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THE PATH FOR JAPAN?: AN EXAMINATION OF PRODUCT LIABILITY LAWS IN THE UNITED STATES, THE UNITED KINGDOM, AND JAPAN

Abstract: *The United States, the United Kingdom, and Japan developed their product liability laws based on a common desire to protect consumers. Although these regimes are similar in many ways, due to cultural differences, it seems there will always be differences. U.S. and British strict product liability regimes date back to the nineteenth and early twentieth century. Japan's strict product liability regime, however, is still in its infancy. By examining the development of strict product liability in each of these countries, focusing on statutory and common law language, as well as the position of, structure of, and access to the judiciary, this Note concludes, due to the similarities between the United Kingdom and Japan—similarities generally not existing with respect to the United States—that Japan is more likely to develop its product liability regime in accordance with the United Kingdom, rather than the United States.*

INTRODUCTION

Across the globe, nations are shedding their individuality in order to facilitate and encourage economic competition and fairness.¹ The European Union (EU), for example, was established in part to achieve harmonization in many areas associated with commercial activities.² Other nations such as Japan have also heeded to the pressure of creating laws in accordance with other nations to ease commercial and economic activity.³

¹ See Frank K. Upham, *Privatization Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 *FORDHAM INT'L L.J.* 396, 401 (1997); George A. Zaphiriou, *Unification and Harmonization of Law Relating to Global and Regional Trading*, 14 *N. ILL. U.L. REV.* 407, 418–19 (1994).

² See generally Treaty on European Union and Final Act, Feb. 7, 1992, Belg.-Den.-Fr.-F.R.G.-Greece-Ir.-Italy-Lux.-Neth.-Port.-Spain-U.K., 31 *I.L.M.* 247 (1992); see also Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 1985 O.J. (L 210) 29, 29 [hereinafter EC Directive].

³ See Jason F. Cohen, Note, *The Japanese Product Liability Law: Sending a Pro-Consumer Tsunami through Japan's Corporate and Judicial Worlds*, 21 *FORDHAM INT'L L.J.* 108, 148 (1997).

The development of product liability laws is one area that has varied across the globe but is now slowly beginning to converge.⁴ Product liability laws generally impose liability on manufacturers, distributors, and sellers for damages caused by commercial goods.⁵ Today, product liability is often controlled by “strict liability,” a no fault doctrine.⁶ Common rationales for this standard are protecting the consumer, cost spreading, and placing the responsibility for harms on the one in the best position to make a difference.⁷

This Note demonstrates the different ways nations have slowly begun to implement similar product liability regimes and then explains how the variations can result in disparate applications. Part I outlines the emergence of product liability regimes in the United States, the United Kingdom, and Japan. Part II compares and contrasts the approaches found in each nation and illustrates the differences that arise as a result of the variations, despite similar foundations. Part III utilizes the differences and similarities among the three nations and the changes in Japan following the passage of Japan’s Product Liability Act in 1994 (1994 Act)⁸ to predict the future path of Japanese product liability doctrine. Finally, Part IV concludes that Japan will most likely follow a path similar to the one taken by the United Kingdom.

I. THE EVOLUTION OF PRODUCT LIABILITY LAW IN THE UNITED STATES, THE UNITED KINGDOM, AND JAPAN

A. *The United States*

Dubbed the “birthplace of product liability,” the United States generally operates under a judicially-created scheme of product liabil-

⁴ See generally EC Directive, *supra* note 2; Mark A. Behrens & Daniel H. Raddock, *Japan’s New Product Liability Law: The Citadel of Strict Liability Falls, But Access to Recovery is Limited by Formidable Barriers*, 16 U. PA. J. INT’L BUS. L. 669 (1995); Cohen, *supra* note 3; Thomas Lundmark, *The Restatement of Torts (Third) and the European Product Liability Directive*, 5 J. INT’L L. & PRAC. 239 (1996).

⁵ See JANE STAPLETON, *PRODUCT LIABILITY* 9 (1994).

⁶ See, e.g., EC Directive, *supra* note 2, at 29; Lundmark, *supra* note 4, at 242–43; Andrew Marcuse, Comment, *Why Japan’s New Products Liability Law Isn’t*, 5 PAC. RIM L. & POL’Y J. 365, 365 (1996).

⁷ See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring); see also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 98, at 692–93 (5th ed. 1984); STAPLETON, *supra* note 5, at 20–21.

⁸ The Product Liability Law, Law No. 85 of 1994 (Japan), *tentative translation available at* (visited Feb. 8, 2000) <<http://www.jef.or.jp/news/guidepll.html>> [hereinafter 1994 Act].

ity based on “strict liability” that imposes liability without fault.⁹ Developing from the Industrial Revolution, U.S. product liability law is derived from case law and restatements of law anchored in contract and tort.¹⁰ It is based on the belief that consumers need protection from business and that business should bear the costs of harms inflicted on consumers.¹¹

1. The Early Years of U.S. Product Liability Law

Before the onslaught of the Industrial Revolution, commercial transactions were relatively personal, and products were generally limited to hand-crafted items.¹² The customer usually knew the source of a product and whom to blame if there was a problem.¹³ Under this system, the common law notion of “caveat emptor,” or “buyer beware,” was the controlling doctrine of commercial activity, making it the responsibility of the buyer to inspect goods for defects and potential dangers.¹⁴ However, the development of machines, the growing reliance on mass production, and the addition of new players that accompanied the Industrial Revolution created new problems.¹⁵ Products became more sophisticated and specialized, making it difficult for the average buyer to perform an adequate inspection.¹⁶

As the problems grew, U.S. courts initially attempted to account for them through contract law and the doctrines of expressed warranty of fitness and implied warranty of merchantability.¹⁷ The warranty doctrines were restrictive as the only means to recover for de-

⁹ See Lundmark, *supra* note 4, at 242–43.

¹⁰ See *id.*; see generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998); RESTATEMENT (SECOND) OF TORTS (1965). Due to the diversity among the fifty states, the Restatements will be used as the basic standards in the United States for the purposes of this Note, with reference to specific states where appropriate. See Lundmark, *supra* note 4, at 260–63.

¹¹ See *Escola*, 150 P.2d at 440–41 (Traynor, J., concurring); STAPLETON, *supra* note 5, at 22; Lundmark, *supra* note 4, at 244.

¹² See Lundmark, *supra* note 4, at 242.

¹³ See STAPLETON, *supra* note 5, at 14.

¹⁴ See GERAIN T. HOWELLS, *COMPARATIVE PRODUCT LIABILITY* 5 (1993); KEETON ET AL., *supra* note 7, § 95A, at 679; C.J. MILLER & P.A. LOVELL, *PRODUCT LIABILITY* 78–79 (1977); STAPLETON, *supra* note 5, at 10.

¹⁵ See STAPLETON, *supra* note 5, at 11.

¹⁶ See *id.*

¹⁷ See KEETON ET AL., *supra* note 7, §§ 95A, 96A, at 679–83. Expressed warranties are the result of expressed statements by the manufacturer, distributor, or seller regarding the quality of a product. See *id.* Implied warranties hold the seller responsible for the fitness of goods for ordinary purposes. See *id.*

fects in products because they were subject to a privity requirement.¹⁸ Privity is a contract requirement allowing only parties directly involved to recover for a breach of contract.¹⁹ Privity allowed manufacturers to avoid a multitude of claims because the right to recover was restricted to a limited group.²⁰

Winterbottom v. Wright,²¹ an English case, set the stage for early U.S. law upholding the privity requirement.²² In that case, a coach company contracted with the Postmaster General to provide coaches for the mail service and to take responsibility for the maintenance of the coaches.²³ The plaintiff was hired by the Postmaster General to drive the coach and deliver the mail.²⁴ The driver was subsequently injured when the coach collapsed as a result of poor maintenance.²⁵ The plaintiff sued the coach company, claiming it had failed to properly maintain the coach, thereby causing his injuries.²⁶ The court held that the driver could not recover from the coach company because the plaintiff was not a party to the contract for maintenance between the coach company and the Postmaster General.²⁷ The court believed that elimination of the privity of contract requirement would open manufacturers to claims not only from the people with whom they had direct contact, but also bystanders, passengers, and a horde of other unknown parties.²⁸ The *Winterbottom* court found that recognizing a new claim extending to those without privity would violate the seller's expectations and go beyond the scope of the law.²⁹

As the nineteenth century ended, a new remedy for damage resulting from products began to emerge as courts started to impose liability in tort where a supplier had knowledge of a defect in its product and placed it on the market anyway.³⁰ Courts also began to

¹⁸ See *id.* § 96, at 681; Lundmark, *supra* note 4, at 244.

