

PRODUCT LIABILITY LAW IN JAPAN: AN INTRODUCTION TO A DEVELOPING AREA OF LAW

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I. INTRODUCTION

The law relating to the liability of manufacturers, wholesalers, and retailers of products that cause injury or death has undergone fundamental changes during the past two decades. While the most dramatic developments have occurred in the United States,¹ product liability has gained increasing attention in all industrial countries.² As a result, product liability law has become a concern not only to domestic enterprises but also to multinational corporations which manufacture and sell products across national boundaries. The involvement of multinational corporations has led to a greater awareness of the various national laws and court decisions on prod-

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¹ The most important development in product liability law in the United States during the past twenty years has been the shift from negligence and warranty theories of liability to a theory of strict liability. California was the first state to adopt strict liability. *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In 1965 the American Law Institute published section 402A of the Restatement (Second) of Torts which has been widely cited by courts as a description of when strict liability will be applied. See *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *RESTATEMENT (SECOND) OF TORTS* § 402A (1965). Two recent developments indicate the direction that product liability law may take during the 1980's in the United States. In *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), the California Supreme Court adopted a theory of "market share liability" to enable a plaintiff to recover when she was unable to prove which drug company had manufactured a product that she had used more than 25 years earlier. In the same year the Indiana prosecution of Ford Motor Company expanded corporate criminal responsibility by establishing that corporations can be criminally prosecuted for homicide if death results from a defective product. See L. STROBEL, *RECKLESS HOMICIDE?* (1980); B. Ottley, *Criminal Liability for Defective Products: New Problems in Corporate Responsibility and Sanctioning*, 53 REV. INT'L DRGT PENEL 145 (1982).

² For a discussion of the liability for defective products in Argentina, Australia, Belgium, Brazil, Canada, Finland, France, Germany, Ireland, Italy, Japan, The Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and the United States, see generally *PRODUCTS LIABILITY: A MANUAL OF PRACTICE IN SELECTED NATIONS* (H. Stucki & P. Altenburger eds. 1981) [hereinafter cited as Stucki & Altenburger].

uct liability³ and to attempts to create a body of international law on the subject.⁴

The articles and books that have been published to date on the comparative and international aspects of product liability law have focused largely on the European Community.⁵ This attention is understandable since Western Europe is a center of United States investment and trade.⁶ In addition, the Common Market countries are devoting increasing legislative and judicial attention to product liability.⁷

An important omission from most of the product liability literature in the United States is consideration of the liability of manufacturers, wholesalers, and retailers for injuries or death caused by

³ In order to further the awareness of national laws on product liability, two international conferences have been held: Products Liability in Europe, a conference of the Association Européenne d' Études Juridiques et Fiscales, held in Amsterdam in September 1975 and the First World Conference on Products Liability, held in London in 1977.

⁴ Among the conventions on product liability that have been signed are the Hague Convention (1973) and the European Convention (1977). For a discussion of these and other conventions relating to product liability, see Wautier, *European Attempts on Harmonizing Law Related to Product Liability*, in 1 Stucki & Altenburger, *supra* note 2.

⁵ For a summary of product liability law in Europe, see H. TEBBENS, *INTERNATIONAL PRODUCT LIABILITY* (1980); ASSOC. EUROPÉENNE D' ÉTUDES JURIDIQUES ET FISCALES, *PRODUCT LIABILITY IN EUROPE* (1975), Stucki & Altenburger, *supra* note 2. Tower, *The Issue of Product Liability in American and European Law*, 1 COMP. L.Y.B. 35 (1977).

⁶ The following figures illustrate the level of United States direct investment and trade in the West European Common Market countries:

U.S. Direct Investment in the E.C.
(in millions of U.S. dollars)

1978	\$55,991
1979	\$66,075
1980	\$77,402
1981	\$80,492

See U.S. DEPT. OF COM., *U.S. DIRECT INVESTMENT POSITION ABROAD AND INCOME, BY COUNTRY, 1970 TO 1981, STATISTICAL ABSTRACT OF THE UNITED STATES 1982-1983 No. 1475*, at 826 [hereinafter cited as *U.S. DIRECT INVESTMENT*].

U.S. Trade with E.C.
(in millions of U.S. dollars)

	<u>Exports</u>	<u>Imports</u>	<u>Balance</u>
1977	\$27,631	\$22,383	+\$ 5,248
1978	\$32,747	\$29,173	+\$ 3,574
1979	\$43,402	\$33,476	+\$ 9,926
1980	\$54,601	\$36,384	+\$18,217
1981	\$52,363	\$41,624	+\$10,739

See U.S. DEPT. OF COM., *EXPORTS AND IMPORTS OF MERCHANDISE, BY CONTINENTS, AREAS AND COUNTRIES: 1970 TO 1981, STATISTICAL ABSTRACT OF THE UNITED STATES 1982-1983 No. 1488*, at 836-37 [hereinafter cited as *EXPORTS AND IMPORTS*].

⁷ See generally Stucki & Altenburger, *supra* note 2.

their products in Japan.⁸ In recognition of the importance of this issue to United States corporations which invest or trade in Japan,⁹ this Article will provide an introduction to Japanese product liability law by focusing on three areas: first, the historical and social influences on Japan's approach to law in general and dispute settlement in particular; second, the provisions of the Civil Code of Japan relating to product liability; and third, some of the cases that have been brought under those code provisions. While Japan is now a fully developed industrial nation, the law relating to the injuries caused by products within the country is still in the developing stages. The most important factors that will determine the future of this area of the law in Japan are not found in the formal legal system but in the social conditions which determine when and how that legal system is used.

II. JAPANESE ATTITUDES TOWARD LAW AND DISPUTE SETTLEMENT

The liability of manufacturers, wholesalers, and retailers for injuries caused by defective products has been accepted in theory in Japan since the early 1960's.¹⁰ This responsibility, however, has not

⁸ The only works in English on Japanese product liability law are Niibori & Cosway, *Products Liability in Sales Transactions*, 42 WASH. L. REV. 483 (1967); Akamatsu & Bonneville, *Disclaimers of Warranty, Limitation of Liability and Liquidation of Damages in Sales Transactions*, 42 WASH. L. REV. 509 (1967); Kitagawa, *The Japanese Experience with Product Liability: A Parallel Development or Unique*, in REPORT OF THE FIRST WORLD CONGRESS ON PRODUCT LIABILITY (1977); Adachi, Henderson, Miyatake, & Fujita, *Japan*, in Stucki & Altenburger, *supra* note 2.

⁹ The importance of United States investment and trade with Japan is illustrated by the following figures:

U.S. Direct Investment in Japan (in millions of U.S. dollars)

1978	\$5,406
1979	\$6,180
1980	\$6,243
1981	\$6,807

See U.S. DIRECT INVESTMENT, *supra* note 6.

U.S. Trade with Japan (in millions of U.S. dollars)

	<u>Exports</u>	<u>Imports</u>	<u>Balance</u>
1977	\$10,529	\$18,550	-\$ 8,021
1978	\$12,885	\$24,458	-\$11,523
1979	\$17,581	\$26,248	-\$ 8,667
1980	\$20,790	\$30,714	-\$ 9,924
1981	\$21,823	\$37,612	-\$15,789

See EXPORTS AND IMPORTS, *supra* note 6.

¹⁰ Kitagawa, *supra* note 8, at 242.

yet produced a significant amount of product liability litigation. An understanding of product liability law and litigation in Japan must begin with a discussion of the factors influencing Japanese attitudes toward law in general and dispute settlement in particular and of the procedural and remedial limitations on private litigation.

A. *The Nature of the Japanese Legal System*

Although the presence of codes gives Japan the outward appearance of a civil law country, the Japanese legal system is a complex blend of tradition,¹¹ civil law,¹² and United States legal influence.¹³ This blend is not the product of centuries of internal development but is the result of external pressures which have an important effect on the public perception of the legal system.

Japan's historical, social, and legal development prior to the Meiji Restoration in 1868 was dominated by its geographic location off the coast of Asia.¹⁴ The country's relative isolation permitted contact with China and Korea but allowed Japan to develop without the constant interaction that characterized European countries. As a result, Japan's own attitudes blended with those of China and Korea to form a particular Japanese character.

Few of the specifics of Japan's traditional legal system have survived Western influence.¹⁵ Many of the social factors that shaped

¹¹ For a discussion of law in Japan prior to the Meiji period, see J. WIGMORE, *A KALEIDOSCOPE OF JUSTICE* 327-48 (1941); Henderson, *Some Aspects of Tokugawa Law*, 27 WASH. L. REV. 85 (1952); Henderson, *The Evolution of Tokugawa Law*, in *STUDIES IN THE INSTITUTIONAL HISTORY OF EARLY MODERN JAPAN* 203 (J. Hall & M. Jansen eds. 1968); Wren, *The Legal System of Pre-Western Japan*, 20 HAST. L.J. 217 (1968); Kim & Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L & COMP. L.Q. 491 (1979); Kiramatsu, *Tokugawa Law*, 14 LAW IN JAPAN 1 (1981).

