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# The Present and Future of Product Liability Dispute Resolution in Japan

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## THE PRESENT AND FUTURE OF PRODUCT LIABILITY DISPUTE RESOLUTION IN JAPAN

Luke Nottage<sup>†</sup>

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### I. THE RENAISSANCE OF PRODUCT LIABILITY IN THE 1990'S

#### A. *Litigation Under New And Old Legislation*

By the end of 1999, at least twenty suits were known to have been brought under Japan's strict-liability Product Liability Law of 1994 ("PL Law;" see Appendix A).<sup>1</sup> Particularly noteworthy, for many readers of this journal is a claim for 15,330,000 Yen (around US \$150,000) filed in the Tokyo District Court against a glass plate manufacturer in the United States (Case No. 18). In addition, at least five judgments had been rendered. One case which attracted

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1. *Seizobutsu Sekinin Ho*, Law No. 85, 1994 (referred to below as the "PL Law"; translated by the present author at <<http://www.law.kyushu-u.ac.jp/~luke/pllaw.html>>). For a recent discussion of several of the cases listed in Appendix A, see Yasushi Shimano, *PLho ni yoru Sosho Jirei III [PL Law Litigation Cases, Part III]*, KOKUMIN SEIKATSU KENKYU 37 (1999).

considerable media coverage in Japan found its way quickly into the law reports, namely the Nagoya District Court's judgment of June 30, 1995 (Case No. 10). The Court held the Japanese subsidiary of the United States conglomerate, McDonald's Japan Co., liable for Yen 100,000 in compensation for lawyers' fees and mental trauma resulting to a person who drank defective orange juice supplied by one of its outlets.<sup>2</sup> The claim itself was for only for 400,000 Yen, and many of the claims filed under the PL Law have been for small amounts (e.g., Nos. 1, 3, 6, and 17). So much, it seems, for the "reluctant litigant" in Japan.<sup>3</sup>

Further, Article 6 of the PL Law expressly preserves causes of action under the venerable Civil Code, the most popular being negligence-based tort liability under Article 709.<sup>4</sup> These causes of action can be brought in addition to or instead of claims under the PL Law, and this occurs in many cases. Sometimes, plaintiffs are unsure whether the sometimes novel concepts in the PL Law will apply, so they claim under the Civil Code in the alternative. If a Court finds liability under the Civil Code, moreover, it need not decide the issue of PL Law liability. This happened in Osaka District Court's judgment in the Sakai City school lunch poisoning case (No. 4), where it was not clear whether the municipality would constitute a "manufacturer" under Article 2(3) of the PL Law. Other plaintiffs can more readily find a manufacturer (or importer) liable under the PL Law, but sue under the Civil Code retailers or intermediaries who normally are not (e.g., Nos. 5, 7). Finally, in some cases it is clear that the PL Law does not apply, leaving Civil Code or other legislation as the only possible cause of action. The most important example of this is in relation to goods delivered before the Law came into effect on July 1, 1995. From 1995, at least four to five claims have been *filed* annually under the Civil Code.<sup>5</sup> Although not directly comparable, of course, on aver-

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2. 1682 Hanji 106. See the annotated translation by the present author in Toshimitsu Kitagawa & Luke Nottage "Japan's First Judgment Under Its PL Law of 1994: Echoes of *Donoghue v. Stevenson*" 10/10 Australian PL Reporter 121 (1999), at 126-130; translation only also at <<http://www.law.kyushu-u.ac.jp/~luke/mcdplcase.html>>.

3. See generally John Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPAN. STUD. 359 (1978).

4. *Minpo*, Law No. 89, 1896. For a breakdown of causes of action in cases involving product liability, broadly defined, see 85-940 in Luke Nottage & Masanobu Kato, *Product Liability*, in CCH JAPAN BUSINESS LAW GUIDE (Veronica Taylor gen. ed., looseleaf: December 1999/June, 2000).

5. *Id.* at 85-360.

age there were only 2.2 judgments reported each year over 1990-1994, involving product liability.<sup>6</sup>

Although litigation seems to have increased in the latter half of the 1990's in Japan, this is certainly no litigation explosion, in comparison with the United States. However, it is wrong to conclude that the PL Law is unimportant.<sup>7</sup> Favorable settlements are evident, especially since the mid-1990's, in claims involving Civil Code as well as PL Law liability.<sup>8</sup> Further, Japan has been comparatively quick off the mark in producing five judgments within five years of the PL Law coming into force. In Australia, for instance, similar legislation enacted in 1992 resulted in one reported judgment in seven years.<sup>9</sup> There has also been very little reported case law in European Union member states following incorporation of the 1985 EC Directive,<sup>10</sup> which inspired both regimes. The first and only reported case in England, for instance, came some six years after enactment of Part 1 of the Consumer Protection Act of 1987.<sup>11</sup>

6. *Id.* at 85-150:

Period	1950-59	1960-64	1965-69	1970-74	1975-79	1980-84	1985-89	1990-94
Automobiles			1	9	13	3	2	
Machinery				6	7	9	6	
Medicine	1		1		10	7	5	1
Food	1			2	6	7	7	1
Household goods			1		3	4	1	2
Gas Appliance etc.			4	7	5	7		
Real property		1	1	5	5	11	11	3
Agricultural goods				3	1			2
Other				2	1	2	5	1
Trans-border				2	2	2	2	1
Total	2	1	8	34	53	52	39	11
Average	0.2	0.2	1.6	6.8	10.6	10.4	7.8	2.2

7. *E.g.*, Andrew Marcuse, *Why Japan's New Product Liability Isn't*, 5 PAC. RIM L. & POL'Y J. 365 (1996).

8. Nottage & Kato, *supra* note 4, at § 85-250.

9. *ACCC v. Glendale Chemical Products Pty Ltd.* A.T.P.R. 41-672 (1999).

10. Council Directive 85/375, 1985 O.J. (L 210) 29. *See generally* Martin Vranken, *The First Decennium of the European Product Liability Directive: A Cause for Celebration?*, 4 TORT L.J. 225 (1996).

