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Japan's New Products Liability Law: Increased Protection for Consumers

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JAPAN'S NEW PRODUCTS LIABILITY LAW: INCREASED PROTECTION FOR CONSUMERS

I. INTRODUCTION

The goal of Japanese tort law is to compensate victims for damages arising from the intentional or negligent violation of their rights.[1] To promote this goal, Japan enacted the Products Liability Law in June 1994. This law is a strict products liability law that became effective July 1, 1995.[2] Although the Products Liability

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1. Minpō (Civil Code), Law No. 89 of 1896, art. 709.

2. Seizōbutsu Sekinin Hō, Law No. 85 of 1994. A translation of the Japanese Products Liability Law appears below.

Purpose

Article One: The purpose of this law is to improve citizens' lives and contribute to the healthy development of the economy. This law protects victims by determining the manufacturer's liability for damages to life, body, and property caused by product defects.

Definitions

Article Two:

1. This law defines "product" as manufactured or processed property.

2. This law defines "defect" as a product which lacks the expected safety features of that product, considering the characteristics of the product, the normal expected method of use, the time the manufacturer delivers the product, and other conditions concerning the product.

3. This law defines "manufacturer" as any one of the following parties.

a. Person(s) who manufactures, processes, or imports the product (hereinafter called manufacturer).

b. Person(s) who acts as the manufacturer of a product which indicates its name, trade name, or trademark (hereinafter called name indication) or who may be misconceived as the manufacturer of the product by indicating its name.

c. Besides the above, person(s) who indicates its name on the product as the true manufacturer considering manufacturing, processing, importing, sales, and other conditions.

Product Liability

Article Three

The manufacturer is liable for damages to another person's life, body, or property due to a defect in the delivered product which was manufactured, processed, or imported by a manufacturer or b or c of the previous article, clause three. However, if the damages occur to the product only, there is no liability.

Exemptions From Liability

Article Four

The manufacturer may avoid liability under the previous article by proving one of the following:

1. Given the state of science and technology at the time of delivery, the defect was not discoverable.

2. The allegedly defective product is a component of another product, and

Law does not fully compensate victims for damages arising from defective products, it better enhances consumer protection.[3] In addition, the new law improves the system of products liability dispute resolution.

This Comment argues that procedural rules and other obstacles limit tort victims' ability to gain access to, and recover damages in, court. Thus, most victims of defective products will depend on alternative dispute resolution for recovery. Although most individuals will be able to recover some damages through alternative dispute resolution, manufacturers are not completely responsible for the harms they cause. Part II of this Comment describes products liability law in Japan. Part III presents an analysis of procedural rules and other factors that affect products liability cases. Part IV provides a brief comparison of Japanese and U.S. tort law. Part V explains alternative dispute resolution in Japan. Part VI describes social changes that have occurred since the enactment of the new Products Liability Law. Part VII concludes that the alternative dispute resolution system and the new Products Liability Law in Japan provide victims with better recovery and better prevention of future product defects.

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the defect is primarily attributable to its misuse by the manufacturer of the aggregate product.

Limitation of Time

Article Five

1. The right to claim the damages described in Article Three extinguishes if the victim or his legal agent does not make a claim within three years of the time when such damages or the responsible person becomes known, or within ten years after the product is delivered.

2. Where the product is harmful when it accumulates in the body, discovery shall be calculated from the time the damages occur or when symptoms for such damages are manifested after a specific latent period.

Application of Civil Law

Article Six

Besides the law described herein, the liability of the manufacturer of defective products is also governed by Civil Law (Law No. 89 of 1896).

Effective Date

This law shall become effective after one year has passed from the publication date and applies to products delivered by a manufacturer after the effective date.

3. A 1978 survey of civil law countries' products liability laws described Japan's previous products liability laws as the "least progressive." Marcy Sheinwold, Comment, *International Products Liability Law*, 1 TOURO J. TRANSNAT'L L. 257, 274-75 (1988).

II. PRODUCTS LIABILITY LAW IN JAPAN

A. Prior Negligence Law

Although a plaintiff may bring a products liability action under breach of contract or tort,[4] most plaintiffs file products liability actions under tort provisions.[5]

In Japan, a plaintiff in a products liability tort action must prove five elements to recover against a manufacturer: (1) the product must be defective; (2) the defect must result from the defendant's act; (3) the plaintiff must suffer an injury; (4) the defendant's product must have caused the plaintiff's injury; and (5) the defendant must have breached the duty of care owed to the plaintiff.[6] As in the United States, a manufacturer may be liable for negligence in the manufacturing process, product design, or the sufficiency of warnings.[7]

Although the Japanese tort provisions are similar to U.S. negligence principles,[8] their effect in society differs tremendously. Instead of looking to the courts, Japanese society has traditionally relied on rigorous regulation for consumer protection.[9] Also, certain industries require manufacturers to contribute to a fund that compensates the victims of the industry's defective products.[10] Thus, although a special products liability law did not protect

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4. MINPŌ, Law No. 89 of 1896, art. 709.

5. Catherine Dauvergne, *The Enactment of Japan's Product Liability Law*, 28 U. B.C. L. REV. 403, 405 (1994). This is most likely because the plaintiff must establish privity of contract, which is a difficult element to prove, in order to prove breach of contract. *See id.*

6. *Id.* at 406.

7. Mark A. Behrens & Daniel H. Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, but Access to Recovery is Limited by Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669, 679-80 (1995).

8. *See generally* RESTATEMENT (SECOND) OF TORTS § 402A (1966) (outlining the general rule for Special Liability of Seller of Product for Physical Harm to User or Consumer).

9. From 1946 to 1993, Japanese courts decided only 145 products liability suits. Dauvergne, *supra* note 5, at 404. In contrast, U.S. federal and state courts decide over 400,000 product liability cases per year. Manabu Hayashida, *PL Taio, Jyoho Sentaa De* [*Information Center Deals with Product Liability*], NIHON KEIZAI SHINBUN, June 30, 1995.

10. Dauvergne, *supra* note 5, at 404. Examples of statutory compensation schemes include the "Consumer Daily Life Appliances Safety Law," which required a "safety goods" seal for appliances and set up a compensation fund for appliance defect victims, and the "Act Concerning the Fund for Relief of Drug Side Effects," which established a fund for pharmaceutical defect victims. Dauvergne, *supra* note 5, at 406-07 (citing MINPŌ, Law No. 31 of 1973; MINPŌ, Law No. 55 of 1979).

consumers in court, the government offered some means of compensation in the event that a defective product injured an individual.