¹⁹ See KEETON ET AL., *supra* note 7, § 96, at 684; STAPLETON, *supra* note 5, at 15–16. For example, if John Doe bought a car and his wife was injured due to a defect in the car while driving, Mrs. Doe would not be able to recover for the resulting injuries because she had not been a party to the sale of the car or the contract relating to the car. See KEETON ET AL., *supra* note 7, § 96, at 684.

²⁰ See STAPLETON, *supra* note 5, at 15–16.

²¹ *Winterbottom v. Wright*, 10 M & W 109, 152 Eng. Rep. 402 (1842).

²² See *id.* at 114, 152 Eng. Rep. at 405; KEETON ET AL., *supra* note 7, § 96, at 681.

²³ See *Winterbottom*, 10 M & W at 109, 152 Eng. Rep. at 402.

²⁴ See *id.*

²⁵ See *id.* at 110, 152 Eng. Rep. at 403.

²⁶ See *id.*

²⁷ See *id.* at 114, 152 Eng. Rep. at 405.

²⁸ See *Winterbottom*, 10 M & W at 114, 152 Eng. Rep. at 405.

²⁹ See *id.* at 115, 152 Eng. Rep. at 405.

³⁰ See STAPLETON, *supra* note 5, at 20.

recognize liability for “inherently dangerous” products.³¹ These tort theories were considered exceptions to the privity rule, but privity still remained a bar to recovery for many product-related claims.³²

The next shift toward more stringent standards for product manufacturers occurred in 1916, when recovery was allowed under a theory of negligence in *MacPherson v. Buick Motor Co.*³³ The facts of *MacPherson* are similar to *Winterbottom* in that the plaintiff was injured and sought to recover from a party with whom he did not have a contractual relationship.³⁴ The defendant had sold a car to a car dealer who subsequently sold the car to the plaintiff.³⁵ The plaintiff was injured when one of the wheels collapsed.³⁶ The court did not find that the defendant had purposely placed a defective product on the market, but rather extended the definition of dangerous product, finding that where a defect could have been discovered upon reasonable inspection, a plaintiff could recover under a theory of negligence.³⁷ By shifting the claim from contract law to tort law and expanding the available tort claims, the court dispensed with the privity requirement because it is not an element of negligence.³⁸ The court reasoned that this approach was appropriate because the defendant was in the best position to discover the danger and knew or should have known that the car would not subsequently be subject to an adequate inspection by the ultimate consumer.³⁹ Therefore, the manufacturer owed a duty to the ultimate purchaser to properly inspect the car.⁴⁰ This case established the concept of suing up the chain of distribution, allowing a consumer to go past the direct retailer to the manufacturer even though no contract existed between the consumer and the manufacturer or distributor.⁴¹

Even though the courts were beginning to recognize a need to protect the general public from dangerous products, the ability to recover for damages remained restricted because decisions still rested

³¹ See KEETON ET AL., *supra* note 7, § 96, at 682–83; STAPLETON, *supra* note 5, at 20.

³² See KEETON ET AL., *supra* note 7, § 96, at 682–83; STAPLETON, *supra* note 5, at 20.

³³ See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916); *see also* STAPLETON, *supra* note 5, at 20.

³⁴ See *MacPherson*, 111 N.E. at 1051.

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *MacPherson*, 111 N.E. at 1051.

⁴⁰ See *id.*

⁴¹ See *id.*; KEETON ET AL., *supra* note 7, § 96, at 683.

on a theory of negligence or contract.⁴² The standard under negligence is a reasonableness standard that means if a “reasonable” manufacturer would still market the product regardless of the defects, no duty of care is violated.⁴³ This determination is often based on a cost-benefit analysis: if the costs of inspection or change outweigh the benefit—usually economic benefit—the manufacturer is not negligent in placing the defective product on the market.⁴⁴ If plaintiffs could not prove the manufacturer acted unreasonably, no recovery was available.⁴⁵ The negligence standard was problematic for most consumers because they did not have the resources or opportunities necessary to prove unreasonable conduct.⁴⁶

2. Strict Liability: The Modern U.S. Standard

The first inkling of a new standard for manufacturers, distributors, and sellers was espoused by Justice Traynor in a concurring opinion in *Escola v. Coca Cola Bottling Co.*⁴⁷ In that case, a waitress was injured when a soda bottle exploded in her hand.⁴⁸ The case itself was decided on negligence grounds, but Justice Traynor asserted that public policy demanded recovery for the plaintiff even if negligence could not be proven because the manufacturer was in the best position to insure against the damage.⁴⁹ This position was based on the theory that the consumer does not have the same opportunity to inspect products, the same knowledge to recognize dangers, or the ability to spread the cost of such dangers.⁵⁰ This idea of liability imposed without fault became known as “strict liability” and was finally accepted by the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*⁵¹

⁴² See STAPLETON, *supra* note 5, at 20–22.

⁴³ See HOWELLS, *supra* note 14, at 206–07.

⁴⁴ See *id.* at 207.

⁴⁵ See STAPLETON, *supra* note 5, at 20–22.

⁴⁶ See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring); see also KEETON ET AL., *supra* note 7, § 98, at 693; STAPLETON, *supra* note 5, at 22.

⁴⁷ See *Escola*, 150 P.2d at 440–41 (Traynor, J., concurring); see also STAPLETON, *supra* note 5, at 22; Lundmark, *supra* note 4, at 244–45.

⁴⁸ See *Escola*, 150 P.2d at 437.

⁴⁹ See *id.* at 440–41 (Traynor, J., concurring); see also STAPLETON, *supra* note 5, at 22; Lundmark, *supra* note 4, at 244–45.

⁵⁰ See *Escola*, 150 P.2d at 440 (Traynor, J., concurring); see also Lundmark, *supra* note 4, at 245.

⁵¹ See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963); STAPLETON, *supra* note 5, at 24.

Almost all fifty states have now adopted strict liability in one form or another, and it has been incorporated into the *Restatement (Second) of Torts* and the *Restatement (Third) of Torts: Products Liability* that provide decision-making guidance to courts based on case authority and legal literature.⁵² Section 402A of the *Restatement (Second) of Torts*, promulgated in 1965, sets out the commonly accepted U.S. standard for a seller's liability.⁵³ It applies to anyone who is in the business of selling products and sells a product in such a condition as to pose an unreasonable danger of physical harm to the user or consumer, or to his or her property.⁵⁴ Section 402A applies regardless of privity and even if "the seller has exercised all possible care."⁵⁵

The *Restatement (Third) of Torts: Products Liability* expands on § 402A by incorporating principles established through case law since the 1960s.⁵⁶ In accordance with case law, the *Restatement (Third) of Torts* identifies three types of product defects: manufacturing defects, design defects, and information defects.⁵⁷ Manufacturing defects are present when the product is not what the manufacturer intended.⁵⁸ Examples include damaged, physically flawed, and incorrectly assembled products.⁵⁹ Products with design defects are those that reach the consumer in the form intended by the manufacturer, but something in the design makes them dangerous, and foreseeable risks could have been avoided with an alternative design.⁶⁰ Finally, information defects are attributed to products that are unavoidably dangerous yet useful to society; therefore, they are only defective if appropriate, adequate warnings are not attached.⁶¹

⁵² See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 1; RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A; Lundmark, *supra* note 4, at 246, 260–63.

⁵³ See RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A.

⁵⁴ See *id.* § 402A(1).

⁵⁵ See *id.* § 402A(2).

⁵⁶ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, at 3.

⁵⁷ See *id.* § 2; see also Lundmark, *supra* note 4, at 251–52.

⁵⁸ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 2(a); see also Lundmark, *supra* note 4, at 251.

⁵⁹ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 2 cmt. c.

⁶⁰ See *id.* § 2(b); see also Lundmark, *supra* note 4, at 251–52.

⁶¹ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 2(c); see also Lundmark, *supra* note 4, at 252.