11. *AB v. South West Water Services Ltd.* Q.B. 507 (1993). There is only one

Indeed, the Nagoya District Court's judgment in the *McDonald's* case was rendered in only one year. This demonstrates that civil proceedings in Japan are not necessarily significantly slower than in other jurisdictions, as has been asserted by commentators particularly from the U.S., especially in relation to product liability dispute resolution.<sup>12</sup>

The judgment also demonstrates significant judicial activism. Perhaps this was an aberration resulting from the Presiding Judge being one of the very few judges selected from the ranks of practicing attorneys (*bengoshi*), rather than a career judge.<sup>13</sup> Yet there have been many other examples of this attitude in product liability litigation in Japan over the years.<sup>14</sup> The fact remains that the Nagoya District Court found liability despite the fact that the plaintiff never established the precise nature of the extraneous matter contained in the juice, which was later inadvertently disposed of by the Plaintiff. (By contrast, the United States District Court for the District of Columbia rendered a judgment almost contemporaneously *in favor* of a McDonald's outlet, allowing its motion for summary judgment, in a claim involving remarkably similar facts.)<sup>15</sup> The Na-

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unreported judgment, ironically involving a Japanese manufacturer of an all-terrain vehicle: *Relph v. Yamaha Motor Co. Ltd.*, 1991 R. No. 7003, July 5 and 24, 1996. See Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 *Tex. Int'l L. J.* 45, 64 (1999).

12. 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 L.* 669 (1995). For a more general criticism of over-generalizations about the comparative speediness of civil litigation in Japan, see J. Mark Ramseyer & Minoru Nakazoto, *Japanese Law: An Economic Approach* 139-141 (1998).

13. Kitagawa & Nottage, *supra* note 2, at 124.

14. The most well-known examples are in some of the earlier mass-injury cases. See Nottage & Kato, *supra* note 4, at 85-150. More recent examples are the reversal of the burden of proof of negligence in Civil Code liability, and willingness to find adequate causation, for instance in the television cases (*infra* note 18). The former were clearly very politically charged, and the latter involved upholding claims against large manufacturers which have been the pillar of the post-War "establishment" in Japan. This therefore appears to be one significant area in which Japanese judges do *not* implicitly follow the policy preferences of the conservative Liberal Democratic Party, which Professor Mark Ramseyer claims characterizes a number of discrete areas of Japanese law. See *supra* note 12, at 17-20; see also Daniel Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of - Stability?*, 43 *UCLA L. REV.* 635 (1996) (stressing judicial activism in preventing employers terminating contracts with employees, surely another "politically charged" area of law); John O. Haley, *The Spirit of Japanese Law* 109-114, 118-122 (1998) (examining backgrounds of Supreme Court justices).

15. *Odom v. Jebroa Enterprises* 47 F. Supp.2d. 42, 43 (D. D.C. 1999). To be

goya District Court held that extraneous matter from the juice must have punctured her throat as she drank it. It was enough that she and other witnesses were able to show that:<sup>16</sup>

(1) the Plaintiff suffered the injury to her throat immediately after drinking the orange juice; (2) there was no opportunity for any extraneous matter, able to cause this injury to her throat, to get into the orange juice from the time of its sale until she drank it; and (3) the Plaintiff was not undergoing any dental treatment at the time, and (4) she drank the juice after finishing eating up the double cheese burger and fried potatoes, so it is inconceivable that she could already have had extraneous matter in her mouth.

Again contrary to older commentary or more recent derivative writing,<sup>17</sup> this shows that Japanese courts do not always impose a burden of proof in civil proceedings which is significantly higher than the "balance of probabilities" standard in common law jurisdictions. The holding of the Nagoya District Court also is consistent with earlier judgments finding manufacturers liable under the Civil Code, especially in cases in which the allegedly defective product was destroyed. Examples include cases involving television sets catching fire, which were decided or settled around the time the PL Law was enacted.<sup>18</sup> A more recent case, in 1999, similarly

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sure, several facts are arguably materially different. In the case before the Nagoya District Court, for instance, a straw was not inserted into the lid on the cup of juice, which might have allowed extraneous matter from other sources to get into the cup. Another possibly related fact was that the cup and separate straw were put into a paper bag with its ends folded down, and this was then put into another plastic bag to be carried away (paragraph 3.1.1.2 of the judgment, *supra* note 2). In *Odum*, a cup of pink lemonade carried back to his workplace with only the lid on "and a straw was inside" (meaning, presumably, inserted through the lid). *Id.* In addition, District Judge James Robertson stressed that this cup of juice was then left some distance from where the plaintiff resumed working, with his foreman also working in the vicinity, so that it was not within his exclusive control for almost two hours. *See id.* It also can be noted that the plaintiff resumed installing insulation on a roof over that period, presumably involving more risk of falling debris than walking down a street straight back to the office cafeteria, as in the case before the Nagoya District Court. For further detailed analysis of the case, see Kitagawa & Nottage, *supra* note 2, at 122-125.

16. Kitagawa & Nottage, *supra* note 2, at 129.

17. *E.g.*, James Cohen, *Note: The Japanese Product Liability Law: Sending a Pro-Consumer Tsunami Through Japan's Corporate and Judicial World*, 21 *FORDHAM INT'L L.J.* 108, 136 (1997).

18. *E.g.*, the Judgment of the Osaka District Court, March 29, 1994, 842 (Hanta 69, translated at <<http://www.law.kyushu-u.ac.jp/~luke/tvcase.html>>). Other cases involving television sets around this time are listed in Table 3, Nottage

concluded that a Sanyo refrigerator was the cause of a fire.<sup>19</sup>

However, other cases decided in the late 1990's under the Civil Code have tended to go against plaintiffs.<sup>20</sup> This heightened uncertainty helps explain why many product liability cases, even those under the PL Law such as the *McDonald's* case, have been appealed. That decision seems a particularly robust one, and may be overturned by the High Court at second instance, which also can review factual issues.<sup>21</sup> Ironically, this overall situation may fuel more litigation, as parties and their legal advisors for out of court settlement negotiations diverge in their assessment of the likely outcome of pursuing claims through the courts,<sup>22</sup> under the PL Law and/or the Civil Code.

Finally, many cases especially under the PL Law, like the *McDonald's* case, involve small amounts.<sup>23</sup> One reason is that good social security still exists in Japan. The plaintiff's medical expenses in the Nagoya case, for instance, were probably covered by national health insurance, or possibly worker compensation insurance.<sup>24</sup> Hence her claim was only for non-pecuniary damages for mental distress (*issharyo*) and lawyers' fees. By contrast, Stella Liebeck's

& Kato, *supra* note 4, at 85-300 (kept updated at <<http://www.law.kyushu-u.ac.jp/~luke/plclaims.html>>).

19. See Judgment of the Tokyo District Court, August 31, 1999 (1013 Hanta 81).

20. Masahisa Yamaguchi, *Seizobutsu Sekinin ga Towareru PL Soshō to Kōgo – McDonald Soshō Hanketsu o Chūshin ni* [*The Present and Future of PL Litigation Regarding Product Liability: Focusing on the McDonalds Litigation Judgment*], 52/11 HYOJUNKA TO HINSHITSU KANRI 64 (1999).