¹² For a discussion of the reception of the civil law in Japan, see G. SANSOM, *THE WESTERN WORLD AND JAPAN* 444-50 (1950); Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1869-1961*, in *LAW IN JAPAN* 5 (A. Von Mehren ed. 1963) [hereinafter cited as Von Mehren]; Mukai & Toshitani, *The Problems of Compiling the Civil Code in the Early Meiji Era*, 1 LAW IN JAPAN 25 (1967).

¹³ The changes brought about in the Japanese legal system by the American occupation from 1945 to 1952 are discussed in Oppler, *The Reform of Japan's Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. 290 (1949); Steiner, *Postwar Changes in the Japanese Civil Code*, 25 WASH. L. REV. 286 (1950); Blakemore, *Post-War Developments in Japanese Law*, 1947 WISC. L. REV. 632; Tanabe, *The Processes of Litigation: An Experiment with the Adversary System*, in Von Mehren, *supra* note 12, at 73.

¹⁴ For a discussion of Chinese and Korean influence on Japanese history, see E. REISCHAUER, *JAPAN: PAST AND PRESENT* 9-31 (3d ed. 1964).

¹⁵ At the time of the drafting of the Civil Code of Japan, Books I and III were heavily influenced by the first draft of the German Civil Code. Books IV and V dealing with family

Japan's pre-Western legal system, however, have continued to have an important influence on the application of the present legal system. Among those factors, four deserve special consideration.

First, Japan's traditional legal system was built upon the inequality of individuals within society. The foundation of that inequality was the Confucian system of relationships which stressed obedience to superiors and protection of inferiors.¹⁶ These inequalities were reinforced by a system of feudalism which reached its height during the Tokugawa shogunate beginning in the 17th century.¹⁷ The feudal system was built upon four distinct classes: samurai, farmers, artisans, and merchants. Much of the written law during that period was aimed at defining and regulating the relationships between those classes.¹⁸

Second, as a result of Japan's hierarchical class system, a person took his place in society based upon his inherited class and his group within the class.¹⁹ Thus, the group defined as the extended family or the village guild, rather than the individual, was the basic unit of society.

Third, the focus on the group led to an emphasis on a person's duties to his superiors and inferiors rather than on individual rights.²⁰ A person did not insist on his rights but instead sought to harmonize his needs with the interests of the community.

Finally, written law in traditional Japan operated in a vertical direction from the ruler down to the subject.²¹ Those laws delineated expected and prohibited behavior. They made little distinction between criminal and civil matters and exacted punishments in order to produce desired results.²² Conflicts between individuals were resolved by conciliation through the group according to Confucian norms and custom.²³ Since those norms were widely known

law and succession, however, were a codification of Japanese custom. These Books were changed after World War II to bring the topics into conformity with other civil law countries. See Wagatsuma, *Democratization of the Family Relation in Japan*, 25 WASH. L. REV. 404 (1950); Comment, *Japanese Family Law*, 9 STAN. L. REV. 132 (1956).

¹⁶ For a discussion of the teachings of Confucius, see D. SMITH, *CONFUCIUS* (1974).

¹⁷ The rise of feudalism in Japan is discussed in E. REISCHAUER, *supra* note 14, at 43-47.

¹⁸ See Hall, *Tokugawa Japan: 1800-1853*, in *MODERN EAST ASIA: ESSAYS IN INTERPRETATION* 62, 76 (J. Crowley ed. 1970).

¹⁹ See R. BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* (1946).

²⁰ *Id.* at 116.

²¹ This observation was first made by John Fairbank concerning law in traditional China. The comment applies with equal force to Japan. See J. FAIRBANK, *THE UNITED STATES AND CHINA* 117-23 (4th ed. 1979).

²² See Wren, *supra* note 11, at 229-33.

²³ *Id.* at 221-26.

and generally accepted by the people, there was little need to put them in writing. Only when conciliation failed was the dispute brought before a government magistrate.²⁴

The changes in Japanese society, economy, and law brought about by the Meiji Restoration²⁵ and by the American occupation after World War II²⁶ have eliminated the formal class structure and the legal restraints on equality.²⁷ These changes have not, however, destroyed the traditional focus on the group, which now includes a person's company,²⁸ or the emphasis on duties rather than on individual rights. Instead, the traditional ideas have combined with the civil law and the American legal influence to produce what Professor Takeyoshi Kawashima has called "Japanese legal consciousness."²⁹ An example of this legal consciousness can be found in Japanese contracts in which interpretation depends more upon the relationship between the parties than upon the actual words used. This emphasis on relationships is illustrated by a clause contained in many Japanese contracts providing for the resolution of possible future conflicts: "If in the future a dispute arises between the parties with regard to the rights and duties stipulated in this contract, the parties will confer in good faith, or . . . will settle [the dispute] harmoniously by consultation."³⁰

Professor Kawashima's discussion of the difference between Japanese and Western attitudes regarding such contract clauses is illustrative of his thesis of Japanese legal consciousness in general.

From the viewpoint of Westerners who see contractual rights and obligations as something fixed and definite, a confer-in-good-faith

²⁴ *Id.*

²⁵ See generally G. SANSOM, *supra* note 12, at 310-497; E. REISCHAUER, *supra* note 14, at 127-411.

²⁶ See generally REPORT OF GOV'T. SEC. SUPREME COMMAND FOR ALLIED POWERS, Sept. 1945 - Sept. 1948, POLITICAL REORIENTATION OF JAPAN, 186-88, 192-245.

²⁷ Both the 1946 Constitution and the Civil Code now provide guarantees of equality. Article 14 of the Constitution states, in part: "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." Article 1-2 of the Civil Code, inserted after World War II, provides that "[t]his Code shall be construed from the standpoint of the dignity of individuals and the essential equality of the sexes."

²⁸ See E. VOGEL, JAPAN AS NUMBER ONE 131-57 (1979) (discussion of Japanese workers' identification and loyalty to their companies).

²⁹ T. KAWASHIMA, *NIHONJIN NO HOISHIKI* (Japanese Legal Consciousness) (1967).

³⁰ Stevens, *Modern Japanese Law as an Instrument of Comparison*, 19 AM. J. COMP. L. 665, 668 (1971). For a general view of the Japanese attitude toward contracts and their negotiation, see Hahn, *Negotiating Contracts with the Japanese*, 14 CASE W. RES. J. 377 (1982); Watts, *Briefing the American Negotiator in Japan*, 16 INT'L LAW 597 (1982).

clause seems to be nonsense [I]n the West one must provide clauses which can certainly settle disputes by means of arbitration methods. However, this is a Western way of thinking. From the point of view of Japanese legal consciousness, such clauses are not unsettling. Rather, conversely . . . it is unsettling to determine rigidly and definitely rights and obligations in advance and not leave room for petitions (for mitigation) between parties, for the exercise of flexibility. Therefore, even if detailed provisions are inserted in contracts, they do not have very much significance, and . . . the parties themselves do not read them carefully or regard them seriously. Rather, when the problems arise, it is very important for the parties to "confer-in-good-faith" to arrive at a harmonious settlement and to "forgive-and-forget the differences." In this sense, the "confer-in-good-faith" clause is the core of our country's contracts.³¹

Thus, a dichotomy exists between the concepts of the formal legal system, as expressed in the codes and statutes, and the actual application of that law to specific situations. It is important to note, however, that while litigation has increased during the past few years,³² the Japanese attitude toward law is still pragmatic in comparison to the Western attitude. Thus, it is necessary to examine how Japanese attitudes are actually expressed in dispute settlement.

B. Attitudes Toward Dispute Settlement

In Japan, as in the United States and Europe, litigation is only one of a number of available methods of dispute settlement. Japanese attitudes toward alternative methods of conflict resolution, however, take on greater significance when examining an area of law such as product liability.

Much of the reluctance of the Japanese to resort to the courts to resolve disputes is a legacy of the pre-Western legal system which rarely intervened in private controversies.³³ There are a number of factors, however, which explain the continued preference for alter-

³¹ T. KAWASHIMA, *supra* note 29, at 115-16. This translation, by Charles R. Stevens and Kazunobu Takahashi, is in the files of the authors. See also Kawashima, *The Legal Consciousness of Contract in Japan*, 7 LAW IN JAPAN 1 (1974).

³² No exact figures are available on the increase of litigation in Japan. In a letter to the authors, however, Judge Hiroshi Seki of the Tokyo District Court stated that in 1976-77 the number of new civil cases filed in the Tokyo District Court numbered approximately 12,000. By 1980-81 this figure had grown to about 15,800.

