

Understanding the Incidence of Litigation in Japan: A Structural Analysis†

The typical reason given for why Japanese litigation rates are less than those in the United States is that the Japanese are a more cooperative, nonlitigious people who try to resolve disputes through mediation and outside of court.¹ While such a label may be descriptive, it does little to assist in the understanding of why the Japanese litigate less frequently. In addition, such a label does not assist lawyers in advising clients on the merits, disadvantages, and risks of being either a plaintiff or a defendant in a Japanese lawsuit.²

*Partner, Showa Law Office, Tokyo, Japan. This article was developed from the text of a presentation made by Mr. Yamanouchi at the Jones, Day General Counsel Conference, The Changing Litigation Landscape: Issues and Strategies for the 1990s (Oct. 25–26, 1990).

**Foreign Associate, Showa Law Office, Tokyo, Japan.

†The Editorial Reviewer for this article was Rebecca Martin Seaman.

1. Many American writers have commented on the Japanese emphasis on cooperation. See M. SHANNON, *LEGAL AND BUSINESS ASPECTS OF DOING BUSINESS WITH JAPAN* 10 (1974) (“Japanese tend to pay greater respect to non-legal norms than do Western people, and Japanese also tend to feel ashamed of directly resorting to law in settling disputes or in deciding their actions.”)

[T]he American who wishes to have a successful long-term business relationship with the Japanese must put aside his Western law-oriented emphasis on the rights and duties of the parties as delineated by the contract. To the Japanese, determining whose rights are at stake in a dispute is not nearly as important as preserving the “wa,” the harmony, between the parties. . . . The Japanese believe that the parties should work out problems amicably in a spirit of trust and cooperation, often regardless of what the contract says and sometimes even in the very face of the contractual language.

E. HAHN, *JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM* 10 (1984). In addition, Japanese commentators also mention the Japanese preference to compromise. See Ohta & Hozumi, *Compromise in the Course of Litigation*, 6 *LAW IN JAPAN: AN ANNUAL* 97, 99 (1973) (“One reason why many civil suits are settled by compromise is a so-called love for compromise—the feeling that exists among the Japanese that, if one has reluctantly become enmeshed in a lawsuit, one should settle it as quickly as possible through compromise.”).

2. The incidence of litigation in Japan, while still less than in the United States, has been increasing until very recently. See generally SUPREME COURT OF JAPAN, *OUTLINE OF CIVIL TRIAL IN JAPAN* 22 (1990) (“in Japan . . . the number of civil cases had increased year by year until 1985, and

One factor that influences the decision to file a lawsuit in both the United States and Japan is the structure of the system for civil litigation.³ This structure includes procedural devices for discovery, contingent attorneys' fees, jury trials, punitive damage awards, and the court costs necessary to file a lawsuit. The structure for civil litigation in Japan generally lacks those factors that promote the filing of lawsuits in the United States. This article compares the various structures for civil litigation as they exist in the United States and in Japan and evaluates the effects of any differences on the rates of civil litigation in both countries.

I. Procedural Devices for Discovery

In both the United States and Japan the decision to file a complaint depends on the evidence available to the aggrieved party and the likelihood that such evidence will sustain a complaint for damages.⁴ At the outset, the quantum of evidence necessary to initiate litigation is much less in the United States than in Japan. In the United States, rule 11 of the Federal Rules of Civil Procedure (FRCP) requires an attorney to conduct a reasonable inquiry, given the circumstances prior to filing a complaint. Such circumstances include consideration of the time for investigation and whether the client is the sole source of information.⁵

In Japan, article 4 of the Rules of Civil Procedure (*Minji Soshō Kisoku*) provides that parties should conduct intensive pretrial investigations, such as interviewing witnesses and examining other evidence.⁶ In both countries attorneys should completely investigate the evidence available to them prior to filing

[the] total number of newly received cases at its peak in 1984 was 2,963,114 as compared with 393,089 in 1944, although in the last few years, it tended to decrease slightly").