B. *The United Kingdom*

The development of product liability law in the United Kingdom did not parallel that in the United States even though the systems of law have a common foundation.⁶² In fact, for a long time the United Kingdom resisted anything similar to that found in the United States.⁶³ Instead, the United Kingdom attempted to maintain a contractual and statutory focus for holding manufacturers responsible for harm caused by products.⁶⁴ In 1932, however, the privity requirement was dispensed with in *Donoghue v. Stevenson*,⁶⁵ which recognized a product liability cause of action in negligence by recognizing a duty to consumers.⁶⁶ In that case, a woman consumed a bottle of ginger-beer, purchased by her friend, that contained the remnants of a decomposed snail.⁶⁷ The bottle was opaque and sealed, thus denying the woman an opportunity to inspect the product prior to consumption.⁶⁸ The woman sued the manufacturer of the ginger-beer to recover for her resulting shock and "severe gastroenteritis."⁶⁹ The manufacturer was held liable even though there was no contract because a duty was owed under the "neighbor principle."⁷⁰ This principle is based on the foreseeability of others being affected by the manufacturer's product and holds a manufacturer liable for those foreseeable damages regardless of privity.⁷¹

Until the latter part of the twentieth century, contract law, negligence law, and statutory law controlled British law concerning recovery for damage resulting from defective products.⁷² The changes in the United Kingdom regarding manufacturer liability since the Indus-

⁶² See The Right Honorable The Lord Griffiths, M.C., et al., *The Developments in English Product Liability Law: A Comparison with the American System*, 62 TUL. L. REV. 353, 355 (1988); Lundmark, *supra* note 4, at 242-43.

⁶³ See Griffiths et al., *supra* note 62, at 355; Lundmark, *supra* note 4, at 242-43.

⁶⁴ See Griffiths et al., *supra* note 62, at 355-56.

⁶⁵ *Donoghue v. Stevenson*, 1932 App. Cas. 562 (Scot.); see HOWELLS, *supra* note 14, at 70-71; MILLER & LOVELL, *supra* note 14, at 171; STAPLETON, *supra* note 5, at 20; Griffiths et al., *supra* note 62, at 356.

⁶⁶ See *Donoghue*, 1932 App. Cas. at 580; see also HOWELLS, *supra* note 14, at 70-71; MILLER & LOVELL, *supra* note 14, at 171; STAPLETON, *supra* note 5, at 20; Griffiths et al., *supra* note 62, at 356.

⁶⁷ See *Donoghue*, 1932 App. Cas. at 566.

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.* at 580; see also HOWELLS, *supra* note 14, at 70-71; MILLER & LOVELL, *supra* note 14, at 171; STAPLETON, *supra* note 5, at 20; Griffiths et al., *supra* note 62, at 356.

⁷¹ See *Donoghue*, 1932 App. Cas. at 580-81; see also HOWELLS, *supra* note 14, at 70-71; Griffiths et al., *supra* note 62, at 358.

⁷² See Griffiths et al., *supra* note 62, at 360-62.

trial Revolution have been largely legislative, as opposed to judicial.⁷³ For example, the Sale of Goods Act of 1979 regulated the sale and supply of goods,⁷⁴ and the Unfair Contract Terms Act of 1977 was aimed at preventing sellers from contracting out of terms governing the quality of goods.⁷⁵ In addition, criminal sanctions have been imposed for certain trading activities that may be related to the introduction of unsafe goods.⁷⁶ Until 1987, as far as tort remedies were concerned, the law of product liability in the United Kingdom was at about the same stage as the United States in 1916 following *MacPherson*.⁷⁷

Things began to change for the United Kingdom in 1985 when the Council of the European Communities adopted the European Product Liability Directive (EC Directive).⁷⁸ This Directive required all Member States to adopt similar measures for the protection of consumers.⁷⁹ The Directive was partially motivated by a desire to maintain competition and facilitate the movement of goods within the common market.⁸⁰ The United Kingdom implemented the EC Directive through Part I of the Consumer Protection Act of 1987.⁸¹ The EC Directive, however, allows certain provisions to be optional.⁸² For example, the adoption of the state-of-art defense was left up to each Member State.⁸³ The United Kingdom exercised the option to include this defense, allowing manufacturers to escape liability if the risks of a product were not known or knowable at the time of production.⁸⁴

Under the Consumer Protection Act, "product" encompasses any goods or electricity, including component parts and raw materials.⁸⁵ Producers of component parts or raw materials are exempt from liability, however, if they can show the defect was a result of instructions given by the manufacturer of the final product or was due to negli-

⁷³ See *id.* at 359.

⁷⁴ See *id.*

⁷⁵ See *id.* at 360.

⁷⁶ See *id.*

⁷⁷ See Griffiths et al., *supra* note 62, at 360.

⁷⁸ See EC Directive, *supra* note 2; see also Griffiths et al., *supra* note 62, at 369–75.

⁷⁹ See EC Directive, *supra* note 2, art. 19.

⁸⁰ See *id.* at 29; see also Griffiths et al., *supra* note 62, at 370.

⁸¹ See Consumer Protection Act, 1987, ch. 43, § 1(1) (Eng.); Griffiths et al., *supra* note 62, at 354.

⁸² See EC Directive, *supra* note 2, art. 15.

⁸³ See *id.* art. 15(1)(b); see also Lundmark, *supra* note 4, at 255.

⁸⁴ See Consumer Protection Act, *supra* note 81, § 4(e); Lundmark, *supra* note 4, at 255.

⁸⁵ See Consumer Protection Act, *supra* note 81, § 1(2).

gence on the part of the final product manufacturer.⁸⁶ The Act imposes liability on producers of the product, importers, and anyone holding him or herself out as producer by affixing a name, trade mark, or other distinguishing feature to the product.⁸⁷ Suppliers may also be held liable, but only if they fail to reveal the name of the producer or importer within a reasonable time of a reasonable request for such information.⁸⁸ A “defect” exists under the Consumer Protection Act “if the safety of the product is not such as persons generally are entitled to expect.”⁸⁹ Expectations can be determined by examining the marketing of the product, any warnings or instructions, the foreseeable uses of the product, and the information available at the time the product left the manufacturer.⁹⁰

C. Japan

The Japanese legal system has been described as “a hybrid of Tokugawa tradition, European-influenced civil codes, and American-influenced laws.”⁹¹ The “Tokugawa tradition” refers to the stage of Japanese legal development that stressed Confucian ideology promoting obedience to hierarchy over the individual.⁹² Under this tradition, the preferred resolution to conflicts is in favor of the whole with little recognition of individual rights.⁹³ Japan has been recognized as a non-litigious culture, and some commentators cite the Tokugawa tradition as the foundation of that culture.⁹⁴

Prior to 1994, product liability law, as an independent area of law, was virtually non-existent in Japan.⁹⁵ Instead of either adopting a product liability statute or creating laws judicially, Japan relied on other provisions and characteristics of its existing laws and customs.⁹⁶ The compromising nature of the Tokugawa tradition was seen as encouraging settlement of any claims as opposed to involving the courts.⁹⁷ Furthermore, the Japanese government did not believe

⁸⁶ See *id.* §§ 1(3), 4(1)(f).

⁸⁷ See *id.* § 2(2).

⁸⁸ See *id.* § 2(3).

⁸⁹ *Id.* § 3(1).

⁹⁰ See Consumer Protection Act, *supra* note 81, § 3(2).

⁹¹ Cohen, *supra* note 3, at 117–18.

⁹² See *id.* at 115–16.

⁹³ See Behrens & Raddock, *supra* note 4, at 672.

⁹⁴ See *id.*

⁹⁵ See Marcuse, *supra* note 6, at 369–70.

⁹⁶ See *id.*

⁹⁷ See Cohen, *supra* note 3, at 120.

product liability laws were necessary due to the intense governmental regulation of Japanese products that sought to achieve uniformity of product design and quality.⁹⁸ The government viewed regulation as a proactive measure to protect consumers and preferred such a measure to a reactive judicial system that entered the picture only after an accident.⁹⁹ For accidents that occurred regardless of the safety regulations, the Japanese courts relied on contract and tort provisions of its Civil Code that has remained virtually unchanged since its passage in 1898.¹⁰⁰

The relevant Civil Code provisions, applied to cases involving product defects, are Articles 415 and 570 (contract provisions) and Article 709 (a tort provision).¹⁰¹ As contract provisions, privity is generally a requirement of Articles 415 and 570.¹⁰² Article 415 imposes liability on a seller for harm caused by its product.¹⁰³ This liability is based on a theory of non-performance—by causing harm, the product failed to perform as expected and therefore, failed to fulfill the contract.¹⁰⁴ The seller, however, may escape liability through proof that the defect was not present at the sale of the product or by showing that there was no negligence on the part of the seller.¹⁰⁵

In contrast, Article 570 imposes liability on the seller for defects present at the time of sale, regardless of fault and thus, is a form of strict liability.¹⁰⁶ Recovery, however, is limited to those in privity with the seller and to the contract price of the product.¹⁰⁷ This article acts to rescind the contract and allows the consumer to be reimbursed.¹⁰⁸

In the tort realm, Article 709 does not specifically refer to product liability cases, but rather sets the general standard for tortious acts and reads: “[a] person who intentionally or negligently violates the rights of another is obligated to compensate for damage arising there-

⁹⁸ See *id.* at 140, 147.

