakajima, *supra* note 123 (quoting the Social Policy Council's chairman, Ichiro Kato: "[c]onsidering the worldwide trend, it's inevitable that Japan will have a products liability law"). The Social Policy Council, a special advisory body to the Prime Minister, consists of consumer advocates, scholars, industry and business representatives, and officials of various ministries. Dauvergne, *supra* note 4, at 411-12.

133. *See* Nakajima, *supra* 123 (stating the European Community's direction to members to enact a product liability law in 1985 stepped up discussion of product liability in Japan); Dauvergne, *supra* note 4, at 409-10 (calling the adoption of the EEC Directive a key event which helped shape Japanese attitudes toward product liability law). The European Community countries have adopted a system which does not require a plaintiff to prove negligence. *Foreign Access*, *supra* note 123. This same article also states plaintiffs need not prove a defect or causation, which is incorrect. *See infra* note 148 and accompanying text (discussing the elements which are required to prove a cause of action for product liability in Japan, including defect and causation). Perhaps one of the reasons the European Community's product liability law influenced Japan's

to occur.[134] The learned legal society, political parties, consumer groups, bar associations, and industrial representatives all participated in discussions, resulting in the publication of model bills and laws.[135] Pressure on Japan to open its market to foreign goods, however, increased the likelihood that imported goods would enter the market and impact the way the Japanese sought to ensure product safety through regulation.[136] Japanese industry maintained that the existing regulations worked sufficiently to protect consumers against faulty products.[137] In addition, industry feared technological advances would be thwarted,[138] making Japanese business less competitive.[139]

Despite industry concerns about expanded liability, higher damage awards, increased litigation, increased costs, and hindered technological advancement,[140] the Japanese government succumbed to societal pressure and passed the new Product Liability Law in 1994.[141] Prime Minister Morihiro Hosokawa's administration pledged introduction of a product liability system as part of its commitment to place a priority on the people rather than corporate profits.[142] Additionally, an enhanced product liability system would ensure Japanese con-

---

legal reform is because the Community, like Japan, has legal procedures which do not encourage or facilitate litigation. *Cf.* Hurd & Zollers, *supra* note 4, at 253-54 (arguing the political and social climates discourage litigation because Member States have comprehensive social programs, compensation systems, minimal damage awards, and little expectation that reforms in consumer protection will be accomplished through legislation and litigation); Ponte, *supra* note 10, at 657-58 (listing disincentives in Europe, such as the lack of discovery and access to product information, which are similar to the disincentives in Japan). Legal rules and procedures also create barriers to litigation. Hurd & Zollers, *supra* note 4, at 254. *See supra* note 61 (discussing compensation funds in Japan) and *infra* notes 299-308 and accompanying text (discussing Japanese damage awards). Thus, the EEC Directive also provided a model law which differed markedly from the U.S. version. Additionally, some Members of the European Community do not permit discovery and still others allow only very limited discovery closely supervised by the court. Hurd & Zollers, *supra* note 4, at 254. The EEC Directive influenced both the timing and the content of the Japanese law. Dauvergne, *supra* note 4, at 410.

134. Interview with Tomoyuki Tobisawa, *supra* note 45; *see* Behrens & Raddock, *supra* note 1, at 687 (crediting adoption of the EEC Directive as the final impetus for Japan's decision to adopt its own law); Dauvergne, *supra* note 4, at 410 (conceding the enactment of the EEC Directive was the primary impetus to Japan's new interest in a product liability system).

135. Interview with Tomoyuki Tobisawa, *supra* note 45.

136. Dauvergne, *supra* note 4, at 411.

137. Reiko Saito, *Japanese Consumers Left to Struggle in Liability Suits,* JAPAN ECON. NEWSWIRE, Nov. 2, 1992, *available in* LEXIS, Asiapc Library, Japan File.

138. *The Japan Scene*, *supra* note 61, at 726; *see* Yuko Inoue, *LDP Official Fears Confusion from Law,* THE NIKKEI WKLY., Oct. 12, 1992, *available in* LEXIS, Asiapc Library, Japan File (citing a likely slowdown in technology innovation as a disadvantage of a product liability law); Dauvergne, *supra* note 4, at 412 (explaining the primary opposition of the business elite initially stemmed from the fear that a product liability law would curtail research and development).

139. Behrens & Raddock, *supra* note 1, at 687.

140. *See supra* notes 123, 137-39 and accompanying text (listing many of the fears experienced by Japanese industries as product liability legislation was contemplated).

141. *See* PRODUCT LIABILITY LAW, *supra* note 5 (indicating a date of July 1, 1994).

142. Editorial, *Diet Must Pass Product Liability Bill,* THE DAILY YOMIURI, Apr. 13, 1994, at 6, *available in* LEXIS, Asiapc Library, Japan File [hereinafter *Editorial*].

sumers damaged by foreign products could receive compensation.[143] In response to the adverse reactions which allegedly occurred in the United States after it enacted its strict product liability laws, Japan chose to follow the European model.[144]

IV. THE NEW PRODUCT LIABILITY LAW: STRUCTURE AND ANALYSIS

The new Product Liability Law marks a major turning point in government efforts to ensure consumer protection.[145] The nation's first bill on manufacturers' liability for defective product,[146] was enacted to replace the contract doctrine previously used to redress product liability claims.[147] Under the new law plaintiffs no longer need to prove negligence in product liability cases.[148] In fact, the basic proposition of the law holds manufacturers responsible for the damage caused by defects in their products.[149] The new law is short and contains fewer substantive provisions[150] than either the European Economic Community Directive (EEC Directive) or U.S. law.[151] The intentional brevity and vagueness of the law reflects the inability of Japanese consumer and industry groups to reach a consensus on many substantive issues.[152] An analysis of each provision follows.

---

143. Dauvergne, *supra* note 4, at 411.

144. *Id.* at 412.

145. *Editorial, supra* note 142; *see* Behrens & Raddock, *supra* note 1, at 689 (describing the new law as a major departure from traditional Japanese tort and contract principles); Bernstein & Fanning, *supra* note 10, at 46 (creating an image of consumer groups celebrating, multinational brokers preparing to expand sales of liability insurance, and characterizing the new law as one which transforms the economy to one that favors consumers). *But see id.* at 67 (stating the statute is not likely to disrupt Japanese society or the function of Japanese law).

146. *Cabinet Clears First Bill, supra* note 77; *Japan: Product Liability Bill Enacted in Japan,* JAPAN CHEM. WK., July 21, 1994, at P1, *available in* LEXIS, Asiapc Library, Japan File.

147. Bernstein & Fanning, *supra* note 10, at 71. *But see* PRODUCT LIABILITY LAW, *supra* note 5, art. 6 (stating any claim in tort under the Japanese Civil Code exists notwithstanding the new law); *infra* notes 245-46 and accompanying text (stating the causes of action under tort principles still exist despite enactment of the new law).

148. Dauvergne, *supra* note 4, at 414; *see* Behrens & Raddock, *supra* note 1, at 689 (describing liability without fault as the most striking feature of the new law); Interview with Tomoyuki Tobisawa, *supra* note 45 (explaining in a product liability action, plaintiff must assert and prove: damage; the existence of a defect at the time when the product was delivered; and causation). No proof of fault or negligence is necessary. *Id. But see Cabinet Clears First Bill, supra* note 77 (pointing out other difficulties in proving liability remain).

149. Dauvergne, *supra* note 4, at 419.

150. Critics complain key issues remain undefined or unanswered. Bernstein & Fanning, *supra* note 10, at 689.

151. Behrens & Raddock, *supra* note 1, at 68; *see Cabinet Clears First Bill, supra* note 77 (claiming the bill neglects a variety of crucial factors).

152. Behrens & Raddock, *supra* note 1, at 689. A few critics complained the statute did little except appease manufacturers. Bernstein & Fanning, *supra* note 10, at 46; *see id.* at 47 (arguing Japanese consumer law remains unreformed).

A. Purpose

In Article 1, the new law states its purpose is to contribute to the stability and improvement of citizens' lives by establishing manufacturer liability for injuries when a consumer has suffered injury to life, body, or property caused by a defective product.[153] Additionally, the law intends to encourage sound development of the national economy by increasing foreign access to its markets.[154] The Japanese government hoped to reduce possible market barriers caused by differences within government and business culture by enacting a law foreigners could understand and harmonize with product liability laws in their own countries.[155] An officer of the Japanese Economic Planning Agency (EPA)[156] set out the objectives of the product liability law: (1) to clarify the issues at trial by delineating the factors of defect,[157] (2) to enable courts to determine whether a defect exists,[158] (3) to stimulate businesses and consumers to focus on the ultimate

---

153. PRODUCT LIABILITY LAW, *supra* note 5, art. 1; *see Responsibility, supra* note 68 (stating the thrust of the new law is to create basic standards with which to determine whether a product is defective, which is in the best interest of the consumer); Behrens & Raddock, *supra* note 1, at 690 (arguing the purpose of the new law is to protect victims by relieving them from the legal burden of proving fault); Milhaupt, *supra* note 45, at 62 (claiming the law attempts to bolster the position of consumers' by lowering obstacles to recovery). *But see Japan to Introduce Product Liability System*, JAPAN CHEM. WK., Nov. 4, 1993, *available in* LEXIS, Asiapc Library, Japan File [hereinafter *Japan to Introduce PL System*] (crediting consumer groups with claims that the law is not strict enough).

154. PRODUCT LIABILITY LAW, *supra* note 5, art. 1; *see Foreign Access, supra* note 123 (referring to a government report which claimed the strengthening of Japan's product liability law was a way to increase foreign access to its markets); Cohen & Martin, *supra* note 3, at 317-18 (claiming the Japanese have been responsive to Western complaints about barriers).

