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The Japanese Product Liability Law: Sending A Pro-Consumer Tsunami Through Japan's Corporate and Judicial Worlds

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Jason F. Cohen

Abstract

This note argues that Japan's former product liability system deprived consumers of adequate protection against product defects. This note also argues that Japan's changing economic and political conditions necessitated the introduction of strict liability. Part I examines the development of the Japanese legal system, traces the history of product liability in Japan, and discusses the structural and cultural barriers to pursuing product liability claims. Part I also explains the product liability legal theories in existence before the PL Law and discusses the twenty-year process in which Japan debated the prospects of passing this legislation. Part I concludes by discussing factors leading to the PL Law's enactment. Part II discusses the PL Law's provisions and examines the impact of the law on corporate Japan, the judiciary and government, and on Japanese consumers. Part III argues that Japan needed the PL Law to bolster the position of Japanese consumers against manufacturers and enable the Japanese government to facilitate deregulation by reducing its product safety standards. Part III also argues that the PL Law is changing Japanese society by promoting a pro-consumer attitude in Japan's legal and corporate spheres. This Note concludes that the PL Law is a key first step to creating a more equitable product liability recovery system and making manufacturers more accountable to the Japanese public.

NOTES

THE JAPANESE PRODUCT LIABILITY LAW: SENDING A PRO-CONSUMER *TSUNAMI* THROUGH JAPAN'S CORPORATE AND JUDICIAL WORLDS

*Jason F. Cohen**

INTRODUCTION

After World War II, the Japanese economy grew faster than that of any other advanced country.¹ By promoting manufacturers' interests at the expense of consumers' interests,² Japanese society moved from war-torn devastation³ to economic juggernaut status between 1945 and 1990.⁴ In the early 1990s, however, Japan's Bubble Economy⁵ burst and economic growth plummeted.⁶

Now, in the aftermath of the collapsed Bubble Economy, a

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1. EDWARD F. DENNISON & WILLIAM K. CHUNG, *HOW JAPAN'S ECONOMY GREW SO FAST: THE SOURCES OF POSTWAR EXPANSION* 46-54 (1976) (discussing how Japan was able to obtain postwar growth rate far above that of any other advanced country).

2. ROBERT C. HSU, *THE MIT ENCYCLOPEDIA OF THE JAPANESE ECONOMY* 81 (1994) (explaining that postwar Japanese economic policy favored manufacturers).

3. *ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS* 9 (H. Patrick & H. Rosovsky eds.) (1976) (discussing how World War Two claimed 2.8 million Japanese deaths and destroyed forty percent of Japan's capital stock); ROBERT C. ANGEL, *EXPLAINING ECONOMIC POLICY FAILURE: JAPAN IN THE 1969-1971 INTERNATIONAL MONETARY CRISIS* 29-30 (1991) (describing Japan's society at end of World War II as being one in which more than ten million people were left unemployed, food and clothing shortages were rampant, imports of essential resources were blocked, inflation was uncontrollable, and industrial production was at standstill).

4. See David Cohen & Karen Martin, *Western Ideology, Japanese Product Safety Regulation and International Trade*, 19 U.B.C. L. REV. 314-16 (1985) (discussing Japan's emergence as leading trading partner of United States and Canada); ANGEL, *supra* note 3, at 44 (discussing how Japan's double-digit postwar growth earned it reputation of "economic miracle" among worldwide watchers).

5. Hsu, *supra* note 2, at 38. "Bubble Economy" is a term often used to refer to Japan's speculative and inflated wealth in securities and land in 1986-89. *Id.* The bubble burst in 1990 when the stock and property markets collapsed. *Id.*

6. CHRISTOPHER WOOD, *THE END OF JAPAN INC.: AND HOW THE NEW JAPAN WILL*

new Japan is emerging.⁷ The Iron Triangle,⁸ an interlocking system of business, bureaucracy, and politics that brought Japan to its present level of prosperity is unraveling⁹ as the system fails to meet the challenges of the global marketplace.¹⁰ Many of Japan's leaders agree that the Japanese economy needs widespread deregulation¹¹ to transform the producer-focused system¹² into one that is more market-driven¹³ and consumer-ori-

LOOK 17-18 (1994) (explaining how collapse of Japan's Bubble Economy is ending Japan's post-1945 model of export-driven, high-growth economic development).

7. *Id.* at 15-18. The fallout of the collapse of the Bubble Economy is not limited to the worlds of economics and finance. *Id.* Instead, the collapse is affecting industrial, political, diplomatic, technological, and social spheres. *Id.* at 16. The crisis resulting from the end of the Bubble Economy is shattering the country's post-1945 consensus and leading to the emergence of a new Japan. *Id.*

8. ELLIOTT J. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM 113-31 (1984). One commentator describes Japan's Iron Triangle system as follows:

The Japanese business system is a hybrid unique to Japan of free market and government involvement. Its uniqueness is derived from the way in which the government regulates the economy. In a democracy such as Japan's, economic regulation by the government is usually based on laws authorizing the government through its ministries to regulate the various sectors of the economy. In Japan, though, the governmental ministries often do not apply the laws directly to regulate business but rather use a more informal process, one sometimes based on no statutory authorization at all. The most famous example of this process is 'administrative guidance' . . . Japan's actual system of government . . . is made up of the elected politicians, big business, and the higher elements of the bureaucracy. These three groups not only work together in a consensus framework for what is commonly perceived as the good of Japan, but in addition each needs the help of the others . . . Ties between the politicians and big business are strong, since so much of the funding for election campaigns comes from the coffers of big business . . . The bureaucracy and big business also have close ties under the Japanese system

Id. at 113-15.

9. See Michael Hirsh & E. Keith Henry, *The Unraveling of Japan, Inc.: Multinationals as Agents of Change*, FOREIGN AFFAIRS, Mar./Apr. 1997, at 12 (explaining how Japan's bureaucracy is losing its grip on Japan's business sector because companies are increasingly moving operations abroad to avoid government control).

10. See *id.* at 11-12 (describing how Japan's multinational corporations believe Japan's market is overregulated and incapable of dealing with international competition).

11. SARKIS J. KHOURY, THE DEREGULATION OF THE WORLD FINANCIAL MARKETS 54 (1990) (illustrating advantages of deregulation such as improved efficiency, shrinkage of transaction costs, increased capital investment, and arguing new growth is best accomplished through deregulation).

12. Hsu, *supra* note 2, at 83-85. The author states that observers of Japan's economy often claim that:

[P]ostwar Japan has been producer oriented rather than consumer oriented, and the Japanese government has promoted producers' interests at the expense of consumers' interests for the sake of pursuing rapid economic growth.

ented.¹⁴ The enactment of the Product Liability Law¹⁵ ("PL Law"), which holds manufacturers liable for defective products regardless of fault, is the result of an intensifying national effort to deregulate government control in the face of consumer empowerment.¹⁶ In fact, many observers view the PL Law as Japan's first major legal victory for its consumers.¹⁷

Critics, however, argue that the PL Law fails to mark a watershed for the Japanese people.¹⁸ Some critics suggest that Japan already had a working product liability system and that strict lia-

As evidence for this proposition, proponents have pointed to the importance that the government has given to its industrial policy, the weak implementation of the Antimonopoly Law, the relative weakness of the consumer groups, the lack of a product liability system, and the high prices of consumer goods and food in Japan

Id.

13. *Id.* at 2 (discussing how Japan's media has recently been criticizing government regulation for impeding market competition).

14. *Keidanren's New Big Wheel*, TOKYO BUS. TODAY, Sept. 1994, at 34 [hereinafter *New Big Wheel*] (describing how Shoichiro Toyoda, Keidanren's chairman and chairman of Toyota Motor Corp., made speech proclaiming that most important theme for Japan's economy is deregulation); *Japanese Premier Says Deregulation Will Give Big, Quick Boost to Economy*, WALL ST. J., Apr. 8, 1997, at A19 [hereinafter *Deregulation Will Give Big, Quick Boost*] (explaining that Prime Minister Hashimoto believes deregulation will solve Japan's long-term economic problems); Todd Crowell, *Seeking Direction: Japan's Rescue Plan May Actually Work — But Not For A While*, ASIaweek, Jan. 31, 1997 (explaining how leading politicians, economic analysts, and businesspeople have unanimously agreed that Japan needs widespread deregulation to enable economy to be guided more by free-market principles).

15. *Seizobutsu Sekinin Ho [The Product Liability Law]*, Law No. 85 of 1994 (Japan) [hereinafter *PL Law*].

16. See Chiyono Sugiyama, *Product Liability Puts Firms on the Defensive*, DAILY YOMIURI, June 29, 1995, at 10 [hereinafter *Firms on the Defensive*] (stating "[the PL Law] is considered a major turning point in government efforts to protect consumers" because consumers no longer have to prove manufacturer's negligence to receive compensation for product defects).

17. See Noriko Sato, *Product Liability Law to Debut in Japan*, JAPAN ECON. NEWSWIRE, June 28, 1995 (quoting "the PL Law is one step forward for consumers . . . [the law] can already be credited for raising awareness among both consumers and manufacturers about product safety."); Stephen H. Dunphy, *Japan Is Experiencing a Retail Revolution*, SEATTLE TIMES, Feb. 19, 1995, at J1 (proclaiming PL Law marked Japan's "transformation from a producer-oriented economy to one that favors consumers.").

18. See, e.g. Mark A. Behrens & Daniel H. 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, 718 (1995) ("In considering the 'big picture,' the new product liability law has limited impact in light of the culture of Japan."); Andrew Marcuse, *Why Japan's New Products Liability Law Isn't*, 5 PAC. RIM. L. & POL'Y J. 365, 388 (1996) (arguing "the new [law] changes the Japanese products liability regime very little."); Anita Bernstein & Paul Fanning, *Weightier Than A Mountain: Duty, Hierarchy, and the Consumer in Japan*, 29 VAND. J. TRANSNAT'L L. 45, 67 (1996) (claiming "[t]he [PL

bility is an unnecessary foreign import which will not take root in Japanese society.¹⁹ Other critics, instead of focusing their argument on whether Japan needed the PL Law, conclude on the basis of generalizations about Japan's culture and legal system that the PL Law will not create a significant impact.²⁰

This Note argues that Japan's former product liability system deprived consumers of adequate protection against product defects. Moreover, this Note contends that Japan's recently changing economic and political conditions further reduced the effectiveness of Japan's system and necessitated the introduction of strict liability.

Part I examines the development of the Japanese legal system, traces the history of product liability in Japan, and discusses the structural and cultural barriers to pursuing product liability claims. Part I also explains the product liability legal theories in existence before the PL Law and discusses the twenty-year process in which Japan debated the prospects of passing this legislation. Part I concludes by discussing factors leading to the PL Law's enactment. Part II discusses the PL Law's provisions and examines the impact of the law on corporate Japan, the judiciary and government, and on Japanese consumers. Part III argues that Japan needed the PL Law to bolster the position of Japanese consumers against manufacturers and enable the Japanese gov-

Law] is not likely to disrupt Japanese society or the function of law in Japan, despite optimistic expressions heard from American consumer advocates.").

19. See Lucille M. Ponte, *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, 667-71 (1993) (discussing that Japan's system of government regulation, public insurance programs, and compensation trust funds obviated need for new product liability law); Marcuse, *supra* note 18, at 365-66, 398 (concluding that PL Law merely codifies the law that Japan's judges were already following); J. Mark Ramseyer, *Products Liability Through Private Ordering: Notes on a Japanese Experiment*, 144 *U. PA. L. REV.* 1823, 1823-40 [hereinafter *Products Liability Through Private Ordering*] (discussing lack of need for mandatory strict liability because some Japanese manufacturers voluntarily subjected themselves to public insurance programs which utilized recovery mechanisms similar to strict liability).

20. Behrens & Raddock, *supra* note 18, at 703-05, 718 (generalizing that structural barriers to accessing Japan's judicial system prevent *PL Law* from having big impact on entirety of Japan's system); Bernstein & Fanning, *supra* note 18, at 69 (arguing *PL Law* is not likely to create any major changes because Japanese are not accustomed to concept of consumer rights and are unable to find attorneys to represent their cases); Alexandra Williams, *Japan's Recipe for Dispute Resolution*, *INTERNATIONAL COMMERCIAL LITIGATION*, June 1996, at 2-3 (arguing that lack of cases brought under *PL Law* reinforces notion that litigation will not increase because Japanese prefer social harmony and can not bear cost and inconvenience of litigation).

ernment to facilitate deregulation by reducing its product safety standards. Part III also argues that the PL Law is changing Japanese society by promoting a pro-consumer attitude in Japan's legal and corporate spheres. This Note concludes that the PL Law is a key first step to creating a more equitable product liability recovery system and making manufacturers more accountable to the Japanese public.

I. *THE HISTORY OF JAPAN'S PRODUCT LIABILITY IN THE CONTEXT OF THE JAPANESE LEGAL SYSTEM AND CULTURE*

Japan's feudal legal history left behind a legacy of structural and cultural barriers that, before the enactment of the PL Law, often prevented injured consumers from pursuing product defect claims.²¹ Japanese plaintiffs injured by defective products faced difficult burdens of proof under pre-strict liability legal theories.²² Political leaders, however, opposed the enactment of a product liability law for more than twenty years.²³ Ultimately, in an effort to bolster Japanese consumers' ability to protect themselves against product defects,²⁴ the government enacted the PL Law, which went into effect on July 1, 1995.²⁵

A. *Historical Development of Japan's Legal System*

Japan's first secular legal system emerged toward the end of

21. See Younghee Jin Ottley & Bruce L. Ottley, *Product Liability Law in Japan: An Introduction to a Developing Area of Law*, 19 GA. J. INT'L & COMP. L. 29, 32 (1984) (explaining "[a]n understanding of product liability law and litigation in Japan must begin with a discussion of the factors influencing Japanese attitudes toward law in general and dispute settlement in particular and of the procedural and remedial limitations on private litigation.").

22. See Marcuse, *supra* note 18, at 373-47 (discussing that, before *PL Law*, Japanese litigants faced difficulty meeting burdens of proof under contract and negligence theories because of plaintiffs' inability to gather evidence and prove manufacturers' fault); Bernstein & Fanning, *supra* note 18, at 71 (stating "Japanese contract and tort laws have been impressively unhelpful to consumers, imposing doctrinal hurdles for plaintiffs in addition to the cultural hurdles of an antilitigious, hierarchy-controlled society.").

23. Ponte, *supra* note 19, at 660 (1993) (discussing how Japanese government opposed *PL Law* because of its belief that proper balance already existed between Japanese manufacturers and consumers).

24. See *PL Law* art. 1, Law No. 85 of 1994 (Japan) (stating purpose of *PL Law* is to relieve people injured by product defects and contribute to improvement of people's lives).

25. See *PL Law* supplementary provisions 1, Law No. 85 of 1994 (Japan) (stating effective date as July 1, 1995).

the seventh century when a centralized Emperor-dominated government gained control.²⁶ The leaders adopted and revised the legal codes of the Chinese T'ang Dynasty²⁷ to create *Ritsuryo*,²⁸ the first Japanese legal code.²⁹ Based on direct rule by the Emperor³⁰ with heavy influence from Confucianism,³¹ this code re-

26. HIROSHI ODA, JAPANESE LAW 14-16 (1992). Before Japan began to adopt Chinese legal concepts and institutions, Japan's system centered on communities that were divided along lines of kinship ties and religious beliefs. JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 29 (1991) [hereinafter AUTHORITY WITHOUT POWER]. The leaders of the communities, chieftains, served as both priest and king and governed largely through Shinto ritual and customary norms. *Id.* The Emperor, who was a religious leader as well as ruler, managed the chieftains. ODA, *supra*, at 15. The leaders did not employ a written legal system. *Id.* Religion and law were inseparable and the system justified the punishment of crime as a way to purify criminals after they had displeased the Shinto gods. *Id.* at 14. By the end of the fifth century, the Yamato region's clan emerged as the dominant force in Japan and its leader claimed both military and religious superiority. AUTHORITY WITHOUT POWER, *supra*, at 29. Simultaneous with this political consolidation, Japan's interaction with Korea and China increased. *Id.* Japan began to borrow a writing system, religion, and other societal elements from the more advanced China. *Id.* By the middle of the seventh century, Japan embarked on its first period of adopting foreign law, with its adaptation of the Chinese legal system. *Id.* By the end of the seventh century, a highly centralized state had emerged under the direct rule of the Emperor. ODA, *supra* at 15.

27. ODA, *supra* note 26, at 15. The T'ang Dynasty's codes provided Japan with a model for establishing its first body of administrative law. *Id.*

28. ODA, *supra* note 26, at 15. Japan enacted its first body of administrative law, known as *ryo*, in 662 A.D. AUTHORITY WITHOUT POWER, *supra* note 26, at 29. The Japanese government later promulgated a series of penal statutes known as *ritsu*. *Id.* In 702, the government compiled the *ritsu* and the *ryo* and established *ritsuryo*, Japan's first comprehensive code of administrative and penal law. *Id.*

29. AUTHORITY WITHOUT POWER, *supra* note 26, at 29. In 718, the government revised the first *ritsuryo* and created what is now known as the *Yoro ritsuryo*. *Id.* For more than a thousand years, the *Yoro ritsuryo* remained Japan's fundamental national law. *Id.* Although the Japanese government directly copied the T'ang Code in its drafting of the *ritsuryo*, Japan's actual system of governance departed from China's in many ways. *Id.* at 30. For example, given that familial relations dominated the Japanese government before adoption of the Chinese system began, the Japanese could not implement the notion of China's merit-based bureaucracy. *Id.* The powerful families of Japan dominated the ranks of Japan's centralized government. *Id.* Without the creation of a strong centralized bureaucracy, Japan's *ritsuryo* failed to lessen the influence of Japan's clan-based aristocracy on the Japanese legal system. *Id.*

30. ODA, *supra* note 26, at 16. Influenced by China's imperial system, Japan's clan-dominated society gave way to the emergence of a Japanese Emperor. *Id.* Japan's Emperor did not, however, serve the same role as China's Emperor. AUTHORITY WITHOUT POWER, *supra* note 26, at 30. The Japanese Emperor continued to have a religious, shamanist role, as did the earlier clan chieftains, in performing rituals to assure purity and fertility. *Id.*

31. Behrens & Raddock, *supra* note 18, at 671; YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 22-26 (Anthony H. Angelo ed. & trans., 9th ed. 1992).

mained in effect until the beginning of the twelfth century³² when *samurai*³³ military rule conquered Japan.³⁴ The period of military rule, the Shogunate era,³⁵ brought with it a hierarchical society that placed emphasis on vertical relationships between warlords and their warriors.³⁶ Unlike the system in medieval Europe,³⁷ the Japanese feudal system was unilateral in that the warriors provided their warlords with loyalty and subservience while retaining no rights or authority against the warlords.³⁸ During

32. ODA, *supra* note 26, at 16. The *ritsuryo* codes remained the official law of the land until the middle of the 1800s. *Id.* When the Emperor began to lose authority due to the nobles' rise to power in the middle of the 10th century, however, the *ritsuryo* were still the official, but no longer the actual, national legal code. *Id.* From the beginning of the 12th century, *buke*, the law of the feudal warriors, took precedence over the *ritsuryo*. *Id.* By accumulating large estates that were exempt from taxes and outside the authority of the centralized government, the warriors created a feudal system that replaced the centralized rule of the monarchy. *Id.*

33. *Id.* at 16-20. In order to protect their fiefdoms, the nobles hired warriors to defend their estates. *Id.* The warriors also began to protect public order in the streets of Kyoto, Japan's capital at that time. *Id.* Eventually, the warriors intermarried with nobles and a new class of power, the *samurai*, emerged. *Id.*

34. *Id.* Different *samurai* clans, such as the Taira and Minamoto, battled each other over time to gain control of Japan. *Id.*

35. *Id.* at 17. In 1192, Yoritomo Minamoto conquered all other clans and was appointed the first *Shogun*, highest general, by the Emperor. *Id.* Minamoto's government, which consisted mostly of warriors, became known as a *bakufu*, a Shogunate. *Id.* Minamoto's successors also became known as *Shogun* and the successor governments became known as Shogunates. *Id.*

36. *Id.* Under the hierarchy of the Shogunate system, the *Shogun* was the supreme leader and retainers, mostly warriors, swore loyalty to the *Shogun* and offered military services. *Id.* In exchange for their loyalty, the *Shogun* provided the retainers with land or the rights to proceeds from the land. *Id.*

37. *See id.* (arguing that under Medieval European feudal system, leaders were formally required to compensate retainers and protect them). The European feudal leaders granted their retainers legal rights. *Id.* The feudal bargain in Europe was viewed as a mutually binding contract and the terms of conditional reciprocity had to be clearly stated. AUTHORITY WITHOUT POWER, *supra* note 26, at 37.

38. ODA, *supra* note 26, at 17. The benefits that Japanese warriors received for remaining loyal to their warlords, such as agricultural proceeds and land, were considered to be favors and not legal rights. *Id.* Thus, warlords were not legally required to provide these benefits. *Id.* Because the Japanese feudal bargain was not viewed as a legally binding contract, the Japanese relied on Confucian values to ensure the preservation of their feudal agreements. AUTHORITY WITHOUT POWER, *supra* note 26, at 37. The Japanese warriors held feudal relations together through an intrinsic set of reciprocal duties, similar to those between parent and child, that extended to warlord and warrior. *Id.* Whereas the feudal covenants in Europe laid the foundation for the social contract and eventually the constitutional government, the Japanese characterization of feudal covenants through a Confucian-kinship model, emphasizing benevolence and loyalty, laid the foundation for the "familial characterization of the modern Japanese state." *Id.* at 38.

the Shogunate era, the legal system consisted mainly of unwritten customary laws.³⁹

Toward the end of the fifteenth century, Japan embarked upon its third period of legal development when the Tokugawa Shogunate,⁴⁰ which followed a period of civil war,⁴¹ closed Japan off from the rest of the world⁴² and reunited the country.⁴³ Instead of enforcing a comprehensive legal code, the Tokugawa

39. Behrens & Raddock, *supra* note 18, at 671. During this period the expansion of informal governance by warriors jeopardized the legitimacy of the formalized written *ritsuryo* and imperial authority. AUTHORITY WITHOUT POWER, *supra* note 26, at 47-49. One of the reasons why Tokugawa rulers kept their law unpublished was to maintain knowledge of the law as an elite preserve. Bernstein & Fanning, *supra* note 18, at 64.

40. AUTHORITY WITHOUT POWER, *supra* note 26, at 51-65. In 1600, Ieyasu Tokugawa founded the Tokugawa Shogunate which lasted through fifteen generations of *Shoguns* until 1867. ODA, *supra* note 26, at 20. The Tokugawa Shogunate restored a Japanese centralized government. *Id.* The system was unique, however, in that while the Tokugawa family had direct control over one-fourth of Japan, territorial lords who were subordinate to the *Shogun* controlled the remaining part of the country. *Id.* "For most Japanese today the institutions and processes of Tokugawa governance appear to define their legal tradition." AUTHORITY WITHOUT POWER, *supra* note 26, at 51.

41. FRANK GIBNEY, *THE PACIFIC CENTURY: AMERICA AND ASIA IN A CHANGING WORLD* 67 (1992). When Tokugawa came to power in 1600, it ended more than a hundred and fifty years of feudal civil wars in Japan. *Id.* Throughout that century and a half, the *Shoguns*, who had taken actual authority away from the Emperor, had also lost their legitimacy. *Id.* *Daimyo*, local barons, essentially ruled fifteenth century Japan with their small competing armies of vassals and retainers. *Id.* Feudal alliances constantly shifted during this period giving it the name of "the era of warring factions." *Id.*

42. *Id.* at 68-69. After Ieyasu Tokugawa defeated all factions and secured his hold on Japan, he reinforced his authority by closing Japan off from the rest of the world and prohibiting foreign trade. *Id.* at 69. The only trading post remained in Nagasaki and was strictly monitored. *Id.* Any foreigner who attempted to enter Japan would be punished with the death penalty. *Id.*

43. *Id.* at 69. Tokugawa kept the country united by consolidating the *daimyo* and awarding those who had supported his war efforts with the wealthiest fiefs. *Id.* He then allowed the *daimyo* to remain as rulers of their territories, but kept them subservient to his central government. *Id.* Tokugawa forced the samurai to live in the *daimyo's* castle towns where they became soldier-bureaucrats. *Id.* No one could leave the town in which he lived without permission from the Shogunate. *Id.* The Tokugawa government brought peace to Japan through a totalitarian system. *Id.* As the later Meiji reformer Fukuzawa Yukichi quoted:

The millions of Japanese at that time were closed up inside millions of individual boxes. They were separated from one another by walls with little room to move around . . . The walls separating them were as strong as iron and could not be broken by any amount of force. Having no motivation to employ their talents in order to progress forward, people simply retreated into the safety of their own shells. Over the course of several hundred years this routine became second nature to them. Their spirit of initiative, as it is called, was lost completely.

Id.

Shogunate relied primarily on unwritten customary law.⁴⁴ The Tokugawa Shogunate promoted Confucian ideology by emphasizing strict obedience to hierarchy instead of recognizing individual rights.⁴⁵

After more than two hundred and fifty years of self-imposed isolation by the Japanese,⁴⁶ Commodore Matthew Perry⁴⁷ opened Japan's doors to the world in 1853.⁴⁸ Unable to handle the challenges of an opened Japan,⁴⁹ the Tokugawa government collapsed and a new period of Japanese legal development commenced.⁵⁰ Under the new legal order, the Meiji government⁵¹ restored the Emperor as a political leader and implemented a sweeping modernization program designed to restructure Japan's political and legal systems.⁵² Seeking to adopt a Western

44. ODA, *supra* note 26, at 21.

45. See Behrens & Raddock, *supra* note 18, at 671-72 (noting Tokugawa Shogunate was heavily influenced by Confucianism and stressed obedience to superiors and harmony over individual rights). The concept of legal rights was so unusual in Japan through the Tokugawa period that no Japanese word existed to express the idea until the very end of the Tokugawa's rule. Cohen & Martin, *supra* note 4, at 315, 326. Ieyasu Tokugawa employed the ideology of the Zhu Xi school of neo-Confucianism to justify his power. GIBNEY, *supra* note 41, at 70. Zhu Xi taught that "the same principle of order bound both the natural world and human political society; hence a strong and harmonious state, organized in a hierarchy of Confucian relationships, was in itself a reflection of heaven's law, something not to be transgressed." *Id.*

46. ODA, *supra* note 26, at 21-22. The only foreign contacts Japan had during its isolationist period were with the Dutch and the Chinese. *Id.* at 22. During this period, Japan learned of the advancements of European civilization by way of the Dutch. *Id.*

47. *Id.* at 24 (discussing when Commodore Perry of the United States Navy arrived in Japan, domestic political turmoil began leading to demise of Tokugawa Shogunate).

48. *Id.* When Perry came to Japan with eight ships, one-fourth of the power of the U.S. Navy, Japan could not resist the threat. *Id.* Perry flaunted the technological prowess of the United States by bringing along a complete miniature railway and showing off the engines and guns of his ships. GIBNEY, *supra* note 41, at 74.

