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WHY JAPAN'S NEW PRODUCTS LIABILITY LAW ISN'T

Andrew Marcuse

Abstract: The statutory language of Japan's 1994 Products Liability Act envisions a strict liability regime that would replace the previous negligence-based regime. This Comment reviews the development of the previous products liability regime, then analyzes the 1994 Products Liability Act in relation to Civil Code articles 415, 570, and 709 as well as EC Directive 85/374, and the 1975 Draft Model Law on Products Liability. The Comment concludes that because the 1994 Products Liability Act incorporates the Civil Code articles and their judicial interpretations, without addressing any of several structural and procedural barriers to suit, the 1994 Products Liability Act cannot and will not impose strict liability on manufacturers.

I. INTRODUCTION

On July 1, 1994, the Japanese Diet passed a new and long-anticipated¹ Products Liability Act (*Seizōbutsu sekinin hō*) ("the Act"), which went into effect on July 1, 1995.² The Act purports to ease plaintiff's burden by introducing to Japan a strict liability regime.³ However, a closer examination of the Act reveals that it changes very little. While the Act accomplishes several noteworthy goals, such as defining important terms like "defect," "product," and "producer,"⁴ and freeing plaintiffs from the burden of proving a manufacturer's negligence,⁵ in many ways the new Act merely codifies previous decisions rendered by Japanese courts.⁶

¹ See Eugene A. Danaher, *Products Liability Overhaul: Strict Liability Is Coming To Japan*, NAT'L L. J., Feb. 7, 1994, at 25; Robert C. Weber, *Japanese Law Edges Westward*, NAT'L L. J., Apr. 6, 1992, at 13. Various Japanese groups and agencies proposed products liability reform as early as 1975 and as recently as December, 1993. See, e.g., Yasuhiro Fujita, *Japan*, in PRODUCTS LIABILITY: AN INTERNATIONAL MANUAL OF PRACTICE 89 (Warren Freedman ed., 1987) (translation of 1975 Draft Model Law On Product Liability); Danaher, *supra*, at 25 (citing three semi-official advisory council reports).

² Law No. 85 (1994) [hereinafter PLA].

³ Article 1 of the Act reads as follows:

The purpose of this Act is to contribute to the stability and improvement of the national livelihood, the sound development of the national economy, and the protection of injured persons by stipulating the liability of producers, or the like for damages arising to a person's life, body, or property caused by defective products.

PLA, art. 1, translated in ZENTARO KITAGAWA, *DOING BUSINESS IN JAPAN*, app. 4D-1 (1995) (emphasis added).

⁴ *Id.* Article 2 of the Act defines "producer."

⁵ 1994 Japan Bus. L. Guide (CCH) ¶ 99-070, at 100,063.

⁶ This thesis builds upon two theories promoted by Frank Upham. The first theory is that in Japan, cases "can embody and declare the existence of a new social consensus that is politically binding on the

Moreover, the Act does not ameliorate certain structural barriers and procedural disincentives that may discourage plaintiffs in single-injury cases from seeking legal redress.

Part I of this Comment provides a brief introduction to Japan's legal institutions. Part II describes how Japanese courts developed the negligence-based products liability regime into a near-strict liability regime and details the legislative and administrative responses to that judicial development. Part III analyzes the 1994 Products Liability Act in relation to the 1975 Draft Model Law on Product Liability, European Economic Community Council Directive 85/374,⁷ the prior negligence-based products liability regime, and Japan's greater legal infrastructure. This Comment concludes that the new Act merely codifies the previous judicial development of the relevant Civil Code articles, reinforces political restraints on judicial lawmaking,⁸ and demonstrates the Diet's preference for informal governance and dispute resolution.

II. BACKGROUND: A BRIEF INTRODUCTION TO THE JAPANESE LEGAL SYSTEM

The modern history of Japan's legal infrastructure is well-documented.⁹ Until the mid-nineteenth century, Japan possessed a feudal law system largely designed to ensure the continued strength of the hereditary samurai class.¹⁰ During the Meiji Restoration,¹¹ civil, commercial, and criminal codes based on French and German models supplanted this feudal

society as a whole as well as the specific defendants." FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 216 (1987). The second is that legislation follows litigation as a means of institutionalizing and controlling societal change. *Id.* at 18-21. See also 1993 Japan Bus. L. Guide (CCH) ¶10-620, at 8,501.

⁷ See RALPH H. FOLSOM, *EUROPEAN UNION BUSINESS LAW: SOURCEBOOK 3-B-1*, available in WESTLAW, TP-ALL Database (1995). The new Act is largely based on Council Directive 85/374. See *infra* Part III.

⁸ As one scholar puts it, "The courts plow the field, and the legislature freezes it." Interview with John O. Haley, Garvey, Schubert, & Barer Professor of Law, University of Washington School of Law, in Seattle, WA. (Sept. 24, 1995).

⁹ There are any number of outstanding treatises and textbooks on Japan's legal history and institutions. These include, but are not limited to: JOHN O. HALEY, *AUTHORITY WITHOUT POWER* (1991); JOHN H. MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* (John H. Merryman, et al. eds., 1994); *LAW IN JAPAN* (Alfred T. Von Mehren ed., 1963); *THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES & MATERIALS* (Hideo Tanaka ed., 1976).

¹⁰ See JOHN W. HALL, *GOVERNMENT AND LOCAL POWER IN JAPAN 500 TO 1700*, 370-74 (1966).

¹¹ The Meiji period dates from 1868 to 1912. See, e.g., Chin Kim & Craig M. Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L. AND COMP. L. Q. 491, 494 (1979).

law system.¹² Civil law systems generally discourage judicial creativity,¹³ but the Japanese judiciary demonstrated remarkable interpretive skills during the early part of this century¹⁴ as they synthesized Japanese cultural values and the rules imposed by the new codes.¹⁵

A number of alternative dispute resolution ("ADR") mechanisms also developed during this period.¹⁶ These ADR mechanisms include *kankai* (reconciliation), *chōtei* (mediation), and mediation by police.¹⁷ Some authors trace these mechanisms back to Tokugawa-era resolution processes instigated by the peasant and merchant classes in response to the perceived inadequacies of the *bakufu's* legal system.¹⁸ Others believe that the Tokugawa-era legal system met disputants' needs,¹⁹ and that ADR mechanisms originated in twentieth-century legislation.²⁰ There is no doubt, however, that ADR and other extra judicial mechanisms remain central to the Japanese legal system in the late twentieth century.²¹

¹² HALEY, *supra* note 9, at 70.

¹³ See JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 36 (2d ed. 1987).

¹⁴ HALEY, *supra* note 9, at 85; see also Kenzo Takayanagi, *Development of Japanese Law Since 1867*, in *THE JAPANESE LEGAL SYSTEM* 164, 188 (Hideo Tanaka ed., 1976) (originally published as *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *LAW IN JAPAN*, *supra* note 9, at 15-40).

¹⁵ HALEY, *supra* note 9, at 85 ("In lawsuit after lawsuit where the consequence of casting traditional relationships in terms of enforceable rights produced harsh results . . . , the courts modified and adapted the rules of the code to conform to accepted, customary norms.")

¹⁶ Takeyoshi Kawashima, *Dispute Resolution In Contemporary Japan*, in *LAW IN JAPAN*, *supra* note 9, at 40, 53-54, 59.

¹⁷ *Id.* at 52-56. Kawashima does not give the Japanese equivalent for "mediation by police."

¹⁸ *Id.* at 53 (citing the Stenographic Record of the House of Representatives' Committees in the 51st Session of the Imperial Diet (1926)). *Bakufu* is Japanese shorthand for the Tokugawa shogunate. See SANSEIDO'S NEW CONCISE JAPANESE-ENGLISH DICTIONARY 44 (1985).

¹⁹ See HALEY, *supra* note 9, at 57-58 (noting the role of Tokugawa magistrates in the development of private law).

²⁰ Hideo Tanaka, *Jittei Hōgaku Nyūmon [Introduction to the Study of Positive Law]*, translated in part in *THE JAPANESE LEGAL SYSTEM*, *supra* note 9, at 492, 493-495 (Hideo Tanaka ed., 1976). These latter two theories undercut arguments that the Japanese have a cultural dislike of litigation and a predisposition towards ADR (for an example of a culturalist argument, see Kim & Lawson, *supra* note 11, at 502). Culturalists and rationalists alike are criticized for overstating their cases in Hideo Tanaka, *The Role of Law in Japanese Society: Comparisons with the West*, in 19 *U. B. C. L. REV.* 375 (1985).

²¹ See UPHAM, *supra* note 6, at 18-22 (describing administrative processes for resolving pollution and sex-discrimination complaints); Richard S. Miller, *Apples vs. Persimmons: The Legal Profession in Japan and the United States*, 39 *J. LEGAL EDUC.* 27, 36 (1989) (describing arbitration of insurance disputes arising out of auto accidents); Koichi Hamada et al., *The Evolution and Economic Consequences of Product Liability Rules in Japan*, in *LAW AND TRADE ISSUES IN THE JAPANESE ECONOMY* 83, 85-88 (G.R. Saxonhouse & Kozo Yamamura eds., 1986) (describing government and industry involvement in "consumer centers," where injured consumers negotiate for compensation). However, in some areas ADR appears to impede progress. See Tamie L. Bryant, *Marital Dissolution In Japan: Legal Obstacles and Their Impact*, in *LAW AND SOCIETY IN CONTEMPORARY JAPAN* 221, 225-26 (John O. Haley ed., 1988). The predilection for informal, extrajudicial resolution of products liability disputes is explored *infra*.

Japan's legal system underwent further change. After the Second World War, the 1947 Constitution established an American-style independent judiciary with inherent powers of broad review,²² but did not impose a guaranteed right to jury trial²³ or other common law mechanisms, such as formal discovery. As a result, Japan's modern legal system is a synthesis of European civil law institutions, American common law institutions, and Japanese ADR institutions.²⁴ However, it remains a very compact system. There may be as few as two thousand judges in all of Japan.²⁵ There is little chance of increasing their numbers, because virtually all judges and trial attorneys or litigators graduate from one relatively small institute,²⁶ and recent graduates prefer to become litigators rather than join the judiciary.²⁷ The small judiciary handles a tremendous caseload,²⁸ although some pressure is relieved by funneling disputes into ADR.²⁹

In products liability suits, as in other suits, the Japanese legal system poses barriers to litigation. For example, clients must post substantial retainer fees up front,³⁰ and must also disburse expensive court filing fees.³¹ However, clients need not subsidize discovery costs, because

²² Lawrence W. Beer, *Japan's Constitutional System and Its Judicial Interpretation*, in LAW AND SOCIETY IN CONTEMPORARY JAPAN, *supra* note 21, at 14. The creation of Japan's postwar Constitution is one of the most interesting episodes in Japan's modern history. Charles L. Kades, *The American Role in Revising Japan's Imperial Constitution*, 104 POL. SCI. Q. 215 (1989), offers a fascinating account.

²³ Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation in Japan: A Structural Analysis*, 25 INT'L LAW. 443, 449 n.32 (1991). Legislative act provided jury trial of right in serious criminal cases between 1928 and 1943, but the statute was suspended during the Second World War and never renewed. *Id.* at 450 n.34. Some scholars have long held that the jury system would be an appropriate addition to modern civil tort actions in Japan. See, e.g., Ichiro Kato, *The Concerns of Japanese Tort Law Today*, in 1 L. IN JAPAN: AN ANNUAL 65, 91 (1967) (Rex Coleman trans.).

²⁴ Younghee Jin Ottley & Bruce L. Ottley, *Product Liability In Japan: An Introduction To A Developing Area Of Law*, 14 GA. J. INT'L. & COMP. L. 29, 32 (1984).

²⁵ J. Mark Ramseyer, *The Cost of the Consensual Myth: Barriers to Antitrust Enforcement and Institutional Barriers to Litigation In Japan*, 94 YALE L. J. 604, 634 (1985). See also HALEY, *supra* note 9, at 106-108.

²⁶ In order to become a judge, prosecutor, or trial attorney or litigator (*bengoshi*), one must graduate from the Legal Training and Research Institute, which admits no more than 500 applicants per year. Edward I. Chen, *The National Law Examination of Japan*, 39 J. LEGAL EDUC. 1, 7 (1989).

²⁷ *Id.* at 18-19; Miller, *supra* note 21, at 27. Yet, trial attorneys or litigators remain nearly as scarce as judges – there are only 13,000 *bengoshi* in Japan. Miller, *supra* note 21, at 27. Japan thus suffers a dearth of trial attorneys or litigators when compared to other civil law countries, much less the United States. See Chen, *supra* note 26, at 20.

²⁸ HALEY, *supra* note 9, at 108.

²⁹ See Miller, *supra* note 21.

³⁰ Miller, *supra* note 21, at 34; Ramseyer, *supra* note 25, at 633; Yamanouchi & Cohen, *supra* note 23, at 448-49; Tsuneo Matsumoto, *Japan*, 15 U. HAW. L. REV. 523, 578 (1993) (part of a symposium entitled *Beyond Compensation: Dealing with Accidents in the 21st Century*).