155. *See* Interview with Tomoyuki Tobisawa, *supra* note 45 (listing conformance with product liability systems of other countries as one objective of the new law); *infra* notes 156-62 and accompanying text (discussing other objectives of the new product liability law in Japan). Westerners, particularly Americans, seem convinced Japan unfairly discriminates against non-Japanese businesses, giving rise to frustration and anger about U.S. business attempts to expand into Japan. Schackmann, *supra* note 17, at 532-35.

156. A Mr. Sakamoto presented these objectives to the Commerce and Industry Committee of the Japanese House of Representatives. Interview with Tomoyuki Tobisawa, *supra* note 45.

157. *See* PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 2 (instructing courts to take into account the nature of the product, the ordinarily foreseeable manner of use, the time when the product was delivered, and other circumstances concerning the product when determining defect); *see also infra* notes 173-209 and accompanying text (discussing the definition of defect.)

158. These factors, delineated in connection with the definition of defect, provide the guidelines for the court in its determination of whether or not the manufacturer created a defective product. PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 2. *See infra* notes 185-209 (discussing how the courts are to analyze these factors in making their determination of defect).

goal of product safety,[159] (4) to facilitate dispute resolution out of court,[160] and (5) to conform the product liability system with those of other countries.[161] However, some commentators believe the goal of the new law is the full disclosure of product liability disputes in order to avoid the problems associated with the past law, rather than the objectives listed by the EPA.[162]

B. Definitions

1. Definition of "product"

Article 2 defines a product as any movable property manufactured or processed.[163] Government commentary[164] defines movable as all corporeal things excluding land and land fixtures.[165] Fixtures will be subject to the new law so long as they were movable at the time of delivery.[166] Blood products, such as plasma, plasma derivatives, and live vaccines, will be treated as products and will fall within the scope of the law.[167]

---

159. *See MITI Sets Up Organ to Enforce Product Liability Law*, JAPAN ECON. NEWSWIRE, Sept. 2, 1994, *available in* LEXIS, Asiapc Library, Japan File (offering greater legal protection against accidents and injuries as the purpose of the law). *But see Product Liability and Improved Safety*, 199 JEI REP., 1994 WL 2987563, *available in* WESTLAW, Japannews Database (arguing the introduction of a product liability law would have no effect on product safety since Japan's safety standards are already among the strictest in the world).

160. *See infra* notes 309-62 and accompanying notes (discussing Japan's reconcilement, conciliation, and chotei systems for dispute resolution).

161. Interview with Tomoyuki Tobisawa, *supra* note 45; *see* Sapsford, *supra* note 53 (proclaiming the new law symbolizes Prime Minister Morihiro Hosokawa's plans to make Japan's economy more like those of other nations).

162. *Product-Liability Law Should be Viewed as Challenge, Not Threat*, THE NIKKEI WKLY., July 24, 1995, at 6, *available in* LEXIS, Asiapc Library, Japan File. [Hereinafter *Challenge, Not Threat.*]

163. PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 1.

164. The Japanese MITI compiled and published a pamphlet of guidelines to help judges and the public work with the new law. *See supra* note 45 (referencing the MITI document, COMMENTARY ON THE PRODUCTS LIABILITY LAW, which was used by Tomoyuki Tobisawa when he answered questions about the new law for this comment).

165. Sato, *supra* note 123. Corporeal property consists of things that may be seen and handled and, if movable, are capable of manual transfer. BLACK'S, *supra* note 1, at 343. Real estate does not fall within the scope of the law because causes of action already exist under contract and tort laws, the useful life of real estate is long, and deterioration, maintenance, and repairs are expected. Behrens & Raddock, *supra* note 1, at n.112. *See Japan to Introduce PL System*, *supra* note 153 (predicting real estate would be excluded). The EEC Directive excludes real estate from its purview as well. Behrens & Raddock, *supra* note 1, at 691 n.112. *See generally* EEC DIRECTIVE, *supra* note 4 (explicitly excluding real estate from the scope of its product liability system).

166. Behrens & Raddock, *supra* note 1, at 692. This approach is also consistent with the EEC Directive. *Id. See generally* EEC DIRECTIVE, *supra* note 4 (including fixtures within the scope of the product liability system if they were movable at the time of delivery).

167. Behrens & Raddock, *supra* note 1, at 692. The rationale for holding manufacturers liable for defects in these items stems from the idea that blood products and vaccines derive from blood or viruses, and have been subjected to processing through the introduction of preservatives and anticoagulants. *Id.*

Claims involving noncorporeal things[168] are excluded from the scope of the law.[169] Other items excluded from the law include: unprocessed or unfinished goods;[170] agricultural, forestry and marine products; livestock; and computer software.[171] Software included as a part of, or as a component in, a "product" within the meaning of the law should be treated as a product.[172]

2. Definition of "defect"

Defining defect was an essential part of the bill, and constituted a major hurdle to those drafting the bill.[173] Consumer groups insisted the definition allow for latitude based on common sense rather than being too detailed or too narrow.[174] On the other hand, the Social Policy Council proposed a specific definition, following the European model.[175] As defined in the statute, a defect means there has been a lack of the normal safety expected from the product.[176] Proponents of the law hope courts will construe the definition of defect liberally in favor of the consumer.[177] Under a broad interpretation, a plaintiff could prove defect by demonstrating the product was used in an ordinary way and damage resulted.[178] However, critics of the law claim the definition is so narrow it represents only a marginal improvement over the former system.[179]

A precise definition of defect was omitted from the Product Liability Law, leaving Japanese judges with broad discretion to define what defect means with

---

168. Examples of noncorporeal things include electricity and other forms of energy, or services such as design and planning. *Id.* at 694.

169. *Id.*

170. The judgment of whether a product is processed or unprocessed, finished or unfinished, is based on relevant circumstances and how the product is commonly viewed. *Id.* at 694 n.119.

171. *Id.* at 694-95.

172. *Id.* at 695. Software built into the control system of a vehicle, for example, would qualify as a component part and would fall within the purview of the law if defective. *Id.*

173. *Editorial*, *supra* note 142.

174. *Id.*

175. Dauvergne, *supra* note 4, at 413.

176. PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para 2; *see* Dauvergne, *supra* note 4, at 414 (defining defect in light of these same factors); *infra* notes 185-209 and accompanying text (discussing the nature of the product, the usually foreseeable manner of its use, the time when the manufacturer delivered the product, and other circumstances concerning the product); *cf.* RESTATEMENT (THIRD) OF PRODUCTS LIABILITY, (1993) (Preliminary Draft No. 1) (providing recent changes suggested for U.S. product liability law, including a functional rather than doctrinal definition of defect).

177. Dauvergne, *supra* note 4, at 415 n.57.

178. *Id.* at 415.

179. Sapsford, *supra* note 53. In addition, the definition does not squarely address the liability of manufacturers of inherently unsafe products, such as an ordinary kitchen knife. Behrens & Raddock, *supra* note 1, at 698.

previous cases serving as precedent.[180] Because the definition of defect parallels that of the EEC Directive,[181] Japanese courts will likely look to European court decisions for guidance.[182] Central to the imposition of liability, allegations of defect must be specific and proven beyond a reasonable doubt.[183] Although only vaguely defined in the statute, several factors were included in the definition of defect to make determinations of defect easier.[184] These factors encompass the circumstances affecting the nature of the product,[185] the usually foreseeable manner

---

180. *Responsibility, supra* note 68; *Final Version of Product Liability Law Drafted*, DAILY NEWS TOKYO FIN. WIRE, Apr. 1, 1994, at 1, *available in* LEXIS, Asiapc Library, Japan File. *But see Japan Law Digest, in* MARTINDALE-HUBBELL INT'L LAW DIGEST, JPN-1, JPN-12 [hereinafter MARTINDALE-HUBBELL] (stating judicial decisions are persuasive but not binding as precedent). However, due to the U.S. influence on Japanese practice, case law is accorded more weight now than in previous years. Reynolds & Flores, *supra* note 31, at III Japan 5. Just as under the previous system, claims under the Product Liability Law can be broken into three categories: (1) manufacturer defect stemming from production; (2) failure to adequately warn; and (3) design defect. Interview with Tomoyuki Tobisawa, *supra* note 45. *See* Cohen & Martin, *supra* note 3, at 329 (confirming the Japanese conception of defective products may be articulated as defective in design, in manufacture, or in the sufficiency of warnings). However, the text of the Japanese law does not delineate these types of defect. Interview with Tomoyuki Tobisawa, *supra* note 45. *See generally* PROSSER & KEETON, *supra* note 16, Ch. 17, § 96 (discussing product liability for physical harm and dividing the discussion into three primary sections: negligence in creating or failing to discover a flaw; negligence in failure to warn or failure to adequately warn; and negligence in the sale of a defectively designed product); *cf.* PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 2 (defining defect generally). *But see* Bernstein & Fanning, *supra* note 10, at 72 (arguing centralizing products liability law may actually take away opportunities for trial judges).

181. *See supra* note 4 (providing the citation to the EEC Directive).

182. Dauvergne, *supra* note 4, at 415.

183. Behrens & Raddock, *supra* note 1, at 696. The new law requires an injured party to show clearly where or what part of the product is defective. *Id.* at 696 n.124. *See* Kenichi Tsuruoka, *Proposed Product Liability Law as Potent as Aspirin*, THE DAILY YOMIURI, Nov. 16, 1993, at 7, *available in* LEXIS, Asiapc Library, Japan File (explaining the consumer would have to "pinpoint" which part of the product was defective). In the United States, the burden of proof for civil matters, such as product liability cases, is by a preponderance of the evidence. Behrens & Raddock, *supra* note 1, at 696 n.125.

184. Mr. Kiyokama, an officer of the MITI, explained the factors at the Commerce and Industry Committees of both the House of Representatives and the House of Councillors. Interview with Tomoyuki Tobisawa, *supra* note 45. *See supra* notes 153-62 and accompanying text (setting forth the purposes of the law and the reasons for including the additional factors in the statute).

185. PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 2; *see Japan: Japan Government Endorses Product Liability Bill*, Reuter News Serv. - Far East, REUTER ECON. NEWS, Apr. 12, 1994, *available in* LEXIS, Asiapc Library, Japan File [hereinafter *Government Endorses PL Bill*] (referring to the three criteria required to prove a defect, including a product's characteristics); Dauvergne, *supra* note 4, at 414 (using the phrase "specific characteristics"); Behrens & Raddock, *supra* note 1, at 696-97 (providing the factors to be considered when defining defect, including the characteristics of the product); *infra* notes 189-95 and accompanying text (discussing the considerations for analyzing the nature of the product).

of its use,[186] the time when the manufacturer delivered the product,[187] and other circumstances concerning the product.[188]

When analyzing the first factor, the nature of a product, courts must direct their attention to several different considerations.[189] These considerations include: (1) the appearance of the product, (2) the benefit or usefulness of the product, (3) the cost-effectiveness of the product, (4) the probability and degree of injury, and (5) the normal lifespan of the product.[190] First, the appearance of the product requires analysis of whether a consumer can appreciate the inherent danger of a product and whether the design or appearance helps prevent accidents.[191] Second, the court assesses the benefit or usefulness of the product as it compares to the danger posed by the product.[192] Next, by comparing the product to the safety standards of similarly priced products and reasonably priced substitutes, the court determines the cost-effectiveness of a product.[193] Additionally, courts will consider the probability and degree of injury posed by a product.[194] Finally, the court

---

186. PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 2; *see Government Endorses PL Bill*, *supra* note 185 (referring to the three criteria required to prove a defect, including the way in which the product was used); Dauvergne, *supra* note 4, at 414 (discussing the product's "ordinary use"); Behrens & Raddock, *supra* note 1, at 696-97 (providing the factors to be considered when defining defect, including the use of the product which could ordinarily be expected); *infra* notes 196-98 and accompanying text (discussing the considerations for analyzing the usually foreseeable manner of its use).

187. PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 2; *see Government Endorses PL Bill*, *supra* note 185 (referring to the three criteria required to prove a defect, including the timing of a product's marketing); Dauvergne, *supra* note 4, at 414 (referencing the time the product was put on the market); Behrens & Raddock, *supra* note 1, at 696-97 (providing the factors to be considered when defining defect, including the time the manufacturer delivered the product); *infra* notes 199-203 and accompanying text (discussing the considerations for analyzing the time when the manufacturer delivered the product to the market).

188. PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 2; *see Dauvergne,* supra note 4, at 414 (broadening the phrase by including *any* other circumstances) (emphasis added); Behrens & Raddock, *supra* note 1, at 696-97 (providing the factors to be considered when defining defect, including the other circumstances relating to the product).

189. Interview with Tomoyuki Tobisawa, *supra* note 45. For example, when contemplating a defect in an automobile, Japanese courts will balance the utility of the product against the danger of the product. *Id.* Similarly, when the court makes a finding that a pharmaceutical product is defective, it examines the adequacy of any warnings or directions to prevent injury when it is impossible to completely eliminate the danger. *Id. See* PRODUCT LIABILITY LAW. *supra* note 5, art. 2, para. 2 (commanding consideration of the nature of the product when determining defect, but failing to include an explanation of what is meant by the "nature of the product").

190. Behrens & Raddock, *supra* note 1, at n.126; *cf.* Interview with Tomoyuki Tobisawa, *supra* note 45 (explaining courts will weigh different factors when determining whether or not the nature of the product creates a defect); PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 2 (commanding consideration of the nature of the product when determining defect, but failing to explain what "nature of the product" means).

191. Behrens & Raddock, *supra* note 1, at n.126; *cf.* Interview with Tomoyuki Tobisawa, *supra* note 45 (listing the possibility of an accident as one factor judges will consider when determining defect).

192. Behrens & Raddock, *supra* note 1, at 696 n.126.

193. *Id.; cf.* Interview with Tomoyuki Tobisawa, *supra* note 45 (listing the comparison of the degree of a product's safety with that of a similar product as a factor judges will consider when determining defect).

194. Behrens & Raddock, *supra* note 1, at 696 n.126.

uses the normal lifespan of the product to aid in its determination of the existence of a defect.[195]

Under the second factor used to determine defect, the ordinarily foreseeable manner of use of a product includes reasonable uses and the ability of consumers to prevent the injury.[196] For example, when a licensed user or consumer uses the product in an unsafe, reckless or unauthorized manner and is then injured, the court may find the injury was not caused by a product defect.[197] Thus, plaintiffs must show the defects were not caused by their own improper use.[198]

Under the third factor of the defect definition, courts must determine the time when the product was delivered to the market in order to aid in their determination of product defect.[199] The degree of safety demanded by society at the time the product was delivered will play an important role in the court's determination.[200] Additionally, safety regulations in place when the product was marketed must be analyzed to make certain the product met legal safety requirements.[201] Next, courts look to the state of technology to assess defect.[202] Finally, the reasonable possibility of adopting a substitute design will help courts decide whether a product was defective.[203]

Finally, the fourth factor of determining defect allows a court to consider any other factors unique to a product.[204] For example, when courts determine whether blood products and vaccines are defective under the new law they must focus on three special considerations unique to these types of products.[205] First, courts must

---

195. *Id.; cf.* Interview with Tomoyuki Tobisawa, *supra* note 45 (confirming judges should consider the degree of injury and the ordinary useful life of the product when determining whether or not a defect exists).

196. Behrens & Raddock, *supra* note 1, at 696 n.127; *cf.* Interview with Tomoyuki Tobisawa, *supra* note 45 (listing the possibility or probability a consumer will prevent an accident as a consideration for the court when determining defect); PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 2 (commanding consideration of the ordinarily foreseeable manner of use when determining defect, but failing to explain what "ordinarily foreseeable manner of use" means).

197. Interview with Tomoyuki Tobisawa, *supra* note 45; *Japan's Product Liability Law Takes Effect*, EAST ASIAN EXEC. REP., Oct. 15, 1995, *available in* LEXIS, Asiapc Library, Japan File.

198. *Panel Opts for Maker-Friendly Product Liability Law*, JAPAN ECON. NEWSWIRE, Nov. 5, 1993, *available in* LEXIS, Asiapc Library, Japan File. Manufacturers are not liable for unforeseeable uses of their products. *Id.*

199. Behrens & Raddock, *supra* note 1, at 696-97. The new law applies in any action involving a product which left the manufacturer's control after July 1, 1995. *Id.* at 690.

200. *Id.* at 697 n.128.

201. *See id.* (including safety regulations as a factor to be considered at the time of delivery).

202. *Id.*

203. *Id.; cf.* Interview with Tomoyuki Tobisawa, *supra* note 45 (stating courts will analyze the degree of safety which society reasonably expected at the time the product was sold and the possibility of another design to eliminate the danger at a reasonable cost).

204. *Id.* Operating instructions and customer warnings may fall into this category. Behrens & Raddock, *supra* note 1, at 697. *Cf.* PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 2 (commanding consideration of other circumstances surrounding the product when determining defect, but failing to explain what "other circumstances" means).

205. Behrens & Raddock, *supra* note 1, at 693; *see supra* note 167 and accompanying text (including blood products and live vaccines within the scope of the new law).

consider when blood products and live vaccines are used.[206] Typically, these products are used when someone's life is endangered and there are no substitute medical treatments.[207] Thus, in emergency situations these products are extremely useful. Second, courts will consider whether the blood product or live vaccine is accompanied by a written warning listing hazards which may exist, including side effects, immunological reactions, and contamination by viruses.[208] Lastly, courts should consider whether it is technologically impossible to completely eliminate all risks from blood products and live vaccines.[209]

3. *Definition of "manufacturer, etc."*

The definition of manufacturer[210] expands the number of persons who can be held liable for defective products to help ensure a plaintiff will be able to find a defendant with sufficient resources to pay damages.[211] Manufacturer has three alternative meanings in order to capture those persons and entities down the chain of product distribution who profit from the product's sale to consumers.[212] First, a manufacturer is any person who manufactured, processed, or imported the product.[213] Thus, both the maker of the product and the maker of parts are liable for damages.[214] Second, any person who places some unique marking, logo or other feature on the product, which would cause him[215] to be mistaken as the

---

206. Behrens & Raddock, *supra* note 1, at 693.

207. *Id.*

208. *Id.*

209. *Id.* Examples of side effects and injuries caused by contaminated blood products which constitute a "defect" under the law include: where a safe alternative becomes practical and the use of blood products is no longer necessary; where the blood product is not accompanied by a warning about risks; where new technologies or methods are developed and come into general use but the manufacturer continues to rely on old technology; and where the presence of contaminants could have been detected or eliminated, but was not because of human error. *Id.* at 693 n.116.

210. "Manufacturer, etc." is the term used in the law. *See* PRODUCT LIABILITY LAW, *supra* note 5, art. 2 (setting forth the definition of "manufacturer, etc."). The definition refers to manufacturers, distributors, and those who present themselves as manufacturers because of a logo or tradename affixed to the product. *Id.*

211. Dauvergne, *supra* note 4, at 415; *see* PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 3 (including, in the definition of manufacturer, any person who manufactured, processed, imported, marked the product with a name or other feature in a manner mistakable for the manufacturer, and any person who may be recognized as the manufacturer-in-fact). Some commentators argue broadening the definition to include more potential liable parties was an attempt to avoid problems experienced in the United States with adequately identifying defendants. Dauvergne, *supra* note 4, at n.60.

212. *See* NEW PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 3.

213. *Id.*, art. 2, para. 3, sec. 1; *see* Dauvergne, *supra* note 4, at 414 (describing manufacturers as producers, processors or importers of products); Behrens & Raddock, *supra* note 1, at 690 n.107 (defining "manufacturer and the like" as any person who produces, processes or imports the product as business).

214. *FTC Warns Against Abuse of Product Liability Law*, THE NIKKEI WKLY., June 12, 1995, at 2, *available in* LEXIS, Asiapc Library, Japan File.