3. See, e.g., Markesinis, *Litigation-Mania in England, Germany and the USA: Are We So Very Different?*, 49 CAMBRIDGE L.J. 233, 252 (1990) (factors such as contingent fees, punitive damages, and large jury awards encourage U.S. litigation).

4. Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352, 356 (1982) ("[d]iscovery provides litigants with an inexpensive method of acquiring information" and can assist settlement negotiations and victory at trial and can decrease uncertainty generally). See generally Hazard, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2242 (1989) (liberal pleading, joinder, and discovery are necessary for modern products liability, toxic tort, and environmental litigation).

5. FED. R. CIV. P. 11 advisory committees notes, 1983 amendment:

[W]hat constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

6. T. HATTORI & D. HENDERSON, *CIVIL PROCEDURE IN JAPAN* § 6.02, at 6-3 n.5 (1985). Art. 4 pretrial preparation includes extensive pretrial investigations, interviews with witnesses, and examination of other evidence. Article 4 provides: "The parties must carefully examine the facts of the case including witnesses and other evidence beforehand to make thoughtful allegations and prove their cases." Supreme Court Rule No. 2 of 1961 (amended), art. 4.

suit. However, because the U.S. pretrial investigation standard is based on the circumstances of the case, litigants may still file suit, even though all or most of the available evidence is controlled by the opposing party, and thereafter develop their case through discovery devices such as interrogatories, requests for admission, depositions, and requests for production of documents and things.⁷ Each of these discovery devices as they exist in the United States and Japan are individually examined and compared in the following sections of this article.

A. INTERROGATORIES AND REQUESTS FOR ADMISSION

Japan has no system for asking for written replies, under oath, to written questions by the opposing party, as is provided for by FRCP rule 33 (Interrogatories to Parties).⁸ In addition, Japan has no system for requesting the opposing party to admit to a statement or opinion of fact or to the application of law for the purposes of the pending action only, as is provided for under FRCP rule 36 (Requests for Admission).⁹ The only admissions that exist under Japanese law arise where a party fails to controvert a statement of fact in a pleading or in court, as provided in article 257 of the Japanese Code of Civil Procedure (*Minji Soshoho*) (CCP).¹⁰

B. DEPOSITIONS

Under FRCP rule 30¹¹ and rule 32,¹² a party uses depositions to discover information held by opposing or nonparty witnesses, to impeach testimony at trial, or to replace live testimony when a witness is unavailable to testify at trial. Japanese law, however, has no comparable device to discover the testimony of opposing or nonparty witnesses who will not permit themselves to be voluntarily interviewed prior to trial.

For witnesses who may be unavailable to testify at trial, Japanese CCP article 343 and the articles that follow provide that a party may make a motion to the court for the preservation of evidence.¹³ Such a motion must indicate the parties, the facts to be proved, the evidence to be discovered, and the reasons for the

7. See, e.g., F. JAMES & G. HAZARD, CIVIL PROCEDURE § 6.2, at 177 (2d ed. 1977) (“[w]ith wide-ranging discovery, it is possible to maintain an action or defense that is dependent on witnesses or documents known only to the opponent”).

8. FED. R. CIV. P. 33(a).

9. *Id.* 36(a).

10. MINJI SOSHO-HO (Code of Civil Procedure) [MINSOHO], Law No. 29 of 1890 (amended), art. 257 [hereinafter CCP] (“The facts the party confessed in court or facts the court finds obvious need not be proved.”).

11. FED. R. CIV. P. 30 (“Depositions Upon Oral Examination”).

12. *Id.* 32 (“Use of Depositions in Court Proceedings”).