B. New Strict Products Liability Law

After the outbreak of several mass tort cases in the 1960's, the Japanese government began investigating the possibility of instituting a strict products liability framework.[11] As the consumers' movement grew, various groups pressured Japanese political leaders to establish a new products liability legal framework that would allow greater recovery against manufacturers and provide recourse for defective imported goods.[12] Politicians did not view implementing more stringent safety regulations as a practical alternative because foreign countries would view the regulations as trade barriers.[13] Similarly, Japanese business leaders, voicing their opinion through Keidanren,[14] wanted to avoid a "litigation explosion" similar to the United States.[15]

In 1993, an alliance of political parties displaced the conservative Liberal Democratic Party's ruling party service and adopted the current consumer-oriented Products Liability Law.[16] The resulting legislation holds manufacturers strictly liable for their defective products, subject to two defenses: a "development risk defense" and a "flawless component defense."[17] In contrast to the prior tort regime, plaintiffs no longer need to prove negligence on the part of manufacturers. Under the new law, a plaintiff only needs to prove that the product has a defect in order to recover damages.[18]

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11. Behrens & Raddock, *supra* note 7, at 686.
12. Dauvergne, *supra* note 5, at 407.
13. *Id.*
14. *Id.* Keidanren is the Federation of Economic Organizations. Keidanren's members include Japanese business leaders who collectively exert a considerable amount of political power over Japan's macroeconomic policy. FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 28 (1987).
15. Dauvergne, *supra* note 5, at 408.
16. Behrens & Raddock, *supra* note 7, at 688-89.
17. SEIZŌBUTSU SEKININ HŌ, *supra* note 2. The law defines "manufacturer," "development risk defense," and "flawless component defense" in its text. *Id.*
18. Dauvergne, *supra* note 5, at 415.

III. CIVIL PROCEDURE RULES AND OTHER FACTORS WILL LIMIT THE EFFECTIVENESS OF THE NEW LAW IN COURT

Proving that a product is defective, and arguing against the development risk or flawless component defenses, will be extremely difficult for most victims. The Japanese court system does not offer many of the procedural tools available to plaintiffs in the United States, such as discovery, class actions, and a right to a jury trial in civil actions.[19] Due to these procedural and other obstacles, the new Products Liability Law will not guarantee recovery to victims of defective products through the Japanese courts.

A. Historical Development of the Japanese Legal System

To understand current Japanese procedural law, one must begin with an analysis of the legal system of the Tokugawa Era,[20] when samurai dominated Japan. The samurai worked as regional leaders for the shogun in Tokyo. The samurai lacked a support system and bureaucracy. Thus, the samurai's role in the legal system could be defined as "judge, jury, and executioner."[21]

Japan adopted many of the Chinese legal codes, which included substantive and procedural laws. Like the Japanese system, however, Chinese Confucianism did not promote participation in the legal system. Confucianism emphasized harmony and relations between people. Society expected the social inferior to defer to his social superior.[22] Taking someone to court created disharmony and society frowned upon it.[23]

Japanese called the obligations stemming from one's relation to others "giri."[24] Although the person owing a duty through giri was expected to perform, the recipient of the duty had no right to

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19. Maurice Rosenberg & Takeshi Kojima, Reform of Procedure and Rule-Making (May 1984), *in* PERSPECTIVES ON CIVIL JUSTICE AND ADR: JAPAN AND THE U.S.A. 179, 184-99 (Takeshi Kojima ed., 1990) [hereinafter PERSPECTIVES].

20. The Tokugawa Era, also called the Edo period, lasted from 1603 to 1853. Behrens & Raddock, *supra* note 7, at 671-72.

21. Harold See, *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U. L. REV. 339, 352 (1982).

22. *Id.* For example, the contractor should defer to the owner, the lessee to the lessor, the employee to the employer, and the seller to the buyer. *Id.*

23. *Id.* at 355.

24. *Id.* at 341.

demand performance of the duty.[25] Thus, instead of relying on the legal system for performance of duties, the Japanese relied on honor.[26]

A series of legislative measures aided the development of the law. Japan enacted the Code of a Hundred Articles in 1742.[27] Although the Code added considerable depth to the legal system, it mainly consisted of instructions to the officials on how to judge and punish, rather than rules for the people.[28] The Meiji Restoration in 1868 brought the emperor back to a supreme political position and led to the adoption of the Meiji Constitution in 1889.[29] Although Japan later adopted codes based on French and German law, the forms of dispute resolution changed little until 1947, when the present Constitution was written. Prepared under strict U.S. review, the present Constitution finally became a protector of individuals' rights.[30] Based on this Constitution, Japan now has a legal basis for claiming rights. Many of the ancient social expectations that discourage involvement in the legal system, however, are still present in the Japanese psyche and procedural rules.

B. The High Burden of Proof

The burden of proof on the Japanese civil plaintiff is much higher than in the United States.[31] Article 185 of the Japanese Code of Civil Procedure governs how judges should make decisions.[32] Although the Code does not provide any formal rules on proof, the prevailing view is that proof is required "beyond a reasonable doubt,"[33] even in civil cases. Generally speaking, the standard of proof in Japan requires the judge to be 80-90% sure of his decisions. When the judge is less than 80% sure, the party who

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25. *Id.* at 341 n.9 (citing YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 175 (Anthony H. Angelo ed. & trans., 1976)).

26. *Id.* at 341 n.11 (quoting NODA, *supra* note 25, at 178).

27. *Id.* at 341.

28. *Id.*

29. *Id.* at 343.

30. *Id.* at 348.

31. *See* TAKAAKI HATTORI & DAN F. HENDERSON, CIVIL PROCEDURE IN JAPAN § 7.05[13], at 7-75 to 7-78 (1985).

32. MINJI SOSHŌHŌ (Code of Civil Procedure), Law No. 29 of 1890 [MINSOHŌ] art. 185.

33. HATTORI & HENDERSON, *supra* note 31, § 7.05[13][b], at 7-76 to 7-77.

has the burden of proof is defeated.[34] This higher standard of proof makes it difficult for a victim to establish a case against a manufacturer, and thus, deters plaintiffs from filing a suit because they face such a statistically small chance of success.[35]

C. The Low Level of Pretrial Discovery

Compared to the United States,[36] pretrial discovery is very limited in Japan.[37] Courts allow proof-taking prior to commencement of an action or prior to trial only for the purpose of preserving evidence.[38] A motion for the preservation of evidence will be successful only in extraordinary circumstances, such as when a future witness is seriously ill or the real property in question is about to be altered or destroyed. The non-appealability of the court's decision on a motion for the preservation of evidence further limits the amount of information available to a potential plaintiff.[39] The lack of pretrial discovery makes it much more difficult for a Japanese plaintiff to prove his case than his U.S. counterpart, who may file a lawsuit and receive a license for a legally sanctioned "fishing expedition"[40] to recover information through discovery.[41]

D. The Lack of a Class Action Provision

In Japan, scattered victims of mass torts may not join in one lawsuit against a single defendant because the Code of Civil Procedure contains no provision for class actions.[42] The lack of a class action provision makes it especially difficult for individual

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34. Maurice Rosenberg & Takeshi Kojima, The Adversary System (May 1984), *in* PERSPECTIVES, *supra* note 19, at 117, 147; *cf.* H. Kaneko, Rissho Sekinin [Responsibility for Adducing Proof], *in* 2 MINJI SOSHOHO KOZA [LECTURES ON THE LAW OF CIVIL PROCEDURE] 568 (1954) (requiring 99% certainty as the standard of proof).

35. Rosenberg & Kojima, *supra* note 34, at 148.

36. *See generally* FED. R. CIV. P. 26(b) (U.S. federal courts' discovery rule.)

37. Dauvergne, *supra* note 5, at 408.

38. MINSOHŌ art. 343. In contrast, the scope of discovery in U.S. federal courts is "any matter, not privileged, which is relevant to the subject matter involved in the pending action." FED. R. CIV. P. 26(b)(1).