21. Kitagawa & Nottage, *supra* note 2, at 125.

22. The now classic exposition of this idea, as a key aspect explaining dispute resolution in Japan, came from J. Mark Ramseyer: *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, J. JAPAN. STUD. 111 (1988). Empirical support was found in patterns of out of court settlement in traffic accident disputes: Minoru Nakazoto & J. Mark Ramseyer, "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan", 18 J. LEG. STUD. 26 (1989). Intriguingly, a decade before these studies, Professor John Haley had noted on the one hand that Californians file twice as many automobile accidents suits as Japanese in Tokyo and Osaka; and, on the other, observed that perceived predictability of judicial dispute resolution will affect incentives to litigate. *Supra* note 3, at 362 and 379-80. However, he did not connect these two points. By contrast, the importance of predictability of outcome was developed quite extensively in contemporary literature in Japanese regarding tort liability generally, in YOSHIO HIRAI, *GENDAI FUHOKOI NO ICHITENBO* [A PERSPECTIVE ON CONTEMPORARY TORT THEORY] (1980).

23. *Supra* text at note 2. See generally Nottage & Kato, *supra* note 4, at § 85-330.

24. See generally Douglas J. Drennan, *Regulation and Response: Industrial Safety and Health Law in Japan*, 65/1 HOSEI KENKYU (Kyushu University Journal of Law and Politics) 216 (1998).

claim against McDonald's in the United States, which arose when Liebeck was scalded by spilled McDonald's coffee, resulted in an award of \$160,000 in compensatory damages in 1994.<sup>25</sup>

The broader lesson to draw, contrary to much received wisdom,<sup>26</sup> is that ordinary people in Japan today are *not* reluctant to pursue their claims even through the courts. The primary motivation may often be a quite emotional response to the accident, and the subsequent behavior of manufacturers or retailers. But in deciding whether to file and maintain suits, potential litigants can be encouraged by the following: (a) ability to claim also their legal fees if successful, in a personal injury action (moreover, a successful defendant normally *cannot* claim *its* legal fees); (b) lower minimum fees that *bengoshi* are required to charge, since October 1, 1995; and perhaps (c) the ability to claim, in addition to damages, pre-judgment interest at a fixed rate of five percent, compared to current market rates of close to zero in Japan.<sup>27</sup>

Of course, it is dangerous to generalize from individual cases. The (much bigger) *Sanyo* case,<sup>28</sup> for instance, took eight years to reach judgment. Nonetheless, a willingness to pursue claims no doubt is underpinned by more concern and debate about product liability, and product safety more generally, dating back to the end

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25. Readers of this journal may remember that case (still unreported) from the extensive media coverage and outrage which ensued, particularly regarding the additional \$2,700,000 in punitive damages awarded by the jury. Far less coverage followed when the trial judge reduced the latter to \$640,000, and when the parties later settled out of court. This pattern of biased reporting appears to be typical of discussions about product liability in the 1990's in the United States. For an extensive development of this thesis, including further research into the *Liebeck* case, see Michael McCann, William Haltom & Judith Aks, *Media Framing of Product Liability Lawsuits and the Social Production of Legal Knowledge*, Paper presented at the Law & Society Association Annual Meeting, Aspen, Colorado, June 4-7, 1998 (on file with the author). This further illustrates the care required when making comparisons of Japan, especially with the United States.

26. A now classic statement came from YOSHIYUKI NODA, INTRODUCTION TO JAPANESE LAW 106 (A. Angelo, trans. 1976): "the Japanese do not like law." Despite subsequent objections from Haley, *supra* note 3, stressing instead institutional barriers to bringing suit and Ramseyer, *supra* note 22, stressing predictability of outcome as a reason for not taking cases to final court judgment, otherwise careful comparative lawyers persist in emphasizing "traditional distaste for written rules of law and litigation" in Japan: see KONRAD ZWEIGERT & HEIN KOETZ, INTRODUCTION TO COMPARATIVE LAW 66 (Tony Weir, trans. 3<sup>rd</sup> ed. 1996). For a trenchant critique of such "legal orientalism" see generally Veronica Taylor, *Beyond Legal Orientalism*, in ASIAN LAWS THROUGH AUSTRALIAN EYES 47 (V. Taylor, ed. 1997).

27. Nottage & Kato, *supra* note 4, § 85-330 and § 85-335.

28. *Supra*, note 19.



of the 1980's.<sup>29</sup> A major aspect is increased consumer voice in a deregulating environment.<sup>30</sup> This is something else which commentators, especially from the United States, appear to have underestimated.<sup>31</sup> Japan's recently enacted Consumer Contracts Law, controlling both the negotiations towards conclusion of the contract and (especially) unfair contract terms, provides further evidence of the momentum which has developed in consumer protection in Japan. It shows that enactment of the PL Law was not a fluke engendered by the conservative Liberal Democratic Party's temporary loss of power in 1993.<sup>32</sup>

### B. *Product Liability Beyond The Courtroom*

Another indication of heightened concern regarding product safety, is the operation of product-specific PL ADR Centers,<sup>33</sup> established by industry associations in the wake of PL Law enactment. Three features categorize their activities so far: (a) many inquiries from businesses; (b) very few involving cases involving accidents which might give rise to PL claims as such, namely for personal injury or consequential property damage; and (c) very little formal mediation proceedings.<sup>34</sup> Skeptics may argue that this demonstrates that Centers are of limited significance to consumers. Again, seemingly oblivious to similar schemes in other countries,<sup>35</sup> some

29. Nottage & Kato, *supra* note 4, at § 85-160 and § 85-170. For much more detail on the historical background to this phenomenon, see Luke Nottage, *The Still-Birth and Re-Birth of Product Liability in Japan*, in ADAPTATION OF LEGAL CULTURES (Johannes Feest & David Nelken, eds., forthcoming, 2001). Cf., e.g., Patricia MacLachlan, *Protecting Producers from Consumer Protection: The Politics of Product Liability Reform in Japan*, 2/2 SOCIAL SCI. JAPAN JNL. 249 (1999).

30. See generally Veronica Taylor, *Consumer Contract Governance in a Deregulating Japan*, 27 VICT. U. WELLINGTON L. REV. 99 (1997).

31. E.g., Anita Bernstein & John Fanning, 'Weighier Than A Mountain': Duty, Hierarchy, and the Consumer in Japan, 29 VAND. J. TRANS. L. 45 (1996); MacLachlan, *supra* note 29, at 253-4.

