JAPAN'S NEW PRODUCT LIABILITY LAW: THE CITADEL OF STRICT LIABILITY FALLS, BUT ACCESS TO RECOVERY IS LIMITED BY FORMIDABLE BARRIERS

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1. INTRODUCTION

The laws relating to the liability of those who make and sell products have undergone fundamental changes during the last thirty years. The most dramatic developments have taken place in the United States. Recently, however,

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The most significant development has been the adoption of strict product liability. See Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1962). The Greenman decision proved to be very effective in persuading the American Law Institute to apply strict liability to all products. See RESTATEMENT (SECOND) OF TORTS § 402A (1965). Soon after the Greenman decision and § 402A, the rule of strict product liability rapidly swept the country. See JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 717 (9th ed. 1994). The rule thus became the common law of the United States and remains so today. See RESTATEMENT OF THE LAW OF TORTS:
product liability law has gained increasing attention in other industrialized nations. Thirteen countries of the European Economic Community and Australia now operate under a uniform Product Liability Directive.\(^2\) Japan's first product liability law took effect on July 1, 1995.\(^3\)

The literature that has been published in the United States on the comparative and international aspects of product liability law has focused almost exclusively on the European Community.\(^4\) The Eurocentric focus of American commentators is understandable since Western Europe is a major center of U.S. investment and trade, and because European history, cultures, and languages are familiar to many U.S. citizens. Japan, in contrast, is less familiar. Furthermore, because product liability cases have been comparatively rare in Japan, and because Japanese product liability law is relatively undeveloped, there has not been a great amount of substance upon which to comment. Recent legal developments, however, including the passage of the new Product Liability Law and a decision from the Osaka District Court, warrant closer attention to the product liability laws of this important Pacific trade nation.

This Article examines Japan's Product Liability Law and provides insights into issues that are likely to arise as Japanese courts begin to interpret the Product Liability Law, drawing on the U.S. experience over the past thirty years. This Article also discusses elements of the Japanese cultural and legal system that may affect the impact of the Product Liability Law. This Article concludes that, although the strict liability citadel\(^5\) has fallen in Japan,

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\(^3\) See The Product Liability Law, Law No. 85 of 1994 (Japan), translated by Professor Yukihiro Asami (on file with the University of Pennsylvania Journal of International Business Law) [hereinafter Product Liability Law or Law].

\(^4\) See infra note 94.

\(^5\) The reference to the "citadel" of strict liability is from two classic articles by Dean William L. Prosser, who was Reporter for the Restatement (Second) of Torts when § 402A was adopted. See William L.
access to recoveries remains limited by formidable cultural and legal barriers.

2. AN OVERVIEW OF THE JAPANESE LEGAL SYSTEM

2.1. Japanese Civil Law Is a Complex Hybrid of Tradition, European Civil Law, and American Legal Influence

The development of the Japanese legal system can generally be divided into four, perhaps five, historical stages. The first period began in the latter half of the seventh century with the emergence of a centralized Imperial government and the transplantation of contemporary Chinese (T'ang Dynasty) institutions and laws known as ritsu-ryō codes.6 The ritsu-ryō codes were moralistic and heavily influenced by Confucianism.7

Beginning in the twelfth century, the warrior (samurai or bushi) class came to power, led by the Shogun.8 During the early Shogunate era, the second period in Japan's legal development, Japan became a rigidly hierarchical society which was essentially feudal in nature.9 The legal system under the early Shogunate was composed primarily of unwritten customary law, which had developed as the ritsu-ryō codes became obsolete.10

At the end of the fifteenth century, Japan entered an age of fighting rival warlords which lasted until Ieyasu Tokugawa reunited the country in 1603 under his centralized leadership.11 The Tokugawa Era, known in Japanese history as the Edo Period,12 marked the third

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8 See id. at 26-31; ODA, supra note 6, at 16-20.
9 See NODA, supra note 7, at 26-31; ODA, supra note 6, at 16-20.
10 See NODA, supra note 7, at 26-31; ODA, supra note 6, at 16-20.
11 See NODA, supra note 7, at 31-39; ODA, supra note 6, at 20-24.
12 The name given to this period in Japanese history derives from the fact that Ieyasu Tokugawa founded the Shogunate in Edo, the old
stage in Japan's legal development. The legal system of the
Tokugawa Shogunate, as with the early Shogunate, was
based primarily on custom and was heavily influenced by
Confucianism. The Confucian system of relationships
and feudal civilization stressed obedience to superiors and
wa (harmony); it did not recognize individual rights.
Therefore, conciliation and settlement of disputes
dominated civil procedure. The Tokugawa society's
emphasis on the settlement of disputes without resort to
litigation continues to influence Japanese behavior today.

The Tokugawa period effectively ended in 1853 when
Commodore Matthew C. Perry and a fleet of U.S. Navy
ships sailed into Edo (Tokyo) Bay and, at cannon point,
opened up medieval Japan to the modern era. Centuries

name for Tokyo.

See NODA, supra note 7, at 31-39; ODA, supra note 6, at 20-24.

The concept of individual rights was so alien to the Japanese
during the Tokugawa period that the Japanese language had no word
to express the concept. See David Cohen & Karen Martin, Western
Ideology, Japanese Product Safety Regulation and International Trade,
"right," as in the right to free speech), as well as most current Japanese
legal terminology, was not devised until the very end of the Tokugawa
Era, when the enterprise of translating French law into Japanese was
begun. See id. Terms such as gimu (legal duty, as opposed to giri
(moral duty)), dōsan/fudōsan (moveables/immovables), and sōsat
(set-off) had to be invented during the course of the translation. See NODA,
supra note 7, at 43-44, 159.

See Elliott J. Hahn, An Overview of the Japanese Legal System,
5 NW. J. INT'L L. & BUS. 517, 519 (1983) [hereinafter An
Overview]; Chin Kim & Craig M. Lawson, The Law of the Subtle Mind: The
Traditional Japanese Conception of Law, 28 INT'L & COMP. L.Q. 491,
503-04 (1979); Harold G. Wren, The Legal System of Pre-Western Japan,

See Donald A. Douglas, Legal Aspects of Doing Business in Japan,
6 AM. BUS. L.J. 679, 680 (1968); Robert J. Smith, Lawyers, Litigiosity,
and the Law in Japan, 11 CORNELL L.F. 53, 55 (1984); Charles R.
Stevens, Japanese Law and the Japanese Legal System: Perspectives for
the American Business Lawyer, 27 BUS. LAW. 1259, 1273 (1972). See
generally J. Mark Ramseyer, The Costs of the Consensual Myth:
Antitrust Enforcement and Institutional Barriers to Litigation in Japan,
94 YALE L.J. 604 (1985) (describing how the institutional barriers to
litigation in Japan have limited antitrust suits).

The resignation of the last Shogun, Keiki Tokugawa, and the
final collapse of the Shogunate did not occur until the end of 1867 and
beginning of 1868. R.H.P. MASON & J.G. CAIGER, A HISTORY OF JAPAN
of isolation had left Japan unable to cope with the military power of the United States and the Western European nations, and Japan was forced to open its ports and enter into one-sided treaties. The Tokugawa Shogunate capitulated under tremendous domestic pressure.\textsuperscript{18}

The collapse of the Tokugawa Shogunate brought about significant legal developments which comprise the final stage of the Japanese system. Those developments may be defined broadly as the reception of Western law, or may be subdivided into the reception of civil law during the Meiji Restoration and the introduction of Anglo-American law following the Second World War.

The Meiji Restoration in 1868 brought the return of the Emperor to power.\textsuperscript{19} The Meiji government embarked on a program to industrialize and modernize the nation rapidly, while restructuring the political and legal systems. This modernization was undertaken both to consolidate and to systematize rule at home, and to achieve economic and military equality with the Western powers.\textsuperscript{20} The Meiji government also sought to import a Western system of law to end the onus of several unfavorable treaties that had been imposed upon Japan by Western nations in the 1850s.\textsuperscript{21} Although the French codes were the first to be translated, the Japanese ultimately chose to adopt a civil


\textsuperscript{19} Historians group periods of Japanese history since 1868 by the name of the ruling emperor. Thus, the Meiji Era denotes the period of history when the Emperor who took the name Meiji (Enlightened Rule) was the ruler of Japan. The current period in Japan is the Heisei (Attaining Peace) Era, which began in January 1989 with the accession of Emperor Akihito, following the death of his father, the Showa (Enlightened Peace) Emperor, Emperor Hirohito.


code system based principally upon German civil law and a constitution modeled after the Prussian Constitution. To this day, the German civil and commercial codes form the foundation of Japanese civil and commercial law.

After World War II, the U.S. legal system exerted a strong influence on Japanese law. During Japan's reconstruction, the Allies superimposed basic elements of the U.S. legal system over the existing legal framework in Japan. The Japanese Constitution, which was adopted in 1947, and the Code of Criminal Procedure reflect that American influence most strongly, but common law principles were also introduced into the other codes.

According to one historical theory, the leaders orchestrating Japan's modernization believed that the Japanese were temperamentally unsuited to the French Napoleonic civil code, with its emphasis on natural human rights, as well as to the English and American common law systems, which emphasized natural human rights and adversarial relationships between parties in dispute. See Kaino, supra note 20, at 384-85; see also ODA, supra note 6, at 26-27 (describing the shift from French to Prussian influence in Japan). German law was based on paternalistic concepts more familiar to the Japanese. See Lansing & Wechselblatt, supra note 21, at 650. Other commentators attribute the choice of German law over French law to the general decline of French influence and the ascendancy of Prussia following the Franco-Prussian War. See NODA, supra note 7, at 48. Furthermore, the Japanese recognized that a civil law system could be implemented more easily than a common law system, which evolves from case precedent. See An Overview, supra note 15, at 521 n.21; Lansing & Wechselblatt, supra note 21, at 650.


2.2. The Japanese Judicial System

Japan has a unitary court system. Unlike the United States, there is no division into state and federal courts. The Japanese judicial system is comprised of a supreme court, eight high (appellate) courts, fifty district (trial) courts, summary (small claims) courts, and family courts.\(^{27}\) The usual court of first instance for civil and criminal matters is the district court, where most cases are heard by a single judge.\(^{28}\) The district courts also hear appeals of summary court decisions.\(^{29}\)

Appeals from the district courts and from quasi-judicial governmental bodies go to a high court.\(^{30}\) The nature of the high court's inquiry depends on the court of first instance. Where the appeal originates from a district court sitting in its capacity as a court of first instance, the high court may review matters of both law and fact.\(^{31}\) In an appeal originating from a case in which a summary court was the court of first instance, the high court may only review issues of law.\(^{32}\) Cases before the high courts are heard by a panel of three judges.\(^{33}\)

At the top of the Japanese court system is the Supreme Court, which sits in Tokyo.\(^{34}\) The Supreme Court has the

\(^{27}\) See George, supra note 25, at 812. Summary courts handle small civil claims (i.e., claims less than $9,000 at current exchange rates of one dollar equal to approximately one hundred yen) and lesser criminal matters. See also ODA, supra note 6, at 68. The family courts have plenary jurisdiction over family and juvenile matters. Id. at 73.

\(^{28}\) See An Overview, supra note 15, at 533; Uchtmann et al., supra note 23, at 356.

\(^{29}\) See ODA, supra note 6, at 68; An Overview, supra note 15, at 533.