39. MINSOHŌ art. 348.

40. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

41. Pretrial discovery is one of the most important aspects of litigation in the United States. WARREN FREEDMAN, THE TORT OF DISCOVERY ABUSE 3 (1989).

42. Takeshi Kojima, *Protection of Diffuse, Fragmented, and Collective Interests in Civil Litigation*, 17 J. COMP. L. 1 (1983), *reprinted in* PERSPECTIVES, *supra* note 19, at 3, 16. In contrast, Federal Rule 23 permits class actions in U.S. federal courts. FED. R. CIV. P. 23.

victims, who each have only a small amount of evidence, to meet a high burden of proof against a manufacturer.[43]

Some provisions in the Japanese Code of Civil Procedure, however, allow a group of victims to work together against a single defendant. Under Article 132, for example, if all of the claims are in one court, the court may consolidate oral arguments.[44] Given today's mass production and advanced distribution systems, however, users of any single product are likely to be spread out among many districts. Thus, claims for the same type of defect will be brought in many court districts, and the plaintiffs will be unable to utilize the consolidation rule. In most cases, the consolidation rule will not aid victims of defective products in accumulating evidence against defendant manufacturers.

Another procedural tool that permits multiple plaintiffs to join in a lawsuit against a defendant is joint litigation. Article 59 allows joint litigation when two or more persons have rights or liabilities in common, or where the subject of their suits is based on the same ground in fact and in law.[45] Using this procedural tool is problematic because it requires a tremendous amount of organization on the part of the plaintiffs.[46]

One successful example of joint litigation is the Tsuruoka Oil Price Fixing Case.[47] In this case, 1654 plaintiffs sued 12 oil companies for damages from illegal cartels, with average damages of ¥2300 per person. A consumer cooperative organized most of the plaintiffs' case.[48] Due to the provision's complexity, however, joint litigation is not an answer to the plaintiff's need to get more evidence.

One last procedural tool that allows plaintiffs to collaborate in

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43. Kojima, *supra* note 42, at 24. Rule 23 specifically addressed this problem. One of the purposes of Rule 23 was to make it easier for individuals, whose claims were too small to merit an independent action, to receive compensation for their damages. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT, PROPOSED FINAL DRAFT 35 (Apr. 5, 1993).

44. MINSOHŌ art. 132. In U.S. federal courts, Rule 42 allows consolidation. FED. R. CIV. P. 42.

45. MINSOHŌ art. 59. This provision is similar to the U.S. joinder rules. FED. R. CIV. P. 19-20.

46. Kojima, *supra* note 42, at 31.

47. *Id.* The District Court eventually dismissed this case because the plaintiffs failed to prove damages. *Id.* at 32.

48. *Id.*

the courtroom is the "appointed party" (*sentei tojisha*) rule.[49] Article 47 allows a group of plaintiffs with a common interest to appoint one party to act as their representative. The decision in the representative's case is then extended to the other group members through *res judicata*.[50] This provision creates difficulties for plaintiffs because the entire group must authorize the selected representative, usually resulting in a smaller group.[51] Like the above provisions, this rule assists victims of defective products in only a limited way.

E. The Burden of Paying Court Fees

In Japan, the losing party must pay all court fees.[52] In some circumstances, though, the court may require the winning party to bear all or part of the expenses of the proceedings. Judges may shift the financial burden when the winning party commits acts that are "unnecessary for the assertion or defense of his right."[53] The courts have viewed plaintiffs who bring suits without offering to negotiate as committing unnecessary acts that create liability for court costs.[54] Thus, plaintiffs potentially face having to pay all litigation expenses if their suit is unsuccessful, and possibly even if successful.

A plaintiff who has no office or place of business in Japan must provide security for the estimated court costs at the beginning of the trial.[55] The plaintiff must replenish the security if it becomes deficient.[56] Most victims of defective products do not have an office or place of business in Japan, and therefore, the court requires them to provide funds for the estimated court costs in advance.[57] Undoubtedly, this requirement makes most products liability plaintiffs more cautious about initiating litigation.[58]

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49. MINSOHŌ art. 47.
50. *Id.* art. 201.
51. Kojima, *supra* note 42, at 33.
52. MINSOHŌ art. 89.
53. *Id.* art. 90.
54. HATTORI & HENDERSON, *supra* note 31, § 10.02 at 10-4 to 10-5.
55. MINSOHŌ art. 107(1).
56. *Id.*
57. Court fees are proportionate to the benefit in dispute, generally between 0.5-1.0%. Takeshi Kojima, Western Style Legal Aid and Japan's Choice (Oct. 30-31, 1984), *in* JAPAN LEGAL AID ASS'N, THE INTERNATIONAL SYMPOSIUM AND LEGAL AID REPORT 79-93 (1984), *reprinted in* PERSPECTIVES, *supra* note 19, at 53, 61.
58. *Id.*

Fortunately, the Code of Civil Procedure allows postponement of the court fee payment if the plaintiff satisfies a means test and a merit test.[59] The court must find that the plaintiff has both insufficient resources and a strong chance of winning his case in order to provide "legal aid in litigation."[60] Therefore, in a few circumstances, there is some relief available to a victim of limited means.

F. The Lack of Contingency Fees

Besides the Code of Civil Procedure, many other aspects of the Japanese legal system limit the availability of justice through the courts or discourage plaintiffs from using the court system for resolving disputes. For example, the Japanese Code does not recognize contingency fees.[61] Under a contingency fee agreement, an attorney represents a client for compensation based on a percentage of the amount recovered,[62] so the client owes nothing to the attorney if nothing is recovered.[63] Such agreements are unique to the United States.[64] Many commentators cite contingency fees as a major cause of the litigation explosion in the United States because contingency fees make the court system more accessible to plaintiffs.[65] Arguably, the opposite is true in Japan, where the lack of contingency fees closes the court system to potential plaintiffs.[66]

Although the Japanese Code does not provide for contingency fees, some lawyers will accept cases with an "implicit" contingency fee arrangement.[67] Typically, Japanese clients pay lawyer's fees in installments. If a client's financial resources are limited, a lawyer may lower the initial fee payment, with the balance due upon completion of the case. Unlike the U.S. contingency fee system, the client still is liable for paying the lawyer's fees if the suit is unsuccessful.[68] If the client has no other resources, the

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59. MINSOHŌ art. 118.
60. Kojima, *supra* note 57, at 62.
61. Rosenberg & Kojima, *supra* note 19, at 184.
62. BLACK'S LAW DICTIONARY 614 (6th ed. 1990).
63. Rosenberg & Kojima, *supra* note 19, at 184.
64. Marc S. Klein & Sills C. Z. Rodin, *Megatrends in International Product Liability Law*, C949 A.L.I.-A.B.A. COURSE OF STUDY: PRODUCTS LIABILITY 113, 121 (1994).
65. Rosenberg & Kojima, *supra* note 19, at 184.
66. *Id.*
67. Klein, *supra* note 64, at 121.
68. Kojima, *supra* note 57, at 67.

lawyer may never be able to collect the balance due, and the end result is a contingency fee arrangement.