215. For the sake of easier reading, the author uses the masculine gender when analyzing the specific provisions of the law because the law itself uses the masculine gender. *See* PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 3 (containing the words "him" and "himself" in the text of the law).

product's manufacturer, is considered a manufacturer for the purpose of liability for defective products.[216] Finally, any person who puts unique markings or logos on a product may be recognized as its manufacturer-in-fact for matters concerning manufacturing, processing, importation, sales, and other circumstances.[217]

C. Product Liability

The Product Liability Law applies to any civil action for damages resulting from human death, personal injury or property damage caused by a defective product.[218] In Article 3, the Product Liability Law simply states a manufacturer is liable for damages when someone's life, body, or property is injured by a defect in its product.[219] Liability for harm is not intended to be limited solely to consumers, but may include third parties.[220] The law places limitations on injured consumers by requiring that they suffer personal injury or injury to property other than the defective product itself.[221] Corporations may sue under the new law for damages to business property caused by a product defect.[222]

D. Exemptions

Article 4 provides exemptions from manufacturer liability even if the plaintiff can prove a product is defective.[223] One exemption Japan recognizes is a state-of-the-art defense similar to that in the United States.[224] Sometimes called the

---

216. PRODUCT LIABILITY LAW, *supra note* 5, art. 2, para. 3, sec. 2. The statute refers to this category as a "representation of name, etc." *Id. See* Dauvergne, *supra* note 4, at 414 (including persons holding themselves out as manufacturers by affixing their name or other representation to the product which would cause consumers to believe they are the actual manufacturer within the definition of manufacturer); Behrens & Raddock, *supra* note 1, at 691 n.109 (describing the second definition as any person who, by putting his name, tradename or trademark on a product, either holds himself out as, or could be mistaken for, the product's manufacturer).

217. PRODUCT LIABILITY LAW, *supra* note 5, art. 2, para. 3, sec. 3; *see* Dauvergne, *supra* note 4, at 414 (describing this third category of manufacturer as any other person who could be considered a manufacturer given the circumstances surrounding the manufacture, process, distribution or importation of the product); Behrens & Raddock, *supra* note 1, at n.109 (identifying the third category as any person who may be recognized as a manufacturer-in-fact in light of the relevant circumstances).

218. Behrens & Raddock, *supra* note 1, at 699.

219. PRODUCT LIABILITY LAW, *supra* note 5, art. 3.

220. Behrens & Raddock, *supra* note 1, at 699.

221. PRODUCT LIABILITY LAW, *supra* note 5, art. 3. Persons alleging damage to the product itself are limited to the traditional tort and contract provisions of the Civil Code. Behrens & Raddock, *supra* note 1, at 699. Claims for mental distress, without physical injury, are not provided for under the statute. *Id.* at 699 n.139.

222. *Id.* at 699. It appears that recovery of consequential loss, such as lost profits suffered by a business because of damage to property, is permitted if a reasonable causal relationship can be established between the defect and the consequential loss. *Id.* at 700.

223. Dauvergne, *supra* note 4, at 414.

224. PRODUCT LIABILITY LAW, *supra* note 5, art. 4, para. 1; Klein, *supra* note 6, at 119; *see* Behrens & Raddock, *supra* note 1, at 701 (stating this provision is consistent with the majority of U.S. case law).

"development risk" defense, the state-of-the-art defense provides no liability for damages resulting from defects which were not foreseeable given the state of the technological knowledge at the time the product was put on the market.[225] Liability does not attach to a manufacturer if it can prove the impossibility of being able to discover the defect.[226]

The new law also recognizes a design defect exemption.[227] This "component" defense allows a manufacturer to incur no liability if the product was used as a component in other products.[228] Provided the defect occurred solely because of design specifications of the finished product, and the component manufacturer was not negligent in its manufacturing process, no liability will attach.[229] Manufacturers of components and raw materials included as fixtures in real estate are not subject to this exception because real estate is not classified as a product under the law.[230]

Under previous Japanese law, Japan had abandoned sovereign immunity in compensation suits for damages caused by the state or public officials.[231] Thus, the government could be named as a co-defendant when products were manufactured according to government regulations.[232] Requiring the government to defend allegations of state negligence in the certification of products which were allegedly unfit for consumer use allowed manufacturers to avoid liability.[233] However, Japan's new Product Liability Law does not recognize a "government standards" defense.[234] The government does not fall within the purview of the new law and cannot be named as a defendant.[235]

---

225. PRODUCT LIABILITY LAW, *supra* note 5, art. 4, para. 1; Dauvergne, *supra* note 4, at 414; *see Japan to Introduce PL System*, *supra* note 158 (confirming the law exempts companies from liability if the defect could not be predicted at the time of sale).

226. Behrens & Raddock, *supra* note 1, at 700.

227. *See* PRODUCT LIABILITY LAW, *supra* note 5, art. 4, para. 2 (stating the manufacturer shall not be liable if the defect results from specification of another product).

228. *Id.*; Dauvergne, *supra* note 4, at 414; Behrens & Raddock, *supra* note 1, at 702.

229. PRODUCT LIABILITY LAW, *supra* note 5, art. 4, para. 2; Dauvergne, *supra* note 4, at 414; Behrens & Raddock, *supra* note 1, at 702.

230. Behrens & Raddock, *supra* note 1, at 701 n.147; *see supra* note 165 and accompanying text (excluding real estate from the definition of product, which keeps it outside the purview of the law).

231. Behrens & Raddock, *supra* note 1, at 704 n.160.

232. Dauvergne, *supra* note 4, at 416; Ponte, *supra* note 10, at 669; *see* Mackey, *supra* note 18, at 168 (stating Japan as a state could be sued like any other private person); Orban, *supra* note 2, at 359 (confirming the government has been joined as a defendant in various cases where state agencies tested, standardized, or regulated the products). The government's liability is codified under the State Compensation Law. Ponte, *supra* note 10, at n.213.

233. Behrens & Raddock, *supra* note 1, at 681 n.64.

234. Klein, *supra* note 6, at 119. The U.S. government standards defense allows manufacturers to escape liability if they produced their products in accordance with government regulations or specifications. Boyle v. United Technologies, Inc., 487 U.S. 500, 512-13 (1988).

235. Dauvergne, *supra* note 4, at 416. This is contrary to previous law. *See supra* notes 231-32 and accompanying text (confirming prior to the new law the government could be named as a co-defendant).

Additional defenses will probably develop under the new law because of its brevity.[236] For example, a manufacturer will avoid liability if it can prove it did not place the product in circulation or the defect arose after the product was already in circulation.[237] When the defect resulted from compliance with a legal requirement or regulation, no liability will attach to the manufacturer.[238] Lastly, if a plaintiff fails to bring a claim within the statutory period, a manufacturer can defend on that basis.

E. Time Limitations

Injured consumers have a limited amount of time within which to file claims against the manufacturer of a defective product.[239] Under Article 5, the right to file a claim expires three years after the victim becomes aware of the injury and of the identity of all liable manufacturers.[240] Additionally, a ten-year statutory period exists for latent defects.[241] This provision benefits Japanese manufacturers by reducing costs associated with defending stale claims.[242] To offset this manufacturers' benefit, the law contains special provisions for toxic harms.[243] Claims for injuries caused by substances which are harmful to human health when they remain or accumulate in the body may also be filed ten years from the time when the damage becomes apparent.[244]

---

236. Dauvergne, *supra* note 4, at 415; *see supra* note 152 and accompanying text (describing the intentional brevity and vagueness in the text of the law).

237. Dauvergne, *supra* note 4, at 410 n.39. If the product was not manufactured commercially the manufacturer can probably avoid liability. *Id.*

238. *See supra* note 201 and accompanying text (discussing the consideration of safety regulations when determining the existence of a defect).

239. PRODUCT LIABILITY LAW, *supra* note 5, art. 5; *see* Dauvergne, *supra* note 4, at 414 (explaining the right to file a claim expires three years after the defect and damages have been discovered, and claimants must file within 10 years for latent defects).

240. PRODUCT LIABILITY LAW, *supra* note 5, art. 5, para. 1; *see* Dauvergne, *supra* note 4, at 414 (confirming the existence of a three year limitation period); Behrens & Raddock, *supra* note 1, at 701 (confirming that time begins to run when the injured person or his representative becomes aware of the damage and the identity of the person who would be liable). No commentators address whether the standard includes when the consumer *should* have known of the defect or the damages. However the EEC Directive, on which the Japanese law was based, includes when the plaintiff should reasonably have become aware of the damage. *Id.* at 701 n.149; EEC DIRECTIVE, *supra* note 4, art. 10.

241. PRODUCT LIABILITY LAW, *supra* note 5, art. 5, para. 1. The period for the 10-year statute of repose is calculated from the time the damage arises. *Id.*, art. 5, para. 2.

242. Behrens & Raddock, *supra* note 1, at 702.

243. PRODUCT LIABILITY LAW, *supra* note 5, art. 5, para. 2; Behrens & Raddock, *supra* note 1, at 702.

244. PRODUCT LIABILITY LAW, *supra* note 5, art. 5, para. 2; Dauvergne, *supra* note 4, at 414; Behrens & Raddock, *supra* note 1, at 702 n.152. Neither the law nor the government commentary specifically delineates examples of harmful substances. Presumably, harmful substances would be asbestos or other carcinogens.

F. Remaining Provisions

The remaining provision of the law, Article 6, provides that any claim in tort under the Japanese Civil Code still exists.[245] The new law supplements existing Japanese law, rather than supersedes it.[246] Except for claims under the Toxic Substances Act, the new law applies to all claims of defect.[247] Thus, plaintiffs still may pursue product liability actions under Article 415 or Article 709 of the Japanese Civil Code.