49. *Id.* As Katsu Kaishi, a supporter of the Shogun and one of Japan's early modernizers wrote, "From the day of Perry's arrival, for more than ten years, our country was in a state of indescribable confusion. The government was weak and irresolute, without fixed policy or power of decision." GIBNEY, *supra* note 41, at 74-75.

50. ODA, *supra* note 26, at 24-25. After the Shogunate signed treaties to open Japan to the West, the *daimyo* began to support the Emperor in opposition to the Shogun. *Id.* at 24. Keiki Tokugawa, the fifteenth Shogun, eventually had to resign in 1867 and surrender his power to the Emperor. *Id.*

51. *Id.* The Meiji government replaced the Tokugawa government and ruled Japan until 1912. *Id.* at 24-32. The Meiji system replaced the feudal system with a new system of prefectures controlled directly by the Emperor and his appointed prime minister, ministers, and councilors. *Id.* at 24-25. Within the span of Emperor Meiji's reign, "Japan transformed itself from a semi-feudal society into a modern nation-state." GIBNEY, *supra* note 41, at 85.

52. Behrens & Raddock, *supra* note 18, at 673. At the beginning of the Meiji

system of law, the Meiji government imported a civil code system and a Constitution modeled after the Prussian legal system.⁵³

The Meiji government's legal system remained intact until Japan's defeat in World War II.⁵⁴ After World War II, the Allies assisted Japan with modifying its legal system.⁵⁵ Japan redrafted its Constitution and enacted other laws based on the U.S. legal system.⁵⁶ Japan's post-World War II legal system, a hybrid of

Revolution, the government implemented three important changes. ODA, *supra* note 26, at 25. These changes included the creation of a modern tax system, the introduction of mandatory military service, and the abolition of class distinctions between *samurai*, peasants, artisans, and merchants. *Id.* at 25. Japan also implemented a rapid industrialization process under the slogan "Enrich the country and strengthen the army." *Id.* at 31. As for adapting a new legal system, the Meiji government initially turned to Chinese Law but then later looked to Europe for the drafting of new civil and criminal codes. *Id.* at 26-27.

53. *Id.* at 26-32. The first Criminal Code, enacted in 1880, was based upon French law but the period of French influence waned with the shift to Prussian Law in the 1880s. *Id.* at 27. The Prussian system influenced Japan's Code of Civil Procedure in 1890. *Id.* Prussia's system also influenced the terms of the Meiji Constitution, cabinet system, and Imperial Diet. *Id.* The Meiji government chose Prussia's Constitution of 1850 as a model because Prussia's situation resembled Japan's in that it was a backwards country that launched a process of modernization. *Id.* at 28-29. Furthermore, the Prussian Constitution gave the Monarch great power over the parliament whereas the Japanese regarded the French and British constitutions as too democratic. *Id.* at 29. Japanese constitutional drafters firmly believed that the Emperor should be left as free from control by the legislature as possible. *Id.* The Constitution was drafted to have no authority over the imperial family. *Id.* The Constitution proclaimed that "loyalty to the Emperor, Confucian obligation of filial piety, and obedience were the essence and virtue of the nation." *Id.* at 30. See AUTHORITY WITHOUT POWER, *supra* note 26, at 75-80 (discussing process by which Meiji government drafted Civil Code and Constitution).

54. ODA, *supra* note 26, at 30. After World War II ended with the signing of the Potsdam Declaration in 1945, the Supreme Commander of the Allied Powers ("SCAP") occupied Japan through indirect military rule. *Id.* at 32. The Japanese government functioned only under SCAP's strict surveillance. *Id.* SCAP demilitarized and democratized Japan and officially separated Shintoism from the state. *Id.*

55. *Id.* at 32-34. In 1945, the Allied Forces recommended five major reforms: "introduction of equality of the sexes, encouragement of trade unions, liberalization and democratization of education, liberalization from autocratic rule, and democratization of the economy." *Id.* at 32. These reform measures, signifying radical social, economic, and political change, were embodied in the Constitution of 1947, which is still Japan's Constitution. *Id.* at 33. This Constitution departs from the former one by declaring that sovereignty rests with the people and not the Emperor, renouncing war as a right of the nation, and incorporating an extensive bill of rights safeguarded by judicial review. *Id.*

56. *Id.* Because SCAP's legal advisers were primarily American, U.S. law strongly influenced the redrafting of the Constitution, the Code of Criminal Procedure, the three major labor laws, and the Anti-Monopoly Law. *Id.* at 33. SCAP did not significantly amend the Criminal Code, Code of Civil Procedure, and the Commercial Code. *Id.*

Tokugawa tradition, European-influenced civil codes, and American-influenced laws, remains in place today.⁵⁷

B. *Factors Affecting Access to the Legal System*

Various structural and cultural barriers, which restrict consumer use of Japan's legal system, play a large role in limiting the number of product liability suits to approximately 150 since the end of World War II.⁵⁸ This low number is in contrast to the more than 14,000 suits that U.S. litigants filed in federal courts during the same time period.⁵⁹ One group of scholars⁶⁰ ("Cultural Theorists") argues that the level of litigation is low because Japanese culture is uniquely non-litigious.⁶¹ The Cultural Theorists claim that changes to the Japanese legal structure, such as enactment of the PL Law, do little to affect the Japanese litigation environment.⁶² Scholars on the other side of the debate⁶³

57. *Id.*

58. Ponte, *supra* note 19, at 663 (1993).

59. *Id.*

60. See, e.g. Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, LAW IN JAPAN, 41, 43-45 (1963) ("Traditionally, the Japanese people prefer extrajudicial, informal means of settling a controversy . . . resort to litigation has been condemned as morally wrong, subversive, and rebellious."); NODA, *supra* note 31, at 159-60. The author states that:

To an honorable Japanese, the law is something that is undesirable, even detestable, something to keep as far away as possible. To never use the law or be involved with the law, is the normal hope of honorable people. To take someone to court to guarantee the protection of one's own interests, or to be mentioned in court, even in a civil matter, is a shameful thing

Id.; Terry W. Schackmann, *Reflections in a Rock Garden: A Civic Commitment to International Understanding?*, 42 KAN. L. REV. 531, 546 (1994) ("The cultural environment in Japan . . . has not yet accepted litigation as a common, ready means of grievance resolution."); ODA, *supra* note 26, at 4-10 (describing that for years scholars have been questioning whether non-litigious nature of Japanese people keeps litigation low).

61. Schackmann, *supra* note 60, at 542-47 (arguing that Japanese culture and tradition, and not structure of Japanese legal system, are reasons why law suits in Japan are rare in comparison to other Western countries).

62. *Id.* at 547. (noting that it is superficial to blame structural barriers for low level of judicial activity because culture creates its own structure and allows it to remain until public consensus mandates change.) *Id.*

63. See, e.g. GLEN S. FUKUSHIMA, Background, in RICHARD H. WOHL ET AL., PRACTICE BY FOREIGN LAWYERS IN JAPAN 8-9 (Richard H. Wohl & Stuart M. Chemtob eds., Richard S. Kanter trans., ABA Sec. of Int'l L. & Prac. 1989) (claiming lack of litigiousness in Japan results from structural problems within Japanese system and not from cultural tendencies toward harmony and consensus); Hideo Tanaka, *The Role of Law in Japanese Society: Comparisons with the West*, 19 U.B.C. L. REV. 375, 387 (1985). The author claims that

The days when Japanese lawyers could attribute the primary cause of our hav-

("Structural Theorists") argue that structural, or institutional barriers,⁶⁴ limit access to the Japanese legal system and are responsible for the low level of litigation in Japan.⁶⁵

1. Cultural Barriers

Cultural Theorists have long argued that a gap exists between the structure of Japanese law, which resembles Western law, and the culture of Japan, which developed independently of Western culture for thousands of years.⁶⁶ These scholars focus on Japan's Confucian-based legal history, which stressed inequality of individuals within a hierarchical society, and claim that as a result of that history, Japanese citizens never developed an innate desire to protect their individual rights.⁶⁷ Japanese scholars use the phrase *ho-ishiki*,⁶⁸ legal consciousness, to describe the unique anti-litigious nature of the Japanese.⁶⁹

ing a smaller number of lawsuits to the people's lack of 'law consciousness' are over. Although the Japanese people's attitude toward law is not the same as that in the West, it is certain that a larger number of people are demanding justice according to law rather than abandoning their claims solely for the purpose of maintaining harmony in the community.

Id.

64. Behrens & Raddock, *supra* note 18, at 705-16. Commonly cited examples of structural barriers to litigation in Japan are a shortage of attorneys, inefficient judiciary, high costs associated with litigation, limited damages, and expansive alternative dispute resolution system. *Id.*

65. Tanaka, *supra* note 63, at 387.

66. See Ottley & Ottley, *supra* note 21, at 35 (explaining "a dichotomy exists between the concepts of the formal legal system, as expressed in the codes and statutes, and the actual application of that law to specific situations."); ODA, *supra* note 26, at 8-10 (explaining that because of traditional Japanese values and morals, legal systems Japan imported throughout its history did not successfully take root in Japanese society); KAREL VAN WOLFEREN, ENIGMA OF JAPANESE POWER 272-78 (1989) (discussing that even though Japan adopted legal systems from many other countries, Japanese notion of law remains largely same as in feudal times).

67. WOLFEREN, *supra* note 66, at 274-76 (claiming that Japan's history did not instill belief in ordinary Japanese citizens that law exists to protect them). Neither the Meiji Constitution nor Western-inspired laws ever instilled a spirit within the Japanese to feel protected against arbitrary abuses of the authority. *Id.* at 274. The absence of a sense of rights in Japan is illustrated by the fact that the Japanese word for rights, *kenri*, still conjures up an image of egotism for the average Japanese. *Id.* at 277. "On the whole Japanese still think of law as an instrument of constraint used by the government to impose its will." *Id.* at 276.

68. Tanaka, *supra* note 63, at 379-80 (explaining that Professor Kawashima first used term "legal consciousness" to describe his socio-cultural explanation for Japanese attitudes to law which is now used as catch-all phrase to describe most of peculiarities of law in Japan).

69. *Id.*

Cultural Theorists argue that instead of pursuing litigation to settle disputes, the Japanese preferred to harmonize their individual needs with the interests of the community.⁷⁰ These scholars explain that, out of respect for authority, consensus, and social order, Japanese tend to shun using the legal system as a vehicle for resolving disputes.⁷¹ Cultural Theorists claim that conciliation is the preferred method among Japanese for resolving conflicts.⁷² These scholars contend that a modification of Japan's legal structure would not change the Japanese cultural tendency to disfavor litigation.⁷³

2. Structural Barriers

Structural Theorists argue it is shortsighted to conclude that Japanese culture is responsible for perpetuating a non-litigious society.⁷⁴ These scholars contend that Japanese claimants often

70. Elliott J. Hahn, *An Overview of the Japanese Legal System*, 5 NW. J. INT'L L. & BUS. 517, 519 (1983) [hereinafter *Overview of Japanese Legal System*]. See Ottley & Ottley, *supra* note 21, at 34 (discussing focus on group rather than on individual rights is exemplified today by way in which Japanese employees dedicate themselves to their companies).

71. Behrens & Raddock, *supra* note 18, at 704-05. An example of Japanese citizens' disdain for use of the legal system involves an incident in which a couple left their young son in the care of their neighbors and the child drowned in a nearby pond. *Id.* The couple sued the neighbors and received a judgment of Yen 5 million. *Id.* After Japanese television and radio reported the verdict, a flood of letters and telephone calls from outraged citizens besieged the couple. *Id.* The outraged citizens felt it was uncharacteristic of Japanese not to settle the dispute among the parties. *Id.* As a result of societal pressure, the couple dropped the suit and all claims for damages. *Id.*

72. *Overview of Japanese Legal System*, *supra* note 70, at 519; U.S. *Business Litigation Roundtable: Japanese Lawyers Stress Commonalities in Law Practice*, [hereinafter *Litigation Roundtable*] U.S. BUSINESS LITIGATION 24, 26 (February 1997). ("A lawsuit is probably the last and hated resort, only after all other means of dispute resolution have been exhausted."). Japanese dislike litigation because the parties involved do not reach their own harmonious solutions. Ottley & Ottley, *supra* note 21, at 36. In litigation, because judges decide which party is right and which party is wrong, the losing party loses face in Japanese society. *Id.* Conversely, conciliation "emphasizes then participation of the parties and attempts to reach a consensus based on mutual agreement. There is, then, no clear winner or loser." *Id.*

73. Schackmann, *supra* note 60, at 546. The author argues that:

The role of law in a society and the people's readiness to resort to courts to assert their rights remain a function of a society's history and culture. In Japan, that history is decidedly non-Western, and nothing suggests that a structural change in the legal system — whether the addition of lawyers, the reduction of trial time or the prohibition of judicial influence in settlement decisions — will significantly increase, in the near term, the willingness of Japanese to bring their grievances to court.

Id.

74. ODA, *supra* note 26, at (arguing that many observers of Japan believe it is un-

decide against using litigation as a means of protecting their individual rights because structural barriers make it disadvantageous for average claimants to litigate.⁷⁵ Structural Theorists, moreover, believe that the ideological gap between Japan's present-day social practice and its imported democratic legal system is not as wide as believed by the Cultural Theorists.⁷⁶

By emphasizing that throughout history the Japanese people never demanded the creation of an extensive alternative dispute resolution system, Structural Theorists reject the notion that the Japanese are inclined to favor conciliation over litigation.⁷⁷ Instead, these scholars explain that the Japanese government, which has long been diverting court cases to conciliation, often gave Japanese claimants no choice but conciliation to resolve their disputes.⁷⁸ The Structural Theorists point out that the Tokugawa government often forced disputants to reach their

true that Japanese are reluctant to litigate); Tanaka, *supra* note 63, at 382, 387 (arguing that shortsighted flaw of cultural theory is its premise that Japanese race is immutable). "Japanese attitudes toward law are a product of various political, economic and social conditions. . . . As the social environment changes and people's attitudes change, we can safely say that no generation of thought entirely determines that of the next." *Id.*

75. FUKUSHIMA, *supra* note 63, at 8-9 ("The lack of litigiousness in Japan resulted . . . from 'structural' problems within the Japanese system that barred the success of Western practices."); John Owen Haley, *The Myth of the Reluctant Litigant and the Role of the Judiciary in Japan*, 4 JOURNAL OF JAPANESE STUDIES 350, 359 (1978) [hereinafter *Myth of the Litigant*] (arguing Japanese sue less often than their counterparts in United States because, due to the cost and uncertainty of litigation, it is less profitable to sue in Japan). Professor Haley explains that the concept of non-litigiousness would only be valid if evidence existed that Japanese litigants were averse to litigation even in situations where litigating would be more profitable. *Id.* A recent public survey supports Professor Haley's argument. J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 609 (1985) [hereinafter *Costs of the Consensual Myth*] (citing *Ho, Saiban, Bengoshi* [Law, Litigation, Lawyers] 76-90 (Osaka Bengoshi Kai ed. 1977)). The survey, which asked what factors would mostly deter respondents from litigating, found that 64% of the respondents cited high litigation expenses, 54% cited court delays, and only 6.1% cited damage to one's reputation from suing. *Id.*

76. ODA, *supra* note 26, at 9 ("An overemphasis on the disparity between law and practice is often misleading and results in the mystification of Japanese Law."). The reception of foreign law occurred easier in Japan than in countries under colonial rule because the Japanese embraced foreign law without substantial resistance. *Id.* The Japanese government, moreover, always modified the foreign laws it adopted to take into account the existing customs and conventions in Japan. *Id.* at 9. As a result, there was less friction between the new laws and established social practice. *Id.*

77. ODA, *supra* note 26, at 87.

78. *Id.*

own compromises⁷⁹ and that the government of the 1920s and 1930s enacted many conciliation statutes to require Japanese litigants to utilize conciliation procedures.⁸⁰ Structural Theorists claim, therefore, that the Japanese system,⁸¹ and not the Japanese people, instituted conciliation as the preferred method of dispute resolution for Japanese society.⁸²

Structural Theorists also argue that while Japanese tend to be concerned about harmony within groups, their relationships with members of different groups are not based on harmony.⁸³ There is, therefore, no cultural explanation, these scholars contend, why Japanese would have any hesitation litigating against someone outside of their neighborhood, company, or social circle.⁸⁴ Structural Theorists maintain that the real explanation for Japan's dearth of litigation is the presence of institutional barriers such as a shortage of Japanese attorneys, inefficient judicial system, and lack of adequate discovery procedures.⁸⁵

a. Shortage of Japanese Attorneys

Japanese citizens have difficulty gaining access to attorneys.⁸⁶ Due to a rigorously controlled licensing process that

79. See Ottley & Ottley, *supra* note 21, at 34 (discussing that during Tokugawa era plaintiffs' cases were only brought before magistrate when conciliation failed).

80. *Authority Without Power*, *supra* note 26, at 85-96 (describing various statutes Japanese government enacted during 1920s and 1930s). By the end of the 1930s, judges and special commissioners had the power to require parties to conciliate and almost all civil disputes became subject to conciliation procedures. *Id.* at 96. In the 1920s and 1930s, when lawsuits were on the rise in Japan, there was concern among the governing elite that "litigation was destructive to a hierarchical social order. . . ." *Id.* Today, the Domestic Proceedings Act of 1947 covers the conciliation of domestic affairs and the Conciliation of Civil Affairs Act of 1951 covers all other disputes. Tanaka, *supra* note 63, at 385.

81. See WOLFEREN, *supra* note 66, at 57 (using term "Japanese system" instead of "Japanese state" or "Japanese society" to create image of overreaching Japanese political resilient to democratic forces.)

82. *Id.* at 280 ("There are good reasons to reject the culturalist explanation and, instead, view current judicial practice as a political legacy from the days when the Japanese were forced to settle by conciliation. The system prefers conciliation, and makes sure that it remains the preferred alternative to litigation.").

83. *Id.* (describing that relationships among different Japanese groups are not harmonious).

84. *Id.*

85. *Myth of the Litigant*; *supra* note 75, at 359-90 (arguing Japanese litigants sue less frequently because it is simply less profitable to do so in Japan and without institutional barriers concept that Japanese are uniquely non-litigious would carry little weight).

86. ODA, *supra* note 26, at 102. Tokyo and Osaka have 17.9% of Japan's total pop-

grants permits to approximately 600 new attorneys per year,⁸⁷ there are currently only 15,000 practicing lawyers in Japan for a population of roughly 120 million.⁸⁸ The United States has twenty-five times as many attorneys per capita.⁸⁹ Most attorneys in Japan, moreover, represent large companies and manufacturers, which makes it difficult for plaintiffs in product liability suits

ulation but have 61.9% of Japan's lawyers. *Id.* See Michael O'Brien, *Products Liability in Japan*, FOR THE DEFENSE, Feb. 1992, at 17 (explaining most Japanese lawyers practice in major cities and almost 50% of lawyers are in Tokyo). Japanese lawyers do not have to compete aggressively for clients. *Id.* As a result, Japanese attorneys can be more selective in choosing clients. Hiroshi Sarumida, *Comparative Institutional Analysis of Product Safety Systems in the United States and Japan: Alternative Approaches to Create Incentives for Product Safety*, 29 CORNELL INT'L L.J. 79, 103 (1996). In product defect cases in Japan, victims that are part of a group of plaintiffs usually have more resources to seek legal services than do isolated plaintiffs. *Id.* at 103-04. Group plaintiffs' cases also usually involve more publicity thus making it easier to find counsel. *Id.* Since single-injury plaintiffs' cases are usually not successful, attorneys are not inclined to bring lawsuits on behalf of these victims. *Id.* A recent survey shows that only 30 of 250 product defect cases in which Japanese lawyers were consulted were eventually filed. *Id.* at 104. American attorneys, in comparison, reported to file half of the cases for which they were consulted. *Id.* Moreover, whereas consultation fees in the United States are usually free because of the intense competition for clients, Japanese clients must pay an average of US\$50 for thirty minutes of consultation. *Id.* at 103. Another difficulty Japanese citizens face in finding counsel for product defect cases is that Japanese attorneys usually do not specialize in areas like personal injury and lawyer advertising is prohibited. *Id.*

87. Behrens & Raddock, *supra* note 18, at 676-78. The Japanese Bar is now reforming its policies and within a few years the number of attorneys expected to be admitted per year will reach approximately 1000. Interview with Yasuhei Taniguchi, Professor of Law, Kyoto University, in New York, New York (Mar. 26, 1997).

88. Behrens & Raddock, *supra* note 18, at 676; see WOLFEREN, *supra* note 66, at 279-80 (claiming that by keeping number of lawyers and judges very small, role of law in Japan is minimized). Because of the lack of attorneys, Japanese are not encouraged to go to court. WOLFEREN, *supra* note 66, at 280. See AUTHORITY WITHOUT POWER, *supra* note 26, at 117 (arguing that although Japan may have efficient extrajudicial system, Japan's lack of lawyers still has negative impact when extrajudicial functions break down).

89. Behrens & Raddock, *supra* note 18, at 676-78. *But see* TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN 2/43-2/45 (1985) (indicating when Japan's non-lawyer specialists are added to total number of attorneys disparity between Japan's number of attorneys and other countries' is less striking). In Japan, there are several kinds of licensed non-lawyer specialists, such as patent agents, tax agents, and judicial scriveners, who may counsel clients on the law. *Id.* There are also nonlicensed specialists, such as corporate in-house counsels, who advise on the law. ODA, *supra* note 26, at 106-07. Most Japanese companies have a department or section handling legal matters. *Id.* Of the employees who staff these departments, sixty percent studied law as their undergraduate major, according to a survey. *Id.* The survey also indicated that only four percent of the companies had a licensed attorney working in their legal departments. *Id.* In contrast, legal departments in the United States are almost completely staffed by attorneys. *Id.*

to find representation.⁹⁰ The lack of lawyers, however, is due not to a lack of interest among Japanese to become attorneys, as evidenced by the nearly 30,000 applicants who take the National Examination⁹¹ each year,⁹² but rather to the government's decision to keep a tight reign on the expansion of the profession.⁹³ The Japanese government justifies its restriction on the profession by pointing to the high cost of providing training for lawyers.⁹⁴ Critics suggest, however, that the government is perpetuating an unofficial policy against litigation to maintain the spirit of Japan's anti-litigious legal history.⁹⁵

In addition to the difficulty plaintiffs face in finding counsel who will represent their interests, potential clients are burdened

90. Interview with Mr. Shinichi Sugiyama, Attorney for Tokyo HIV Litigation Attorneys Group, in New York, New York (May 5, 1997) (discussing that before enactment of *PL Law* many attorneys in Japan did not want to represent product liability plaintiffs because lack of product liability law impeded efforts to make strong cases in front of judges); See Bernstein & Fanning, *supra* note 18, at 69 (stating "The consumer's lawyer, heir to the gunslinger of the American frontier is absent in Japan. . . [even Japan's progressive] lawyer's are not of the same breed as the solitary and colorful personal-injury entrepreneur, who helped to build strict products liability in the United States.").

91. HATTORI & HENDERSON, *supra* note 89, at 2/9-2/14; ODA, *supra* note 26, at 109-10. To become a private attorney, public prosecutor, or judge in Japan, one must pass the national legal examination. *Id.* Although approximately 36,000 Japanese students graduate from undergraduate law departments each year, only a small number of them pass the national exam and can practice law. *Id.* On average, applicants take the exam more than six times before passing. *Id.*

92. Behrens & Raddock, *supra* note 18, at 677-78. A comparison of applicants who took the Japanese exam and a bar exam in the United States in 1975 showed that the number of Japanese, relative to the total population, was higher than the number of Americans. WOLFEREN, *supra* note 66, at 281. The Japanese may even have a stronger desire to become attorneys than Americans do. *Id.*

93. Behrens & Raddock, *supra* note 18, at 676-77. There is great pressure from the Japanese Bar Association to maintain this relative monopoly on the number of lawyers. *Id.*

94. *Id.* at 678. After applicants pass the National Examination, the Japanese government requires them to attend the Legal Research and Training Institute in Tokyo before becoming certified attorneys. *Id.* at 677. The cost of the training is borne by the national government. *Id.* at 678. By the end of the two year training, the trainees must choose to become either a judge, private attorney, or public prosecutor. See Bengoshi Ho [*Lawyer's Law*] Law No. 205 of 1949, art. 5(3) (Japan). There is discussion now about the possibility of reducing the two-year training period to a one year period which would increase the number of new attorneys beginning practice each year. Taniguchi Interview, *supra* note 87.

95. Behrens & Raddock, *supra* note 18, at 678; WOLFEREN, *supra* note 66, at 280-281; AUTHORITY WITHOUT POWER, *supra* note 26, at 110 ("Some suggest that the limits on admission to the [Japanese Bar] reflect a . . . premeditated concern by the Japanese bureaucracy to reduce or at least contain litigation and judicial activity.").

with the expense of retaining counsel.⁹⁶ Prior to receiving a court's judgment, Japanese clients must pay their attorneys a retainer fee based on their anticipated recovery amount.⁹⁷ If they win their case, plaintiffs customarily also pay a post-judgment fee based on the award.⁹⁸ Potential litigants often find it difficult to afford litigation and, therefore, avoid taking legal action to escape the risk of paying for an unsuccessful suit.⁹⁹ In contrast, litigants in the United States can bring a suit with more ease by paying a small retainer fee or by paying a contingent fee based on actual recovery amount.¹⁰⁰

b. Inefficient Judicial System and Restrictive Damages Scheme

The inefficiency of the judicial system presents several structural barriers to plaintiffs pursuing product liability suits in Japan.¹⁰¹ First, the slow pace of trial proceedings discourages plaintiffs from litigating.¹⁰² Japanese trials often continue for years marked by periods of a month or more between hearings.¹⁰³ A practical and obvious explanation for the trial delays is that a shortage of judges causes trial schedules to get backlog-

96. Behrens & Raddock, *supra* note 18, at 708-11.

97. Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation in Japan: A Structural Analysis*, 25 INT'L LAW 443, 447-49 (1991).

98. *Id.* The Japan Federation of Bar Associations establishes retainer and success fee schedules. *Id.* The fee schedules are not mandatory and are used only as guidelines. *Id.* According to the schedules, attorneys may receive a minimum of four percent and a maximum of thirty percent of the final recovery. *Id.*

99. Yamanouchi & Cohen, *supra* note 97, at 449. Plaintiffs are discouraged from seeking high damage awards because they have to pay a percentage of that amount whether they win or lose their suit. *Id.* Legal aid in Japan for people who can not afford to hire counsel is far from sufficient in comparison with the funds available for needy litigants in the United States and Europe. ODA, *supra* note 26, at 82-83.