³³ See generally D. HENDERSON, *infra* note 41. See *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U.L. REV. 339 (1982).

native methods of conflict resolution. First, as the discussion of the Japanese attitude toward contracts indicates, there is a reluctance on the part of the Japanese to admit that a dispute might arise out of a contractual relationship.³⁴ Litigation acknowledges the existence of such a controversy. Second, litigation results in a decision by a third party who determines who is right and who is wrong according to standards which have been set in advance without consideration of the particular relationship between the parties.³⁵ Third, because a lawsuit is resolved by the decision of judges, litigation deprives the parties of the opportunity to participate in the settlement.³⁶ Finally, by making clear who is right and who is wrong, litigation assigns moral fault and, thus, may result in a loss of face.³⁷

As a consequence of these attitudes toward litigation, the Japanese have developed a number of extrajudicial and quasi-judicial methods of dispute resolution. The three most important of these are reconciliation, conciliation and *chotei*.

Reconciliation is an extrajudicial process whereby the parties to a dispute confer with each other to reach a solution.³⁸ This process, which was the basic form of dispute resolution in traditional Japan, allows the parties to consider their particular relationships, needs, and demands.

A second method of extrajudicial conflict resolution, conciliation, takes two forms in Japan.³⁹ The first is mediation by a third party who offers his help in resolving a dispute. The mediator offers sug-

³⁴ See Ohta & Hozumi, *Compromise in the Course of Litigation*, 6 LAW IN JAPAN 97 (1973).

³⁵ See Kawashima, *Dispute Resolution in Contemporary Japan*, in Von Mehren, *supra* note 12, at 41, 43-45.

³⁶ *Id.* An example of this attitude is the recent scandal that arose in Japan when a couple brought suit against their neighbors. The couple had left their young son in the care of the neighbors. The child drowned when he fell into an irrigation pond which was not on the neighbor's property. The couple sued the contractor who had deepened the water by extracting gravel from the pond, the national government, and the neighbors. The Tsu District Court ordered the neighbors to pay 5 million yen in damages to the couple but dismissed the suits against the other defendants. When the decision was announced on television and radio, a flood of outraged telephone calls and letters were directed at the couple. To many people it was uncharacteristic of the Japanese mentality not to settle the dispute among the parties. The husband even lost his job as a subcontractor when his contractor quit giving him work. As a result, the couple dropped the suit and all claims for damages. See *Couple Ostracized, Harassed for Resorting to the Courts*, The Japan Law Letter, May 1983, at 38.

³⁷ For a discussion of the effect of fault and shame in Japanese society, see R. BENEDICT, *supra* note 19, at 222-27.

³⁸ See Kawashima, *supra* note 35, at 50.

³⁹ *Id.* at 50-51.

gestions which have no binding force. The second form of conciliation is arbitration by a third party who makes a binding decision on the merits of the dispute. In traditional Japan these two forms of conciliation were not differentiated. In their modern use, the third party is usually a person of higher status than the parties to the dispute. When such a person "suggests" conditions for settlement, his prestige and authority are usually sufficient to persuade the parties to accept the settlement. This type of conflict resolution is still frequently used to settle marriage problems, disputes between neighbors, and employment problems.⁴⁰

Even if the parties to a dispute are unable to reach an agreement by extrajudicial methods, there is a third, quasi-judicial alternative to formal litigation. This procedure is *chotei*. *Chotei* may be invoked by the parties to a dispute either prior to litigation or at any time during a lawsuit.⁴¹ Instead of relying on extrajudicial methods or resorting to litigation, parties to a dispute may file a request for *chotei* with any one of the Summary Courts in Japan.⁴² *Chotei* is conducted by the court through a *chotei* committee⁴³ composed of a judge designated by the court⁴⁴ and two or more conciliators⁴⁵ appointed by the court from a list made up each year by the court.⁴⁶ The judge may act alone at his own discretion, however, if the parties do not request a committee.⁴⁷

Even during litigation *chotei* is encouraged by article 136 of the Code of Civil Procedure which provides that a court may, at any time during a trial, attempt to reach agreement by compromise.⁴⁸ If the judges think that the matter is appropriate, the lawsuit may

⁴⁰ *Id.* at 53-56.

⁴¹ For a translation of the MINJI CHOTEI HO, Law No. 222 of 1951, see 2 D. HENDERSON, CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN APP. 3 (1965). See generally Muto, *Concerning Trial Leadership in Civil Litigation: Focusing on the Judge's Inquiry and Compromise*, 12 LAW IN JAPAN 23 (1979); H. TANAKA, THE JAPANESE LEGAL SYSTEM 492-505 (1976).

⁴² MINJI CHOTEI HO (Conciliation of Civil Affairs Act), Law No. 222 of 1951, art. 3.

⁴³ *Id.* art. 5(1).

⁴⁴ *Id.* art. 7(1).

⁴⁵ *Id.* art. 6.

⁴⁶ *Id.* art. 7(2).

⁴⁷ *Id.* art. 5.

⁴⁸ Article 136 of the Japanese Code of Civil Procedure provides:

The court may, whatever stage the suit may be in, attempt to carry out compromise or have a commissioned judge or an entrusted judge try the same. The court, a commissioned judge or an entrusted judge may for compromise order the principal party or his legal representative to appear before the court.

MINJI SOSHO HO, Law No. 29 of 1890, art. 136.

be referred to a *chotei* committee. If the parties are able to reach an agreement, it is reduced to writing and filed with the court. The compromise then becomes effective as a final judgment.⁴⁹ If the parties are unable to agree on a compromise among themselves, the *chotei* committee may be terminated,⁵⁰ or the court may hear the opinions of the committee and issue a decision.⁵¹ If neither of the parties files a protest against the decision within two weeks, it becomes effective.⁵²

Chotei is attractive because the hearings, which are not open to the public, are usually held in a small room in the court building with the parties and the committee seated informally. Thus, *chotei* emphasizes the participation of the parties and attempts to reach a consensus based upon mutual agreement. There is, then, no clear winner or loser.

Reconcilement, conciliation, and *chotei* are modern expressions of traditional Japanese methods of dispute resolution. These methods continue to work well in matters involving continuing relationships such as family, neighbors, and employment. Cases against commercial enterprises for injuries caused by defective products, however, neither present the same compelling reasons for compromise nor seem capable of such compromise.

The recent litigation against food and drug manufacturers indicates that as the Japanese become involved in relationships outside the group, the incentives to compromise will decrease. Although cultural and economic factors are less likely to make the Japanese as litigious as their Western counterparts, litigation may gain greater acceptance in the future. Much of the litigation may result from the unwillingness of manufacturers to acknowledge that their product was defective. Thus, Japanese manufacturers may be willing to incur litigation costs, equal to many times the price of a particular settlement, in order to avoid future claims.

C. *Procedural and Remedial Limitations*

One of the consequences of the Japanese reluctance to use courts to resolve disputes is that the Japanese legal system has never developed procedural and remedial incentives to litigation to the extent that they exist in the United States. One principal procedural

⁴⁹ MINJI CHOTEI HO, (Conciliation of Civil Affairs Act) Law No. 222 of 1951, art. 16.

⁵⁰ *Id.* art. 14.

⁵¹ *Id.* art. 17.

⁵² *Id.* art. 18.

deterrent to complex litigation in Japan is the long delay in proceedings.⁵³ Unlike trials in the United States which, once started, proceed continuously until completed, trials in Japan are marked by intervals of a month or more between days of hearings. While the purpose is to encourage the parties to reach a resolution through compromise, the result is that the judges have no incentive to expedite a trial. Instead, they prefer to delay and to wait for the parties to settle the matter. An example of this procedural deterrent is the thalidomide cases which were first filed in November 1964.⁵⁴ The hearings continued at intervals until December 1974 when an out of court settlement finally was reached.

A second procedural limitation, which is particularly important in product liability cases, is that the various forms of discovery known in the United States do not exist in Japan.⁵⁵ Interrogatories and depositions, which permit the discovery of evidence, are not used in Japan. In addition, public agencies usually rely on "administrative guidance"⁵⁶ to police the activities of private corporations. Because of the informality of this method, little data is collected by the agencies concerning the details of corporate wrongdoing. In contrast, suits in the United States by government agencies produce a tremendous amount of evidence for later use in private damage suits.⁵⁷

In addition to these procedural delays, the small amount of damages awarded by courts in Japan operates as a remedial deterrent to litigation.⁵⁸ Japanese law regards damages merely as a method

⁵³ See H. TANAKA, *supra* note 41, at 475-81.

⁵⁴ For a discussion of the thalidomide cases, see *infra* notes 93-105 and accompanying text.

⁵⁵ For a discussion of discovery procedures available to Japanese courts before trial, see T. HATTORI & D. HENDERSON, *CIVIL PROCEDURE IN JAPAN* § 6.03 (1983).

⁵⁶ "Administrative guidance" (*gyoseishido*) is difficult to define precisely but generally includes a wide variety of means by which the Japanese Government exercises formal and informal regulatory control over businesses operating in Japan. While "administrative guidance" is unofficial in nature and depends to a large degree upon voluntary cooperation by businesses, a variety of sanctions may be imposed by governmental agencies against those who do not comply with their "suggestions." See generally Narita, *Administrative Guidance*, 2 *LAW IN JAPAN* 45 (1968); Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 *LAW IN JAPAN* 22 (1974); see Lansing & Wechselblatt, *Doing Business in Japan: The Importance of the Unwritten Law*, 17 *INT'L LAW* 647, 657-59 (1983).