³¹ Yamanouchi & Cohen, *supra* note 23, at 453; Miller, *supra* note 21, at 33.

discovery (as it is known in the United States and elsewhere) is nonexistent.³² Also, Japanese trials are unlike their Western counterparts in that there may be delays not only in securing a trial date, but also intermittent and lengthy delays throughout the trial process itself.³³ Damage awards are limited, including damages for pain and suffering;³⁴ there is some evidence that the judiciary independently establishes and applies arbitrary figures.³⁵ Often, injunctive relief is not a viable alternative.³⁶ It is widely believed that this combination of scarce counsel, high up-front costs, lack of discovery, substantial delay, and limited remedies significantly reduces the incidence of litigation in Japan.³⁷ These elements also affected the development of Japan's negligence-based products liability regime.

III. THE DEVELOPMENT OF JAPAN'S PREVIOUS PRODUCTS LIABILITY REGIME

Prior to the enactment of the 1994 Products Liability Act, Japan's products liability law was unconsolidated.³⁸ Nominally founded on several

³² Yamanouchi & Cohen, *supra* note 23, at 445-47.

³³ Fujita, *supra* note 1, at 40; J. Mark Ramseyer, *The Reluctant Litigant Revisited*, 14 J. JAPANESE STUD. 111 at 116-17 (1988). According to Fujita, it appears that Japanese trials are made up of disjointed and intermittent hearings largely because there is no jury being pressured for a quick resolution.

³⁴ Yamanouchi & Cohen, *supra* note 23, at 451.

³⁵ Miller, *supra* note 21, at 35; HALEY, *supra* note 9, at 115; Matsumoto, *supra* note 30, at 579.

³⁶ HALEY, *supra* note 9, at 118.

³⁷ There are many theories about the relative lack of litigation in Japan. Some authors cite native cultural factors. See, e.g., Kim & Lawson, *supra* note 11, at 501. Others proffer economic arguments. See, e.g., J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amount and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989); but see Robert B. Leflar, *Personal Injury Compensation Systems in Japan: Values Advanced and Values Undermined*, 15 U. HAW. L. REV. 742, 755-756 (1993) (criticizing Ramseyer for sweeping generalizations). And to further complicate things, reported litigation rates demonstrate no steady trend. See, e.g., HALEY, *supra* note 9, at 98, 119 (rising rate of first-instance trial proceedings and new civil actions); Yamanouchi & Cohen, *supra* note 23, at 443 n.2 (civil cases increasing through 1984); Matsumoto, *supra* note 30, at 577 (cases filed in district courts dropped from 220,000 in 1980 to 190,000 in 1990). Still, the perception of nonlitigiousness shows little sign of abating, even among the Japanese. See, e.g., Ramseyer, *supra* note 33, at 112; Kim & Lawson, *supra* note 11, at 506-07. In the end, the truth probably lies somewhere in the middle: perhaps traditional Japanese values slightly depress the inclination to litigate, which inclination is strongly reinforced by the substantial economic and structural disincentives to suit. Cf. Tanaka, *The Role of Law in Japanese Society*, *supra* note 20, at 386-87 (noting that the traditional Japanese attitude towards law is "noticeably different" from Western attitudes, and also noting the development of Japanese "rights consciousness").

³⁸ David Cohen & Karen Martin, *Western Ideology, Japanese Product Safety*, 19 U. B. C. L. REV. 315, 324 (1985).

Civil Code articles,³⁹ the substance of Japanese products liability law developed through several distinct mechanisms. First, creative judicial interpretation of the Civil Code articles resulted in several groundbreaking decisions.⁴⁰ Contemporaneously, mediation produced structured settlements in large, highly publicized suits as well as more mundane cases.⁴¹ Then, subsequent legislation codified both judicial decisions *and* extra judicial settlements, and created new institutions to resolve similar situations without resorting to the legal system.⁴²

A. *The Contract Approach to Products Liability*

The foundation of modern Japanese products liability law rests upon Civil Code articles 415, 570, and 709.⁴³ Articles 415 and 570 sound in contract, whereas as article 709 sounds in tort.⁴⁴ Article 415 provides a contractual remedy if an obligor negligently fails in performing an obligation or duty.⁴⁵ In a seller-buyer relationship, the seller must overcome a presumption of negligence.⁴⁶ Interestingly, privity of contract is not an absolute requirement.⁴⁷ A seller may rebut the presumption of liability by proving the absence of defect at the time of sale, or by utilizing other standard contractual defenses, such as express disclaimers, statutes of limitation or repose, and liquidated damages clauses.⁴⁸ While article 415 generally limits damages to the replacement cost or value of the subject

³⁹ Zentaro Kitagawa, *Products Liability, in DOING BUSINESS IN JAPAN XIII* §§ 4.01[1], 4.07[1] (Zentaro Kitagawa ed., 1989) [hereinafter Kitagawa (1989)]. The Civil Code provisions remain relevant not only because they are the foundation of all earlier products liability law in Japan, but also because the new Act is prospective; thus, any products liability actions arising out of incidents that occurred prior to July 1, 1995 (the activation date of the new Act) will base liability on the Civil Code articles.

⁴⁰ *Id.* § 4.05[5].

⁴¹ Cohen & Martin, *supra* note 38, at 330-31.

⁴² See discussion of subsequent legislation and administrative remedies, *infra* Part III.D. The reader may also wish to consider Professor Haley's comment, *supra* note 8.

⁴³ Kitagawa (1989), *supra* note 39, §§ 4.03[2], 4.06[2].

⁴⁴ Kitagawa (1989), *supra* note 39, §§ 4.03[2], 4.06[2].

⁴⁵ The text of article 415 is as follows: "[i]f an obligor fails to perform in accordance with the main sense of the obligation-duty, the obligee may demand compensation for damages; the same shall apply in the cases where performance becomes impossible for any reason imputable to the obligor." Kitagawa (1989), *supra* note 39, § 4.06[1], § 4.06[2].

⁴⁶ Cohen & Martin, *supra* note 38, at 333.

⁴⁷ Kitagawa (1989), *supra* note 39, § 4.06[1] (discussing Kanmaki v. Ohashi, 725 Hanrei Jihō 19 (Gifu Dist. Ct., Dec. 27, 1973)).

⁴⁸ Kitagawa (1989), *supra* note 39, § 4.06[3]; Fujita, *supra* note 1, at 8-9. These defenses also apply to suits under article 570. Fujita, *supra* note 1, at 5.

matter of the suit, "expanded damages" (consequential damages) may be recovered as well.⁴⁹

Unlike article 415, article 570 specifically addresses defective products,⁵⁰ establishing that sellers are strictly liable for injuries caused by products with latent defects.⁵¹ However, liability under article 570 is available only if the purchaser had no knowledge of the defect at the time of purchase,⁵² and liability exists only where there is privity between the seller and the purchaser.⁵³ Damages are limited to the price of the product.⁵⁴ An injured purchaser may subrogate the seller's claim against the manufacturer in the event that a seller is insolvent, but subrogation is otherwise unavailable.⁵⁵ Thus, although article 570 establishes a seller's strict liability, it is disfavored because of its severely limited scope and equally limited remedies.⁵⁶

B. *The Tort Approach to Products Liability*

The majority of products liability actions are brought in tort, under article 709.⁵⁷ Like article 415, article 709 is broadly worded⁵⁸ and applied to the products liability sphere through liberal judicial construction.⁵⁹ Unlike article 415, there is no presumption of manufacturer negligence.⁶⁰ The plaintiff must prove that an injury occurred, the existence of a defect, a causal link between that defect and the injury, and the fault of the manufac-

⁴⁹ Kitagawa (1989), *supra* note 39, § 4.06[1]; *see also* Ottley & Ottley, *supra* note 24, at 43 (if the injured party proves both adequate causation and foreseeability of harm, Civil Code article 416 permits recovery of damages arising through "special circumstances").

⁵⁰ Fujita, *supra* note 1, at 4.

⁵¹ Kitagawa (1989), *supra* note 39, § 4.06[2].

⁵² Fujita, *supra* note 1, at 5. Defendant's lack of knowledge is not a defense.

⁵³ Fujita, *supra* note 1, at 5.

⁵⁴ Fujita, *supra* note 1, at 4. Expanded damages are not available, though damages interest at the judicial rate (five percent per annum).

⁵⁵ Consonant with article 415, subrogation is permitted by reading together article 570 and article 423. Fujita, *supra* note 1, at 5.

⁵⁶ Fujita, *supra* note 1, at 5; *cf.* Ottley & Ottley, *supra* note 24, at 45 (contract theory as a whole is "largely a theoretical basis for recovery"). *But see* KIJURO ARITA, PRODUCTS LIABILITY IN JAPAN LAW: PRINCIPLES AND CASES 3, 14, 17 (1980) (informal publication, Kinki University, Osaka, Japan) (reporting three cases decided under article 415, involving prescription drugs, imported badminton sets, and automobile steering wheels).

⁵⁷ Fujita, *supra* note 1, at 12 ("[p]ractitioners and the courts clearly prefer to utilize the tort approach of Article 709 . . ."); *see also* Ottley & Ottley, *supra* note 24, at 45.

⁵⁸ Article 709 reads, "[o]ne who violates the rights of another intentionally or negligently is responsible to render compensation for harm arising therefrom." Fujita, *supra* note 1, at 12.

⁵⁹ Fujita, *supra* note 1, at 12.

⁶⁰ Kitagawa (1989), *supra* note 39, § 4.05[5].

turer or distributor in making or marketing the product.⁶¹ In defending against a products liability suit in tort, manufacturers or sellers may invoke a number of arguments.⁶² As with claims in contract, defendants may raise general denials, introduce evidence of adequate warning, and apply disclaimers and statutes of limitation or repose. Comparative fault may also play a role.⁶³ The defendant may also attack the plaintiff's proof of causation, plead unforeseeability, or raise state-of-the-art defenses.⁶⁴

C. *A Brief Analysis of Reported Products Liability Decisions*

A true understanding of Japan's previous products liability regime can be gained only by analyzing reported products liability decisions.⁶⁵ Here, analysis of reported decisions demonstrates that Japan's previous products liability regime evolved away from the simple,⁶⁶ negligence-based Civil Code articles towards a near-strict liability standard that foreshadowed

⁶¹ Fujita, *supra* note 1, at 13. Because no contractual relationship exists to create a duty on the part of the manufacturer or distributor towards the plaintiff, the plaintiff must show that the relevant party's intentional or negligent actions could produce the injury in question.

⁶² Fujita, *supra* note 1, at 25. The government may find itself defending such suits as well—in fact, it has been named a party defendant in nearly every mass-injury products liability case of record. *See, e.g.* Fujita, *supra* note 1, at 47-54. Obviously, there is no rule of sovereign immunity in Japan. Kitagawa (1989), *supra* note 39, § 4.05[6]. An in-depth analysis of the government's role in products liability cases is beyond the scope of this Comment.

⁶³ Adachi et al., *Japan, in 2 PRODUCTS LIABILITY: A MANUAL OF INTERNATIONAL PRACTICE* 45 (Stucki & Allenberger, eds., 1981).

⁶⁴ Fujita, *supra* note 1, at 25.

⁶⁵ At first, case analysis seems an inappropriate tool for investigating Japanese law because *stare decisis* is not officially recognized in civil law countries. *Cf.* MERRYMAN, *supra* note 13, at 22; Hamada et al., *supra* note 21, at 88. In addition, Japanese judges flexibly wield their powers of statutory interpretation. Hamada et al., *supra* note 21, at 88; 1993 Japan Bus. L. Guide, *supra* note 6, ¶ 10-620. *But see* Ottley & Ottley, *supra* note 24, at 56 ("courts in civil law countries do not have the same power of interpretation as common law courts"). In context, however, it seems that Ottley and Ottley are addressing the absence of *stare decisis*, not a lack of interpretive powers; this impression is reinforced by their citation to Merryman. Ottley & Ottley, *supra* note 24, at 56 n.133. They likely intend the reader to explore Merryman's Chapter VII (entitled "The Interpretation of Statutes") which concludes that civil law courts have *de facto* powers of statutory interpretation, but lack a formal tradition of *stare decisis*. MERRYMAN, *supra* note 13, at 39-47 (especially 46-47).

Yet, Japanese judges endeavor to harmonize the outcomes of similar cases. Miller, *supra* note 21, at 35; Ramseyer & Nakazato, *supra* note 37, at 269, 270. Thus, their decisions are relatively accurate predictors of future outcomes, (and well worth analyzing in that light). *See* Miller, *supra* note 21, at 35; Ramseyer & Nakazato, *supra* note 37, at 269, 270. Indeed, courts' decisions in Japan also undergird many later legislative and administrative responses to products liability (the relationship between court cases and later legislative and administrative actions are explored in depth below).

⁶⁶ Hamada et al., *supra* note 21, at 88, 89.

the provisions of the sophisticated new Act.⁶⁷ The cases may be divided into at least two categories: single-injury cases⁶⁸ and mass-injury cases. While there may be any number of consumer injuries caused by defective products,⁶⁹ very few single-injury incidents⁷⁰ become the subject of a suit. Plaintiffs have prevailed in single-injury cases characterized by several factors: an obvious causal link between injury and defect;⁷¹ a relatively self-evident, easy to prove, or well-documented defect;⁷² and a clear breach of a clear duty on the part of the manufacturer or seller.⁷³

Depending on the product involved or the injury suffered, courts require a lesser burden of proof than the Civil Code articles would other-

⁶⁷ The new statute is relatively sophisticated in that it specifically addresses products liability, defines what constitutes "defect," establishes explicit defenses, and encompasses periods of limitation and repose — all in one small package. See KITAGAWA, *supra* note 3.