32. *Shohisha Keiyaku Ho*, Law No. 61, 2000. See Luke Nottage, *Comparing Japan's Consumer Contracts Act*, 43 ASIAWATCH (forthcoming, September 2000); and a more detailed summary of the new legislation at JPN ¶30-011 in his comprehensive update of the *Japan Tab* in CCH DOING BUSINESS IN ASIA (looseleaf, forthcoming in October, 2000). For detailed and incisive analyses of the political transformations in the 1990's, see POWER SHUFFLES AND POLICY PROCESSES: COALITION GOVERNMENT IN JAPAN IN THE 1990S (Hideo Otake ed., 2000).

33. Table 4 at § 85-400, Nottage & Kato, *supra* note 4 (kept updated at <<http://www.law.kyushu-u.ac.jp/~luke/pladrlist.html>>).

34. Nottage & Kato, *supra* note 4, at § 85-450 through § 85-470.

35. E.g., Bernstein & Fanning, *supra* note 31, at 70; Marcuse, *supra* note 7, at 367, 397. Good examples in other jurisdictions are the Banking Ombudsman

commentators argue that these are simply a means for the bureaucracy or more tenably manufacturers to prevent cases getting to court, and hence establishing the basis for credible claims in future cases. However, a closer analysis shows that at least some of the Centers do provide yet another ready source of information, especially about technical issues involved, for those wishing to find out and do something about problematic products. If they are not satisfied, they can turn for instance to local government supported Consumer Life Centers all around Japan, or the Japan Consumer Information Center (JCIC) which coordinates those Centers especially through its extensive PIONET database.<sup>36</sup> The industry association based PL ADR Centers also are encouraged to adhere to minimal standards by these and other government agencies, especially the Economic Planning Agency which has responsibility for consumer policy. Also significant is early and ongoing scrutiny from the media, *bengoshi* and others working for consumer interests.

Of course, the PL ADR Centers still reveal existing or potential problems, in transparency and accountability, particularly from the perspective of consumers.<sup>37</sup> One is whether material submitted to such Centers can be used in subsequent Court proceedings. In the first case filed under the PL Law (No. 1 in Appendix A), the plaintiff restaurant owner first complained to the "*Seikyo Inryo* (Carbonated Beverages) Center". Dissatisfied with the outcome, he brought suit in the Niigata District Court, only to find his written statements to the Center being used against him by the tea-pack manufacturer. Eventually, the Nagaoka Branch of the Niigata District Court rejected the plaintiff's claim. However, that Center was closed down in July, 1999. The main reason reported was that the one person running the Center, still working part-time for the industry associa-

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schemes operated in many Anglo-Commonwealth countries. There is even a similar scheme even in the United States, specifically for product defect issues, namely the Better Business Bureau's Autoline (to which the subsidiaries of Japanese automobile manufacturers belong: see <<http://www.bbb.org/complaints/BBBautoline.html>>). See Luke Nottage & Yoshitaka Wada, *Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?*, 6 ZEITSCHRIFT FUER JAPANISCHES RECHT 40, 69-70 (1998).

36. These Centers have reported rapid increases in consultations from around the time the PL Law was enacted. Nottage & Kato, *supra* note 4, at § 85-550. Their activities are overlooked by MacLachlan (*supra* note 29, at 260), who only discusses the still marginal role of local government committees (*kujo shori iinkai*).

37. *Id.* at 68-71.

tion concerned, had retired.<sup>38</sup> But its demise may also be due to adverse publicity resulting from this case. Tellingly, in a survey of 13 Centers released earlier in 1999 by consumer organizations and lawyers (also involved in monitoring Centers around the time of their establishment), this Center was the only one to be given the worst "score" across all six categories:<sup>39</sup>

CENTER	DIS-CLOSURE	EQUAL TREATMENT (Koheisei)	FAIRNESS (Koseisei)	PRO-CONSUMER	INDEPENDENCE	ACCESSIBILITY
Medicines	C	C	C	C	C	B
Chemicals	B	C	C	D	D	C
Gas/Petroleum Appliances	B	B	B	B	B	B
Home Electrical Appliances	C	B	B	C	C	C
Automobiles	B	B	C	C	C	B
Products for Consumer Living	B	A	C	B	A	C
Carbonated Beverages	D	D	D	D	D	D
Daily Necessities	C	B	B	B	A	C
Cosmetics	C	D	D	D	D	C
Toys	C	C	D	C	D	C
Pleasure Boats	C	C	C	C	C	C
Building Components	B	C	C	C	C	B
Disaster Prevention Appliances	A	C	B	C	C	B

More generally, these scores largely accord with the impressions gained by visits to most of the Centers by the present writer in late 1996, and some in 1999, along with analysis of reports and data issued by the Centers or other organizations.<sup>40</sup> Consumers and government agencies will draw on such assessments in deciding if and

38. *Seizobutsu Sekinin, Imada Kabe* [Barriers Still to Product Liability], ASAHI SHIMBUN, December 12, 1999, 11.

39. *Id.*

40. See generally Nottage & Wada, *supra* note 35, at 57-68. For a further comprehensive review of the PL ADR Centers, see research conducted by Shadan Hojin Nihon Risachi Sogo Kenkyujo for the Economic Planning Agency, published by the latter's Kokumin Seikatsu Seikatsu Kyoku, *SEIZOBUTSU SEKININ HO EIKYO CHOSA HOKOKUSHO (MINKAN PL. SENTA NI KANSURU CHOSA HEN)* [REPORT ON IMPACT STUDIES OF THE PL LAW: VOLUME FOR THE STUDY RELATING TO PRIVATE SECTOR PL CENTERS] (EPA ed., Tokyo, March, 1998).

how to deal with individual Centers. Consumers also may respond to the particular problem in the tea-pack case by being more careful in disclosing information to the Centers, especially those assessed as less favorable to them, for instance by conducting more oral inquiries and discussions.

On the other hand, Japanese manufacturers will continue to use these Centers to improve their product safety activities. All empirical studies clearly reveal the significant gains made especially around the mid-1990's. These include establishing new committees and guidelines on improving labeling and instructions, and product safety standards, often instituted by industry associations; more monitoring of accidents by associations and companies; improvements in company instruction manuals and education programs; new guidelines on recalls and customer "after care;" new or additional staff positions to deal with product liability issues and complaints; and large increases in product liability insurance cover.<sup>41</sup> Especially in some business sectors, some of these activities may remain considerably less developed compared to the United States, where a sophisticated literature aimed at both company managers and legal counsel has emerged over the last few decades.<sup>42</sup> The increasing number of Japanese companies operating in American markets are now using such literature and then ratcheting up their product safeties in other markets.<sup>43</sup> Generally, Japanese industry continues to take very seriously the renewed interest in product liability, safety, and consumer issues, which emerged in the 1990's.<sup>44</sup>

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41. Nottage & Kato, *supra* note 4, at § 85-550.