⁵⁷ An example of such a suit is *S.E.C. v. Texas Gulf Sulfur Co.*, 446 F.2d 1301 (2d Cir. 1971), where the government's suit for an injunction gave rise to a number of private actions for damages. Those private actions could not have been brought if the private parties had not been able to rely on the evidence collected by the S.E.C. and disclosed in its action for an injunction. *Id.*

⁵⁸ See H. TANAKA, *supra* note 41, at 345.

of compensating pecuniary loss. The reasons for the low amount of damages in Japan include not only the absence of a jury, but also the absence in Japan of many of the categories of damages that contribute to high damage recovery in the United States. For example, damages for pain and suffering and punitive damages are almost nonexistent in Japan.⁵⁹ In addition, compensatory damages are not calculated by reference to the annual price rise from the date of the injury.⁶⁰

D. *Reliance on Government Action*

A fourth reason for the small amount of private litigation in Japan is that the Japanese legal system does not encourage private persons to become involved in the enforcement of the law. In the United States private actions by persons actually injured often complement government sanctions since the government does not have the resources to prosecute every wrongdoer. Many statutes in the United States encourage private individuals to police matters by permitting large damage awards if a violation is found.⁶¹ The civil law, however, views intervention in areas that require protection of the public as the exclusive function of the government.⁶² In Japan this attitude is illustrated by the antimonopoly law⁶³ which, although modeled on United States antitrust law, contains no provision for treble damages and by regulatory statutes such as the *Act for the Prevention of Air Pollution*⁶⁴ which contain only criminal sanctions for enforcement.

⁵⁹ See *Five-Year Hearing on Drug Damages Suit Concluded in Tokyo Court*, The Japan Times, July 24, 1980, at col. 1 [hereinafter cited as *Five-Year Hearing*].

⁶⁰ *Id.*

⁶¹ One example of a statute encouraging private action is the *Clayton Act*, 15 U.S.C. § 12 (1976). Section 4 of the Clayton Act provides that:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of the suit, including reasonable attorney's fees.

15 U.S.C. § 15 (1976).

⁶² For a discussion of the relationship between tort and criminal law in civil law jurisdictions, see Limpens, Kruithof, & Meinertzhagen-Limpens, *Liability for One's Own Act*, 11 INT'L ENCYCLOPEDIA COMP. L. ch. 2, 2-150.

⁶³ See SHITEKI DOKUSEN NO KINSHI OYOBI KOSEI TORIHIKI NO KAKUHO NI KAN-SURU HORITSU (Act for the Prohibition of Private Monopoly and the Maintenance of Fair Trade), Law No. 54 of 1947.

⁶⁴ For a discussion of TAIKI OSEN BOSH. HO (Air Pollution Control Law), Law No. 97 of 1968, see J. GRESSER, *ENVIRONMENTAL LAW IN JAPAN* (1981).

In recent years the Japanese Government and a number of local governmental bodies have enacted statutes and ordinances regulating many of the activities of manufacturers.⁶⁵ The principal method used by these laws to deal with unsafe products is to grant the government the power to stop all sales of a product which is alleged to be unsafe until the manufacturer can prove that it is safe. While this method does not create a monopoly of enforcement against defective products, the generally widespread use of exclusive governmental remedies in other areas affects public attitudes in all areas of the law.

Although Japanese law provides for a considerable amount of regulatory power to police manufacturing activities, one of the most important sanctions is rarely invoked: the power of criminal prosecution. One of the most important developments in product liability law in the United States in recent years has been the use of criminal indictments against corporations for defective products which cause injury or death.⁶⁶ Although the most famous of these prosecutions, the *Ford Pinto* case, resulted in an acquittal for the corporation, the case expanded corporate criminal responsibility by holding that a corporation can be prosecuted even for homicide. Unlike the common law, the civil law holds that a corporation cannot be liable for a criminal act.⁶⁷ Only the corporate officers and agents can be indicted. In Japan, a corporation can be prosecuted only for a few specific offenses.⁶⁸ Under article 211 of the Penal Code of Japan, however, corporate officers may be prosecuted for criminal negligence for the injury or death of a person in the course of business.⁶⁹

⁶⁵ Examples of these laws include YAKUJI HO (Pharmaceutical Affairs Act), Law No. 145 of 1960, and SHOHI SEIKATSO-YO SEIHIN ANZEN HO (Consumer Products Used in Daily Life Safety Law), Law No. 31 of 1973.

⁶⁶ For a discussion of the *Ford Pinto* case, *State v. Ford Motor Co.*, No. 5324 (Indiana Superior Ct. 1979), see L. STROBEL, *supra* note 1; Ottley, *supra* note 1, at 145.

⁶⁷ For a discussion of the civil law position on corporate criminal responsibility, see Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 28-35 (1957).

⁶⁸ Among the laws that provide for corporate criminal responsibility in Japan are ZEI HO (Law Concerning Violations of Tax Law or Ordinances), Law No. 52 of 1900 and GAIKOKU KAWASE HO (Foreign Exchange Law), Law No. 83 of 1941.

⁶⁹ Article 211 of the Japanese Criminal Code provides that:

A person who fails to use such care as is required in the performance of profession, occupation or routines and thereby kills or injures another shall be punished with penal servitude or imprisonment for not more than five years or a fine of not more than one thousand yen. The same shall apply to a person who, by gross negligence, injures or causes the death of another.

KEIJI SOSHO HO, Law No. 131 of 1948, art. 211.

Few prosecutions have been brought under article 211. The most celebrated case arose out of the *Morinaga Dairy* case in which the general manager and the production manager of a corporation were charged with accidental homicide resulting from the deaths of more than one hundred children.⁷⁰ After a long trial the court acquitted the defendants, holding that they had not been negligent in failing to check the quality of the chemicals used in the milk. The court said that the defendants were entitled to assume that the chemicals used in the milk were the same quality as had been supplied previously.

II. THE LAW RELATING TO PRODUCT LIABILITY IN JAPAN

The outward appearance of Japan's legal system gives the impression that it is part of the civil law system. The Japanese codes, however, operate in a context which has been created by the country's historical and social conditions. Thus, in an attempt to understand the Japanese approach to product liability, it is necessary to consider not only the code provisions but also the attitudes of potential litigants and judges who must interpret and apply those codal provisions.

In the United States, the theories of contract, tort, and strict liability have been applied to compensate personal, property, and economic loss caused by defective products.⁷¹ Although the theories of contract and tort have been used in product liability litigation in Japan, the Japanese Civil Code and case law are not clear with regard to the scope of the application of these theories.⁷² This section will focus on the provisions of the Civil Code and on the few cases that have been brought before the courts in order to describe the present state of product liability law in Japan.

⁷⁰ Judgment of Oct. 15, 1963, Tokushima District Court, 5 Kakyu Keishu 977. For a discussion of the civil suits that arose out of this incident, see *infra* notes 109-110 and accompanying text.

⁷¹ For examples of recovery under a theory of express contract warranty, see *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932). For recovery under the theory of implied contract warranty, see *Henningsen v. Bloomfield Motors Co.*, 32 N.J. 358, 161 A.2d 69 (1960). Negligence was used as a theory for recovery in *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 11 N.E. 1050 (1916). Strict liability was first used in *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

⁷² Unlike the German Civil Code, which has been revised to include provisions specifically dealing with product liability, the Japanese Civil Code has not been amended to address this problem. For a discussion of the German Civil Code provisions relating to product liability, see H. TEBBENS, *supra* note 5, at 66-82.

A. *Contract Theory*

Contract theory and the concept of warranty, which play an important role in product liability cases in the United States,⁷³ are much more restricted in Japan. Two articles of the Civil Code provide that a seller of goods may be liable for breach of contract or breach of warranty for the sale of a defective product.

Article 415 of the Civil Code permits a buyer to recover damages for breach of contract if a seller "fails to effect performance in accordance with the tenor and purport of the obligation."⁷⁴ In the case of a sale of goods, the "tenor and purport" of the seller's obligation is to deliver a product fit for the purpose for which it is sold. Thus, if a product is defective, the seller has breached the contract by failing to meet his obligation. In such a case, the buyer may recover damages "as would ordinarily arise from the non-performance" of the contract and "damage which has arisen through special circumstances."⁷⁵ In actual practice, courts award damages for personal injury, and for property and economic loss so long as foreseeability of harm and adequate causation are established.⁷⁶

Because contracts are part of the law of obligations in Japan, a breach of contract requires a showing of fault by the seller.⁷⁷ The burden, however, is on the seller to show that he was not at fault in selling the product.⁷⁸ Thus, if the defect is due to some factor over which the seller had no control or if the seller took reasonable steps to inspect and prevent the defect, he will not be liable. Similarly, a manufacturer may not be liable for a defective product condition which arises after it leaves his control.