⁶⁸ All single-injury cases are cited from ARITA, *supra* note 56. Again, there is a very small universe of reported single-injury cases: other authors reference many of the 26 single-injury tort cases collected by Arita. See, e.g., Cohen & Martin, *supra* note 38, at 330 n.66, 331 n.72; Fujita, *supra* note 1, at 54 n.75, 55 nn.76, 77; Hamada et al., *supra* note 21, at 92 n.22; Kitagawa (1989), *supra* note 39, § 4.05[9] n.37; Ottley & Ottley, *supra* note 24, at 51 n.112 (citing a lower court decision for which Arita supplies a later appellate decision). However, these perfunctory citations do not provide as much detail as Arita's collection. Therefore, citation is to Arita's more complete work.

Hamada et al., report fewer than one hundred cases (encompassing both single-injury and mass-tort suits) on the books as of 1982, while they and others report a rapid increase in cases over time. Hamada et al., *supra* note 21, at 95; see also Kitagawa (1989), *supra* note 39, § 4.04[2]. It is important to remember that they are reporting new case *decisions*, not new case *filings*. Many of the cases decided in the late 1970s and early 1980s were suits involving mass-tort victim's associations—a glut of cases initiated in the late 1960s and early 1970s. See, e.g., Fujita, *supra* note 1, 49-54. Recall that at least one scholar reports a substantial decrease in the number of new case *filings*. See Matsumoto, *supra* note 30 (reporting a drop in new case filings between 1980 and 1990).

⁶⁹ Hamada et al., *supra* note 21, at 95.

⁷⁰ Single-injury cases are defined here as those cases involving a single defective product which causes injury. More than one plaintiff may be injured (such as in a car accident arising out of a defective repair job), but no more than one set of plaintiffs is exposed to the danger. This term is suggested by Cohen and Martin's observation that "[w]hether the plaintiff's injuries occur *in isolation* or instead are part of a larger products liability disaster will likely have a significant impact . . . The *isolated plaintiff* . . . will often have considerable difficulty." Cohen & Martin, *supra* note 38, at 330 (emphasis added); see also Fujita, *supra* note 1, at 70. Kitagawa also uses the term, but does not define exactly what he means. See, e.g., Kitagawa (1989), *supra* note 39, § 4.04[1]. Here, the term is used to better demonstrate the disparate treatment of mass-tort cases.

⁷¹ See, e.g., ARITA, *supra* note 56, at 50-52, 55 (citing four cases where defective propane gas containers or pipes leaked and exploded, causing death and injury).

⁷² See, e.g., ARITA, *supra* note 56, at 39, 43, 47, 70 (citing four cases respectively involving *fugu* poisoning at a restaurant). The poisonous nature of *fugu*, or blowfish, is an obvious danger. See Hamada et al., *supra* note 21, at 92. Other examples include an improperly installed hot water spigot; a toxic root extract (known to be poisonous in certain quantities); and a defective copier (well-documented by plaintiff and defendant).

⁷³ See, e.g., ARITA, *supra* note 56, at 50-52, 55, 59 (manufacturer of defective car seat had duty to conform to industry and government minimum standards; other defendants obviously had duties not to poison, scald, or electrocute their customers).

wise indicate.⁷⁴ Manufacturers of food products and pharmaceuticals, as well as physicians at well-equipped hospitals, must overcome a presumption of negligence imposed by the court-created "special negligence"⁷⁵ rule. Yet, it appears that in order to prevail a plaintiff still must positively prove the existence of a defect.⁷⁶ Where such proof is lacking or difficult to achieve, a plaintiff will not prevail.⁷⁷ Moreover, damages will be reduced in proportion to a plaintiff's degree of fault.⁷⁸ In some cases, comparative fault may offset most of the award.⁷⁹

On the other hand, plaintiffs in mass-tort suits and large-scale products liability cases⁸⁰ have been uniformly successful, whether by

⁷⁴ Fujita, *supra* note 1, at 13.

⁷⁵ The phrase is Kitagawa's. Kitagawa (1989), *supra* note 39, § 4.05[4].

⁷⁶ Arita documents the use of *res ipsa loquitur* theory. ARITA, *supra* note 56, at 23-25; *see also* Kitagawa (1989), *supra* note 39, § 4.05[5] n.18 (separate cases in which defendant auto repair shops failed to rebut presumption of defective repair and were held liable). In two other cases, plaintiffs' claims were denied because they failed positively to establish the existence of a defect. *See* ARITA, *supra* note 56, at 41-43 (no recovery in cases where defects not positively shown to cause a dump truck bed to fall, or to cause small car to weave dangerously across road at highway speeds). This contrasts with several of the mass-tort cases discussed below. There, the judiciary allowed proof of injury to establish a rebuttable presumption of defect where the injury *could* have been caused (epidemiologically speaking) by the alleged defect. *See* Hamada et al., *supra* note 21, at 91; Fujita, *supra* note 1, at 15; Cohen & Martin, *supra* note 38, at 331; Kitagawa (1989), *supra* note 39, § 4.05[5] n.20. In most of the other mass-injury tort cases, the courts applied the "special negligence" rule for manufacturers of pharmaceuticals and food products, so that theories of epidemiological causation or *res ipsa loquitur* became superfluous. *See, e.g.* Kitagawa (1989), *supra* note 39, § 4.05[5].

⁷⁷ ARITA, *supra* note 56, at 41-43; 57-58; *see also* Fujita, *supra* note 1, at 70.

⁷⁸ Courts applied a comparative fault analysis in five out of twelve single-injury cases where plaintiff prevailed. *See* ARITA, *supra* note 56, at 68-74.

⁷⁹ Kitagawa (1989), *supra* note 39, § 4.05[9] n.37. *But see* ARITA, *supra* note 56, at 72 (reporting the opposite ratio of liability in favor of plaintiff).

⁸⁰ These cases include the egg-tofu case; the fish-cake fritters case; the Morinaga Dairy case; the rice oil cases; the thalidomide cases; and the SMON cases. Full citation to these cases may be found in the notes accompanying the discussion of them, *infra* notes 82 - 99.

Virtually every work on modern Japanese tort law makes reference to these large-scale cases. *See, e.g.* Cohen & Martin, *supra* note 38, at 330; Fujita, *supra* note 1, at 47-54; Hamada et al., *supra* note 21, at 83, 89-90; Kitagawa (1989), *supra* note 39, § 4.04[2]-4.04[5]; and Ottley & Ottley, *supra* note 24, at 47-55. The "Big Four" pollution suits laid much of the groundwork for these products liability cases: in all four suits, the courts relaxed the plaintiffs' burden of proof on the causation element, and all four courts decided for the plaintiffs. The "Big Four" include the *Itai-Itai* disease case, *Komatsu v. Mitsui Kinzoku Kogyo*, 635 HANREI JIHŌ 17 (Toyama Dist. Ct., June 30, 1971); *aff'd*, 674 HANREI JIHŌ 25 (Nagoya High Ct., Kanazawa Br., Aug. 9, 1972); the two Minimata disease trials, *Ono v. Showa Denko K.K.*, 642 HANREI JIHŌ 96 (Niigata Dist. Ct., Sept. 29, 1971), and *Watanabe v. Chisso K.K.*, 696 HANREI JIHŌ 15 (Kumamoto Dist. Ct., Mar. 20, 1973); and the Yokkaichi air pollution trial, *Shiono v. Showa Yokkaichi Sekiyu K.K.*, 672 HANREI JIHŌ 30 (Tsu Dist. Ct., Yokkaichi Br., July 24, 1972), cited in Julian Gresser, *The 1973 Japanese Law for the Compensation of Pollution Related Health Damage: An Introductory Assessment*, in *LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES* 165 nn. 50, 54, 57 (John O. Haley ed., 1988).

rendered verdict or negotiated settlement. In the *Morinaga Dairy* case,⁸¹ twelve thousand infants (some of whom later died) were sickened by arsenic-tainted powdered milk.⁸² A civil action brought against the manufacturer and the government⁸³ settled out of court after the defendants agreed to establish a fund that would pay the victims' medical costs and provide annuities.⁸⁴

In the *Kanemiya shō* case,⁸⁵ over ten thousand individuals were sickened by cooking oil contaminated with PCB.⁸⁶ Multiple tort actions were filed against the cooking oil manufacturer, the PCB manufacturer, and the government.⁸⁷ One court invoked the "special negligence" rule⁸⁸ to create a presumption of fault, shifting the burden of proof from the plaintiffs to the defendants.⁸⁹ Another court also invoked the special negligence rule, not to create a presumption of fault, but rather to find that the defendants did not meet the high duty of care imposed by the rule.⁹⁰ Both courts found for the plaintiffs; the decisions were appealed to intermediate courts, and then the Supreme Court.⁹¹ In 1987, the parties agreed to a compromise suggested by the Supreme Court.⁹²

In the thalidomide case,⁹³ sixty-three plaintiff families sued the government and the manufacturers of Isomin for failure to warn of the drug's

⁸¹ Japan v. Ooka, 356 HANREI JIHŌ 7 (Tokushima Dist. Ct., Oct. 25, 1963), *rev'd and remanded*, 447 HANREI JIHŌ 31 (Takamatsu High Ct., Mar. 31, 1966), *appeal dismissed*, 547 HANREI JIHŌ 92 (Sup. Ct., Feb. 27, 1969); 302 HANREI TAIMUZU 123 (Tokushima Dist. Ct., Nov. 28, 1973), *cited in* Fujita, *supra* note 1, at 82 n.69.

⁸² Fujita, *supra* note 1, at 48.

⁸³ The government was named as a defendant for failing to insure sanitary food production. Fujita, *supra* note 1, at 48.

⁸⁴ Fujita, *supra* note 1, at 48-49. In a related action, criminal sanctions were imposed on the dairy's manufacturing section chief for failing to meet his high duty of care; sentence was suspended.

⁸⁵ There were actually two cases, which are usually cited together. Those cases are Kubota v. Kanemi Soko K.K., 866 HANREI JIHŌ 21 (Fukuoka Dist. Ct., Oct. 5, 1977); and Noguchi v. Kanemi Soko K.K., 881 HANREI JIHŌ 17 (Fukuoka Dist. Ct., Kokura Br., Mar. 10, 1978).

⁸⁶ Fujita, *supra* note 1, at 49. The defendant used the chemical as a heat-transfer medium in the manufacturing process.

⁸⁷ Fujita, *supra* note 1, at 49.

⁸⁸ Kitagawa (1989), *supra* note 39, § 4.04[4].

⁸⁹ Fujita, *supra* note 1, at 50.

⁹⁰ Fujita, *supra* note 1, at 50.

⁹¹ Fujita, *supra* note 1, at 50.

⁹² Kitagawa (1989), *supra* note 39, § 4.04[4]. The defendant was not held liable; government's liability was not decided.

⁹³ There were at least eight separate suits filed against Isomin manufacturers. Kitagawa (1989), *supra* note 39, § 4.04[2]. The National Thalidomide Litigation Plaintiffs' Group represented the plaintiffs in major negotiations.

known side-effects.⁹⁴ The plaintiffs' representative association, the drug company, and the government ultimately settled out of court.⁹⁵ The defendants acknowledged their liability and agreed to a flexible compensation scheme that provided for both current medical costs and future welfare payments.⁹⁶ The settlement agreement also created a separate foundation or welfare center to handle the victims' ongoing medical, education, and employment needs.⁹⁷

Finally, the SMON cases⁹⁸ resulted after a neurological disease affected ten thousand people who ingested a drug used to treat diarrhea.⁹⁹ At its height, this litigation involved approximately six thousand plaintiffs in over twenty district courts. Early decisions favored the plaintiffs, and defendants appealed.¹⁰⁰ All of the plaintiffs eventually agreed to a detailed settlement.¹⁰¹

The outcomes of these cases highlight the judicial development of Japanese products liability law generally. The courts seemed ready to follow the lead of the "Big Four" pollution cases¹⁰² and lessen the plaintiff's burden of proof for causation. Unlike the "Big Four," however, settlements precluded any definitive judicial opinions in three out of four cases. In turn, those settlements demonstrate that mediation or other ADR mechanisms may be more attractive than litigation because innovative, substantial compensation packages allow plaintiffs to circumvent the limited damages available through the court system, avoid incurring the costly attorney fees noted earlier, and receive compensation more quickly.

⁹⁴ Kitagawa (1989), *supra* note 39, § 4.04[2].

⁹⁵ Kitagawa (1989), *supra* note 39, § 4.04[2].

⁹⁶ Kitagawa (1989), *supra* note 39, § 4.04[2].

⁹⁷ Kitagawa (1989), *supra* note 39, § 4.04[2].

⁹⁸ The acronym stands for Subacute Myelo-Optic Neuropathy. Fujita, *supra* note 1, at 52. The cases include Yagi v. State, 879 HANREI JIHŌ 26 (Kanazawa Dist. Ct., Mar. 1, 1978); Oyama v. State, 899 HANREI JIHŌ 48 (Tokyo Dist. Ct., Aug. 3, 1978); Ochi v. State, 910 HANREI JIHŌ 33 (Fukuoka Dist. Ct., Nov. 14 1978); and Aoyama v. State, 910 HANREI JIHŌ 19 (Hiroshima Dist. Ct., Feb. 22, 1979), *cited in* Fujita, *supra* note 1, at 83 n.73.