100. Behrens & Raddock, *supra* note 18, at 709-11. Contingent fees have been accepted in the United States as a way for less wealthy plaintiffs to also be able to retain counsel. *Id.* The U.S. system is criticized, however, for increasing the incentive for litigation and seeking excessive damage awards. *Id.*

101. Behrens & Raddock, *supra* note 18, at 705-08.

102. *Id.*

103. ODA, *supra* note 26, at 79-82. Even the simplest cases may take two or three years to resolve at the district court level and larger cases may take ten years if there are appeals. WOLFEREN, *supra* note 66, at 281. For complex cases, it is not unusual for proceedings to last twenty five years before a judgment is reached. *Id.* Even though the Japanese Constitution guarantees the right to a speedy trial, the Supreme Court is reluctant to acknowledge a violation of this right. ODA, *supra* note 26, at 81. The Supreme Court has even held that a 25 year litigation process does not violate this constitutional provision. *Id.*

ged.¹⁰⁴ Some scholars offer a more critical explanation by claiming that, in the face of a national propensity toward harmony and compromise, Japanese judges intentionally plan the long breaks between hearings to encourage parties to reach their own resolutions.¹⁰⁵

Limited pre-trial discovery is another procedural limitation affecting product liability cases.¹⁰⁶ Unlike the U.S. legal system,¹⁰⁷ the Japanese system does not allow for the use of interrogatories¹⁰⁸ or depositions.¹⁰⁹ Japanese law also restricts the

104. ODA, *supra* note 26, at 80; Bernstein & Fanning, *supra* note 18, at 45. Although the Japanese population has more than tripled since 1890, the number of judges has not even doubled. WOLFEREN, *supra* note 66, at 281. Because Japanese courts are so overloaded with cases, there is a demand for more judicial personnel. *Id.*

105. Behrens & Raddock, *supra* note 18, at 705. The purpose of scattering the hearing dates of trials is to encourage the parties to reach their own compromise. *Id.* This custom gives judges no incentive to handle trials efficiently. *Id.* In the United States, trials proceed almost continuously after they are started. *Id.* In Japan, even after court proceedings begin, judges pressure plaintiffs to switch to the conciliation procedure. WOLFEREN, *supra* note 66, at 281-82. If plaintiffs reject the pressure to settle out-of-court and insist on receiving a decision from the court, judges are known to make clear to the litigants that because of their non-cooperation, the case will most likely be decided against them. *Id.* at 282. "Judges themselves tend to believe that to pursue a case through the legal process reflects an inferior moral attitude." *Id.*

106. ODA, *supra* note 26, at 375. Traditionally, Japan's Civil Code allowed parties to ask the court to examine evidence before the trial if that evidence would be difficult or impossible to examine at trial. *Id.* In recent years, these rules on preservation of evidence have been used for discovery purposes as well. *Id.*

107. Behrens & Raddock, *supra* note 18, at 706. Parties in the United States enjoy the benefits of a very liberal discovery process and have many opportunities to investigate opponents' cases before trial. FED. R. CIV. P. 26. U.S. discovery methods include "depositions upon oral examination or written questions, written interrogatories, production of documents or things or permission to enter upon land or other property for inspection or other purposes, and physical and mental examinations." Behrens & Raddock, *supra* note 18, at 706. As long as the information being sought is relevant to some issue in the case, and is not privileged, the information is obtainable. FED. R. CIV. P. 26(b)(1). See H. Michael O'Brien, *Products Liability in Japan*, FOR THE DEFENSE, Feb. 1992, at 18 (illustrating that liberal discovery procedures in United States allow plaintiffs in product liability suits to obtain defendant manufacturer's sensitive documents, thus making plaintiff's burden of proof easier to meet).

108. FED. R. CIV. P. 33. Interrogatories are written replies under oath to written questions propounded by another party. *Id.*

109. FED. R. CIV. P. 30-31. Depositions are used to discover information, to impeach testimony at trial, or to replace live testimony when a witness is unavailable to testify at trial. *Id.*; Behrens & Raddock, *supra* note 18, at 706-07 (explaining that in Japan, interrogatories and requests for admissions are unavailable as are depositions of witnesses who will not allow themselves to be voluntarily interviewed before trial). For witnesses who will be unable to testify at trial, the Civil Code allows a party to make a motion to the court for the preservation of evidence. Minji Soshoho [*Minsoho*] (Code of Civil Procedure) Law No. 29 of 1890, art. 257 (Japan). A motion for the preservation

production of documents during pre-trial discovery.¹¹⁰ When litigants request documents, they must make a motion that includes a specific request for each document, a description of each document's contents, and an identification of who possesses the documents.¹¹¹

Limits on pre-trial discovery have negatively impacted consumers' efforts to bring product liability claims against large manufacturers.¹¹² Restrictive discovery prevents plaintiffs from being able to force defendants to produce internal corporate reports about a defective product.¹¹³ In light of these problems, observers hoped the PL Law would have included a special discovery provision.¹¹⁴ Although a discovery provision was not ultimately included in the PL Law, the Diet¹¹⁵ recently approved a revised draft of the discovery provision of the Japanese Civil Procedure Code.¹¹⁶

The absence of a jury system is another disincentive for con-

of evidence must include a description of the facts to be proved, the evidence to be discovered, and the reasons for the preservation of evidence. *Id.* An example when preservation of evidence would be allowed is in the case of a dying witness. *Litigation Roundtable, supra* note 72, at 26.

110. *Minsoho* art. 257. Discovery is limited to the production of three categories: (1) where the document has already been specifically mentioned in the litigation, (2) where the party with the burden of proof has a legal right to the document, and (3) where the document has been prepared for the benefit of the other party. *Id.* In all other circumstances, a party to litigation does not have to turn over documents sought by the opposing party. Behrens & Raddock, *supra* note 18, at 707-08.

111. *Minsoho* art. 312. See Yamanouchi & Cohen, *supra* note 97, at 446 (highlighting that vagueness of three discovery categories has led to many lawsuits).

112. Behrens & Raddock, *supra* note 18, at 708.

113. *Id.*

114. O'BRIEN, *supra* note 86, at 18; Interview with Mr. Masato Nakamura, Consumer Rights Attorney, in Tokyo, Japan (Aug. 8, 1996) [hereinafter Nakamura Interview]; Interview with Mr. Toshihide Shichi, Attorney at Anderson Mori (Tokyo), in Tokyo, Japan (Aug. 13, 1996) [hereinafter Shichi Interview].

115. HATTORI & HENDERSON, *supra* note 89, at 1/19-1/20. The first Japanese Diet, or parliament, was the Imperial Diet, which began in 1890. *Id.* at 1/18. The Imperial Diet consisted of two houses, the House of Peers and the lower house. *Id.* at 1/19. The House of Peers included representatives of the royal family and others appointed by the Emperor. *Id.* The lower house members were elected by popular male vote. *Id.* Ever since 1947, under the new Constitution, all Diet members are elected by Japanese citizens twenty years of age or older, regardless of sex. *Id.* The Japanese Diet now consists of two houses, the House of Representatives and the House of Councilors. *Id.*

116. Toshihide Shichi, *Why Product Liability Litigation is About to Increase*, INTERNATIONAL COMMERCIAL LITIGATION, 1996, at 16 [hereinafter *Product Liability Litigation Increase*] (discussing how new discovery law may enhance plaintiffs' ability to access important documents to establish their burdens of proof).

sumers to bring product liability suits in Japan.¹¹⁷ Commentators note that Japanese judges have historically favored manufacturers and often blamed consumers for misusing products and causing their own injuries.¹¹⁸ In difficult cases, badly injured plaintiffs who face difficult burdens of proof have been unable to rely on the sympathy of juries, as do their counterparts in the United States, and, thus, see little incentive in bringing suit.¹¹⁹

In addition to paying high attorney fees, Japanese litigants must pay court filing fees, which progressively increase with the amount of damages claimed.¹²⁰ If plaintiffs lose their claims, the filing fees are not recoverable.¹²¹ This is another disincentive for Japanese citizens to seek large recovery amounts.¹²² Moreover, litigants are often prevented from pursuing large claim amounts because the Japanese system provides for no punitive damages,¹²³ limits non-economic damages such as pain and suf-

117. Nancy L. Young, *Japan's New Products Liability Law: Increased Protection for Consumers*, 18 *LOY. L.A. INT'L & COMP. L.J.* 893, 903 (1996). The lack of a jury system discourages plaintiffs from filing suits because the likelihood of receiving an excessive damage award is reduced. *Id.* Plaintiffs are more willing, therefore, to settle out of court. *Id.* In comparison, the use of juries in the United States favors finding defendant manufacturers liable and awarding plaintiffs with higher damages. *Id.* See O'Brien, *supra* note 86, at 18 (arguing juries are perceived by many as "wild card" of U.S. civil litigation).

118. Sarumida, *supra* note 86, at 113-14.

119. *Id.* A survey conducted by the RAND Corporation confirmed that juries often have a pro-plaintiff attitude when defendants are corporations and plaintiffs suffer severe injuries. *Id.* at 112. The survey showed when defendants are manufacturers, plaintiffs' chances of winning lawsuits increase with the severity of plaintiffs' injuries. *Id.* The level of injury severity, however, did increase plaintiffs chance of winning against defendant corporations. *Id.* There are many cases that illustrate the role of jury sympathy in the United States. See, e.g., *Ayers v. Johnson & Johnson Baby Products Co.*, 818 P.2d 1337, 1342 (Wash. 1991) (holding where infant drank baby oil and suffered brain damage; manufacturer was liable for failure to warn although the risk was extremely low); *Siegel v. Mazda Motor Corp.*, 835 F.2d 1475, 1478 (D.C. Cir. 1987) (holding where driver suffered brain damage from car accident, manufacturer was liable although manufacturer rebutted every possibility that any manufacturer-related defect had caused accident).

120. Yamanouchi & Cohen, *supra* note 97, at 453. As an example of court filing fees, a suit which involves damages of US\$500,000 requires a fee of approximately US\$4,500. *Id.*

121. *Id.*, at 446.

122. *Id.* (discussing that because court filing fees are paid in proportion to claim amounts, plaintiffs are discouraged from seeking high damage awards).

123. *Minpo* [Civil Code] art. 709, Law No. 9 of 1898 (Japan)[hereinafter *Minpo*]. Japanese civil law functions only to compensate plaintiffs and not to punish defendants. *Id.* But see LITIGATION ROUNDTABLE, *supra* note 72, at 27-28 (suggesting that since Supreme Court has yet to render judgment on punitive damages Japanese companies

fering,¹²⁴ and prohibits use of the collateral source rule.¹²⁵

c. Japanese Alternative Dispute Resolution System

Dating back to feudal Japan,¹²⁶ the Japanese alternative dispute resolution system¹²⁷ ("ADR") deters litigants from utilizing the Japanese courts¹²⁸ because ADR is less expensive and more accessible than the judicial system.¹²⁹ Commentators argue that Japanese ADR institutions usurp the judiciary's role of defining and enforcing the rules of society.¹³⁰ In the specific context of

still have reason to fear possibility of having to pay punitive damages in future). "There is one court case that upheld not punitive, but rather consolation damages in favor of a company. Though punitive and consolation damages are different economically, consolation damages function in a similar way because you don't have to prove hard evidence of sustained damage." *Id.*

124. *Minpo* art. 710, Law No. 9 of 1898 (Japan). Non-pecuniary damages, *isharyo*, are recoverable for pain and suffering but the amount of damages are minimal and set by the court. *Id.* Non-pecuniary damages in Japan in the past have rarely exceeded approximately US\$200,000 (using an exchange rate of one U.S. dollar being equal to 100 Japanese yen.) Yamanouchi & Cohen, *supra* note 97, at 451. In accordance with *Minpo* art. 723, courts may award a remedy to restore an aggrieved party's reputation which includes:

an apology in open court; a letter of apology from the wrongdoer to the defamed; a letter of apology or letter of withdrawal to the person concerned; broadcasting of the withdrawal and an apology on television; a notice of apology or withdrawal of the statement in the place where it occurred; removal of the cause of the defamation; publication of an apology and a withdrawal in newspaper; and the right to refute.

Yamanouchi & Cohen, *supra* note 97, at 452.

125. Behrens & Raddock, *supra* note 18, at 714-16. The collateral source rule, as used in the United States, allows claimants to recover damages in addition to any compensation received from insurance, workmen compensation or government benefits. *Id.* In Japan, court damages offset the amount of money claimants receive from social insurance and workers' accident compensation. *Id.* This practice discourages inflated damages claims. *Id.*

126. ODA, *supra* note 26, at 23. The Tokugawa Shogunate viewed civil disputes as less important than criminal disputes and believed that civil disputes should be settled without the authority if possible. *Id.* The Shogunate, therefore, encouraged local officials or elders to informally settle disputes by conciliation. *Id.*

127. Andrew M. Pardieck, *Virtuous Ways and Beautiful Customs: The Role of Alternative Dispute Resolution in Japan*, 11 *TEMP. INT'L & COMP. L.J.* 31, 37-55 (classifying Japan's ADR system into processes of compromise, conciliation, and arbitration).

128. Ponte, *supra* note 19, at 666-67 (arguing Alternative Dispute Resolution ("ADR") process is greatly available to claimants without costs and delays of judicial system, thus encouraging plaintiffs to use ADR instead of courts to settle disputes); Kawashima, *supra* note 60, at 43-45; Cohen & Martin, *supra* note 4, at 325-26; Ottley & Ottley, *supra* note 21, at 35-38.

129. ODA, *supra* note 26, at 86; Ponte, *supra* note 19, at 666-67.

130. See Pardieck, *supra* note 127, at 44 (arguing that facilitators of conciliation

product liability, scholars view litigants' preference for ADR over the judiciary as problematic for the development of an effective product liability system because ADR institutions do not publish their opinions and, therefore, claimants have less access to information regarding product defects.¹³¹ When parties resolve their disputes through ADR, moreover, judges have less of an opportunity to interpret product liability law and develop new legal theories.¹³² Supporters of ADR stress, however, that ADR works well in Japan,¹³³ thus reducing the need for a stronger judicial role in product liability.¹³⁴

Japanese ADR consists both of conciliation and arbitration processes.¹³⁵ The most formal ADR process is *chotei*,¹³⁶ the Japanese conciliation process which takes place under the guidance of the courts.¹³⁷ In civil disputes, parties may decide to initiate

processes have freedom to disregard substantive law and rely on subjective standards). In analyzing the impact of ADR on the role of the judiciary, Professor Haley notes that:

Where, for example, governmental bureaucracies or private groups become the law's primary enforcers . . . they, not the courts, define the rules being enforced and control their efficacy. To be sure, the judiciary may continue to play a role and determine the outer boundaries of the law, but it is a much diminished and less efficacious one. The containment of the judiciary's role thus restricts the law's domain and empowers other agencies, public and private, of enforcement.

AUTHORITY WITHOUT POWER, *supra* note 26, at 119.

131. Ponte, *supra* note 19, at 666-67 ("[The] private, informal nature [of ADR] prevents the collection of product defect information, vital to other injured consumers considering litigation . . .").

132. *Id.* at 667 ("By limiting litigation and encouraging the use of alternative dispute resolution mechanisms, Japanese courts have few meaningful opportunities for detailed legal analysis of causation or for more expansive interpretations of cause-in-fact theories"); Tetsuya Obuschi, *Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects with Special Emphasis on In-Court Compromise*, 20 LAW IN JAPAN 74, 88-89 (1987); Ottley & Ottley, *supra* note 21, at 56; Cohen & Martin, *supra* note 4, at 327.

133. See Ottley & Ottley, *supra* note 21, at 38 (arguing ADR comports with Japanese culture because Japanese prefer informal legal structure in which parties reach consensus based upon mutual agreement); *But see* Pardieck, *supra* note 127, at 40 (suggesting that parties may be indirectly forced into compromise agreements because same judge who monitors compromise discussion often decides case if compromise is not reached and case goes to trial).

134. *Id.*

135. ODA, *supra* note 26, at 83-86.

136. Ottley & Ottley, *supra* note 21, at 36-37 (describing *chotei* as a quasi-judicial alternative to formal litigation which involves a hearing conducted by a specifically designated committee).

137. Young, *supra* note 117, at 913-14; ODA, *supra* note 26, at 83. Court-level conciliation is regulated mainly by the Law on Civil Conciliation and Family Affairs Adjudi-

chotei instead of filing a suit.¹³⁸ A conciliation committee, composed of a judge and two civil conciliation commissioners,¹³⁹ conducts hearings for the parties in dispute.¹⁴⁰ If the parties reach an agreement, the committee documents and files the resolution, which has the same legal effect as a court judgment.¹⁴¹ If the parties are unable to reach an agreement, the judge has the authority to recommend a resolution.¹⁴² The judge's decision, however, is only binding on the parties if they choose to accept the judge's terms.¹⁴³

Japanese administrative bodies with quasi-judicial power¹⁴⁴ and various private non-for-profit institutions employ conciliation systems less formal than the *chotei* process.¹⁴⁵ The Center for Settlement of Traffic Accident Disputes¹⁴⁶ (the "Center") is an example of a private non-for-profit organization that performs conciliation services.¹⁴⁷ The Center receives funding from the Association of Marine and Fire Insurance Companies, but acts independently and retains more than 100 attorneys on a part-time basis.¹⁴⁸ When a claimant goes to the Center to settle a dispute, the Center contacts the opposing party, usually an insurance company representative, and encourages the parties to reconcile their differences.¹⁴⁹ If necessary, the parties may proceed

cation Law. *Id.* The aim of the Law on Civil Conciliation is "the resolution of disputes through mutual concession of the parties by way of taking into account 'actual state of affairs and in conformity with reason.'" *Id.*

138. ODA, *supra* note 26, at 83. Even if a litigant chooses to file a law suit, the court may require the case to be solved by *chotei*. *Id.*

139. *Id.* The Supreme Court appoints civil conciliation commissioners for two year terms. *Id.* The commissioners are part-time government employees, between the ages of 40 and 69. *Id.* The role of the commissioners often eliminates the need for lawyers to take part in the proceedings. Young, *supra* note 117, at 914.

140. ODA, *supra* note 26, at 83.

141. *Id.*

142. *Id.* at 84.

143. *Id.*

144. *Id.* at 85. As another example of an administrative body, the Coordinating Commission for Pollution, established in 1970 as a commission attached to the Prime Minister's Office, has quasi-judicial power to mediate disputes concerning pollution. *Id.* Since 1971, the Commission has mediated 592 cases. *Id.*

145. ODA, *supra* note 26, at 85.

146. *Id.* In 1988, the Center advised on 12,445 cases, 1,934 of which reached compromise before being forwarded to the conciliation board. *Id.* at 86. In most cases, the center settles disputes after four or five meetings. *Id.*

147. ODA, *supra* note 26, at 85-86.

148. *Id.*

149. *Id.*

to mediation with one of the Center's attorneys.¹⁵⁰ If the parties fail to reach an agreement with the aid of an attorney, they may ask the Center's conciliation board, composed of both attorneys and law professors, to make a recommendation.¹⁵¹ The recommendation is binding on the insurance company but not on the victim.¹⁵²

Arbitration also exists in Japan but is less popular than conciliation.¹⁵³ Arbitration is less frequently used because, unlike conciliation, if parties in dispute are unable to reach an agreement, the arbitrator is empowered to reach his own agreement and enforce it upon the parties.¹⁵⁴ A party may request a court to invalidate an arbitration decision when an arbitrator deviates from the procedure outlined in the Japanese Civil Code.¹⁵⁵ Commentators argue, however, that arbitration rules in the Civil Code are vague, which creates difficulty for parties attempting to prove an arbitrator did not follow the proper rules of procedure.¹⁵⁶

C. Japanese Products Liability Before the PL Law and Factors Leading to the Law's Enactment

Before the PL Law's enactment, the Civil Code made no mention of the concept of product liability,¹⁵⁷ and Japan's judges, who function under a civil law system, did not have the same power of statutory interpretation as judges working in common law systems.¹⁵⁸ With the exception of major environmental and pharmaceutical mass tort suits,¹⁵⁹ Japan's judges dismissed most product liability suits brought under the provisions of the

150. *Id.*

151. *Id.*

152. ODA, *supra* note 26, at 85-86.

153. Young, *supra* note 117, at 912; ODA, *supra* note 26, at 85 (noting between 1980 and 1990 only 65 cases were filed with Japan Commercial Arbitration Association).

154. Young, *supra* note 117, at 912.

155. *Minsoho* art. 801, Law No. 29 Of 1890 (Japan).

156. *Id.*

157. See MINPO art. 709 and art. 415, Law No. 89 of 1896 and Law No. 9 of 1898 (Japan) (describing basic negligence and contract theories).

158. Ottley & Ottley, *supra* note 21, at 56.

159. See O'Brien, *supra* note 86, at 15 (noting that although there are few reported product liability decisions in Japan, there have been some highly publicized mass-tort suits).

Civil Code.¹⁶⁰ In spite of the lack of legislation protecting the rights of product liability claimants, the Japanese government¹⁶¹ and business leaders¹⁶² lobbied against the enactment of the PL Law for more than twenty years.¹⁶³ These leaders attempted to keep strict liability out of Japan by denouncing the concept as a foreign and unnecessary legal protection for Japanese consumers.¹⁶⁴ Recent economic,¹⁶⁵ social,¹⁶⁶ and political¹⁶⁷ changes in Japan, however, weakened the persuasiveness of the opposition and paved the way for the PL Law's enactment.¹⁶⁸

1. Japanese Product Liability System Prior to the PL Law

Because the Japanese Civil Code, prior to the enactment of the PL Law, provided no explicit rules or theories for product liability actions,¹⁶⁹ Japanese litigants had to bring product defect claims under the general provisions of contract law¹⁷⁰ or negli-

160. See Cohen & Martin, *supra* note 4, at 327 n.54 (noting that by 1981, only fifty cases had been brought by consumers against manufacturers).

161. See Yuko Inoue, *LDP Officials Fear Confusion from Law*, NIKKEI WEEKLY, Oct. 12, 1992, at 8 [hereinafter *LDP Officials*] (explaining how head of Liberal Democratic Party's ("LDP") product liability law study group concluded product liability law would interfere with Japan's existing product safety system and engender surge in irrational consumer complaints).

162. Yuko Inoue, *Controversy Heightens in Debate Over Product Liability Law: Industry Initiates Opposition Campaign*, NIKKEI WKLY., Oct. 12, 1992 at 1 [hereinafter *Controversy Heightens*] (discussing how top corporate officials resisted *PL Law* by arguing consumers were already well protected).

163. Toshihiro Mitsui, *Product Liability in Japan: Background and Comments*, PRODUCT LIABILITY INTERNATIONAL 99 (July 1995).

164. See Nakamura Interview, *supra* note 114 (describing reasons why government and business leaders believed *PL Law* was unnecessary). Business and government leaders often cited tendency of Japanese manufacturers to employ strict quality control systems, existence of government initiated product safety system, and preference of consumers to utilize ADR methods instead of litigation as reasons why a product liability law was unnecessary for Japan. *Id.*

165. Hirsh & Henry, *supra* note 9, at 11-13 (describing how Japan's five year economic downturn is fostering major structural changes in Japanese economy).

166. Todd Crowell, *supra* note 14 (discussing new demands of Japanese consumers).

167. Michael Blaker, *Japan In 1994: Out With the Old, In With the New?*, ASIAN SURVEY, Jan. 1995 (explaining fall of LDP and end of unresponsive Japanese politics).

168. Shichi Interview, *supra* note 114.

169. Behrens & Raddock, *supra* note 18, at 678; Mitsui, *supra* note 163, at 99; Toshihide Shichi, *Why Product Liability Litigation is About to Increase*, INTERNATIONAL COMMERCIAL LITIGATION 16 (February 1996) [hereinafter *Product Liability Litigation Increase*]; O'Brien, *supra* note 86, at 14; Marcuse, *supra* note 18, at 370.

170. Zentaro Kitagawa, *Products Liability*, in DOING BUSINESS IN JAPAN XIII 4.06[1], 4.06[2] (Zentaro Kitagawa ed., 1989). Applicable contract law is found in Article 415 of

gence-based tort law.¹⁷¹ The high burden of proof under these theories prevented most individual plaintiffs from litigating successfully.¹⁷² Prior to the PL Law, almost all successful product liability litigants were involved in mass tort suits.¹⁷³ The number of mass tort suits was small, however, which allowed Japanese manufacturers to operate largely without the risk of litigation.¹⁷⁴ The Japanese judiciary, thus, was unable to play a large role in inducing manufacturers to produce safer products.¹⁷⁵ Instead, the Japanese government directed product safety by regulating product standards and determining levels of safety.¹⁷⁶ Many observers argue that governmental regulation of product safety adversely affected the Japanese economy by preventing manufacturers from selling lower quality, less expensive goods.¹⁷⁷

a. PL Legal Theories: Breach of Contract and Negligence in Tort

Articles 415¹⁷⁸ and 570¹⁷⁹ of the Japanese Civil Code provide the basis for product liability claims under contract theory.¹⁸⁰ Article 415 allows a buyer of goods to recover from the seller when the product is not fit for the purpose for which it is sold.¹⁸¹ A defective product falls under this standard if a claimant can establish foreseeability of harm and adequate causation.¹⁸² Article 570 allows buyers to recover even if they are un-

the Civil Code as follows: “[i]f an obligor fails to perform in accordance with the main sense of the obligation-duty, the obligee may demand compensation for damages; the same shall apply in cases where performance becomes impossible for any reason imputable to the obligor.” MINPO art. 415, Law No. 89 of 1896 and Law No. 9 of 1898 (Japan).

171. O’Brien, *supra* note 86, at 14. Applicable tort law is found in Article 709 of the Civil Code as follows: “A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.” MINPO art. 709, Law No. 89 of 1896 and Law No. 9 of 1898 (Japan).

172. Marcuse, *supra* note 18, at 373-74.

173. *Id.*

174. Sarumida, *supra* note 86, at 82.

175. *Id.*

176. *Id.* at 124-29.

177. *Id.* at 129-30.