42. E.g., RANDALL L. GOODDEN, PREVENTING AND HANDLING PRODUCT LIABILITY (1997); and the Product Safety Management Guidelines written by a subcommittee of the Product Safety Standing Committee of the National Safety Council's Business and Industrial Division (2nd ed. 1997).

43. Indeed, sometimes they go too far. A legal advisor to Mazda's subsidiary in Germany, for instance, recently criticized that car manufacturer's manuals, aimed primarily at the United States market, "exclamation marks and danger signs are to be found on almost every page." See Thomas Geiger, *Bestsellers on Wheels: Car Manuals Leave You None the Wiser*, DEUTSCHE PRESS AGENTUR, September 1, 1999 (available in LEXIS). For a useful illustrated summary, see also Bernard Ross, *Product Liability Experiences of Japanese Manufacturers in the U.S.A.*, 20/2 INT. J. FATIGUE 107 (1998).

44. Indeed, the latest White Paper from Japan's Ministry of International Trade and Industry argues that the government should raise the number of *bengoshi* to improve the risk-management capabilities of Japanese companies in areas like product liability and environmental protection. See *MITI Calls for Free Trade With Regional Integration*, YOMIURI SHIMBUN, May 17, 2000, at 12; see also Toshimitsu Kitagawa & Luke Nottage, *Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects*, Paper presented at the confer-

This concern can only grow in the wake of several extensively publicized food poisoning incidents during the summer of 2000.<sup>45</sup>

## II. TOWARDS A NEW PARADIGM FOR PRODUCT LIABILITY AND SAFETY IN JAPAN

### A. *The Limits To Standardization*

What of the future, though, for Japan? One factor helping to explain post-War product liability litigation patterns in Japan, although difficult to isolate and determine quantitatively, does seem to be predictability of outcome. For instance, the drop off in cases pursued to final judgment in the 1980's may be related to more difficulty in succeeding in product liability claims after the era of the earlier mass injury cases.<sup>46</sup> Looking forward, quantum of damages for personal injury has become highly standardized, thanks largely to formulas applied in traffic accident cases, particularly for calculating lost income in a fatal accident.<sup>47</sup> Rules regarding property loss, and perhaps non-pecuniary loss, are relatively clear, too.<sup>48</sup> As in other countries, like England,<sup>49</sup> this encourages settlement out of

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ence on "The Emergence of an Indigenous Legal Profession in the Pacific Basin", Harvard Law School, December 11-14, 1998 (and forthcoming in a book edited by William Alford).

45. For many of the large food companies involved, lapses seem to have caused by cutting corners during the ongoing economic slowdown (e.g. replacing full-time with part-time staff, or forcing staff to work long shifts); and believing that product safety had been maximized simply by achieving HACCP ("Hazard Analysis Critical Control Point") accreditation, which involves developing and recording extensive safety procedures. Already, renewed concerns have prompted two or three times more inquiries or complaints to major Japanese manufacturers. *Kuzureta Manyaru Shinwa [The Collapse of Myths Involving Manuals]*, NIHON KEIZAI SHIMBUN, AUGUST 30, 2000, at 13. See generally Luke Nottage, *New Concerns and Challenges for Product Safety in Japan*, 11 AUSTRALIAN PRODUCT LIABILITY REPORTER (forthcoming, 2000).

46. Nottage, *supra* note 29; and the Table reproduced *supra* note 6.

47. Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, L. & SOC'Y REV. 651, 672, 690 (1990). A further consolidation is the agreement reached recently by District Court in Osaka, Nagoya, and Tokyo to unify their formulae for lost income calculations, adopting the Leibniz formula preferred by the Tokyo Court. Accordingly, amounts awarded in Osaka and Nagoya are expected to rise for those not yet employed who suffer a fatal accident; but generally to fall for those employed. See *Kotsu Jikoshi - Isshitsu Rieki no Kijun Toitsu e [Deaths in Traffic Accidents: Towards Unification of Standards Regarding Lost Income Awards]*, ASAHI SHIMBUN, November 16, 1999, at 3.

48. Nottage & Kato, *supra* note 4, at § 85-780.

49. PATRICK ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-

court, or even before. More generally, Japan has had a rapidly rising per capital civil litigation rate since the early 1970's, with much smaller increases in judges and resources for the courts.<sup>50</sup> This heightens pressures on judges to manage cases in an efficient manner.<sup>51</sup> Standardization provides real attractions for them.

However, the factual matrices and the legal concepts are much more complex in product liability cases, compared for instance to those arising in traffic accidents.<sup>52</sup> The picture is complicated by a recent tendency to succeed in claims under the PL Law, but not under the Civil Code.<sup>53</sup> In addition, the legislative history leading up to enactment of the PL Law is particularly convoluted, and thus cannot provide much guidance in interpreting key concepts.<sup>54</sup> The Law also differs subtly, and sometimes considerably, from the EC Directive.<sup>55</sup> This diminishes the de facto harmonization which results from the latter's influence on recent legislation around the world, including many jurisdictions in the Asia-Pacific region.<sup>56</sup> Still, the Directive provides a useful common core of ideas. Nevertheless, matters are now further complicated by a new contender as a "global standard", the *Restatement (Third) of Tort: Product Liability*, which involves a distinct set of concepts and underlying principles.<sup>57</sup> Further, this "Restatement" has been criticized as nothing of the sort; but rather an attempt to move United States law in a particular direction, mostly restricting liability.<sup>58</sup> Japanese judges and commentators are likely to draw increasingly on jurisprudence emerg-

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AMERICAN LAW 278 (1987). Standardization has been further developed recently by the House of Lords approving the use of actuarial evidence in *Wells v. Wells* 1 W.L.R. 319 (1998).

50. Nottage, *supra* note 32, at JPN ¶70-201.

51. See generally Masaaki Abe, *The Internal Control of a Bureaucratic Judiciary: The Case of Japan*, 23 INT'L J. SOCIO. L. 303 (1995).

52. Incidentally, similar problems surely will be encountered in relation to Article 9(1) of the new Consumer Contracts Law, which simply requires judges to limit agreed damages to the "average" amount in damages that the business would suffer from termination in "similar" consumer contracts. See Nottage, *supra* note 32.

53. *Supra*, text at notes 8, 13 and 20.

54. Nottage & Kato, *supra* note 4, at § 85-170 and § 85-180.

55. *Id.* at § 85-600 through § 85-720.

56. See generally David Harland, Conclusion, in *PRODUCT LIABILITY IN THE ASIA-PACIFIC* 361 (Jocelyn Kellam gen. ed., 2<sup>nd</sup> ed. 1999).