⁹⁹ Fujita, *supra* note 1, at 52.

¹⁰⁰ Fujita, *supra* note 1, at 53.

¹⁰¹ Fujita, *supra* note 1, at 53. Under the agreement, individuals received sliding-scale damages in proportion to the severity of their injury; existence of SMON-linked injury was established by a court-appointed expert panel.

¹⁰² See discussion of the "Big Four," *supra* note 80.

D. *Legislative and Administrative Response to Mass-Tort and Products Liability Litigation*

Scholars theorize that one role of litigation in Japan is to signal to the government and ruling elite a shift in the social paradigm.¹⁰³ The mass-tort and products liability litigation signaled such a shift and the subsequent legislative and administrative responses demonstrate that the signal was received.¹⁰⁴ For instance, the SMON settlement negotiations led to the statutory establishment of the Law Concerning the Relief for Drug Side Effect Injury,¹⁰⁵ which provides for the ongoing medical expenses of SMON victims and compensates others injured by pharmaceuticals.¹⁰⁶

Although the individual plaintiffs in these single-injury cases probably were not motivated by a social agenda, the aggregate effect of the many cases involving defective appliances¹⁰⁷ led to the passage of the 1973 Consumer Daily Life Appliances Safety Law.¹⁰⁸ The 1973 Safety Law encourages manufacturers to submit their products for testing in order to qualify for liability insurance, and if their products meet testing requirements, they may attach the "S.G." (Safety Goods) label.¹⁰⁹ The Law not only sets safety standards, but also provides compensation for those injured by products which meet those standards.¹¹⁰

¹⁰³ UPHAM, *supra* note 6, at 216; Matsumoto, *supra* note 30, at 581; Shigeaki Tanaka, *Justice, Accidents, and Compensation*, 15 U. HAW. L. REV. 736, 737 (1993). *But see* Tanaka, *supra* note 103, at 739 ("[t]he primary aim of a judicial remedy is the realization of individualized corrective justice.").

¹⁰⁴ The outcomes of the "Big Four" were codified in the 1973 Law for the Compensation of Pollution-Related Health Damage ("Compensation Law"), as well as the Clean Air Act and the Clean Water Act; *see* Gresser, *supra* note 80, at 147; Akio Morishima, *The Japan Scene and the Present Products Liability Proposal*, 15 U. HAW. L. REV. 717, 723 (1993). For example, as in the Yokkaichi case, the Compensation Law imposes strict liability on polluters for injuries caused by their pollution. Polluters are required to pay a pollution levy which goes into a fund that is used to compensate victims, provided that those victims meet certain criteria; *see* Gresser, *supra* note 80, at 147.

¹⁰⁵ Fujita, *supra* note 1, at 32 (citing to *Iyakuhin fukusayo higai kyūzai kikin hō*, Law No. 55, 1979).

¹⁰⁶ Fujita, *supra* note 1, at 56; Yutaka Tejima, *Tort and Compensation in Japan: Medical Malpractice and Adverse Effects from Pharmaceuticals*, 15 U. HAW. L. REV. 728, 732, 735 (1993). Recently, the Act was read broadly in order to compensate hemophiliacs infected by the HIV virus through tainted blood products.

¹⁰⁷ Eleven of the twenty-one single-injury cases reported by Arita involved defective propane water heaters, containers, or pipes. ARITA, *supra* note 56, at v-viii.

¹⁰⁸ Fujita, *supra* note 1, at 30, 31 (citing *Shōhi seikatsuyō seihin anzen hō*, Law No. 31, (1973)).

¹⁰⁹ Kitagawa (1989), *supra* note 39, § 4.08[2]; Hamada et al., *supra* note 21, at 87. Neither author indicates how consumers respond to the SG label. However, it seems reasonable to assume that Japanese consumers respond much as consumers in the United States respond to the "Underwriters Laboratory" (UL) labels on many appliances which is to say, not at all, or at least not until a problem arises.

¹¹⁰ Kitagawa (1989), *supra* note 39, § 4.08[2].

The local consumer centers and the Japan Consumer Information Center are yet additional administrative responses to products liability suits.¹¹¹ These centers serve as clearinghouses for consumers with complaints about defective products, providing consultation, research, and occasional mediation services.¹¹² The centers may make recommendations to manufacturers, secure replacement products for consumers, and issue warnings.¹¹³

In addition, there is an entire patchwork of statutory remedies that address specific products, materials, and industries.¹¹⁴ While it is unclear whether litigation inspired each of these remedies, there is little question that their net effect is to remove such issues or disputes from the judicial arena, and place them instead under informal administrative control.¹¹⁵ Though this patchwork of remedies and institutions may have sufficed for most parties,¹¹⁶ *legal* tort liability remained predicated on negligence. In this respect, Japan's products liability law was out of step with consumer protection schemes in other nations. Thus scholars, legislators, and bureaucrats began the arduous process of revising Japan's products liability law.

¹¹¹ *Shōhi Seikatsu Centers and Kokumin Seikatsu Center, respectively.* Hamada et al., *supra* note 21, at 84.

¹¹² Kitagawa (1989), *supra* note 39, § 4.09[1],[2].

¹¹³ Hamada et al., *supra* note 21, at 87; Kitagawa (1989), *supra* note 39, § 4.09[1],[2].

¹¹⁴ These include but are not limited to the following: Consumer Protection Basic Law, Foodstuffs Sanitation Law, Agricultural Chemical Control Law, Pharmaceutical Affairs Law, Poisonous and Harmful Substances Control Law, Consumer Products Safety Law, Harmful Substances Used in Household Products Control Law, Electrical Appliance and Materials Control Law, Electric Utility Industry Law, Gas Enterprises Law, High Pressure Gas Control Law, Explosives Control Law, and Heat Supply Business Law, among others. ARITA, *supra* note 56, at 26-27. Morishima notes that compensation legislation is "formulated in reaction to the public needs of the time." Morishima, *supra* note 104, at 726.

¹¹⁵ One scholar comments that "[i]f one of the goals is to keep administrative costs down, the Japanese system certainly is successful . . . [i]f a goal is to keep the development of safety standards in administrative hands and out of the reach of the courts and plaintiffs' attorneys, the system generally works very well indeed." Leflar, *supra* note 37, at 756.

¹¹⁶ Whether or not the Japanese products liability regime suffices, or ought to suffice, is open to question. See, e.g., Ramseyer & Nakazato, *supra* note 37, at 290 ("Litigation is scarce in Japan not because the system is bankrupt. It is scarce because the system works."). But see Morishima, *supra* note 104, at 727 ("[t]he public cries out for more compensation"); see also Tejima, *supra* note 106, at 735 ("[t]he Japanese victim . . . is confronting many problems in getting relief.").

E. The 1975 Draft Model Law on Product Liability

Reform efforts began with the 1975 Draft Model Law on Product Liability.¹¹⁷ The 1975 Draft Law contemplated a near-total overhaul of the regime in that it would have imposed strict liability on producers of defective products.¹¹⁸ Article 2 redefined important terms, such as producer, product, and defect.¹¹⁹ Article 3 specified that producers would be liable without fault.¹²⁰ Article 5 not only inferred the existence of defects from injuries arising out of otherwise normal and ordinary use of products, it also inferred time-of-production defects from later-detected defects in injury-causing products.¹²¹ Article 10 extended liability beyond manufacturers to sellers and distributors, and placed the burden of proof on them to demonstrate that they were not responsible for defects. Articles 12 through 14 set out a mandatory compensation scheme to which producers would be required to contribute.¹²²

The 1975 Draft Law contemplated substantial procedural overhauls as well. It proposed introducing broad powers of compulsory discovery, the creation of a class-action type suit, and procedures for relieving relatively small or low-cost injuries.¹²³ These last provisions were perceived as radical at the time the 1975 Draft Law was published and still seem so radical that "there is little if any prospect that these proposals will become law in the foreseeable future."¹²⁴ Not all of the 1975 Draft Law provisions were so radical, however. In fact, some were *de facto* incorporated into the jurisprudence early on.¹²⁵ Moreover, the 1975 Draft Law's requirement that producers contribute to a compensation fund was not so much a break from past practice as it was a codification or consolidation of previous case

¹¹⁷ The 1975 Draft Model Law on Product Liability, Aug. 28, 1975 [hereinafter 1975 Draft Law], translated in Fujita, *supra* note 1, app.

¹¹⁸ See 1975 Draft Law, art. III.

¹¹⁹ Fujita, *supra* note 1, at 88-89. A more detailed analysis of the 1975 Draft Law's definition may be found *infra* Part III which compares the Draft Law's definition with those of the 1994 Products Liability Act and the 1985 EC Directive.

¹²⁰ Fujita, *supra* note 1. The 1975 Draft Law thus contemplated strict liability for manufacturers.

¹²¹ Fujita, *supra* note 1.

¹²² Fujita, *supra* note 1, at 91-92.

¹²³ Fujita, *supra* note 1, at 92.

¹²⁴ Fujita, *supra* note 1, at 72. *But see* Matsumoto, *supra* note 30, at 581 (noting that the Ministry of Justice recently began to overhaul the Code of Civil Procedure).

¹²⁵ For instance, the "Big Four" advanced the liberalization of causality requirements. Kitagawa (1989), *supra* note 39, § 4.05[5].

verdicts and settlements,¹²⁶ merely extending those decisions beyond their facts.

The 1975 Draft Law's fate is unclear.¹²⁷ While some authors¹²⁸ have implied that the judicial expansion of article 709 and the enactment of consumer-friendly legislation incorporated the 1975 Draft Law's important features, others offered a pessimistic explanation for its fate. One author wrote that support for the 1975 Draft Law dwindled after its potential negative effects were demonstrated by a series of products liability cases handed down subsequent to its publication.¹²⁹ Whether because of positive changes to jurisprudence, or a negative change in societal attitudes, it seems probable that in the late 1970s and early 1980s there was no political consensus or consumer pressure to revise Japan's products liability law.

F. *The 1985 EC Directive and Subsequent Products Liability Reform Proposals*

The European Community's adoption of Council Directive 85/374 rekindled Japanese interest in revising the products liability law.¹³⁰ It appeared that a wave of strict liability legislation was sweeping over European, Pacific Rim, and Asian nations alike.¹³¹ In the eighteen month period between February 1990 and October 1991, the *Kōmeitō*,¹³² the Private Law Society's Research Group, the Federation of Japanese Bar Associations, the Tokyo Lawyer's Association, and the Socialist Party Special Committee on Products Liability all published proposals for

¹²⁶ Kitagawa (1989), *supra* note 39, § 4.05[5].

¹²⁷ No English-language materials offer any explicit commentary on the demise of the 1975 Draft Law. Cf. Otley & Otley, *supra* note 24, at 56; Fujita, *supra* note 1, at 72; Kitagawa (1989), *supra* note 39, § 4.10[1].

¹²⁸ See, e.g., Fujita, *supra* note 1, at 72, 74; Kitagawa (1989), *supra* note 39, § 4.10[1].

¹²⁹ Yukihiro Asami, *Sangyōkai wa katakuna na taido o aratameru beki da* [The Industrial Community Should Revise Its Stubborn Attitude], *ECONOMISUTO*, Dec. 17, 1991, at 18, 19. Literally, "a rash of products liability litigation, including the SMON cases and the *Kanemiyu shō* cases, tentatively indicated the future course of such a solution and thus caused the opportunities for that legislation gradually to wither away."

¹³⁰ *Id.* at 19. Literally "with the EC directive acting as the catalyst, social concern for products liability has risen again, in Japan as well." The EC Directive is described in detail *infra* Part III.

¹³¹ Asami writes that "not only the EC nations, but the European Free Trade Agreement nations, Brazil, the U.S.S.R., Australia, the People's Republic of China, and the Republic of Korea have enacted products liability law based on no-fault liability or are investigating such legislation." *Id.*

¹³² *Kōmeitō* is the "Clean Government Party" of Japan, at the time a minority party in the Diet. See, e.g., Karl Schoenberger, *Recruit Scandal Jolts Japan Opposition*, *L.A. TIMES*, May 18, 1989, at 14.

products liability legislation.¹³³ The proposal put forth by the Federation of Japanese Bar Association was perhaps the most radical. Like the 1975 Draft Law, it would have imposed both compulsory discovery in products liability suits and fines for manufacturers of poor quality goods.¹³⁴ Many of the proposals would have abolished altogether the state-of-the-art defense, and lowered plaintiff's burden of proving the causal link between defect and injury.¹³⁵

Initially, the government concluded only that there was a need for national consensus on the actual state of affairs in Japan¹³⁶ and that there should be sufficient investigation into products liability systems as a means of dispute settlement.¹³⁷ Still, an Economic Planning Agency survey of the manufacturing, construction, sales, and service industries showed that members unhappily saw reformed liability legislation as a "trend of the times."¹³⁸ Industry observers also reported rising supply-side support for standardized damages as a means of safeguarding research and development.¹³⁹

Yet, others supported a new products liability statute as a means of harmonizing trade conditions between Japan and the EC nations and also as a means of providing quality control over the growing tide of foreign goods entering Japan as trade barriers fell.¹⁴⁰ Still others pointed to L-tryptophan injuries¹⁴¹ as an example of cases wherein foreign and domestic consumers

133 Asami, *supra* note 129, at 19.

134 Asami, *supra* note 129, at 19.

135 Literally, "they [the legislative proposals] have in common a strong consciousness of the need for protection of injured parties, visible in measures such as the recognition of liability for time-of-production defect undetectable by scientific standards (denial of the so-called "danger of development defense" [state-of-the-art defense]), a reduction of the injured party's burden of proof for demonstrating the connection between defects and injury, and so forth." Asami, *supra* note 129, at 19.