13. MINSOHO art. 343 provides: “The court may, if it considers that there exist such circumstances that make the use of evidence in question difficult unless examination thereof is made beforehand, conduct examinations of evidence on motion in accordance with the provisions of this Chapter.” *Id.*

preservation of the evidence.¹⁴ Motions to preserve evidence may even be initiated prior to naming the opposing party to the suit, and in such event the court will appoint a special representative for the other party.¹⁵ However, if the witness is available at the time of trial, and the other party makes such a motion, the court will examine the witness at trial regardless of his or her prior preserved testimony.¹⁶

C. PRODUCTION OF DOCUMENTS AND THINGS

The scope for the production of documents is much broader in the United States than in Japan. While any documents that are relevant to the subject matter of the action, except those that are privileged, may be requested pursuant to FRCP rule 34,¹⁷ only three categories of documents may be requested under Japanese law. Japanese CCP article 312 provides for the production of the following categories of documents:

- (1) where the party in possession of the document has referred to it in the litigation;
- (2) the party who has the burden of proof has a legal right (pursuant to laws other than the CCP) to demand the delivery or the inspection of the document; or
- (3) where the document has been prepared for the benefit of the other party or relates to a legal relationship between the party and the holder of the document.¹⁸

These three categories are vague and, therefore, have been the source of many discovery disputes, as parties attempt to determine what evidence can be discovered in each category.¹⁹ For example, medical records have been treated as documents drafted for the benefit of patients and therefore have been discoverable under category (2) above; however, they have also been treated as documents relating to a category (3) legal relationship between a doctor and patient.²⁰

14. MINSOHO art. 345 provides: "1. The following matters shall be made clear in a motion for preservation of evidence: (1) Indication of persons in possession of evidence; (2) Facts to be proved; (3) Evidence; (4) Reason for preservation of evidence. 2. The reason for the preservation of evidence shall be explained by prima facie showing of evidence."

15. MINSOHO art. 346 provides: "A motion for preservation of evidence shall be made even when the designation of the person in possession of the evidence is impossible. In this case, the court may appoint a special representative for the prospective person in possession of the evidence."

16. MINSOHO art. 351-2 provides: "In the event that a party makes a motion for the examination of the witness at oral argument who was examined at the proceedings for the preservation of evidence, the court shall re-examine him."

17. FED. R. CIV. P. 34 ("Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes").

18. MINSOHO art. 312.

19. 7 *DOING BUSINESS IN JAPAN* pt. 14, § 10.09[5][c], at 10-53 (Z. Kitagawa ed. 1989) ("Since these [MINSOHO art. 312] provisions are so vaguely formulated, there have been many court cases concerning them.')

20. While patients may request the discovery of their own records, discovery of those records by other parties has been refused when the records were made for the benefit of the patients and not the

In addition, Japanese CCP article 313 requires that requests for production be made by a motion that identifies the document, summarizes its contents, identifies the holder of the document, specifies the fact to be proved, and sets forth one of the three CCP article 312 categories listed above as to the legal basis for the production of the document.²¹ The requirement that a party to Japanese litigation identify specific documents, therefore, means that that party may not make a blanket request for the production of an entire category of relevant documents in the possession of any opposing party, as is permitted under U.S. law.²²

D. SUMMARY OF DISCOVERY LAW IN THE UNITED STATES AND JAPAN

To the extent that a Japanese litigant has enough evidence after the pretrial investigation to successfully prosecute the case, such a case can be filed. However, more often than not, a party will have incomplete information, and the remaining documents and witnesses will be in the possession of the opposing party.²³ In such a case, the Japanese litigant lacks the powerful U.S. discovery devices, such as interrogatories, requests for admissions, depositions, and requests for production of documents. Japanese depositions are only available for the limited purpose of preserving testimony, and Japanese requests for production of documents are infrequently permitted.

II. Contingent Attorneys' Fees

Contingent fee agreements, where an attorney agrees that the litigating fee will be drawn from a portion of the recovery in the event of a successful prosecution or defense of an action, are generally recognized as valid in the United States.²⁴

other parties. *See, e.g.*, Shizuoka Prefecture v. Yamazaki, 908 Hanrei-Jiho [HANJI] 52 (Tokyo High Court, July 31, 1978) (the family of a patient murdered in the hospital by another patient could not obtain the murderer's medical records); Tomiko Ooka v. Tanabe Pharmaceuticals, 904 HANJI 73 (Kobe Dist. Ct., Dec. 27, 1977), *rev'd*, 364 Hanrei Times 17 (Osaka High Court, May 17, 1978) (a drug company product-liability defendant could not obtain the plaintiff's medical records).