\(^{30}\) See Charles R. Stevens, Japanese Law and the Japanese Legal System: Perspectives for the American Business Lawyer, 27 BUS. LAW. 1259, 1268 (1972). Although the high courts are normally courts of appeal, they have original jurisdiction in certain types of cases, such as treason or challenges to the validity of elections. See ODA, supra note 6, at 68-69.

\(^{31}\) See An Overview, supra note 15, at 533-34.

\(^{32}\) The high court is the court of last resort for actions originating in the summary courts. ODA, supra note 6, at 69.

\(^{33}\) See An Overview, supra note 15, at 533.

\(^{34}\) See Uchtmann et al., supra note 23, at 355. Tokyo is also the site of the most important district court and high court. See Stevens, supra
power of judicial review over and may interpret all laws and regulations. It is also responsible for the administration of the courts. The court consists of fifteen justices, and "sits either as a grand (full) bench or as a petty bench of five justices." The chief justice is appointed by the emperor on the basis of the cabinet's designations; the other justices are appointed by the cabinet. Interestingly, only ten of the fifteen justices on the Supreme Court must be attorneys, procurators (prosecutors), judges, or law professors. The rationale for placing people without legal training on the Supreme Court is that they broaden the collective outlook of the court. Traditionally, however, the cabinet has sought to provide balance to the court by choosing five justices from the judiciary, five from the ranks of procurators and law professors, and five from among practicing attorneys. Recently, this ratio has begun to favor career judges and those with ties to government ministries.

2.3. Lawyers in Japan

The Japanese have developed a rigorous attorney (bengoshi) licensing process that effectively curtails the number of practicing attorneys and, as a result, the amount of litigation. Japan has roughly 15,000 practicing lawyers in a population of approximately 120 million; in comparison, the State of California alone has more lawyers than Japan has, but only one-fifth the population. The U.S. popula-

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35 See Uchtmann et al., supra note 23, at 355.
36 See ODA, supra note 6, at 71.
37 Uchtmann et al., supra note 23, at 356.
38 See KENPO [CONSTITUTION] arts. 6(2), 79 (Japan).
39 See Uchtmann et al., supra note 23, at 356.
40 An Overview, supra note 15, at 535; see George, supra note 25, at 814.
42 See ODA, supra note 6, at 72.
43 See Hideo Tanaka, Note, The Role of Law in Japanese Society: Comparisons with the West, 19 U.B.C. L. REV. 375, 376-77 (1985); see also Derek C. Bok, A Flawed System of Law Practice and Training, 33
tion is twice the size of Japan's population, but has twenty-five times as many attorneys per capita.44

Japan has so few lawyers primarily because the government licenses only a small number of new attorneys each year.45 To become a lawyer, prosecutor, or judge in Japan, one generally must pass a difficult national examination and graduate from the Legal Research and Training Institute in Tokyo.46 The pass rate of the

J. LEGAL EDUC. 570, 574 (1983) (remarking that while "Japan boasts a total of less than 15,000 lawyers, . . . American universities graduate 35,000 every year" (emphasis in original)). The small number of attorneys in Japan is significant because there is limited access to lawyers, even for those who have legitimate grievances. Similarly, there is little lawyer-driven litigation in Japan.

44 See An Overview, supra note 15, at 530. Data comparing the raw number of lawyers in Japan versus the United States has been a subject of debate, however, because quasi-lawyers are widely used in Japan. See Richard S. Miller, Apples vs. Persimmons — Let's Stop Drawing Inappropriate Comparisons Between the Legal Professions in Japan and the United States, 17 VICTORIA U. WELLINGTON L. REV. 201, 203 (1987). Individuals with an undergraduate degree in law, though not permitted in court, may perform many tasks associated with attorneys in the United States, such as the drafting of some legal documents. See id. at 203; Stevens, supra note 30, at 1271. Most members of Japanese corporate law departments are university graduates who specialized in law. See Tanaka, supra note 43, at 387. There is also a national licensing system for tax attorneys (zeirishi), patent attorneys (benrishi), and judicial scriveners, who are not classified as bengoshi, but perform work that would constitute practicing law in the United States. The combined number of tax and patent attorneys and judicial scriveners is more than three times that of the bengoshi. See ODA, supra note 6, at 103-06.


46 See Lansing & Wechselblatt, supra note 21, at 652. The examination requirement can be waived for persons who have taught law at the university level for five years or more in Japan. See BENGOSHI HÔ [LAWYERS' LAW], Law No. 205 of 1949, art. 5(3) (Japan). Once admitted to the Institute, students must complete a two-year program consisting of a four-month initial training period, a sixteen month period of "field training," and a four-month term of final training. The Institute places special emphasis on practical instruction. See Lansing & Wechselblatt, supra note 21, at 652; An Overview, supra note 15, at 525; Uchtmann et al., supra note 23, at 357. "Based on the
national examination is very low. Of the nearly 30,000 applicants who take the examination each year, less than 500 pass.47

The Japanese government has justified the restrictive admissions policy by pointing to the high cost of providing funding for additional students.48 Commentators, however, speculate that the actual rationale is an unwritten policy of discouraging litigation.49 This has enabled the Japanese legal system "to maintain the key Tokugawa/Confucian value of nonlitigiousness."50

3. PRE-PRODUCT LIABILITY LAW THEORIES OF RECOVERY IN JAPAN

Japan’s tort and contract laws are found in the Law of Obligations in the Civil Code, Minpō,51 and supplementary legislation, as well as in the Commercial Code, Shōhō.52 The Civil Code has not changed substantially since it was introduced in the late 1890s, and until the new Product Liability Law became effective, the Civil Code did not provide any specific rules for product liability actions.53

example of the civil law system of continental Europe, Institute graduates immediately become judges, procurators [prosecutors], or attorneys.” An Overview, supra note 15, at 525.

47 Traditionally, the Institute limits admission to persons of Japanese ancestry. See An Overview, supra note 15, at 522-524; Uchtmann et al., supra note 23, at 357.

48 Students at the Institute are considered employees of the Ministry of Justice, and they receive a modest government salary during their time of study. See Uchtmann et al., supra note 23, at 357.


50 See An Overview, supra note 15, at 528.

51 See MINPŌ (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898 (Japan).

52 See SHŌHŌ (Commercial Code), Law No. 48 of 1899 (Japan).

53 See Yukihiro Asami, Product Liability in Japan, JAPAN BUS. L. LETTER, July 1989, at 9, 9 [hereinafter Product Liability in Japan]. It should be noted, however, that special laws relating to tort liability, such as the Law Guaranteeing Compensation for Damage Caused by Automobiles [Jidōsha Songai Baishō Hoshō Hō], Law No. 97 of 1955, and the Law Concerning Compensation for Loss Arising from Atomic Energy [Genshiryoku Songai no Baishō ni Kansuru Hōritsu], Law No. 147 of 1961, incorporated strict liability-like principles. See ŌDA, supra note 6, at 208.
Japanese courts, however, have applied flexibly the Civil Code's general tort and contract provisions to product liability cases.\(^{54}\)

### 3.1. Negligence Liability

The general provision for tort liability is set forth in Article 709 of the Civil Code, which provides that "[a] person who violates intentionally or negligently the right of another is bound to make compensation for the damage arising therefrom."\(^{55}\) In the case of a product-related harm, recovery under Article 709 is predicated on the plaintiff proving beyond a reasonable doubt\(^{56}\) the existence of a product defect which was proximately caused by the defendant and which resulted in damages.\(^{57}\) In Japan, as in the United States, negligence actions can be brought under a number of different theories, including negligence in the manufacturing process, in the design of a product, in

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\(^{54}\) See Product Liability in Japan, supra note 53, at 11. The concept of product liability was first introduced in Japan in the mid-1960s. It has not, however, been a fertile ground for litigation. Through April 1994, according to Japan's Economic Planning Agency's First Consumers Affairs Division, only 141 product-related cases had ever been filed in Japanese courts. By way of contrast, data collected by the National Center for State Courts indicates that about 42,000 product liability cases were filed in 1992 in U.S. state courts alone. See NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 16 (1992).

\(^{55}\) MINPO art. 709. Article 724 of the Civil Code serves as a statute of limitations, providing that any claim for damages in tort must be brought within three years after the injured party recognizes the injury and the identity of the injurer, and no later than twenty years after the commission of the tort. See id. art. 724; see also Seimei Hayashida, The Necessity for the Rational Basis of Duty-Risk Analysis in Japanese Tort Law: A Comparative Study, 1981 UTAH L. REV. 65, 65-67 (discussing the basic elements of Japanese tort law).

\(^{56}\) Japanese civil law requires judges to be "convinced" of the existence of necessary facts. See TEIICHIRO NAKANO ET AL., MINJI SOSHÔ HÔ KÔGI 287-88 (8th ed. 1983). "Convinced" is defined as believing in the existence or nonexistence of a fact beyond a reasonable doubt. See id.

\(^{57}\) See Hayashida, supra note 55, at 65-67; cf. MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (setting forth the rule now accepted in the United States that one who negligently manufactures a product is liable for personal injuries proximately caused by such negligence).
the sufficiency of warnings that accompany a product, or in the testing and marketing of a defective product. Damages may be recovered for personal injuries and property damages. Unlike the majority rule in the United States, however, damage claims in Japan may be based solely on consequential economic losses.

The requirement of a concrete showing of intent or negligence on the part of a manufacturer, coupled with the restrictive scope of Japanese discovery, makes success in a negligence action that is not based on a manufacturing flaw very difficult to achieve. Consequently, Japanese courts utilize various methods to reduce the plaintiff’s evidentiary burden, particularly in mass tort cases.

One example of such Japanese judicial activity occurred during the early 1970s in litigation commonly known as the “SMON cases.” The court permitted the plaintiffs to introduce epidemiological and statistical evidence to support their claims of personal injuries resulting from the use of antidiarrheal medicines containing clioquinol, a chemical that causes a nervous system disease known as subacute-myelo-optico-neuropathy (SMON). Most SMON victims were children who became disabled from the waist down, and in some cases, lost their eyesight. Approximately

68 Cf. RESTATEMENT (SECOND) OF TORTS § 291 (1965) (discussing generally negligence and unreasonableness).
60 See infra section 5.2.2.
61 A 1990 survey by the Japan Federation of Bar Associations showed that “of around 250 instances in which members were consulted about product-related accidents, only 30 cases were brought to court.” Tadashi Saito, Product Liability Reform in Japan, 3A JAPAN ECON. INST. REP. 7 (1994). Of those cases, plaintiffs won four and lost five; final judgments had not been issued in the remaining cases as of January 21, 1994. See id.
5,000 plaintiffs filed suit in twenty-seven district courts and sought a total of ¥110 billion from three pharmaceutical companies and the Ministry of Health and Welfare. In 1978, the Kanazawa District Court handed down the first decision in a SMON case, finding for the plaintiffs. During the following year, similar decisions were issued by eight other district courts. In 1979, a final settlement was reached between the remaining plaintiffs and the drug companies and the Ministry of Health and Welfare.