178. MINPO art. 415, Law No. 89 of 1896 and Law No. 9 of 1898 (Japan).

179. MINPO art. 570, Law No. 89 of 1896 and Law No. 9 of 1898 (Japan).

180. MINPO art. 415 and art. 570, Law No. 89 of 1896 and Law No. 9 of 1898 (Japan).

181. MINPO art. 415, Law No. 89 of 1896 and Law No. 9 of 1898 (Japan).

182. *Id.*

able to prove foreseeability, such as in the case of a latent defect.¹⁸³ Article 570, however, limits damages to the value of the product itself and does not provide for personal injury or other property or economic loss.¹⁸⁴

Under Japanese contract law, there are two major hurdles for plaintiffs attempting to recover for product liability claims.¹⁸⁵ First, Japanese courts require privity of contract¹⁸⁶ between the seller and the immediate buyer in any suit based on a breach of contract.¹⁸⁷ Privity of contract, a legal theory which courts in the United States have not used for more than thirty years,¹⁸⁸ prevents Japanese litigants from recovering against manufacturers in most cases because it is rare for buyers to have contracts with manufacturers.¹⁸⁹ Second, Japanese retailers often include disclaimers in sales agreements to limit their liability in product defect suits.¹⁹⁰ Although the concept of recovering under contract

183. MINPO art. 570, Law No. 89 of 1896 and Law No. 9 of 1898 (Japan).

184. *Id.*

185. Behrens & Raddock, *supra* note 18, at 684-85.

186. BLACK'S LAW DICTIONARY 712 (6th ed. 1990). "Privity of contract" is the relationship that exists between two or more contracting parties. *Id.*

187. *Id.*

188. SIMPSON THATCHER & BARTLETT, PRODUCT LIABILITY IN THE UNITED STATES: A PRACTICAL GUIDE FOR JAPANESE COMPANIES 3 (2d. ed. 1995) [hereinafter SIMPSON, THATCHER & BARTLETT]. Until the early 1900s, product liability law in the United States was closely tied to contract law. *Id.* For a plaintiff to recover for injuries caused by a defective product, the plaintiff was required to be in contractual privity with the manufacturer. See *Winterbottom v. Wright*, 10 M&W 109 (1842) (denying mail coach driver recovery against coach manufacturer for his injuries caused by defect in coach because mail coach driver's employer, and not mail coach driver, was in privity of contract with manufacturer). The privity requirement rested on the basic premise that it was better for a customer to suffer than for a manufacturer to be burdened with liability to an unlimited number of potential claimants. W. PROSSER & W. KEETON, THE LAW OF TORTS 682 (5th ed. 1984). Courts in the United States began to abolish the privity of contract requirement soon after *Winterbottom*. See *Thomas v. Winchester*, 6 N.Y. 397 (1852) (holding manufacturers of "imminently dangerous" products, such as poison, owed duty of care to anyone who may be injured by their products); *Staller v. George A. Ray*, 195 N.Y. 478 (1909) (removing privity of contract requirement for "inherently dangerous" products); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) (abolishing privity of contract requirement for plaintiffs injured by automobiles because automobiles are "reasonably certain" to be dangerous if defective). After *MacPherson*, any plaintiff injured by a defective product could recover against a negligent defendant. SIMPSON THATCHER & BARTLETT, *supra*, at 5. Not only did the plaintiff no longer have to prove privity of contract, but he also no longer had to prove that he even purchased or used the defective product. *Id.*

189. Behrens & Raddock, *supra* note 18, at 684.

190. *Id.* at 685. Disclaimers in sales transactions are allowed in Japan as long as they do not violate Article 1 of the Civil Code. *Id.* Article 1 provides that "[a]ll private

law exists for product defects in Japan, such recovery remains an elusive goal for the average product liability plaintiff.¹⁹¹

Before the enactment of the PL Law, most claimants brought product liability actions in tort law under Article 709 of the Civil Code.¹⁹² Article 709 provides for general negligence principles which allowed judges to apply Article 709 to product liability cases.¹⁹³ To prove negligence, Japanese litigants must show beyond a reasonable doubt the existence of duty, breach of duty, injury, and causation.¹⁹⁴ In Japan, as in the United States, plaintiffs may bring negligence actions under several theories such as negligent manufacture,¹⁹⁵ negligent design,¹⁹⁶ and negligent warning.¹⁹⁷ Japanese law recognizes comparative negli-

rights shall conform to the public welfare" and "shall be done in good faith and in accordance with the principles of trust." MINPO art. 1. A manufacturer's warranty is ineffective if the manufacturer has knowledge of a defect and fails to disclose the information to the buyer. MINPO art. 572, Law No. 89 of 1896 and Law No. 9 of 1898 (Japan).

191. *Id.*; Ottley & Ottley, *supra* note 21, at 45.

192. Ottley & Ottley, *supra* note 21, at 32. Article 709 provides that "[a] person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom." MINPO art. 709, Law No. 89 of 1896 and Law No. 9 of 1898 (Japan).

193. Ponte, *supra* note 19, at 661.

194. *Id.* at 661-62. To prove negligence a plaintiff must specifically show (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached a duty of reasonable care, (3) the defendant negligently sold or manufactured a defective product, (4) the plaintiff suffered an injury, and (5) the defendant's product caused the injury. *Id.*

195. *Id.* at 662; Cohen & Martin, *supra* note 4, at 329. To prove that a product was defective due to a manufacturing defect, the plaintiff must show that the manufacturer failed to use reasonable care in making the product or in inspecting the product to discover any flaws. SIMPSON THATCHER & BARTLETT, *supra* note 188, at 19. Plaintiffs generally attempt to prove that the manufacturer's inspection process failed or was inadequate. *Id.*

196. Ponte, *supra* note 19, at 662; See Cohen & Martin, *supra* note 4, at 329 (explaining Japanese litigants may sue on theory of negligence in design as may their U.S. counterparts). To prove that a manufacturer negligently designed a product, the plaintiff must show that the manufacturer failed to exercise reasonable care in the adoption of a design for its product. SIMPSON THATCHER & BARTLETT, *supra* note 188, at 20. The plaintiff must establish that the manufacturer knew or should have known that its design would render the product unreasonably dangerous for its intended and foreseeable uses. *Id.*

197. Ponte, *supra* note 19, at 662; See Cohen & Martin, *supra* note 4, at 329 (explaining Japanese litigants may sue on theory of negligence in warning as may their U.S. counterparts). To prove that a manufacturer negligently failed to warn users of the risks associated with its product, the plaintiff must show that the manufacturer knew or should have known of the product's risks and that the manufacturer failed to provide adequate warnings of such risks. SIMPSON THATCHER & BARTLETT, *supra* note 188, at 21.

gence¹⁹⁸ but does not recognize contributory negligence.¹⁹⁹ Despite the availability of bringing suit under negligence theories, most Japanese litigants fail to establish the existence of negligence beyond a reasonable doubt because of the limited discovery system and lack of attorneys willing to represent plaintiffs' cases.²⁰⁰

b. Overview of Product Liability Cases in Japan Before the Enactment of the PL Law

Prior to the passage of the PL Law, almost all of the successful product liability cases in Japan involved suits arising from mass disasters in which plaintiffs brought their claims collectively.²⁰¹ A review of Japanese product liability case law indicates that plaintiffs involved in mass tort suits often succeeded because judges reduced the burden necessary for proving negligence.²⁰² In cases involving individual plaintiffs, however, judges were less likely to alter the elements needed to prove negligence and plaintiffs were unable to meet their burdens of proof because of their inability to access necessary information from the defendants.²⁰³

Critics, who argued Japan did not need a strict liability system, attempted to prove the workings of the negligence system by highlighting famous product liability cases, such as the Morinaga dairy case,²⁰⁴ Thalidomide case,²⁰⁵ SMON case,²⁰⁶

Even if a manufacturer provided warnings with its product, a plaintiff can recover for "failure to warn" by proving the warnings were inadequate. *Id.*

198. Ponte, *supra* note 19, at 663. Comparative negligence is the allocation of responsibility for damages incurred between the plaintiff and defendant, based on the relative negligence of the two. BLACK'S LAW DICTIONARY 712 (6th ed. 1990). Under the theory of comparative negligence, a reduction of damages is to be recovered by the negligent plaintiff in proportion to his fault. *Id.*

199. Ponte, *supra* note 19, at 662. Contributory negligence exists where the plaintiff's conduct is a legally contributing cause in addition to the negligence of the defendant in bringing about the plaintiff's harm. BLACK'S LAW DICTIONARY 712 (6th ed. 1990). At common law, any degree of contributory negligence on behalf of the plaintiff would completely bar recovery by the plaintiff. *Id.* Now, most states follow a comparative negligence approach to allocating fault. *Id.*

200. Behrens & Raddock, *supra* note 18, at 680; Ponte, *supra* note 19, at 662.

201. Ottley & Ottley, *supra* note 21, at 55.

202. Marcuse, *supra* note 18, at 373-75.

203. Ponte, *supra* note 19, at 661; Sugiyama Interview, *supra* note 90 (arguing that before *PL Law* only plaintiffs in large cases received preferential treatment by judges who used abstract form of negligence was applied).

204. *Japan v. Ooka*, 365 HANREI JIHO 7 (Tokushima Dist. Ct., Oct. 25, 1963), *rev'd*

Kanemi case,²⁰⁷ and the most recent HIV litigation.²⁰⁸ Many

and remanded, 447 HANREI JIHO 31 (Takamatsu High Ct., Mar. 31, 1966), *appeal dismissed*, 547 HANREI JIHO 92 (Sup. Ct., Feb. 27, 1969); 302 HANREI TAIMUZU 123 (Tokushima Dist. Ct., Nov. 28 1973). In the Morinaga Dairy cases, twelve thousand infants became sick, and many later died, by drinking arsenic-tainted milk. *Id.* This case was settled out of court and the defendants agreed to set up a fund to pay for the medical costs of the injured plaintiffs. *Id.*

205. *Kubota v. Kanemi Soko K.K.*, 866 HANREI JIHO 21 (Fukuoka Dist. Ct., Oct. 5, 1977); *Noguchi v. Kanemi Soko K.K.*, 881 HANREI JIHO 17 (Fukuoka Dist. Ct., Kokura Br., Mar. 10, 1978). In the thalidomide cases, babies were born with injuries due to side effects of fertility drugs. *Id.* Here, sixty-three families sued the government and the manufacturers of the drug Isomin for their negligence in producing drugs containing thalidomide. *Id.* None of the plaintiffs in the thalidomide cases brought suits individually. Ottley & Ottley, *supra* note 21, at 48. *Id.* Instead of being represented by private attorneys, all of the plaintiffs were represented by legal aid organizations such as the Kyoto Civil Liberties Union and the Tokyo Civil Liberties Union. *Id.* The plaintiffs, the government, and the manufacturer eventually settled out of court. *Id.* at 50.

206. *Yagi v. State*, 879 HANREI JIHO 26 (Kanazawa Dist. Ct., Mar. 1, 1978); *Oyama v. State*, 899 HANREI JIHO 48 (Tokyo Dist. Ct., Aug. 3, 1978); *Ochi v. State*, 910 HANREI JIHO 33 (Fukuoka Dist. Ct., Nov. 14, 1978); *Aoyama v. State*, 910 HANREI JIHO 19 (Hiroshima Dist. Ct., Feb. 2 1979). The SMON (subacute myelo-optico neuropathy) cases are other examples where Japanese trial judges reduced the burden of proof for plaintiffs in a mass tort situation. *Id.* Here, in 1964, a drug used to treat bowel disease caused neurological suffering to around 10,000 people. *Id.* The Kanazawa District Court held in 1978 that the manufacturers were negligent under Article 709 by concluding that the manufacturers would have noticed the damaging effect of one of the ingredients in the drug if the manufacturers had exercised a high degree of care. *Id.* The court here basically inferred the manufacturers' negligence from the circumstances despite the plaintiffs' inability to clearly prove negligence. *Id.*

207. *Id.* In 1968, in the Kanemi rice oil case, more than fourteen thousand plaintiffs brought suit after sustaining damage to their kidney and nervous systems after eating food cooked with rice oil contaminated with PCB (polychlorinated biphenyl). *Id.* The contamination occurred when PCB, which was being used in the manufacturing process of heat oil, leaked into the rice oil through a hole in a corrosive heating pipe. *Id.* The plaintiffs filed tort actions against the cooking oil company, the manufacturer of PCB, and the government. *Id.* In order to give the plaintiffs leverage in the suits, the court created a "special negligence" rule which created a presumption of fault and shifted the burden of proof. *Id.* The court held that the supplier of PCB was negligent for failing to warn about the potential danger of PCB to the food manufacturer. *Id.*

208. Sugiyama Interview, *supra* note 114. The HIV litigation involved more than 100 hemophiliac plaintiffs who were infected with HIV through the use of tainted blood products. *Id.* The plaintiffs sued the Japanese government and five pharmaceutical companies. *Id.* The first group of plaintiffs reached settlement in 1996, seven years after the trials began. *Id.* Plaintiffs had difficulty proving negligence because of their need to prove that the harm was foreseeable and that the harm could have been avoided given the knowledge at the time. *Id.* Because evidence was difficult on these issues, the courts stretched their application of negligence to rule in the plaintiffs favor. *Id.* If the *PL Law* had been in effect, the plaintiffs would have had a much easier case because the burden would have been reversed. *Id.* Instead of the plaintiffs' needing to prove foreseeability and avoidability, the defendants would have had to prove lack of foreseeability and avoidability as their defenses. *Id.* Although the result would have

proponents of the PL Law note that these cases, in which product liability plaintiffs were successful, are exceptions because the plaintiffs were represented by public interest organizations rather than individual attorneys.²⁰⁹ Observers argue that these cases, therefore, do not represent the difficulties that isolated plaintiffs confront in pursuing product liability litigation under negligence theory.²¹⁰ For example, in the famous mass tort cases, Japanese courts lowered the plaintiffs' burdens of proof by inferring negligence and admitting statistical evidence.²¹¹ Moreover, as these cases gained widespread public attention, the government assisted the plaintiffs in collecting necessary evidence.²¹²

Observers argue that under the negligence system, litigants had the best chance for recovery if they were involved in situations where the injury was widespread.²¹³ Plaintiffs without group support and national attention, however, were rarely able to prove causation and fault.²¹⁴ Although this approach comported with a Japanese tendency to protect group rights, it offered little justice for isolated claimants.²¹⁵

c. Governmental Regulation of Product Safety

The legal systems of the United States and Japan follow different approaches in encouraging manufacturers to promote product safety.²¹⁶ In the United States, the judicial system plays a large role in creating strong incentives for American manufacturers to reduce product risks.²¹⁷ U.S. courts have accomplished

most likely turned out the same under strict liability theory, the judges would not have had to stretch their application of the law. *Id.* Moreover, the process would have been different because the plaintiff would not have had to prove the defendants' fault. *Id.*

209. Ottley & Ottley, *supra* note 21, at 55.

210. Marcuse, *supra* note 18, at 375; Cohen & Martin, *supra* note 4, at 327 (discussing before enactment of *PL Law* "little attention was paid to the plight of the isolated plaintiff and his difficulties in proving his case."). Isolated plaintiffs are at a disadvantage because they do not have access to data demonstrating the extent of the product safety risk. *Id.*

211. Marcuse, *supra* note 18, at 374.

212. *Id.*

213. *Id.* ("Plaintiffs in mass-tort suits and large-scale products liability cases have been uniformly successful, whether by rendered verdict or negotiated settlement.")

214. ODA, *supra* note 26, at 130.

215. Sugiyama Interview, *supra* note 90.

216. Sarumida, *supra* note 86, at 79-80.

217. *Id.*

this by significantly reducing consumers' burden of proof against manufacturers in product defect cases and by requiring manufacturers to pay large damage awards, including punitive damages, to consumers injured by their products.²¹⁸

In Japan, because few product liability cases have been brought and damage awards have been limited, Japanese manufacturers have not been as concerned with the cost of litigation or the repercussions associated with product defects.²¹⁹ As a result, the Japanese judiciary has not provided much incentive to Japanese manufacturers to increase the safety of their products.²²⁰ Instead, the Japanese government has assumed a large role in regulating the activities of manufacturers.²²¹ Japanese consumers, therefore, rely on regulations imposed by governmental agencies,²²² rather than legal protection from the courts, to shield them from defective products.²²³

The Japanese government implements and oversees a structured regulatory scheme that imposes standards for product safety.²²⁴ The governmental standards focus on uniformity of product quality and design within the Japanese marketplace.²²⁵ Foreign manufacturers and governments criticize that these regulations are non-tariff barriers²²⁶ to imported goods because

218. *Id.* In the United States, because the pendulum may have swung too far against manufacturers, the U.S. product liability system is now experiencing reform. *Id.*

219. *Id.*

220. *Id.*

221. Sarumida, *supra* note 86, at 123. The Japanese government established rigorous product safety standards, including requirements for detailed design specifications and strict certification procedures. Ponte, *supra* note 19, at 667.

222. Ponte, *supra* note 19, at 668 (mentioning role of governmental agencies in licensing and certifying products and supervising design and manufacturing activities of industries they regulate).

223. Ponte, *supra* note 19, at 667-69 (stating "Japanese regulatory law relies heavily on government action to protect consumers rather than encouraging private litigation to enforce laws that protect the public."); Cohen & Martin, *supra* note 4, at 334-35; Ottley & Ottley, *supra* note 21, at 40.

224. Ponte, *supra* note 19, at 667-68.

225. Cohen & Martin, *supra* note 4, at 348 (explaining that because many of Japan's laws regulate design of products rather than performance characteristics of products, some high performing goods may be rejected because of minor deviations from design standards). As an example of this type of design regulation, American metal baseball bats were denied entry into the Japanese market because they did not contain a certain alloy and did not have rubber at the end of the bats. *Id.*

226. Cohen & Martin, *supra* note 4, at 318-19 (explaining how government's regulation of product safety constitutes non-tariff barriers to trade). Examples of non-tariff barriers that result from governmental regulatory practices include government pro-

they eliminate goods from the Japanese market that do not conform to the standards.²²⁷ The Japanese government reacts to this criticism by explaining that a removal of such regulations would result in a product safety system in which the government would address safety through recalls and judicial procedures after accidents occur rather than through regulatory prevention.²²⁸

Observers suggest that Japanese consumers bear the burden of Japan's tightly regulated product safety system by paying higher prices for manufactured goods.²²⁹ Critics contend that because lower quality, less expensive goods are blocked from the market for failing to meet the government's standards, consumers' choice of goods is limited.²³⁰ Observers also contend that Japanese consumers are forced to pay for governmental regulation through expensive inspection systems required on certain consumer products, such as on automobiles.²³¹ Other observers claim, however, that Japanese consumers prefer the security they derive from paternalistic government-imposed regulation rather than being faced with choosing among products with varying degrees of safety.²³²

curement policies, customs practices, administrative guidance, and product standards and certification requirements. *Id.* at 319.

227. Cohen & Martin, *supra* note 4, at 367 n.247. See Ponte, *supra* note 19, at 668 (noting that United States has been requesting Japanese government to allow U.S. manufacturers to self-certify that their goods comply with Japanese standards on safety). "Japanese product standards and certification procedures have undeniably operated as barriers to trade." Cohen & Martin, *supra* note 4, at 350-51.

228. Sarumida, *supra* note 86, at 124. Opponents of the structured regulatory scheme indicate, however, that the Japanese regulatory system already is one which deals with product defects after they occur since most of the regulations are enacted "only after social problems related to defective products [are] highlighted by the public (or consumer groups)." *Id.*

229. *Id.* at 125-26.

230. *Id.* (explaining Japanese regulations exclude inferior products from ever reaching Japanese market because "extensive government intervention may narrow a manufacturer's business practice options.").

231. *Id.* at 126. Japanese car owners must pay approximately US\$1,000 once every two years for inspection of cars between three and eleven years of age. *Id.* After a car reaches eleven years of age, car owners must have their cars inspected every year. *Id.*

232. Cohen & Martin, *supra* note 4, at 359. The authors note that:

In a society which is highly structured, it may be that consumers would prefer that experts replace them in [deciding between safe and unsafe products]. The benefits of certainty, the avoidance of risk . . . may be associated with the view that 'freedom from risk of injury' is a merit which ought to be allocated paternalistically rather than through the market.

Id. at 363-64.

In addition to establishing product safety standards, the Japanese government plays a role in the product liability sphere²³³ by implementing public insurance programs²³⁴ and compensation trust funds.²³⁵ The Safety Goods Mark System²³⁶ ("SG System") is the hallmark of the Japanese public insurance program.²³⁷ Created by the Japanese Consumer Product Safety Association ("JCPSA"),²³⁸ the SG System sets safety standards for consumer products²³⁹ and provides payment for damages caused by products that have been approved by the SG System.²⁴⁰ Manufacturers who choose to participate in the SG System must adhere to JCPSA's design and production standards.²⁴¹ Funding for this program stems from the fees paid by participating manu-

233. *Products Liability Through Private Ordering*, *supra* note 19, at 1848 (describing how Japanese government enacted Consumer Products Safety Act in 1973 and through it established Product Safety Council which created certain insurance programs for products liability).

234. Ponte, *supra* note 19, at 670. Japanese public insurance programs, which ensure compensation for consumers injured by certain defective products, spread the risk of loss among industry participants, employers, and the Japanese government. *Id.* Manufacturers contributing to the insurance fund pay fixed premiums rather than face future unknown damage awards. *Id.*

235. *Id.* Compensation trust funds, established by Japanese legislation, require manufacturers in certain industries, such as pharmaceutical and consumer product industries, to contribute to industry-wide funds. *Id.*

236. Sarumida, *supra* note 86, at 128-29; *Products Liability Through Private Ordering*, *supra* note 19, at 1828-39. The SG System is a government-initiated product liability insurance program for manufacturers that produce certain kinds of products. *Products Liability Through Private Ordering*, *supra* note 19, at 1828.

237. *Products Liability Through Private Ordering*, *supra* note 19, at 1834-36. Shortly after the SG System was established, firms in industries outside the scope of the SG System began similar, independent systems. *Id.* at 1835. The makers of large household items (such as kitchen cabinets and bathroom units) introduced the Better Living label and toymakers began the Safety Toy label. *Id.* The golf club industry has created a system for affixing safety stickers to golf products which meet certain specifications. *Product Liability Litigation Increase*, *supra* note 116, at 17.

238. *Id.* Japanese Consumer Product Safety Association ("JCPSA") is the government agency responsible for implementing the SG mark system and other product liability insurance programs. Sarumida, *supra* note 86, at 127.

239. *Id.* Under the SG System, a committee of consumer group representatives, manufacturer representatives, and other specialists decide safety standards for each type of product to be covered by the insurance program. *Id.* at 128.

240. *Products Liability Through Private Ordering*, *supra* note 19, at 1832-33. Claims are paid quickly, sometimes within a month, under the SG System. *Id.* If a claimant can show serious personal injury, the claimant can usually receive an initial award of Yen 600,000 as interim aid. *Id.* Even if the claimant fails to later prove his or her claim, he can often keep the initial damages award. *Id.* By contrast, a claimant suing in court usually has to wait at least five years before receiving any damages award. *Id.*

241. Sarumida, *supra* note 86, at 128.

facturers.²⁴²

All products meeting JCPSA standards receive an identifiable logo,²⁴³ which allows consumers to look for the label when making purchases.²⁴⁴ Consumers who purchase products with the SG System logo receive insurance against product defects.²⁴⁵ If a defect occurs and a consumer becomes injured, the SG System indemnifies consumers after meeting a much less substantial burden of proof than that which is required to prove negligence in the courts.²⁴⁶ Consumers seeking indemnification from the SG System must only prove the existence of a defect without having to prove the source of the defect.²⁴⁷ Critics argue the SG System is overly selective by only including safer types of products²⁴⁸ and, therefore, is inadequate in meeting the needs of a diverse product base.²⁴⁹ Critics also demonstrate that consumers do not widely utilize the claim system.²⁵⁰

The Japanese government has also passed legislation to require certain industries to establish compensation trust funds to provide compensation for injured plaintiffs.²⁵¹ The funds cover specific industries, such as pharmaceutical or consumer products, and demand mandatory contributions from certain manu-

242. Cohen & Martin, *supra* note 4, at 335-36; Sarumida, *supra* note 86, at 128.

243. *Products Liability Through Private Ordering*, *supra* note 19, at 1829. Once a product meets the safety standards, the manufacturer of the product has the right to attach an "SG" label to its product. *Id.*

244. *Id.* at 1838-39. Most consumers who pay the additional cost for "SG" products are more interested in the added safety they expect from the products, rather than the insurance that comes with the products. *Id.*

245. *Id.* at 1830. Products sold under the SG System essentially come with a product-liability insurance contract. *Id.* Consumers injured by defective SG goods are paid specific amounts under the insurance program. *Id.*

246. *Products Liability Through Private Ordering*, *supra* note 19, at 1831. Manufacturers choosing to participate in the SG System raise the legal standard by which they are bound because the system replaces the negligence standard with a much easier burden of proof for consumers. *Id.*

247. *Id.* To prove a claim under the SG System, a claimant must show that the product had been defective, that he or she had been injured, and that the defect had caused the injuries. *Id.* In analyzing an SG System claim, the JCSPA basically adheres to the philosophy that if a product became defective in the course of normal use, damages should be paid. *Id.*

248. *Products Liability Through Private Ordering*, *supra* note 19, at 1831.

249. *Id.* at 1838 (claiming "The SG [S]ystem covers only a small segment of the Japanese economy and disproportionately covers the safer products . . .").

250. *Id.* Between 1987 and 1991, 727 cases have been investigated and only 339 cases have resulted in insurance payouts. *Id.*

251. Ponte, *supra* note 19, at 670.

facturers.²⁵² The funds fix recovery amounts and collect premiums from manufacturers in proportion to their share of the market.²⁵³ To recover under the funds, plaintiffs are not required to show fault, or identify the manufacturer.²⁵⁴ Claimants' recoveries, however, are less than court-awarded damages.²⁵⁵

2. The Process of Enacting the PL Law

After twenty years of consideration, the Diet enacted the PL Law in 1994.²⁵⁶ Fearful that the PL Law would stir a boom in frivolous product liability suits and subsequently increase corporate costs, leaders opposed the PL Law for many years.²⁵⁷ Once much of the industrialized world enacted product liability laws, however, the Japanese government decided to follow the global trend by enacting its own statute.²⁵⁸

a. Legislative History: Twenty Years in the Making

The enactment of Japan's PL Law involved years of debate and negotiation.²⁵⁹ The Japanese government studied the notion of strict liability for two decades before enacting the PL

252. *Id.*

253. *Id.* One compensation fund was set up in the pharmaceutical industry after the SMON cases. *Id.* at 671. The pharmaceutical trust fund required contributions from domestic manufacturers, drug importers, and the government. *Id.* The trust fund contained a fixed schedule of benefits for medical expenses, disability allowances, and death benefits. *Id.*

254. *Id.* at 671. If a plaintiff can prove a particular manufacturer to be negligent, the plaintiff must pursue tort remedies and may not rely on compensation from the trust fund. *Id.* The compensation trust funds allow plaintiffs who are unable to identify defendants to receive some level of compensation. *Id.*

255. *Id.*; Otley & Otley, *supra* note 21, at 53 n. 124; Cohen & Martin, *supra* note 4, at 336-37.

256. Behrens & Raddock, *supra* note 18, at 688-89 (explaining origins of *PL Law*); Mitsui, *supra* note 163, at 99 (discussing twenty year process of enacting *PL Law*); Marcuse, *supra* note 18, at 379-83 (tracing path of *PL Law* from original 1975 Draft).

257. Shichi Interview, *supra* note 114 (describing how Japanese government and manufacturers feared U.S.-style litigation explosion would follow enactment of *PL Law*).

258. Marcuse, *supra* note 18, at 380-81 (explaining how Japanese leaders eventually felt it was time to follow other countries' example and reform its product liability system).

259. *Controversy Heightens*, *supra* note 162, at 1 (discussing push for enacting *PL Law* among Japanese lawyers, scholars, and consumer groups in face of opposition from Japanese politicians, industry groups, and government agencies).

Law.²⁶⁰ The first attempt to create new product liability legislation occurred as early as August 1975 when the Product Liability Research Group²⁶¹ published the Draft Model Law²⁶² ("1975 Draft").²⁶³ The 1975 Draft highlighted the concept of strict liability and suggested radical procedural changes in such areas as discovery.²⁶⁴ In 1976, the Japanese government's 6th Social Policy Council²⁶⁵ responded to the 1975 Draft and issued its own final report recommending the introduction of strict liability.²⁶⁶ The Social Policy Council's proposal did not induce legislative action and product liability reform remained a low government priority for several years.²⁶⁷

In 1985, the European Community's²⁶⁸ ("EC") promulgation of the EC Directive,²⁶⁹ a charter calling for all Member States to harmonize their product liability laws and enact product liability statutes, revived Japanese interest in strict product

260. *Product Liability Lawsuits*, 1994 JEI REPORT, JAPAN ECONOMIC INSTITUTE OF AMERICA, Jan. 21, 1994.