136 Asami, *supra* note 129, at 19-20.

137 Asami, *supra* note 129, at 20.

138 The survey reported that 58% of those questioned had "resigned themselves" to new products liability legislation (the number rises to 60% and 67% respectively when limited to the manufacturing and construction industries). Sixty-one percent indicated that they were researching the impact of products liability on their industry. *Shiryō: PL hō seitei wa jidai no nagare ka [Data: Is Enactment of a Products Liability Law the Trend of the Times?]*, ECONOMISUTO, Dec. 17, 1991, at 30, 31 (Economic Planning Agency survey of various industrial sectors throughout Japan) [hereinafter *EPA Survey*]. The survey does not report its margin of error, nor does it break down respondents by firm or firm size.

139 See, e.g., Sumihiko Shigeno, *PL hoken no mondaiten wa nani ka [What Are the Problems in Products Liability Insurance?]*, ECONOMISUTO, Dec. 17, 1991, at 28 (Literally, "industry is urging the necessity of standardizing damage payment costs in order to prevent research and development from slowing."). Others worried that strict liability would engender "an excessive pursuit of quality control." *EPA Survey, supra* note 138, at 31 (60% of respondents so indicated).

140 See, e.g., Morishima, *supra* note 104, at 725.

141 See, e.g., Matsumoto, *supra* note 30, at 580. Matsumoto does not provide a specific citation.

injured by Japanese-manufactured products received disparate compensation.¹⁴² Such cases lent credence to demands that Japan's law had to be overhauled in order for justice to prevail¹⁴³ and to address the "drastic changes" in the balance of consumer and industry power.¹⁴⁴ Eventually, a series of legislative proposals¹⁴⁵ culminated in the July 1, 1994 Products Liability Act.

III. JAPAN'S 1994 PRODUCTS LIABILITY ACT: AN ALL-NEW PRODUCT OR JUST A NEW PACKAGE?

An analysis of the July 1, 1994 Products Liability Act requires analysis not only of the Act itself, but also comparison with the sources which inspired and informed the Act. Those sources include the 1985 EC Directive,¹⁴⁶ the 1975 Draft Model Law on Product Liability, and the earlier Japanese products liability regime.¹⁴⁷

A. *Article 1 (Purpose)*

The Act's stated purpose is to contribute to the stability and improvement of the national livelihood, the sound development of the national economy, and the protection of injured persons by stipulating the

¹⁴² In fiscal year 1991, Shōwa Denkō (the manufacturer of a contaminated amino acid supplement) paid US\$66,000,000 in settlements to injured U.S. consumers, and US\$100,000,000 in litigation and settlement costs after facing more than 1,000 lawsuits involving over 1,500 victims. In Japan, Showa faced the threat of *one* suit—though the plaintiff's attorney admitted a lack of proper evidence which could be admitted in a Japanese court. Matsumoto, *supra* note 30, at 580.

¹⁴³ "Aren't . . . Japan's enterprises coping with products liability laws in foreign countries? Aren't they selling the same products in Japan, Europe, and America, and compensating European and American consumers where accidents have occurred? Japanese consumers are bearing an injustice, since the same rights are not given in Japan." Masato Nakamura, *Seizōbutsu ni yoru higai o dō kyūsai suru no ka [How Should Product-Related Injuries Be Compensated?]*, ECONOMISUTO, Dec. 17, 1991, at 22, 25.

¹⁴⁴ "In these times when the balance of consumer and industry power has undergone drastic changes, a law that will guarantee equality between these groups is a necessity." Kazuko Miyamoto, *Seizōbutsu ni yoru higai o dō kyūsai suru no ka? [How Should Product-Related Injuries Be Compensated?]*, ECONOMISUTO, Dec. 17, 1991, at 22, 27.

¹⁴⁵ Danaher, *supra* note 1, at 25 (citing three semi-official advisory reports).

¹⁴⁶ EC Directive 85/374, reprinted in Marc S. Klein, *Megatrends in International Product Liability Law*, C949 A.L.I.-A.B.A. 113, 118 (1994), available in WESTLAW, Products Liability—Law Reviews, Texts & Bar Journals Database (PL-TP). The 1985 EC directive itself is somewhat reminiscent of Restatement (Second) of Torts § 402A.

¹⁴⁷ The earlier products liability regime is comprised of the relevant Civil Code articles, the judicial gloss on those articles as developed in the cases, and the legislation and administrative agencies created in response to that judicial gloss. See *supra* Part II discussing the Earlier Products Liability Regime.

liability of "producers, or the like" for damages arising to a person's life, body or property caused by defective products.¹⁴⁸ The drafters of the Act clearly were concerned with its impact on national economic matters; two out of four clauses address the need to protect the economy, leaving the last two for consumer protection.¹⁴⁹ By comparison, the EC Directive's lengthy preamble¹⁵⁰ makes but a single reference to economic matters, and any number of references to protecting consumers.¹⁵¹

Article 1 of the 1975 Draft Law provides a more dramatic comparison. Its stated purpose was to "promote the protection of consumers through the establishment of liability for payment of compensation for injury caused by defects in manufactured goods and the provision of measures to secure the performance thereof."¹⁵² The 1975 Draft Law voiced no economic concerns that might infringe, limit, or otherwise color an injured consumer's right to recover for injuries caused by defective products. While preambles or statements of purpose admittedly are not binding statements of law, they may be considered statements of legislative intent. Courts may refer to them in close cases to construe properly the meaning of statutes. It appears that the drafters of the new Act intended the courts to strike an entirely different sort of balance from that envisioned by the drafters of the EC Directive or the 1975 Draft Law. This is not surprising, given that the overhaul comes during a protracted recession¹⁵³ and that the Government's reaction to the initial call for change was lukewarm at best.¹⁵⁴

¹⁴⁸ See PLA, art. I, translated in KITAGAWA, *supra* note 3.

¹⁴⁹ The Act is silent on what constitutes the "national livelihood" and its stability or improvement, thus leaving the door open for judicial interpretation. PLA, art. I, translated in KITAGAWA, *supra* note 3. The phrase in question is *kokumin seikatsu no antei kōjō*. Kitagawa translates *seikatsu* as "livelihood," carrying with it an economic emphasis: the sense of earning one's daily bread, or one's standard of living. KITAGAWA, *supra* note 3, app. 4D-1. See also SANSEIDO'S NEW CONCISE JAPANESE-ENGLISH DICTIONARY 788 (2d ed., 1985).

¹⁵⁰ This appellation is used for lack of any better title by which to describe the three-and-a-half page introduction to the Directive. See EC Directive 85/374, Klein, *supra* note 146, at 126.

¹⁵¹ Klein, *supra* note 146, at 126-28.

¹⁵² Fujita, *supra* note 1, at 88.

¹⁵³ Danaher, *supra* note 1, at 29.

¹⁵⁴ Cf. Asami, *supra* note 129, at 19-20.

B. *Article 2 (Definitions)*

Article 2 defines three key terms: product, defect, and producer.¹⁵⁵ Products are broadly defined as produced or processed movables.¹⁵⁶ Defects are defined as a product lacking the safety it should normally have, taking into account its characteristics, the normally anticipated method of use, the time of its delivery by “producers, or the like,” and any other circumstances relating to the product.¹⁵⁷ The definition of “producers, or the like” includes manufacturers, processors, importers, and anyone holding themselves out as a producer by placing their name, tradename, trademark, or other representation on the product in question.¹⁵⁸ The definition also includes anyone making a representation which is misleading as to the identity of the actual producer or which identifies the representor as the producer, taking into account “other circumstances” including the means of production, processing, importing or distribution.¹⁵⁹

The Act’s definition of “product” is broader than the EC Directive’s definition¹⁶⁰ but narrower than the 1975 Draft Law’s definition.¹⁶¹ The Act does not follow the Directive in disallowing liability for damage caused by “primary agricultural products,”¹⁶² which include the products of fisheries, soil, and stock farming that have not undergone “initial processing”—an additional term, left undefined.¹⁶³ If the Act disallowed such products, it might well prohibit the courts from hearing new cases arising from the mishandling of raw *fugu* (blowfish) in restaurants,¹⁶⁴ or cases arising from the erroneous prescription of traditional folk remedies relying on unprocessed animal, vegetable, or mineral materials.¹⁶⁵ The Act’s definition of “product” thus preserves several causes of action historically utilized by

¹⁵⁵ KITAGAWA, *supra* note 3, app. 4D-1.

¹⁵⁶ KITAGAWA, *supra* note 3, app. 4D-1.

¹⁵⁷ KITAGAWA, *supra* note 3, app. 4D-1.

¹⁵⁸ KITAGAWA, *supra* note 3, app. 4D-1.

¹⁵⁹ KITAGAWA, *supra* note 3, app. 4D-1.

¹⁶⁰ Klein, *supra* note 146, at 128.

¹⁶¹ Fujita, *supra* note 1, at 88.

¹⁶² Klein *supra* note 146, at 128.

¹⁶³ Klein *supra* note 146, at 128. The Directive’s definition of “product” and failure to define “initial processing” would create justiciable questions whether raw *fugu* (blowfish) sliced and served in a restaurant, *see* ARITA, *supra* note 56, at 39-40, and adonis root sold for medicinal tea-brewing purposes, *see* ARITA, *supra* note 56, at 47-48, did or did not undergo “initial processing” that might create liability. The Act’s construction moots the issue.

¹⁶⁴ *See, e.g.,* Adachi v. Shoga, 704 HANREI JIHŌ 80, (Kobe Dist. Ct, Dec. 21, 1972), *noted in* Kitagawa (1989), *supra* note 39, § 4.05[8]; ARITA, *supra* note 56, at 47-48.

¹⁶⁵ *See* ARITA, *supra* note 56, at 47-48.

plaintiffs in single-injury cases.¹⁶⁶ The Act does not reach as far as article two of the 1975 Draft Law, which defined product as "anything which enters the distribution process . . . without regard to whether an item is a product of nature."¹⁶⁷

It is difficult to compare the Act with the relevant Civil Code articles and prior judicial decisions because those sources did not explicitly define the term "product."¹⁶⁸ It appears that the courts subsumed the product-or-not-product inquiry within the wider inquiry into whether there was a duty and a breach of that duty.¹⁶⁹ Now, it appears that some cases formerly classified as products liability cases under the negligence regime will be reclassified as negligence cases under the new strict liability regime because they lack a "product" as defined by the Act.¹⁷⁰ Plaintiffs in such cases may be denied the strict liability protections imposed by the Act,¹⁷¹ but the

¹⁶⁶ See ARITA, *supra* note 56, at 39-40, 47-48.

¹⁶⁷ The Draft law, much like the EC Directive, provided that, in the alternative, products of nature might be excluded if unprocessed in any way. Fujita, *supra* note 1, at 88.

¹⁶⁸ Fujita, *supra* note 1, at 14 ("The question asked here is simply whether the particular defendant can be said to have violated the plaintiff's right negligently"). *But see* Kitagawa (1989), *supra* note 39, § 4.02[2] ("[t]he product must be such that its kind, standards, structure, raw materials, manufacturing process, and quality are unilaterally determined by its manufacturer"), citing *Dai-Tokyo Fudosan v. Kanto Kogyo K.K.*, 330 HANREI TAIMUZU 287, (Tokyo High Ct., June 30, 1975).

¹⁶⁹ See, e.g., ARITA, *supra* note 56, at 39-40, 47-48 (citing two cases: one decreeing a restaurant liable for poisoning caused by raw fish, and the other decreeing an apothecary liable for poisoning caused by ingestion of root prescribed as folk remedy). One might theorize that the courts never confronted directly the question of what constituted a "product" because the small universe of products liability cases involved items obviously manufactured or processed and thus "products" within any meaningful definition of that term. See, e.g., Cohen & Martin, *supra* note 38, at 327 ("Since major products liability cases are exceedingly rare, the Japanese court has simply not had the opportunity to consider the problem over a wide variety of situations"). Yet, this theory is contrasted by the record. Arita documented products liability cases involving items ranging from foodstuffs to pharmaceuticals to vehicles to toys to brake-repair jobs. ARITA, *supra* note 56, at v-viii. Kitagawa notes that a court considered, and rejected, the notion of an unfinished building as a "product." Kitagawa (1989), *supra* note 39, § 4.02[2].

¹⁷⁰ For example, Kitagawa and Arita cite as products liability cases two incidents of defective repairs to automobile brakes. Kitagawa (1989), *supra* note 39, § 4.05[4] n.18; ARITA, *supra* note 56, at 24-25. In one case, the owners of the car and the garage that repaired the car were held liable for damages caused when the brakes failed as the owners drove the car home from the garage. There was no evidence that a faulty part was to blame; instead, proper parts were improperly adjusted or installed. ARITA, *supra* note 56, at 24-25. It is unlikely that a court could stretch the Act's definition of "product" to encompass an overhauled automobile brake system composed of proper parts and improper adjustments or installation, because the improper service component (which sounds in negligence or contract) is simply too significant. Absent a defective product, the Act does not apply, and the plaintiff would be left with a cause of action for breach of contract or negligence under Civil Code articles 415 or 709, or both. For further discussion, see analysis of article 3 *infra* Part IV.C. Interestingly, an improperly adjusted automobile brake system might well have constituted a "product" under the 1975 Draft law definition, since the brake system could be classified as an item that enters the distribution system. See Fujita, *supra* note 1, at 88.