⁹⁹ See *id.* at 141.

¹⁰⁰ See Behrens & Raddock, *supra* note 4, at 678; see also Zentaro Kitagawa, *Products Liability*, in 7 DOING BUSINESS IN JAPAN (MB) Part 13, § 4.03[1] (Zentaro Kitagawa ed., 1989); Marcuse, *supra* note 6, at 370–72.

¹⁰¹ See Kitagawa, *supra* note 100, § 4.03[1] & n.1; Marcuse, *supra* note 6, at 370–72.

¹⁰² See Kitagawa, *supra* note 100, §§ 4.03[1][b], 4.06[1].

¹⁰³ See *id.* § 4.06[1]; Junko Mori, *Japan*, in PRODUCT LIABILITY IN THE ASIA-PACIFIC 113, 114 (Jocelyn Kellam ed., 1995).

¹⁰⁴ See Mori, *supra* note 103, at 114.

¹⁰⁵ See Kitagawa, *supra* note 100, § 4.06[2]; Marcuse, *supra* note 6, at 370.

¹⁰⁶ See Kitagawa, *supra* note 100, § 4.06[2].

¹⁰⁷ See *id.*; Mori, *supra* note 103, at 114; Marcuse, *supra* note 6, at 371.

¹⁰⁸ See Mori, *supra* note 103, at 114.

from.”¹⁰⁹ This article has been applied to product cases, and because it is based in tort, does not require privity of contract.¹¹⁰ Under this provision of the Civil Code, the burden is on the injured party to prove fault.¹¹¹ Furthermore, a plaintiff must prove fault “beyond a reasonable doubt” as opposed to the “preponderance of the evidence” standard found in U.S. civil cases.¹¹² A defendant can refute a claim by attacking causation, pleading unforeseeability, or raising a state-of-art defense.¹¹³

In 1975, Japan began to specifically address the problem of product liability when the legislature proposed the Draft Model Law on Products Liability (1975 Draft).¹¹⁴ If adopted, this act would impose liability on producers regardless of fault or privity.¹¹⁵ Furthermore, liability would be extended to sellers and distributors who would have the burden of proving they were not responsible for the defect.¹¹⁶ In addition, the 1975 Draft proposed new, expanded discovery procedures¹¹⁷ and required producers to contribute to a compensation fund that would pay for damage awards.¹¹⁸ The idea of a compensation fund was not new in Japan but rather would have been a codification of past practices.¹¹⁹ The 1975 Draft has not been adopted, and its fate is presently uncertain.¹²⁰

The 1994 Act was later passed primarily as a reaction to domestic and international pressures rather than out of concern for consumers and individual rights.¹²¹ The domestic pressure arose from the 1993 elections when a new party gained control of Japan for the first time since World War II.¹²² Prior to this shift in power, the government was pro-business and pro-regulation.¹²³ Manufacturers had little trouble convincing the government that product liability laws were unnecessary because the level of regulation insured that the likelihood of

¹⁰⁹ Kitagawa, *supra* note 100, § 4.05[1] n.1; see Mori, *supra* note 103, at 114.

¹¹⁰ See Kitagawa, *supra* note 100, § 4.05[1]; Mori, *supra* note 103, at 114.

¹¹¹ See Mori, *supra* note 103, at 115; Marcuse, *supra* note 6, at 371.

¹¹² See Mori, *supra* note 103, at 115.

¹¹³ See Marcuse, *supra* note 6, at 372.

¹¹⁴ See *id.* at 379.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See Behrens & Raddock, *supra* note 4, at 706–07; Marcuse, *supra* note 6, at 379.

¹¹⁸ See Marcuse, *supra* note 6, at 379–80.

¹¹⁹ See *id.*

¹²⁰ See *id.* at 380.

¹²¹ See Cohen, *supra* note 3, at 145–46, 150.

¹²² See Behrens & Raddock, *supra* note 4, at 688; Cohen, *supra* note 3, at 153.

¹²³ See Behrens & Raddock, *supra* note 4, at 688; Cohen, *supra* note 3, at 148.

product defects was significantly less than that found in the United States.¹²⁴ The new government, however, was more consumer-oriented and advocated deregulation.¹²⁵ Although the old party is back in power, voter behavior has caused it to continue the commitment to consumers.¹²⁶

On the international front, when the EC Directive was adopted by its Member States, Japan became the only industrialized nation without a product liability law.¹²⁷ In addition, Japan had long endured international criticisms of its regulation of industry.¹²⁸ Critics claimed the regulation created barriers to foreign entry into the Japanese market because the standards were so much higher than in other nations.¹²⁹ These criticisms, coupled with the recognition of the importance of a global economy, fueled the new government's support of deregulation.¹³⁰ With the prospect of deregulation, Japan finally decided it was time for a product liability law.¹³¹

The 1994 Act was inspired by the EC Directive and essentially embraces the same concepts.¹³² It also incorporates ideas found in the 1975 Draft that are in symmetry with the EC Directive.¹³³ The 1994 Act, however, does not incorporate the 1975 Draft's proposal for expanded discovery procedures, and it relies on the Civil Code for matters on which the law is silent.¹³⁴ For example, although the law now imposes liability for a defect regardless of fault, the 1994 Act is silent on the issue of burden of proof, leaving a heavy burden on the plaintiff to show beyond a reasonable doubt that the defect existed at the time the product left the manufacturer.¹³⁵ Without the expanded discovery procedures, this burden is still very heavy because it is difficult to obtain any information about the product.¹³⁶

¹²⁴ See Cohen, *supra* note 3, at 148.

¹²⁵ See Behrens & Raddock, *supra* note 4, at 688.

¹²⁶ See Cohen, *supra* note 3, at 154.

¹²⁷ See *id.* at 148.

¹²⁸ See *id.* at 140-41.

¹²⁹ See *id.*

¹³⁰ See *id.* at 148, 149-50.

¹³¹ See Cohen, *supra* note 3, at 152.

¹³² See Mori, *supra* note 103, at 116; Marcuse, *supra* note 6, at 382.

¹³³ See Marcuse, *supra* note 6, at 382.

¹³⁴ See 1994 Act, *supra* note 8, art. 6; Cohen, *supra* note 3, at 159, 176; Marcuse, *supra* note 6, at 388.

¹³⁵ See Mori, *supra* note 103, at 115-16; Marcuse, *supra* note 6, at 388.

¹³⁶ See Behrens & Raddock, *supra* note 4, at 706-08; Mori, *supra* note 103, at 115-16; Cohen, *supra* note 3, at 176.

The 1994 Act applies to “movable property [that is] manufactured or processed.”¹³⁷ It imposes liability on “any person who manufactured, processed, or imported the product as business”¹³⁸ and anyone who puts “his name, trade name, trade mark or other feature . . . on the product presenting himself as its manufacturer” or who could be mistaken as the manufacturer.¹³⁹ The 1994 Act does not impose liability on a mere seller.¹⁴⁰ Under the 1994 Act, defect is defined as “lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable manner of use of the product, the time when the manufacturer, etc. delivered the product, and other circumstances concerning the product.”¹⁴¹ Article 4 of the 1994 Act allows for a state-of-art defense¹⁴² as well as a defense for component part manufacturers who can show the defect is a result of compliance with instructions from the manufacturer of the whole product or a result of negligence on the part of the manufacturer of the whole product.¹⁴³

II. A COMPARISON OF THE THREE NATIONS

The product liability laws of the United States, the United Kingdom, and Japan are very similar on the surface.¹⁴⁴ They appear to place the consumer first, and they attempt to influence manufacturers, importers, and sellers to take steps to protect consumers.¹⁴⁵

Each nation has established tort remedies for damage caused by defective products.¹⁴⁶ By finding a cause of action in tort, privity is no longer required, and therefore, a consumer or user who has not dealt directly with the manufacturer can recover for damage resulting from

¹³⁷ 1994 Act, *supra* note 8, art. 2(1).

¹³⁸ *Id.* art. 2(3)(1).