⁷³ See *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932); *Henningsen v. Bloomfield Motors Co.*, 32 N.J. 358, 161 A.2d 69 (1960).

⁷⁴ Article 415 of the Japanese Civil Code provides that "[i]f the obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may demand compensation for damages; the same shall apply in cases where performance becomes impossible for any cause for which the obligor is responsible." MINPO, Law No. 89 of 1896 and Law No. 9 of 1898, art. 415.

⁷⁵ Article 416 of the Japanese Civil Code provides that:

A demand for compensation for damages shall be for the compensation by the obligor of such damages as would ordinarily arise from the non-performance of an obligation. The obligee may recover the damages which have arisen through special circumstances too, if the parties had foreseen or could have foreseen such circumstances.

Id. art. 416.

⁷⁶ See *Ricks, A Comparison of the Scope of Damages in the United States and Japan*, 12 INT'L LAW. 105, 106-07 (1978).

⁷⁷ *Id.* at 113-22.

⁷⁸ See *Niibori & Cosway, supra* note 8, at 491.

The second article of the Civil Code providing a remedy in contract for a defective product is article 570.⁷⁹ That article provides for *tenpo*, or breach of warranty liability, for latent defects which were neither foreseen nor contemplated at the time of sale. The article gives the injured buyer a choice of two remedies: rescission of the contract or recovery of damages.

There are two principal problems which limit the effectiveness of article 570 in product liability cases. First, unlike damages under article 415, damages arising out of a latent defect under article 570 are limited in practice to the buyer's reliance or expectancy interest.⁸⁰ This interest includes damage to the product itself but does not cover personal injury or other property or economic loss. Second, article 566(1) specifically provides that the buyer must have been unaware of the defect at the time of sale.⁸¹ If the seller can prove that the buyer had knowledge of the defect, the buyer will have assumed the risk, and this assumption of risk will be taken into account in calculating damages.⁸²

In addition to the specific problems with articles 415 and 570 of the Civil Code, use of the contract theory generally entails two other problems. First, articles 415 and 570 apply only to a sale between a seller and his immediate buyer. A bystander or ultimate user who is not in privity of contract with the seller cannot enforce the provisions of the articles.⁸³ This privity requirement effectively eliminates most actions against manufacturers since they do not sell directly to the public. Second, by issuing "special stipulations" containing the proper terms and conditions, a manufacturer may

⁷⁹ Article 570 of the Civil Code of Japan provides: "If any latent defects exist in the object of a sale, the provisions of Article 566 shall apply. . . ." MINPO, Law No. 89 of 1896 and Law No. 9 of 1898, art. 570. Article 566 provides that when a buyer is unaware that the object of a sale is encumbered, and when the encumbrance frustrates the object of the contract, the buyer is entitled to rescission. If the object of the sale can be attained despite the encumbrance, the buyer cannot rescind but is entitled to damages. *Id.* art. 566.

⁸⁰ See Ricks, *supra* note 76, at 113-18.

⁸¹ Article 566(1) of the Civil Code of Japan provides:

Where the object of a sale is subject to a superficies, emphyteusis, servitude, right of retention or pledge and the buyer is unaware thereof, he may rescind the contract only if the object of the contract cannot be attained thereby; in other cases the buyer may demand only compensation for damages.

MINPO, Law No. 89 of 1896 and Law No. 9 of 1898, art. 566(1).

⁸² Article 418 of the Civil Code of Japan provides: "If there has been any fault on the part of the obligee in regard to the non-performance of the obligation, the Court shall take it into account in determining the liability for and assessing the amount of the compensation for damages." MINPO, Law No. 89 of 1896 and Law No. 9 of 1898, art. 418.

⁸³ See Adachi, Henderson, Miyatake, & Fujita, *supra* note 8, at 36-42.

disclaim liability under articles 415 and 570.⁸⁴ For such stipulations to be effective, however, they must not violate the "public welfare" and "good faith" principles of article 1 of the Civil Code.⁸⁵ In addition, a manufacturer cannot escape liability for a defect about which he had knowledge but which he failed to disclose to the buyer.⁸⁶ These specific and general problems cause contract theory to remain largely a theoretical basis for recovery in product liability cases.

B. Tort Theory

As a result of the limitations of contract theory, the majority of product liability actions in Japan are brought under tort theory. Before examining the basis of this theory in detail, it is necessary to consider two preliminary issues relating to the tort liability of foreign manufacturers in Japan.

1. Jurisdiction and Choice-of-Law in Tort Cases

Two important issues for United States manufacturers who sell products in Japan are whether a Japanese court will have jurisdiction if one of the products is defective and causes injury and, if so, what law will be applied to determine liability. Under the Code of Civil Procedure, a Japanese court has jurisdiction over a foreign corporation in two situations: if the foreign corporation has an office, branch, or representative in Japan or if the foreign corporation owns property in Japan.⁸⁷ This provision is analogous to the

⁸⁴ For a discussion of disclaimers of warranty under Japanese law, see generally Akamatsu & Bonneville, *supra* note 8.

⁸⁵ Article 1 of the Japanese Civil Code provides that: "[a]ll private rights shall conform to the public welfare. The exercise of rights and the performance of duties shall be done in good faith and in accordance with the principles of trust. No abusing of rights is permissible." MINPO, Law No. 89 of 1896 and Law No. 9 of 1898, art. 1.

⁸⁶ Article 572 of the Civil Code of Japan provides:

Even where the seller has made a special stipulation that he is not liable in respect of the warranties mentioned in the preceding twelve articles, he cannot be relieved of the liability in respect of any fact of which he was aware and nevertheless failed to disclose or in respect of any right which he himself created in favor of, or assigned to, a third party.

Id. art. 572.

⁸⁷ Article 4 of the Code of Civil Procedure provides:

The general forum of a juridical person or any other association or foundation shall be determined by the place of its principal office or principal place of business, or in case there is not an office or place of business, by the domicile of the principal person in charge of its affairs.

MINP SOSHO HO, Law No. 29 of 1890, art. 4.

"in rem" and "quasi-in rem" methods of obtaining jurisdiction in the United States.

A Japanese court also may obtain jurisdiction over a lawsuit relating to a tort if Japan is "the place where the act was committed."⁸⁸ Japanese courts have interpreted this article to obtain jurisdiction both when Japan is the place where the injury occurred and when the product is manufactured in Japan. In *Yabuya v. The Boeing Co.*⁸⁹ the families of victims of an airplane crash in Japan brought a negligence suit in Japan against the United States manufacturer of the aircraft. The Tokyo District Court held that since Japan was the place of injury, it had jurisdiction to hear the case. In *Kansai Tekko Co. v. Marubeni Tida (America), Inc.*,⁹⁰ plaintiff sought a declaratory judgment that he had no duty to indemnify defendant for any damages assessed against defendant in a product liability action then pending in the United States. The Osaka District Court initially held that since the defendant was an American corporation with no office, branch, or assets in Japan, there was no basis for jurisdiction in the case. The court reasoned, however, that although the suit was for a declaratory judgment, the underlying dispute between the parties concerned responsibility for a tort. Since the product which caused the injury was designed and manufactured in Osaka, the court held that Osaka was the place where the tort was committed, and proper jurisdiction was established. Thus, like courts in the United States, a plaintiff in a product liability suit in Japan can bring the action where the injury occurred or where the defendant "resides."

Once it is determined that a Japanese court has jurisdiction, the second question is whether the court will apply Japanese or United States law to establish liability. Article 11 of the Law Concerning the Application of Laws in General provides that the law governing a tort case is "the law of the place where the facts forming the cause of such obligation have occurred."⁹¹ No Japanese cases have

Article 8 of the Code of Civil Procedure provides: "A suit concerning a property right against a person whose domicile is not known, may be brought before the court situated in the place where the subject-matter of a claim or the security therefor, or any property of the defendant attachable is located." *Id.* art. 8. On the issue of jurisdiction, see T. HATTORI & D. HENDERSON, *supra* note 55, §§ 4.04-.05.

⁸⁸ Article 15(1) of the Japanese Code of Civil Procedure provides that: "A suit relating to a tort may be brought before the court of the place where the act was committed." MINJI SOSHO HO, Law No. 29 of 1890, art. 15(1).

⁸⁹ HANREI JIHO (No. 754) 58 (Tokyo D.C. July 24, 1974).

⁹⁰ HANREI JIHO (No. 728) 77 (Osaka D.C. Oct. 9, 1973).

⁹¹ HOREI (Law Concerning Application of Laws in General), Law No. 10 of 1898 provides

yet decided whether the "place where the facts forming the cause of such obligation have occurred" is the place of manufacture, sale, or injury. The United States arguably should be considered the "place where the facts forming the cause of such obligation have occurred" if all manufacturing occurred in the United States and if the defect was created in the manufacturing process. In such a situation, the case should be tried in Japan according to the law of the state in the United States where the manufacturing was done. Judges, however, are more inclined to apply the laws of their own country if at all possible. Thus, there is a strong possibility that a Japanese court would apply Japanese law even if the product had been manufactured in the United States.