¹⁷¹ While article 6 of the Act incorporates by reference the Civil Code articles (and presumably the relevant case law as well, see *infra* Part IV.F), it remains to be seen whether the courts will continue to

majority of mainstream products liability cases should be little affected by the Act's broad definition of product.

It appears also that the Act's definition of "defect"¹⁷² will have little impact on most cases. Here, the Act follows closely the contours of both the EC Directive's definition¹⁷³ and the 1975 Draft Law's definition.¹⁷⁴ In following these definitions, the Act takes a step away from true strict liability. By including elements such as "the normally anticipated method of use,"¹⁷⁵ the Act admits considerations of comparative negligence and foreseeability, which in turn allow the courts to apportion fault to a plaintiff who uses the product in an unforeseeable manner, or who incorrectly installs or misuses a product. Such apportionment, however, follows the courts' past practice.¹⁷⁶

A significant change may lie in the Act's definition of "producer."¹⁷⁷ The Act casts a wide net that appears to ensnare any and all persons associated with the relevant product, except retailers. By excluding retailers from liability, the Act resembles not only the EC Directive¹⁷⁸ and the 1975 Draft Law, but also recent U.S. legislation.¹⁷⁹ All of these approaches allow an

impose a strict duty of care in negligence now that the negligence doctrine does not of necessity serve a second, near-strict liability function.

¹⁷² The Japanese term is *kekkan*, denoting a defect, fault, or shortcoming. SANSEIDO'S NEW CONCISE JAPANESE-ENGLISH DICTIONARY 446 (1985). Earlier advisory council reports were divided on whether to define "defect" or to leave it to the courts. Danaher, *supra* note 1, at 28.

¹⁷³ The Directive defines a defective product as one which "does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation." Klein, *supra* note 146, at 128.

¹⁷⁴ The 1975 Draft law defined "defect" as "any flaw in a product which causes an inordinate danger to life, to the person, or to property during ordinarily foreseeable use." Fujita, *supra* note 1, at 88. However, the phrase "inordinate danger to life" would have granted the judiciary an enormous amount of discretion.

¹⁷⁵ KITAGAWA, *supra* note 3, app. 4D-1. The Japanese translation is *tsūjō yoken sareru shiyō keitai*.

¹⁷⁶ See, e.g., Kitagawa (1989), *supra* note 39, § 4.05[8] n.37 (citing five cases where courts apportioned fault or negligence between defendants and plaintiffs, with ratios ranging from 50/50 to 70/30); see also ARITA, *supra* note 56, at 68-74 (citing seven cases featuring fault or negligence apportionment; some cases overlap with Kitagawa).

¹⁷⁷ KITAGAWA, *supra* note 3, app. 4D-1. The Japanese translation is *seizō gyōsha nado* (literally, "manufacturer[s] and so forth").

¹⁷⁸ The EC Directive does allow the injured person to treat each supplier of the product as the producer unless or until the supplier informs the injured person of the producer's identity within a reasonable time. Klein, *supra* note 146, at 128. However, this is clearly a means to compel disclosure or discovery of the actual producer (who presumably would be named to the suit in place of the supplier) rather than a means of settling a supplier's liability. Klein, *supra* note 146, at 128.

¹⁷⁹ See, e.g. Common Sense Legal Reforms Act of 1995 § 103(a)(B), available in LEXIS, LEGIS Library, BILLS File; see also WASH. REV. CODE § 7.72.010 (1995) *et seq.* Both statutes limit a product seller's liability to cases where a manufacturer is unavailable. Historically, products sellers have been held

injured consumer to bring suit against manufacturers, component manufacturers, processors, importers, and "private labelers" who put their tradename, trademark, or other identifier on a product actually manufactured by another.¹⁸⁰ Yet, such definitions do not include resellers or retailers, and in this respect the Act represents a shift away from prior practice, wherein an injured consumer had recourse first and foremost against the seller.¹⁸¹ Currently, it is possible for sellers to be entirely excluded from the liability scheme.¹⁸²

Theoretically, it should be possible to attack sellers under a very expansive reading of the Act's "or the like" residuary clause, but such a reading would tend to contravene the apparent legislative intent to focus liability on actual or putative producers. Removing sellers from the liability scheme may reduce an injured person's access to previously available defendants, but this reduction should not be felt too strongly given the enormous class of defendants encompassed within the Act's broad sweep.¹⁸³

C. Article 3 (Products Liability)

Article 3 stipulates a producer's liability for injuries caused by a defective product. Where a defective product (produced, processed, or imported by a producer or representor or the like under article 2) causes death or injury to a person, or damage to property other than the product itself, the producer (or the like) is liable to compensate for such damage.¹⁸⁴ In this regard the Act resembles the 1975 Draft Law¹⁸⁵ and the EC

liable for injuries caused by defective products whether or not a manufacturer was available to defend. See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A (1965), cited in HENDERSON ET AL., THE TORTS PROCESS 576 (James A. Henderson, et al. eds., 4th ed. 1994).

¹⁸⁰ See Klein, *supra* note 146, at 128; Fujita, *supra* note 1, at 88.

¹⁸¹ See discussion of article 415, *supra* Part III.

¹⁸² Given that the courts widely permitted sellers to subrogate their liability as against a manufacturer, the new Act may in fact merely remove that intermediate procedural step in the process of establishing a manufacturer's liability. See discussion of article 415, *supra* Part III.

¹⁸³ Again, article 6 preserves the relevant Civil Code articles, so an injured person ought to be able to sue a seller in negligence or breach of contract. See discussion, *infra* Part IV.C. Though, this option seems rather unattractive, as the typical Japanese retail outlet—a "mom and pop" operation—lacks anything resembling deep pockets. See, e.g., Hugh T. Patrick & Thomas P. Rohlen, *Small-Scale Family Enterprises*, in 1 THE POLITICAL ECONOMY OF JAPAN—THE DOMESTIC SCENE 331, 350 (Kozo Yamamura & Yasukichi Yasuba eds., 1987).

¹⁸⁴ See KITAGAWA, *supra* note 3, app. 4D-1.

¹⁸⁵ Article 3 of the 1975 Draft Law reads: "[t]he producer shall be responsible to compensate any natural person for injury to life, to the person, or to property incurred as a result of a defect in a product."

Directive,¹⁸⁶ both of which also stipulate the liability of a broad class deemed "producers" under the law. In the Act's case, however, the stipulation is but a nominal advancement over previous law because the courts previously developed *de facto*, if not *de jure*, strict liability for producers.¹⁸⁷ In this respect, the Act does not effect a material change over the previous products liability regime, but instead codifies the spirit of the previous regime.

However, the Act differs materially from both the EC Directive and the 1975 Draft Law because it does not explicitly address the burden of proving the existence of a defect, an injury, or a causal link between the two.¹⁸⁸ Absent such a provision, the Act appears to accept the old regime's allocation of the burden of proof.¹⁸⁹ The old regime required that the plaintiff meet "a crushing burden of proof."¹⁹⁰ The plaintiff must prove beyond a reasonable doubt that an injury occurred, that a defect exists, a causal link between the defect and the injury,¹⁹¹ and the fault of the manu-

Fujita, *supra* note 1, at 89. Like article 2 of the Act, article 2 of the 1975 Draft Law stipulates that importers, processors, component manufacturers, and private labelers shall be liable as producers. Fujita, *supra* note 1, at 88.

¹⁸⁶ Article 1 of the Directive reads: "[t]he producer shall be liable for damage caused by a defect in his product." See Klein, *supra* note 146, at 128. Like article 2 of the Act, article 3 of the Directive stipulates that importers, processors, component manufacturers, and private labelers shall be liable as producers. See Klein, *supra* note 146, at 128.

¹⁸⁷ Adachi et al., *supra* note 63; Kitagawa (1989), *supra* note 39, § 4.05[5]; Fujita, *supra* note 1, at 71.

¹⁸⁸ Article 4 of the EC Directive stipulates that the plaintiff must prove the existence of a defect, injury, and a causal relationship. See Klein, *supra* note 146, at 128-129. In contrast, articles 4 through 6 of the 1975 Draft Law stipulated that under certain circumstances, the existence of a defect, and a causal relationship between the defect and the injury, shall be inferred. Fujita, *supra* note 1, at 89. Thus, under the 1975 Draft Law, plaintiff's burden of proof might have ended with proof of injury. Article 5 of the 1975 Draft Law further stipulated that if a product had been in service for some time, and a defect in that product was found contemporaneous with an injury resulting from use of the product, the defect would be deemed to have existed at the time the product was delivered. Fujita, *supra* note 1, at 89. Thus, articles 4 through 6 not only suggested a marked departure from actual practice, but ameliorated the lack of discovery mechanisms as well, making the courts a more viable tool for redress in single-injury cases.

¹⁸⁹ Again, article 6's incorporation of the Civil Code articles (and therefore the courts' interpretation of those articles) signals that the courts' previous distribution of the burden of proof may continue in force. See discussion of article 6 *infra* Part IV.F.

¹⁹⁰ Fujita, *supra* note 1, at 14.

¹⁹¹ Kitagawa (1989), *supra* note 39, § 4.05[5]. Courts appear to honor this rule in the breach, however. The judiciary unofficially revised this requirement beginning with the "Big Four" pollution suits. See Gresser, *supra* note 80. These cases introduced the plaintiff-friendly concepts of epidemiological or probability-based causation. Kitagawa (1989), *supra* note 39, § 4.05[5]. However, the theories do not always receive a warm judicial welcome. See, e.g., Kitagawa (1989), *supra* note 39, § 4.05[5] n.22.

facturer or distributor in making or marketing the product.¹⁹² In certain cases, plaintiff's burden was reduced because the courts imposed a strict duty of care upon certain limited classes of defendants.¹⁹³ Under the "special negligence"¹⁹⁴ rule, "[p]roof of the existence of a defect per se goes a long way toward demonstrating that this duty of care has been breached and that the defendant is at fault."¹⁹⁵ Still, it is difficult to meet even this reduced burden of proof.¹⁹⁶ As the Act does not incorporate any explicit discovery rules or mechanisms, it incorporates *in toto* the discovery rules and mechanisms set forth in the Civil Code and the Rules of Civil Procedure.¹⁹⁷

Although Japan's Rules of Civil Procedure provide that parties should ensure sufficient pretrial investigation,¹⁹⁸ there are no devices to compel oral examination of an uncooperative witness or person¹⁹⁹ and no written interrogatories or requests for admission.²⁰⁰ Production of documents and other evidence is highly restricted, dependent on substantive law, and not terribly useful unless a party already has detailed information about the desired items.²⁰¹ These discovery limitations have a well-documented chilling effect on potential litigation.²⁰² The effect adheres even

¹⁹² Fujita, *supra* note 1, at 13. Because no contractual relationship exists to create a duty on the part of the manufacturer or distributor towards the plaintiff, the plaintiff must show that the relevant party's intentional or negligent actions could produce injury in question.

¹⁹³ Kitagawa (1989), *supra* note 39, § 4.05[4]. Large-scale producers or distributors of foodstuffs, pharmaceuticals, and similar items were primarily subject to this higher duty of care. Kitagawa (1989), *supra* note 39 § 4.05[4]. The courts early imposed *de facto*, if not *de jure* strict liability on polluters as well. Gresser, *supra* note 80, at 146. But, as Gresser notes, the subsequent enactment of the pollution law denied the courts any further opportunity to expand or interpret their holding in the Yokkaichi case. Gresser, *supra* note 80, at 146.

Other defendant classes, such as physicians employed by large well-equipped hospitals, were held to higher standards as well. Kitagawa (1989), *supra* note 39, § 4.05[4] n.17. Even so, the plaintiff's burden remained high by American standards. Matsumoto, *supra* note 30, at 579.

¹⁹⁴ The phrase is Kitagawa's. Kitagawa (1989), *supra* note 39, § 4.05[4].

¹⁹⁵ Fujita, *supra* note 1, at 13.

¹⁹⁶ Matsumoto, *supra* note 30, at 579.

¹⁹⁷ See analysis of article 6 *infra* Part IV.F.

¹⁹⁸ Yamanouchi & Cohen, *supra* note 23, at 444 n.6 (citing T. HATTORI & D. HENDERSON, CIVIL PROCEDURE IN JAPAN § 6.02, at 6-3 n.5 (1985)).

¹⁹⁹ American-style depositions are unknown in Japan. Yamanouchi & Cohen, *supra* note 23, at 445.

²⁰⁰ See Yamanouchi & Cohen, *supra* note 23, at 446.

²⁰¹ Yamanouchi & Cohen, *supra* note 23 at 446-447.