261. Behrens & Raddock, *supra* note 18, at 686-87. The Product Liability Research Group is a nongovernmental group of lawyers and professors which studies product liability issues. *Id.* Leading scholars in Japan, such as Professor S. Wagatsuma, formed the group after the concept of strict liability was introduced in the United States in the middle of the 1960s. Mitsui, *supra* note 162, at 99.

262. Marcuse, *supra* note 18, at 379-80. The 1975 Draft widened the scope of liability beyond manufacturers to include sellers and distributors. *Id.* The 1975 Draft also proposed substantial procedural overhauls such as enforcement of compulsory discovery, the creation of a class-action type suit, and enactment of procedures for small or low-cost injuries. *Id.*

263. *Id.*

264. *Id.*

265. Mitsui, *supra* note 163, at 100. The Social Policy Council is an advisory body to the Japanese Prime Minister which addresses consumer issues, including the conditions and problems of product liability in Japan. *Id.*

266. *Id.*

267. *Id.*

268. Ponte, *supra* note 19, at 648. In 1957, several European nations formed the EC, a "single market of common trade policies with harmonized national laws facilitating the unhampered movement of people, goods, and capital among the member states." *Id.*

269. *Id.* The Council of Ministers of the EC introduces Directives on matters such as consumer regulation, monetary systems, and trade policies. *Id.* EC Member States are required to enact national laws in accordance with the directives by particular deadlines. *Id.* Realizing that inconsistent product liability laws among the Member States would lead to the unequal protection of consumers, effect competition among producers, and possibly interfere with the free flow of goods, the EC debated the enactment of a uniform product liability Directive for ten years. *Id.* Ultimately, in 1985 the EC adopted a directive calling for member states to implement the theory of strict product liability. *Id.* at 650.

liability.²⁷⁰ Japanese leaders were more willing to reconsider the concept once they witnessed the way in which the EC handled the issue.²⁷¹ They were also no longer able to avoid responsibility in this area by claiming that strict liability could only work in the United States, the country in which the concept evolved.²⁷²

Five new proposals for strict liability were written between February 1990 and October 1991.²⁷³ Three different bills were sent to the Diet by the end of April 1994.²⁷⁴ Due to opposition from the business community, however, the Social Policy Council was again unable to reach a consensus and concluded that the ministries should continue to examine the matter and issue a final report to the Prime Minister during the Diet's next session.²⁷⁵ After several levels of negotiations and studies, the Cabinet approved a product liability bill in April 1994.²⁷⁶ The Diet ultimately enacted the law in July 1994 and, after a one year grace period, the PL Law became effective on July 1, 1995.²⁷⁷

b. Opposition to the Enactment of the PL Law

Strong opposition stood in the way of Japan's enactment of the PL Law.²⁷⁸ For many years, the Ministry of International Trade and Industry²⁷⁹ ("MITI") and the ruling Liberal Demo-

270. Behrens & Raddock, *supra* note 18, at 688-89; Mitsui, *supra* note 163, at 100.

271. Mitsui, *supra* note 163, at 100. Japanese feel more closely connected with European code law than U.S. law due to the similarities in Europe and Japan's legislative systems. *Id.* The Japanese are better able to understand Europe's statutory approach to product liability than the U.S. case law approach. *Id.* In particular, the Japanese have difficulty understanding the diverging standards for product liability that exist among the states. *Id.*

272. Otley & Otley, *supra* note 21, at 29 n.1. In the decision of *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), California began shifting the U.S. product liability system from a negligence and warranty theory-based system to a strict liability system. *Id.* In 1965, the American Law Institute published section 402A of the Restatement (Second) of Torts which serves as a guide for courts in applying strict liability. *Id.*

273. Mitsui, *supra* note 163, at 100.

274. *Id.*

275. *Id.*

276. *Id.*; Behrens & Raddock, *supra* note 18, at 688-89.

277. Mitsui, *supra* note 163, at 100.

278. *Controversy Heightens*, *supra* note 162, at 1; *LDP Officials*, *supra* note 161, at 8; Mihoko Iida, *Foreign Access Linked to Product-Liability Law; Tougher Statute Coupled With Easing of Regulations Suggested in New Government Report*, NIKKEI WKLY., July 11, 1992; Sarumida, *supra* note 86, at 83.

279. Sarumida, *supra* note 86, at 83. The Ministry of International Trade and Industry ("MITI") is the most powerful ministry with regard to Japanese industrial and

cratic Party²⁸⁰ ("LDP") opposed the enactment of the PL Law by arguing the Japanese people did not need the law.²⁸¹ Comparing Japanese consumers with their counterparts in the United States, Japanese government leaders claimed Japanese consumers did not need the additional protection of strict liability because the Japanese government enforced high safety standards which better protected Japanese consumers.²⁸² Leaders also claimed that Japan's extensive ADR system provided consumers with adequate mechanisms for recovery and obviated the need for the PL Law.²⁸³

Japanese manufacturers resisted the PL Law by arguing the law would incite a boom of irrational claims and frivolous lawsuits.²⁸⁴ Manufacturers argued that product costs would in-

economic policies. *Id.* For many years, MITI protested enacting product liability legislation because it maintained that Japanese consumers were already adequately protected by existing safety standards. *Id.*

280. *LDP Officials, supra* note 161, at 8. The LDP was the uninterrupted dominant political party in Japan since its founding in 1955 until its first defeat in 1993. Hsu, *supra* note 2, at 222. Before the Diet passed the *PL Law*, the ruling LDP claimed the law would "confuse" Japanese society. *LDP Officials, supra* note 161, at 8. Yoshiro Hayashi, head of the LDP's study group on the *PL Law*, forecasted that the *PL Law* would not be advantageous for Japanese society. *Id.* In discussing potential disadvantages, Mr. Hayashi cited conflicts with the already existing governmental regulation system, a sharp increase in "irrational" consumer complaints, and a likely slowdown in technology innovation. *Id.* To demonstrate that Japan's level of consumer protection was adequate without the *PL Law*, Mr. Hayashi illustrated that many pollution victims eventually won their cases. *Id.*

281. Ponte, *supra* note 19, at 660 (discussing that Japanese government once claimed product liability law would "disrupt a necessary balance between consumer and business interests."). *Id.* The government also asserted that negligence law was adequate for plaintiffs to bring product defect cases and warned that imposing strict liability would "lead to judicial system abuses and consumer price increases." *Id.*

282. *Controversy Heightens, supra* note 162, at 1. The government stressed its cooperative relationship with the business sector in trying to show why a product liability law was unnecessary. Sarumida, *supra* note 86, at 129-30. The government explained it was able to emphasize "the national interest" and seek consensus among relevant corporations when determining the scope of product safety regulations. *Id.* Critics claim the real reason the government resisted the *PL Law* was because it desired Japanese manufacturers to maintain a competitive edge in product innovation and cost over European and U.S. manufacturers who were burdened by the restraints of their countries' product liability laws. Yuko Inoue, *Consumers Press for More Protection: Efforts Stepped up to Enact a Japan Law on Products Liability*, NIHON KEIZAI SHIMBUN, Dec. 22, 1990, at 4.

283. *Controversy Heightens, supra* note 162, at 1.

284. *Id.* In expressing their fear about the potential increase of frivolous lawsuits, Japanese corporate officials said Japanese gangsters could take advantage of the *PL Law* by threatening to sue unless they are paid off. Iida, *supra* note 278, at 3.

crease²⁸⁵ and product development would be impeded.²⁸⁶ Manufacturers also claimed that because of their greater emphasis on quality control, compared with their counterparts in the United States, there was less chance of product defects, and, thus, less need for the PL Law.²⁸⁷

c. Factors Leading to the PL Law's Enactment

A confluence of several international and domestic factors in 1994 served as the catalyst for the government's passage of the PL Law.²⁸⁸ On the international front, once the EC enacted the EC Directive on strict product liability, Japan became the only industrialized country without such a law.²⁸⁹ The Japanese government decided, in the spirit of global convergence,²⁹⁰ to follow trends in product liability and consumer protection among the other industrialized countries and enact its own product liability statute.²⁹¹ Equally as important as international influences,

285. *Product Liability Lawsuits*, *supra* note 260 (mentioning increase in lawsuits would result in additional costs to manufacturers).

286. *Controversy Heightens*, *supra* note 162, at 1.

287. Sarumida, *supra* note 86, at 135-37. "Japanese manufacturers are more interested in quality control-related methods for their product safety practices than U.S. manufacturers." *Id.* It is believed, moreover, that Japanese consumers demand and expect higher quality products than consumers in other parts of the world. *Id.* As a result, many Japanese manufacturers implement one hundred percent inspection programs instead of random-sampling methods. *Id.* Japanese manufacturers' ability to maintain a close rapport with part assists them in reaching high quality standards. *Id.*

288. Marcuse, *supra* note 18, at 381-82 (describing how combination of domestic and international factors eventually overcome opposition in Japan to allow for *PL Law's* promulgation).

289. Mihoko Iida, *Delay on Product-Liability Draws Fire; While Businesses Applaud, Consumer Groups Decry Decision by Council to Put Off Recommendation*, NIKKEI WKLY., Oct. 26, 1992, at 4 [hereinafter *Product-Liability Draws Fire*] (stating "Japan is the only industrialized country without [a product liability] law.").

290. Frank K. Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 FORDHAM INT'L L.J. 396, 401 (1996). The concept of convergence means that:

[T]echnological, economic, and political factors are forcing the integration of national economies and a decline in the importance of nation states as economic and social units.

To the extent that national regulatory styles remain distinct and particularistic, however, they pose a challenge to the deep economic integration and social convergence that many commentators seem to assume are inevitable.

Id. at 401.

291. See Marcuse, *supra* note 18, at 380-81 (explaining how EC Directive rekindled Japanese interest in enacting strict liability statute). Many representatives of manufacturers, sales and services industries ultimately saw reforming Japan's product liability system as a "trend of the times." *Id.*

domestic changes in Japan's economic and political systems played a large role in encouraging the Japanese government to enact the PL Law.²⁹²

1. International Influences

Observers of Japan agree that *gaiatsu*,²⁹³ outside influence, is often the catalyst for creating change inside Japan.²⁹⁴ In the product liability context, actions taken by other industrialized countries influenced the Japanese government to reform its product liability system.²⁹⁵ The EC directive of 1985 strongly influenced Japanese legislators,²⁹⁶ as did the promulgation of new product liability laws throughout Asia.²⁹⁷ The Japanese government did not want to be the only industrialized country without a product liability statute.²⁹⁸

Moreover, the Japanese Diet enacted the PL Law to reduce

292. Marcuse, *supra* note 18, at 382 (discussing Japan's product liability system had to be overhauled to address incongruencies in balance of consumer and industry power). "In these times when the balance of consumer and industry power has undergone drastic changes, a law that will guarantee equality between these groups is a necessity." Kazuko Miyamoto, *Seizobutsu ni yoru higai o doo kyusai suru no ka?* [How Should Product-Related Injuries Be Compensated?], *EKONOMISUTO*, Dec. 17, 1991, at 22, 27.

293. Hsu, *supra* note 2, at 26 (describing how Japanese system has until now "proved almost constitutionally unable to reform itself without the exerting of foreign pressure or *gaiatsu*.").

294. *Id.* One of the Ministry of Finance's top bureaucrats has been quoted as saying:

It is market competition, especially international competition, and so-called *gaiatsu* which have increasingly acted as forces for reform It is sad in a certain sense that there has been no large-scale systematic reform without *gaiatsu*, but on the other hand, it is only normal that it is hard for a stable and successful society to harness the energy for reform from within.

Id.

295. *Product Liability Centers to Handle Consumer Cases*, *DAILY YOMIURI*, Feb. 12, 1995. "[The] passage of PL laws has become an international trend." *Id.* Japan felt the need to follow other countries' *PL Laws* to avoid criticism that Japan is an unfair player in the global market. *Id.*

296. Ponte, *supra* note 19, at 618.

297. *A Primer on Product Liability*, *JEI REPORT*, Jan. 21, 1994 [hereinafter *Primer on Product Liability*] (discussing recent enactment of product liability regimes in countries of the European Union, Australia, Philippines, and People's Republic of China). China's new product liability law spurred a sharp rise in lawsuits. *Chinese Discover Product Liability Suits*, *WALL ST. J.*, Nov. 13, 1997, at B1. Since 1994, when China's product liability law was introduced, product liability lawsuits have risen to more than half a million annually. *Id.* Observers note that Chinese consumers are applying the product liability law with a vengeance. *Id.* Rising Chinese consumer awareness is prompting Chinese manufacturers to improve the quality of their products and services. *Id.* at B14.

298. *Product-Liability Draus Fire*, *supra* note 289, at 4.

ongoing criticism that Japan's market is over-burdened with non-tariff barriers.²⁹⁹ Commentators believed the enactment of a product liability law would enable the government to ease its regulation of consumer products, thus increasing foreign access to Japan's market.³⁰⁰ In the eyes of the Japanese government, the passage of the PL Law provided another example³⁰¹ of Japan's growing commitment to meeting international trade standards.³⁰² The government also hoped the law would reduce foreign complaints that Japanese manufacturers unfairly enjoy a cost advantage over American and European manufacturers by not being burdened with the costs of a product liability law.³⁰³

2. Deregulation of Japan's Economy

Recent changes in Japan's domestic economy also helped create the right environment for passage of the PL Law.³⁰⁴ Since World War II, the Iron Triangle,³⁰⁵ an interlocking relationship among Japanese bureaucrats, politicians, and business leaders, facilitated the government's use of administrative guidance³⁰⁶ in

299. Cohen & Martin, *supra* note 4, at 351 (discussing how Western businesses and governments demand that Japanese government needs to continue to implement market-opening reforms.)

300. See generally Marcuse, *supra* note 18, at 381 (discussing how government and industry observers saw new product liability statute as means of harmonizing Japan's trade conditions); Cohen & Martin, *supra* note 4, at 317 (explaining it would be unrealistic for Japanese government to modify non-tariff barriers relating to product safety regulation without substantially reforming Japan's product liability system).

301. Cohen & Martin, *supra* note 4, at 352-54 (discussing other Japanese efforts to reduce non-tariff barriers such as adoption of system which allows test data from outside Japan, simplified approval procedures, and recognition of foreign laboratories for inspection and certification purposes).

302. Marcuse, *supra* note 18, at 381.

303. *Id.*

304. Hirsh & Henry, *supra* note 9, at 12 (discussing "the growing divergence between corporate, public, and private interests is probably the most important change in Japan in the 1990s").

305. WOLFEREN, *supra* note 66, at 58, 63. The Iron Triangle system of governance is often referred to as "Japan, Inc." *Id.* The Iron Triangle survived on the basis of the LDP's reign of nearly 40 years. Nobuhito Kishi, *Ministry of Ministries: Leader of Japan's Bureaucracy Rushes to Keep Up With Current of Change*, *By THE WAY*, July/Aug. 1994, at 47. Within the workings of the Iron Triangle, corporations make political contributions to entrenched LDP politicians who influence the bureaucrats which regulate the corporation's industries. *Id.* Many politicians are former bureaucrats which allows the lines between bureaucrats and elected officials to be blurred and makes it easier for a system of "give and take" to operate. WOLFEREN, *supra* note 66, at 59-60.

306. Upham, *supra* note 290, at 398. Administrative guidance is

[T]he tendency of all Japanese bureaucracies to prefer informal means of

maintaining a highly regulated, export-driven economy.³⁰⁷ While Japan experienced decades of high economic growth, the interworkings of the Iron Triangle remained secure.³⁰⁸ Now, however, as the Japanese economy remains mired in a prolonged recession,³⁰⁹ business leaders are blaming the bureaucracy for overregulating their industries,³¹⁰ and the Iron Triangle is beginning to unravel.³¹¹

These domestic pressures are making deregulation a national objective.³¹² In a recent government press release, Japa-

policy implementation to formal ones. It includes the practice of an agency to instruct private parties to take action that the agency does not have the legal power to compel. In the economic context, this means a ministry's efforts to extend its regulatory influence beyond its formal statutory power and to influence firm behavior to achieve economic results that are not supported by compulsory enforcement power.

Id. In Japan, bureaucrats use administrative guidance to induce corporations to adopt certain "voluntary" measures in exchange for awarding the corporations business licenses, tax subsidies, and other privileges. WOLFEREN, *supra* note 66, at 58-59. Because bureaucrats retaliate against companies that resist their informal orders, companies are implicitly obligated to follow administrative guidance. Sarumida, *supra* note 86, at 129. In the product safety context, companies normally have no choice but to follow safety directives regardless of the kind of product risks the ministries are targeting. *Id.*

307. WOLFEREN, *supra* note 66, at 58-60, 143-82.

308. *Id.*

309. Hirsh & Henry, *supra* note 9, at 12 (describing that "after five years of economic stagnation, [it is] evident that the [economic] problems run deeper than a cyclical downturn.").

310. *See id.* at 11 (stating that "[t]he message of the multinationals is this: The low productivity and growth of this overregulated marketplace no longer works for us."). Shoichiro Toyoda, chairman of Keidanren, Japan's most powerful business organization stated that it is time to "rethink Japan, Inc." because Japan's economic and social systems "have become largely ineffective and irrelevant." *Id.* at 12.

311. Hirsh & Henry, *supra* note 9, at 11 (explaining that goals of Japan's government and giant corporations are diverging). Japanese companies are no longer able to obey the workings of the Iron Triangle but must instead obey the competitiveness of the global marketplace. *Id.* at 11. Many Japanese corporations are moving their production facilities abroad to avoid regulation in their home market. *Id.* The bureaucracy is losing its grip on Japanese companies. *Id.* "Japanese companies [are going] abroad . . . to escape their economy." *Id.*

312. *New Big Wheel*, *supra* note 14, at 34 (quoting Shoichiro Toyoda, Keidanren chairman and Toyota Motor Corp. chairman, as saying "[a]t present, the most pressing theme is deregulation."); *All the PM's Men: A Council Makes the Tough Call*, ASIaweek, Jan. 31, 1997 (stating "only a complete overhaul of [Japan's] industrial structure and government bureaucracy will guarantee Japan's prosperity in the 21st century"); *Deregulation Will Give Big, Quick Boost to Economy*, *supra* note 14, at A19 (explaining Prime Minister Hashimoto has insisted deregulation will solve Japan's long-term economic problems); Crowell, *supra* note 14 (explaining that "politicians, economic analysts and businesspeople have unanimously agreed on the need to overhaul Japan's economy:

nese leaders proposed a sweeping deregulation package that aims to put Japan on the same deregulatory path the United States has pursued during the last two decades.³¹³ This plan calls for reducing the size of Japan's bureaucracy and loosening restrictions on Japan's airlines, telephones, banks, brokerages, insurance, and other industries.³¹⁴ Because deregulation will weaken the government's ability to exert administrative guidance over corporations and monitor safety standards,³¹⁵ Japanese legislators enacted the PL Law to increase consumer protection.³¹⁶

3. Japanese Political System Changes to Meet Needs of Consumers

Long known for putting up with high prices and a relatively low-standard of living for a country as wealthy as Japan,³¹⁷ Japanese consumers are now looking for a better way of life.³¹⁸ Re-

industries must be deregulated, monopolies broken up, government reorganized, bureaucracies dismantled and the economy as a whole put on more free-market principles.”).

313. Andrew Pollack, *Deregulation in Japan: Too Many Rules, But Not For All*, N.Y. TIMES, Nov. 17, 1996, at E14 [hereinafter *Deregulation in Japan*].

314. *Id.* Hashimoto has plans to reduce the number of ministries and agencies from twenty-two to eleven and group their functions into four major categories such as foreign policy, defense, welfare, and medical care. Crowell, *supra* note 14.

315. Sarumida, *supra* note 86, at 129-30 (stressing that because reducing regulations is now main priority in Japan, product risks that were once eliminated by strict government standardization and certification programs may now increase).

316. Sarumida, *supra* note 86, at 129-30; Cohen & Martin, *supra* note 4, at 365. The commentators discuss that a strong bureaucracy is necessary to maintain Japan's highly regulated product safety system by noting that:

Regulatory control of product quality and safety is reinforced by the magnitude and nature of bureaucratic power in Japan The co-operative structure of government-business relations as well as the interchange of personnel between [government and business] suggest that regulatory supervision in Japan . . . may be generated by co-operative decisions of private industry and state.

Id.

317. Norihiko Shimizu, *Educate Japanese Consumers: Their Gain Will Be Your Gain*, TOKYO BUS. TODAY, June 1994, at 48. The low standard of living in Japan is evidenced by the fact that Japanese must pay more for goods and services than almost any other country. *Id.* Moreover, Japanese consumers are usually offered a more narrow range of products and services than people in other countries. *Id.* Japanese consumers were long unaware of the high prices they pay because of “the closed nature of the Japanese market, the many regulations which conceal inefficiencies of the distribution system, and governmental protection of the establishment which restricts real competition in many sectors.” *Id.*

318. See Crowell, *supra* note 14 (explaining that “[t]he Japanese people are fed up

cent spending habits, by which consumers are disproving their reputation of being ambivalent to high prices, are making discount stores the only retailers to experience fast growth and high profits in the past few years.³¹⁹ As Japan continues to modernize and struggle through a recession, consumers are showing a preference for less regulation and more freedom of choice in the Japanese marketplace.³²⁰

In 1993, consumers expressed their dissatisfaction with the status quo by ousting the LDP from power for the first time since World War II.³²¹ This political mandate paved the way for a seven-party coalition led by Prime Minister Hosokawa to take control of Japan.³²² Backed by a strong consumer-oriented momentum, Prime Minister Hosokawa's regime had the support to introduce the product liability bill that eventually became the PL Law.³²³ The interplay of a growing consumer movement and political change created a ripe environment for the passage of the PL Law.³²⁴ Observers note that the PL Law is one of the greatest accomplishments for Japan's consumer groups,³²⁵ which have not had much power throughout Japan's history.³²⁶

Consumer demands for political and economic change have

with the archaic system of bureaucracy, keiretsu groupings, and government guidance.”). *Id.* “Consumption patterns are changing. The bursting of the bubble made Japanese thrifter and less willing to pay exorbitant prices for products simply because they were made in Japan.” *Id.* After being exposed to more lower-priced foreign-made goods, Japanese consumers may be less demanding of high quality goods. Sarumida, *supra* note 86, at 138.

319. Shimizu, *supra* note 317, at 48. Before the current recession, “price [was] not . . . the driving source in [Japanese] economic behavior.” *Id.*

320. *Id.*

321. Blaker, *supra* note 167 (explaining how LDP ruled Japan for 38 years of uninterrupted conservative rule).

322. *Primer on Product Liability*, *supra* note 297.

323. *Id.*; Sugiyama Interview, *supra* note 90 (discussing how consumer groups historically had little chance to work with LDP and saw their opportunity to push for *PL Law* once LDP was out of power).

324. Sugiyama Interview, *supra* note 90. Because the LDP did not pay much attention to the concerns of Japan's consumer groups before it lost its power in 1993, consumer groups were accustomed to working with the minority parties. *Id.* The consumer groups therefore saw it as their golden opportunity to push for the passage of the *PL Law* when the coalition government came to power. *Id.*

325. Hsu, *supra* note 2, at 65. There were 4639 consumer groups at the end of 1988. *Id.* Japan's consumer groups can be classified into five categories: consumer cooperatives, advocacy groups, experts groups, and housewives organizations. *Id.*

326. Interview with Mr. Akira Ishida, General Manager for the Electric Home Appliance Products Liability Center, in Tokyo, Japan (Aug. 8, 1996) (discussing that because Japan's consumer groups worked together more than ever before in lobbying for

encouraged Japanese politicians, who once could rely on satisfied and complacent voters, to become more sensitive to the needs of their constituents.³²⁷ Recent elections continue to indicate that, although they are back in power, LDP leaders must maintain a pro-consumer attitude to remain popular among voters.³²⁸ The once pro-government, conservative LDP politicians highlighted to their constituents during recent campaigns that excessive regulation and an overbearing bureaucracy suffocate Japan's economic growth.³²⁹ This pro-consumer platform runs counter to the big business agenda the LDP championed for the past fifty years.³³⁰

II. ANALYSIS OF THE PROVISIONS OF THE PL LAW AND THE PL LAW'S IMPACT ON JAPANESE SOCIETY

The major thrust of the PL Law is its introduction of strict liability to Japanese society.³³¹ Under strict liability theory, plaintiffs must only prove the existence of a product defect, and no longer must prove fault, to find manufacturers liable.³³² This change is already impacting Japan's corporations,³³³ judiciary,³³⁴ legislature,³³⁵ and consumers.³³⁶

the passage of *PL Law*, *PL Law* is perhaps greatest legislative victory for Japan's consumer groups.)

327. *Id.*

328. *Id.*; Upham, *supra* note 290, at 503-04 (describing rise and fall and rise again of LDP); Sugiyama Interview, *supra* note 114 (mentioning LDP needed to attract new voters so it reached out to consumer groups which once could only receive attention from minority parties).

329. *Deregulation in Japan*, *supra* note 113, at E14.

330. *Id.*

331. See *Product Liability Litigation Increase*, *supra* note 116, at 16 (discussing that introduction of strict liability is major substantive change of *PL Law* from old system).

332. See *PL Law* art. 3, Law No. 85 of 1994 (Japan) (discussing manufacturer's unconditional liability for injuries resulting from its product's defects).

333. Masato Ishizawa, *Product Law Means Having to Say, "I'm Sorry,"* NIKKEI WKLY., July 22, 1996, at 1 [hereinafter *Product Law Means*] (explaining corporations' efforts to produce safer products, improve warnings, settle claims more expediently, and purchase product liability insurance as result of *PL Law*).

334. *Matsushita Won't Appeal District Court Ruling*, MAINICHI DAILY NEWS, Apr. 9, 1994 [hereinafter *Matsushita Won't Appeal*] (discussing how *PL Law* influenced Osaka judge to rule against manufacturer for first time on behalf of plaintiff's product liability claim).

335. Taniguchi Interview, *supra* note 87 (discussing how recent Diet debate on amending Japan's Civil Code was Japan's most animated and lively debate ever on civil procedure partly because of *PL Law's* spurring of strong public interest in reforming Japan's discovery law).

A. Provisions of the PL Law

The PL Law contains six provisions.³³⁷ The PL Law is shorter and less detailed than the EC Directive and the 1975 Draft.³³⁸ Observers believe that the PL Law's brevity will give the courts latitude in interpreting the PL Law over the next several years.³³⁹

1. PL Law's Definitions

The PL Law defines the key terms of product, defect, and manufacturer.³⁴⁰ Product is defined as any movable property³⁴¹ that is manufactured or processed.³⁴² The definition leaves the exact parameters of what constitutes a product to interpretation of the courts.³⁴³ Under contract and tort law, the Civil Code does not define the term product.³⁴⁴ Courts analyzed claims brought under contract and tort law by focusing on the existence of manufacturer duty instead of questioning whether a particular good was a product.³⁴⁵ Claimants whose defected goods do not constitute products will not be able to recover under the PL Law.³⁴⁶

336. *Product Complaints Double After Liability Law Start*, JAPAN ECONOMIC NEWSWIRE, Apr. 18, 1996 (discussing how consumer product liability claims to consumer centers doubled after *PL Law's* start).