21. MINSOHO art. 313 provides: "A motion requesting that the court order the production of a document shall clearly indicate the following: (1) Name of the document; (2) Summary of its contents; (3) The holder of the document; (4) The fact to be proved; (5) The legal basis for production of the document."

22. Under U.S. law, a rule 34 request for production of documents "shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity." FED. R. CIV. P. 34(b). "[T]he standard of reasonable particularity . . . varies with the circumstances of a case." R. HAYDOCK & D. HERR, DISCOVERY PRACTICE § 5.8, at 329 (1982). *Compare* M. RAEDER, FEDERAL PRETRIAL PRACTICE § 25.4, at 525 (1987) (requests for production must be broad enough to include unknown documents) *with* H. REISS, PERSONAL INJURY AND PRODUCT LIABILITY LITIGATION 86 (1987) (one cannot simply request all relevant documents).

23. *See* Note, *supra* note 4, and accompanying text.

24. A "contingent fee contract" has been defined as "one that provides that a fee is to be paid to the attorney for his services only in case he wins, that is, a fee which is made to depend upon the success or failure to enforce a supposed right, and which fee is generally paid out of the recovery for

The Anglo-American common law originally considered the taking by an attorney, as compensation, of a share of the proceeds of litigation to be the crime of champerty.²⁵ However, contingent fee agreements have been accepted in the United States as a means by which less wealthy litigants can afford to seek legal redress, and such fees are frequently used in personal injury cases.²⁶

Japan does not prohibit contingent fee agreements. Nevertheless, contingent fee agreements in Japan are rarely used in the same ways as they are used in the United States. Most Japanese litigation cases are handled for a flat fee based on the amount alleged in the complaint (the retainer), with that retainer being paid to the attorney at the beginning of the litigation. Such retainer may also include a separate agreement that the litigant will pay a success fee to the attorney, based on the amount of any award collected, if the litigation ends satisfactorily.²⁷ The Japan Federation of Bar Associations provides the following retainer and success fee schedules for litigation cases:²⁸

<i>The amount in controversy/ or the amount of award</i>	<i>Retainer Fee</i>	<i>Success Fee</i>
up to 500,000 yen	15%	15%
500,000 yen up to 1 million yen	12%	12%
over 1 million yen up to 3 million yen	10%	10%
over 3 million yen up to 5 million yen	8%	8%
over 5 million yen up to 10 million yen	7%	7%
over 10 million yen up to 50 million yen	5%	5%
over 50 million yen up to 100 million yen	4%	4%
over 100 million yen up to 1 billion yen	3%	3%
over 1 billion yen	2%	2%

the client." *Pocius v. Halvorsen*, 30 Ill. 2d 73, 78, 195 N.E.2d 137, 139 (1963), *as modified* (1964). The rule in the United States today is that "[i]n the absence of a prohibitory statute, a contingent fee agreement . . . is generally recognized as valid." 14 AM. JUR. 2D *Champerty & Maintenance* § 4, at 844-45 (1964).

25. I S. SPEISER, ATTORNEYS' FEES § 2.1, at 82 (1973) ("At common law any bargain by an attorney to take as his compensation a share of the proceeds of the litigation was considered champertous, and therefore illegal.").