Similar judicial activity in Japan occurred in another famous set of cases, the Kanemi Rice-Bran Oil cases, where negligence was prima facie inferred. In those cases, Japanese-produced PCBs contaminated with quatraphenyls leaked from a decayed pipe into a drum of cooking oil during the manufacturing process. Lawsuits were brought by more than 14,000 individuals who allegedly suffered poisoning from eating foods cooked with con-
taminated Kanemi Rice-Bran Oil.\(^6\)

More recently, anticipating the adoption of the Product Liability Law, the Osaka District Court applied a doctrine similar to *res ipsa loquitur*\(^7\) to shift the burden of proof in a product liability action from the plaintiff to the defendant in a manufacturing defect action. In *Taishi Kensetsu Kōgyō K.K. v. Matsushita Denki Sangyō K.K.*,\(^7\) the court held that the defendant, a consumer electronics manufacturer, had to pay damages to a real estate agency after a television which the company had produced burst into flames and set the agency's offices on fire. The court reasoned that where the plaintiff could demonstrate that the television was used in a normal, reasonable manner, the court could presume that the television caught fire because of a product defect. The Matsushita television combustion case is the first case to shift the burden of proof to the defendant to prove that its product was not defective once the plaintiff had established reasonable use.\(^7\)

3.2. Contract Theories

Japanese contract law also provides a means of recourse for damages due to defective products, but it is restrictive. Article 415 of the Civil Code permits a buyer to recover damages for breach of contract if the seller "fails to effect performance in accordance with the tenor and purport of the obligation."\(^7\) "In the case of a sale of goods, the 'tenor and purport'... is to deliver a product fit for the purpose for which it is sold."\(^7\) Thus, if a product is defective, the

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\(^6\) See *Product Liability in Japan*, supra note 53, at 11.

\(^7\) Under American common law, negligence may be inferred when a product has been in the defendant's control and an incident occurs which would be highly unlikely to have happened unless the defendant was indeed negligent. See, e.g., *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968).

\(^7\) 842 HANTA 69 (Osaka Dist. Ct., March 29, 1994).


\(^7\) See *MINPÔ* art. 415. A claim under Article 415 must be brought within ten years after the occurrence of the event which gives rise to the cause of action for breach of contract. See *id*.

\(^7\) Ottley & Ottley, supra note 62, at 43.
seller has failed to meet its contractual obligation. In such a case, the buyer may recover damages for the "inadequate performance" (Fukanzen-Rikō) so long as foreseeability of harm and adequate causation are established.

Article 415 does not expressly state that negligence on the part of the seller is required to establish liability, but courts have interpreted this to be a requirement of the law. The burden, however, is on the seller to show that it was not at fault in selling a defective product. In this way, breach of contract theory is favorable to a plaintiff who claims damages against a seller of a defective product. Nevertheless, if a defect is due to some factor over which the seller had no control, or if the seller took reasonable steps to inspect the product and prevent the defect, the seller will not be held liable.

The second article of the Civil Code that provides a remedy in contract for a defective product is Article 570. That article provides for breach of warranty liability for defects that were neither foreseen nor contemplated by the purchaser at the time of sale. Under Article 570, a purchaser of a product containing a latent defect is entitled to

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75 Cf. U.C.C. § 2-314 (implied warranty of merchantability); U.C.C. § 2-315 (implied warranty of fitness for a particular purpose); RESTATEMENT (SECOND) OF TORTS § 402B (1965) (misrepresentation).

76 Product Liability in Japan, supra note 53, at 10.

77 See MINPO art. 416 ("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.").

78 See Product Liability in Japan, supra note 53, at 10. See generally H. Timothy Ricks, A Comparison of the Scope of Contract Damages in the United States and Japan, 12 INT'L LAW. 105, 113-22 (1978) (explaining that because contracts are part of the law of obligations in Japan, a breach of contract action under Article 415 requires a showing of fault by the seller).

79 See Ottley & Ottley, supra note 62, at 43.

80 See MINPO art. 570. A claim under Article 570 must be brought within one year after the buyer discovers the defect. See id. art. 566(3).
rescind the contract or to demand damages.\textsuperscript{81}

There are two specific aspects of Article 570 which substantially limit its effectiveness as a civil remedy. First, unlike Article 415 damages, damages arising out of a latent defect under Article 570 are limited in practice to the buyer's reliance or expectancy interest (Shinrai Rieki).\textsuperscript{82} This interest includes damage to the product itself, but does not include personal injury or other property or economic loss. Second, the buyer must be unaware of the defect at the time of purchase.\textsuperscript{83} If the seller can prove that the contrary is true, the seller can establish the buyer's assumption of risk and defeat liability.\textsuperscript{84}

In addition to the impediments frustrating imposition of liability under Articles 415 and 570 of the Civil Code, use of a contract theory generally entails two other problems for plaintiffs. First, Articles 415 and 570 apply only to a sale between a seller and the immediate buyer. This "privity" requirement, which was abandoned in the United States over thirty years ago,\textsuperscript{85} is strictly observed by Japanese courts, and it effectively eliminates most contract actions

\textsuperscript{81} Article 570 of the Civil Code states: "If any latent defects exist in the object of a sale, the provisions of Article 566 shall apply..." See id. art. 570. Article 566 of the Civil Code provides that "[w]hen 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.

\textsuperscript{82} See Product Liability in Japan, supra note 53, at 11; Ottley and Ottley, supra note 62, at 44; Ricks, supra note 78, at 113-18.

\textsuperscript{83} See MINPO art. 566(1).

\textsuperscript{84} Article 418 of the Civil Code 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." Id. art. 418.

\textsuperscript{85} See Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (removing privity requirement in action for breach of implied warranty of merchantability); Baxter v. Ford Motor Co., 12 P.2d 409 (Wash. 1932), aff'd, 15 P.2d 1118 (Wash. 1932) (removing privity requirement in action for breach of express warranty); see also U.C.C. § 2-313 cmt. 2 ("warranties need not be confined... to the direct parties to such a contract"); RESTATEMENT (SECOND) OF TORTS § 402B cmt. e (1965).
against manufacturers. Second, a seller can disclaim or limit liability under Articles 415 and 570 by issuing "special stipulations." While these disclaimers are not permitted to violate public policy and must adhere to certain content requirements, they can serve to avoid liability. For all of these reasons, contract law "remain[s] largely a theoretical basis for recovery in product liability cases" in

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86 Kanmaki v. Ōhashi, 725 HANJI 19 (Gifu Dist. Ct., Dec. 27, 1973), is the only reported Japanese product liability case which has not applied the privity requirement. In that case, the plaintiffs brought an action against a manufacturer, a wholesaler, and a retailer on behalf of two girls who died from food poisoning due to consumption of egg tofu (bean curd) polluted with salmonella. The court held that the manufacturer was negligent and liable in tort under Article 709 of the Civil Code. Under traditional privity rules, the retailer and wholesaler would not have been liable under Article 415 of the Civil Code to the deceased girls because they had no contractual relationship. The court ruled, however, that the deceased girls were entitled to compensation from the retailer on the theory that the retailer's contractual duty extended to the purchaser's family or household members who were reasonably expected to consume or use the food. Furthermore, since the retailer lacked sufficient funds to compensate the plaintiffs, the court allowed the plaintiffs to subrogate the retailer's claim against the wholesaler under Article 423 of the Civil Code. See Product Liability in Japan, supra note 53, at 10.

87 See Ottley & Ottley, supra note 62, at 44-45; cf. U.C.C. § 2-719 (providing that remedies for breach of warranty may be modified or limited); U.C.C. § 2-719 (providing that remedies for breach of warranty may be modified or limited). See generally Teisuke Akamatsu & George H. Bonneville, Disclaimers of Warranty, Limitation of Liability, and Liquidation of Damages in Sales Transactions, 42 WASH. L. REV. 509 (1967) (examining the domestic law of Japan on disclaiming and limiting liability in sales transactions); Satoshi Niibori & Richard Cosway, Products Liability in Sales Transactions [in Japan], 42 WASH. L. REV. 483 (1967) (addressing the liability of manufacturers under Japanese law).

88 To be effective, disclaimers must not violate the requirements in Article 1 of the Civil Code that "[a]ll private rights shall conform to the public welfare" and "shall be done in good faith and in accordance with the principles of trust." MINPO art. 1. In addition, a manufacturer cannot escape warranty liability under Article 570 for a defect if it has knowledge of the defect and fails to disclose the information to the buyer. See id. art. 572 ("Even where the seller has made a special stipulation that he is not liable in respect of the warranties mentioned [in Article 570], 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.").
3.3. The Movement Toward Strict Liability in Japan

The Japanese movement toward a strict product liability standard began in the 1960s when there occurred the first in a series of large-scale incidents involving product-related injuries, particularly the thalidomide cases. Some courts employed various evidentiary procedures and presumptions to facilitate recovery where plaintiffs showed a causal link between the allegedly defective product and the harm. Beginning in 1975, the Social Policy Council, a blue-ribbon government advisory council on consumer issues, initiated research on legislative solutions to the problem of defective products and injured consumers. That same year, a nongovernmental group of lawyers and

89 Ottley & Ottley, supra note 62, at 45.

90 Some sources suggest that the first product liability case arose from the 1955 arsenic poisoning of 12,000 infants, 131 of whom died, due to the consumption of contaminated powdered milk. See Economic Planning Agency's National Life Bureau, Chikujō Kaisetsu Seizōbutsu Sekinin Hō 11-12 (1994). The action, known as the Morinaga Dairy case, was not brought until 1970, and it settled in 1979. Under the terms of the settlement, the company issued an apology in court for the poisoning and "agreed to establish a foundation to administer a long-term relief program for the victims." Ottley & Ottley, supra note 62, at 51.

91 "[D]rugs containing thalidomide were marketed in Japan as tranquilizers, sleeping pills, and gastrointestinal medicines. Beginning in the 1960's . . . a number of badly deformed babies were born to women who had taken thalidomide during their pregnancies." Ottley & Ottley, supra note 62, at 47-48. As a result, class action suits were filed in 1964 against two drug manufacturers and Japan's Ministry of Health and Welfare. Id. at 48-49. Plaintiffs alleged that the defendants had breached 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." Id. at 48 (quoting Diary of a Plaintiff Attorney's Team, 8 LAW IN JAPAN 136, 165 (1975)). "[H]earings continued until December 1973, when the defendants informed the court that they wanted to compromise." Id. at 49. Under the terms of the settlement, plaintiffs could choose "between an immediate lump sum payment of damages and a partial immediate payment coupled with an annuity to begin three years later and to continue for life." Id. The manufacturers also agreed to pay the plaintiffs' litigation fees and expenses, to establish a thalidomide welfare center, and to pay "an amount toward the cost of artificial limbs and therapeutic devices." Id. at 49-50.
professors called the Product Liability Research Group published the “Draft Outline for Product Liability Law” (*Seizōbutsu Sekinin Hō Yōko Shian*), which called for the adoption of strict liability, but the proposal failed to attract legislative attention.\(^92\)

Momentum for product liability “reform”\(^93\) within Japan developed slowly over the next decade. The Council of the European Community's adoption of a Product Liability Directive in 1985 provided the final impetus for Japan's decision to adopt its own law.\(^94\) Several legislative proposals modeled after the European Council Product Liability Directive were subsequently generated.\(^95\) All of

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\(^92\) *See* Ottley & Ottley, *supra* note 62, at 56; *Product Liability in Japan, supra* note 53, at 9.

\(^93\) The word “reform” is placed in quotes because it must be viewed in context. In Japan, “reform” has been applied to ease legal burdens on plaintiffs; in the United States, “reform” has been used to ease legal burdens on defendants.