2. *Negligence Theory*

The basis of tort liability in Japanese law is article 709 of the Civil Code. Article 709 provides that "[a] person who violates intentionally or negligently the right of another is bound to make compensation for the damage arising therefrom." A plaintiff must prove four elements to recover under this article: (1) intent or negligence by the defendant; (2) an infringement of a "right" belonging to the plaintiff; (3) the defendant's legal capacity; and (4) damages.⁹² Although a few cases alleging negligence have been brought in Japan, no significant decisions have yet come from the courts. Based upon the litigation, however, it is possible to consider product liability in Japan under the same classifications which are used in the United States.

a. *Negligence in the Design of the Product*

The most famous cases in Japan alleging negligence in the design of a product are the thalidomide cases. Although the defendants ultimately admitted liability in these cases, the cases illustrate the difficulties of the design aspect of product liability litigation.⁹³

During the 1950's drugs containing thalidomide were marketed

in article 11 that: "The formation and effect of obligations due to negotiorum gestio, unjust enrichment or unlawful acts shall be governed by the law of the place where the facts forming the cause of such obligation have occurred."

⁹² See Hyashida, *The Necessity for the Rational Basis of Duty-Risk Analysis in Japanese Tort Law: A Comparative Study*, 1981 UTAH L. REV. 65, 66-67.

⁹³ The discussion of the thalidomide cases is taken from *Diary of a Plaintiff's Attorney's Team in the Thalidomide Litigation*, 8 LAW IN JAPAN 136 (1975) [hereinafter cited as *Diary of a Plaintiff's Attorney's Team*].

in Japan as tranquilizers, sleeping pills, and gastrointestinal medicines. Beginning in the 1960's, however, a number of badly deformed babies were born to women who had taken thalidomide during their pregnancies. Although the manufacturers stopped selling the drugs in 1962, they refused to admit a causal connection between thalidomide and birth defects. As a result, a total of sixty-two families brought suits against the two drug manufacturers and the Ministry of Health and Welfare which had issued the license to produce the drug.⁹⁴

Before considering the arguments made by plaintiffs and defendants in these cases, it is necessary to mention three procedural aspects of the cases. First, no suits were brought by individual families or children. In each case a class action was filed by an organization such as the "Association of Parents for Opening a Better Future for Our Children." Second, in none of the suits was the plaintiff represented by a private attorney. Instead, plaintiffs were represented by legal aid organizations such as the Kyoto Civil Liberties Union and the Tokyo Civil Liberties Union. The reason for this absence of private attorneys was expressed by one of plaintiffs' attorneys who said: "I don't think it would be proper for an individual attorney to take on a case that may have serious social repercussions."⁹⁵ Finally, plaintiffs were able to bring their suits against the two drug manufacturers and the Ministry of Health and Welfare not only because article 719 of the Civil Code provides for joint and several liability,⁹⁶ but also because Japanese law does not recognize the concept of sovereign immunity.⁹⁷

The claim against the manufacturers in all suits was negligence in producing drugs containing thalidomide. Plaintiffs alleged that defendants had a duty "to confirm the safety of medicine by seeing that, apart from its intended therapeutic purposes, the medicine will have no side effects such as may inflict harm or damage on the users' life or body."⁹⁸ Plaintiffs alleged that the manufacturers

⁹⁴ *Id.* at 174.

⁹⁵ *Id.* at 136.

⁹⁶ Article 719 of the Civil Code of Japan provides: "If two or more persons have by their joint unlawful act caused damage to another, they are jointly and severally liable to make compensation for such damage; the same shall apply if it is impossible to ascertain which of the joint participants has caused the damage." MINPO, Law No. 89 of 1896 and Law No. 9 of 1898, art. 719.

⁹⁷ See KOKKA RAISHO HO (Law Concerning State Liability for Compensation), Law No. 125 of 1947.

⁹⁸ *Diary of a Plaintiff's Attorney's Team*, *supra* note 93, at 165.

breached this duty by failing to take precautions in the testing and marketing of the drug.

Plaintiffs' claims against the Ministry of Health and Welfare also were based upon negligence. They argued that the Ministry had a duty to confirm the safety of the drug before granting a license to manufacture it. The Ministry allegedly breached this duty by the laxity of its supervision procedures.⁹⁹

The two drug manufacturers in the thalidomide cases initially denied that they had been negligent. They argued that, at the time of the development and marketing of the drug, it was "utterly inconceivable" that a drug which was perfectly safe for adults would have adverse side effects on a fetus.¹⁰⁰

The first of the thalidomide cases was filed in 1964, and hearings continued until December 1973 when defendants informed the court that they wanted to compromise. The lengthy hearings were caused not only by the nature of Japanese trials, but also by the complicated scientific evidence presented at the trial as well as the necessity of translating many of the documents from foreign languages. In December 1973, however, the defendants agreed to admit both the causal connection between the drug and the abnormal births, and their responsibility for causing the injuries.¹⁰¹ The reasons for this admission by the defendants included the weight of the evidence presented by plaintiffs during their case and the pressures of public opinion. In December 1974 the thirty families under the jurisdiction of the Tokyo District Court reached a compromise with the drug manufacturers and with the Ministry of Health and Welfare. The settlement provided the plaintiffs with a choice between an immediate lump sum payment of damages¹⁰² and a partial immediate payment coupled with an annuity to begin three years later and to continue for life.¹⁰³ The drug manufacturers also agreed to pay the costs and expenses related to the litigation.¹⁰⁴ This was particularly important to the public interest organizations that represented plaintiffs. Finally, the manufacturers agreed to establish a thalidomide welfare center for the children and to pay an amount toward the cost of artificial limbs and thera-

⁹⁹ *Id.* at 166.

¹⁰⁰ *Id.* at 167.

¹⁰¹ *Id.* at 174-76.

¹⁰² *Id.* at 186.

¹⁰³ *Id.* at 187.

¹⁰⁴ *Id.* at 186.

peutic devices.¹⁰⁵

The thalidomide cases were resolved by settlement and not by judicial decision; thus, the viability of the defense of lack of foreseeability of injury was not resolved. Based upon other product liability cases, however, the crucial issue in determining foreseeability is what the defendant could have known in light of the technology available at the time of manufacture.

The attitude of Japanese courts toward foreseeability of injury in product liability can be illustrated by two cases. In *Kato v. Nanson Pharmaceutical Co.*¹⁰⁶ plaintiff suffered from serious eye injury after using defendant's eye lotion. Two problems confronted plaintiff in proving her case: medical literature contained no description of her type of eye damage and, although the product was widely sold, only a few persons had reported eye injuries. The evidence introduced at the trial, however, indicated that the eye lotion contained bleach which could cause eye injury even if the product was used only once. The Tokyo District Court held that defendant was negligent in the design of the eye lotion, stating that if defendant had conducted further tests before marketing the product, the injury could have been prevented. Thus, even though the manufacturer did not actually foresee the harm from the product, the court held that it could have foreseen the injury by more extensive testing of the product.

In March 1983 four pharmaceutical companies were ordered to pay 27.6 million yen to three children disabled by injections of their drug.¹⁰⁷ The children had received between eight and forty-seven intermuscular injections in their thighs as cold treatment between 1969 and 1972. The injections resulted in a degeneration of the quadriceps thigh muscles and in an inflexibility of the ankles. Plaintiffs argued that the companies were negligent in determining the safety of the drug and that the companies should have foreseen the side effects of the drug. The drug companies argued that they were not negligent and blamed the doctors for giving too many injections. The Tokyo District Court found that the drug caused the disabilities and that the drug companies could have foreseen the problems if they had made sufficient studies using their knowledge and expertise.¹⁰⁸

¹⁰⁵ *Id.* at 186-87.

¹⁰⁶ 6 KAMINSYU 1440 (Tokyo D.C. July 14, 1955).

¹⁰⁷ *Drug Firms Ordered to Pay 27.6 Million Yen*, *The Japan Law Letter*, May 1983, at 30.

¹⁰⁸ *Id.*

b. *Negligence in the Manufacturing Process*

The most famous case involving negligence in the manufacturing process, the *Morinaga Dairy* case, also was settled by compromise.¹⁰⁹ In the summer of 1955, 12,000 infants suffered cerebral palsy and paralysis, and 130 died in the Chugoku and Shikoku districts from the consumption of milk containing arsenic poisoning. Beginning in 1970 a number of victims filed suits seeking damages against the Morinaga Dairy and the Ministry of Health and Welfare.¹¹⁰ In their complaints, plaintiffs alleged that the dairy was negligent in mistakenly using sodium phosphate No. 2, a waste product used in the manufacture of aluminum, instead of sodium dihydrogenphosphate as a stabilizer in making powdered milk. In addition, plaintiffs alleged that the Ministry of Health and Welfare was negligent in failing to keep a strict watch to prevent such an accident. Although the Morinaga Dairy initially denied any cause and effect relationship between the drinking of their milk and the subsequent injuries and deaths, in 1979 the company decided not to contest the actions. Instead, it apologized in court for the mistake and agreed to establish a foundation to administer a long-term relief program for the victims. As with the thalidomide cases, the settlement of the Morinaga Dairy controversy provided no discussion of the issues of causation, of what constitutes negligence by a manufacturer, or of the extent of government liability.