¹³⁹ *Id.* art. 2(3)(2).

¹⁴⁰ *See id.* art. 2(3).

¹⁴¹ *Id.* art. 2(2).

¹⁴² 1994 Act, *supra* note 8, art. 4(1).

¹⁴³ *Id.* art. 4(2).

¹⁴⁴ *See generally* 1994 Act, *supra* note 8; Consumer Protection Act, *supra* note 81; RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10; RESTATEMENT (SECOND) OF TORTS, *supra* note 10.

¹⁴⁵ *See generally* 1994 Act, *supra* note 8; Consumer Protection Act, *supra* note 81; RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10; RESTATEMENT (SECOND) OF TORTS, *supra* note 10.

¹⁴⁶ *See* 1994 Act, *supra* note 8, art. 3; Consumer Protection Act, *supra* note 81, § 2(1); RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A.

a defective product.¹⁴⁷ This tort remedy imposes strict liability, or liability without fault, on manufacturers, relieving the consumer of the need to prove the manufacturer acted unreasonably.¹⁴⁸ The plaintiff is left with the burden of proving that the defect existed at the time it left the manufacturer, regardless of the care taken, and that the damage resulted from the defect.¹⁴⁹

Beneath the general principles of product liability laws, however, the laws and the application of the laws begin to deviate.¹⁵⁰ The language of the statutes and judicially created laws treat some elements of product liability claims differently.¹⁵¹ In addition, the judicial systems, the reasons behind the adoption of the laws, and the culture of each nation contribute to variations in application and outcome.¹⁵²

A. Differences Among the Provisions of the Laws

A significant difference among the United States, the United Kingdom, and Japan is whom the product liability laws can affect.¹⁵³ Under § 402A, the seller is liable to the consumer even if the seller did not manufacture the product.¹⁵⁴ Sellers are also accountable under the *Restatement (Third) of Torts*,¹⁵⁵ whereas in the United Kingdom, liability is imposed on the seller of a defective product only if the seller fails to give an injured consumer the name of his or her supplier within a reasonable time of a request for such information.¹⁵⁶ In Japan, under the 1994 Act, liability is restricted to manufacturers, processors, importers, and those placing distinguishing marks on the product so as to be identified as a manufacturer, processor, or importer.¹⁵⁷ Sellers

¹⁴⁷ See 1994 Act, *supra* note 8, art. 1; HOWELLS, *supra* note 14, at 70–71; STAPLETON, *supra* note 5, at 20.

¹⁴⁸ See 1994 Act, *supra* note 8, art. 3; Consumer Protection Act, *supra* note 81, § 2(1); RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A.

¹⁴⁹ See 1994 Act, *supra* note 8, art. 3; Consumer Protection Act, *supra* note 81, § 2(1); RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A; Mori, *supra* note 103, at 115–16; Griffiths et al., *supra* note 62, at 364; Marcuse, *supra* note 6, at 388–89.

¹⁵⁰ See *infra* notes 153–230 and accompanying text.

¹⁵¹ See *infra* notes 153–81 and accompanying text.

¹⁵² See *infra* notes 182–230 and accompanying text.

¹⁵³ See 1994 Act, *supra* note 8, art. 2; Consumer Protection Act, *supra* note 81, § 2; RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 1; RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A.

¹⁵⁴ See RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A.

¹⁵⁵ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 1.

¹⁵⁶ See Consumer Protection Act, *supra* note 81, § 2(3).

¹⁵⁷ See 1994 Act, *supra* note 8, art. 2.

are not included in this list.¹⁵⁸ Unlike the United States, where the entire chain of distribution can be held accountable and left to allocate responsibility amongst themselves, in the United Kingdom and Japan, the exclusion of sellers leaves a hole in which the upper levels of the distribution chain can place blame, making it more difficult for the consumer to recover.¹⁵⁹

Another important difference among the nations is what is covered by the product liability laws.¹⁶⁰ Under the *Restatement (Second) of Torts*, "product" was not specifically defined, but it did include unprocessed agricultural items such as poisonous mushrooms.¹⁶¹ The *Restatement (Third) of Torts* has defined "product" as "tangible personal property" that includes unprocessed materials.¹⁶² The 1994 Act, on the other hand, is limited to "moveable property manufactured or processed,"¹⁶³ and the Consumer Protection Act excludes agricultural items and game that have not "undergone an industrial process."¹⁶⁴ One effect of this variation is a restriction on the causes of action available in the United Kingdom and Japan as compared to the United States.¹⁶⁵

The defenses available to a party subject to liability in the three nations are another key difference.¹⁶⁶ For example, the Consumer Protection Act and the 1994 Act both provide that a producer shall not be liable when the state of scientific knowledge at the time of sale of the product was such that the defect was not known or knowable.¹⁶⁷

¹⁵⁸ See *id.*

¹⁵⁹ See *supra* notes 153–58 and accompanying text; see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 2 cmt. a; RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A cmt. c.

¹⁶⁰ See 1994 Act, *supra* note 8, art. 2(1); Consumer Protection Act, *supra* note 81, § 1(2); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 19; RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A cmt. e.

¹⁶¹ See RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A cmt. e.

¹⁶² RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, §§ 19(a), 19 cmt. b.

¹⁶³ 1994 Act, *supra* note 8, art. 2(1).

¹⁶⁴ Consumer Protection Act, *supra* note 81, § 1(2).

¹⁶⁵ See 1994 Act, *supra* note 8, art. 2(1); Consumer Protection Act, *supra* note 81, § 1(2); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 19 cmt. b; RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A cmt. e.

¹⁶⁶ See, e.g., 1994 Act, *supra* note 8, art. 4(1); Consumer Protection Act, *supra* note 81, § 4(e); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 2 cmt. d; STAPLETON, *supra* note 5, at 239–42; Lundmark, *supra* note 4, at 255–56.

¹⁶⁷ See 1994 Act, *supra* note 8, art. 4(1); Consumer Protection Act, *supra* note 81, § 4(e).

This is known in the United States as the state-of-art defense.¹⁶⁸ The burden on British producers is further reduced by the need to only show the information was not available within the industry, as opposed to being held to the information known to the scientific community.¹⁶⁹

The availability of the state-of-art defense in the United States, however, is not as straightforward. Comment k to § 402A suggests a standard of liability stemming from “the present state of human knowledge.”¹⁷⁰ Over the decades, the majority of states have allowed the state of scientific knowledge to be considered or used as an affirmative defense, but when it is considered, it is not always a determinative factor.¹⁷¹ Under the *Restatement (Third) of Torts*, state-of-art evidence may be admitted, but it is not dispositive.¹⁷² This means that in some jurisdictions, U.S. manufacturers, unlike their Japanese or British counterparts, can be held liable for defects in their products even if it was impossible to discover the defects at the time of sale.¹⁷³ Furthermore, even if a state-of-art defense is available to a U.S. manufacturer, many states do not allow the defense if the manufacturer did not issue post-sale warnings when the information became known.¹⁷⁴

Yet another portion of the Consumer Protection Act and the 1994 Act that differs from U.S. product liability law is the existence of a statute of repose.¹⁷⁵ A statute of repose “establish[es] a fixed or ascertainable time period within which a products liability suit must be

¹⁶⁸ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 2 cmt. d. This is also known as the “developmental risks defense.” See Lundmark, *supra* note 4, at 255–56.

¹⁶⁹ See STAPLETON, *supra* note 5, at 239–42; Lundmark, *supra* note 4, at 255–56.

¹⁷⁰ See RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A cmt. k.

¹⁷¹ See generally PRODUCT LIABILITY DESK REFERENCE: A FIFTY-STATE COMPENDIUM (Morton F. Daller ed., 1998) [hereinafter PRODUCT LIABILITY DESK REFERENCE].

¹⁷² See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 2 cmt. d.

¹⁷³ See generally PRODUCT LIABILITY DESK REFERENCE, *supra* note 171; see also 1994 Act, *supra* note 8, art. 4(1); Consumer Protection Act, *supra* note 81, § 4(e).

¹⁷⁴ See generally PRODUCT LIABILITY DESK REFERENCE, *supra* note 171; see also HOWELLS, *supra* note 14, at 216.