\(^95\) The most significant plan was the Proposal for the Enactment of a Product Liability Law produced by the reporting group of the 1990 Association for the Study of Private Law. *See* George M. Newcombe, *In Tokyo, Liability on the Line, PAC. RM,* May 11, 1992, at 28, 30. Under the proposal, a plaintiff could recover damages from the manufacturer and distributor of a product by demonstrating that the injury-causing
these proposals were opposed by industry groups, which expressed concerns that changes to Japan's product liability laws would harm the domestic economy by making Japanese business less competitive. 96

In August 1993, however, Prime Minister Morihiro Hosokawa's seven-party coalition government, which included the consumer-oriented Social Democratic and Kömeito (Clean Government) parties, 97 assumed power and displaced the conservative, pro-business Liberal Democratic Party. 98 The Hosokawa government quickly moved to adopt product liability legislation and was supported by favorable reports on the issue from three government advisory groups 99 and the Social Policy Council, which recommended a "watered-down version" of the European Council Product Liability Directive. 100 A legislative drafting team was formed in early 1994 to produce a revised draft along the lines of the Social Policy Council's product was defective and that it had caused the plaintiff's injury during normal and "reasonably foreseeable" use. See id. at 30. The Special Committee on Consumer Affairs of the Tokyo Lawyers' Association, the Legislative Committee of the Tokyo Lawyers' Association and the Clean Government Party (Kömeito) offered similar proposals. See id.


97 See Saito, supra note 61, at 3. The Social Democratic Party and Kömeito, both pro-consumer minority political parties, had each introduced product liability legislation in the Diet in 1992. These bills were promptly rejected, however, due to opposition by the pro-business Liberal Democratic Party. See id.


99 Reports were issued in November and December 1993 by the Industrial Structure Council (Sangyō Kösei Shingikai), which advises Japan's Ministry of International Trade and Industry, by the Economic Welfare Council (Kokumin Seikatsu Shingikai), which advises the prime minister, and by a committee of the Ministry of Justice's legislative Council (Hōsei Shingikai). See Eugene A. Danaher, Products Liability Overhaul: Strict Liability Is Coming to Japan, NAT'L L.J., Feb. 7, 1994, at 25.

100 See Charles Smith, supra note 98, at 72.

4. JAPAN'S NEW PRODUCT LIABILITY LAW: STRICT LIABILITY COMES TO JAPAN

Japan's new Product Liability Law is short and contains few substantive provisions in comparison to the European Council Product Liability Directive. Although the Japanese government's Commentary on the Product Liability Law clarifies several issues, courts likely will interpret the law for years to come because key and controversial issues remain undefined or unanswered. The intentional brevity and vagueness of the Product Liability Law reflects the inability of Japanese consumer and industry groups to reach a consensus on many substantive issues.

The following section discusses the new Product Liability Law and the issues that the Law is likely to raise. Additionally, the following section provides suggestions for resolving some of these issues.

4.1. Liability of Manufacturers Imposed Irrespective of Fault

4.1.1. Liability Without Regard to Fault

The most striking feature of the Product Liability Law is the imposition of liability against manufacturers and others for product-related harms without regard to fault. The new Law represents a major departure from traditional Japanese tort and contract principles. The core provision of the Product Liability Law, Article 3, provides: "The manufacturer or the like shall be liable for damages caused by a defect of the product which is manufactured .

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101 See id.

This rule applies in any action involving a product that left the manufacturer's control after July 1, 1995, the effective date of the Law. Like the American doctrine of strict product liability, the purpose of the Japanese Product Liability Law is to protect victims by relieving them from the legal burden of proving fault.

4.1.2. Liable Persons

The Product Liability Law holds liable manufacturers, "any person who holds himself out as the manufacturer of a product," and "any person who may


104 See Product Liability Law supplementary provision 1.


106 See Product Liability Law art. 1.

107 See Product Liability Law art. 2(3)(i) (explaining that "manufacturer and the like" means "any person who produces processes or imports the product as business"). The term does not include non-importer retailers who do not put their name on a product. Comments to the Product Liability Law clarify that the phrase "as business" should be understood as engaging in the same type of activities continuously and repeatedly. See Commentary on the Product Liability Law, supra note 102, at 61; cf. European Council Product Liability Directive, supra note 2, art. 3(2) ("Without prejudice to the liability of the producer, any person who imports into the community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this directive and shall be responsible as a producer.").

Contrary to the European Council Product Liability Directive, the new Product Liability Law does not impose strict liability on Japanese product sellers in those situations where the manufacturer or importer cannot be identified. See European Council Product Liability Directive, supra note 2, art. 3(3) ("Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product" or, in the case of an imported product, the name of the importer.).

108 Product Liability Law art. 2(3)(ii).
be recognized as the manufacturer-in-fact."\(^{109}\) In the United States, everyone in the chain of distribution may be held strictly liable.\(^{110}\)

### 4.2. The Defective Product

#### 4.2.1. Products Within the Scope of the New Law

The Product Liability Law applies to "any movable which is manufactured or processed."\(^{111}\) Government commentary defines the term "movable" as "all corporeal things, other than land and things firmly affixed to land."\(^{112}\) The commentary explains that fixtures (i.e.,

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\(^{109}\) Product Liability Law art. 2(3)(iii). The *Commentary of the Product Liability Law* explains liability under the new Law as follows: Liability under the new law falls on "manufacturer[s], etc." "Manufacturer, etc." is defined in one of three ways. First, any person who manufacturers, processes or imports products as a business. Second, any person who, by putting his name, trade name or trade mark on a product, either holds himself out as, or could be mistaken for, the product's manufacturer. And third, any other person who may be recognized as its manufacturer-in-fact in light of the relevant circumstances. *Commentary on the Product Liability Law, supra* note 102, at 57; cf. European Council Product Liability Directive, *supra* note 2, art. 3(1) ("Producer means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.").


\(^{111}\) Product Liability Law, art. 2(1); cf. European Council Product Liability Directive, *supra* note 2, art. 2 ("For the purpose of this Directive 'product' means all moveables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable.").

\(^{112}\) See *Commentary on the Product Liability Law, supra* note 102, at 57. The government commentary further states that real estate does not fall within the scope of the Product Liability Law, because: (1) viable causes of action are already available to buyers under contract law and to third parties under tort law because Civil Code Art. 717, Responsibility of Possessors of Structures, provides that third parties may seek compensation for damage due to defects in structures from the possessor of the structure; or, where the possessor exercised due diligence, from the owner of the structure; (2) the useful life of real estate is long, and, during the life of real estate, deterioration, maintenance and repair are necessary; and (3) the European Council Product Liability Directive excludes real estate from its purview. *See*
movables, such as bricks or lumber, which are incorporated into an immovable) will be subject to the Product Liability Law, so long as they were movable at the time of delivery.\textsuperscript{113}

Government commentary also suggests that blood products, including plasma and plasma derivatives, and live vaccines, are to be treated as "products" and are therefore subject to the Product Liability Law. The stated rationale for holding manufacturers of these products strictly liable is that blood products and vaccines are derived from blood or viruses, and have been subjected to "processing," such as through the introduction of preservatives and anticoagulants.\textsuperscript{114}

\textit{id.} at 58.

\textsuperscript{113} See \textit{id.} at 59. This approach is consistent with the European Council Product Liability Directive. See European Council Product Liability Directive, supra note 2, art. 2. The majority rule in the United States is that a defective product that is incorporated into an improvement to realty does not lose its identity as a product, and that a manufacturer or a contractor may be strictly liable for any damages proximately caused by the defect. See, e.g., Pamperin v. Interlake Cos., Inc., 634 So. 2d 1137 (Fla. Dist. Ct. App. 1994); Berman v. Watergate W., Inc., 391 A.2d 1351 (D.C. Cir. 1978); O'Laughlin v. Minnesota Natural Gas Co., 253 N.W.2d 826 (Minn. 1977).

\textsuperscript{114} See \textit{Commentary on the Product Liability Law}, supra note 102, at 57. American law differs. The general rule in the United States is that provision of blood or blood products constitutes a service, rather than a sale and, therefore, strict liability does not attach. See RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 4(c) (Tentative Draft No. 2, 1995) ("Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement."). This rule is supported by public policy. Blood, blood products, and vaccines are critical for therapeutic purposes, and their production and use should be encouraged. See generally Brown v. Superior Court, 751 P.2d 470, 479 (Cal. 1988) ("If drug manufacturers were subject to strict liability, they might be reluctant to undertake research programs to develop some pharmaceuticals."); Grundberg v. Upjohn Co., 813 P.2d 89, 97 (Utah 1991) (justifying the granting of immunity from strict liability claims based on design defects for FDA-approved drugs by with "the benefits to society in promoting the development, availability, and reasonable price of drugs); Blankenship v. General Motors Corp., 406 S.E.2d 781, 783 n.4 (W. Va. 1991) ("The greatest problem with product liability emerges from its chilling effect on research and development."); THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 7 (Peter W. Huber & Robert E. Litan eds., 1991) (reporting an American Medical Association study finding that "[i]nnovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance")
Notwithstanding its "black letter" provisions, the Commentary on the Product Liability Law instructs courts to focus on three special considerations in determining whether blood products and vaccines are "defective" for purposes of the Product Liability Law. First, courts are instructed to consider that blood products and live vaccines often are used when human life is endangered, that there are no substitute medical treatments, and that such products are extremely useful. Second, courts are to consider whether the blood product or live vaccine is accompanied by a written warning listing hazards which may exist, including side effects, immunological reactions, and contamination by viruses. Third, courts are to consider that, even where blood products and live vaccines conform to the world's highest safety standards, it is still technologically impossible to eliminate completely all risks associated with their use.

Thus, in cases where side effects result from immunological reactions or where contamination of blood products by viruses could not have been prevented by commonly accepted scientific techniques, such side effects or contamination should not render the blood product "defective." An analysis similar to that used for blood products would also apply to the decision of whether side effects from live vaccines render the vaccines "defective."

See Commentary on the Product Liability Law, supra note 102, at 57.

116 See id. Instances where side effects and injuries due to contaminated blood products are suggested to constitute a "defect" under the Law include: (1) where a safe alternative to blood products becomes practical and it is no longer necessary to use blood products; (2) where the blood product is not accompanied by a warning about risks that may be associated with its use; (3) where new technologies or methods are developed and come into general use, but the "manufacturer, etc," of blood products continues to rely on old technology in checking for contaminants; and (4) where, under existing technology, the presence of contaminants could have been detected or eliminated, but due to human error was not. See Tsuneyuki Yamamoto, Chūshaku Seizōbutsu Sekinin Hō 43 (1994).
Claims involving noncorporeal things such as electricity and other forms of energy, or services such as design and planning, are excluded from the scope of the Law. Claims involving unprocessed or unfinished goods, agricultural and forestry products, and livestock and marine products are likewise not covered under the Product Liability Law.

The European Council Product Liability Directive takes a different approach. See European Council Product Liability Directive, supra note 2, art. 2 ("'Product' includes electricity."). Courts in the United States have held that the provision of electricity is a service and not a sale. See Rodgers v. Chimney Rock Pub. Power Dist., 345 N.W.2d 12, 15-16 (Neb. 1984); Wyrulec Co. v. Schutt, 866 P.2d 756, 760 (Wyo. 1993). See generally Michael P. Sullivan, Annotation, Products Liability: Electricity, 60 A.L.R.4th 732 (1988) (describing cases where the courts held that electricity was a service, rather than a good); Malcolm Loeb, Comment, Shocks, Shorts and Sparks — Strict Liability For Electric Utilities?, 20 LOY. L.A. L. REV. 973 (1987). This is particularly true when electricity is still in the distribution system, before the electricity has been "stepped-down" to a voltage useable in the home. See, e.g., Fong v. Pacific Gas & Elec. Co., 245 Cal. Rptr. 436 (Cal. Ct. App. 1988) (finding electricity to be a service until it passes through the customer's meter); Schriner v. Pennsylvania Power & Light Co., 501 A.2d 1128, 1133 (Pa. Super. Ct. 1985) ("Entry of electricity into the stream of commerce has been deemed to occur, generally, when the electricity leaves the transmission lines and passes through the customer's meter."). Apart from the conceptual basis for treating the delivery of electricity as a service, courts have asserted public policy reasons for their decisions in this area. An important reason is that "risk distribution theory," which is an underlying motivation for strict liability, is not believed to be applicable to a regulated utility. Of equal importance is the fact that courts do not want to burden the public with the cost of imposing strict liability on utilities. See, e.g., Otte v. Dayton Power & Light Co., 523 N.E.2d 835, 841-42 (Ohio 1988).