26. BLACK'S LAW DICTIONARY 553 (5th ed. 1979) (contingent fees are "[f]requently used in personal injury actions").

27. Under the regulations of the Japan Federation of Bar Associations, "[t]he initial retainer fee shall be payable when a case or legal matter . . . is accepted by an attorney, the success fee upon the accomplishment of his assignment, . . . or, in the absence of such provisions, at the time agreed upon with the client." JAPAN FEDERATION OF BAR ASSOCIATIONS, REGULATIONS CONCERNING THE STANDARDS FOR ATTORNEY'S FEES, ETC. art. 2, at 2 (Federation Rule 20, March 8, 1975) (amended May 26, 1984).

28. *Id.* art. 18, at 14-16. In addition, "the initial retainer fee and success fee . . . may be respectively increased or decreased to the extent of 30% depending on the contents of the case." *Id.* art. 18, at 16.

The preceding fee schedule is not compulsory and is only a guideline for fee arrangements, which are negotiated and agreed to between the attorney and a litigant in each case.²⁹

The best way to illustrate the negative effect the initial retainer fee schedule has on the incidence of Japanese litigation is by an example. If a party wants to file a complaint for personal injuries in the amount of one billion yen (about \$7,700,000 at 130 yen to the U.S. dollar), the litigant will have to advance an initial retainer fee of 30,000,000 yen (about \$231,000). Therefore, the payment of attorneys' fees at the commencement of litigation may persuade less wealthy plaintiffs in Japan not to file suit.³⁰ In addition, Japanese retainer fees provide an incentive not to overstate damage claims, and any resulting decrease in recoveries correspondingly decreases the incentive to litigate.

III. Jury Trials

In the United States the right to jury trial in civil cases, subject to certain exceptions, is preserved by the seventh amendment to the United States Constitution.³¹ Japan has no similar constitutional, or even statutory guarantee of a civil jury trial right.³²

United States' juries award considerably higher damages than would similarly situated U.S. judges. One study of U.S. jury verdicts found a relationship be-

29. See JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 27. The Japan Federation of Bar Associations' fee schedule is used most often for domestic litigation cases. In many cases, however, litigation involving Japanese international lawyers (*Shogai Bengoshi*) will be handled on an hourly fee basis.

30. See generally Markesinis, *supra* note 3, at 253 (the low cost of litigation is an "important contributory factor" in the larger number of German cases than English cases that are litigated to a conclusion).

31. U.S. CONST. amend. VII. "The scope of the right preserved is . . . governed by a historical test, which requires jury trial only of issues that, viewed in context, would have been tried by a jury [at the time the seventh amendment was adopted] in 1791." *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 424 (5th Cir. 1982); see also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1978) (since 1791, directed verdicts, retrials limited to the question of damages, and summary judgments all "have been found not to be inconsistent with the Seventh Amendment").

32. SUPREME COURT OF JAPAN, *supra* note 2, at 11 ("[t]here is no trial by jury in the civil procedure of" Japan). "A comparative evaluation of the Japanese system is rendered difficult because the jury is not used in Japan; manifestly no body of law has developed to govern formal instructions of law and arguments that may properly be submitted to lay jurors." George, *The "Right of Silence" in Japanese Law*, in *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67*, at 265 (D. Henderson ed. 1968); see also G. KOSHI, *THE JAPANESE LEGAL ADVISOR* 187 (1970) ("there is no jury system in Japan").

tween the size of the original jury award and the size of its eventual reduction by such methods as post-verdict settlement, appeal, and remittitur. "[A] \$1 million award would, on average, be reduced by 21 percent, while a \$10 million award would, on average, be reduced 57 percent."³³ Thus, the higher damage awards by U.S. juries give plaintiffs an additional monetary incentive to litigate their disputes by jury trial.

The right to jury trial has not always been alien to Japan. In 1923 the Japanese Jury Act (*Baishin Ho*) was promulgated for selected serious criminal cases, and that Act took effect on October 1, 1928.³⁴ The use of juries in Japan was considerably different from the use of juries in the United States. A Japanese jury was only permitted to provide answers to specific questions that were submitted to it by the trial judge. The trial judge had the discretion to reject the jury's answers and could impanel a new jury for a retrial on the same issues.³⁵ However, the operation of the Japanese jury system was suspended by law on April 1, 1943, and has not been used since that time.³⁶

33. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 JUST. SYS. J. 349, 359 n.14 (1986) (citation omitted). The sample of the Broder study consisted of reported verdicts of one million dollars or more returned in 1984 and 1985 with follow-up surveys of the lawyers associated with each case. "Reliable and/or usable information on case status was obtained in 362 cases, of which 198 were closed and 164 were still on appeal." *Id.* at 350 (footnotes omitted).