For a more concrete example of how a fee arrangement similar to the above contingency fee system works out, take the case where a plaintiff's lawyer is involved in a $40,000 dispute. The lawyer would usually ask for 5% ($2000) up front for legal fees; in the event of a favorable verdict, the lawyer would receive an extra 7% ($2800).[69]

G. The Lack of Jury Trials in Civil Cases

Japanese courts do not use juries to determine facts such as the amount of damages in civil cases.[70] Commentators widely cite to jury involvement in civil trials as another cause of the U.S. litigation explosion because the use of a jury in U.S. civil cases favors verdicts finding liability on the part of a defendant manufacturer and higher levels of damages.[71] Some speculate that the converse is also true: a lack of juries discourages plaintiffs from filing suits.[72] In any case, the use of juries increases verdict uncertainty.[73] This uncertainty encourages some plaintiffs to gamble that their prospects might be better in court than settling out of court.

H. No Recovery for Non-Economic Damages

The Japanese Code does not allow recovery of non-economic damages.[74] For example, a plaintiff in Japan cannot recover

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69. Stephen J. Carroll et al., On Mass Tort and Alternative Dispute Resolution (Dec. 1984), *in* BEIEI NIOKERU SHŌKIBOFUNSŌ-SHORI JITTAI HŌKOKUSHO (Koji Shindo ed., 1986), *reprinted in* PERSPECTIVES, *supra* note 19, at 352, 363.

70. Takeshi Kojima, *Civil Procedure in Japan*, 11 MICH. J. INT'L L. 1218 (1990). Calculating damages is very straightforward. For example, the formula for determining loss of income in case of death is:

$S = (I-E) \times ((1/1+r) + (1/1+2r) + \ldots (1/1-r)$

S= the amount of lost income
I= the amount of annual income of the victim at the time of death
E= the amount of the victim's annual living expenses (usually 30-50% of income)
n= expected remaining years of employability
r= legal interest rate

7 DOING BUSINESS IN JAPAN § 4.05(7) (Zentaro Kitagawa ed., 1994). To calculate loss of income damages, the judge only needs to solve the equation by plugging in the variables.

71. Rosenberg & Kojima, *supra* note 19, at 191.

72. Klein, *supra* note 64, at 121.

73. Carroll et al., *supra* note 69, at 365.

74. Klein, *supra* note 64, at 122.

punitive damages or damages for pain and suffering.[75] Due to this rule, the Osaka District Court ordered Matsushita Electric Industrial Company to pay only ¥4.4 million (approximately $42,000) in damages for an office building that burned down due to a defective television set that caught fire.[76] The court also encouraged the family of a man who died in a fire caused by a defective television to settle for only ¥18 million (approximately $171,000) in damages.[77] Plaintiffs will be discouraged from filing suit when the economic damages in question are not very high because the quantum of possible damages is limited in this way.

To some degree, Japanese courts reduce the perceived injustice stemming from the prohibition on non-economic damages by awarding "solace money" (*isharyo*).[78] Although solace money in Japan and punitive damages in the United States both have the effect of increasing the amount a plaintiff may recover for economic damages, in practice, solace money exposes a defendant to much less risk than punitive damages.[79] Thus, the Japanese plaintiff's recovery is still limited, and the potential award of a fantastic windfall does not promote lawsuits.

I. The Small Number of Attorneys in Japan

Finally, Japan has far fewer attorneys than the United States.[80] In order to become an attorney in Japan, one must pass an exam. Although about 30,000 applicants take the exam each

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75. 7 DOING BUSINESS IN JAPAN, *supra* note 70, at § 4.05(7).

76. Judgment of Mar. 29, 1994, Osaka Chisai [Osaka District Court], *Matsushita Denki Ni Baishou-Meirei* [*Damages Judgment Against Matsushita Electric Industrial Co.*], YOMIURI SHINBUN, Mar. 30, 1994. For an interesting analysis of how a U.S. court might decide this case, *see generally* MASAYUKI TAKAYAMA & JULIA TACHIKAWA, LITIGATION DROWNS AMERICA 107-09 (1995). The authors speculate that a U.S. court would award damages of at least $100 million after totaling the damages from the fire, the loss of all documents and records, profit loss, the pain and suffering and losses to the people who worked in the destroyed building, and punitive damages against Matsushita Electric Industrial Company, based on its market share and annual gross sales, for its bad faith in dealing with the plaintiffs. *Id.*

77. *Matsushita Agrees to Pay Damages for TV-Caused Fire*, Kyodo News Service, Nov. 25, 1994, *available in* LEXIS, Nexis Library, Japan File.

78. Article 711 of the Civil Code allows the award of solace money. MINPŌ art. 711.

79. Kojima, *supra* note 42, at 37.

80. 2 DOING BUSINESS IN JAPAN, *supra* note 70, at § 3.02(3). About 12,000 attorneys practice in Japan, which has a population of over 100 million. The United States, with roughly twice the population of Japan, has about 850,000 qualified attorneys. Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 723 n.4 (1994).

year, fewer than 500 people pass.[81] There is little competition in fees and services, and attorneys are less willing to take on small or dubious cases, because there are so few attorneys.[82] Thus, plaintiffs who wish to file suit may find it difficult to obtain adequate legal representation.

As described above, the Japanese court system is extremely inaccessible to victims of defective products. The next section of this Comment will examine how the U.S. court system handles products liability claims. Although U.S. courts are more open to plaintiffs, the procedural rules make the system inefficient, and ironically, may deny justice in their own way.

IV. BRIEF COMPARISON WITH PRODUCTS LIABILITY LAW IN THE UNITED STATES

The U.S. tort industry overwhelms the Japanese legal system. More than 800,000 tort claims are filed each year in the United States.[83] In 1985, total compensation to tort plaintiffs through the U.S. court system exceeded $20 billion.[84] Due to the availability of contingency fees, flexible procedural rules, statutes that encourage plaintiffs to sue, and other cultural attitudes favoring dispute resolution in court,[85] justice through the court system for tort claims appears accessible to all who seek it.

The system, however, is not without problems. Tort litigation is tremendously expensive for all parties involved. In 1985, $16 to $19 billion was spent on tort litigation.[86] Not only do litigation costs increase the ultimate price consumers pay for the products involved, but they also make U.S.-made products less competitive abroad.[87] In addition, tort litigation imposes administrative burdens on the parties involved and can cause corporate bank-

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81. Behrens & Raddock, *supra* note 7, at 678. Some believe these statistics indicate the Japanese government's unwritten policy of discouraging litigation. *Id.*

82. Dan F. Henderson et al., Mediation and Arbitration in Japan and the U.S. (Nov. 1984), *in* PERSPECTIVES, *supra* note 19, at 279, 287.

83. JOHN G. FLEMING, THE AMERICAN TORT PROCESS 1 (1988).

84. *Id.*

85. Rosenberg & Kojima, *supra* note 19, at 184-99.

86. JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 67 (1986). This figure does not include any compensation paid to plaintiffs.

87. Alfred W. Cortese, Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity with Our International Rivals*, 13 U. PA. J. INT'L BUS. L. 1, 4 (1992).

ruptcy.[88] Further, the threat of possible tort litigation deters some manufacturers from releasing useful products into the market.[89] Clearly, individual justice comes at a cost.