²⁰² Fujita, *supra* note 1, at 3 (identifying the absence of formal discovery mechanisms in Japan as a significant hurdle to plaintiffs in products liability cases); Yamanouchi & Cohen, *supra* note 23, at 447 (comparing Japanese and American discovery devices and finding Japanese devices less effective); Ottley & Ottley, *supra* note 24, at 39, 45 (noting the lack of discovery procedures and the impact of administrative guidance (*gyōsei shidō*) on discovery by minimizing evidence about corporate malfeasance);

under the special negligence rule, wherein the plaintiff still must prove positively the existence of a defect.²⁰³ Absent the necessary proof, the plaintiff's case will fail.²⁰⁴ The Act's substantive law maintains the artificially high stakes a plaintiff is required to muster, and thus reduces the set of plaintiffs that may bring and maintain a products liability suit. Article 3 of the Act represents a significant disappointment for those who hoped the Act would bypass the anemic discovery mechanisms which impede single-injury cases.²⁰⁵ Absent any discovery revisions,²⁰⁶ the Act's protections are not readily accessible to persons injured by defective products.²⁰⁷

Article 3, combined with article 2, also excludes from the new products liability universe certain types of cases previously included. Such cases, among them the defective automobile brake repair cases,²⁰⁸ cannot meet the definitional standards of the Act. There is no "product," or

Matsumoto, *supra* note 30, at 578-79 (lack of extensive discovery is the "principal reason" for scarcity of products liability suits); *see also* Cohen & Martin, *supra* note 38, at 330, 339-40 (noting the lack of a formal discovery process). *But see* Ramseyer, *supra* note 25, at 635 n.188 (the lack of discovery may reduce litigation costs).

²⁰³ Arita documents the use of *res ipsa loquitur* theory, *see* ARITA, *supra* note 56, at 23-25; *see also* Kitagawa (1989), *supra* note 39, § 4.05[4] n.18 (citing separate cases in which defendant auto repair shops failed to rebut presumption of defective repair and were held liable). Yet in two other cases, plaintiffs' claims were denied because they failed positively to establish the existence of a defect. *See* ARITA, *supra* note 56, at 41-43 (no recovery in cases where defects not positively shown to cause a dump truck bed to fall, or to cause small car to weave dangerously across road at highway speeds). This is in contrast to several of the mass-tort cases discussed below. There, the judiciary allowed proof of injury to establish a rebuttable presumption of defect where the injury *could* have been caused (epidemiologically speaking) by the alleged defect. *See* HAMADA ET AL., *supra* note 21, at 91; Fujita, *supra* note 1, at 15; Cohen & Martin, *supra* note 38, at 331; Kitagawa (1989), *supra* note 39, § 4.05[5] n. 20. In most other mass-injury tort cases, the courts applied the "special negligence" rule for manufacturers of pharmaceuticals and food products, rendering superfluous theories of epidemiological causation or *res ipsa loquitur*. *See, e.g.* Kitagawa (1989), *supra* note 39, § 4.05[4].

²⁰⁴ ARITA, *supra* note 56, at 41-43, 57-58; *see also* Fujita, *supra* note 1, at 54.

²⁰⁵ An open question is whether such far-reaching revisions would be appropriate within an Act aimed at a relatively narrow area of law, but the 1975 Draft Law contemplated exactly that. *See* Fujita, *supra* note 1, at 89.

²⁰⁶ Because the discovery limitations are universal, the Civil Code articles' protections are not readily accessible either. However, there are rumblings that Japan's century-old Civil Code will undergo a revision in the near future. *See, e.g.* Matsumoto, *supra* note 30, at 581. Revisions of the Code itself might cure the present discovery shortcomings.

²⁰⁷ The new Act does not bode well for the 52-year-old housewife injured by Showa Denko's contaminated L-tryptophan. Matsumoto, *supra* note 30, at 580. Many hoped that the Act would afford Japanese plaintiffs legal remedies similar to those available to their American counterparts. *Cf.* Asami, *supra* note 129, at 21: "One cannot say that circumstances are equitable when European or American consumers are compensated for injuries caused by a given Japanese-made product under the no-fault liability doctrine, and Japanese consumers are not compensated for the same injuries under the negligence liability doctrine." Those hopes appear to be forgone.

²⁰⁸ *See* Matsumoto, *supra* note 30, note 172.

"producer" even within the Act's broad definition of those terms.²⁰⁹ The distinction may be a fine one, however, as very similar cases (like airplane crashes triggered by defectively-manufactured or defectively-repaired steering gear)²¹⁰ may well fit into the new universe. It is possible that the defective auto-repair cases were not product liability cases to begin with, but were instead ordinary negligence cases improperly labeled and miscategorized; however, this seems unlikely because the defective auto-repair cases clearly met the former "product" and "producer" tests.²¹¹ Therefore, the Act appears in some small respects to restrict the products liability universe, and narrow the courts' domain.

D. Article 4 (Exemptions)

Article 4 provides two explicit defenses to producer liability. It exempts component manufacturers from liability if the defect in question is traceable to improper design or improper instructions by the manufacturer of the product as a whole, and the component manufacturer is not at fault.²¹² It also exempts regular product manufacturers from liability if the defect in question could not be detected given the state of the art at the time of the product's delivery.²¹³ By codifying these explicit defenses, the Act strikes a middle path between the EC Directive and the 1975 Draft Law. The 1975

²⁰⁹ It might be possible to consider the mechanic a "processor" within the Act's definition of that term, *see* KITAGAWA, *supra* note 3, app. 4D-1; still, the other elements, such as causation and fault, would be lacking.

²¹⁰ *See, e.g.,* Yabutani v. The Boeing Company, 754 HANREI JIHŌ 58 (Tokyo Dist. Ct., July 24, 1974). It is important to note that defectively repaired aircraft also may be a special case, because they are commonly repaired—in many ways, remanufactured—by their producers at regular intervals. The manufacturer thus maintains control over the product's quality over time, and may be said to retain liability for defects in that quality. The same cannot be said for defectively repaired automobiles. Cited in Kitagawa (1989), *supra* note 39, § 4.05[2].

²¹¹ Kitagawa describes the typical products liability problem as involving, among other things, "consumer products in general—'products'" and "a manufacturer of [that product] as an injuring party." Kitagawa (1989), *supra* note 39, § 4.02[2]. As a consumer product manufactured or processed by an injuring party, a defectively repaired automobile brake system qualified as a "product" under the old test. Furthermore, article 10, paragraph three of the 1975 Draft Law specified that "[r]epairers who cause a defect in a product or overlook a defect that should have been discovered" would be held liable as producers. Fujita, *supra* note 1, at 90. Given the advisory, prophylactic role of the Draft Law in Japan (similar to the role of § 402A of the Restatement (Second) of Torts in the United States), it is likely that repairers would have been held liable in near-strict liability under the old regime.

²¹² KITAGAWA, *supra* note 3, app. 4D-2.

²¹³ KITAGAWA, *supra* note 3, app. 4D-2.

Draft Law encompassed no such measures;²¹⁴ the EC Directive features at least six, two of which are nearly identical to those incorporated into the Act.²¹⁵

Previous Japanese case law also recognized a state-of-the-art defense,²¹⁶ though it was disliked and avoided by the courts, and thus difficult to implement.²¹⁷ Article 4's component-manufacturer liability escape clause is not so readily linked to earlier cases, yet it is undoubtedly familiar to the courts.²¹⁸ The Act's inclusion of these particular defenses does not seem to constitute a dramatic break from past practice. However, it does seem to severely undermine the Act's stated purpose of stipulating to a producer's liability. Moreover, the inclusion of explicit defenses restricts the courts' earlier freedom to develop or abandon the defenses, or to adopt the defenses in some cases (but not others) according to flexible criteria. The Act thus removes a modicum of judicial discretion.

E. Article 5 (Limitation of Time)

Article 5 provides two statutes of limitation for products liability suits. First, article 5 provides a three-year statute of limitations that runs from the time an injured person or his or her legal representatives become

²¹⁴ See generally Fujita, *supra* note 1, at 88-92. The 1975 Draft Law explicitly included component manufacturers as "producers." Fujita, *supra* note 1, at 88 ("Producer" includes component manufacturers "to the extent of the portion of the final product comprised of such parts.")

²¹⁵ EC Directive No. 85/374, July 25, 1985, art. 7, reprinted in Klein, *supra* note 146, at 128, 129. Article 7, (a)-(f) codifies six defenses; (d) and (f) resemble the defenses in Japan's new act. Several other caveats that might serve as defenses are scattered throughout the Directive. ("A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.") Klein, *supra* note 146, at 128, 129.

²¹⁶ Adachi et al., *supra* note 63, at 47.

²¹⁷ Adachi et al., *supra* note 63, at 47. The courts' disapproval of this argument may be traced back to several of the early pollution cases, where the courts specifically held that a polluter's use of "the best technology available in any part of the world . . . would not shield defendants from liability if other protective measures also could have been employed." Gresser, *supra* note 80, at 146.

²¹⁸ The author has located no English-language source describing either a larger policy or a specific incident of releasing component manufacturers from liability for defects attributable to the main product manufacturer's faulty design or specifications. However, it stands to reason that such a practice exists, given the longstanding joint-and-several liability of all producers. See, e.g., Kitagawa (1989), *supra* note 39, § 4.05[6][b]; Adachi et al., *supra* note 63, at 45. If such a policy did not exist, Japanese component manufacturers (mostly small to medium size family enterprises, in Japan's notorious dual economy) would be forced out of business in droves by the cost of defending twice over: once, in the products liability lawsuit; and again, in any subsequent suit over apportionment of liability. Cf. Patrick & Rohlen, *supra* note 183, at 332, 343-49; Kitagawa (1989), *supra* note 39, § 4.05[6]; Fujita, *supra* note 1, at 21, 23-25 (in light of Fujita's comments at 23, it seems likely that the Act's provisions are intended to ease such tortfeasors in and out of cases).

aware of compensible damage *and* the identity of the person liable to compensate for such damage.²¹⁹ Second, article 5 provides a statute of repose that runs out ten years from the time of the product's delivery.²²⁰ The article further provides that in cases where damage results from an accumulation of dangerous substances in the human body, or in cases where damage is diagnosed after a latent period, the ten-year statute of repose runs from the time of occurrence of such damage.²²¹

The EC Directive²²² and the Civil Code articles²²³ feature similar provisions. The Act differs from the Code and the 1975 Draft Law only in omitting an alternative twenty-year absolute statute of limitation running from the occurrence of the injury.²²⁴ While the Act's statute of limitation appears to be plaintiff-friendly (as it concedes an injured party's limited powers of discovery), the elimination of the twenty-year provision means that the Act may be somewhat less favorable to an injured party than was the previous Code.²²⁵ Still, the Act sweeps a very broad class of persons into the "producer" category.²²⁶ Article 5 probably will not have a significant negative effect for plaintiffs, as almost any plaintiff should be able to find someone nominally liable under article 2, paragraph three within the statutory period.²²⁷

The remainder of article 5 appears to anticipate incipient asbestos and smoking cases.²²⁸ This part of the article is susceptible to judicial

219 KITAGAWA, *supra* note 3, app. 4D-2, 4D-3. *Black's Law Dictionary* 1411 (6th ed. 1990) defines a statute of repose as "one that cuts off a right of action after specified time measured from delivery of product . . . regardless [of when the cause of action accrued]."

220 KITAGAWA, *supra* note 3, app. 4D-2, 4D-3.

221 KITAGAWA, *supra* note 3, app. 4D-2, 4D-3.

222 The EC Directive's article 10 provides a three-year statute of limitations running from the time a plaintiff becomes aware or should become aware of the damage, the defect, and the producer's identity; article 11 provides a ten-year statute of repose. See Klein, *supra* note 146, at 129.

223 See Adachi et al., *supra* note 63, at 17 (Civil Code article 724 provides a three year statute of limitation running from the time an injured person becomes aware of the injury and the identity of the injuring party). The 1975 Draft Law appears to have recodified the Civil Code provisions as well. See Fujita, *supra* note 1, at 90. The 1975 Draft Law also provided an alternative ten-year statute of limitation for cases of imperfect performance of obligation. Given the Act's focus in tort, and the dereliction of contract as a products liability remedy, such a clause would be both inappropriate and ineffective.

224 See KITAGAWA, *supra* note 3, app. 4D-2; Adachi et al., *supra* note 63, at 17; Fujita, *supra* note 1, at 90.

225 Again, article 6 preserves the applicability of the Civil Code provisions, so the 20 year extinctive period may still apply; whether or not this is the case remains to be seen.

226 See discussion of article 2 *supra* note 177.

227 See KITAGAWA, *supra* note 3, app.4D-2.

228 Cf. Leflar, *supra* note 37, at 751-53. It is likely that asbestos and smoking cases "will dramatically increase over time" due to Japan's later and longer use of asbestos and high smoking rates.

interpretation, because the "time of occurrence of . . . damage"²²⁹ is conceptually vague. *Damage* from *exposure* to a dangerous product (such as lung damage from asbestos in the workplace) can occur for years before *symptoms* are manifested. And *symptoms* may be manifested for some time before a *diagnosis* of an exact cause is possible. At which time is the "damage" said to occur? If "damage" is said to occur at the time of exposure, the Act is hostile to injuries caused by the slow accumulation of toxic agents and to injuries with a long latent period. If "damage" is said to occur when symptoms are manifested, the Act is hostile to injuries whose symptoms may be common to many sources. If "damage" is said to occur when a causal diagnosis is possible, the Act is hostile to those plaintiffs without access to sophisticated medical care as well as to manufacturers, whose liability would hinge on the various medical communities' diagnostic skills.