337. PL Law arts. 1-6, Law No. 85 of 1994 (Japan).

338. Marcuse, *supra* note 18, at 379-96 (comparing provisions of EC Directive, 1975 Draft, and *PL Law*).

339. *Id.* at 387. Commentators claim that the brevity of the statute "reflect[ts] the inability of Japanese consumer and industry groups to reach a consensus on many substantive issues." Behrens & Raddock, *supra* note 18, at 689.

340. PL Law arts. 2(1), 2(2), 2(3), Law No. 85 of 1994 (Japan).

341. PL Law art. 2(1), Law No. 85 of 1994 (Japan). Movable is defined as "all corporeal things, other than land and things firmly affixed to land." Behrens & Raddock, *supra* note 18, at 7. Real estate, property, and services are not included. *Id.*

342. Mitsui, *supra* note 163, at 100. Processing is defined as "to use movables as materials and add new value and/or nature to them." *Id.* A discussion in the Diet made further attempts to define processing and it was agreed that any product that was heated, grinded, or squeezed would be deemed to be processed whereas cutting, freezing, refrigerating, and drying of a product would not be considered processed. *Product Liability Litigation Increase*, *supra* note 116, at 16. This means sushi is covered but sashimi is not. *Id.*

343. *Id.* The PL Law's definition of product is not as open-ended as the definition of "product" laid out in the 1975 Draft which said a product is "anything which enters the distribution process . . ." Marcuse, *supra* note 18, at 385.

344. MINPO, arts. 415, 570, 709.

345. Marcuse, *supra* note 18, at 384-86.

346. *Id.*

The PL Law defines defect as the lack of safety a particular product ordinarily should provide.³⁴⁷ The PL Law's standard of defect is similar to the consumer's expectation test³⁴⁸ that most U.S. jurisdictions use to define defect.³⁴⁹ Japanese courts are able to employ notions of comparative negligence and foreseeability, and may apportion fault to plaintiffs who use a product in an unforeseeable manner or who misuse a product.³⁵⁰ Japanese courts adhered to the practice of apportioning fault before the enactment of the PL Law and commentators argue that inclusion of this practice in the new law may limit the practical scope of strict liability.³⁵¹

The PL Law's definition of manufacturer breaks with the past by including more potential types of defendants in its

347. PL Law art 2(2), Law No. 85 of 1994 (Japan). "Defect" means "lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable use of the product, the time when the manufacturer, etc. delivered the product, and other circumstances concerning the product." *Id.* The PL Law's broad definition of "defect" surprised observers who were expecting lawmakers to enact a more specific standard in light of the flood of litigation in the United States over how to interpret "defect." Interview with Mr. Phillip Quaranta, Jr., attorney with the Law Firm of Wilson, Elser, Moskowitz, Edelman, & Dicker (Tokyo), in Tokyo, Japan (Aug. 17, 1996); Jon Choy, *Reform Movement Reaches Legal Arena*, JEI REPORT, Apr. 1994.

348. DAVID G. OWEN ET. AL., *PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS* 192 (3d. ed. 1996).

Many courts [in the United States] have used consumer expectations as a criteria for defining defect. If a consumer reasonably expects a product to be safe to use for a purpose, the product is defective if it does not meet those expectations. The consumer expectations test is natural since strict liability in tort developed from the law of warranty. The law of implied warranty is vitally concerned with protecting justified expectations since this is a fundamental policy of the law of contracts.

Fisher, *Products Liability: The Meaning of Defect*, 39 Mo. L. Rev. 339, 348 (1974). In the United States, an alternative to the consumer expectations test is the risk-utility test. OWEN, *supra* note 348, at 202-15. A product is considered defective under a risk-utility test if the costs of improving its safety are less than the benefits resulting from the improvement. *Id.* In applying the risk-utility test, many courts look at some or all of the following factors: the usefulness and desirability of the product; the safety aspects of the product; the availability of a substitute product; the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness; the user's ability to avoid danger by the exercise of care in the use of the product; the user's anticipated awareness of the dangers inherent in the product; and the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. *Id.* at 212.

349. Behrens & Raddock, *supra* note 18, at 696-97.

350. Marcuse, *supra* note 18, at 386.

351. *Id.*

scope.³⁵² Under the PL Law, injured consumers may bring a suit against any party involved in the manufacturing process, such as component manufacturers, processors, or importers.³⁵³ Consumers' ability to bring suit against retailers and distributors, however, does not extend beyond those sellers who affix their name or trademark on products they sell or who import goods directly from abroad.³⁵⁴

2. Strict Liability

The PL Law's notion of strict liability holds manufacturers or producers liable, regardless of fault, for injuries that their defective products cause.³⁵⁵ This rule applies to any action involving a product that left the manufacturer's control after July 1, 1995.³⁵⁶ Some observers argue that although plaintiffs are no longer required to prove fault, plaintiffs' burden of proof will still be difficult to meet because of the PL Law's failure to include a special discovery procedure for product liability suits.³⁵⁷ Lawyers and consumers, moreover, had hoped the PL Law would have included an automatic presumption of liability for situations where a causal relationship between a defect and injury is obvious.³⁵⁸ Although lawmakers did not include auto-

352. *Id.* at 386-87. The *PL Law* defines manufacturer as one of the following:

(1) any person who manufactured, processed, or imported the product as business; (2) any person who, by putting his name, trade name, trade mark or other feature on the product presents himself as its manufacturer, or any person who puts the representation of name, etc. on the product in a manner mistakable for the manufacturer; (3) apart from any person mentioned in the preceding subsections, any person who, by putting their representation of name, etc. on the product, may be recognized as its manufacturer-in-fact, in the light of a manner concerning manufacturing, processing, importation or sales, and other circumstances.

PL Law art. 2(3), Law No. 85 of 1994 (Japan).

353. *Id.*

354. *Id.*

355. *Id.* art. 3.

The manufacturer, etc. shall be liable for damages caused by the injury, when he injured someone's life, body, or property by the defect in his delivered product which he manufactured, processed, imported or put the representation of name, etc. as described in subsection 2 or 3 of section 3 of Article 2. However, the manufacturer, etc. is not liable when only the defective product itself is damaged.

Id.

356. *Id.*

357. Choy, *supra* note 347; Marcuse, *supra* note 18, at 388-90.

358. Choy, *supra* note 347.

matic presumption of liability, the PL Law is vague on this point which gives judges latitude to lower the causation burden.³⁵⁹ Judicial interpretation will be important for further clarification.³⁶⁰

3. Defenses

The PL Law provides two manufacturer defenses.³⁶¹ The 1975 Draft did not include these defenses, and before the PL Law, courts used discretion in applying them.³⁶² The first defense exempts component manufacturers from liability if the defect is due to the fault of the manufacturer of the product as a whole.³⁶³ The second defense exempts manufacturers from liability if manufacturers are unable to detect a defect given the state of the art³⁶⁴ at the time of the product's delivery.³⁶⁵ By explicitly including these defenses in the PL Law, the law restricts the courts' judicial discretion to not apply the defenses.³⁶⁶

4. Time Limitations

The PL Law addresses time limits for filing product liability suits and provides two specific statutes of limitation.³⁶⁷ The first

359. Interview with Mr. Atsushi Yamashita, Attorney, Law Office of Tanaka & Takahasi, in Tokyo, Japan (Aug. 11, 1996).

360. *Id.*

361. PL Law art. 4(1), 4(2), Law No. 85 of 1994 (Japan). In cases where Article 3 applies, the manufacturer, etc. shall not be liable as a result of Article 3 if he proves:

(1) that the state of scientific or technical knowledge at the time when the manufacturer, etc. delivered the product was not such as to enable the existence of the defect in the product to be discovered, or (2) in the case where the product is used as a component or raw material of another product, that the defect is substantially attributable to compliance with the instruction concerning the specifications given by the manufacturer of the said another product, and that the manufacturer, etc. is not negligent on occurrence of the defect.

Id.

362. Marcuse, *supra* note 18, at 392-93.

363. PL Law art. 4(1), Law No. 85 of 1994 (Japan).

364. Thomas Leo Madden, *An Explanation of Japan's Product Liability Law*, 5 PAC. RIM L. & POL'Y J. 229, 320 (defining state of the art as "the risk of being unable, through the level of scientific and technical knowledge at the time [a] product is placed into distribution, to detect any inherent defect which may exist in such product").

365. *Id.* art. 4(2).

366. Marcuse, *supra* note 18, at 392-93.

367. PL Law art. 5(1), 5(2), Law No. 85 of 1994 (Japan). Time limitations in the PL Law for bringing claims are explained as follows:

(1) The right for damages provided in Article 3 shall be extinguished by prescription if the injured person or his legal representative does not exercise

limit requires a plaintiff to file suit within three years from when the plaintiff first discovered the defect.³⁶⁸ The second statute of limitation restricts plaintiffs from bringing a cause of action more than ten years after the plaintiff received the product.³⁶⁹ The PL Law defers the beginning of the ten year statute of limitations for toxic harms.³⁷⁰

5. Application of the Civil Code

The PL Law allows judges to use contract and tort provisions of the Civil Code where the PL Law is silent on an issue.³⁷¹ Critics argue this provision of the PL Law is a major blow to the effectiveness of the PL Law because it partially reinforces the status quo.³⁷² For example, judges must award damages in accordance with the provisions of the Civil Code because the PL Law does not address the topic of damages.³⁷³ Further, the statute failed to make mention of the relationship between the judiciary and ADR system.³⁷⁴ Critics argue that this shortcoming fails to grant the courts power to review or influence ADR mechanisms and could provide for the development of disparaging standards between ADR and judicial results.³⁷⁵

such right within 3 years from the time when he becomes aware of the damage and the liable party for the damage. The same shall also apply upon the expiry of a period of 10 years from the time when the manufacturer, etc. delivered the product; (2) The period in the latter sentence of section 1 of this Article shall be calculated from the time when the damage arises, where such damage is caused by the substances which are harmful to human health when they remain or accumulate in the body, or where the symptoms for such damage appear after a certain latent period.

Id.

368. *Id.* art. 5(1).

369. *Id.* art. 5(1), 5(2).

370. Marcuse, *supra* note 18, at 393-95.

371. PL Law art. 6, Law No. 85 of 1994 (Japan). Article 6 provides: "In so far as this law does not provide otherwise, the liability of the manufacture, etc. for damages caused by a defect in the product shall be subject to the provisions of the Civil Code."

Id.

372. Marcuse, *supra* note 18, at 394-95.

373. *Id.* at 396.

374. *Id.* at 397.

375. Nakamura Interview, *supra* note 114 (discussing that disparaging standards between ADR decisions and court opinions reduce role of law and allow ADR to exist outside purview of established legal standards).

B. *The PL Law's Impact*

In the short time since its enactment, the PL Law has changed Japan in many ways.³⁷⁶ Corporate Japan has a new attitude toward product safety and consumer claims.³⁷⁷ The Japanese judiciary is showing signs of a new bias toward consumers,³⁷⁸ and the Diet is reforming laws on discovery and freedom of information.³⁷⁹ Consumer interest in the PL Law has created a new public debate on consumer rights,³⁸⁰ and holders of defective products are more willingly coming forward with their claims.³⁸¹

376. *Product Law Means*, *supra* note 333, at 1, 4 (describing dramatic change in corporate attitude toward settling consumer claims and respecting consumer rights after enactment of *PL Law*); Shichi, *Product Liability Litigation Increase*, *supra* note 116, at 17 (explaining how *PL Law* created new ADR mechanisms and *PL Law* is changing business relationships between retailers and distributors through enforcement of new contracts); *PL Ho Hoko Kara Ichi Nen, Soshō Wa Zero Da Ga — Minpo No Fuho Ko De Sekinin O Tomonau Soshō Ga Kyuzochū* [One Year After PL's Enactment: No Strict Product Liability Cases Decided But Manufacturers Assume Tort Responsibility in Settlements], NIKKEI VENTURE, July 1996, at 10 [hereinafter *Manufacturers Assume Tort Responsibility*] (discussing how manufacturers are more readily assuming liability for product defects due to influence of *PL Law* and consumers are bringing more suits); Masato Nakamura, *Seizobutsu Sekinin Ho Shiko Ichi Nen to Sono Jitai* [The Situation One Year After PL Law's Enactment], ATARASHII BUSINESS LAW NO SENMONZASHI (NBL), July 1, 1996, at 23-27 [hereinafter *The Situation*] (discussing increase in product liability insurance sales and increase in power of consumers in consulting with manufacturers); *PL Ho Shiko Kara Ichi Nen Jiko Boshi no Tame ni Doo Kawata Ka* [How Has Safety Prevention Changed One Year After PL Law Began?], TASHIKA NA HI, July 1996, at 18-22 [hereinafter *Safety Prevention Changed*] (discussing increase in consumer consciousness of product safety and *PL Law*).

377. *PL Ho no Ichi Nen o Kensho Suru* [Reviewing the First Year of the PL Law], SHUPAN TOYO KEIZAI, June 29, 1996 (discussing corporations' creation of new systems for claim settlements, product safety, and recalls).

378. *Manufacturers Assume Tort Responsibility*, *supra* note 378, at 10 (explaining how Osaka judge behaved unusually pro-consumer by awarding damages to single-injury plaintiff in suit against Matsushita Electric where negligence and causation was assumed by court).

379. *Product Liability Litigation Increase*, *supra* note 116, at 18 (discussing Diet's amendment to Japan's discovery rule to require greater production of documents during discovery).

380. Ishida Interview, *supra* note 326 (discussing active role consumer groups have taken to use *PL Law* as vehicle for educating consumers about consumer rights).

381. *Reviewing The First Year of the PL Law*, *supra* note 377, at 148 (explaining that consumer claims to consumer centers doubled in the first year after *PL Law* began); *Manufacturers Assume Tort Responsibility*, *supra* note 376, at 10 (discussing increase in plaintiff product liability suits under negligence regime because only products delivered after July 1, 1995 can be included in suit under the *PL Law*); Kazuo Takita, *Japan Non-Life Sector in P&L Policy Sales Drive*, INSURANCE DAY, June 27, 1996, at 3 (stating "the number of complaints about products and services is beginning to soar.").

1. The Effect on Corporate Japan

Japanese manufacturers are increasing capital investments to educate themselves on the PL Law and restructure their businesses to improve the safety and quality of their products.³⁸² Specifically, manufacturers are responding faster to claims,³⁸³ increasing their purchases of product liability insurance coverage,³⁸⁴ and revising product warnings and instructions.³⁸⁵ Japanese manufacturers are also focusing on the safety of their products more than they had in the past.³⁸⁶ Manufacturers and retailers, moreover, are placing more significance on the negotiation and drafting of contracts to apportion potential liability between themselves.³⁸⁷

a. Manufacturers Increase Settlements with Consumers

The PL Law has triggered a new corporate attitude in responding to consumer product liability claims.³⁸⁸ Before the enactment of the PL Law, manufacturers often ignored claims and blamed consumer misuse for the cause of product defects.³⁸⁹ Consumers, at that time, rarely had any other option but to accept such a response and suffer the consequences.³⁹⁰ Now, aware that consumers need only prove the existence of a prod-

382. *Toshiba PL Shanai Kansasei: Setsubi, Seizoku Kara Hanbai Ko Made* [Toshiba Implements PL System: From Manufacturing to Sales], NIHON KEIZAI SHIMBUN, July 3, 1996 (explaining how Toshiba corporation created product liability system which includes new department staffed with safety specialists and special consumer consultation center).

383. *Product Law Means*, *supra* note 333, at 1.

384. Takita, *supra* note 381, at 3. A spokesperson for Tokio Marine & Fire Insurance, Co., Japan's largest non-life insurer, said its sales of product liability insurance doubled over the course of the first year after the *PL Law* was enacted. *Id.* Mitsui Marine & Fire Insurance, Co. also reported a sharp increase in insurance sales and disclosed that its product liability claims doubled since the law went into effect. *Id.*

385. *Product Law Means*, *supra* note 333, at 1; *Firms on the Defensive*, *supra* note 16, at 1.

386. *Product Liability Law Forcing Toy Makers to Make Changes*, DAILY YOMIURI, Aug. 23, 1995; Andrew Pollack, *Japan Learns to Love Safety*, N.Y. TIMES, Nov. 21, 1996, at D1 [hereinafter *Japan Learns to Love Safety*].

387. *PL Law Sure to Change Business Relationships*, DAILY YOMIURI, Aug. 25, 1997 at 17 [hereinafter *Change Business Relationships*].

388. *Product Law Means*, *supra* note 333, at 1; Ishida Interview, *supra* note 326.

389. *Product Law Means*, *supra* note 333, at 1.

390. *Id.*; See Nakamura Interview, *supra* note 114 (discussing that before *PL Law* consumers had little leverage in their negotiations with manufacturers and were often unable to find alternative means of dispute resolution once manufacturers dismissed their claims).

uct defect to win in court, corporations are quickly acknowledging their defects and settling claims with consumers.³⁹¹

Several recent settlements illustrate the change in the attitude of manufacturers in regard to settling product liability cases.³⁹² For example, before the PL Law's enactment, an automatic door manufacturer refused to compensate a claimant who suffered injuries when one of the manufacturer's doors closed on the claimant.³⁹³ The manufacturer blamed the claimant for not moving through the doorway fast enough, and the claimant lost his case.³⁹⁴ After the PL Law's enactment, however, another plaintiff, who suffered similar injuries from an automatic door manufactured by the same company, received a settlement of US\$30,000 from the manufacturer.³⁹⁵ In the second case, which had almost identical facts to the first case, the manufacturer acknowledged that a defect existed and admitted that the door was not designed to close while someone stood in the doorway.³⁹⁶ In the second case, the manufacturer considered strict liability theory and determined that the claimant should recover because she would be able to prove the existence of the defect and win the case under the PL Law if the case went to court.³⁹⁷

In another case, a plaintiff sued a manufacturer of baby cribs because of an alleged design defect which caused the suffocation of his baby.³⁹⁸ The case ensued for more than nine and a half years because of the plaintiff's difficulty in proving the manufacturer's negligence.³⁹⁹ Once the PL Law passed, however, the manufacturer quickly settled with the plaintiffs and admitted

391. *Id.*; Sugiyama Interview, *supra* note 90 (arguing consumers now have bargaining power against manufacturers because manufacturers do not want to go to court and cause damage to their reputation in media). The PL Law is being used by attorneys and mediators in settlement discussions. *Id.* Manufacturers are now examining claims under strict liability regardless of whether claims will wind up in court. *Id.*

392. See *Manufacturers Assume Tort Responsibility*, *supra* note 376, at 10 (discussing that manufacturers are now settling claims they would have once dismissed because of lower burden of proof required by consumers under PL Law); *PL Ho Ichi Nen, Takamaru Ishiki* [*Consciousness Toward PL Law Rises After One Year*], ASAHI SHIMBUN, July 1, 1997 [hereinafter *Consciousness Toward PL Law*] (discussing that manufacturers now want to settle all product liability-related problems as quickly as possible).

393. *Manufacturers Assume Tort Responsibility*, *supra* note 376, at 10.

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *The Situation*, *supra* note 376, at 26.

399. *Id.*

the existence of the defect.⁴⁰⁰ Other claims that settled in favor of consumers, which before the PL Law observers claim typically would have been dismissed by manufacturers, included accidents where electronic goods, such as televisions and ceramic heaters, allegedly caused fires.⁴⁰¹ Even though most of the evidence was destroyed in the fires, the manufacturers settled with the consumers in these cases because of fear that the consumers would win their claims under the PL Law.⁴⁰²

b. Corporations Create New Dispute Resolution Facilities

To handle product liability claims more efficiently, individual companies and industry groups created dispute resolution systems in response to the PL Law.⁴⁰³ Approximately eighty percent of 1320 major manufacturers recently surveyed established departments to handle product liability claims.⁴⁰⁴ At the industrial level, fifteen industries, including automobile, cosmetic, drug, toy, and home-appliance industries, pooled resources and established new product liability centers to mediate and arbitrate consumer claims.⁴⁰⁵

When consumers bring claims to these centers, the centers conduct their own investigations by examining the defective products and interviewing witnesses.⁴⁰⁶ When the centers declare products defective, the centers are supposed to negotiate with manufacturers on behalf of consumers.⁴⁰⁷ If a consumer is dissatisfied with the results of a negotiation, the consumer may choose to have the center's arbitration panel⁴⁰⁸ rule on the

400. *Id.* Even though this incident occurred many years before the *PL Law* became effective and was litigated under negligence theory, the manufacturer wanted to take no chances that a court would apply strict liability theory. *Consciousness Toward PL Law*, *supra* note 392. Thus, manufacturers are even eager to settle cases that technically do not fall under the scope of the PL Law. *Id.*

401. *The Situation*, *supra* note 376, at 25-26.

402. *Id.*

403. *Id.*

404. *Id.*

405. *Product Law Means*, *supra* note 333, at 1. MITI requested each industry to set up a center to deal with product liability claims. *Product Liability Centers to Handle Consumer Cases*, DAILY YOMIURI, Feb. 12, 1995 [hereafter *Product Liability Centers*].

406. *Product Liability Litigation Increase*, *supra* note 116, at 17.

407. *Id.*

408. *Id.* The arbitration panel would consist of a legal expert (such as a lawyer or judge), a consumer specialist and other experts. *Id.* In the first year following the law's enactment, no cases, at any of the fifteen industry centers, had reached the arbitration

case.⁴⁰⁹ If the arbitration panel's solution is still unsatisfactory to the consumer, the center may help the consumer pursue litigation.⁴¹⁰ The centers process consumer claims at little or no cost and provide free discovery which may later be used in court.⁴¹¹

Critics argue that the centers, largely funded by manufacturers, do not adequately represent consumer interests.⁴¹² Critics also emphasize that the centers must take a more active role in disseminating information about product defects and resist the temptation to conceal evidence in an effort to protect the reputation of manufacturers.⁴¹³ If manufacturers and consumers continue to settle claims between themselves and refrain from disclosing product defect information to the public, critics argue that Japan's product liability system will not continue to develop.⁴¹⁴

c. Companies' New Emphasis on Warnings and Instructions

Under the PL Law, manufacturers are held strictly liable for

stage. Ishida Interview, *supra* note 326. Most consumer calls were mere inquiries and several were actual accidents that resulted in negotiations. *Id.*

409. *Product Liability Litigation Increase*, *supra* note 116, at 17.

410. *Id.*

411. *Id.*

412. *PL Ho Shiko Ichi Nen: Sofu Shori Kikai, Wakai Wa Tsutsuki* [One Year After PL Law's Enactment: ADR Mechanisms On the Rise], NIKKEI SHIMBUN, June 21, 1996 [hereinafter *ADR Mechanisms on the Rise*] (explaining that most product liability centers are allowing manufacturers to deal directly with consumers without intervention by neutral third parties which may hinder bargaining power of consumers). "To win trust from both consumers and manufacturers, an organization set up by an industry should practice transparency in the process of conciliation and mediation and assure a neutral position." *Product Liability Centers*, *supra* note 405.

413. *ADR Mechanisms on the Rise*, *supra* note 412. In a recent situation where several young children swallowed Japanese *konyaku* jelly and choked to death, critics argue that the product liability centers did not disclose warnings about the product soon enough. Isoyama Tomoyuki, *PL Ho Ichinen: Hanran Suru Keikoku, Anzen Taisaku Ni Kigyo Sa* [Differences Among Industries in Warning and Product Safety Procedures], NIKKEI BUSINESS, June 24, 1996, at 115-16.

414. *Joho no Kokai ga PL Ho o Ikasu* [PL Law Depends on Disclosure of Information], HOKKAIDO SHIMBUN, July 7, 1996 (arguing that PL Law will not be successful if manufacturers do not take responsibility to inform public of product defects); *Shohisha mo Koeage Joho Kokai* [Consumers Are Demanding More Disclosure], June 27, 1995 (discussing that PL Law sparked debate among consumers on the need for more information from manufacturers); *Seihin Jiko Joho Kokai wa Fujubun* [Disclosure of Product Defect Information is Inadequate], NIKKEI SHIMBUN, June 23, 1996 (discussing that when MITI attempted to compile data from manufacturers on product defect claims reported to manufacturers within first year of PL Law's enactment, less than three percent of manufacturers responded).

selling products without sufficient warnings and instructions.⁴¹⁵ As a result, manufacturers are emphasizing improved quality in this area by clarifying their instructions and warnings.⁴¹⁶ For example, in response to a series of incidents involving young children who choked to death on *konyaku* jelly,⁴¹⁷ manufacturers quickly added a warning to the product's label advising parents to cut the jelly into smaller pieces before giving it to their children.⁴¹⁸

Before the PL Law, Japanese warnings were often vague and only slightly cautionary.⁴¹⁹ Japanese manufacturers argued in the past that strong language on warning labels would insult Japanese consumers.⁴²⁰ For products being exported to foreign markets, however, Japanese manufactures often included specific warnings and instructions to match the standards of the

415. See *Firms on the Defensive*, *supra* note 16, at 10 (indicating that because warnings and handling instructions are considered part of products, manufacturers are liable under *PL Law* for selling defective products if warnings or instructions are inadequate).

416. *Makers of Pharmaceuticals Taking Steps to Prevent Improper Use of Medication*, DAILY YOMIURI, Aug. 24, 1995, at 13. companies were said to have sold the antiviral drug Sorivudine without clear instructions on usage when it first was sold. *Id.* Sixteen people died from using the drug incorrectly. *Id.* In light of preventing similar situations from occurring in the future, pharmaceutical companies have recently been adding illustrations to their instructions to clarify proper usage. *Id.*

417. *Konyaku Hairi Jeri no Jiko: Keikoku Hyoji no Kisai o Yobo* [*The Konyaku Jelly Incident — Protection Through Warning Labels*], NIHON KEIZAI SHIMBUN, Nov. 20, 1996 (describing *konyaku* jelly as "Japanese Jello"). The jelly is sold in separately wrapped mouth-size portions which adults can eat whole but children have difficulty swallowing. *Id.*

418. *Konyaku Jeri no Chuikaki ga Fujubun* [*Konyaku Jelly's Warning Labels Are Inadequate*], KOBE SHIMBUN, Apr. 30, 1996, at 3 (noting that warnings on *konyaku* jelly did not originally state that *konyaku* jelly could easily get stuck in children's throats).

419. *Id.*; *Product Liability Law Should Be Viewed as Challenge, Not Threat*, NIKKEI WKLY., July 24, 1995, at 6 (clarifying that before enactment of *PL Law* Japanese manufacturers did not sufficiently consider package information and warnings).