57. E.g., Geraint Howells & Mark Mildred, *Is European Product Liability More Protective Than the Restatement (Third) of Torts: Product Liability?*, 65 TENN. L. REV. 985 (1998).

58. E.g., Note, *Just What You'd Expect: Professor Henderson's Redesign of Products Liability*, 111 HARV. L. REV. 2366 (1998).

ing in relation to the EC Directive and offspring regimes. Yet the law in the United States has long been studied, and may continue to provide some insights as well. The latter's present complexity nonetheless compounds the challenges involved in attempting to standardize even key concepts in Japan.

In the early 1960's, a group of Japanese judges managed to develop uniform rules to help overcome a very large, but delimited social problem: the rapid rise in traffic accidents following the rapid expansion of automobile use and increase in economic activity.<sup>59</sup> However, that effort may prove to be an historical anomaly. The approach sits uneasily with the present era of greater transparency and accountability, epitomized by enactment in 1999 of nation-wide official information legislation;<sup>60</sup> and calls for widespread increases in the numbers of judges as well as lawyers,<sup>61</sup> allowing more scope for individualized justice. This also makes it more difficult to develop or expand alternative dispute resolution mechanisms, at least *instead* of court procedures. That was an important aspect of the system developed to deal with traffic accidents.<sup>62</sup> Another was compulsory insurance, provided by private companies but under the heavy hand of government authorities. Yet, the insurance market in Japan is now experiencing major changes, in the wake of "Big Bang" (or "Long Bang") deregulation of financial markets.<sup>63</sup> Growing penetration of product liability insurance, without more, will not encourage more standardization and hence predictability of outcome in product liability disputes for the foreseeable future.

### B. *Complexity, Konnyaku Jelly, And Product Safety*

More generally, the new complexity of the social, economic and legal order in Japan can be illustrated by product safety and liability issues which have emerged with *konnyaku* jelly snacks. This example also points towards an alternative paradigm which may emerge over the next few decades.

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59. Daniel Foote, *Resolution of Traffic Accident Disputes and Judicial Activism in Japan*, 25 L. IN JAPAN 19 (1995).

60. See generally Narufumi Kadomatsu, *The New Administrative Information Disclosure Law in Japan*, 8 ZEITSCHRIFT FUER JAPANISCHES RECHT 34 (1999).

61. Luke Nottage, *Reformist Conservatism and Failures of Imagination in Japanese Legal Education*, 9 ZEITSCHRIFT FUER JAPANISCHES RECHT 23 (2000).

62. Tanase, *supra* note 46, at 667-670.

63. Nottage, *supra* note 32, at 85-001.

*Konnyaku* is a viscous root vegetable, used in a range of traditional dishes and grown in Japan, but with some imports from other East Asian countries.<sup>64</sup> In 1995, powdered *konnyaku* started to be used as a binding agent for bite-sized flavored jelly snacks, harder and chewier than normal jellies. Subsequent developments can be divided into five phases.

(i) Initially, the snacks were a huge market success.<sup>65</sup> However, by October of 1995, several accidents involving infants and children choking had been reported through the PIONET database to the JCIC in Tokyo. It issued cautions to all regional Consumer Life Centers,<sup>66</sup> and the media promptly reported these concerns.<sup>67</sup> The JCIC then conducted its first product test, and urged product and warning improvements from manufacturers and various associations.<sup>68</sup> This resulted in the main *konnyaku* industry association recommending a strict warning to be added to existing and future products, and other associations informing their members about potential issues.<sup>69</sup> However, more accidents continued to be reported through the PIONET system.<sup>70</sup> These developments also were covered

64. Ministry of Agriculture and Fisheries (MAF), Agriculture and Horticulture Bureau ed., *KONNYAKU O MEGURU Jijo* [CIRCUMSTANCES REGARDING KONNYAKU] (unpublished report, January, 2000).

65. E.g., *Ajiagata Desato Ninki* [Asian-type Deserts Popular], SAGA SHIMBUN, June 22, 1995 (this article and others cited from this local newspaper are freely available in full text through its website at <<http://www.saga-s.co.jp/>>, for instance by searching under the term "konnyaku zjeri" in Japanese characters).

66. JCIC, *Shohisha Higai Sokuhō (Kigai Joho Shisutemu kara)* [Consumer Injury Newsflash (From the Danger Information System)] No. 3, October 16, 1995.

67. *Konnyaku Zeri de Shibo Rei* [Instances of Fatalities from Konnyaku Jelly], SAGA SHIMBUN, October 15, 1995.

68. *Konnyaku-iri Zeri ga Noda ni Tsukamari, Nyuyoji ni Shibo Jiko!* [Fatal Accidents with Infants: Konnyaku filled Jelly Gets Caught in Throats!], TASHIKA NA ME 48-9 (Feb. 1997).

69. The *Zenkoku Konnyaku Kyodo Kumiai Rengokai* (National Network of Konnyaku Cooperatives) notified its members to insert the following warning, preferably printed on the outside of the package (or if impossible, printed onto a label fixed onto the package or displayed inside it):

To the customer:

This product may lead to death if it gets caught in the throat. Do not eat it in one swallow. In particular, please instruct small children or the elderly to chew it well. If it does catch in the throat, hit the person on the back, or use fingers etc. to immediately make it come out again.

JCIC, *Shohisha Higai Keikoku Joho (Kigai Joho Shisutemu kara)* No. 5 [Consumer Injury Warning Information (From the Danger Information System) No. 5], June 21, 1996, Appendix Test Results, at 2.

70. KSC, *Shohisha Higai Keikoku Joho (Kigai Joho Shisutemu kara)* [Consumer In-



by the newspapers.<sup>71</sup>

(ii) This resulted in a second JCIC test. Reported in June, 1996, it urged further product and warning improvements.<sup>72</sup> The JCIC also released reports about three additional accidents.<sup>73</sup> Once again, the reports prompted media attention and included interviews with those involved in the accident.<sup>74</sup> In the end, Japan's Ministry of Agriculture and Fisheries (MAF) as well as industry associations agreed to have a sticker added which contained a warning in red, somewhat less strict but stressing that the products should not be given to small children due to the fact that the product was a choking hazard.<sup>75</sup> That was not enough for the JCIC. It reported some further accidents, this time affecting elderly people, and asked for products to be made softer as well.<sup>76</sup> One big manufacturer, Kanetsu Bussan, complied. However, another big manufacturer, Mannan Life (which also exports e.g. to the U.S.), instead concentrated on developing a new heart-shaped con-

*jury Newsflash (From the Danger Information System)*], November 1, 1996.