The commentary clarifies that "repair/maintenance and installation activities are not to be considered within the purview of the Product Liability Law, since they occur after delivery and are distinguishable from the manufacturing of new goods and/or the addition of new attributes." Commentary on the Product Liability Law, supra note 102, at 59.

See id. at 58. The Commentary on the Product Liability Law states:

The judgment of whether a product is processed or unprocessed or finished or unfinished is to be determined considering the relevant circumstances and how such product is commonly viewed. Regarding food processing, activities such as heating, flavoring, powdering and juicing should be regarded as falling within the meaning of processing under the Law, but cutting, refrigerating, freezing and drying are not to be so regarded.
With regard to software, the government commentary states that, because software is "noncorporeal" like electricity, it should fall outside of the purview of the Product Liability Law.\textsuperscript{120} Software that is included as a part of, or as a component in, a "product" within the meaning of the Product Liability Law, however, is treated as a "product" for the purposes of the Law.\textsuperscript{121} For example, when a defect in software built into the control system of a car, airplane, or electric appliance results in damage to life, body, or property, the software should be viewed in the same way as any other defective component part. In contrast, an application program, such as word processing software, computer game software, or a spreadsheet normally would not be considered a "product" within the meaning of the Product Liability Law.\textsuperscript{122}

Both the Product Liability Law's definition of "product" and the government commentary leave at least one issue unclear. While services are clearly outside the scope of the Law, false information provided through movable goods, such as maps and navigational charts, is not expressly addressed.\textsuperscript{123} This issue will have to be resolved by the

\begin{flushright}
\textit{Id.}
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\textsuperscript{120} See id. at 59.

\textsuperscript{121} See id.


\textsuperscript{123} U.S. courts have imposed strict liability for false information in maps and navigational charts. See Brocklesby v. United States, 767 F.2d 1288, 1295 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); Aetna Casualty & Sur. Co. v. Jeppesen & Co., 642 F.2d 339, 341-42 (9th Cir. 1981). These cases have been distinguished from those involving information published in books and magazines. See Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1035 (9th Cir. 1991); see also Jones v. J.B. Lippincott Co., 694 F. Supp. 1216, 1217-18 (D. Md. 1988) (refusing to impose strict liability on a publisher for the content of books it publishes); Way v. Boy Scouts of America, 856 S.W.2d 230, 238-39 (Tex.
 courts.

4.2.2. Defectiveness: Consumer Expectations

Proof of a product "defect" is central to the imposition of liability under the new Product Liability Law. Allegations of defect must be specific, and proof of the existence of a defect must be established by the plaintiff beyond a reasonable doubt.

The Product Liability Law defines the term "defect" as "a lack of safety which ordinarily the product should provide, in consideration of the characteristics of the product, the use of the product which could ordinarily be expected, the time that the manufacturer . . . deliv-

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Ct. App. 1993) (holding that ideas and information conveyed by a magazine are not "products" within the meaning of the Restatement).

124 See Commentary on the Product Liability Law, supra note 102, at 60 (noting that, in principle, the new Product Liability Law requires an injured party to show clearly where, or what part of, the product is defective; nonparticularized allegations of defect are insufficient).

125 See NAKANO ET AL., supra note 56, at 287-88 (stating that Japanese civil law requires proof of the existence of a fact beyond a reasonable doubt); see also Commentary on the Product Liability Law, supra note 102, at 62 (noting that, under the Product Liability Law, aside from only having to prove the existence of a defect (rather than having to prove negligence), the plaintiff's burden of proof is the same as under negligence-based liability). The Japanese burden of proof standard is much higher than the U.S. civil standard, which is proof by a "preponderance of the evidence."

126 In its commentary on the Product Liability Law, the Economic Planning Agency's National Life Bureau explains that "the nature of the product" includes factors such as the appearance of the product (i.e., whether a user can appreciate the inherent danger of a product, whether the design or appearance acts to prevent accidents, etc.), the benefit or usefulness of the product (as compared to the danger posed by the product), the cost-effectiveness of the product (as compared to the safety standards of similarly priced products and reasonably-priced substitutes), the probability and degree of injury, and the normal lifespan of the product. See Commentary on the Product Liability Law, supra note 102, at 59.

127 See Commentary on the Product Liability Law, supra note 102, at 59 (stating that "the ordinarily foreseeable manner of use of the product" includes both the reasonably foreseeable manner of use and the ability of the user or consumer to prevent the injury or damage from arising).
ered the product, and other circumstances relating to the product. Thus, Japan applies an objective "consumer's expectation" test in determining whether a product is "defective" for the purposes of the Product Liability Law. In this respect, the Japanese notion of what constitutes a defective product is consistent with U.S. law, as found in Section 402A of the Restatement (Second) of Torts.

Operating instructions and warnings given to the customer would seem to be relevant factors in considering what degree of safety the reasonable consumer is entitled to expect because the instructions and warnings are "circumstances relating to the product." Accordingly, courts should find unavoidably unsafe products, such as pharmaceuticals and medical devices, to be nondefective when the manufacturer has adequately informed the public (or a learned intermediary such as a doctor) of the product's potential side effects. This approach is followed in the United States, as set forth in comment K of Section 402A of the Restatement (Second) of Torts.

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128 See Commentary on the Product Liability Law, supra note 102, at 59 (providing that "the time when the manufacturer, etc., delivered the product" includes factors at the time of delivery, such as the degree of safety demanded by society, the safety regulations, the state of technology, and the possibility of adopting substitute designs).

129 Product Liability Law art. 2(2).

130 See RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

131 Product Liability Law art. 2(2).

132 See RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965); see also Brooks v. Medtronic, Inc., 750 F.2d 1227 (4th Cir. 1984) (imposing no liability on the manufacturer of a cardiac pacemaker for failing to warn the consumer when the manufacturer had warned the consumer's physician); Brown v. Superior Court, 751 P.2d 470 (Cal. 1988) (finding that a manufacturer can only be held liable for failure to warn if the manufacturer either knew of the danger or would have discovered the danger with proper investigation); RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 8 (Tentative Draft No. 2, 1995). A five-year study conducted by reporters of the American Law Institute also approves this method. See AMERICAN LAW INSTITUTE, 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: REPORTERS' STUDY 56 (1991). For a scholarly treatment of prescription drug liability, see Richard A. Merrill, Compensation for Prescription Drug Injuries, 59 VA. L. REV. 1 (1973); Victor E. Schwartz, Unavoidably Unsafe Products: Clarifying the Meaning and Policy Behind Comment K, 42 WASH. & LEE L. REV. 1139 (1985).
The definition of "defect" does not squarely address the liability of manufacturers of so-called "inherently unsafe products." This will be an issue for the courts to resolve. An example of such product is the ordinary kitchen knife. The fact that the knife is capable of cutting a finger does not make the product defective or undesirable for use as a kitchen utensil. In the United States, courts have generally declined to impose liability for products where the risk cannot be eliminated without depriving the consumer of the usefulness or desirability of the product, regardless of whether courts have believed it is a good idea for people to use such products as tobacco, alcohol, convertible automobiles, and motorcycles. This principle is supported by the comments to Section 402A of the Restatement (Second) of Torts. Nearly every major U.S. court has recognized that legislatures and administrative agencies are better suited to decide whether products that are generally available, but considered socially controversial or undesirable for some segments of society, should be controlled or banned.
4.3. The Harm

The Product Liability Law applies to any civil action for "damages due to human death, personal injury or property damage caused by a defect of the product . . .". The commentary to the new Product Liability Law indicates that liability for harm is not intended to be limited solely to consumers, but also may include third parties and legal persons. Thus, corporations may sue under the new Law for damages caused by a product to business property.

The commentary also clarifies in part the application of the Product Liability Law to commercial loss claims, but adopts a schizophrenic approach that has been criticized sharply. Specifically, the commentary suggests that persons alleging damage to the product itself are limited to the traditional tort and contract provisions of the Civil Code for relief. This approach is consistent with the European Council Product Liability Directive and with U.S. law.

inherent danger of depositing cholesterol in the arteries, which leads to heart attacks; but this does not make butter unreasonably dangerous.

The Court of Appeals of Maryland deviated from the usual rule that manufacturers of "inherently unsafe products" are not strictly liable. See Kelley v. R.G. Industries, Inc., 497 A.2d 1143, 1159 (Md. 1985) (holding handgun manufacturer strictly liable for injury resulting from properly functioning "Saturday Night Special"). Kelley was subsequently overruled by legislation. See MD. ANN. CODE art. 27, § 36-I(h) (Supp. 1990).

Product Liability Law art. 1; see also Commentary on the Product Liability Law, supra note 102, at 61 (noting that claims for mental distress unaccompanied by physical injury are not provided for under the Product Liability Law).

See Commentary on the Product Liability Law, supra note 102, at 57.

See European Council Product Liability Directive, supra note 2, art. 9 ("[D]amage means: (a) damage caused by death or by personal injuries; (b) damage to, or destruction of, any item of property other than the defective product itself . . . provided that the item of property: (i) is of a type ordinarily intended for private use or consumption, and (ii) was used by the injured person mainly for his own private use or consumption.").

The leading case is Seely v. White Motor Co., 403 P.2d 145 (Cal. 1965), which takes the position that damage to the product itself and commercial losses are remedies that should be decided under the U.C.C. The U.S. Supreme Court strongly endorsed this principle in an
On the other hand, the approach outlined in the commentary appears to allow for the recovery of consequential economic loss, such as lost profits, suffered by a business due to damage to property, if a reasonable causal relationship can be shown. This approach, which is not in accord with either the European Council Product Liability Directive or U.S. law, has been criticized for creating a path to unreasonably large recoveries against those who manufacture products used by businesses.

4.4. Defenses

The new Product Liability Law contains a number of exceptions to the general rule regarding liability irrespective of fault.

4.4.1. State of the Art

One of the most important provisions in the Product Liability Law is the exclusion of "developmental risks" from strict liability. Under the Law, strict liability does not attach to a "manufacturer and the like" that proves the impossibility of being able to discover the existence of the defect given the state of scientific and technical knowledge.


The commentary states, "Where the damaged party was a business or where damage was caused to property used by a business, given the existence of a proper causal relationship between the defective product and lost profits, compensation for damage to the business or business property may be sought." Commentary on the Product Liability Law, supra note 102, at 63.

See European Council Product Liability Directive, supra note 2, art. 9.


See Yukihiro Asami, Ōbei to Waga Kuni no Seizōbutsu Sekinin Hō no Hikaku, 478 HÔGAKU SEMINA 37, 39 (1994).
at the time of product delivery. This provision is consistent with the majority of U.S. case law and reflects sound public policy.