A. Historical Development of Products Liability Law

Products liability law evolved from no liability to fault-based liability to strict liability.[90] Before the 1800's, there were few tort cases because of the expense of tort litigation, the availability of regulatory statutes to protect consumers, and cultural attitudes.[91] Economic expansion in the 19th century led to more transactions between unrelated parties, and consequently, more dispute resolution in courts. Courts initially focused on contract law to settle product defect disputes, but soon came to realize that many transactions did not involve consensual agreements.[92]

In 1893, the courts developed an implied warranty of merchantability to protect commercial buyers.[93] Implied warranties, in general, had a strict standard, and thus were biased against the manufacturer.[94] A privity of contract requirement and the terms of the warranty, however, restricted a breach of warranty action. In addition, a breach of warranty action did not allow recovery of punitive damages. Thus, this remedy was not available to many buyers.[95]

By the 20th century, the courts realized that many contracts were not "bargained for," and therefore contract law should not be the sole solution for product defect claims.[96] By 1915, tort liability no longer required privity of contract.[97] Negligence became the standard for liability. In many instances, however, the negligence standard did not help plaintiffs because the case became more complex and the law more uncertain. Litigation became slow and expensive.[98]

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88. JANE STAPLETON, PRODUCT LIABILITY 31 (1994).
89. *Id.* at 32. The swine-flu vaccine is one example of this phenomenon. *Id.*
90. VINCENT R. JOHNSON, MASTERING TORTS 169 (1995).
91. STAPLETON, *supra* note 88, at 9-10.
92. *Id.* at 10.
93. *Id.* at 11.
94. *Id.* at 12.
95. JOHNSON, *supra* note 90, at 169.
96. STAPLETON, *supra* note 88, at 19.
97. MacPherson v. Buick Motor Co., 111 N.E. 1050 (1916).
98. JOHNSON, *supra* note 90, at 169.

The case *Escola v. Coca-Cola Bottling Co. of Fresno*[99] concerned an exploding Coke bottle that injured a waitress. In his concurring opinion, Justice Traynor first suggested the adoption of a strict liability standard for defective products, although the court found liability based on a negligence standard. Following the decision, nearly all jurisdictions rapidly embraced some sort of strict products liability standard[100] similar to Section 402A of the Restatement (Second) of Torts, entitled Special Liability of Seller of Product for Physical Harm to User or Consumer.[101] Presently, if a defective product injures a person, that person has a cause of action for breach of warranty, ordinary negligence, or strict liability in tort.[102]

Originally, the definition of "defect" only included manufacturing defects. A manufacturing defect occurs when the product in question leaves the seller's hands in a condition inconsistent with the manufacturer's plan. For example, a manufacturing defect exists when the product is missing a screw or includes a wrong size screw.[103] In these situations, the plaintiff in a strict products liability action only needs to prove that the product was defective when it left the manufacturer and does not need to prove negligence.[104]

In the 1970's, courts expanded the definition of "defect" to include design defects.[105] The issue in a design defect case is whether the product was "safe enough."[106] In making its decision, the court will balance the utility of the product against the actual danger of the product. The degree of foreseeable danger is not relevant. The mere fact that a design could have been safer will not satisfy the court. Rather, the plaintiff must show that the safer design was both technically feasible and practicable.[107] With the recognition of design defects, the number of products liability cases grew exponentially because once a design defect was identified, the whole production line could be labeled defective.[108]

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99. 150 P.2d 436 (1944).
100. STAPLETON, *supra* note 88, at 25.
101. RESTATEMENT (SECOND) OF TORTS § 402A (1966).
102. JOHNSON, *supra* note 90, at 169.
103. *Id.* at 172.
104. *Id.*
105. STAPLETON, *supra* note 88, at 29.
106. JOHNSON, *supra* note 90, at 172.
107. *Id.* at 173-74.
108. FLEMING, *supra* note 83, at 14.

The courts further expanded the definition of "defect" to include failure to warn cases. In such cases, the court may find liability when the warning of dangers is inadequate, which occurs if the manufacturer does not (1) specify the risk, (2) disclose the reason for the warning, or (3) reach foreseeable users with the warning.[109]

In summary, the United States has gradually broadened the scope of products liability. Many commentators attribute this trend to the United States' lack of welfare programs, programs which are readily available in other Western countries, in the United States. Thus, these commentators feel that more judicial social reform is needed.[110] Others blame the attitude of the U.S. public, which pressures the court system to compensate all individuals who suffer an injury.[111] Due to the novelty of Japan's Products Liability Law, it is uncertain whether Japanese courts will follow the same path, recognizing design defects and failure to warn cases, but certainly the social conditions for change differ from the United States.

B. Civil Procedure Rules Open the Courts to Plaintiffs

The U.S. judicial system provides many tools to plaintiffs that make the courts more accessible. Procedural rules for mass torts are particularly well developed because the U.S. courts have dealt with far more of these cases than any other country.[112] Most mass torts are litigated in federal court due to diversity jurisdiction,[113] thus, this section will focus on the Federal Rules of Civil Procedure.

Three main procedural tools aid plaintiffs in mass tort actions. First, consolidation allows courts to transfer cases to one location for pretrial proceedings if the cases have at least one common

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109. JOHNSON, *supra* note 90, at 174.

110. FLEMING, *supra* note 83, at 11. *See also* Stephen C. Yeazell, *The Salience of Salience: A Comment on Professor Hazard's Authority on the Dock*, 69 B.U. L. REV. 481, 484 (1989).

111. Rosenberg & Kojima, *supra* note 19, at 189. Rosenberg goes so far as to say that "[t]he United States has made the courthouses the great secular temples and has made suing a religion." *Id.* at 187.

112. FLEMING, *supra* note 83, at 236. The rules are so well-developed that foreign plaintiffs often hope to take advantage of them whenever possible. For example, the victims of a Turkish Airlines crash outside of Paris litigated their case in the United States. *Id.*

113. *Id.* at 237.

question of law or fact.[114] Although this rule only applies to pretrial proceedings, this pretrial period may be the most important for a case because it includes discovery, summary judgment, and sometimes settlement.[115]

Second, class actions allow multiple plaintiffs to sue in a single lawsuit. Plaintiffs may bring a class action if the class is so numerous that joinder of all members is impracticable, there are common questions of law or fact, the claims of the representatives are typical of the claims of the class, and the representatives will fairly protect the interests of the class.[116] In order to be certified, the plaintiffs must also prove either that separate actions would create a risk of inconsistent adjudications, or that relief would be appropriate for the class as a whole because the party opposing the class has acted on grounds generally applicable to the class, or that common questions of law or fact predominate over any questions affecting only individual members.[117] Certification for a class action in a products liability suit is difficult because the case will usually consist of a series of discrete events. Thus, individual facts and issues, rather than common facts and issues, will dominate.[118]

Third, all claims may be combined in the event of the corporate reorganization of the defendant. For example, when the Johns-Manville Corporation filed for bankruptcy proceedings under Chapter 11 of the Bankruptcy Act, the bankruptcy proceedings discharged more than 10,000 asbestos claims.[119] This procedure allows the business to continue operating while it generates profits to pay its victims.[120]

Although these procedural tools were created to benefit plaintiffs, they often create more problems than they solve. Merely determining whether a procedural rule is applicable consumes a great deal of court time.[121] For example, *In re Bendectin Products Liability Litigation*[122] was an appellate case entirely devoted to determining the certification of a class action. The court

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114. FED. R. CIV. P. 42.
115. FLEMING, *supra* note 83, at 238.
116. FED. R. CIV. P. 23(a).
117. FED. R. CIV. P. 23(b).
118. FLEMING, *supra* note 83, at 241.
119. *Id.* at 250.
120. *Id.*
121. Patricia Howlett, Comment, *Compensation for Drug Induced Fetal Deformities in Common and Civil Law Systems*, 2 TOURO J. TRANSNAT'L L. 243, 258 (1991).
122. 749 F.2d 300 (6th Cir. 1984).

devoted eight years to arguments on procedural issues before it even started considering whether Bendectin caused birth defects.[123]

The procedural complexity and uncertainty of these types of suits is a major reason why more than 95% of all tort claims settle out of court.[124] Thus, although the civil procedure rules appear to open the U.S. courts to plaintiffs, they actually close the door to courtroom justice in many cases.