In short, the new Product Liability Law reflects government acknowledgement of the need for consumer protection from defective products for the first time in Japan's history.[248] Previously, Japanese plaintiffs could not recover compensation in product liability cases unless they could prove the manufacturer was negligent.[249] Under the new law consumers need only prove a product defect, damages, and causation in order to hold the manufacturer liable.[250]

While based on both the EEC Directive and U.S. law, Japan's product liability law contains fewer substantive provisions.[251] The law's brevity and vagueness show the difficulty Japanese consumer groups and industry experienced when attempting to reach an agreement on substantive issues.[252] As a result, the law states its purpose,[253] defines only three terms,[254] provides exemptions,[255] and lists time limitations.[256]

---

245. PRODUCT LIABILITY LAW, *supra* note 5, art. 6; *see* Dauvergne, *supra* note 4, at 414 (confirming consumers may still sue under contract and tort provisions).

246. PRODUCT LIABILITY LAW, *supra* note 5, art. 6.

247. *Id.*

248. *See supra* note 145 and accompanying text (confirming the government wanted to ensure consumer protection); note 146 and accompanying text (calling this law the first of its kind in Japanese history).

249. *See supra* note 68 and accompanying text (explaining the burdens of proof for plaintiffs under the Japanese Civil Code).

250. *See supra* note 148 and accompanying text (providing the requirements for a product liability claim under the new law).

251. *See supra* note 150 and accompanying text (claiming the Japanese law is short and contains fewer substantive provisions than either the EEC Directive or U.S. law).

252. *See supra* note 152 and accompanying text (attesting to the difficulties various groups had in reaching consensus on substantive provisions of the law).

253. *See supra* notes 153-62 and accompanying text (analyzing the law's purpose).

254. *See supra* notes 163-217 and accompanying text (discussing the definitions of product, defect, and manufacturer under the new law).

255. *See supra* notes 223-38 and accompanying text (commenting on the various defenses apparently available under the new law).

256. *See supra* notes 239-44 and accompanying text (offering the time limitations placed on plaintiffs when filing claims under the new law).

V. IMPLICATIONS FOR FOREIGN LITIGANTS

While the Japanese do not expect foreigners to understand or adopt their customs,[257] foreign litigants still must abide by Japanese judicial procedures and law.[258] Specific attention must be paid to administrative guidance[259] rather than strictly to formal law.[260] Many foreigners, particularly those from the West, do not fully understand the language and culture of the Japanese people[261] and how they relate to the formation of the Japanese legal consciousness.[262] For example, formal regulation barriers and informal business culture barriers raise obstacles in Japan for businesses accustomed to Western practices.[263] Additionally, the typical civil proceeding in Japan consists of a series of isolated meetings and communications between counsel and the judge, instead of public hearings and other trial proceedings familiar in the common law system.[264] Westerners tend to see the similarities between Japanese legal concepts and their own, and tend to ignore the differences in application.[265]

According to the Japanese EPA, product liability claims should be filed initially in a prefectural consumer center.[266] The consumer center will attempt to

---

257. WALDEN COUNTRY REPORTS, Japan (1995), *available in* LEXIS, Asiapc Library, Japan File.

258. Mackey, *supra* note 18, at 133. Japan follows a statist tradition, with almost unfettered prosecutorial discretion and, in the criminal context, a conviction rate of 99.8%. Bernstein & Fanning, *supra* note 10, at 64.

259. Administrative guidance combines the prescriptive and coercive functions of government agencies into one activity. Broiles, *supra* note 21, at 129. Guidance is provided by a specific administrative agency, which develops expertise in a particular field. *Id.* Because guidance does not have a legal character it is considered voluntary. *Id.* Some Japanese legal scholars have criticized administrative guidance as unfair and arbitrary. *Id.* at 130. The agency exercises influence over the parties' concurrence through the expression of expectations and wishes. *Id.* In sum, administrative guidance is the process of governing in Japan. *Id.* at 131.

260. Lansing & Wechselblatt, *supra* note 12, at 647.

261. *See* Schackmann, *supra* note 17, at 532 (explaining a majority of U.S. citizens have little knowledge of Japanese business practices or social customs).

262. Lansing & Wechselblatt, *supra* note 12, at 647. This legal consciousness resulted in a legal system that has never developed procedural and remedial incentives to litigate. Behrens & Raddock, *supra* note 1, at 705. *See supra* notes 44-56 and accompanying notes (discussing the traditional disincentives to litigation in Japan).

263. Schackmann, *supra* note 17, at 535.

264. Mackey, *supra* note 18, at 150; *see supra* note 53 (explaining the typical trial consists of a series of meetings, once a month, over a period of years).

265. Lansing & Wechselblatt, *supra* note 12, at 651. To be sure, foreign litigants may wish to contact the embassies in Japan for guidance and an explanation of procedures. The U.S. Embassy in Japan is located at 10-1 Akasaka 1-chome Minato-ku, Tokyo 107. *Country: Japan*, KCWD/KALEIDOSCOPE, (ABC-Clio, Inc., 1995), *available in* LEXIS, Asiapc Library, Profil File. The embassy's telephone number is (03) 3224-5000 and telex is 22118. *Id.* The Canadian Embassy is located at 3-38 Akasaka 7-chome, Minato-ku, Tokyo 107. *Id.* That telephone number is (03) 3408-2101 and telex is 22218. *Id.*

266. *EPA Releases Guidelines on Product Liability Law*, THE NIKKEI WKLY., June 26, 1995, *available in* LEXIS, Asiapc Library, Japan File [hereinafter *EPA Releases Guidelines*]. A prefecture is a district governed by a chief officer or magistrate, and Japan has 47 prefectures. WEBSTER'S, *supra* note 92, at 1787; Redden, *supra* note 30, § 2.1(A). Consumer centers are official response centers designed to conciliate grievances, rather than set precedents. Bernstein & Fanning, *supra* note 10, at 70. They are usually industry-specific organizations. *Id.*

mediate the dispute between the individual and the Japanese manufacturer.[267] If the problem is not resolved, the center will refer the case to a settlement committee composed of attorneys, former judges, and specialists in the area of the particular product's manufacture.[268]

A. Procedural Barriers

Although the enactment of the new Product Liability Law eases the burden of proof for plaintiffs, significant procedural barriers still exist in Japan's legal system.[269] These barriers exist largely because Japan does not have a fact-finding or "discovery" system like most common law countries.[270] If a claim makes it to a Japanese court, restrictions on access to information present the most difficult hurdle for a plaintiff.[271] For example, Japanese law does not provide a device to discover the testimony of parties or witnesses comparable to a deposition.[272] Likewise, interrogatories[273] are not used in Japan.[274] Additionally, prefectural governments and product liability centers promise confidentiality to encourage manufacturers to join discussions about defective products.[275] This confidentiality limits the public's access to important information about defective products.[276]

---

267. *EPA Releases Guidelines, supra* note 266. *But see* Shinmura, *supra* note 77 (indicating a survey by the EPA in January 1995 found that only two of the fifty-nine prefectural committees actually held sessions investigating possible product liability cases).

268. *EPA Releases Guidelines, supra* note 266. These settlement committees are critical since jury trials are not available in civil law countries. Scheinwold, *supra* note 13, at 257.

269. *See supra* note 148 and accompanying text (explaining plaintiffs no longer have to prove the manufacturers' negligence to recover for injuries caused by a defective product).

270. *See supra* note 79 and accompanying text (providing comments about Japan's lack of discovery system). Japan did not sign the Hague Convention on Evidence so the Convention rules do not apply. Mackey, *supra* note 18, at 134. The Hague Convention tries to bridge the differences between common law and civil law approaches to evidence when taken abroad. *Id.* at 156. It also sets the minimum standards to which all contracting states agree to comply while preserving all domestic laws. *Id.* Until Japan ratifies the treaty, attorneys cannot use the Convention for obtaining evidence in Japan. *Id.*

271. Cohen & Martin, *supra* note 3, at 340.

272. Behrens & Raddock, *supra* note 1, at 706-07. A deposition is a pretrial discovery device by which one party (through his or her attorney) asks oral questions of the other party or of a witness for the other party. BLACK'S, *supra* note 1, at 440. Depositions are usually conducted under oath outside of a courtroom, and a verbatim transcript is made. *Id. See generally* FED. R. CIV. P., 30 (defining depositions and describing the procedures for the use of depositions in U.S. federal courts).

273. Black's Law Dictionary defines interrogatories as a pretrial discovery device consisting of a series of written questions about the case submitted by one party to the other party or witness. BLACK'S, *supra* note 1, at 819. The answers to interrogatories are usually given under oath. *Id. See generally* FED. R. CIV. P., 33 (defining interrogatories and describing the procedures for using interrogatories in U.S. federal courts).

274. Ottley & Ottley, *supra* note 35, at 39; Behrens & Raddock, *supra* note 1, at 706; *see* T. HATTORI & D. HENDERSON, CIVIL PROCEDURE IN JAPAN § 6.03 (1983), for a discussion of discovery procedures available to Japanese courts before trial.

275. *Access Crucial, supra* note 53.

276. *Id.*

Exchange of documents occurs but the practice is limited.[277] Requests for document production must be made by motion to the court.[278] The motion must identify the document sought with particularity, summarize its contents, identify the holder of the document, specify facts to be proven, and identify which of three specified categories applies.[279] The first category allows production of documents when the possessing party has referred to them in the litigation.[280] The second category permits exchange where the party with the burden of proof has a legal right to demand the delivery or inspection of the documents.[281] The last category allows production of documents when the documents have been prepared for the benefit of the other party.[282] This category also permits the production of documents if they relate to a legal relationship between the party and the holder of the document.[283] The holder of documentary evidence need not always turn over documents sought by the opposing party.[284] For example, a plaintiff in a product liability suit cannot force a defendant company to produce an internal report concerning the dangerous nature of the product because such a report would not ordinarily fall within any of the three specified categories.[285]

Apart from the office of the public prosecutor, only the Japanese court has the authority to demand the production of documents.[286] The judge determines the scope of evidence to be procured.[287] Once the Japanese court exercises its authority, substantial non-disclosure privileges make obtaining critical pre-trial evidence expensive and potentially useless since business secrets are fiercely

---

277. Behrens & Raddock, *supra* note 1, at 707. *But see id.* at n.177 (noting a draft revision of the Japanese Code of Civil Procedure provides for enhanced obligations to produce documents, procedures similar to interrogatories and depositions but compliance with these provisions would be strictly voluntary and penalties would only apply if false information was provided).