4.4.2. Limitations Periods

The Product Liability Law contains two provisions which place outer limits on recovery under the general rule. First, the Law contains a three-year statute of limitations which begins to run "from the time when the injured person or his legal representative became aware of the damage and the identity of the person who would be liable." This provision is particularly beneficial to persons who suffer from toxic or latent harms, and it is more favorable to consumers than are many laws in the United States. 

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147 See Product Liability Law art. 4(1). The commentary states that manufacturers of components and raw materials included as fixtures in real estate are not subject to this exception because real estate is not classified as a "product" under the law. See Commentary on the Product Liability Law, supra note 102, at 64.

148 See generally Victor E. Schwartz, The Death of "Super Strict Liability": Common Sense Returns to Tort Law, 27 GONZ. L. REV. 179 (1991-92) (discussing the notion of "super strict liability," or the imposition of liability in defective-design cases even when the manufacturer could not have known about the risk and could not have made the product safer given existing technology); John W. Wade, On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing, 58 N.Y.U. L. REV. 734 (1983) (analyzing how the availability of knowledge to the manufacturer can affect its liability).

149 Product Liability Law art. 5(1); cf. European Council Product Liability Directive, supra note 2, art. 10 (providing that a three-year limitations period "shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer").

150 In some states, such as Virginia, the statute of limitations begins to run at the "time of injury." See, e.g., Large v. Bucyrus-Erie Co., 707 F.2d 94, 97 (4th Cir. 1983) (applying Virginia law); see also Wojcik v. Almase, 451 N.E.2d 336, 341-42 (Ind. Ct. App. 1983) (holding that the plaintiff's statute of limitations began to run at the time he was harmed); New Mexico Elec. Serv. Co. v. Montanez, 551 P.2d 634, 637 (N.M. 1976) (explaining that the statute of limitations begins to run from the time of injury, and not from the time of the negligent act). Recognizing the harshness of this rule in cases involving a harm that has a latency period or becomes manifest only after repeated exposure to the product, some states have adopted a rule under which the limitations period begins to run when the claimant discovers or should have discovered the harm. See, e.g., CONN. GEN. STAT. ANN. § 52-
Second, the Product Liability Law contains a statute of repose to offset the potential long-term liability that could result from the pro-plaintiff statute of limitations. The repose period is set at “ten years from the time when the product was delivered by the manufacturer.”\textsuperscript{151} This provision benefits Japanese manufacturers and importers of products into Japan by reducing costs associated with defending stale claims. In order to be fair to plaintiffs, however, the Product Liability Law contains a special rule for toxic harms.\textsuperscript{152}

4.4.3. The "Passive" Component Manufacturer

Finally, the Product Liability Law provides that producers of components may not be liable where their product was used as a component in other products. Such producers are not liable if the defect solely was due to compliance with the design or instructions of the manufacturer of such other products, and if there was no negligence on the part of the manufacturer of the component.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{151} Product Liability Law art. 5(1); cf. European Council Product Liability Directive, \textit{supra} note 2, art. 11 (stating that liability shall be extinguished “10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer”).
\item \textsuperscript{152} See Product Liability Law art. 5(2) (providing that the ten-year repose period is to be “calculated from the time when the damage arises, where such damage is caused by the substances which are harmful to human health when they remain or accumulate in the body, or where the symptoms for such damage appear after a certain latent period”). The European Council Product Liability Directive does not contain a similar exception for latent injury claims.
\item \textsuperscript{153} See Product Liability Law art. 4(2); cf. European Council Product Liability Directive, \textit{supra} note 2, art. 7(f) (“[T]he producer shall not be liable as a result of this directive if he proves . . . in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the
\end{itemize}
5. IMPACT ON JAPANESE MANUFACTURERS AND U.S. AND OTHER IMPORTERS

5.1. Cultural Influences Discourage Litigation

Perhaps more than in any other developed country, the liability system in Japan must be understood in the context of its culture. Many of the social factors that shaped Japan's pre-Western legal system continue to influence the current legal system.

Japan's traditional legal system was premised "upon the inequality of individuals within society." The foundations of that inequality were established by the feudal class system, which existed during the early shogunate and Tokugawa shogunate eras, and by the Confucian system of relationships. Both the class and Confucian systems stressed obedience to superiors and protection of inferiors. As a result of this hierarchical class system, little emphasis was placed on the individual; the basic unit of society was the group. People did not insist on individual rights. Instead, individuals harmonized their needs with the interests of the community. This mindset was not merely a question of individual preference, but was rather a societal imperative. Conciliation thus became the preferred method for resolving conflicts. A dispute was taken to court only when conciliation had failed.

Changes brought about by both the Meiji Restoration and the American occupation after World War II eliminated Japan's formal class structure and the legal restraints on instructions given by the manufacturer of the product.

154 Ottley & Ottley, supra note 62, at 33.
155 See supra note 49, at 340-44.
156 See Ottley & Ottley, supra note 62, at 33.
157 See An Overview, supra note 15, at 519.
159 See An Overview, supra note 15, at 519.
equality. Nevertheless, Japanese society today continues to focus on the group rather than on the individual, and on moral duties rather than on individual rights. This pre-modern pattern of thinking has been called the Japanese “legal consciousness.”

An incident related to Japan’s product liability law which occurred several years ago provides a spectacular example of this legal consciousness. A couple had left their young son in the care of neighbors. While in their care, the child fell into a nearby irrigation pond and drowned. The couple sued the neighbors and two other parties. A district court ordered the neighbors to pay ¥5 million in damages to the couple and dismissed the claims against the other parties. When the decision was reported on Japanese television and radio, a flood of outraged letters and telephone calls was directed at the couple. To many Japanese, 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 stopped giving him work. As a result, the couple dropped the suit and all claims for damages. This ethos naturally has implications in the area of products liability and

160 See Ottley & Ottley, supra note 62, at 34; see also Oppler, supra note 26, at 290 nn.1 & 2 (citing literature discussing Allied Occupation and its effect on Japan’s legal system).

161 See Lansing & Wechselblatt, supra note 21, at 653.

162 See TAKEYOSHI KAWASHIMA, NIHONJIN NO HOISHIKI [THE LEGAL CONSCIOUSNESS OF THE JAPANESE] 140 (1967). Professor Kawashima notes that those who go to court are branded as “eccentric,” “quarrelsome,” or “litigation crazy.” Id. at 142. See Kato, supra note 41, at 662-63; Tanaka, supra note 44, at 378-80.

163 See Ottley & Ottley, supra note 62, at 36 n.36.

164 See id. Another illustration of this legal consciousness is found in many Japanese contracts, which provide, “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 [sic] by consultation . . . .” Charles R. Stevens, Modern Japanese Law as an Instrument of Comparison, 19 AM. J. COMP. L. 665, 668 (1971) (quoting KAWASHIMA, supra note 162, at 115-16). For a general view of the Japanese attitude toward contracts and their negotiation, see Elliot J. Hahn, Negotiating Contracts with the Japanese, 14 CASE W. RES. J. INT’L L. 377 (1982); Lansing & Wechselblatt, supra note 21, at 654-56; R.E. Watts, Briefing the American Negotiator in Japan, 16 INT’L LAW 597 (1982).
suggests that, despite the new Product Liability Law, an epidemic of new lawsuits is unlikely.

5.2. Procedural and Evidentiary Constraints to Litigation in Japan

5.2.1. Restrictions Within the Japanese Judicial System

One consequence of the Japanese "legal consciousness" is that the Japanese legal system has never developed procedural and remedial incentives to litigate similar to those present in the United States. In fact, the Japanese legal system is filled with devices that operate to deter litigation. One principal procedural deterrent to initiating complex litigation in Japan is the long delay in proceedings, caused in part by a shortage of judges.\(^{165}\)

A second source of delay is that, unlike trials in the United States which, once started, proceed almost continuously until completed, Japanese trials are marked by intervals of a month or more between hearing dates.\(^{166}\) Although the purpose of this practice is to encourage the parties to reach a resolution through compromise, the result is that judges have no incentive to expedite a trial. Instead, judges prefer to delay and wait for the parties to settle the matter.

An extraordinary example is the thalidomide cases, which were first filed in November 1964 and continued at intervals until December 1974, when the parties reached an out of court settlement.\(^{167}\) On average, the length of a civil suit brought in district court is about one year and is somewhat longer in a high court.\(^{168}\) Civil suits that go to

\(^{165}\) Excluding summary court judges, there are only about two thousand judges in Japan, which is an inadequate number considering the size of the population and the amount of litigation. See ODA, supra note 6, at 80.

\(^{166}\) See Bolz, supra note 18, at 123; see also ODA, supra note 6, at 80; Miller, supra note 44, at 210 ("[E]xaminations of individual witnesses are separately scheduled (and scheduled again weeks or months later if insufficient time is allowed for the first hearing).”).

\(^{167}\) See Ottley & Ottley, supra note 62, at 39.

\(^{168}\) See ODA, supra note 6, at 79; Kato, supra note 41, at 670.
the Supreme Court average about five and one-half years in length.\textsuperscript{169}

5.2.2. Japan Permits Very Limited Pre-Trial Discovery

A second procedural limitation, and one that is particularly important in product liability cases, is that the various forms of pre-trial discovery available in the United States generally do not exist in Japan. In the United States, parties to lawsuits have an extensive opportunity to investigate opponents' cases.\textsuperscript{170} Discovery methods include depositions upon oral examination or written questions,\textsuperscript{171} written interrogatories,\textsuperscript{172} production of documents or things or permission to enter upon land or other property for inspection and other purposes,\textsuperscript{173} physical and mental examinations,\textsuperscript{174} and requests for admission.\textsuperscript{175} The information or materials sought need not be admissible at trial. Unless privileged, the information sought merely must be relevant to some issue in the case.\textsuperscript{176}

In Japan, interrogatories and requests for admissions are not available.\textsuperscript{177} Japanese law also provides no device

\textsuperscript{169} See Kato, \textit{supra} note 41, at 670.

\textsuperscript{170} See \textit{FED. R. CIV. P.} 26.

\textsuperscript{171} Depositions are used to discover information, to impeach testimony at trial, or to replace live testimony when a witness is unavailable to testify at trial. See \textit{FED. R. CIV. P.} 30-31.

\textsuperscript{172} Interrogatories are written replies under oath to written questions propounded by another party. See \textit{FED. R. CIV. P.} 33.

\textsuperscript{173} See \textit{FED. R. CIV. P.} 34.

\textsuperscript{174} See \textit{FED. R. CIV. P.} 35.

\textsuperscript{175} See \textit{FED. R. CIV. P.} 36.

\textsuperscript{176} See \textit{Fed. R. Civ. P.} 26(b)(1).