420. Ishida Interview, *supra* note 326. An example of how Japanese and non-Japanese manufacturers warned their customers differently involves warnings and instructions for the use of a hairdryer. *Firms on the Defensive*, *supra* note 16, at 10. A Japanese hairdryer had the warning "Never use this product inside the bath or with wet hands due to danger of electric shock." *Id.* Meanwhile, a non-Japanese-made hairdryer stressed a list of several precautions consumers should follow when using the hairdryer and listed particular dangers the consumers should avoid. *Id.* The non-Japanese-made hairdryer, for example, specifically stated that if the hairdryer falls into water, the plug should be removed from the socket and the consumer's hands should be kept out of the water. *Id.* The wording on the non-Japanese hairdryer was said to leave nothing to the consumer's imagination. *Id.*

market abroad.⁴²¹

Japanese companies are now aggressively studying how to improve their warning labels for Japanese consumers.⁴²² Many companies have hired experts to assist them with changing their warnings.⁴²³ Manufacturers are concerned, however, because there is little precedent in Japan to determine what level of warning is sufficient to protect manufacturers from liability.⁴²⁴ Critics argue, moreover, that few Japanese consumers understand or pay attention to new warnings and that Japanese manufacturers may actually confuse consumers more by including too many warnings on packages.⁴²⁵

d. New Corporate Focus: Product Safety.

Manufacturers are reducing product liability exposure by creating safer products and recalling potentially dangerous products.⁴²⁶ Since the PL Law's enactment, manufacturers have been greatly increasing their product recalls and have been more widely announcing their recall campaigns.⁴²⁷ Moreover, at the suggestions of new in-house safety consultants and industry-wide experts, manufacturers are making their products more resilient to product liability suits by redesigning and discontinuing

421. Noriko Yamaguchi, *Pressure Builds for Japanese Product Liability Law*, REUTERS BUS. REP., Apr. 21, 1993. As an example of disparate warning procedures taken by Japanese manufacturers for their products sold abroad, Nintendo's labels on video games sold in the United States included the dangers of having epileptic fits from playing the video games but included no such warning for the domestically-sold video games. *Id.* At that time, Nintendo's reason for using two different warnings for the same product was "Consumer interest differs in the two countries. We don't have a product liability law here in Japan." *Id.*

422. *Makers of Pharmaceutical Taking Steps to Prevent Improper Use of Medication*, *supra* note 416, at 13. The PL Law is prodding Japanese manufacturers to "take steps to prevent consumers from incorrectly using their products." *Id.*

423. Tomoyuki, *supra* note 413, at 111-13.

424. *Id.* (explaining that inconsistency and lack of clarity among Japanese warnings impedes manufacturers' efforts to determine standard of care).

425. *How Has Safety Prevention Changed One Year After Law Began?*, *supra* note 376, at 21-22 (indicating results of November 1995 survey in which consumers' knowledge and understanding of warning labels was tested).

426. *Product Law Means*, *supra* note 333, at 4.

427. *See Auto News: Mitsubishi Recall*, EDMONTON JOURNAL, July 30, 1996 (discussing that risk of lawsuits under PL Law encouraged Mitsubishi Motors Corp. to recall 635,000 vehicles as part of its largest-ever recall); *Kyujitsu Henjo De, Seihin Kaishyu — CD ni Wuirusu [Recall of CD ROMs Infected with Computer Virus]*, KOBE SHIMBUN, July 4, 1996 (discussing computer maker's decision to recall its virus-infected CD ROMs because of fear that computer viruses could be identified as defects under PL Law).

certain products.⁴²⁸

Companies in the food⁴²⁹ and clothing⁴³⁰ industries have made changes in their production lines to ensure safe manufacturing.⁴³¹ In a more dramatic response to the PL Law, Japan's two major manufacturers⁴³² of silicone decided to withdraw from the Japanese market.⁴³³ Both manufacturers cited the PL Law as a reason for quitting their production of silicone and expressed concern over potential law suits.⁴³⁴ Toy manufacturers, moreover, are struggling, under the PL Law, to create safer products that continue to appeal to children.⁴³⁵

The automobile industry is also reacting to the PL Law by launching major advertising and marketing campaigns that aim to sell safety.⁴³⁶ Compared to their counterparts in the United States and Europe, Japanese automakers in the past focused more on fuel economy, car style, and low prices than on safety.⁴³⁷ Now, however, Japanese automakers are attempting to

428. *Product Law Means*, *supra* note 333, at 1.

429. *Id.* Since the law was passed, sales of sterilization machines, used in food processing, have increased twenty percent, thus indicating a concern among food manufacturers that lawsuits could result from contaminated food products. *Id.* Ishida Co., a Kyoto-based maker of the sterilization machines sold approximately 2000 machines to detect metal in food over the past year. *Id.* "Our business has dramatically changed since April 1995 because of the product liability law," said a manager of Ishida. *Id.*

430. *Id.* Clothing manufacturers have been buying new equipment to detect needles in their products. *Id.* In Aomori Prefecture, a major clothing manufacturer bought three needle-detecting machines during the past year and hired three workers to operate them. *Id.*

431. *Product Law Means*, *supra* note 333, at 4.

432. Nori Kageki, *Product Liability Law Scares Silicone Firms Out of the Market*, NIKKEI WEEKLY, Aug. 28, 1995, at 9. Shin-Etsu Chemical Co. and Toshiba Silicone Co. are the two manufacturers that withdrew from the Japanese market. *Id.*

433. *Id.* Even though the two pharmaceutical companies manufactured silicone for coating hypodermic needles, and not breast implants, the companies feared the possibility of future problems in the needle silicone industry. *Id.* Their fear exists despite the fact that there has been no problem since silicone began being used in needles over twenty years ago. *Id.*

434. *Id.*

435. *Product Liability Law Forcing Toy Makers to Make Changes*, *supra* note 386. New safety measures at one toy company included treating dolls with a sour material to discourage children from putting it into their mouths. *Id.* Bandai Corporation, a major Japanese toy manufacturer, spent 500 million yen preparing for the new law. *Id.* An example of one of Bandai's changes is its decision to increase the size of a handbag on one of its popular dolls to prevent young girls from swallowing the handbags. *Anzensei wa Kakujitsu ni Kojo* [*Increasing Safety Checks*], KYOTO SHIMBUN, June 16, 1996.

436. *Japan Learns to Love Safety*, *supra* note 386, at D1.

437. *Id.*

increase their competitiveness by building more accident-proof automobiles.⁴³⁸

e. Increase in Purchases of Product Liability Insurance

Japanese manufacturers are preparing for potential product liability claims by substantially increasing their insurance coverage.⁴³⁹ Although private product liability insurance has been in existence in Japan for more than thirty-eight years, few companies purchased policies until the PL Law went into effect.⁴⁴⁰ Japanese insurance companies began creating corporate interest in the PL Law by conducting nation-wide seminars on the reform of the product liability system as early as a few years before the law's enactment.⁴⁴¹ In addition to selling insurance, Japan's major insurance companies are offering expansive consulting services to help clients prevent product liability claims.⁴⁴² Because product liability insurance premiums are fixed at rates too expensive for most small and midsize corporations, the Japanese government created a special insurance pool to enable small and midsize companies to buy product liability insurance at approximately half the cost of ordinary policies.⁴⁴³

438. *Id.*

439. See *Nonlife Insurers Enjoy Boom After PL Law*, DAILY YOMIURI, Aug. 26, 1995, at 9 [hereinafter *Insurers Enjoy Boom*] (explaining that between July and August of 1995, share of Japanese companies with policies increased from two percent to ten percent). *Id.* Sumitomo Marine & Fire Insurance Co., one of Japan's leading nonlife insurance companies, sold 14,000 product liability insurance policies between April and June of 1995. *Id.* In all of fiscal year 1994, Sumitomo sold 12,000 contracts. *New Law Spurs Sales of Product Liability Insurance: Consumer Protection Measure Puts Firms on Unchartered Ground*, NIKKEI WKLY., Aug. 28, 1995, at 16.

440. *Insurers Enjoy Boom*, *supra* note 439, at 9.

441. *Insurance Firms Look to Consulting on Product Liability*, JAPAN ECONOMIC NEWSWIRE, Oct. 11, 1993 [hereinafter *Consulting on Product Liability*] (stating "by consulting clients on the prevention of product liability disputes and by strengthening connections in this area . . . insurance companies are hoping that such efforts will lead to expanding their business opportunities).).

442. *Id.* Most major insurance companies provide free services to assess how well a company is prepared to prevent potential product liability problems. *Id.*

443. Hiroyuki Nishimura, *Product-liability Premiums Slashed*, NIKKEI WEEKLY, Feb. 27, 1995, at 20. Under this special insurance pool, three major business organizations, The Japan Chamber of Commerce and Industry, the Central Federation of Societies of Commerce and Industry, and the National Federation of Small Business Associations, contract for product liability coverage as a group and promote it to small companies at a discount. *Id.* These organizations created the insurance pool because analysts predicted small and midsize companies would be impacted most by the *PL Law*. Mihoko Iida, *Product-Liability Law Approaching Birth; Impact Projected to be Roughest on Nation's Small and Midsize Companies*, NIKKEI WKLY., Oct. 25, 1993, at 3. According to a MITI report,

Consultants are warning manufacturers to enact a total safety system and not rely solely on their insurance policies⁴⁴⁴ because the insurance does not protect against all potential claims.⁴⁴⁵ One limitation of a standard product liability insurance policy is that manufacturers must recall or exchange defective products in order to be eligible for insurance benefits.⁴⁴⁶ Insurance policies do not, however, cover expenses related to product recalls.⁴⁴⁷ Moreover, insurance policies limit indemnification amounts and, in cases of gross negligence, provide no indemnification.⁴⁴⁸ Product liability insurance also fails to cover exported goods.⁴⁴⁹ Exporters must, therefore, purchase a separate policy to cover products sold abroad.⁴⁵⁰

f. Increase in Use of Contracts to Structure Business Relationships

Distinguishable from practices in the United States, Japanese business relationships have tended to be based more on mutual trust and familiarity⁴⁵¹ than on specific rights and obligations set forth by contracts.⁴⁵² The PL Law, however, is weaken-

more than ninety-nine percent of Japanese manufacturers are small or midsize. *Id.* One reason why small and midsize companies may be affected greatly by the *PL Law* is that defective products are often the result of a fault in a product's parts and most part manufacturers are small or midsize companies. *Id.* Food manufacturers, the majority of which are small and midsize, are believed to be particularly vulnerable to potential suits under the law. *Id.* Overall, Japan has approximately five million small and midsize corporations which have fewer resources to cope with the *PL Law* than large companies. *Id.*

444. Masako Fukuda, *New Law Spurs Sales of Product-Liability Insurance*, NIKKEI WEEKLY, Aug. 28, 1995, at 16 (demonstrating that companies need to enact safety-control system to avoid defective products in addition to purchasing liability insurance); *Product Liability Law Should Be Viewed as Challenge, Not Threat*, *supra* note 419, at 6 (stressing companies must do more to prevent law suits than buy insurance).

445. *Insurers Enjoy Boom*, *supra* note 439, at 9 (claiming product liability insurance favors consumers and not policy holders).

446. *Id.*

447. *Id.*

448. *Product Liability Law Should Be Viewed As A Challenge, Not Threat*, *supra* note 419, at 6.

449. *Insurers Enjoy Boom*, *supra* note 439, at 9.

450. *Id.*

451. 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). Japanese business relationships are based primarily on familiarity and trust. *Id.* Most Japanese business partners view the law as unimportant in enforcing the scope of their relationships. *Id.*

452. Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, 7 LAW IN JAPAN: AN ANNUAL 1-21 (1974) [hereinafter *Contract in Japan*] (explaining Japanese

ing the trust between Japanese retailers and manufacturers, and between retailers and consumers, as they all begin to wrestle with apportioning liability for product defects.⁴⁵³ To delineate clear lines of liability, Japanese retailers are starting to use detailed contracts in their dealings with manufacturers and consumers.⁴⁵⁴

preference for engaging in long-standing business relationships that exist unrestricted by specific contract provisions). The concept was flushed out by Professor Hattori Shiro, a linguistics professor at Tokyo University, when he stated:

Americans carefully observe the law, regulations and contractual agreements, and they make full use of these legal forms. Japanese do not have a sufficiently clear conception of such legal forms but honor and trust *jojo*, the surrounding circumstances; *giri*, moral or social obligation to others; *ninjo*, human feeling; *yujo*, friendship; [and] *magokoro*, sincerity It is perhaps well-known that Americans observe contractual obligations more closely than Japanese. An American will say that he is not responsible for what he did not agree to. When a Japanese makes an agreement with another person, the goodwill and friendship that gave rise to the agreement is more important to him than the agreement itself. If there is sincerity, it does not matter if the contract itself is not executed exactly according to its terms. To Americans, legal agreements and feelings of friendship are completely different things. In these circumstances, Japanese tend to be preoccupied with a friendly atmosphere and are not careful to see that the agreement itself is thorough.

ASAHI SHIMBUN, December 20, 1952 at 6 (quoted in *Contract in Japan*, *supra*, at 6-7). "In Japan, not only are there many instances where written agreements are not drafted, but even when written agreements are drafted, their contents are generally very simple." *Contract in Japan*, *supra*, at 15. In contrast, Western contracts tend to set forth the rights and duties of business partners in detail and provide for all possible contingencies. *Id.*

453. *Reviewing the First Year of the PL Law*, *supra* note 377, at 150-51.

454. *Change Business Relationships*, *supra* note 387, at 17 (explaining that before *PL Law* contracts between manufacturers and retailers did not deal with apportionment of liability for product defect claims); *Product Liability Litigation Increase*, *supra* note 116, at 17 (describing how *PL Law* triggered retailers and distributors to focus on amending contracts with manufacturers). For example, Daiei Inc., a major Japanese retailer is considering amending its contracts to deal more specifically with assigning responsibility for product liability. *Change Business Relationships*, *supra* note 387, at 17. Isetan Department Store is delineating the allotment of product liability responsibility in its contracts with new business partners. *Id.* This trend in apportioning liability runs counter to the traditional notion that Japanese are not inclined to use precisely written contracts with contingency provisions for potential disputes. Eiichi Hoshino & John Haley, *The Contemporary Contract*, 5 *LAW IN JAPAN* 1, 44 (1972). It was believed that Japanese did not enter into human relationships anticipating the outbreak of a dispute and did not want the courts to resolve a dispute, should it occur, based on law. *Id.* Therefore, most Japanese contracts have not spelled out the rights and obligations of the parties should a dispute occur. *Contract in Japan*, *supra* note 452, at 17. Instead of specific allocations of risk, most Japanese contracts have traditionally included general phrases requiring parties to settle any disputes harmoniously and in good faith. *Id.* Moreover, in the past, Japanese have seen no use in negotiating specific liability provisions because it has been the general practice of Japanese businesses that any provisions that are included in a written agreement are tentative rather than definite. *Id.*

Under the PL Law, retailers and distributors are excluded from liability unless they affix their own brand names to products or import products directly from abroad.⁴⁵⁵ Nonetheless, many retailers and distributors, whose businesses are outside the scope of the PL Law, are requiring manufacturers to enter into contracts and assume liability for product defect claims.⁴⁵⁶

Observers claim the situation has become coercive where large retailers, who sell house-brands or direct imports and thus would be held liable under the PL Law, are using their dominant market position to require small manufacturers to assume liability for product defect claims.⁴⁵⁷ Some retailers are also requesting manufacturers to allow the retailers to directly negotiate claim settlements with customers on behalf of the manufacturers.⁴⁵⁸ In such situations, the manufacturers would be required to pay any settlement amount the retailers promised to the injured customers.⁴⁵⁹ Some retailers are refusing to do business with manufacturers that have not purchased product liability insurance.⁴⁶⁰

Small manufacturers often lack the in-house legal departments that large retailers have⁴⁶¹ and, without access to legal expertise, are being coerced into contracts of adhesion.⁴⁶² The situation has become problematic enough for the Japanese Fair Trade Commission⁴⁶³ to approach the retailers and distributors that are imposing unreasonable amendments on manufacturers and warn them of the possibility of being penalized for violating

455. PL Law art. 2(3), Law No. 85 of 1994 (Japan). Because of changes in the Japanese economy and a new demand for less expensive goods, more retailers are selling house brands and importing goods directly from abroad. *Change Business Relationships*, *supra* note 387, at 17. Daiei Inc. sells more than 4500 products that are either Daiei house brands or direct imports. *Id.* Daiei's house brand sales account for 13.1 percent of the store's total sales. *Id.*

456. *Product Liability Litigation Increase*, *supra* note 116, at 17.

457. *Id.*

458. *Id.* Although manufacturers are often ultimately liable for a product defect claim, the reality is that customers usually go back to the store where they bought a defective product to make a claim. *Change Business Relationships*, *supra* note 387, at 17.

459. *Product Liability Litigation Increase*, *supra* note 116, at 17.

460. *Insurers Enjoy Boom*, *supra* note 439, at 9; *Product Liability Litigation Increase*, *supra* note 116, at 17.

461. *Liability Law Spurs Consulting Services*, DAILY YOMIURI, Sept. 1, 1995.

462. *Product Liability Litigation Increase*, *supra* note 116, at 17.

463. Hsu, *supra* note 2, at 135. The Fair Trade Commission is "[a] government commission under the prime minister's office established to implement the Antimonopoly Law of 1947." *Id.*

the Japanese Antimonopoly Law.⁴⁶⁴ The issue of apportioning liability between retailers and manufacturers is complicated⁴⁶⁵ and, before the enactment of the PL Law, retailers did not utilize contracts to allocate product risks.⁴⁶⁶

As a result of the PL Law, some Japanese retailers are also using contracts for the first time to structure relationships with their customers.⁴⁶⁷ For example, ski shops are requiring customers to sign waivers that relieve the ski shops of liability for any injuries resulting from the customers' use of skis.⁴⁶⁸ If a customer refuses to sign the waiver, many ski shops will not sell the skis to the customer.⁴⁶⁹ In another example, owners of bungee jumping sites are requiring bungee jumpers to sign contracts that shield the owners from liability.⁴⁷⁰

2. Impact on Japanese Judiciary, Legislature, and Bureaucracy

Recent product liability case law⁴⁷¹ evidences a more pro-consumer attitude among Japan's judges, who have long been criticized for protecting large manufacturers against individual plaintiffs.⁴⁷² By bringing the debate on Japan's new discovery

464. *Product Liability Law Should be viewed as a challenge, Not Threat*, *supra* note 419, at 6. The Japanese government introduced the Antimonopoly Law in 1947 to decentralize the postwar economy. Hsu, *supra* note 2, at 12. The Antimonopoly Law bans trusts, cartels, private monopolization, and unreasonable restraints of trade and unfair competition. *Id.* Although critics argue the government has not strictly applied the law because of its desire to preserve its relationship with the business community, recent years show an increase in government enforcement of the Antimonopoly Law. *Id.*

465. *Change Business Relationships*, *supra* note 387, at 17. When determining who should be responsible for compensation arising from a product defect claim, the analysis turns on who was in charge of designing the product and at what stage of production the defect was caused. *Id.*

466. *Id.*

467. *Suki Kau no ni Do Isha — 'Jiko o Menseki' Gyokai ga PL Ho Taisaku* [*Even When Buying Skis, Consumers Must Sign Waivers Under the PL Law*], ASAHI SHIMBUN, Dec. 6, 1996.

468. *Id.*

469. *Id.*

470. *Bunjee Jumpu: Setsubi no Shiyō wa 'Jiko Sekinin'* [*Bungee Jumping: 'At Your Own Risk'*], NIHON KEIZAI SHIMBUN, Aug. 8, 1996.

471. *Taishi Kensetsu Kogyo K.K. v. Matsushita Denki Sangyo K.K.*, 842 HANTA 69 (Osaka Dist. Ct., Mar. 29, 1994).

472. Nakamura Interview, *supra* note 114 (claiming new attitude of judges is one of greatest changes resulting from *PL Law*); Sugiyama Interview, *supra* note 90 (claiming before *PL Law* plaintiff attorneys' biggest hurdle was helping judges see cases from plaintiffs' perspectives).

law to center stage,⁴⁷³ the PL Law is also being credited for impacting the Japanese legislature's initiative to reform the Civil Code.⁴⁷⁴ Commentators additionally credit the PL Law for encouraging Japan's bureaucracy to upgrade the governmental ADR system for resolving product defect claims.⁴⁷⁵

a. Recent PL Case Law: A New Bias Toward Consumers

Scholars claim a change in the attitude of the Japanese judiciary is recognizable in the 1994 decision of *Taishi Kensetsu Kogyo K.K. v. Matsushita Denki Sangyo K.K.*⁴⁷⁶ Commentators hold that this case, although settled before the PL Law became effective, was decided in anticipation of the coming of the PL Law.⁴⁷⁷ The *Matsushita Denki* decision is in fact being hailed as the trend-setting case under the new product liability regime.⁴⁷⁸

In *Matsushita Denki*, Taishi Construction claimed a defective Matsushita Electric television caused a fire which completely destroyed its office.⁴⁷⁹ Although the plaintiff was unable to clearly prove causation, the Osaka District Court surprised the consumer electronics industry by finding the television defective and assuming the manufacture's negligence.⁴⁸⁰ The court lessened the plaintiff's burden by deciding that proof of defect was enough to assume negligence.⁴⁸¹ This case marked a sharp break from the past because, for the first time in Japan, a court

473. Sugiyama Interview, *supra* note 90 (discussing how *PL Law* illuminated information disclosure problems associated with Japan's legal system).

474. *Id.*

475. Yamashita Interview, *supra* note 359.

476. 84 HANTA 69 (Osaka Dist. Ct., March 29, 1994); Nakamura Interview, *supra* note 114.

477. Behrens & Raddock, *supra* note 18, at 682 (claiming Osaka District Court applied doctrine similar to *res ipsa loquitor* in anticipation of adoption of strict liability in *PL Law*); Noriko Sato, *Product Liability Law to Debut in Japan*, JAPAN ECONOMIC NEWSWIRE, June 28, 1995 (stating Japanese government's move toward enacting *PL Law* had effect on court in *Matsushita Electric*); *Matsushita Told by Court to Pay Fire Damages*, REPORT FROM JAPAN, Mar. 30, 1994 (describing how *Matsushita Electric* drew great attention because it came before enactment of *PL Law*).

478. Nakamura Interview, *supra* note 114; *Matsushita Won't Appeal*, *supra* note 334 (claiming *Matsushita Electric* was Japan's "first ruling that acknowledged a manufacturer's liability for its products."). Skeptics wonder whether the *PL Law* will lead to more such victories for consumers. *Id.*

479. 84 HANTA 69 (Osaka Dist. Ct., March 29, 1994).

480. Sato, *supra* note 17.

481. *Id.* (mentioning that if court had not lifted plaintiff's burden, it would have been difficult for plaintiff to prove negligence under Civil Code in this case).

held an electronic manufacturer liable for producing a defective product.⁴⁸² The court justified its decision on the basis of showing manufacturers the importance of ensuring safety.⁴⁸³ Matsushita decided not to appeal the case because of Japan's growing public interest in consumer protection.⁴⁸⁴ Matsushita has revamped its product safety system in response to the court's decision.⁴⁸⁵

Another landmark product liability case decided shortly before the PL law's enactment shows the judiciary's new attitude toward the importance of disclosure of information.⁴⁸⁶ In this case, a Japanese citizen filed a lawsuit against the Tokyo Metropolitan government for its failure to disclose information about a high-density chemical detected in a type of health tea.⁴⁸⁷ The Tokyo government resisted the plaintiff's plea for disclosure of the brand name of the tea and the amount of chemical detected.⁴⁸⁸

The plaintiff brought suit against the Tokyo government for its violation of a Tokyo freedom of information ordinance that requires the government to disclose to the public information where disclosure is necessary to protect citizens' health.⁴⁸⁹ The government attempted to avoid disclosure here by relying on a clause in the ordinance that allows the Tokyo government to withhold information in cases where disclosure would negatively impact the competitiveness and profits of the manufacturer.⁴⁹⁰ The Tokyo District Court ruled against the Tokyo government by holding the government can only refuse disclosure when it is attempting to avoid specific and obvious damage to the manu-

482. *Matsushita Won't Appeal*, *supra* note 334.

483. *Id.* Presiding Judge Takeshi Mizuno stated "[Manufacturers] have a responsibility to guarantee safety of their products. If there is a defect in the product, an accident is possible." *Id.*

484. *Id.*

485. Sato, *supra* note 17 (stating "Matsushita Electric is taking measures to 'double check and triple check' the safety of its products Ten working groups have been set up in the company to undertake everything from reviewing product design to making educational video tapes for consumers.").

486. *Court Demands Disclosure of Brand Name in Toxic-Tea Case*, *MAINICHI DAILY NEWS*, Nov. 17, 1994 at 12 [hereinafter *Court Demands Disclosure*].

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

facturer.⁴⁹¹ Observers claim the ruling is significant for its priority on consumers' health rather than on manufacturers' profit and they believe the case will have a positive effect on the future application of the PL Law.⁴⁹²

Although no court has rendered a judgment under the PL Law, the case that made headlines as the first case to be brought under the PL Law is one in which a restaurant owner sued a container maker and Dai Nippon Printing Co., a major printing company.⁴⁹³ The plaintiff, who injured his thumb while trying to open a tea container, claimed the carton's structure had a design defect.⁴⁹⁴ The court has not yet reached its verdict, but the defendants, after denying liability, quickly changed the design of the carton.⁴⁹⁵

Another famous case brought after the PL Law's enactment is one in which a plaintiff sued a Tokyo condom maker for alleged mental distress he suffered as a result of using a defective condom.⁴⁹⁶ The plaintiff found a hole in the condom he used while engaging in sexual intercourse with a prostitute in Thailand and said he suffered from fear of contracting the AIDS virus.⁴⁹⁷ The court dismissed this case, but observers hail this case, as well as the tea carton case, as new kinds of cases in which isolated plaintiffs feel empowered to use the legal system to bring suits against large manufacturers.⁴⁹⁸

b. PL Law Spurs Enactment of New Discovery Law and Debates on Freedom of Information Act

The 1975 Draft included provisions for compulsory discov-

491. *Court Demands Disclosure*, *supra* note 486, at 12. In his ruling of this case, Presiding Judge Hisao Sato said, "If information on the quality of products is made public, it will enable consumers to compare different products. Manufacturers must accept freedom of information, even if a disclosure adversely affects profits and competitiveness." *Id.*

492. *Id.*

493. *Product Law Means*, *supra* note 333, at 4.

494. *Shiteki no Kekkan o Saibanchu ni Kairyo*, ASAHI SHIMBUN, July 13, 1996.