C. Contingency Fees: The Poor Man's Key to the Courthouse

Contingency fees, the "poor man's key to the courthouse,"[125] are unique to the United States.[126] Many commentators blame contingency fees for promoting litigation because they shift the risk of loss from the plaintiff, often risk-averse, to the attorney, usually more risk-neutral.[127] While contingency fees may enable more plaintiffs to pursue a cause of action, there are many criticisms of the contingency fee system.

First, the rates are sometimes unfair. Attorneys charge a premium on their fee for bearing the risk of loss, which may become unreasonable. In the Penzoil case, for example, the successful attorneys collected more than $2 billion of a $10 billion award based on their contingency fee arrangement.[128]

Second, shifting the risk of loss to the attorney encourages excessive and unprofessional efforts to win the case at all costs.[129] Third, the system promotes "ambulance chasing," where an attorney convinces a client to bring a case for the purpose of generating income for the attorney.[130]

D. Calculation of Damages

Unlike juries in Japan, a jury calculates damages for a products liability suit as a question of fact in the United States. In addition to economic damages, juries may sometimes award

123. Howlett, *supra* note 121, at 260.
124. FLEMING, *supra* note 83, at 174-75.
125. *Id.* at 147.
126. Klein, *supra* note 64, at 121.
127. FLEMING, *supra* note 83, at 197.
128. *Id.* at 200.
129. *Id.* at 203.
130. *Id.* at 204.

punitive damages.[131] In determining the amount of punitive damages, the jury may consider the following:

> 1. The existence and magnitude of the product's danger to the public;
> 2. The cost or feasibility of reducing the danger to an acceptable level;
> 3. The manufacturer's awareness of the danger;
> 4. The nature and duration of, and reasons for, the manufacturer's failure to act appropriately to discover or reduce the danger;
> 5. The extent to which the danger was purposely created by the manufacturer;
> 6. The extent to which the defendant is subject to federal safety regulations;
> 7. The probability that compensatory damages might be awarded against the defendant in other cases; and
> 8. The amount of time that has passed since the actions sought to be deterred.[132]

Punitive damages tend to promote litigation by raising the stakes for the plaintiff and the plaintiff's attorney in a contingency fee situation[133] because the prevailing plaintiff traditionally receives punitive damages.[134] In response to this tendency, some states enacted legislation requiring the unsuccessful defendant to pay some portion of the punitive damages to the state.[135] Legislators hoped that this legislation would deter potential defendants from engaging in dangerous activities, limit the number of tort claims, and benefit the state's coffers. In reality, the legislation led to more out of court settlements, allowing the victim and the defendant to split the amount that would be payable to the state.[136] Thus, the legislation still encourages lawsuits.

Judicial remedies are much more accessible for a U.S. plaintiff than a Japanese plaintiff in a products liability suit. The U.S. system of compensating tort victims, however, is focused on the individual, and thus, is extremely inefficient. Besides the formal court system, however, alternative dispute resolution systems are

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131. California allows punitive damages to be awarded for "oppression, fraud, or malice" on the part of the defendant. CAL. CIV. CODE § 3294 (West 1970). This standard is generally interpreted as "recklessness." FLEMING, *supra* note 83, at 219.

132. JOHNSON, *supra* note 90, at 60.

133. FLEMING, *supra* note 83, at 214.

134. JOHNSON, *supra* note 90, at 61.

135. *Id.*

136. *Id.*

also available in Japan.

V. ALTERNATIVE DISPUTE RESOLUTION IN JAPAN

A. Existing Alternative Dispute Resolution Methods

Although fewer products liability lawsuits are filed in Japan than in the United States,[137] commentators feel the number of disputes concerning products liability is similar.[138] This disparity implies that the method of resolving the disputes differs.[139] Japan has three types of alternative dispute resolution systems: arbitration,[140] conciliation,[141] and administrative handling of complaints.[142] While the new Products Liability Law will not significantly change plaintiffs' recovery in court, it will alter the background for less formal negotiations between victims and manufacturers.[143] Alternative dispute resolution in Japan offers benefits to the parties involved in a products liability case, but it will not guarantee total recovery for victims of defective products. Nevertheless, through alternative dispute resolution and application of the new law, the majority of victims will receive some compensation.[144]

1. Arbitration

Book VIII of the Japanese Code of Civil Procedure governs arbitration.[145] Although arbitration alleviates some of the problems associated with litigation, such as cost and time,[146] and offers procedures that are unavailable in other dispute resolution meth-

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137. Dauvergne, *supra* note 5, at 406.

138. Henderson et al., *supra* note 82, at 284.

139. *Id.*

140. Takeshi Kojima, *Arbitration System in Japan, in* CONFLICT AND INTEGRATION: COMPARATIVE LAW IN THE WORLD TODAY 327 (Inst. Of Comparative Law ed., 1989); ARBITRATION (G. Levi ed., 1990), *reprinted in* PERSPECTIVES, *supra* note 19, at 77, 82.

141. Bruce E. Barnes & Takeshi Kojima, Comparative Conciliation and Mediation Systems: The U.S. and Japan (Dec. 1984), *in* PERSPECTIVES, *supra* note 19, at 311, 314.

142. Kojima, *supra* note 57, at 55.

143. Dauvergne, *supra* note 5, at 419.

144. *Id.* at 420.

145. MINSOHŌ arts. 786-805. Although arbitration is regarded as an important dispute resolution system in Japan, the rules governing arbitration are covered in only 20 articles, barely covering five pages of text in English. Arbitrators have a great deal of latitude in the methods they use to investigate and decide their cases. Also, the minimal number of rules limits the ways a party can attack an arbitration award.

146. Kojima, *supra* note 57, at 54.

ods,[147] parties do not utilize it as often as other alternative dispute resolution systems.[148]

Parties may not feel comfortable using arbitration to resolve a dispute because they must place all decision-making power in the arbitrator. For example, if the parties cannot reach an agreement, the arbitrator will determine the arbitration procedure,[149] the validity of the arbitration agreement,[150] and the ultimate award.[151] Also, a party may only attack the arbitration award in limited circumstances.[152] Thus, it seems unlikely that victims of defective products will turn, in large numbers, to arbitration to resolve their disputes with manufacturers.