71. *Konnaku Zeri Nodo ni Tsumarase, Kodomo Futari Shibo, Kyunin Higai - Kōkumin Seikatsu Senta Chosa [Konnyaku Jelly Gets Stuck in Throat, Two Children Die and Nine Injured: Japan Consumer Information Center]*, MAINICHI SHIMBUN, November 2, 1996, at 22 (Osaka Morning Edition), 27 (Tokyo Morning Edition).

72. JCIC, *supra* note 71; *Zokuhatsu! Konnyaku-iri Zeri ni yoru Shibo Jiko [Continued Outbreaks! Fatal Accidents from Konnyaku-filled Jellies]*, TASHIKA NA ME 16 (Oct. 1997).

73. JCIC, *supra* note 71.

74. JCIC official, Ryoko Yoshida, was quoted as commenting that fundamental measures were needed to prevent accidents, such as instructions "do not give to infants," while a spokesperson for the National Network of *Konnyaku* Cooperatives stated:

We are discussing preventive measures with both MAF and the confectionary industry. The warning we notified to manufacturers last autumn was strict in content, in the context of the Product Liability Law [1994, in force from July 1, 1995]. There were views among manufacturers that it was too strict, and it is difficult to get fully accepted. Basically we will have to get accident preventative measures adopted by manufacturers on their own responsibility, but the big ones are making efforts by improving instructions, etc. I hope that small and medium sized manufacturers will follow that.

*Jiko-Zoku Konnyaku Zeri [Accidents Continue: Konnyaku Jelly]*, SAGA SHIMBUN, July 10, 1996.

75. It read: "Take Care: There are times when this product can catch in the throat, so please do not give to small children. Please keep out of the reach of small children." *Zokuhatsu! Konnyaku-iri Zeri ni yoru Shibo Jiko [Continued Outbreaks! Fatal Accidents from Konnyaku-filled Jellies]*, TASHIKA NA ME 16 (Oct. 1997).

76. JCIC, *Shohisha Higai Sokuho (Kigai Joho Shisutemu kara) [Consumer Injury Newsflash (From the Danger Information System)] No. 4*, August 14, 1996.

tainer. They argued that this made it more difficult to slurp out the jelly in one gulp, and hence for the product to get caught in the throat. By October, 1996, most manufacturers were still deciding what to do.<sup>77</sup>

(iii) By late 1997, however, many manufacturers had simply stopped making *konnyaku* jelly snacks.<sup>78</sup> Remaining manufacturers also developed "soft type" *konnyaku* jelly snacks by reducing the amount of ground *konnyaku*, increasing the proportion of other binding agents (such as gelatine). But two more accidents occurred, one involving soft type snacks.<sup>79</sup> Both accidents, and a third JCIC test, led to focusing on the need to have better warnings and instructions, even on soft type.<sup>80</sup> Another was to clearly label whether the snacks involved *konnyaku* or normal jelly.<sup>81</sup>

(iv) The Consumer Life Center operated by the Tokyo Metropolitan government (TTSSC), one of the largest in Japan, then got involved. It conducted a fourth test in late 1997 and early 1998.<sup>82</sup> Like the third JCIC test, this found that products had become generally somewhat softer but that warnings remained problematic. The TTSSC issued its own request to local industry associations for improvements. (In late 1999, it initiated a mail survey to gauge if and how further improvements had been made, and re-

77. *Konnyaku-iri Zeri - Seihin Jiko no Shuhen (Ge) [Konnyaku-filled Jelly: The Context of Product Accidents (Part 2)]*, SAGA SHIMBUN, October 23, 1996.

78. On September 13, 1997, the ASAHI SHIMBUN newspaper reported that the number of manufacturers had dropped from 200 to 50 in three years. See Nottage & Wada, *supra* note 35, at 41.

79. Request No. 9005, Product Name "Konnyaku iri Zeri [Jelly containing Konnyaku]", [http://www.kokusen.go.jp/kujo/data/a\\_KUJOT\\_213.html](http://www.kokusen.go.jp/kujo/data/a_KUJOT_213.html) (reported also in *Kujo Shori Tesuto To Jishi Jokyo Hokoku - 9nen bun [Report on Situation in Carrying out Tests Etc to Resolve Disputes] (For 1997)* (JCIC, ed., June, 1998) 1.

80. JCIC, *Kujo Shori Tesuto kara [From Dispute Resolution Tests] No. 3*, September 5, 1997; *Kairyohin no Sofuto Taiyū de mo Chissoku Jiko - Konnyaku-iri zeri [Suffocation Accidents Even in Improved Soft Type: Konnyaku Jelly]*, [December, 1997] TASHIKA NA ME 48.

81. This aspect is seen as particularly important in this context in order to satisfy the overarching "consumer expectations" safety test for defectiveness, pursuant to Article 2(2) of the PL Law, by Mariko Suzuki, *Seizobutsu Sekinin no Kanten kara mita Konnyaku Zeri Jiko [Konnyaku Jelly Accidents Seen from the Viewpoint of the Product Liability Law]*, 62/7 KATEIKA KYOIKU 63 (1998). See generally Nottage & Kato, *supra* note 4, at 85-665.

82. TTSSC, *Shohin Jiko Tsuseiki Tesuto Kekka Hokoku (Dai 1-go) [Report on Results of Tests Following Up Product Accidents (Vol. 1)]* (March, 1999) at 57.

ported a further fatality involving an elderly consumer.<sup>83</sup>) (v) A final stage so far involves some prominent litigation. First, in late 1997, there was wide coverage of a large settlement for a fatal accident which had involved a six-year-old boy in June 1996, one of the first complaints to be taken at a local Consumer Life Center.<sup>84</sup> The plaintiff's lawyer wrote that an additional 25,000,000 Yen was originally claimed as "a punitive solatium"; but that this was abandoned when the manufacturer agreed to the prompt settlement of 50,000,000 Yen in compensatory damage, close to the amount claimed. The lawyer also noted that a defense of comparative negligence put forward by the manufacturer was quickly abandoned after he demonstrated that when the accident occurred in June, 1996, there were 2 deaths and 5 hospitalizations reported through the JCIC, yet the manufacturer had not tried to improve the product design or even add the warning recommended by its industry association in October, 1995.<sup>85</sup> Secondly, even the English language media reported on a 59,000,000 Yen suit filed against Mannan Life (No. 14 in Appendix A), following a fatal accident involving a two-year-old boy. Not surprisingly, the lawyer for his family is alleging that the manufacturer did not adequately heed JCIC recommendations.<sup>86</sup>

Problems involving *konnyaku* jelly snacks in Japan are still being worked out. Further, a similar snack manufactured in Taiwan has now given rise to litigation in California, for which the author has been engaged as an expert witness. It is therefore inappropriate to draw conclusions in this article on particular legal or safety issues regarding such products. However, this example suggests the following more theoretical points, and possible directions in the future evolution of product liability and safety in Japan.