495. *Id.* The companies denied liability by claiming that they use a soft plastic metal and that they had received no other report of injury after shipping 50 million units of the container. *Id.*

496. *Id.*

497. *Id.*

498. Quaranta Interview, *supra* note 347; Nakamura Interview, *supra* note 114.

ery in product liability cases.⁴⁹⁹ Proponents of the 1975 Draft argued that Japan's deficient discovery system was the major barrier plaintiffs faced during litigation and strict liability would only assist plaintiffs if they had increased access to defendants' information.⁵⁰⁰ Because drafters of the PL Law did not include special discovery rules, attorney groups and political leaders clamored for an amendment to the discovery rule in the Civil Procedure Law of Japan.⁵⁰¹

The former discovery rule, Article 312, provided only three cases where a holder of a document was required to produce the document for the adverse party.⁵⁰² In all other situations, document holders were able to refuse production.⁵⁰³ The new amendment adds a general phrase, which is subject to two exceptions, that requires production of all other documents that do not meet the requirements of the three original provisions of Article 312.⁵⁰⁴ The two exceptions are for those documents that are deemed confidential and documents that are created for the exclusive use of the document holder.⁵⁰⁵ Observers argue that the second exception is against the spirit of the discovery amendment because, if interpreted broadly, the exception could allow any internal corporate documents to be excluded from production.⁵⁰⁶ Scholars do hope, however, that courts will not interpret the provisions broadly because the basic premise of the amendment is that all documents are available for discovery except for the specific exceptions.⁵⁰⁷ This premise, observers argue, is the

499. Marcuse, *supra* note 18, at 379-80 (describing how many people viewed compulsory discovery scheme as radical but necessary).

500. *Id.*

501. Shichi Interview, *supra* note 114; Yamashita Interview, *supra* note 359 (discussing that debate on passing of PL Law exposed problems with Japan's discovery law).

502. *Minsoho*, art. 312. Article 312 provides that:

A holder shall not refuse the production thereof in the following cases: (1) In [the] case the party himself is in possession of the document to which it has referred to in litigation; (2) In [the] case the person going to prove is entitled to require the holder of the document the delivery thereof or to demand its perusal thereof; (3) In [the] case the document has been drawn for the benefit of the person going to prove or drawn for the legal relations between him and the holder thereof.

Id.

503. *Product Liability Litigation Increase*, *supra* note 116, at 17.

504. *Minsoho*, art. 220.

505. *Id.*

506. Taniguchi Interview, *supra* note 87.

507. *Id.*

reason for the amendment because under the old law the presumption was against production unless the documents met specific requirements.⁵⁰⁸

The discovery law only applies to disclosure of non-government documents.⁵⁰⁹ As part of the amendment, however, the Diet is required to enact a national freedom of information act that would govern disclosure of government documents.⁵¹⁰ Currently, debate surrounds the enactment of this legislation on the issue of whether the court or the government agency in possession of a document should have the authority to determine whether the government document should be produced.⁵¹¹

c. Government ADR Upgraded and Law Promoted

In response to the enactment of the PL Law, the Japanese bureaucracy upgraded its offering of product liability services.⁵¹² The government made efforts to respond to a predicted rise in out of court settlements by assisting local governments with establishing consumer centers and complaint settlement agencies that would mediate between consumers and manufacturers.⁵¹³ These local government agencies are equipped to handle all types of products and can service consumers who are unable to visit industry-specific centers which are located mostly in Tokyo.⁵¹⁴ The Economic Planning Agency⁵¹⁵ ("EPA") has drafted mediation guidelines for the local agencies to follow and has trained national government mediators to travel to local sites when necessary.⁵¹⁶

In addition to upgrading product liability centers, the national government has spent much time and effort introducing the PL Law to Japan.⁵¹⁷ Seminars to publicize the PL Law have

508. *Id.*; Sugiyama Interview, *supra* note 87.

509. *Minsoho*, art. 220.

510. *Id.*

511. Taniguchi Interview, *supra* note 87; Sugiyama Interview, *supra* note 90.

512. *Stamping Out Appliance Fires*, MAINICHI DAILY NEWS, Dec. 6, 1995; Sato, *supra* note 17.

513. *Stamping Out Appliance Fires*, *supra* note 512.

514. *Id.*

515. Hsu, *supra* note 2, at 112. The EPA is "[a] [G]overnment agency under the prime minister's office responsible for drafting the national economic plan and for monitoring, analyzing, and forecasting economic trends."

516. *Id.*

517. Sato, *supra* note 17.

been held in over 300 places nationwide, and pamphlets and books have been sent to schools,⁵¹⁸ companies, and local governments. The government has also aired informational commercials about the PL Law on national television and radio.⁵¹⁹

3. Impact on Consumer Consciousness and Consumer Assertiveness

Through public and private efforts, Japanese consumers have been flooded with information about the PL Law.⁵²⁰ Widespread education on product safety is triggering unprecedented interest in consumer rights.⁵²¹ Consumers have bought more books describing the new PL Law than any other type of law book in Japan's history.⁵²² Moreover, according to a recent Tokyo survey, seventy percent of Tokyo respondents claimed to know the contents of the PL Law.⁵²³

Observers claim that due to the increase in consumer consciousness regarding product liability, Japanese consumers have become more assertive and inquisitive about their rights.⁵²⁴ For example, the number of consumer complaints about product troubles more than doubled after the PL Law went into effect.⁵²⁵ Consumers, moreover, have greatly increased their consultations with attorneys and mediators regarding potential product liability suits since the PL Law's enactment.⁵²⁶ Additionally, consumers have increased their product liability lawsuits under negli-

518. Ishida Interview, *supra* note 326 (explaining that Japanese public school curriculum now includes consumer education for first time and new consumer education video being used in schools across Japan highlights PL Law).

519. Sato, *supra* note 17.

520. Ishida Interview, *supra* note 326.

521. *Id.*

522. See *Liability Law Spawns Consulting Services*, YOMIURI SHIMBUN, Sept. 1, 1995, at 5 (discussing that appearance of several product liability law books on booksellers' best-selling lists was unprecedented for law-related books in Japan).

523. *Product Law Means*, *supra* note 333, at 1. A survey of consumers released in March 1995 by the Management and Coordination Agency found that 65.1% of the respondents were unaware of the PL Law. *Id.* In a February 1996 survey conducted by the Tokyo Metropolitan government, however, 70% of respondents claimed to know the contents of the law. *Id.*

524. Nakamura Interview, *supra* note 114; Sugiyama Interview, *supra* note 90.

525. *Product Complaints Double After Liability Law Start*, *supra* note 336. The number of complaints submitted to local governments more than doubled between July and December 1995 compared with the same time period the previous year. *Id.*

526. Nakamura Interview, *supra* note 114.

gence theory since the Diet enacted the PL Law.⁵²⁷ Observers claim that the increase in negligence lawsuits reflects the fact that the PL Law only applies to products delivered to consumers after July 1, 1995.⁵²⁸

III. *THE CRITICS ARE WRONG: THE PL LAW IS A NECESSARY AND EPOCH-MAKING CHANGE FOR JAPAN*

Critics either claim that Japan did not need the PL Law or that the PL Law is incapable of creating substantial change in Japanese society.⁵²⁹ The critics largely come to their conclusions by relying on out-dated generalizations about the workings of Japan's legal system and society. Shortsightedly, many of the critics fail to incorporate into their analyses the recognition that major changes are sweeping through Japan today.

A. *Japan Needed The PL Law to Empower Individual Plaintiffs in Product Defect Cases and to Deregulate Product Safety Regulations*

A common argument given for why Japan did not need strict liability is that Japan's consumers were adequately protected by government regulations.⁵³⁰ This argument fails to consider that excessive government regulation and intervention impeded Japan's economic growth in the global market by preventing free-market principles from taking root.⁵³¹ Another argument claims manufacturers voluntarily subjected themselves to public insurance programs, such as the SG System,⁵³² thus eliminating the need for a mandatory strict liability system.⁵³³ The shortcoming of this argument is that only certain products are covered by public programs and the weakening of adminis-

527. *Manufacturers Assume Tort Responsibility*, *supra* note 376, at 10.

528. Nakamura Interview, *supra* note 114.

529. See *supra* notes 18-20 and accompanying text (presenting varying criticisms of PL Law's need and effectiveness)

530. See *supra* notes 280-82 accompanying text (discussing view of government leaders who opposed enactment of PL Law that regulation protected consumers).

531. See *supra* notes 218-31 and accompanying text (discussing method of government regulation and its impact on free market for consumers).

532. See *supra* notes 237-47 and accompanying text (discussing workings of SG System).

533. See *supra* notes 278-87 and accompanying text (discussing view of critics who dismissed need of PL Law).

trative guidance may greatly reduce manufacturers' voluntary compliance with such programs.⁵³⁴ A third argument claims that because judges waived the negligence burden for some plaintiffs, judges did not need the PL Law to apply strict liability theory. The problem with this argument is that only plaintiffs involved in mass disasters received preferential judicial treatment.⁵³⁵ Single-injury plaintiffs, meanwhile, were often left without recovery options in court or through ADR because of their lack of bargaining power.

1. The Negligence System Existed as an Inadequate Legal Regime for Single-Injury Product Liability Plaintiffs

Because of the difficulty in proving privity of contract in most cases, plaintiffs brought their claims under negligence theory.⁵³⁶ Japan's negligence law did not make any specific allowances for product defect cases and, thus, with limited discovery practices, plaintiffs rarely had enough evidence to prove their cases.⁵³⁷ Moreover, unable to view internal corporate documents,⁵³⁸ most plaintiffs were unable to prove a manufacturer's foreseeability of harm and availability of alternative designs.⁵³⁹

In light of inadequate law, judges sometimes used discretion in employing their own versions of negligence and waiving plaintiffs' burden of proof for elements such as causation and foreseeability.⁵⁴⁰ Because Japan is a Civil Code country, however, judges are not legally empowered to take such expansive views of the law. As a result, judges had to be selective in which cases they

534. *See supra* notes 315-16 and accompanying text (discussing shortcomings of government regulation).

535. *See supra* notes 200-14 and accompanying text (discussing how negligence system worked only where judges distorted application of law in mass disaster cases).

536. *See supra* notes 191-99 and accompanying text (discussing Japan's negligence law).

537. *See supra* notes 191-214 and accompanying text (discussing negligence law and famous product liability cases brought under negligence theory).

538. *See supra* notes 112-16 and accompanying text (discussing limits of Japan's former discovery law).

539. *See supra* note 208 and accompanying text (discussing difficulty plaintiffs had in HIV litigation proving elements of manufacturer foreseeability and avoidability in making successful negligence claim).

540. *See supra* notes 203-07 and accompanying text (showing example cases where judge modified application of negligence law).

applied an abstract form of negligence.⁵⁴¹ Unfortunately for single-injury plaintiffs, Japan's judges tended to only waive burdens of proof in cases involving widely-publicized mass disasters.⁵⁴²

Preclusion from the legal system forced single-injury product liability plaintiffs to consider ADR options.⁵⁴³ Before the PL Law, however, consumers faced manufacturers and retailers without much bargaining power because few manufacturers believed there was any chance begrudged consumers would sue and win.⁵⁴⁴ Thus, although many of those who opposed the PL Law said the law was unnecessary because Japanese consumers preferred ADR and were satisfied handling their claims out-of-court,⁵⁴⁵ in reality, the playing field was unlevelled. Many consumers were forced to forego their claims or settle for less than they deserved.⁵⁴⁶

Critics who contend the PL Law was unnecessary for Japan often point to the mass disaster cases as their proof that Japan did have a working product liability system where plaintiffs could sue and win. A product liability system, however, can not be deemed to be working if judges must distort the law to allow for plaintiffs' recovery.⁵⁴⁷ Moreover, the former system essentially excluded recovery for injuries which occurred outside of the mass disaster cases.⁵⁴⁸ Japanese society clearly needed the PL Law to bring greater justice to the average product liability plaintiff whose television, for example, may explode, in an isolated incident, and cause a fire.

541. See *supra* note 203 and accompanying text (discussing plaintiffs in famous mass tort suits were successful because of judicial discretion).

542. See *supra* notes 201-03 and accompanying text (explaining how single-injury plaintiffs did not receive same treatment as plaintiffs in mass disaster cases).

543. See *supra* notes 126-56 and accompanying text (explaining ADR options available to plaintiffs prior to *PL Law's* enactment).

544. See *supra* notes 383-86 and accompanying text (illustrating boost *PL Law* gave to consumer bargaining power).

545. See *supra* notes 77-82 and accompanying text (discussing whether Japanese really prefer ADR methods over litigation or whether system gives them no other choice but to pursue claims through ADR).

546. See *supra* note 390 and accompanying text (describing imbalance in bargaining power between consumers and manufacturers before *PL Law*).

547. See *supra* notes 201-03 and accompanying text (discussing how judges distorted tort law to benefit certain plaintiffs).

548. See *supra* notes 213-15 and accompanying text (describing inability of single-injury plaintiffs to recover under negligence system).

2. Government-Initiated Product Safety System Harmed Japan's Economy by Erecting Non-Tariff Trade Barriers and Restricting Product Choice

Because of a dearth of product liability litigation under the negligence system,⁵⁴⁹ Japan's judiciary offered little incentive for manufacturers to take consumer claims seriously and spend corporate assets on promoting safer products. In place of judicial incentives, Japan's government assumed the role of regulating product safety.⁵⁵⁰ The government's regulation focused on enforcing uniform product standards and certification and inspection systems.⁵⁵¹ The government's regulation, however, contributed to Japan's economic and trade problems⁵⁵² by creating non-tariff barriers to imported goods, limiting domestic manufacturers' diversity in creating products, and forcing consumers to pay for expensive inspection and certification systems.⁵⁵³

Japan needed the PL Law to loosen government regulation and allow the Japanese market to behave more like a free-market economy. Manufacturers needed to be able to conduct their own cost-benefit analyses to determine whether a product's benefits outweighed its risks instead of being prevented by the government to sell certain products because the products' designs did not meet the government's uniformity standards. The government's regulatory system was economically inefficient because the market was not determining the suitability of products.⁵⁵⁴ Often, the government's standards existed without a rational basis for product safety.⁵⁵⁵

Now, with consumers better able to fend for themselves under the protections of the PL Law, the government is loosen-

549. *See supra* note 58 and accompanying text (citing small number of product liability cases brought in Japan over the last fifty years).

550. *See supra* notes 210-32 and accompanying text (describing role of government in regulating Japan's product safety).

551. *See supra* notes 223-27 and accompanying text (describing how Japanese government regulates product safety).

552. *See supra* notes 299-302 and accompanying text (describing how governmental regulation impacted Japan's trade problems).

553. *See supra* notes 225-27 and accompanying text (discussing how governmental regulation of product safety negatively impacts Japanese society).

554. *See supra* notes 230-31 and accompanying text (discussing how uniformity standards guide Japanese regulation of product safety).

555. *See supra* note 227 and accompanying text (showing example of product regulation unrelated to safety issues).

ing its top-down approach to product safety and reducing its barriers to imported goods. This will improve Japan's commitment to global convergence⁵⁵⁶ and enable the government to show the world that it is serious about deregulating and making Japan behave more like other free-market economies.⁵⁵⁷

3. Unraveling of the Iron Triangle and Consumer Demands for Less Expensive Products Decreases Manufacturer Incentives to Produce Safe Products

Japan's changing political and economic landscape⁵⁵⁸ is reducing manufacturer incentives to produce safe products.⁵⁵⁹ As Japanese manufacturers increasingly move abroad to avoid the workings of the Iron Triangle, the government's influence on industry and its ability to exert administrative guidance will continue to wane.⁵⁶⁰ Manufacturers, who once felt compelled to comply with government standards to receive business favors, will be more willing to act independently.⁵⁶¹ Thus, the government will have less ability to enforce public insurance programs,⁵⁶² compensation trust funds,⁵⁶³ and safety regulations.⁵⁶⁴

Moreover, Japanese consumers, considered by some observers to be the other incentive-creating factor in Japan's product safety equation,⁵⁶⁵ are becoming less willing to pay high costs for

556. See *supra* notes 290-91 and accompanying text (discussing trend of global convergence).

557. See *supra* notes 299-302 and accompanying text (explaining Japan's desire to reduce non-tariff trade barriers and enhance its international image as a free market economy).

558. See *supra* notes 306-11 and accompanying text (describing the unraveling of Japan's interlocking system of politicians, bureaucracy, and business).

559. See *supra* notes 315-16 and accompanying text (discussing how manufacturers will be less willing to follow governmental orders).

560. See *supra* note 311 and accompanying text (explaining how Japanese companies are moving facilities abroad to avoid the regulation of Japanese market).

561. See *supra* notes 309-11 (discussing new independence among Japanese manufacturers).

562. See *supra* notes 233-47 and accompanying text (discussing workings of Japan's public insurance programs).

563. See *supra* notes 251-55 and accompanying text (explaining functioning of Japan's compensation trust funds).

564. See *supra* notes 222-26 and accompanying text (explaining government regulations).

565. See *supra* note 287 and accompanying text (explaining how high demands of Japanese consumers encouraged manufacturers to enact very efficient quality control programs).

products.⁵⁶⁶ In an effort to reduce costs, manufacturers may have less incentive to continue their 100% inspection policies. Manufacturers may also have less ability to ensure high quality in their production facilities abroad. This is where a stronger judiciary, bolstered by the enactment of the PL Law, is necessary to provide incentives to manufacturers to pay attention to consumers.

B. PL Law Has Changed Japan by Increasing the Power of Consumers vis-à-vis Manufacturers and the Government

Because plaintiffs have brought few cases under the PL Law, critics have been quick to suggest that Japanese non-litigiousness will prevent the PL Law from creating substantial impact. These critics, however, fail to realize that since the PL Law's enactment, consumers have greatly increased their claims against manufacturers and have received much more equitable settlements from manufacturers.⁵⁶⁷ The judiciary, moreover, has gained a greater role in creating incentives for manufacturers to produce safer products. By bringing education on consumer rights to the forefront, the PL Law has also reduced cultural tendencies of Japanese consumers to be averse to promoting their rights. Moreover, structural barriers are showing signs of reduction in the wake of the PL Law.

1. PL Law Leveled Playing Field Between Manufacturers and Consumers

Critics argue the PL Law is too ambiguous to lead to much positive legal change for consumers. They argue that the law should have contained a clearer definition of defect, should not have provided for manufacturer defenses, and should have included a provision for presumed defects in certain cases.⁵⁶⁸ The law's legal ambiguity, however, does not mean it will be used against consumers. In fact, ambiguity leaves interpretation in the hands of the judiciary in determining whether the law will be pro-consumer or not.

566. *See supra* notes 318-20 and accompanying text (describing new tendency among Japanese consumers to be bargain shoppers).

567. *See supra* notes 388-402 and accompanying text (discussing favorable settlements consumers are being offered as result of *PL Law*).

568. *A Lukewarm PL Bill*, MAINICHI DAILY NEWS, Apr. 14, 1994, at 1.

The recent *Matsushita Denki*⁵⁶⁹ decision, moreover, indicates that the PL Law is actually influencing Japan's judges to favor consumers.⁵⁷⁰ The burden of proof for plaintiffs now begins with an assumption of fault on behalf of the manufacturer.⁵⁷¹ This change is in direct contrast to the prevailing presumption among judges prior to the PL Law that product defects were mostly attributable to consumer misuse.

The PL Law has also leveled the playing field between manufacturers and consumers by ushering in a plethora of new consumer-oriented alternative dispute facilities. The government has implemented new product liability services at its consumer centers across the country⁵⁷² and major industries have established product liability centers.⁵⁷³ These centers provide consumers with viable options to pursue claims against manufacturers.⁵⁷⁴ Moreover, many companies have initiated sophisticated programs to facilitate claim handling.⁵⁷⁵ Manufacturers have also revamped their warnings and instructions to give Japanese consumers the same treatment they once only gave consumers in their export markets.⁵⁷⁶ The PL Law has clearly expanded injured plaintiffs' opportunities to have their claims taken seriously. If this trend continues, the law will undeniably exist for the benefit of consumers.

2. PL Law Strengthens Role of Judiciary in Japan's Product Liability System

The PL Law has engendered a fear among manufacturers

569. See *supra* note 471 and accompanying text (discussing *Matsushita Denki* decision).

570. See *supra* notes 471-85 and accompanying text (discussing *Matsushita Electric* decision and its impact on Japan's judges).

571. See *supra* note 355 and accompanying text (describing under strict liability theory plaintiffs no longer have burden to prove fault on behalf of manufacturer).

572. See *supra* notes 512-16 and accompanying text (describing how Japanese government has implemented new product liability services at existing consumer centers throughout Japan).

573. See *supra* notes 403-14 and accompanying text (explaining how major Japanese manufacturers and entire industries have established product liability centers).

574. See *supra* notes 406-11 and accompanying text (describing claim-handling processes at product liability centers).

575. See *supra* notes 382, 404 and accompanying text (describing how individual manufacturers are establishing new processes for handling product liability claims).

576. See *supra* notes 415-25 and accompanying text (discussing manufacturers' initiatives to upgrade warnings and instructions on products).

that consumers can actually sue them for product liability claims and win.⁵⁷⁷ Thus, judicial incentives are finally at work in Japan. Manufacturers are now much more willing to apply strict liability theory and settle claims with consumers to avoid the potential of having their reputation ruined through litigation.⁵⁷⁸ Manufacturers are also greatly increasing their purchase of product liability insurance which is leading to higher settlement awards for consumers.⁵⁷⁹

Although the greatest evidence of a stronger judicial role is being seen through increased manufacturer incentives to apply the PL Law in their settlements with consumers, the PL Law has also encouraged more consumers to utilize the courts to pursue their claims.⁵⁸⁰ Although only a few cases have been brought under the PL Law since the PL Law's enactment, the number of product liability cases brought under negligence law has increased.⁵⁸¹ Critics often overlook that only those products delivered to consumers after July 1, 1995 are protected by the PL Law. The rise in negligence product liability cases evidences a new attitude among consumers that even under the original legal theories, their chances of winning in court are greater because of the influence of the PL Law. This trend indicates the potential for profound change in Japan's litigation environment once more products actually covered by strict liability become defective.

3. PL Law Reduces Cultural and Structural Barriers to Litigation

The PL Law has disproved the Cultural Theorists' view that Japanese are innately averse to exercising their individual rights.⁵⁸² In fact, in the wake of the PL Law's enactment, Japa-

577. *See supra* notes 391, 397 and accompanying text (describing new attitude of manufacturers toward consumers in light of manufacturers' belief that consumers can now bring successful product liability claims in court).

578. *See supra* notes 388-402 and accompanying text (discussing greater willingness among manufacturers to settle claims with consumers).

579. *See supra* notes 439-41 and accompanying text (explaining increase in product liability insurance sales).

580. *See supra* notes 493-98 and accompanying text (describing trend among consumers to pursue product liability litigation).

581. *See supra* notes 527-28 and accompanying text (discussing increase in negligence-based product liability lawsuits after *PL Law* was enacted).

582. *See supra* note 60 and accompanying text (describing that some scholars argue

nese consumers are now more willing to voice their complaints. Product liability claims at consumer centers have doubled since the PL Law began,⁵⁸³ law suits have risen,⁵⁸⁴ and attorney consultations have increased.⁵⁸⁵ Recent widespread education about the PL Law and consumer rights in general appears to be encouraging Japanese to protect their interests and question authority when necessary.⁵⁸⁶

The PL Law has also shed doubt on the belief held by Cultural Theorists that the Japanese are opposed to structuring relationships through the use of contracts.⁵⁸⁷ Since the PL Law's enactment, consumers and merchants are facing contracts more frequently in their daily lives. Skiers and bungee-jumpers, for example, are now asked to sign contracts before engaging in the sports.⁵⁸⁸ Manufacturers are facing unprecedented pressure from retailers to negotiate allocation of product liability risks in contracts.⁵⁸⁹ The PL Law, in conjunction with other societal changes in Japan, appears to be increasing the role of law in the lives of more Japanese. In time, more and more Japanese are apt to prove Cultural Theorists wrong⁵⁹⁰ by showing that Japanese attitudes toward law do change with time and that Japanese consumers can actually believe the law exists to protect their individual rights.⁵⁹¹

The PL Law has also led to a reduction in structural barri-

Japanese believe protecting individual interests is a shameful thing and using law to further one's own rights is detestable).

583. *See supra* note 525 and accompanying text (illustrating rise in consumer claims once law took effect).

584. *See supra* notes 476-98, 527-28 and accompanying text (discussing increase in lawsuits).

585. *See supra* note 526 and accompanying text (noting that consumers are increasing attorney consultations about product liability questions).

586. *See supra* notes 67-69 and accompanying text (describing Cultural Theorists' view that Japanese are unwilling to assert claims and protect their individual rights).

587. *See supra* notes 451-52 and accompanying text (describing traditional view that Japanese shun use of contracts in business and non-business relationships).

588. *See supra* notes 467-70 and accompanying text (describing increase in use of contracts between retailers and customers).

589. *See supra* notes 453-66 and accompanying text (describing confrontational situation between retailers and manufacturers in attempting to allocate product liability risks).

590. *See supra* notes 67-68 and accompanying text (discussing view among some scholars that Japanese citizens do not view role of law as Westerners do).

591. *See supra* notes 63, 74-77 and accompanying text (discussing Structural Theorists view that Japanese are not simply non-litigious because of an innate cultural tendency and that Japanese attitudes toward law change with time).

ers. Debate on the PL Law has illuminated the weaknesses of the Japanese legal system to the public at large. The importance of transparency in disseminating information has become a topic of great scrutiny. The new discovery law comes into effect January 1, 1998 and a national freedom of information act is on its way.⁵⁹² The number of attorneys in Japan is also increasing. Within a few years, 1,000 attorneys are expected to be admitted per year.⁵⁹³ Attorneys will be more available and willing to represent product liability plaintiffs now that judges can easily rule in plaintiffs' favor without having to distort the law.⁵⁹⁴ The PL Law has also led to an increase in ADR processes. Although at first glance the new ADR services may seem to be a barrier to the PL Law's effectiveness, recent settlements show that the theories of the PL Law are being followed in ADR negotiations.

CONCLUSION

This Note, while discussing the positive effects of the PL Law, in no way suggests Japan's product safety system is now adequate. On the contrary, much more needs to be accomplished. The courts must become more accessible for plaintiffs and the new discovery rule must not just exist as a law on the books but must be a changing force in the way litigation is carried out in Japan. The ability for plaintiffs to access information will determine the future of the PL Law. If consumers are not given reason to maintain what seems to be a new confidence in the judicial system, manufacturers will no longer fear litigation and all gains made in increasing the role of the judiciary will be lost. Judges must also continue to be fair to plaintiffs.

Because the PL Law enters Japanese society amidst great social, political, and economic change, many of the cultural and institutional barriers of the past are sure to be continually reduced. Critics who analyze the PL Law's potential from the perspective of a static Japanese society are missing the true picture. Deregulation and consumer empowerment are becoming revo-

592. *See supra* notes 499-511 and accompanying text (discussing new amendment to Japan's discovery law); Shichi Interview (noting that new discovery law has potential to greatly affect future litigation in Japan).

593. *See supra* note 87 and accompanying text (explaining increase in number of attorneys being admitted to Japanese bar).

594. *See supra* notes 90, 472 and accompanying text (discussing that Japanese attorneys were reluctant to take plaintiffs' product liability cases before PL Law)

lutionizing forces for the future of Japan, and the PL Law is playing a role in shaping these forces. While it is difficult to predict future impact, it is clear that in the short time since the law's enactment, great change is underway. In the words of economist Adam Smith, ". . . producers and consumers must stand on an equal footing if a market economy is to be preserved."⁵⁹⁵ Due to the PL Law, Japanese consumers are now standing on a more equal footing.

595. *A Lukewarm PL Bill*, *supra* note 568, at 1.