¹⁷⁵ See 1994 Act, *supra* note 8, art. 5(1); Consumer Protection Act, *supra* note 81, § 1(1) (giving effect to the EC Directive); EC Directive, *supra* note 2, art. 11; Stephen J. Werber, *The Constitutional Dimension of a National Products Liability Statute of Repose*, 40 VILL. L. REV. 985, app. at 1053–55 (1995); see generally, PRODUCT LIABILITY DESK REFERENCE, *supra* note 174. Section 1(1) of the Consumer Protection Act incorporates the EC Directive that provides that each Member State “shall provide in their legislation” for a ten-year statute of repose. See Consumer Protection Act, *supra* note 81, § 1(1); EC Directive, *supra* note 2, art. 11.

brought or be forever barred.”¹⁷⁶ While a limited number of states have adopted statutes of repose, most states have not done so, or have repealed such statutes.¹⁷⁷ In the states that have adopted statutes of repose, some are limited to improvements to real property, and another group is left open-ended by setting the limit at the end of the “useful life” of the product.¹⁷⁸ In contrast, the United Kingdom (pursuant to the EC Directive) and Japan have each set a ten-year statute of repose.¹⁷⁹ In each of those countries, a consumer is barred from bringing a product liability action if the product has been in circulation for more than ten years.¹⁸⁰ This again places a limit on the availability of recovery.¹⁸¹

B. *Differences Among the Applications of the Laws and the Ability to Benefit from the Laws*

Not only is the language of the laws different, but the culture and political structure of each nation also influence the application of product liability laws.¹⁸² In addition to the variations in the provisions of each nation, significant differences exist in the judicial process, consumers’ access to court, and each country’s emphasis on litigation.¹⁸³

A substantial difference among the United States, the United Kingdom, and Japan is the emphasis on litigation and the preferred methods of handling disputes or complaints.¹⁸⁴ Litigation is a com-

¹⁷⁶ 4 AM. PROD. LIAB. 3D, § 47:55 (1990).

¹⁷⁷ See Werber, *supra* note 175, app. at 1053–55; see also PRODUCT LIABILITY DESK REFERENCE, *supra* note 171, at 21 (explaining Arizona found its statute of repose unconstitutional).

¹⁷⁸ See, e.g., PRODUCT LIABILITY DESK REFERENCE, *supra* note 171, at 121, 153, 161, 215, 267.

¹⁷⁹ See 1994 Act, *supra* note 8, art. 5(1); Consumer Protection Act, *supra* note 81, § 1(1); EC Directive, *supra* note 2, art. 11.

¹⁸⁰ See 1994 Act, *supra* note 8, art. 5(1); Consumer Protection Act, *supra* note 81, § 1(1); EC Directive, *supra* note 2, art. 11.

¹⁸¹ See 1994 Act, *supra* note 8, art. 5(1); EC Directive, *supra* note 2, art. 11.

¹⁸² See, e.g., HOWELLS, *supra* note 14, at 232; Behrens & Raddock, *supra* note 4, at 672; Griffiths et al., *supra* note 62, at 359–62; Mori, *supra* note 103, at 121; Cohen, *supra* note 3, at 129; Marcuse, *supra* note 6, at 367.

¹⁸³ See, e.g., HOWELLS, *supra* note 14, at 232; Behrens & Raddock, *supra* note 4, at 672; Griffiths et al., *supra* note 62, at 359–62; Mori, *supra* note 103, at 121; Cohen, *supra* note 3, at 129; Marcuse, *supra* note 6, at 367.

¹⁸⁴ See HOWELLS, *supra* note 14, at 232; Behrens & Raddock, *supra* note 4, at 672; Griffiths et al., *supra* note 62, at 359–62; Marcuse, *supra* note 6, at 367.

mon occurrence in the United States.¹⁸⁵ In 1990, over 19,400 product liability cases were filed in federal courts alone.¹⁸⁶ This contrasts with the 150 similar cases filed in Japan since World War II prior to the passage of the 1994 Act.¹⁸⁷

In the arena of product liability, the United States has preferred to create its laws through the judicial process, therefore reinforcing its reliance on civil courts to resolve conflicts.¹⁸⁸ For half a century, the United States has not only relied on civil courts to resolve conflicts between consumers and manufacturers, but it has relied on the doctrine of strict liability that gives consumers a great advantage over manufacturers.¹⁸⁹ The United Kingdom, on the other hand, has preferred to handle product liability disputes through statutes and contract law.¹⁹⁰ Although contract law is an area of civil law, it is a much more restrained area than strict liability in tort because it requires privity.¹⁹¹ In addition, the British statutes that have been passed to help account for harms to consumers are often criminal in nature; thus, the recourse is between the manufacturer and the government, rather than the manufacturer and the consumer.¹⁹²

In contrast to both the United States and the United Kingdom, the culture of Japan has traditionally relied on methods other than the courts to resolve conflicts.¹⁹³ The Tokugawa tradition emphasizes the group and resolving disputes through means that the modern world refers to as alternative dispute resolution.¹⁹⁴ Since the change in government, this tradition appears to be shifting toward a more individual and consumer-oriented culture, but it is not evident how far this shift will go.¹⁹⁵ Regardless of the increased desire to litigate, the costs of litigation in Japan create such a barrier that many will con-

¹⁸⁵ See HOWELLS, *supra* note 14, at 232. The attitude towards litigation in the United States has been described as stemming from a "frontier mentality." See *id.* "[W]hereas in the past Americans would have shot someone who injured them, they now take them to court." *Id.*

¹⁸⁶ See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, app. B at 1292 (1992).

¹⁸⁷ See Cohen, *supra* note 3, at 118 & n.59.

¹⁸⁸ See Griffiths et al., *supra* note 62, at 359; Lundmark, *supra* note 4, at 242–43.

¹⁸⁹ See STAPLETON, *supra* note 5, at 20–22; Lundmark, *supra* note 4, at 245.

¹⁹⁰ See Griffiths et al., *supra* note 62, at 359–60.

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ See Behrens & Raddock, *supra* note 4, at 672; Cohen, *supra* note 3, at 129–30; Marcuse, *supra* note 6, at 367.

¹⁹⁴ See Behrens & Raddock, *supra* note 4, at 672; Marcuse, *supra* note 6, at 367.

¹⁹⁵ Compare Cohen, *supra* note 3, at 153 & n.318 with Behrens & Raddock, *supra* note 4, at 704–05.

tinue to rely on methods of settlement because it is cheaper and more accessible.¹⁹⁶ In addition, like the United Kingdom, Japan has focused on methods other than civil remedies through strict governmental regulation of industries.¹⁹⁷

Other important differences rest in who can get to court.¹⁹⁸ In the United States, it is relatively easy for a consumer to have his or her day in court.¹⁹⁹ Product liability cases in the United States are generally handled on a contingency fee basis that allows a plaintiff to bring a suit and pay the attorney only if the plaintiff prevails.²⁰⁰ The attorney then receives a percentage of the award.²⁰¹ This gives the attorney discretion as to which cases to bring, but if a plaintiff can find an attorney willing to take the risk, the plaintiff can get to court.²⁰² If the defendant wins, the plaintiff rarely pays anything, not even his or her own attorney's fees.²⁰³ Things are not so easy in the United Kingdom or in Japan, where contingent fees are not used.²⁰⁴

In addition, other costs create problems for potential litigants in the United Kingdom and Japan.²⁰⁵ For instance, in the United Kingdom, the losing party usually must pay the other side's court costs, including attorney's fees.²⁰⁶ This can be an expensive result, particularly without an award out of which to pay.²⁰⁷ In Japan, litigants must pay very high retainers and court costs that increase as the potential awards increase.²⁰⁸ Therefore, the more egregious the damages presented in a case, the more the litigant must pay before getting to court.²⁰⁹ Moreover, there is a limited number of attorneys in Japan.²¹⁰ As a result of a strict licensing process, there is roughly one attorney

¹⁹⁶ See Mori, *supra* note 103, at 121; Cohen, *supra* note 3, at 129.

¹⁹⁷ See Cohen, *supra* note 3, at 140, 147.

¹⁹⁸ See Behrens & Raddock, *supra* note 4, at 709; Griffiths et al., *supra* note 65, at 375; Mori, *supra* note 103, at 121; Cohen, *supra* note 3, at 125.

¹⁹⁹ See Behrens & Raddock, *supra* note 4, at 709; Cohen, *supra* note 3, at 125.

²⁰⁰ See Behrens & Raddock, *supra* note 4, at 709.

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See *id.* at 708–09.

²⁰⁴ See Griffiths et al., *supra* note 62, at 375; Mori, *supra* note 103, at 121.