The cases that have come before the courts involving defects that occurred during the manufacturing process have not been unusual. In *Kanmaki v. Ohashi*,¹¹¹ where two deaths and fifteen injuries resulted from food poisoning due to tainted egg tofu (bean curd), the manufacturer, wholesaler, and retailer were held liable in tort and in contract, and damages were awarded. Similarly, in *Kamesaki v. Mitsubishi*¹¹² a passenger in the back seat of an automobile was injured when the front seat came loose at a sudden stop. The court found that there was a defect in the manufacturing process and held the manufacturer liable for damages.

¹⁰⁹ The discussion of the *Morinaga Dairy* case is taken from a series of articles in The Japan Times which is reprinted in H. TANAKA, *supra* note 41, at 432-38.

¹¹⁰ *Id.* at 434.

¹¹¹ HANREI JIHO (No. 725) 19 (Gifu D.C. Dec. 27, 1973).

¹¹² HANATA (No. 324) 268 (Yokohama D.C. Feb. 4, 1975).

c. *Negligence in the Failure to Provide Clear Instructions for the Use of a Product or Warnings of the Hazards of Use*

Although the instructions and warnings category of negligence is a new development in Japan, the increasing complexity of products, particularly drugs, will likely make this category a frequent source of litigation in the future. Two of the most important cases that already have been brought in this area indicate the direction which the courts may take.

i. *The S.M.O.N. Cases*

In the early 1970's, approximately 5,000 plaintiffs brought suits in twenty-seven district courts seeking a total of 110 billion yen from three pharmaceutical companies and the Ministry of Health and Welfare.¹¹³ Plaintiffs alleged that their injuries resulted from the use of medicines containing clioquinol, a chemical which causes a disease to the nervous system known as Subacute-Myelo-Optico-Neuropathy (S.M.O.N.).

Clioquinol was first developed in 1899 as a germicide for external use. By the 1930's it was widely used internally as a bactericide against dysentery. In Japan, clioquinol was first used against children's dysentery without any experimentation as to its possible harmful effects. Subsequently, the permitted dosage of the drug was increased, and its application was expanded.¹¹⁴ In the early 1960's Japanese pharmaceutical companies obtained information relating to nervous system disorders arising from the use of the drug in animals and humans. Neither doctors nor the general public received information on these side effects. Instead, as the Tokyo District Court later found, the drug companies "created an atmosphere of mass distribution and mass consumption of the drug, as if the drug was an ordinary product, by emphasizing its safety and taking advantage of the rapid economic growth in the post-war period."¹¹⁵ As a result, when clioquinol first produced S.M.O.N. symptoms in children, clioquinol was prescribed as the treatment

¹¹³ The discussion of the S.M.O.N. cases is taken from the judicial opinions reprinted in *The Judge's Power to Propose Terms for Settlement: The S.M.O.N. Cases*, 11 LAW IN JAPAN 76 (1978) [hereinafter cited as *The Judge's Power*], and in *Terms of Settlement: The SMON Litigation*, 12 LAW IN JAPAN 99 (1979) [hereinafter cited as *The SMON Litigation*].

¹¹⁴ *The Judge's Power*, *supra* note 113, at 82.

¹¹⁵ *Id.* at 87.

for the illness.¹¹⁶ Thus, unlike thalidomide, where there was little evidence of the side effects at the time of distribution, a substantial amount of information about the harmful effects of clioquinol existed which was not made available to the public.

The defendants initially denied any causal connection between clioquinol and S.M.O.N. In June 1976, however, at the conclusion of plaintiff's case in the Tokyo District Court, the drug companies proposed a settlement and offered to "assume social responsibility for S.M.O.N. and to make appropriate compensation therefor."¹¹⁷ The Tokyo District Court then made a formal recommendation of settlement¹¹⁸ which was rejected by the plaintiffs.¹¹⁹ In 1978 the Kanazawa District Court handed down the first decision in a S.M.O.N. case, finding for the plaintiffs.¹²⁰ During the following year, decisions from eight other district courts found against the defendants.¹²¹ In 1979 a final settlement was negotiated between the remaining plaintiffs and the drug companies and the Ministry of Health and Welfare.¹²² Under the terms of the settlement, plaintiffs will receive an immediate lump sum payment determined by the victim's age and the severity of his or her condition, the necessary health care allowances and nursing fees, and the "bereaved family solita."¹²³ In addition, defendants agreed to pay plaintiffs' attorney fees.¹²⁴

¹¹⁶ *Id.* at 86.

¹¹⁷ *The SMON Litigation*, *supra* note 113, at 101.

¹¹⁸ *The Judge's Power*, *supra* note 113, at 102.

¹¹⁹ *The SMON Litigation*, *supra* note 113, at 102.

¹²⁰ *Id.*

¹²¹ In addition to the decision of the Kanazawa District Court, the following courts also issued opinions: Tokyo District Court (Aug. 3, 1978); Fukuoka District Court (Nov. 14, 1978); Hiroshima District Court (Feb. 22, 1979); Sapporo District Court (May 10, 1979); Kyoto District Court (July 2, 1979); Shizuoka District Court (July 19, 1979); Osaka District Court (July 31, 1979); and Maebashi District Court (Aug. 21, 1979). See *The SMON Litigation*, *supra* note 113, at 102. For the text of the Hiroshima District Court opinion, see *The Hiroshima District Court Decision*, 12 LAW IN JAPAN 99 (1979).

¹²² For the text of that settlement, see *The SMON Litigation*, *supra* note 113.

¹²³ *Id.* at 106.

¹²⁴ *Id.* at 105. After the settlement in the S.M.O.N. cases, the Diet enacted legislation to provide compensation for mass drug injuries. The legislation creates a special trust fund, financed by manufacturers and importers of drugs and by government contributions, which provides for medical expenses, a disability allowance, benefits for raising disabled children, and death benefits according to a fixed schedule. Recovery under the legislation does not require a showing of fault, and victims remain free to pursue their tort remedies. No benefits are allowable, however, if negligence of a manufacturer or retailer can be proved. Thus, victims must choose the lower level of benefits provided by the legislation or resort to tort litigation. See Fleming, *Drug Injury Compensation Plans*, 30 AM. J. COMP. L. 297, 303-04 (1982).

ii. *The Chloroquine Case*

In December 1975 a suit seeking 16.6 billion yen in damages was filed by 276 persons in the Tokyo District Court against six pharmaceutical companies, the Ministry of Health and Welfare, and fourteen government and private medical institutions.¹²⁵ Plaintiffs claimed that they suffered retinal ailments, such as weakening or loss of eyesight, after taking chloroquine drugs for kidney and rheumatic disease. Allegedly the pharmaceutical companies and the government were aware of the dangerous side effects of the drug even before they began marketing them in Japan in 1961. Many cases concerning chloroquine had been reported in other countries in 1959, and the American Medical Association had warned against using the drug in a 1960 issue of its journal. According to the Plaintiff's claims, the drug companies deliberately covered up those reports when marketing the drug. Plaintiffs also alleged that the Ministry of Health and Welfare authorized the pharmaceutical companies to market dangerous drugs and that the defendant medical institutions carelessly administered the drug to patients.

Unlike the S.M.O.N. cases, the defendants in the chloroquine case did not dispute the causal relationship between the drug and the eye disorder. Defendants did argue, however, that they did not foresee those side effects when distribution of the drug began and that they had taken all necessary precautions.¹²⁶

The chloroquine case is unusual because of the broad scope of plaintiffs' claim for damages. Plaintiffs claimed not only compensatory damages but also punitive damages, which are not given in Japanese courts. In addition, plaintiffs asked that the amount of damages be determined by taking into account the average five percent annual inflation rate since 1961.¹²⁷ Japanese cases contain no precedent for this broad claim for recovery.

The Tokyo District Court completed hearings on the suit in July 1980¹²⁸ and in February 1982 awarded 2.88 billion yen in damages to 266 of the plaintiffs.¹²⁹ The court linked the chloroquine with the eye disorders and held that the pharmaceutical companies, the

¹²⁵ *Five-Year Hearing*, *supra* note 59.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ 2.88 Billion Yen in Damages Awarded in Chloroquine Side Effects Case, *The Japan Times*, Feb. 2, 1982, at 2, col. 1.

government, and the medical institutions were liable for not taking steps to prevent the side effects of the drug. The basis for this holding was that the previous documentation made such side effects foreseeable. Despite the awards, plaintiffs' attorneys announced that they would appeal to the Tokyo High Court.¹³⁰

The provisions of the Japanese Civil Code and the product liability cases decided under those provisions reveal that the principal differences in product liability law in Japan and in the United States and Europe are procedural rather than substantive. Four areas are particularly apparent. First, for reasons discussed in the last section, far fewer product liability cases are brought in Japan than in other industrial countries. The suits that have been brought frequently resulted from mass disasters such as food poisoning or the side effects of drugs, rather than from individual claims for damages from other types of products. Second, the cases involving mass disasters usually have been brought as class actions rather than as individual claims. This is due in part to the smaller number of attorneys in Japan as compared to the United States or Europe.¹³¹ Third, most plaintiffs in Japanese product liability cases have been represented by public interest organizations rather than by private attorneys. Finally, most of the product liability cases were ultimately settled by the parties rather than by formal court decision.