34. A. OPPLER, *LEGAL REFORM IN OCCUPIED JAPAN* 146 (1976) ("A petty jury system, patterned . . . on the German model, existed in Japan from 1923 to 1943, but never enjoyed much popularity during its short lifetime."); Urabe, *Wagakuni ni Okeru Baishin Saiban no Kenkyu (A Study on Trial by Jury in Japan)*, Shiho Kenshusho Chosa Soshu, No. 9, at 1 (1968), reprinted in H. TANAKA, *THE JAPANESE LEGAL SYSTEM* 483 (1976) (The Japanese "Jury Act was promulgated in 1923, and put into effect on October 1, 1928.').

35. Urabe, *supra* note 34, at 484. The major points of difference between common law and Japanese juries were as follows:

(i) Under [the] Jury Act, which adopted only the petty jury system, the jury of twelve was not to give a verdict of "guilty" or "not guilty." . . . It was to give "answers" (*toshin*) to questions submitted to it by the judge relating to the existence or non-existence of facts, the proof of which would constitute a crime. These answers were based on the views of the majority of jurors (Jury Act, Articles 29, 77, 88 & 91).

(ii) The answer given by the jury was not binding. The court, upon finding the jury's answer unwarranted, could [disregard it and] call another jury and submit the case anew (Article 95).

(iii) Cases which would be tried by a jury were limited to those of a serious nature. There were two categories of such cases. [One was for cases where the maximum penalty was death or imprisonment for life, for which the law provided trial by jury unless waived by the accused (Articles 2 & 6). The other was for cases where the maximum penalty was imprisonment for more than three years and the minimum penalty was imprisonment for not less than one year, for which the law provided trial by jury only if a specific request was made by the accused (Article 3).]

Id.

36. An Act to Suspend the Jury Act (*Baishin Ho no Teishin ni Kansuru Horitsu*) ch. 88 (1943). "The operation of the Jury Act was suspended in 1943, in order to save time, money and material resources in view of the wartime conditions." Urabe, *supra* note 34, at 485. After the World War II, the American occupation in Japan "did not impose a jury system." A. OPPLER, *supra* note 34, at 146.

IV. Punitive Damage Awards

The United States' use of civil punitive damage awards to punish intentional, outrageous, and in some cases reckless conduct³⁷ does not exist in Japan. Tort plaintiffs in Japan leave any punishment of defendants to the criminal law, while the civil law functions to make the plaintiff whole again through compensatory damages.³⁸

Article 709 of the Japanese Civil Code (*Minpo*) (JCC) provides that "[a] person who violates intentionally or negligently the right of another shall make compensation for the damage arising therefrom."³⁹ JCC article 722 describes such compensation by reference to JCC article 417, which states that the "amount of compensation for damages shall be assessed in money."⁴⁰ The formula for calculating the amount of damages has been provided by analogy to the contracts damage provision of JCC article 416, which compares the post-accident plaintiff with the status quo ante.⁴¹

Compensation for damages in Japan is available not only for damages inflicted on property or to a person's body, but also for mental damages.⁴² JCC article 710 provides that a person liable for a tort is responsible for paying mental damages, which are called *Isha-Ryo* (consolation money).⁴³ The amount of *Isha-Ryo* awarded by courts in the past has been usually in the range of 500,000 yen to two million yen (about \$4,000–\$15,400) and has rarely exceeded twenty million yen (about \$154,000).⁴⁴ In several industrial pollution cases courts have rejected

37. See 4 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 25.5A, at 527–28 (2d ed. 1986) (justifications given for punitive damages are "[p]unishment and deterrence"); W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (punitive damages for a defendant's intentional, deliberate, and outrageous conduct are a criminal law concept that has "invaded the field of torts").