²⁰⁵ See Behrens & Raddock, *supra* note 4, at 709; Griffiths et al., *supra* note 62, at 375; Mori, *supra* note 103, at 121; Marcuse, *supra* note 6, at 368.

²⁰⁶ See Griffiths et al., *supra* note 62, at 375.

²⁰⁷ See *id.*

²⁰⁸ See Behrens & Raddock, *supra* note 4, at 709–11; Mori, *supra* note 103, at 121; Cohen, *supra* note 3, at 125; Marcuse, *supra* note 6, at 368.

²⁰⁹ See Behrens & Raddock, *supra* note 4, at 709–11; Cohen, *supra* note 3, at 125.

²¹⁰ See Behrens & Raddock, *supra* note 4, at 676–77.

per 8,000 Japanese citizens.²¹¹ Compared to Japan, the United States has approximately twenty-five times the number of attorneys servicing a population that is only twice as large.²¹²

Once an injured consumer gets into court, there are more hurdles to conquer.²¹³ Each nation places the burden of proof on the plaintiff, but that burden varies.²¹⁴ Unlike plaintiffs in the United States and the United Kingdom, a Japanese plaintiff must prove his or her case beyond a reasonable doubt in the civil system as well as in the criminal system.²¹⁵ Additionally, in Japan, allegations must specifically point to what part of the product was defective.²¹⁶ This is very difficult to achieve, however, because Japan has very few discovery procedures.²¹⁷ Japanese discovery is limited to situations where:

- (1) the party holding the document is required by law to surrender the document to the moving party;
- (2) the other party relied on what is supposedly written in the document; or
- (3) the nature of the document is such that it states the legal relationship between the parties or it was prepared for the interests of the moving party.²¹⁸

These limitations make it very difficult for the plaintiff to have enough information to know which particular part of a product was defective, thus restricting the ability to recover.²¹⁹

Not only does the burden on the plaintiff vary among the three nations, the body assessing the sufficiency of the evidence is also different.²²⁰ In the United States, product liability actions are most often

²¹¹ See *id.* at 676.

²¹² See *id.* This number works out to approximately one attorney for every 640 Americans.

²¹³ See MILLER & LOVELL, *supra* note 14, at 273–75; Behrens & Raddock, *supra* note 4, at 696, 707–08; Mori, *supra* note 103, at 115.

²¹⁴ See MILLER & LOVELL, *supra* note 14, at 273–75; Behrens & Raddock, *supra* note 4, at 696; Mori, *supra* note 103, at 115; see also EC Directive, *supra* note 2, art. 7.

²¹⁵ See MILLER & LOVELL, *supra* note 14, at 273–75; Mori, *supra* note 103, at 115.

²¹⁶ See Behrens & Raddock, *supra* note 4, at 696.

²¹⁷ See *id.* at 707–08.

²¹⁸ Zentaro Kitagawa, *Structure and Operation of Japanese Law*, in 1 DOING BUSINESS IN JAPAN (MB) § 3.04[4] (Zentaro Kitagawa ed., 1989).

²¹⁹ See Behrens & Raddock, *supra* note 4, at 707–08; Mori, *supra* note 103, at 115; Cohen, *supra* note 3, at 126–27.

²²⁰ See HOWELLS, *supra* note 14, at 231–32; Yasuhiro Fujita, *Japan*, in 1 PRODUCTS LIABILITY: AN INTERNATIONAL MANUAL OF PRACTICE § 6.1.1 (Warren Freedman, Esq. ed., 1987); Griffiths et al., *supra* note 62, at 375; Lundmark, *supra* note 4, at 258; Cohen, *supra* note 3, at 127–28.

decided by a jury, whereas in the United Kingdom, a single judge is usually responsible for the disposition of product liability cases.²²¹ In Japan, there is no jury system; therefore, judges are responsible for decision-making.²²² This difference plays a major role in the outcome of product liability cases because judge awards are “notoriously” lower than jury awards.²²³ The difference between jury awards and judge awards is generally attributed to the sympathetic angle juries bring to a case that a seasoned judge does not.²²⁴

In addition to the body awarding compensation, differences exist among the three nations as to what can be awarded.²²⁵ For example, in the United Kingdom, punitive awards are only granted in three specific situations: when there is oppressive behavior by public servants, when a tort is committed with the intention of profiting from it, and when the damages are expressly sanctioned by statute.²²⁶ The Consumer Protection Act of 1987 does not specifically sanction punitive damages for product defects; therefore, punitive damages cannot be recovered unless one of the other exceptions is proven.²²⁷ In Japan, punitive damages are prohibited.²²⁸ The Japanese civil system is purely intended to account for damage, not to punish.²²⁹ In the United States, on the other hand, some jurisdictions allow for punitive damages that can raise award amounts above and beyond the value of the damage incurred in an effort to punish the manufacturer, distributor, or seller.²³⁰

III. ANALYSIS—THE PATH AHEAD FOR JAPAN

The differences between the United Kingdom and the United States illustrate that the imposition of strict liability does not mean that product liability doctrines will develop in the same direction.²³¹ The relative newness of the 1994 Act leaves open to question the ultimate development of the product liability doctrine in Japan.²³²

²²¹ See Griffiths et al., *supra* note 62, at 375.

²²² See Fujita, *supra* note 220, § 6.1.1; Cohen, *supra* note 3, at 127–28.

²²³ See Griffiths et al., *supra* note 62, at 375.

²²⁴ See *id.*; see also Lundmark, *supra* note 4, at 258.

²²⁵ See Griffiths et al., *supra* note 62, at 393–94; Mori, *supra* note 103, at 115.

²²⁶ See Griffiths et al., *supra* note 62, at 393–95.

²²⁷ See *id.* at 395.

²²⁸ See Mori, *supra* note 103, at 115.

²²⁹ See Behrens & Raddock, *supra* note 4, at 713.

²³⁰ See *id.* at 712.

²³¹ See *supra* notes 144–230 and accompanying text.

²³² See Behrens & Raddock, *supra* note 4, at 670.

There have been few judicial decisions based on the new law, and in the first three years of its enactment, only ten cases were filed.²³³ Changes by manufacturers and within the government, however, suggest the direction in which Japan may head.²³⁴ In addition, the similarities between the United Kingdom and Japan may be predictive of Japan's path.

A. Changes in Japan Since Passage of the 1994 Act

Since the passage of the 1994 Act, manufacturers have taken various steps toward producing safer products and being able to compensate for damage resulting from their products.²³⁵ Generally, manufacturers have initiated research and implementation of better warnings for their products so consumers know of potential dangers before purchase.²³⁶ In addition, although a state-of-art defense is available under the 1994 Act, recalls have increased, and a few products have been taken off the market.²³⁷ Manufacturers have also begun to acknowledge their liability and settle claims in cases similar to ones that were fought before.²³⁸ In addition, the sale of product liability insurance has risen in an effort to guarantee funds to pay for damage.²³⁹

Furthermore, in accordance with the previous settlement orientation of Japan, corporations have created dispute resolution centers to facilitate recovery for damage by products.²⁴⁰ The centers conduct investigations into the defect of the product and then negotiate with the manufacturer on behalf of the consumer.²⁴¹ There is little or no

²³³ See Cohen, *supra* note 3, at 175; *Report on PL Law Gives Mixed Reviews*, MAINICHI DAILY NEWS, July 17, 1998, at 14, available in LEXIS, World Library, MAINWS File; see also *Court orders McDonald's Japan arm to pay 100,000 yen*, JAPAN WKLY. MONITOR, July 5, 1999, available in LEXIS, Japan Country Files (court awarded one quarter of requested amount for injury incurred after consuming orange juice from McDonald's establishment); *Sakai city ordered to pay 45 mil. yen over food poisoning*, JAPAN ECON. NEWSWIRE, Sept. 10, 1999, available in LEXIS, Japan Country Files (court awarded just over one half requested amount for food poisoning resulting from O-157 strain of E-coli bacteria in school food).

²³⁴ See Cohen, *supra* note 3, at 160-72; *Industry News: Nippon Cement Orders 400 Metal Detectors*, COMLINE-CONSUMER GOODS, June 24, 1999, available in LEXIS, Japan Country Files.

²³⁵ See Cohen, *supra* note 3, at 160-72.

²³⁶ See *id.* at 164-65.

²³⁷ See *id.* at 166-67; see also 1994 Act, *supra* note 8, art. 4(1).

²³⁸ See Cohen, *supra* note 3, at 161-63.

²³⁹ See *id.* at 167.