278. Behrens & Raddock, *supra* note 1, at 708; Cohen & Martin, *supra* note 3, at 339.

279. Behrens & Raddock, *supra* note 1, at 708.

280. *Id.* at 707.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 707-08. Likewise, a medical doctor has no obligation to turn over his or her patient records to a third party. *Id.* at 708. The vagueness of these three categories has led to numerous discovery disputes. *Id.* at 707 n.179. A draft revision of the Japanese Code of Civil Procedure likely to become law enhances obligations to produce documents and incorporates procedures similar to interrogatories, but compliance with these procedures would be strictly voluntary, and penalties would apply only if a party provides false information. *Id.* at 706 n.177.

286. Cohen & Martin, *supra* note 3, at 339. Prefectural governments and product liability centers set up by industry promise confidentiality, thus making public access to important information difficult. *Access Crucial, supra* note 53.

287. Mackey, *supra* note 18, at 151.

protected.[288] Trying to pursue litigation without this information is futile.[289] The new law fails to give consumers any tools to force companies to disclose their internal information.[290] Thus, plaintiffs' attempts to argue against a development risk or flawless component defense[291] will continue to be hindered by a lack of access to manufacturer records.[292] Unless existing laws regarding pre-trial discovery are changed, Japanese product liability plaintiffs will still face considerable obstacles when pursuing their claims.[293]

B. Presumptions

Prior to enactment of the new law, plaintiffs did not have any presumptions in their favor for product liability claims.[294] In a product liability case just months prior to the new law's passage,[295] the Osaka District Court discussed basic principles contained in the law, including a presumption of negligence against the manufacturer.[296] The ruling was widely regarded as a major breakthrough because presiding Judge Takeshi Mizuno held the manufacturer should be responsible unless it could prove its product was not defective.[297] Such a decision was a

---

288. Cohen & Martin, *supra* note 3, at 339-40.

289. *Id.* Japan recognizes broad protection from discovery concerning documents that contain technical or commercially sensitive information. Behrens & Raddock, *supra* note 1, at 708. For example, if a defective product causes a fire, lawyers cannot obtain a copy of the report declaring the cause of the fire. *Access Crucial, supra* note 53. Without the report, filing a lawsuit is impossible. *Id.* The new law does nothing to address this bureaucratic problem.

290. *Cabinet Clears First Bill, supra* note 77; *see also Responsibility, supra* note 68 (reiterating as long as product information available from manufacturers is limited, it will be difficult for plaintiffs to prove a defect). *But see* Dauvergne, *supra* note 4, at 405 (arguing the law will indirectly make more information available to consumers). *See generally* PRODUCT LIABILITY LAW, *supra* note 5 (stating where there are no provisions for changing any of the procedural hurdles inherent in the Japanese civil system).

291. *See supra* notes 224-30 and accompanying text (discussing the development risk and flawless component defenses).

292. Dauvergne, *supra* note 4, at 415.

293. Behrens & Raddock, *supra* note 1, at 708.

294. *See supra* note 68 and accompanying text (explaining prior to the new law, plaintiffs' had the burden of proof beyond a reasonable doubt).

295. Taishi Kensetsu Kogyo K.K. v. Matsushita Denki Sangyo K.K., 842 HANTA 69 (Osaka Dist. Ct., Mar. 29, 1994). The Osaka District court ordered the Matsushita Electric Industrial Company to pay 4.4 million yen (US$42,000) in damages for a fire caused by a faulty mechanism in a television set manufactured by Matsushita. *Product Liability Ruling Saddles Makers with Burden of Proof; Decision Hailed as Step Toward 'Fairer' Consumer Protection Laws*, THE NIKKEI WKLY., Apr. 4, 1994, at 20, *available in* LEXIS, Asiapc Library, Japan File [hereinafter *PL Ruling Saddles Makers*].

296. *Id.* The court applied a doctrine similar to *res ipsa loquitur* to shift the burden of proof from the plaintiff to the defendant to prove that its product was not defective once the plaintiffs had established reasonable use. Behrens & Raddock, *supra* note 1, at 682; Dauvergne, *supra* note 4, at 415 n.56. The Matsushita case was the first case to shift the burden of proof to the defendant. Behrens & Raddock, *supra* note 1, at 682.

297. *PL Ruling Saddles Makers, supra* note 295; *see Responsibility, supra* note 68 (quoting the Osaka District Court's ruling, which said "[w]hen it is proved that a product is defective, its manufacturer by inference should be held responsible"). The Osaka court's decision was reached on the

significant departure from prior decisions since Japanese courts have traditionally maintained a harsh attitude toward consumers and have readily dismissed product defect cases.[298]

C. Damage Awards

Japanese courts grant small damage awards to deter litigation.[299] Damages are regarded merely as a means of compensating pecuniary loss.[300] Punitive damages are prohibited in Japan and compensatory damages are not adjusted for price changes which may occur after the date of injury.[301] Pain and suffering damages, called consolation money, are recoverable.[302] The amount is set by the court to prevent plaintiffs from inflating their injuries to circumvent the prohibition against punitive damages.[303]

The court may consider plaintiff negligence when it assesses the amount of damages to be awarded.[304] While Japan does not recognize contributory negligence principles, it does apply comparative negligence.[305] It is unclear whether comparative negligence is relevant under the new law because plaintiffs no longer need to prove the manufacturer's negligence.[306] For example, damages in breach of warranty claims are limited to an expectancy interest,[307] thereby restricting

---

assumption that manufacturers have an obligation to ensure the safety of their products. *Id.*

298. Tsuruoka, *supra* note 183.

299. Scheinwold, *supra* note 13, at 278; *see* Behrens & Raddock, *supra* note 1, at 712 (stating limits on recovery of damages operate as a remedial deterrent to litigation). *But see* Dauvergne, *supra* note 4, at 409 (arguing damage awards are high enough to create a motivation to sue).

300. Scheinwold, *supra* note 13, at 278. Japanese damages typically do not include recovery for medical expenses, since these are paid through programs of socialized medicine. Behrens & Raddock, *supra* note 1, at n.208.

301. Scheinwold, *supra* note 13, at 278; *see* Behrens & Raddock, *supra* note 1, at 713 (stating there are no punitive damages in civil law because punishment is left exclusively to the criminal law).

302. Behrens & Raddock, *supra* note 1, at 714-15.

303. *Id.*

304. *Id.* at 712. The court has complete discretion in adjusting the amount of recovery where the plaintiff is at fault. *Id.* The court does not have to reduce plaintiff's percentage of fault, but in most cases, a proportionate reduction of damages can be expected. *Id.*

305. *See* Ponte, *supra* note 10, at 663 (stating Japan recognizes principles of comparative negligence). *See generally* PRODUCT LIABILITY LAW, *supra* note 5 (failing to address the issue of comparative negligence on behalf of the plaintiff).

306. *See supra* notes 148-49 and accompanying text (explaining the primary change from enactment of the new law is that plaintiff only has to prove defect, not negligence).

307. Under Article 570 of the Japanese Civil Code, expectancy interest includes damage to the product itself, but does not include personal injury or other property or economic loss. Behrens & Raddock, *supra* note 1, at 684. The new law, however, provides just the opposite, allowing recovery for personal injury to person or property but not to the product itself. *See* PRODUCT LIABILITY LAW, *supra* note 5, art. 3 (requiring consumers to have suffered personal injury or injury to property other than the product itself); *see also supra* notes 218-222 and accompanying notes (discussing the scope of the new law).

damages to product repair or replacement costs and excluding recovery for personal injury or other economic loss.[308]

D. Dispute Resolution Alternatives

As part of the consensus it forged with business elites and bureaucrats, the Social Policy Council[309] recommended that out-of-court settlement systems be improved.[310] Additionally, the Social Policy Council recommended a mechanism for investigating the causes of product defects be established during the one-year notification period before the new law took effect.[311] The EPA views the establishment of a public research institute as one response to the absence of discovery provisions in Japanese civil procedure.[312] Moving this information into a public forum allows the cause of a defect, a key element in a plaintiff's case, to be determined before any legal action is taken.[313] Once causation is determined, the incentive to go to court disappears, and the parties can negotiate and settle disputes outside the courtroom.[314]

Japan has developed extra-judicial and quasi-judicial methods for resolving disputes[315] in an effort to remain consistent with social harmony.[316] Three principal methods of alternative dispute resolution currently exist: reconcilement, conciliation, and chotei.[317]

1. Reconcilement

An extrajudicial approach to resolving disputes is reconcilement, which requires the parties to consider their respective positions, relationships, and

---

308. Scheinwold, *supra* note 13, at 281.

309. *See supra* note 132 (providing a brief description of the Social Policy Council).

310. Dauvergne, *supra* note 4, at 417. There were plans to enhance existing facilities run by the national and local governments to examine consumer goods. *Editorial, supra* note 142; Dauvergne, *supra* note 4, at 417. In fact, the 1994 fiscal national budget appropriated funds to improve these facilities. *Id.* Lack of organization and concerns over organizational turf prevented government ministries and agencies from exchanging information. *Id. See* Shinmura, *supra* note 79 (stating the capability of public institutions to determine causation related to safety is poor and strengthening is needed).

311. Dauvergne, *supra* note 4, at 417.

312. *Id.* at 417-18. *But see id.* at 418 (arguing a public institution is not a functional equivalent for discovery).