38. 7 *DOING BUSINESS IN JAPAN*, *supra* note 19, pt. 13, § 4.05[7][a], at 4–22 ("Damage [in Japan] must be actual. Therefore, no punitive damages are permitted. This is partly due to the clear-cut distinction between criminal sanctions and civil remedies."). However, recent products liability legislation proposed by the Japan Federation of Bar Associations has included provisions for the introduction of punitive damages. *Japan Times*, Oct. 19, 1990, at 3, col. 4.

39. MINPO (Civil Code) [MINPO], Law No. 89 of 1896 (amended) art. 709.

40. MINPO art. 722 ("The provisions of Article 417 shall apply mutatis mutandis to the compensation to be made for the damage which has arisen from an unlawful act."); *id.* art. 417.

41. MINPO art. 416(1) ("A demand for compensation for damages shall be for such damages as would ordinarily arise from the non-performance of a legal obligation.").

42. 7 *DOING BUSINESS IN JAPAN*, *supra* note 19, pt. 13, § 1.06, at 1–25: "Under the Civil Code, as the law now operates, compensation is usually in monetary form. This method of compensation is appropriate for damages of a monetary nature, but it is also employed where damage is more psychological than monetary."

43. MINPO art. 710 provides: "A person who is liable to make compensation for damages in accordance with the provisions of the preceding Article shall make compensation therefor even in respect of non-pecuniary damage, irrespective of whether such injury was to the body, liberty or reputation of another person or to his property rights."

44. One example of an award of consolation money for pain and suffering occurred in the Yokkaichi asthma case. The case was a tort action brought by sulphur dioxide air pollution victims

plaintiffs' motions that the court should use awards of mental damages as substitutes for punitive damages and thus should award much higher damages to the plaintiffs.⁴⁵

One remedy that is available in addition to compensatory and mental damages in Japan, but not in the United States, is the JCC article 723 provision, which orders the taking of suitable measures to restore the aggrieved party's reputation.⁴⁶ Actions to restore another's reputation can include: 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 the newspaper; and the right to refute.⁴⁷

The absence of punitive damages in Japan discourages litigation in two ways. First, punitive damages provide a direct monetary incentive for plaintiffs to file a lawsuit. Second, punitive damages, when combined with contingent attorneys'

from the Isozu District and several family members of the deceased against six petrochemical and power companies. J. GRESSER, K. FUJIKURA & A. MORISHIMA, ENVIRONMENTAL LAW IN JAPAN § 3.1, at 105 (1981). On July 24, 1973, the Yokkaichi District Court delivered its decision holding the defendants jointly and severally liable and awarding plaintiffs damages of 88 million yen. *Id.* The decision of the court included the following damage provisions for pain and suffering:

(C) Pain and Suffering. . .

[1](b) Physical pain. The plaintiffs became ill between 1961 and 1965 and have been suffering [extremely painful asthma attacks] from six to as long as ten years [with no prospect of recovery].

[1](c) Mental suffering. Mental anguish result[ed] from . . . long hospitalization and accompanying anxiety. . . . [and the plaintiffs' fear] of their own sudden and unexpected deaths.

[1](d) The Breakdown of family life. Long hospitalizations not only deprived plaintiffs of the pleasure of family life, it also caused financial difficulties in cases where a victim was the bread winner of the family. . . . [The court examines the circumstance of each plaintiff and awards between 2 million yen and 5 million yen in damages for pain and suffering.]