Substantively, the principal difference between product liability law in Japan and in the United States is the almost complete reliance in Japan on negligence theory rather than on warranty or strict liability. In this respect Japanese law is similar to product liability law in Europe, where no country has yet adopted the United States concept of strict liability.¹³² Thus, it can be expected that product liability law in Japan will continue to develop along the lines of negligence unless legislation is adopted providing for strict liability.

III. TOWARD STRICT LIABILITY

The articles of the Civil Code of Japan dealing with contract and

¹³⁰ *Id.*

¹³¹ It is estimated that there are just over 10,000 lawyers in all of Japan. See *Tokyo Air Crash: Why Japanese Do Not Sue*, New York Times, Mar. 10, 1982, at 1, col. 1. For a discussion of the Japanese legal profession, see Hattori, *The Legal Profession in Japan: Its Historical Development and Present State*, in Von Mehren, *supra* note 12, at 111.

¹³² See generally *supra* notes 2 and 5.

tort were not designed for product liability litigation. Since courts in civil law countries do not have the same power of interpretation as common law courts¹³³ and since few product liability cases in Japan have been resolved by judicial application of the Civil Code provisions, many questions relating to product liability in Japan remain unanswered. As a result, there has been considerable interest among legal scholars in enacting legislation to deal specifically with product liability. One example of this interest is the Draft Model Law on Product Liability which was prepared by the Product Liability Research Group in 1975.¹³⁴ Although the Draft Law has attracted considerable discussion, the Japanese Government has taken no steps to enact it.

The Draft Law is a pragmatic approach to the problems of product liability in Japan. Not only does it deal specifically with injuries resulting from defective products, it also defines the key elements required for liability. Most importantly, however, the Draft Law moves away from contract and tort as the basis of recovery and adopts a system of no fault liability.

A. *No Fault Liability*

The provision for "liability without fault" is central to the system of liability by the Draft Law. Under the Draft Law, "[a] producer shall be responsible to compensate any natural person for injury to life, to the person, or to the property incurred as a result of a defect in a product."¹³⁵ Unlike actions under a contract theory, any attempt by a producer to limit this liability "with respect to injury to life or person shall be null and void."¹³⁶ Three terms are crucial to this formulation: "product," "producer," and "defect."

1. *Product*

Most of the product liability cases that have come before the courts in Japan have involved drugs or food. Thus, the courts have not yet had to consider the vast array of defective items that have been the subject of litigation in the United States. Under the Draft

¹³³ For a discussion of the methods available to civil law courts to interpret code provisions and statutes, see J. MERRYMAN, *THE CIVIL LAW TRADITION* (1969).

¹³⁴ PRODUCT LIABILITY RESEARCH GROUP, *DRAFT MODEL LAW ON PRODUCT LIABILITY* (Aug. 28, 1975), translated in Adachi, Henderson, Miyatake & Fujita, *Japan*, in Stucki & Altenburger, *supra* note 2, at app.

¹³⁵ *Id.* art. 3.

¹³⁶ *Id.* art. 8.

Law, a product is defined to include "anything which enters the distribution process, without regard to whether an item is a completed product, and without regard to whether an item is a product of nature."¹³⁷ While this is a broad definition, it does not indicate whether the drafters intended to include in the definition only chattels or also immovable items such as houses or buildings.¹³⁸

2. *Producer*

The Draft Law places liability only on the "producer" rather than on wholesalers or retailers.¹³⁹ This limitation represents a combination of two policy goals. First, by placing liability on the producer, the drafters indicated a desire to limit liability to the person or corporation that actually created the defect. For this reason, the note to the definition states that the term is also meant to include processors, producers of raw materials, and producers of component parts.¹⁴⁰

Although the drafters sought to place liability on the party who created the defect, they also wanted to give the injured party maximum protection by providing a wide choice of potential defendants. Thus, the Draft Law applies the term producer to six persons: first, "[a] person engaged in the business of manufacturing products;"¹⁴¹ second, "[a] person engaged in the business of distributing products to which such person has attached a trademark or other mark or trade name or any other term indicative of such person;"¹⁴² third, "[a] person engaged in the business of importing a product;"¹⁴³ fourth, "[p]ersons in the business of selling and leasing products" who caused the defect or knew or should have known of the defect;¹⁴⁴ fifth, "[t]ransporters or warehousemen who

¹³⁷ *Id.* art. 2(1).

¹³⁸ The note to article 2(1) states only that "products of nature may be excluded if they are distributed without having been processed in any way." *Id.*

¹³⁹ *Id.* art. 2(2).

¹⁴⁰ The note to article 2(2) states:

The following persons shall be deemed to be a producer of a complete product or its main component: any processor, to the extent of the processing activity; any producer of raw materials, to the extent of the raw material content; and any parts producer to the extent of the portion of the final product comprised of such parts.

Id.

¹⁴¹ *Id.* art. 2(2)(i).

¹⁴² *Id.* art. 2(2)(ii).

¹⁴³ *Id.* art. 2(2)(iii).

¹⁴⁴ *Id.* art. 10(1)(i).

cause a defect in a product;"¹⁴⁵ and finally, "[r]epairers who cause a defect in a product or overlook a defect they should have discovered."¹⁴⁶ If more than one "producer" is responsible for the defect in the product, the Draft Law provides for joint and several liability for the entire loss.¹⁴⁷

3. *Defect*

The Draft Law defines a defect as "a flaw in the product which causes an inordinate danger to life, to the person or to property during ordinarily foreseeable use."¹⁴⁸ In cases where the product is used properly and the injury is "of a nature as does not ordinarily arise from proper use of that product," there is a presumption that the product contains a defect.¹⁴⁹ In addition, if the injury is "of the same type that would be expected to result from such a defect," it is presumed that the damage was caused by the defect.¹⁵⁰

Despite the breadth of the definition of defect, two important issues remain unanswered. First, what constitutes an "inordinate danger" to life, person, or property has not been determined. Since this cannot be defined precisely, it can only be answered by the courts in specific cases. Second, a producer's responsibility for unforeseeable defects in a product must be determined. This issue is important in drug cases where there may be no evidence that the manufacturer knew of the specific side effects at the time the product was first marketed.

B. *Defenses*

The only defenses available to a producer under the Draft Law are gross negligence on the part of the plaintiff, use of a product with knowledge of the defect,¹⁵¹ and the statute of limitations.¹⁵² Gross negligence and knowledge of the defect are not treated as a complete bar to recovery under the Draft Law. Instead, they are considered by the court "when determining liability for compensation for injury and the amount of such compensation."¹⁵³ Thus, the

¹⁴⁵ *Id.* art. 10(1)(ii).

¹⁴⁶ *Id.* art. 10(1)(iii).

¹⁴⁷ *Id.* art. 4.

¹⁴⁸ *Id.* art. 2(3).

¹⁴⁹ *Id.* art. 5(1).

¹⁵⁰ *Id.* art. 6.

¹⁵¹ *Id.* art. 7.

¹⁵² *Id.* art. 9.

¹⁵³ *Id.* art. 7.

Draft Law proposes the use of a system of comparative negligence. Finally, all actions for recovery under this Draft Law must be brought within three years of the date the injured person became aware of the injury and of the identity of the person responsible.¹⁵⁴ No action can be brought, however, more than twenty years after the date of the injury.¹⁵⁵

IV. CONCLUSION

Although Japan is now a fully developed industrial society, the law relating to the liability for injuries produced by the products of that society is still in its developing stages. This relatively slow development is due primarily to the public perception of the formal Japanese legal system and to the specific provisions of the Civil Code.

The future of product liability law in Japan will continue to be heavily influenced by public attitudes and by the Civil Code provisions on contract and tort. Japanese courts do not have the same creative powers as common law courts, therefore, the only way to expand liability is through specific legislation or codal revision. Despite the Draft Law that has been in circulation since the mid-1970's, significant pressures to change the law have not yet developed. This lack of change indicates that the most important factors in product liability law in Japan are not the formal codal provisions but the social conditions which determine when those provisions will be used. Thus, the foreign businessman operating in Japan should be aware not only of the "letter of the law" but also of the sociological and cultural undercurrents of the Japanese legal system if he is to assess accurately potential problems in the area of product liability.

¹⁵⁴ *Id.* art. 9.

¹⁵⁵ *Id.*

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