313. *Id.*

314. *Id.*

315. *See* Iida, *supra* note 94 (reporting the liability system relies heavily on non-litigated dispute resolution).

316. Scheinwold, *supra* note 13, at 279.

317. Ponte, *supra* note 10, at 664. The private, informal nature of these alternatives prevents the collection of product defect information, which is vital to other injured consumers considering litigation. *Id.* at 665. In most writings, conciliation and chotei are used interchangeably, but there are fine distinctions so each has been considered independent from the other.

demands.[318] It relies heavily on the status of the social groups involved and does not adhere to any particular rules.[319] Traditional reconcilement involves negotiation sessions between the affected parties in an effort to reach a resolution within the nature and needs of the relationship.[320] The more powerful party exercises power in the best interests of the less powerful party.[321] Through this process, the parties mutually agree upon a solution.[322]

2. *Conciliation*

Of the principal alternatives to litigation, conciliation[323] is the most common and the most important.[324] The conciliation process settles claims under judicial supervision through non-judicial means.[325] It reflects efforts by the parties to resolve problems and disagreements by reaching a consensus rather than relying on an independent third party's solution.[326] The parties can request conciliation prior to any formal court action.[327] However, courts occasionally refer cases pending before them to conciliation when it appears a settlement might result.[328]

On the date of the scheduled conciliation, the committee or the judge summons the parties and endeavors to settle the disputes either by persuading them to make concessions, or by suggesting proper conditions of settlement.[329] Because

---

318. Scheinwold, *supra* note 13, at 279.

319. Ponte, *supra* note 10, at 664.

320. *Id.*

321. *Id.*

322. Scheinwold, *supra* note 13, at 279. Typically, the decision of the superior party is forced on the inferior party, which often leads to an unfair result. Ponte, *supra* note 10, at 664.

323. The conciliation system was adopted in 1922 to settle disputes involving land and house leasing, but since then its scope has expanded to all types of civil disputes. OUTLINE OF CIVIL TRIAL IN JAPAN 19 (Sup. Ct. of Japan 1993) [hereinafter OUTLINE]. Pursuant to 1992 amendments to the Law for Conciliation of Civil Affairs, conciliation proceedings must be exhausted before filing in the District Court when the case concerns increases or reductions in a housing or land rent fee. *Id.*

324. Ottley & Ottley, *supra* note 35, at 36. Conciliation procedures have been widely regarded as a clear indication of the peculiar Japanese attitudes favoring dispute in the spirit of harmony. Tanaka, *supra* note 45, at 384. *See supra* note 45 (discussing the concept and importance of harmony in Japanese society).

325. Broiles, *supra* note 21, at 132; Ottley & Ottley, *supra* note 35, at 36; MARTINDALE-HUBBELL, *supra* note 180, at JPN-3. A series of conciliation statutes were enacted in the 1920s and 1930s for official procedures in dispute resolution in various fields. Tanaka, *supra* note 45, at 384-85. Today, conciliation procedures within the court structure are available for almost every kind of dispute. *Id.* at 385. Two specific statutes are used in modern conciliation: the Domestic Proceedings Act of 1946 for domestic affairs; and the Civil Affairs Act of 1946 for all other claims. *Id.*

326. Broiles, *supra* note 21, at 132; Ottley & Ottley, *supra* note 35, at 36.

327. MARTINDALE-HUBBELL, *supra* note 180, at JPN-3.

328. OUTLINE, *supra* note 323, at 20; MARTINDALE-HUBBELL, *supra* note 180, at JPN-3. Determination of whether a case should be heard by a conciliation committee or by the judge is a matter within the discretion of the court. OUTLINE, *supra* note 323, at 20.

329. Ottley & Ottley, *supra* note 35, at 36-37. This "third party" is provided through the offices of the Conciliation Committee, composed of either one judge or a judge and two or more Conciliation Commissioners who are appointed from among the general public. OUTLINE, *supra* note 323, at 19.

of the prestige and authority of the third party, the recommendations are usually sufficient to persuade the parties to accept the settlement.[330] Typically, conciliation is used in local domestic, neighborhood, and employment disputes, and is less suited for cases outside these social relationships.[331] Since the proceedings are simple and inexpensive, conciliation is a widely used alternative to litigation.[332] Conciliation can be either binding on the merits or have no binding effect.[333]

Critics of conciliation claim excessive use stunts the growth of rules.[334] Emphasis on conciliation tends to eliminate the legal system and its ability to put social concerns into rules of decision which benefit society as a whole.[335] Often the individual parties are satisfied with conciliation.[336] However, failure to litigate cases involving issues of public interest, like product safety, tends to cover up bad laws and practices.[337]

3. *Chotei*

Chotei is a quasi-judicial alternative to formal litigation involving a hearing conducted by a specifically designated committee.[338] Chotei strives for a compromise agreement, reduced to a writing and filed with the court.[339] This written compromise then serves as a final judgment.[340] A request for chotei can be filed

---

330. Ottley & Ottley, *supra* note 35, at 36-37. Conversely, the conciliation commission has the authority to reject the parties' settlement if it deems the settlement inappropriate. Donahey, *supra* note 43, at 76.

331. Ponte, *supra* note 10, at 665. Ms. Ponte asserts product liability claims would not be well suited for resolution by conciliation. *Id.*

332. MARTINDALE-HUBBELL, *supra* note 180, at JPN-3; OUTLINE, *supra* note 323, at 19. The conciliation committee received 99,973 conciliation cases in 1992 alone. OUTLINE, *supra* note 323, at 20. Only 307,750 civil suits were filed in the courts that same year. *Id.* The rate is approximately two civil cases for every five conciliation cases. *Id. But see* Broiles, *supra* note 21, at 134 (stating excessive use of conciliation tends to eliminate the legal system and its ability to set out social concerns and rules of decision).

333. Ottley & Ottley, *supra* note 35, at 36-37. A binding decision on the merits is provided by a third party, normally of higher status than the parties to the dispute, in an arbitration proceeding. *Id.* In non-binding conciliation, a mediator offers suggestions for settlement, but the parties are not required to acquiesce. *Id.* at 36-37. *See* Donahey, *supra* note 43, at 76 (explaining the Civil Conciliation Act, upon advance written agreement of the parties, provides that conciliators may issue binding decisions which are converted later to judgments by the court).

334. Broiles, *supra* note 21, at 134.

335. *Id.*

336. *Id.*

337. *Id.*

338. Ottley & Ottley, *supra* note 35, at 36-37; Ponte, *supra* note 10, at 665; Scheinwold, *supra* note 13, at 279. Similar to a conciliation committee, a chotei committee consists of one judge or a judge and two or more commissioners chosen from the general public. OUTLINE, *supra* note 323, at 19. Chotei was implemented after the post-World War I breakdown of traditional social relationships in Japan. Ponte, *supra* note 10, at 665.

339. Scheinwold, *supra* note 13, at 279; Ponte, *supra* note 10, at 665.

340. Scheinwold, *supra* note 13, at 279; Ponte, *supra* note 10, at 665.

in a Japanese summary court[341] either prior to or during litigation.[342] As a rule, chotei commences on the application of the parties.[343] The court usually conducts the proceedings through the chotei committee[344] but the judge may adjudicate the matter if the parties do not request a committee.[345]

When chotei is successfully accomplished, the terms are entered into a protocol, which has the same force and effect as a formally binding judgment.[346] The chotei committee has the authority to reject the parties' settlement if it deems it inappropriate.[347] If chotei has not been successful, the proceedings end with the dispute unsettled.[348] The chotei committee may present recommendations to the court to aid in the issuance of a final decision.[349] Thus, the process can ultimately become an arbitration process, with the court taking evidence, hearing witnesses, and conducting its own investigation of the facts.[350] If the court deems it necessary, it may adjudicate the case by entering a judgment in place of an agreement.[351] In that case, parties or any interested third party may object to the court's judgment within two weeks.[352] Objection causes the judgment to lose its effect.[353] If no objection occurs, the judgment has the same effect as a judicial compromise.[354]

To summarize, foreign litigants must take care to abide by Japanese judicial procedures and administrative guidance when pursuing an action in Japan.[355] The language and culture of Japan play an important role in the judicial system.[356] Japanese culture discourages litigation so product defect claims should first be filed in a consumer center for resolution.[357] If the problem is not resolved, the

---

341. A summary court is a court that handles minor civil actions involving claims of not more than 900,000 yen, and criminal actions in which punishment is limited to not more than three years. MARTINDALE-HUBBELL, *supra* note 180, at JPN-6.

342. Scheinwold, *supra* note 13, at 279; Ponte, *supra* note 10, at 665.

343. OUTLINE, *supra* note 323, at 20.

344. The chotei committee is composed of a judge designated by the court and two or more conciliators appointed by the court from a list made up each year. Ottley & Ottley, *supra* note 35, at 37; Scheinwold, *supra* note 13, at 279.

345. Ottley & Ottley, *supra* note 35, at 37; Scheinwold, *supra* note 13, at 279.

346. OUTLINE, *supra* note 323, at 20; Scheinwold, *supra* note 13, at 279.

347. Donahey, *supra* note 43, at 76.

348. OUTLINE, *supra* note 323, at 20; Scheinwold, *supra* note 13, at 279.

349. Ponte, *supra* note 10, at 665.

350. Donahey, *supra* note 43, at 76.

351. OUTLINE, *supra* note 323, at 20-21; Scheinwold, *supra* note 13, at 279.

352. OUTLINE, *supra* note 323, at 21; Scheinwold, *supra* note 13, at 279.

353. OUTLINE, *supra* note 323, at 21; Scheinwold, *supra* note 13, at 279.

354. OUTLINE, *supra* note 323, at 21; Scheinwold, *supra* note 13, at 279.

355. *See supra* notes 257-60 and accompanying text (discussing the importance of following judicial procedures and guidance).

356. *See supra* notes 261-65 and accompanying text (stating Westerners do not fully understand the Japanese language or culture).