Id. § 3.2, at 124 (quoting *Shiono v. Showa Yokkaichi Sekiyu*, 672 HANJI 30; 280 Hanrei Taimuzu [HANTA] 100; Hanrei Kogaiho 491 (Tsu Dist. Ct., Yokkaichi Branch, July 24, 1972)) (italics omitted). Compare *Japan v. Udagawa*, 15 Minshu 244 (Supreme Court, Feb. 16, 1961), reprinted in H. TANAKA, *supra* note 34, at 72 n.h (awarding 200,000 yen in consolation money for the negligent transmission of syphilis by a blood transfusion).

45. See *Diary of a Plaintiff's Attorneys' Team in the Thalidomide Litigation*, 8 LAW IN JAPAN 136 (1975), reprinted in D. HENDERSON & J. HALEY, LAW AND THE LEGAL PROCESS IN JAPAN 609 (rev. ed. 1979):

[Because pollution related injury case damages in Japan do not necessarily include punitive damages, the Thalidomide plaintiffs] insisted that computation of damages should not be by "comprehensive demand," but rather by adding up consolation money and benefits that would otherwise have accrued to the injured child and direct damages, such as expenses for medical treatment and nursing care, as well as consolation money and direct damages for his or her parents.

46. MINPO art. 723 provides:

If a person has injured the reputation of another, the Court may, when alleged by the person whose reputation was injured, make an order requiring the injuring person to take suitable measures for the restoration of the injured person's reputation either in lieu of or together with compensation for damages.

47. 7 DOING BUSINESS IN JAPAN, *supra* note 19, pt. 13, § 1.07[2][b], at 1-27.

fees, provide attorneys with an incentive to prosecute marginal or difficult cases. In contrast, plaintiffs in Japan will only recover their actual damages, and their attorneys will only be compensated by a combination of an initial retainer fee and success fee.

V. Court Costs to File a Lawsuit

Pursuant to 28 U.S.C. section 1914, the filing fees required by federal district courts to institute any civil action are \$120.⁴⁸ Japanese filing fees, on the other hand, progressively increase with the amount of damages alleged in the complaint. The Law Concerning Civil Litigation Costs, Etc. (*Minji Soshō Hiyo to ni Kansuru Horitsu*) provides the following schedule of filing fees:⁴⁹

<i>The amount of claim</i>	<i>Court fee</i>
up to 300,000 yen	500 yen for each 50,000 yen claimed
over 300,000 yen and up to 1 million yen	400 yen for each 50,000 yen claimed
over 1 million yen and up to 3 million yen	700 yen for each 100,000 yen claimed
more than 3 million yen	1000 yen for each 200,000 yen claimed

The same personal injury complaint analyzed above for attorneys' fees also illustrates the deterrent effect on litigation of the progressive filing fees in Japan. To file a complaint in the amount of one billion yen (about \$7,700,000), the filing fee in Japan would be 5,007,600 yen (about \$38,520). As with the case of retainers for attorneys' fees, filing fees that progressively increase as the amounts alleged in the complaint increase discourage large damage claims and litigation in general in Japan.⁵⁰

VI. Conclusion

Attorneys advising clients about the possibilities of litigating in Japan should realize that many of the procedural devices and economic incentives that favor litigation in the United States are not available under the structure for civil

48. 28 U.S.C. § 1914(a) (1988).

49. Law No. 40 of 1971, art. 3 and annexed list No. 1.

50. See generally Howard, *Our Litigious Society*, 38 S.C.L. REV. 365, 374 (1987) ("Who finally pays for [litigation] fees and costs obviously will affect very much what kind of cases are brought and how often.").

litigation in Japan. Japanese litigants must often begin blindly because of their opponents' abilities to obstruct their pretrial investigations. Should the decision to litigate still be made, plaintiffs in Japan must pay large retainers for attorneys' fees and filing fees at the beginning of the case. In addition, Japan offers no monetary incentives to compensate plaintiffs for the burden of litigation, such as are provided by U.S. jury awards and punitive damages. In fact, even if the "more cooperative, nonlitigious" nature of the Japanese people changed tomorrow, substantial structural impediments would still hinder any dramatic increases in Japanese litigation.