\textsuperscript{177} The only admissions that exist under Japanese law arise where a party fails to controvert a statement of fact in a pleading or in court. See \textit{MINJI SOSHÔHÔ [MINSÔHO]} (Code of Civil Procedure), Law No. 29 of 1890, art. 257 (Japan) ("The facts the party confessed in court or obvious facts need not be proved."). Note, however, that a draft revision of the Code of Civil Procedure likely to become law provides for enhanced obligations to produce documents and procedures similar to interrogatories and depositions. Nevertheless, compliance with such procedures would be strictly voluntary, and penalties would apply only if a party provides false information. See generally Hideyuki
that is comparable to the deposition to discover the testimony of opposing or nonparty witnesses who will not permit themselves to be voluntarily interviewed before trial.\(^{178}\) Production of documents is permitted, but the practice is limited compared to that in the United States. Japanese law provides for the production of only three categories of documents:

1. where the party in possession of the document has referred to it in the litigation;
2. where the party who has the burden or proof has a legal right . . . to demand the delivery or inspection of the documents; or
3. where the document has been prepared for the benefit of the other party or relates to a legal relationship between the party and the holder of the document.\(^{179}\)

In other situations, the holder of documentary evidence, even if a party to the litigation, need not turn over documents sought by the opposing party. For example, a plaintiff in a product liability suit generally cannot force a defendant company to produce an internal report concerning the dangerous nature of a product because such a report ordinarily would not fall within any of the three specified

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\(^{178}\) For witnesses who may be unavailable to testify at trial, the Civil Code permits a party to make a motion to the court for the preservation of evidence. See MINŠOHO art. 343. Such a motion must indicate the facts to be proved, the evidence to be discovered, and the reasons for the preservation of the evidence. See id. art. 345. Motions to preserve evidence may even be initiated prior to naming the opposing party in the suit, and in such event the court will appoint a special representative for the prospective party. See id. art. 346. If, however, the witness is available at the time of trial, the court will, upon motion of the opposing party, examine the witness at trial regardless of his or her prior testimony. See id. art. 351-52.

\(^{179}\) Id. art. 312; see also Nobutoshi Yamanouchi & Samuel J. Cohen, Understanding the Incidence of Litigation in Japan: A Structural Analysis, 25 INT'L LAW. 443, 446 (1991). The vagueness of these three categories has led to numerous discovery disputes. See id.
categories. Similarly, a medical doctor has no obligation to
turn over his or her patient records to a third party, even
where the patient is the plaintiff in a lawsuit.\footnote{\textsuperscript{160}}

Two other factors limit the scope of permissible dis-
covery of documentary evidence under Japanese law. First,
Japan recognizes broad protection from discovery concern-
ing documents that contain technical or commercially
sensitive
\footnote{\textsuperscript{181}} information.\footnote{\textsuperscript{182}} Second, Japan’s approach to
document requests is more focused than the type of “fishing
expedition” requests sometimes permitted in litigation in
the United States.\footnote{\textsuperscript{182}} Japanese law requires that requests
for production be made by a motion that not only identifies
with particularity the document sought, but also sum-
marizes its contents, identifies the holder of the document,
specifies the fact to be proved, and identifies which of the
three categories listed above applies.\footnote{\textsuperscript{183}} Thus, despite
Japan’s adoption of the new Product Liability Law, unless
the existing laws regarding pre-trial discovery are changed,
Japanese product liability plaintiffs will still face a con-
siderably greater burden of proof than do plaintiffs in the
United States.

5.2.3. Absence of a U.S. Style Contingent Fee System

Attorneys representing plaintiffs in product liability and
other civil actions in the United States typically are paid

\footnote{\textsuperscript{160}} See Shizuoka Prefecture v. Yamazaki, 908 HANJI 52 (Tokyo High
Ct., July 31, 1978) (family of patient murdered in hospital by another
patient could not obtain the murderer’s medical records); Ōka v. Tanabe
Pharmaceuticals, 904 HANJI 72 (Osaka High Ct., May 17, 1978) (drug
company product liability defendant could not obtain plaintiff’s medical
records).

\footnote{\textsuperscript{181}} See \textsc{MINSŌHō} art. 281(3); see also Cohen & Martin, supra note 14,
at 339-40 (”[N]on-disclosure privileges granted by the Code of Civil
Procedure are substantial, particularly in the area of industrial
secrets.”); cf. \textsc{FED. R. CIV. P.} 26(c) (stating that a court may issue a
protective order to avoid the disclosure of confidential information).

\footnote{\textsuperscript{182}} See Yamanouchi & Cohen, supra note 179, at 447 (”The
requirement that a party to Japanese litigation identify specific
documents, therefore, means that party may not make a blanket
request for the production of an entire category of relevant documents
in the possession of any opposing party, as is permitted under U.S.
law.”).

\footnote{\textsuperscript{183}} See \textsc{MINSŌHō} art. 313.
only if the plaintiff recovers from the defendant. The attorney receives his or her litigation expenses (e.g., expert witness fees, court costs, and other expenses) and collects a fee for services (usually equivalent to one-third of the recovery). If the case is appealed, however, the attorney may receive as much as fifty percent of the recovery. Contingent fees have been accepted in the United States as a means by which less wealthy litigants can afford to seek legal redress.\textsuperscript{184} It has been argued, however, that the system may provide an additional incentive for litigation and encourage attorneys to seek inflated damages awards.\textsuperscript{185}

The Japanese legal system deviates from the U.S. model by requiring that a claimant first pay his or her attorney a retainer, in addition to a fee contingent upon success. Both retainer and success fee schedules are established by the Japan Federation of Bar Associations, which provide that attorneys may receive between a minimum of four percent (i.e., two percent retainer, two percent contingent on success) and a maximum of thirty percent (i.e., fifteen percent on retainer, fifteen percent contingent on success).

\textsuperscript{184} See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e)(1)(1994) (stating that “a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter”); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 389 (1994) (“It is ethical to charge contingent fees as long as the fee is appropriate and reasonable and the client has been fully informed of the availability of alternative billing arrangements.”).

\textsuperscript{185} Some critics call for the reform of the contingent fee system because of certain abuses that have occurred. See, e.g., LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES (1994); Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 CARDOZO L. REV. 1819, 1834-40 (1992); Lester Brickman, Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?, 37 UCLA L. REV. 29, 33 (1989) (citing several articles that discuss the negative aspects of the contingency fee system). Plaintiffs’ lawyers argue that there is no incentive to bring baseless claims or inflate damages because they are only paid if they win. On the other hand, those who believe that the system should be reformed argue that the absence of an effective mechanism to sanction baseless claims and the burden of very high defense costs permit abuses by some lawyers who represent plaintiffs.
The attorney's percentage decreases as the amount of total possible recovery increases. The Japanese retainer/contingent fee system discourages litigation in several important ways. First, the "up front" cost of filing a lawsuit in Japan makes legal representation unaffordable for many. An estimate based on the customary fees charged by the Japan Federation of Bar Associations members indicates that, on average, "a civil suit involving compensation claims costs more than ¥3 million ($27,300) for a plaintiff who initially seeks compensation of $30 million ($272,700); the typical award is about ¥10 million ($90,900)." Thus, a would-be litigant generally must be either indigent and thus eligible for free legal services, wealthy enough to be able to afford the initial fee, or willing to appear pro se.

Second, plaintiffs in Japan cannot impose the risk of unsuccessful litigation completely on their lawyers, as they can in the United States. The retainer system thus forces litigants to share with their attorneys some of the risk that the claim may prove fruitless.

Third, Japanese retainer fees provide plaintiffs with a

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186 The Japan Federation of Bar Associations has established the following retainer and success fee schedule:

<table>
<thead>
<tr>
<th>Amount in Controversy</th>
<th>Retainer Fee</th>
<th>Success Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to ¥500,000</td>
<td>15%</td>
<td>15%</td>
</tr>
<tr>
<td>¥500,000 up to ¥1 million</td>
<td>12%</td>
<td>12%</td>
</tr>
<tr>
<td>Over ¥1 million up to ¥3 million</td>
<td>10%</td>
<td>10%</td>
</tr>
<tr>
<td>Over ¥3 million up to ¥5 million</td>
<td>8%</td>
<td>8%</td>
</tr>
<tr>
<td>Over ¥5 million up to ¥10 million</td>
<td>7%</td>
<td>7%</td>
</tr>
<tr>
<td>Over ¥10 million up to ¥50 million</td>
<td>5%</td>
<td>5%</td>
</tr>
<tr>
<td>Over ¥50 million up to ¥100 million</td>
<td>4%</td>
<td>4%</td>
</tr>
<tr>
<td>Over ¥100 million up to ¥1 billion</td>
<td>3%</td>
<td>3%</td>
</tr>
<tr>
<td>Over ¥1 billion</td>
<td>2%</td>
<td>2%</td>
</tr>
</tbody>
</table>

Yamanouchi & Cohen, supra note 179, at 448; see also Miller, supra note 44, at 209 (citing JAPAN FEDERATION OF BAR ASSOCIATIONS, REGULATIONS CONCERNING THE STANDARDS FOR ATTORNEYS' FEES, ETC. art. 2, at 2 (Federation Rule 20, Mar. 8, 1975) (amended May 26, 1984)). The fee schedule is not compulsory and is used only as a guideline for fee arrangements. See Yamanouchi & Cohen, supra note 179, at 449; An Overview, supra note 15, at 527-28 n.41.

187 Saito, supra note 61, at 7.

188 Recent figures indicate that in 82.3% of summary court cases and in 13.4% of district court cases, neither party retained a lawyer. See Oda, supra note 6, at 103.
strong monetary incentive not to overstate damage claims. As a consequence, the Japanese system results in lower recoveries and a correspondingly weaker incentive to litigate.

5.2.4. Court Filing Fees Can Be Expensive

Filing fees for product liability and other civil actions brought in federal and state courts in the United States are nominal and rarely play any role in the decision to institute a lawsuit.\(^{189}\) Japanese filing fees, however, are set according to a statutory sliding scale, which progressively increases with the size of the amount claimed.\(^{190}\) For example, in an action alleging $500,000 in damages, the court filing fee is approximately $4,500 (using current exchange rates of one U.S. dollar to one hundred Japanese yen). "As with the case of retainers for attorneys' fees, filing fees that progressively increase as the amounts alleged in the complaint increase discourage large damage claims and litigation in general in Japan."\(^{191}\)

5.3. The Extent to Which Damages May Be Recovered Is Limited

In addition to the procedural delays and hurdles that characterize Japan's civil justice system, limits on the recovery of damages operate as a remedial deterrent to litigation.

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\(^{189}\) For example, the filing fee required by United States district courts is only $120. See 28 U.S.C. § 1914(a) (1988).

\(^{190}\) The Law Concerning Civil Litigation Costs, etc. (Minji Soshō Hiyō to ni Kansuru Hōritsu) provides the following schedule:

<table>
<thead>
<tr>
<th>Amount Of Claim</th>
<th>Court Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>up to ¥300,000</td>
<td>¥100 for each ¥10,000 claimed</td>
</tr>
<tr>
<td>over ¥300,000 up to ¥1 million</td>
<td>¥80 for each ¥10,000 claimed plus ¥600</td>
</tr>
<tr>
<td>over ¥1 million up to ¥3 million</td>
<td>¥70 for each ¥10,000 claimed plus ¥1,600</td>
</tr>
<tr>
<td>over ¥3 million</td>
<td>¥50 for each ¥10,000 claimed plus ¥7,600</td>
</tr>
</tbody>
</table>

\(^{191}\) Id.
### 5.3.1. Plaintiff Fault as a Reducer of Damages

Under Japanese law, the court may consider plaintiff negligence when it assesses the amount of damages to be awarded. The court has complete discretion in adjusting the amount of the recovery where there is plaintiff fault, and is not bound to reduce the plaintiff's recovery based on the plaintiff's percentage of fault or based on any other fixed formula. In most cases, however, a proportionate reduction of damages based on plaintiff fault can be expected.