357. *See supra* notes 266-68 and accompanying text (confirming claims should first be filed in consumer centers).

consumer center will refer the case to one of the three principal dispute resolution alternatives: reconcilement, conciliation, and chotei.[358] Without a discovery system, plaintiffs cannot get crucial information from manufacturers.[359] The new Product Liability Law fails to address these procedural issues and does nothing to force manufacturers to disclose information.[360]

Even if a litigant were to prevail under a product liability claim, damage awards are small and are merely a means of compensating pecuniary loss.[361] Punitive damages are prohibited and pain and suffering damages are set by the court to prevent plaintiffs from circumventing the prohibition against punitive damages.[362] In short, the rare plaintiff who prevails in a product liability action in Japan is likely to receive a very small damage award as compensation for injuries caused by defective products.

VI. CONCLUSION

Before the new law, Japanese consumer protection emphasized regulation.[363] Under the Japanese Civil Code, consumers could recover for injuries from defective products by using Article 415 (contracts) or Article 709 (negligence).[364] Neither of these options proved very helpful since plaintiffs had difficulty proving the existence of a defect and the manufacturer's negligence.[365] Additionally, product liability plaintiffs have always struggled with causation, largely because of the procedural limitations inherent in the Japanese system.[366] Although causation is still difficult to prove,[367] the new law is a great leap toward consumer

358. *See supra* notes 318-54 and accompanying text (explaining reconcilement, conciliation, and chotei).

359. *See supra* notes 270-76 and accompanying text (discussing Japan's lack of a discovery system).

360. *See* NEW PRODUCT LIABILITY LAW, *supra* note 5 (failing to address any judicial rules or procedures); *supra* note 290 and accompanying text (confirming the new law does not change any procedural provisions).

361. *See supra* notes 299-308 and accompanying text (discussing Japanese damage awards).

362. *See supra* note 303 and accompanying text (confirming the judge sets the amount of pain and suffering damages to keep plaintiffs from inflating their damage claims to circumvent the punitive damage prohibition).

363. *See supra* note 58 (confirming Japanese consumer protection emphasized regulation prior to enactment of the new law).

364. *See supra* notes 62-68 and accompanying text (discussing the ways in which a consumer could pursue product defect claims under the Japanese Civil Code).

365. *See supra* notes 69-93 and accompanying text (discussing the difficulties plaintiffs faced when pursuing product liability claims under the Japanese Civil Code).

366. *See supra* notes 269-93 and accompanying text (discussing the procedural barriers which exist in Japan).

367. *See supra* notes 270-76 and accompanying text (discussing the lack of a discovery system in Japan and defendant's control over causation information).

protection.[368] Notwithstanding efforts by the Japanese courts to ease burdens on plaintiffs, consumers still struggle with their burdens of proof.[369]

Pressure on Japan to open its market to foreign goods and public demand for greater consumer protection urged the Japanese government to pass the new law.[370] With the help of bureaucratic elites and business elites, the Japanese government passed a law which imposes liability on manufacturers for defective products, but also imposes limits.[371] To avoid a litigation explosion like the one experienced in the United States after it enacted strict product liability laws, the new Product Liability Law is based on the European model passed in 1985.[372]

The Japanese statute is an exemplar of current product liability law and resembles the work of numerous legislatures in the United States and Europe.[373] The new Product Liability Law makes it unnecessary for plaintiffs to prove the manufacturer was negligent,[374] but the need to prove a product defect did not change.[375] Thus, even when a manufacturer is not guilty of negligence, it will bear the responsibility for compensation if a plaintiff can prove the product is defective.[376] While the law has eased some of the burdens on plaintiffs, the largest obstacles under previous law still exist.[377] Critics of the law claim they are "hard-pressed" to find any major substantive differences regarding the standards governing product liability under Japan's new Product Liability Law.[378] Skeptics argue consumers will remain disadvantaged because they will still have a difficult

---

368. *Challenge, Not Threat*, *supra* note 162; *see* Sato, *supra* note 123 (repeating the words of Hideo Yamazaki, an analyst at the Fuji Research Institute: the product liability law is one step forward for consumers). It is raising the awareness of manufacturers about product safety, which is causing companies to strengthen their safety standards). *Id.*

369. *See supra* notes 71-84 and accompanying notes (discussing the difficulties plaintiffs faced when trying to prove the elements of a product liability claim under Article 709).

370. *See generally supra* notes 105-44 and accompanying text (outlining the discussions leading to legal reform).

371. *See supra* notes 115-23 and accompanying text (discussing the views of the bureaucratic elites and business elites when discussing creation of a product liability law in Japan).

372. *See supra* note 133 and accompanying text (discussing the impact the EEC Directive had on Japan's enactment of the new law).

373. Bernstein & Fanning, *supra* note 10, at 47.

374. *Access Crucial*, *supra* note 53.

375. *Id.*

376. *Challenge, Not Threat*, *supra* note 162; *see* Interview with Tomoyuki Tobisawa, *supra* note 45 (explaining since the product liability law adopts "defect" instead of a negligence standard, the plaintiff has to prove neither duty to prevent damage nor foreseeability of risk).

377. *See* Dauvergne, *supra* note 4, at 405 (arguing there are continuing procedural barriers for plaintiffs). *But see* Schackmann, *supra* note 17, at 546 (arguing nothing suggests a structural change in the legal system will significantly increase the willingness of the Japanese to bring their grievances to court).

378. Klein, *supra* note 6, at 118; *see* Bernstein & Fanning, *supra* note 10, at 47 (arguing Japanese consumer law remains impervious to reform). Still others claim product liability lawsuits in Japan mirror product liability cases in the United States, involving the same theories and the same or substantially similar products. Klein, *supra* note 6 at 122.

time proving a product is defective.[379] In sum, the new law removes the burden of proving negligence, broadens the range of potential defendants, and provides a flexible definition of product defect,[380] but it does not provide any change to judicial procedures.[381]

When pursuing a product liability claim in Japan, foreign litigants must be mindful of Japan's cultural differences because they are reflected in the legal system.[382] Administrative guidance must be respected and followed.[383] It is difficult to speculate about the effects the new Product Liability Law will have on industry.[384] Whether or not the new law will prove effective depends on the judges' understanding of the system.[385] Since Japan is one of the world's leading trade powers, a careful study of future patterns may benefit those who are interested in the long-term effects of this product liability system.[386] Most agree the judicial system needs to be improved before consumers will profit from laws like the Product Liability Law.[387] One thing is certain; the new law assures foreign consumers that Japanese manufacturers are as concerned about the safety

---

379. Shinmura, *supra* note 79. A director of a consumer advocacy group states that although consumers no longer have to prove negligence, it is still not easy to prove product defects or causal relationships because consumer goods have grown increasingly sophisticated. Yomiuri Shimbun, *Consumer Groups Led Fight for PL Law*, THE DAILY YOMIURI, Aug. 30, 1995, at 15, *available in* LEXIS, Asiapc Library, Japan File. *But see* Masato Ishizawa, *Companies Spend More to Avoid Defects, Please Consumers*, THE NIKKEI WKLY., July 22, 1996, at 1, *available in* LEXIS, Asiapc Library, Japan File (arguing consumers benefit under the new law because companies have increased investments in product quality, established more offices where consumers can lodge complaints, and issued more warnings on labels and in instruction manuals).

380. Dauvergne, *supra* note 4, at 417; *see supra* notes 173-209 and accompanying notes (analyzing and criticizing the definition and interpretation of defect under the new law).

381. Dauvergne, *supra* note 4, at 417. *See generally* PRODUCT LIABILITY LAW, *supra* note 5 (omitting any reference to procedural or systemic changes). Japanese plaintiffs compete on an uneven playing field: they must use credentialed lawyers and buy legal services at fixed prices while insurance companies and manufacturers obtain the cheaper labor of law-trained workers who are not even admitted to the bar. Bernstein & Fanning, *supra* note 10, at 50.

382. *See supra* notes 261-65 and accompanying text (explaining foreign litigants often do not understand the language and culture of Japan and how these things relate to the Japanese legal system).

383. *See supra* note 259 (explaining the significance of administrative guidance).

384. *PL Symposium Held by FPMAJ and JPMA*, DAILY NEWS BIOTECH. & MED. TECH., Nov. 7, 1994, *available in* LEXIS, Asiapc Library, Japan File. The judgments made by the courts will be the source of information relative to the effects on industry. *Id.* One professor commented there will be no difference in the amount of damages awarded, with or without the law. *Id. See* Donald L. Morgan & Shirley A. Chowdhary, *The First Year of Japan's New Product Liability Law*, EAST ASIAN EXECUTIVE REP., July 15, 1996, at 9, *available in* LEXIS, Papersap Library (stating only two product liability cases have been instituted one year after the law became effective).

385. Tsuruoka, *supra* note 183.

386. Stuart Ashworth, *Japan: Viewpoint - Law on Product Liability*, LLOYDS PRODUCT LIABILITY INT'L, July 31, 1994, at 98, *available in* LEXIS, Asiapc Library, Japan File.

387. *See Access Crucial*, *supra* note 53 (stating changes and improvements to the judicial system will make it easier for people to file lawsuits). Masato Nakamura, a Tokyo lawyer and an expert on product liability lawsuits, suggests providing financial assistance to plaintiffs who file lawsuits that help society as one way of improving the legal system. *Id.* Ralph Nader, a famous U.S. consumer advocate, suggested that freedom of information legislation is the next necessary step. *Id.*

of their products as are other producers.[388] Through the implementation of this law, shoddy and unsafe goods have been condemned by the Japanese legal system.[389]

Wendy A. Green[*]

388. Bernstein & Fanning, *supra* note 10, at 72.

389. *Id.*

* J.D., McGeorge School of Law, University of the Pacific, to be conferred May 1997; B.A., UC Irvine, 1988. I would like to thank my mother who has always told me I can do and be anything I want. I am starting to believe her.