2. Conciliation

Parties use conciliation to reach a compromise agreement, which the parties reduce to writing and file with the court. This agreement serves as the final judgment in the dispute.[153] As one of the most widely used forms of dispute resolution,[154] conciliation in Japan takes on three forms: chotei,[155] public administration mediation, and conciliation judgment.[156] Conciliation may begin with either a petition by one of the parties or by court order.[157] Conciliation is mandatory in family disputes, such as divorce, but is voluntary in civil cases.[158] The Conciliation Committees of the Summary and District Courts handle nearly one quarter of all civil disputes.[159]

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147. For example, an arbitrator is allowed to investigate on his own motion. MINSOHŌ art. 795. In court, a judge is not authorized to examine witnesses or experts, except on a party's motion. Kojima, *supra* note 140, at 87.

148. Kojima, *supra* note 140, at 78.

149. MINSOHŌ art. 794(2).

150. *Id.* art. 797.

151. *Id.* art. 799.

152. A court can only cancel the award if the arbitration procedure was incorrect, the award orders a party to perform an illegal act, or the parties lacked representation in accordance with the law. *Id.* art. 801.

153. Sheinwold, *supra* note 3, at 279.

154. Kojima, *supra* note 57, at 55.

155. Chotei literally means mediation in Japanese. OBUNSHA'S ESSENTIAL JAPANESE-ENGLISH DICTIONARY 117 (1990).

156. Barnes & Kojima, *supra* note 141, at 322.

157. *Id.* at 325.

158. *Id.* at 316-19.

159. Kojima, *supra* note 57, at 55. In 1982, the Agency for General Affairs handled 197,635 cases. The Agency for General Affairs combined with the National Life Center, local governments, and Consumers Centre resolved a total of 232,006 cases through chotei

In a chotei proceeding, the judge and two lay people[160] work with the parties to resolve the dispute. The chotei's informal procedures and the advisory role of the conciliator often eliminate the need for lawyers to participate in the proceedings.[161]

Public administration mediation is similarly informal.[162] This procedure was established because litigation was not always the most effective means for settling disputes, especially where sensitive family problems, employer-employee relations, or civil rights were concerned.[163] The conciliators in these agencies often encourage the stronger party to accept liability without fault,[164] and thus may protect consumers more effectively than courts.[165]

The conciliation judgment procedure is a hybrid of arbitration and chotei. In this proceeding, a neutral conciliator listens to both sides, and then offers a very persuasive opinion.[166]

Although conciliation offers many benefits to parties involved in a dispute, there are some valid criticisms of the procedures. For example, because the conciliator has such a strong interest in resolving the matter, he may not engage in a detailed examination of the relevant facts before forming a proposal for conciliation.[167] Even if the conciliator does investigate, certain facts essential for a satisfactory dispute resolution may never surface because the fact-finding procedures are so informal.[168]

3. Administrative Handling of Complaints

The Japanese government requires certain industries to contribute to a fund that the government uses to compensate

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procedures. *Id.*

160. Unlike the lay people who act as jurors in the United States, the lay people who work as conciliators are professionals. They earn ¥11,800 (roughly $112) per day plus expenses. Using these professional conciliators reduces the need for lawyers to participate in the process, thus reducing costs. Barnes & Kojima, *supra* note 141, at 314-16.

161. *Id.* In 1982, plaintiffs' lawyers were present in 22.8% of all conciliation cases and 44.7% of all lawsuits in summary and district courts. Similarly, defendants' lawyers were present in 11% of all conciliation cases and 25.7% of all lawsuits in summary and district courts. *Id.* at 56.

162. Barnes & Kojima, *supra* note 141, at 322.

163. Kojima, *supra* note 42, at 12, 14.

164. Barnes & Kojima, *supra* note 141, at 321.

165. *Id.*

166. *Id.* at 322.

167. Kojima, *supra* note 57, at 57.

168. *Id.*

victims of defective products in that industry.[169] This type of compensation system is regarded as the most inexpensive and efficient method of complaint resolution.[170] For example, the Act Concerning the Fund for Relief of Drug Side Effects[171] allows the Japanese government to collect a special tariff on Japanese pharmaceutical manufacturers.[172] The Japanese government uses this fund to compensate people injured by these drugs in a social security-like manner.[173] Many commentators criticize this program as biased toward the supporting industry's interests.[174] Thus, while the administrative handling of complaints may be an excellent program for compensating victims when the disputed amount is small and does not merit an individual lawsuit, the program's reputation for bias disqualifies it as an effective solution when the disputed amount is large.

B. New Alternative Dispute Resolution Methods Arising After the Enactment of the Products Liability Law

Following the enactment of the new Products Liability Law, the Japanese government began establishing a system that would better protect victims of defective products.[175] Although alternative dispute resolution offers merits, many consumers knew nothing about the existence of such programs.[176] In order to educate the public about their rights under the new law, the Japanese government held seminars about the new law in 365 locations nationwide, sent out pamphlets and books to consumers, distributed videotapes and audiotapes to local governments, and ran commercials on television, radio, and in magazines.[177] Further, the government created institutes to settle products liability disputes out of court[178] and established mechanisms to send product technology

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169. Dauvergne, *supra* note 5, at 404.

170. Robert C. Weber, *Japanese Law Edges Westward*, NAT'L L. J., Apr. 6, 1992, at 13.

171. MINPŌ, Law No. 55 of 1979.

172. Sheinwold, *supra* note 3, at 282.

173. *Id.*

174. *Product Liability Law Should Be Viewed as Challenge, Not Threat*, NIKKEI WKLY., July 24, 1995, Editorial and Commentary at 6.

175. *Government, Industry Preparing for Debut of PL Law*, COMLINE Daily News Chemicals & Materials, July 13, 1995, *available in* LEXIS, Nexis Library, ASIAPC File.

176. Hayashida, *supra* note 9.

177. *Government, Industry Preparing for Debut of PL Law*, *supra* note 175.

178. The Economic Planning Agency hopes most defective product victims will make use of an alternative dispute resolution program even after the new Products Liability Law

experts to dispute settlement panels.[179] In the future, the government plans to strengthen these programs.[180]

The official complaint-filing procedure for defective products under the new Products Liability Law will work as follows:

1. The victim will file a complaint at the Complaint Center (Center)[181] in his prefecture.

2. The Center will mediate between the individual and the manufacturer.

3. If the mediation is unsuccessful, the Center will refer the case to a Complaints Settlement Committee composed of attorneys, former judges, and specialists on the product in question.[182] This team will work as an arbitration panel and resolve the dispute.[183]

Using the Centers for dispute resolution offers consumers cheap and timely settlements. The Centers have a toll-free telephone number, so inquiries into possible claims are free for consumers.[184] The Centers also provide advice and mediation free of charge.[185] If the claim proceeds to arbitration and the damage amount is less than ¥100,000 (approximately $910), the mediation fee is ¥2000 (approximately $18).[186] Further, the Centers must resolve all disputes within 90 days.[187]

The program undoubtedly goes far in educating the general population about their new rights under the Products Liability Law

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is effective because court proceedings cost the government, the consumer, and the manufacturer time and money. *PL Ho to Kurashi* [*Products Liability Law and Lifestyle*], YOMIURI SHINBUN, June 30, 1995, at 9. For example, if someone filed a lawsuit under the new Products Liability Law for damages of ¥5,000,000 (approximately $45,500), it would cost about ¥500,000 (approximately $4550) in court fees and take at least two years in litigation due to the newness of the law and small number of attorneys. *PL Tokushu* [*Product Liability Special Edition*], KASHIKOI SHŌHISHA [SMART CONSUMER], July 1, 1995, at 2.