One solution lies in the courts' approach to the similar, if not more complex, problems of causal determination in the early pollution cases.²³⁰ In those case, the courts relied on epidemiological causation and statistical probability to first lower, then shift the plaintiff's burden of proof.²³¹ The courts may well adopt this solution when confronted with the questions inherent in article 5.²³²

F. Article 6 (*Application of Civil Code*)

Article 6 dictates that not only the Products Liability Act, but also the Civil Code articles apply to the liability of a "producer or the like" for damage caused by a defective product.²³³ Although it may be anticlimactic to state, article 6 is perhaps the single most important provision in the Act. By reiterating the applicability of the Civil Code articles (and by implication, the body of interpretive case law), the Act reinforces the status quo. Together with the forgoing analysis of the other provisions, article 6

²²⁹ KITAGAWA, *supra* note 3, app. 4D-2, 4D-3. The ambiguity may be a creature of translation. The Japanese is *songai ga shōjita toki kara kisan suru*—literally, "is reckoned from the time harm occurred/happened/was caused" (emphasis added). Using the "was caused" definition of *ga shōjita* might resolve the dilemma. For the nuances of the verb *shōjiru*, see SANSEIDO'S NEW CONCISE JAPANESE ENGLISH DICTIONARY 869 (1985).

²³⁰ See Gresser, *supra* note 80, at 143-46.

²³¹ See Gresser, *supra* note 80, at 143-46.

²³² Article 6 may preserve the courts' ability to administer both epidemiological and statistical probability approaches to proof of causation. See discussion of article 6 *infra*.

²³³ See KITAGAWA, *supra* note 3, app. 4D-3.

demonstrates that the Act advances or alters the state of Japanese products liability law only at the margin, if at all.²³⁴

As discussed in the analysis of article 3, the Act preserves the flaws as well as the strengths of the previous products liability regime. Other, systemic flaws are incorporated via the indiscriminating, catch-all article 6. For example, an injured party who actually manages to locate a competent, licensed attorney must pay a substantial up-front fee to secure representation, and disburse expensive court filing fees.²³⁵ Moreover, high attorney retainers and expensive filing fees are but two of several significant barriers a plaintiff must initially overcome before going to trial.²³⁶ The intermittent nature of many Japanese trials may constitute another disincentive.²³⁷ Unlike western-style civil jury trials, Japanese bench trials are composed of intermittent hearings separated by long intervals.²³⁸ Overcrowded dockets exacerbate delays.²³⁹ Plaintiffs may not have the emotional and financial fortitude to endure the lengthy and expensive trial process.²⁴⁰

²³⁴ For example, one past practice that may well continue under the current Act is the courts' sliding scale for mandatory product safety levels. *Cf.* Kitagawa (1989), *supra* note 39, § 4.05[5]. The bench will likely remain free to set the level of safety a product "should normally have taking into consideration its characteristics . . . or the like, and any other circumstances relating to the relevant product." KITAGAWA, *supra* note 3, app. 4D-1. This language's inherent flexibility should allow the courts to adjust the safety requirements for a given class of products, virtually guaranteeing the continued viability of the special negligence doctrine for producers of food products, drugs, and chemicals. Kitagawa (1989), *supra* note 39, § 4.05[5]; Fujita, *supra* note 1, at 71,72. As with fault apportionment, its continued use should not alter greatly the Japanese products liability regime. Thus, Part II of this Comment may function as a discussion of present, as well as previous, Japanese products liability law.

²³⁵ Assuming an exchange rate of US\$1 = ¥100, a suit involving US\$1,000,000 damages would require a US\$5,000 filing fee. *See, e.g.,* Yamanouchi & Cohen, *supra* note 23, at 453 (table demonstrating progressive-rate filing fee schedule); *see also* Miller, *supra* note 21, at 33. By comparison, any action brought in a U.S. federal district court requires a US\$120 filing fee. Yamanouchi & Cohen, *supra* note 23, at 453. In Japan, the up-front retainer fee for the same suit would be US\$30,000; an identical amount would come due if plaintiff won. Yamanouchi & Cohen, *supra* note 23, at 448 (demonstrating statutory-sliding scale retainer fee schedule); *see also* Miller, *supra* note 21, at 34. These sources are silent as to how or where plaintiffs (other than the rich, who can afford such services—or the indigent, who are eligible for legal aid) get such funds.

²³⁶ One potential barrier lies in the fact that Japan's Rules of Civil Procedure do not recognize formal class actions. *See* Ramseyer, *supra* note 25, at 631. However, mass-tort victims overcome this barrier by forming informal associations that expedite trial preparation and settlement negotiations. *See* Cohen & Martin, *supra* note 38, at 340.

²³⁷ Ramseyer, *supra* note 25, at 634; Ottley & Ottley, *supra* note 24, at 39.

²³⁸ Fujita, *supra* note 1, at 40. In contrast, Ramseyer notes that this trial format may allow the parties to discern the judge's inclination before a final decision is reached, leading to multiple settlement opportunities based on the expected outcome. Ramseyer, *supra* note 33, at 116-17.

²³⁹ Ramseyer, *supra* note 25, at 633-34.

²⁴⁰ While there is no *a priori* reason for a products liability statute to remedy a systemic problem like trial delay, it remains important to understand that plaintiffs in a products liability suit face not only substantive, but procedural barriers to litigation.

If a plaintiff's case actually goes to trial, if the formidable burden of proof is met,²⁴¹ and if the plaintiff prevails, only limited damages are available.²⁴² Civil Code articles 709 and 710 provide that plaintiffs may recoup damages for physical and emotional harm,²⁴³ but these damages are usually quite low.²⁴⁴ Moreover, punitive damages are not awarded,²⁴⁵ and awards in lieu of lost future income do not account for inflation.²⁴⁶ As noted earlier, the judiciary apparently sets and enforces arbitrary award rates of its own accord.²⁴⁷ Where damages are awarded, the plaintiff's attorney may take as much as fifteen percent of the award as a "success fee"²⁴⁸ in addition to his or her sizeable retainer fees.²⁴⁹ Awards are often reduced in proportion to the plaintiff's degree of fault,²⁵⁰ and in some cases,

²⁴¹ Matsumoto, *supra* note 30, at 579.

²⁴² Ottley & Ottley, *supra* note 24, at 39-40. Monetary remedies may be limited, but other remedies are not: Japan Civil Code article 723 provides that a liable party shall restore the injured party's reputation, which task may be accomplished in whole or in part by public or private apology through an appropriate medium. Yamanouchi & Cohen, *supra* note 23, at 452; see also Colluquy, *Discussion: The Japan Experience*, 15 U. HAW L. REV. 757-758, 761-762 (concerning apology as a tort remedy). Also, criminal sanctions are available under Criminal Code article 211; charges have been brought against defendant manufacturers on several occasions. Fujita, *supra* note 1, at 45, 47, 48, 51, 54. The charges stuck in only two cases, and sentence was suspended in each. Fujita, *supra* note 1, at 48, 51. Fujita also reports that adept counsel would sometimes file a criminal complaint against a manufacturer named in a previous civil suit, in the hopes that the government would exercise its powers of compulsory discovery where counsel had none. Apparently, prosecutors are now wise to this maneuver. Fujita, *supra* note 1, at 46.

Where the Act does not address the issue of damages, articles 12-14 of the 1975 Draft Law does. Fujita, *supra* note 1, at 91. The Act's failure to address damages must irk plaintiffs and defendants alike. See, e.g., Shigeno, *supra* note 139, at 28 ("industry is urging the necessity of standardizing damage payment costs in order to prevent research and development from slowing").

Many of the Draft Law's provisions (such as mandatory products liability insurance, trust deposits, and so forth, see Fujita, *supra* note 1, at 91) appear to be embodied in modern ADR mechanisms. The new Act makes no mention of the ADR mechanisms.

²⁴³ Fujita, *supra* note 1, at 18. Fujita reports that because the Civil Code does not specify any formula for damages, courts apply both the Hoffman and Reipnitz formulae in calculating lost income. Fujita, *supra* note 1, at 19.

²⁴⁴ Yamanouchi & Cohen, *supra* note 23, at 451.

²⁴⁵ Yamanouchi & Cohen, *supra* note 23, at 451.

²⁴⁶ Hamada et al., *supra* note 21, at 103. However, the Hoffman and Reipnitz damages formulae allow for interest accruing at the judicial rate, which Fujita reports as five percent. Fujita, *supra* note 1, at 19.

²⁴⁷ Miller, *supra* note 21, at 35; HALEY, *supra* note 9, at 115; Matsumoto, *supra* note 30, at 579.

²⁴⁸ Yamanouchi & Cohen, *supra* note 23, at 448 (citing Japan Federation of Bar Associations' Regulations Concerning the Standards for Attorney's Fees, Etc.).

²⁴⁹ But see Ramseyer & Nakazato, *supra* note 37, at 276 n.42 (a successful plaintiff in tort may recover partial attorney's fees).

²⁵⁰ Courts applied a comparative fault analysis in five out of twelve single-injury cases where plaintiff prevailed. See ARITA, *supra* note 56, at 68-74.

comparative fault may offset most of the award.²⁵¹ As a result, products liability suits in general, and single-injury cases in particular, seem an unattractive legal remedy.²⁵² Additionally, a litigant seeking injunctive rather than monetary relief will discover that judges lack the power to enforce court orders.²⁵³ It seems that Japan has earned its reputation for a low rate of litigation²⁵⁴ and that consumer centers and other ADR mechanisms remain busy for good reason.²⁵⁵

Yet, the Act does not address in any way the judiciary's relationship to the many ADR mechanisms. The Act's shortcomings leave the courts powerless to review, alter, or influence in any way the liability policy implemented through the ADR mechanisms.²⁵⁶ By denying the courts the power to review ADR proceedings, the Act raises the specter of a products liability system with double, or even multiple standards. There may be one set of solutions for cases resolved through the legal system and another set or sets of solutions for cases resolved through the various ADR mechanisms. This lack of integration virtually guarantees that a severely injured plaintiff must seek redress in several arenas simultaneously to guarantee sufficient compensation. It is unfortunate at best, destructive and disruptive at worst, and further compromises a severely-injured plaintiff's chances of success in a single-injury case.²⁵⁷

²⁵¹ Kitagawa (1989), *supra* note 39, § 4.05[8] n.37. *But see* ARITA, *supra* note 56, at 72 (reporting the opposite ratio of liability, in favor of plaintiff).

²⁵² *Cf.* Cohen & Martin, *supra* note 38, at 330; Fujita, *supra* note 1, at 70, 74. The disincentives for single-injury lawsuits are heightened by the fact that local consumer centers and other administrative remedies offer the option of settling for a sum certain *now* rather than waiting for an indeterminate award *later*. Hamada et al., *supra* note 21, at 87-88. *See also* Ramseyer, *supra* note 25, at 634 n.184.

²⁵³ HALEY, *supra* note 9, at 118.

²⁵⁴ *See* discussion *supra* note 37.

²⁵⁵ *Cf.* Hamada et al., *supra* note 21, at 87 ("[C]onsumer centers serve a very important function for Japanese citizens, most of whom are reluctant to take these matters as far as lawsuits.").

²⁵⁶ As mentioned earlier, *see supra* note 244, the provisions of the 1975 Draft Law incorporated ADR mechanisms, while the new Act makes no mention of them. The Draft Law provisions left the ADR mechanisms under the control and supervision of the courts, which would have ensured a uniform system enforcing one set of rules and remedies. The new Act silently and permanently deprives the courts of any supervisory role, effectively creating two entirely separate products liability systems. *See, e.g.*, Kitagawa (1989), *supra* note 39, § 4.09[2] ("[t]reatment of products liability cases at consumer centers is substantially different from that in the courts").

²⁵⁷ Again, Leflar writes:

If one of the goals is to keep administrative costs down, the Japanese system certainly is successful. If one goal is to achieve equity in damage recoveries among the injured, Japan is relatively successful in that respect as well, at least to the extent that the injured engage the system. If a goal is to keep the development of safety standards in administrative hands and out of the reach of the courts and plaintiffs' attorneys, the system generally works very well indeed. In times past, the courts have served as a channel for public participation; that role appears to

V. CONCLUSION

The new Act changes the Japanese products liability regime very little. In many ways, the Act recapitulates the prior judicial development of the principles underlying the Civil Code articles. Where the Act does not recapitulate that prior judicial development, it limits the scope of judicial discretion and interpretation. In some instances, the Act reverses the prior judicial development of liability. These limitations and reversals indicate that Japan's substantive products liability law may not undergo subsequent development as a tool for redressing injury or halting injurious practices.²⁵⁸

Further, the Act fails to address the many structural and procedural impediments to suit. Indeed, the Act creates new impediments, because it divides Japan's products liability system into two distinct regimes: one enforced via the courts and the other enforced via ADR mechanisms outside the legal system. The cumulative, resonant effect of these three factors—the division into separate legal and administrative regimes; the procedural and structural barriers to suit; and the Act's reliance on the previous Code-based system—ensures that the 1994 Products Liability Act's uniform "strict liability" system will not function as intended.

have diminished in significance. But if the goals of systematic compensation and injury prevention are considered important, then with the possible exception of traffic accident compensation, one has to look outside the Japanese legal system for their fulfillment.

Leflar, *supra* note 37, at 756.

²⁵⁸ Put more succinctly, the Act has frozen the field of substantive products liability law in Japan. See Professor Haley's observation, *supra* note 8. The freeze will be deepened by the recent downturn in the use of lawsuits as a tool for social activism. Cf. Tanaka, *supra* note 103, at 737-38.