First, the contemporary significance of government sponsored agencies is obvious at both central and local levels: the JCIC,

83. *Konnyaku-iri Zeri no Chissoku ni yoru Shibo Jiko ga Hassei [Fatal Accident by Suffocation Occurs with Konnyaku-filled Jelly]*, TOKYO KURASHI NETTO 4 (Nov. 1999).

84. 23 "Oya ni Baisho" de Wakai - "Konnyaku Zeri" de 6sai Chissokushi [Six Year Old Dies from Suffocation on "Konnyaku Jelly": Settlement through "Damages to Parents"], MAINICHI SHIMBUN (Morning Edition) October 18, 1997, at 31.

85. Taiji Sato, *Konnyaku Zeri Shibo Jiken Hokoku [Report on a Fatal Case involving Konnyaku Jelly: November 14, 1997]*, 26 PLHO/JOHO KOKAI NYUSU 2 (December 20, 1997).

86. *Couple Sues Jelly Manufacturer for Son's Death*, JAPAN ECONOMIC NEWSWIRE, October 30, 1998.

as a coordinating and testing body; local Consumer Life Centers as part of an extensive information network, and ready first point of contact; and the larger local Centers like the TTCCS, which also have their own testing facilities. This importance will surely grow further, as impressive internal database networks come online. That is related to considerable progress in information technology applications in Japan in recent years, also among government agencies, as well as local and now national official information disclosure requirements.<sup>87</sup> As well as being a source of information and advice for consumers, the Centers (especially the JCIC) provide a stimulus for product safety activity awareness and improvements among manufacturers. The main avenue for this comes through recommendations to industry associations, but it can also apply lateral pressure by involving other ministries or regulatory bodies. The Centers have little direct interaction with individual companies. Yet, their recommendations to industry associations or other bodies can have some immediate impact, depending on the timing and the issues. Further, they may assist more indirectly in setting parameters relevant to the pursuing or settlement of litigation.<sup>88</sup> The mass media, which played an important role in reflecting and raising awareness of product safety issues from the early 1990's,<sup>89</sup> supports the interactions among these multifarious institutions and procedures. The only missing aspect in the context of refining and resolving issues involving *konnyaku* jelly snacks is a PL ADR Center; there happens to be none for food products as such. However, the quite transparent involvement of a range of regulatory bodies and manufacturer associations provides at least a partial functional substitute.

More theoretically, a key aspect to the system emerging in Japan may be that many of these institutions and procedures are part of highly developed sub-systems. Each has its own logic or discourse, tending to draw conclusions based on that, but open at

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87. See generally Luke Nottage, *Cyberspace and the Future of Law, Legal Education and Practice in Japan*, [1998/5] Web Journal of Current Legal Issues, available at <<http://webjcli.ncl.ac.uk/1998/issue5/nottage5.html> (with an updated version forthcoming in a book edited by Makoto Ibusuki); Kadomatsu, *supra* note 59.

88. The work of the Centers may help define the state of technical or scientific knowledge relevant to the "technological risks" exemption from liability in Article 4(1) of the PL Law, for instance, or the "state of the art" considerations arguably implicit in determining at least some aspects of defectiveness under Article 2(2). See generally Nottage & Kato, *supra* note 4, at 85-665 and 85-705.

89. *Id.* at 85-160; see also Nottage, *supra* note 29.

least in part to other sub-systems. This functional differentiation into increasingly complex sub-systems is a phenomenon observed in other complex industrialized democracies. It has generated a rich literature in legal and social theory on how to better "couple" them,<sup>90</sup> with or without a strong normative foundation.<sup>91</sup> It suffices that these insights appear highly relevant to Japan, particularly in areas such as contract and product liability law,<sup>92</sup> and hence essential to an accurate evaluation of its foreseeable future.

Nonetheless, as in processes involving at least some PL ADR Centers in Japan,<sup>93</sup> an intriguing specific development consonant with this thesis in the context of *konnyaku* jelly issues is the transformation of certain discourses. In particular, legal discourse about "defectiveness," or economic discourse about manufacturing "costs" and "preferences" of buyers, is evolving into discourse at a more abstract level about product "safety". A similar trend has been observed in the co-evolution of law and technology in other developed economies, such as Germany.<sup>94</sup> In Europe, this is underpinned, or at least paralleled in fact, by new regulatory regimes regarding product safety.<sup>95</sup> This broader theoretical and comparative perspective, combined with an analysis of developments in the late 1990's in particular, therefore lead to the prediction that refinement of broader norms relating to "product safety" will form a key aspect of a new paradigm for Japan into the 21<sup>st</sup> century.

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90. Cf., e.g., Gunther Teubner, *Autopoiesis and Steering: How Politics Profit from the Normative Surplus of Capital*, in *AUTOPOIESIS AND CONFIGURATION THEORY: NEW APPROACHES TO SOCIETAL STEERING* 127 (Roeland in 't Veld et. al, eds. 1993).

91. See generally, e.g., Gunther Teubner, *Law As An Autopoietic System* (Anne Bankowska and Ruth Adler trans., Zenon Bankowski ed., 1993); and Juergen Habermas, *Between Facts and Norms* (W. Rehg trans., 1996).

92. See generally Luke Nottage, *Form, Substance and Neo-Proceduralism in Comparative Private Law: Law in Books and Law in Action in New Zealand, England, the U.S. and Japan* 239-271 (Ph.D. in Law thesis submitted to Victoria University of Wellington on September 2, 1999).

93. Nottage & Wada, *supra* note 35, 67-68.

94. E.g., Karl-Heinz Ladeur, *The Integration of Scientific and Technological Expertise into the Process of Standard-Setting According to German Law*, *INTEGRATING SCIENTIFIC EXPERTISE INTO REGULATORY DECISION-MAKING* 77 (C. Joerges et. al eds., 1997).

95. See generally GERAINT HOWELLS, *CONSUMER PRODUCT SAFETY* (1998).

### III. APPENDIX A: SUITS FILED UNDER THE 1994 PL LAW<sup>96</sup>

For a table of "Reported Case Filings Under the PL Law" maintained by Luke Nottage, see:

<http://www.law.kyushu-u.ac.jp/~luke/pllawcases.html>.<sup>97</sup>

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96. <http://www.law.kyushu-u.ac.jp/~luke/pllawcases.html>

97. Last updated on May 8, 2000.

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