²⁴⁰ See *id.* at 163-64.

²⁴¹ See *id.* at 163.

cost to the consumer.²⁴² The consumer may choose to go to the center's arbitration panel if not satisfied with the result of the negotiation, and if not satisfied there, the center will help the consumer litigate.²⁴³ Any information gathered during the center's process may be used later in court.²⁴⁴ This is significant given the high costs of going to court because the consumer will not have to rely on the attorney to gather all the information, thereby speeding up the process and saving attorney's fees.²⁴⁵

Recent actions by the Japanese government also illustrate the impact of the 1994 Act.²⁴⁶ Since the passage of the 1994 Act, more responsibility has been placed on the manufacturers and away from the government.²⁴⁷ The Ministry of Trade and Industry has begun to deregulate by allowing manufacturers to conduct their own certifications.²⁴⁸ In addition, the government has considered measures to further protect consumers in contract transactions.²⁴⁹ Although this is a different area than the 1994 Act and the product liability laws at issue in this Note, it is indicative of the shift in Japan towards the consumer, for whom product liability laws generally account.²⁵⁰

B. *The United Kingdom as a Guide but Not a Mirror*

The similarities between the U.K. product liability regime and the new Japanese law suggest that as the 1994 Act is applied, the results will be more similar to the United Kingdom than the United States.²⁵¹ Many of the areas in which the United Kingdom differs from

²⁴² See *id.* at 164.

²⁴³ See Cohen, *supra* note 3, at 163-64.

²⁴⁴ See *id.* at 164.

²⁴⁵ See *id.* at 129, 164.

²⁴⁶ See *id.* at 172-73; *Agency slows down progress of consumer-protection bill: Review Needed to Win Support, Sakaiya Contends*, NIKKEI WKLY., Mar. 15, 1999, at 3, available in LEXIS, World File, NIKKEI File [hereinafter *Agency slows down progress*]; *Japan Trade Ministry to Ease Product-Safety Regulations*, ASIA PULSE, Mar. 19, 1998, available in LEXIS, World Library, APULSE File.

²⁴⁷ See *Japan Trade Ministry to Ease Product-Safety Regulations*, *supra* note 246; cf. Behrens & Raddock, *supra* note 4, at 688.

²⁴⁸ See *Japan Trade Ministry to Ease Product-Safety Regulations*, *supra* note 246.

²⁴⁹ See *Agency slows down progress*, *supra* note 246, at 3; *Government seeks to protect consumers with new contract bill*, MAINICHI DAILY NEWS, Aug. 15, 1997, at 14, available in LEXIS, World Library, MAINWS File.

²⁵⁰ See Cohen, *supra* note 3, at 154.

²⁵¹ See generally 1994 Act, *supra* note 8; Consumer Protection Act, *supra* note 81; EC Directive, *supra* note 2.

the United States are the same areas in which Japan varies from the United States.²⁵² The most significant areas are the exclusion of sellers from liability, the reliance on judges instead of juries, the adoption of statutes of repose, the lack of punitive damages, and the traditionally preferred methods of handling product liability disputes.²⁵³

The exclusion of sellers from liability is significant because, unlike the United States, where the seller is equated with the manufacturer, the retailer in the United Kingdom and Japan is on equal footing with the consumer.²⁵⁴ This indicates the acceptance of leaving some of the burden on the consumer.²⁵⁵ Unlike the United Kingdom, Japan still excludes the seller even if the importer is not known, thus essentially allowing the consumer to be left without recourse if a foreign manufacturer is judgement-proof.²⁵⁶ The existence of statutes of repose illustrates the same notion of being more pro-business than the United States because an innocent victim is still innocent ten years and a day after the product is put into circulation, but the United Kingdom—by virtue of the EC Directive—and Japan do not allow the innocent plaintiff to recover after ten years.²⁵⁷

The traditionally preferred approaches to handling product liability disputes and elements of the respective judicial systems also suggest what path Japan may take.²⁵⁸ Unlike the United States, where product liability laws developed out of a concern for consumers and by virtue of judicial decisions, the laws in the United Kingdom and Japan were only partially motivated by such a concern and have primarily developed from legislative actions and external forces.²⁵⁹ The similarities of these traditions suggest that the continued development of product liability law in Japan will remain as constrained as it is in the United Kingdom.²⁶⁰ In addition, in contrast to the United

²⁵² See *supra* notes 144–230 and accompanying text.

²⁵³ See *id.*

²⁵⁴ See 1994 Act, *supra* note 8, art. 2(3); Consumer Protection Act, *supra* note 81, § 2; RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 2 cmt. e; RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A cmt. c.

²⁵⁵ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 2 cmt. e; RESTATEMENT (SECOND) OF TORTS, *supra* note 10, § 402A cmt. c.

²⁵⁶ See 1994 Act, *supra* note 8, art. 2(3); Consumer Protection Act, *supra* note 81, § 2.

²⁵⁷ See 1994 Act, *supra* note 8, art. 5(1); Consumer Protection Act, *supra* note 81, § 1(1); see also EC Directive, *supra* note 2, art. 11.

²⁵⁸ See, e.g., EC Directive, *supra* note 2, at 29; see also Behrens & Raddock, *supra* note 4, at 687–88; Griffiths et al., *supra* note 62, at 369–75; Cohen, *supra* note 3, at 148–50.

²⁵⁹ See EC Directive, *supra* note 2, at 29; see also Behrens & Raddock, *supra* note 4, at 687–88; Griffiths et al., *supra* note 62, at 369–75; Cohen, *supra* note 3, at 148–150.

²⁶⁰ See Griffiths et al., *supra* note 62, at 359.

States, the United Kingdom and Japan rely on judges for disposition of product liability claims and do not allow punitive damages.²⁶¹ These elements will restrain the awards granted to injured consumers, thus providing less incentive for manufacturers to change than exists in the United States.²⁶²

Regardless of the similarities with the United Kingdom, however, without drastic change, Japan will always be unique, at least in relation to the United States and the United Kingdom.²⁶³ Japan's uniqueness is illustrated by the areas in which it differs from both the United States and the United Kingdom.²⁶⁴ Consumers attempting to bring claims under the 1994 Act will still face high retainer fees and court costs and will still be limited by the number of attorneys practicing in Japan.²⁶⁵ In addition, once in court, plaintiffs are still required to prove beyond a reasonable doubt that a defect existed at the time the product left the manufacturer.²⁶⁶ Moreover, as explained above, the complete exclusion of sellers from the 1994 Act leaves the consumer with little recourse if the importer is unknown and it is not possible to reach a foreign manufacturer.²⁶⁷

CONCLUSION

The United States, the United Kingdom, and Japan all now operate under a theory of strict liability for the disposition of product liability cases. Although the standard is the same, slight differences among the laws and the countries bar the three from being identical. The United States implemented the strict liability standard long before the others and has had time to develop and modify its application. The United Kingdom has been operating under such a standard for twenty years since the change was mandated by the EU. Japan, on the other hand, only recently imposed such a standard on its commercial industries and has not had time to fully identify in what direction it will head.

Although there is no fool-proof way to predict the direction of a new law, examination of the existing laws and systems of the United States, the United Kingdom, and Japan can help predict the path of

²⁶¹ See *supra* notes 220–30 and accompanying text.

²⁶² See *id.*

²⁶³ See *supra* notes 144–230 and accompanying text.

²⁶⁴ See *id.*

²⁶⁵ See *supra* notes 196–212 and accompanying text.

²⁶⁶ See *supra* notes 153–59, 214–16 and accompanying text.

²⁶⁷ See *supra* notes 153–59, 254–56 and accompanying text.

the 1994 Act. Such a review suggests that Japan is more likely to apply its product liability law like the United Kingdom. Similar to the United Kingdom, Japan relies on judges to make its decisions, as opposed to a sympathetic jury. It has imposed a statute of repose and excludes the seller from those liable under the 1994 Act. Furthermore, tradition indicates that Japan will always try to handle matters in ways other than going to court.

The uniqueness of Japan, as compared to these nations, however, will always play a role in the 1994 Act's application and will continue to create barriers to Japanese consumers. The high court costs and limited number of attorneys will continue to restrict the number of claims that can be brought under the 1994 Act. The stringent "beyond a reasonable doubt" burden of proof will also create problems that are not found in the United States or the United Kingdom. In sum, although Japan was partially motivated by a desire to assimilate its product liability laws with the rest of the world, external factors and its choice of provisions will continue to prevent Japan from fully assimilating to the Western world.

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