179. *Government, Industry Preparing for Debut of PL Law, supra* note 175.

180. *EPA's FY '96 Budget Requests Up 4.7%*, Japan Economic Newswire, Aug. 28, 1995, *available in* LEXIS, ASIAPC Library, Japan File. The budget request included ¥2,680 million to strengthen the government-run Better Living Information Center. *Id.*

181. Complaint Centers exist in all prefectures for home appliances, automobiles, gas and oil appliances, chemical products, bicycles, furniture, stationery, tableware, daily necessities, disaster prevention products, cosmetics, pharmaceuticals, and foods. Hayashida, *supra* note 9.

182. *EPA Releases Guidelines on Product-Liability Law*, NIKKEI WKLY., June 26, 1995, Economy at 2.

183. Hayashida, *supra* note 9.

184. *Id.*

185. *Id.*

186. *EPA Releases Guidelines on Product-Liability Law, supra* note 182, at 2.

187. Hayashida, *supra* note 9.

and improving recovery for victims. This program, however, may not provide much assistance to consumers because the prefectural centers have a policy of not releasing much of their gathered information.[188] Also, the program is likely to face the same problems currently encountered in conciliation and in the administrative handling of complaints. As government-run centers, the mediators will have every incentive to settle cases quickly and little motivation to work as advocates for the victims' rights. Thus, although the victims may recover more with the new Products Liability Law and prefectural centers, satisfying the purpose of the Products Liability Law,[189] they still will not recover as completely as their rights under tort law would require. Fortunately, manufacturers are changing the way they produce and market products to reduce exposure to liability.

VI. SOCIAL CHANGES SINCE THE PRODUCTS LIABILITY LAW'S ENACTMENT

The new Products Liability Law has undoubtedly forced businesses and consumers to become more safety conscious.[190] Product liability insurance policies are also in greater demand.[191] Roughly one-third of manufacturing firms and the majority of Japanese firms with more than 1000 employees plan to take out products liability insurance.[192] Insurance does not completely resolve, however, the products liability problem. Policy payouts are usually limited and do not cover cases of clear negligence.[193]

To avoid the risk of a products liability lawsuit, companies are strengthening their products' safety.[194] For example, Matsushita Electric Company now "double checks and triple checks" all

188. *Japan's Product Liability Law Poised to Go Into Effect*, Japan Economic Newswire, June 30, 1995, *available in* LEXIS, Nexis Library, Japan File.

189. *See* SEIZŌBUTSU SEKININ HŌ, *supra* note 2.

190. Noriko Sato, *Product Liability Law to Debut in Japan*, Japan Economic Newswire, June 28, 1995, *available in* LEXIS, Nexis Library, Japan File.

191. The product liability law is expected to create a ¥200 billion market for the nonlife insurance industry. *Product Liability Insurance Growing Popular*, Jiji Press Ticker Service, July 3, 1995, *available in* LEXIS, Nexis Library, Japan File.

192. *Id.*

193. *Product Liability Law Should Be Viewed as Challenge, Not Threat*, *supra* note 174, at 6.

194. Sato, *supra* note 190.

products leaving the warehouse.[195] A large toy manufacturer is coating the small parts of its toys with a chemical that tastes bad, discouraging children from putting the small parts in their mouths.[196] New appliances feature safety devices, such as an electric heater with a built-in sensor that automatically turns off the heater if it senses vibrations or if the heater topples.[197]

In addition to increasing the safety level of their products, manufacturers are teaching salesmen a new sales approach. Rather than merely emphasizing a product's positive characteristics during a sales presentation, salesmen now explain the product's proper usage and warn of possible consequences of improper usage.[198]

Similarly, drug manufacturers are reviewing their package inserts and making more voluntary disclosures of possible adverse reactions.[199] Further, many drug and medical equipment manufacturers are refraining from concealing the recalls of their defective products.[200]

In extreme cases, some manufacturers, fearing liability, are leaving the market.[201] Both Shin-Etsu Chemical Company and Toshiba Silicone Company, who dominated the silicone market, shut down because of the new Products Liability Law.[202] Japanese manufacturers who used the silicone products in their own products are now forced to seek foreign sources of silicone.[203]

As for consumers, awareness of the new Products Liability Law seems to discourage people from merely suffering the losses they experience with defective products.[204] Knowledge of the

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195. *Id.* (quoting Shoji Fuji, Public Relations Department of Matsushita Electric Industrial Company).

196. *PL Tokushu* [*Product Liability Special Edition*], *supra* note 178, at 4. The company uses Disodium Benzoate, which is the most bitter tasting substance. *Id.*

197. *New Electric Heaters Feature Safety Devices*, Japan Economic Newswire, Aug. 4, 1995, *available in* LEXIS, Nexis Library, Japan File.

198. *Anta no Kaisha mo Abunaizo!!* [*Your Company Is Also In Danger!!*], GENDAI (Japan), June 30, 1995, at 17.

199. *Enforcement of PL Law and Industry's Reactions*, COMLINE Daily News Biotechnology & Med. Tech., June 26, 1995, *available in* LEXIS, Nexis Library, Japan File.

200. *Id.*

201. Norri Kageki, *Product Liability Law Scares Silicone Firms Out of Market, Toshiba Silicone, Shin-Etsu Stop Supplying Coating for Needles*, NIKKEI WKLY., Aug. 28, 1995, Industry Digest at 9.

202. *Id.* Bunjiro Murai, Director of Toshiba Silicone Co., explained they "don't want to risk a lawsuit." *Id.*

203. *Id.*

204. *PL Ho to Kurashi, supra* note 178, at 9.

Products Liability Law, however, is still limited.[205] Thus, many consumers still do not recover damages due to defective products.

VII. CONCLUSION

Japan's new Products Liability Law improves recovery for victims of defective products both substantively and systematically. Substantively, it changes the standard of liability from negligence to strict liability, and systematically, it provides programs that allow more individuals to recover for their injuries.

Japanese civil procedure rules and other factors limit plaintiffs' ability to recover in court. The courts are not very accessible to individuals because the rules are inflexible. U.S. courts, in contrast, focus on the individual, and thus, have more flexible procedural rules. U.S. courts are far more open to plaintiffs than Japanese courts, but at a cost. The U.S. judicial system operates inefficiently because litigants spend so much time arguing about the procedural rules and so much money on legal fees.

The development of alternative dispute resolution in Japan diminishes the effects of an inaccessible court system. Although the lack of attention to individual plaintiffs may deny recovery to the full extent that tort law would demand, the alternative dispute resolution system's establishment and further growth, both encouraged by the new Products Liability Law, provide at least some recovery for products liability claims. The Products Liability Law thus offers more compensation to victims of defective products, especially when the claim is minor.

The new law has encouraged manufacturers to accept more responsibility for the products they place on the market. Not only are manufacturers purchasing insurance policies to cover whatever liability they may face, but they are also taking more preventative measures to avoid injuring consumers. The Products Liability Law, in this sense, most broadly improves consumer welfare in Japan.

Nancy L. Young[*]

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205. In a recent survey, 39% of those surveyed knew of products liability and understood the contents of the new law; 31% had only heard of the term products liability; and 30% had never heard of products liability. *PL Tokushu*, *supra* note 178, at 7.

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