### 5.3.2. No Punitive Damages

Punitive damages are available in the United States as a quasi-criminal remedy. Their sole purpose is to punish a wrongdoer and deter that individual and others from engaging in similar wrongful conduct in the future. Punitive damages awards have nothing to do with "making the plaintiff whole." That purpose is served by compensatory damages, which compensate tort

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192 See MINPÔ (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898, art. 722(2) (Japan). This approach is generally consistent with U.S. law. See generally VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE (3d ed. 1994) (summarizing various rules regarding the effect of plaintiff fault on liability and damages awards).


195 See KEETON ET AL., supra note 105, § 2 at 9 (noting that punitive damages are those "over and above" full compensation for injuries).
victims for personal injuries and economic losses.\textsuperscript{196}

In Japan, as in other civil law systems, there are no punitive damages. The civil law functions only to provide compensation to plaintiffs.\textsuperscript{197} Punishment is left exclusively to the criminal law. This point is illustrated by Japan's antimonopoly law which, although modeled on U.S. antitrust law, contains no provision for treble damages, and by regulatory statutes such as the Atmospheric Contamination Prevention Law, which contain only criminal sanctions for enforcement.\textsuperscript{198}

In the United States, one result of punitive damages is to provide a direct and substantial monetary incentive for plaintiffs to file lawsuits. In Japan, however, this incentive does not exist because there is no opportunity for the plaintiff and his or her attorney to reap a windfall. Moreover, the Japanese system prevents plaintiffs from abusing the threat of punitive damages as a "wild card" to leverage higher settlements.

5.3.3. Recovery for Noneconomic Damages Is Limited

While punitive damages are not recognized in Japan, non-pecuniary damages, including damages for pain and

\textsuperscript{196} See Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 435 (5th Cir. 1962) ("Compensatory damages are such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses, and to these may be added bodily pain and suffering."). In personal injury actions, compensatory damages include payment for out-of-pocket expenses (e.g., lost wages and medical costs) and awards for "pain and suffering." See 1 MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS § 1.02(1) (1995) (noting that the U.S. definition of compensatory damages includes compensation for physical and mental suffering).

\textsuperscript{197} See MINPO art. 709.

\textsuperscript{198} See SHITEKI DOKUSEN NO KINSHI OYOBI KOSEI TORIHKI NO KAKUHO NI KANSURU HÔRITSU ACT [LAW RELATING TO PROHIBITION OF PRIVATE MONOPOLY AND METHODS OF PRESERVING FAIR TRADE], Law No. 54 of 1947 (Japan).

\textsuperscript{199} See TAIKI OSEN BÔSHI HÔ, Law No. 97 of 1968 (Japan) (permitting civil actions for compensatory damages, although the punitive element is provided only by criminal sanctions).

\textsuperscript{200} See Ottley & Ottley, supra note 62, at 40; Yamanouchi & Cohen, supra note 179, at 451.
suffering, are recoverable. The amount of these damages, called *Isha-Ryô* (consolation money), is set by the court and in the past “has been usually in the range of Y500,000 to Y2 million (about $4,000 — $15,400).”

Courts have rejected attempts by plaintiffs to inflate pain and suffering damages to circumvent the prohibition against punitive damages.

5.3.4. Collateral Source Rule Generally Not Recognized

Another major difference pertaining to damages is that Japan generally does not employ the collateral source rule. In the United States, benefits received by a

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201 See MINPO art. 710 (“A person who is liable to make compensation for damages... shall make compensation [for]... non-pecuniary damage, irrespective of whether such injury was to the body, liberty, or reputation of another person or to his property rights.”).

202 Yamanouchi & Cohen, supra note 179, at 451 (noting also that nonpecuniary damages in Japan in the past have “rarely exceeded twenty million yen” (about $200,000 at an exchange rate of approximately one hundred yen to the dollar)); cf. CLIFFORD WINSTON & JOHN CALFEE, THE CONSUMER WELFARE EFFECTS OF LIABILITY FOR PAIN AND SUFFERING: AN EXPLORATORY ANALYSIS (1993) (suggesting that pain and suffering damages cost the U.S. economy at least seven billion dollars annually and account for as much as fifty-seven percent of amounts awarded by juries).

203 See Yamanouchi & Cohen, supra note 179, at 451-53. One remedy that is available in Japan, but not in the United States, is the reward of suitable measures to restore an aggrieved party’s reputation. See MINPO art. 723 (“If a person has injured the reputation of another, the Court may, when alleged by the person whose reputation was injured, make an order requiring the injuring person to take suitable measures for the restoration of the injured person’s reputation either in lieu of or together with compensation for damages.”). In particular:

Actions to restore another’s reputation can include: an apology in open court; a letter of apology from the wrongdoer to the defamed; a letter of apology or letter of withdrawal to the person concerned; broadcasting of the withdrawal and an apology on television; a notice of apology or withdrawal of the statement in the place where it occurred; removal of the cause of the defamation; publication of an apology and a withdrawal in the newspaper; and the right to refute.

Yamanouchi & Cohen, supra note 179, at 452.

claimant from health or medical insurance, disability insurance, workers' accident compensation benefits and government benefits, are deemed "collateral" to the tortfeasor since the tortfeasor did not pay for them, and are not deducted in calculating the amount of the claimant's alleged damages. Recent data suggests that use of the collateral source rule in the United States contributes to inflated damages claims.

In Japan, however, payments received by a claimant through social insurance and workers' accident compensation are offset from the amount of damages that a product liability defendant must pay. This practice removes the attorney's incentive to "boost" his or her client's medical expenses to produce a bigger fee. In Japan, the practical effect of this "offset" practice on discouraging inflated damages claims and litigation in general is magnified because the country has implemented a number of compulsory social insurance programs that provide compensation

205 See John G. Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Cal. L. Rev. 1478, 1478 (1966). A plaintiff, however, does not necessarily recover double when the collateral source rule is applied. Health insurance contracts, for example, may provide that the insurer is to be subrogated to the insured's tort claim. See KEETON ET AL., supra note 105, § 2 at 522. There has been substantial criticism of the collateral source rule. See, e.g., 2 AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 161-182 (Reporters' Study, 1991) (recommending abolition of collateral source rule, except with respect to life insurance); Victor E. Schwartz, Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix, 39 Vand. L. Rev. 569 (1986) (stating that the simultaneous application of the collateral source rule and strict liability is unsound); Richard C. Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669 (1962) (questioning the benefits of the collateral source rule). Many states have modified the common law collateral rule by statute, usually as part of "tort reform" movements. See KEETON ET AL., supra note 105, § 2 at 522-23.

206 See STEVEN CARROLL ET AL., THE COSTS OF EXCESSIVE MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES (1995); see also Jeffrey O'Connell, Must Health And Disability Insurance Subsidize Wasteful Injury Suits?, 41 Rutgers L. Rev. 1055 (1989) (indicating that the availability of insurance has expanded the growth of tort liability).

207 Benefits received, however, from life insurance and other insurance arrangements set up by separate contract between the plaintiff and a private insurer are not offset against the damages award.
for many types of product-related injuries.\textsuperscript{208}

5.3.5. No Right to Jury Trial

The lack of a jury system is a final factor which may result in limiting the amount of damages recoverable in product liability and other civil actions in Japan.\textsuperscript{209} In the United States, the right to jury trial in civil cases, subject to certain limitations,\textsuperscript{210} is preserved by the Seventh Amendment to the United States Constitution\textsuperscript{211} and analogous state constitutions. Japan, like other civil


\textsuperscript{209} Some commentators believe that it is preferable to have issues of liability and damages determined by a court, rather than by a jury, because judges are thought to be well suited to evaluating evidence and meting out justice in a dispassionate manner. Recent data suggests, however, that this viewpoint may place too much emphasis on the ability of judges to resist the "passions" which allegedly fuel large jury awards. See Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 CORNELL L. REV. 1124 (1992) (indicating that there is not much difference in the determination of damage awards, either compensatory or punitive, between jury and judge).


\textsuperscript{211} U.S. CONST. amend. VII.
law and most common law countries, has no similar constitutional or statutory guarantee of a civil jury trial right.

6. CONCLUSION

The concept of strict product liability in tort developed in the United States in the mid-1960s. In spite of several publicized large-scale events involving defective products, however, Japan long resisted imposing liability irrespective of fault on those who make and sell products. Traditionally, the Civil Code provided only two theories of recovery: tort (negligence) and contract. Japan's new Product Liability Law, modeled after the Council of the European Community's July 1985 Product Liability Directive, provides an additional theory of recovery for cases related to products leaving the control of the manufacturer after July 1, 1995. The new Product Liability Law aids plaintiffs by eliminating the need to prove negligence on the part of producers, sellers, or importers of products. Under the Law, plaintiffs must prove beyond a reasonable doubt: (1) the existence of a defect in a manufactured or processed good, (2) damages, and (3) causation. To balance the liability that attaches under the Product Liability Law, defendants are aided by

212 See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) (highlighting some of the differences between U.S. states and foreign legal systems and noting that jury trials are not available in civil law countries). Indeed, most common law countries, including England, Canada, and Australia, do not recognize a right to jury trial in civil cases.

213 As Yamanouchi and Cohen explain:

The right to jury trial has not always been alien to Japan. In 1923 the Japanese Jury Act (Baishin Hō) was promulgated for selected serious criminal cases... The use of juries in Japan was considerably different from the use of juries in the United States. A Japanese jury was only permitted to provide answers to specific questions that were submitted to it by the trial judge. The trial judge had the discretion to reject the jury's answers and could impanel a new jury for a retrial on the same issues.

Yamanouchi & Cohen, supra note 179, at 450. On April 1, 1943, the jury system was suspended by the Act of Suspension of the Jury System (Baishin Hō no Teishi ni Kansuru Hōritsu) "in order to save time, money and material resources in view of the wartime conditions," and has not been used since that time. Id. at 450 n.36; see also Kato, supra note 41, at 631 n.9.
a "developmental risk" clause (i.e., a state-of-the-art defense) that frees them from liability where the alleged defect could not have been discovered given the state of scientific and technical knowledge available at the time the product was first delivered. Defendants are also aided by a statute of repose, which extinguishes liability for harms (except toxic harms) caused by a product after ten years from the date of delivery.

Core provisions of the Product Liability Law are vague and will require judicial interpretation. The interpretation of the Law as being pro-plaintiff, or as being more neutral, will affect its potential impact. Thus, Japanese businesspeople and importers of products into Japan should closely monitor legal developments for indications of the direction of the Product Liability Law.

Notwithstanding possible future developments, in considering the "big picture," the new Product Liability Law has limited impact in light of the entirety of the tort and procedural law and culture of Japan. Although the Law makes it easier for consumers to press claims against those who make or sell products in Japan, those who export products to Japan, those who import products into Japan, and those who sell manufactured or imported products under their own names, significant cultural as well as legal barriers remain which discourage, or simply prevent, product liability and other civil litigation.

For example, the Japanese have a strong "legal consciousness" disfavoring litigation. In addition, the long delays associated with judicial proceedings, the limited number of attorneys, the restrictive range of discovery permitted in Japan, and the very high burden of proof standard (equivalent to the criminal law standard in the United States) are all major barriers to plaintiffs, which discourage litigation in general. The conservative approach to damages, particularly the absence of punitive damages and the restrictions on noneconomic damages and the collateral source rule, as well as the rules setting attorney and court filing fees, further lessen the incentive to litigate. In sum, recent developments in Japanese law, principally the Osaka District Court decision in the Matsushita television combustion case and the new Product Liability Law, warrant close attention by those involved in business
or trade of products in Japan. Although the citadel blocking strict products liability has finally fallen, plaintiff access to recoveries remains fundamentally limited.