

Japan - Overview

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I. Introduction

Japanese product liability (PL) law is based mainly on tort law, particularly the Product Liability Law (PL Law, No 85 of 1994). Applicable to goods delivered after 1 July 1995, it superimposes strict liability for defective products on the mainly negligence-based liability provisions subsisting in the Civil Code (Law No 89 of 1896). Like Part VA of the *Trade Practices Act* 1974 (TPA) added in 1992 in Australia, the PL Law is based on the original EC PL Directive (85/374/EEC).

Unlike Australia (and the US), however, PL and tort law in Japan remain on an expansive trajectory. Nonetheless, this comes off a low base, due more to institutional or procedural impediments to bringing civil litigation generally. As access to civil justice has improved since the late 1990s, more PL suits are being brought before Japanese courts, with many pro-plaintiff judgments particularly under the PL Law itself; but overall levels remain low, as in most countries other than the US. Out-of-court settlements are common, and claims are often resolved before suit even further down the “dispute resolution pyramid”, for example after the intercession of government-sponsored Consumer Lifestyle Centres (CLCs) and/or industry association based PL ADR Centres established in the mid-1990s in the wake of the PL Law.

Low levels of PL claims against suppliers, and particularly lawsuits taken through to final judgment, are partly due to certain state-supported compensation or insurance schemes (eg for the side-effects of drugs). They are also due to considerable scope for claiming damages from the government under the State Compensation Law (No 125 of 1947).

Nonetheless, PL claims can be expected to increase as Japan continues to reorient itself away from a strongly interventionist society and economy relying on ex ante regulation, and towards more indirect ex post control through private initiative (including private law compensation claims). Already in the mid-1990s, then after a spate of recalls around 2000 and a series of broader safety problems around 2005 (notably asbestos), Japanese firms have been forced to take product safety much more seriously.

II. Traditional Liability Regime

II.A Contract

Japanese contract law is found primarily in Civil Code Book III (Obligations). Many provisions, and the legal theory and case law developed over the 20th century to make the new Code work in Japanese society, drew primarily on German law.

Contractual causes of action have quite often been pursued for defectively supplied and/or installed machinery and real property. However, strict liability on sellers for latent defects (Civil Code Art 570) generally does not extend to consequential damages, and full liability for misperformance (Art

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415) depends on a direct contractual relationship between the harmed plaintiff and the supplier.¹ Correspondingly, 80 percent of the “typical PL judgments” (consumers versus manufacturers) reported between 1949 and 1994 applied the general tort provision of Art 709.² Japan has not followed French law, for example, in developing PL out of contract law.

II.B Tort

This section addresses first tort law in general, namely (a) the general negligence provision under Art 709, (b) specific provisions tending towards strict liability (eg for defective structures on land), and (c) remedies, as the backdrop to (d) PL litigation under the Civil Code.³

(a) General Provision - Negligence

Art 709 provides that “a person who intentionally or negligently infringes another’s rights or benefits to be protected by law shall be liable for the losses caused” (Art 709). Generally, the plaintiff has to prove (i) fault of the defendant (intentional tortfeasance gives rise to less case law and debate), (ii) infringement of plaintiff’s rights or benefits to be protected by law (i.e., the “unlawfulness or illegality” of the defendant’s behaviour), (iii) a causal link, and (iv) losses (discussed under “Remedies” below). The defendant must plead any lack of capacity (Arts 712 and 713), but this is less important in commercial contexts.

On the first requirement of “fault”, the longstanding precedent is the *Osaka Alkali* case.⁴ The predecessor to the Supreme Court required the plaintiffs (36 neighbouring farmers, in that case) to prove the failure on the part of the defendant (releasing a sulphuric acid gas from its factory) to take feasible measures to avoid the harm (crop damage) if its occurrence is foreseeable. It overruled the suggestion that mere foreseeability would amount to fault, despite some early academic commentators – influenced by some German law doctrine – having tended to focus more on such a state of mind of the defendant when interpreting fault. Focusing more on foreseeability, rather than the subsequent avoidability of harm, still remains a feature of prosecutions for criminal negligence in the course of business causing death or injury (Criminal Code, Law No 45 of 1907, Art 211), especially in practice. That provides one explanation for high levels of such prosecutions in Japan, at least in certain areas such as medical malpractice and traffic accidents, compared to other jurisdictions where the role of tort law remains much more significant in regulating socio-economic behaviour.

In Japanese tort law per se, it remains the prevailing view among courts and academic commentators that fault also requires a failure to avoid even a foreseen or foreseeable outcome. Nonetheless, liability exposure has remained significant by setting high standards of duty to prevent losses, at least in some categories of Art 709 claims (such as environmental pollution, and defective products causing mass injuries or more generally involving for example foodstuffs and pharmaceuticals).⁵

¹ Itsuko Matsuura, 'Product liability law and Japanese-style dispute resolution' (2001) 35 *University of British Columbia Law Review* 135, pp 137-8, 145.

² Luke Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (RoutledgeCurzon, London, 2004) p 38.

³ Parts (a)-(c) draw particularly on Hisakazu Hirose and Ayako Okada, 'Tort Law' in McAlinn (ed.) *Japanese Business Law* (Kluwer, The Hague, 2006) forthcoming., which should be consulted for more details and full footnote references. I completed a first draft of parts (a) and (b) for that publication, and also contributed to part (c). Part (d) draws on Luke Nottage, 'Product Liability and Safety Regulation' in McAlinn (ed.) *Japanese Business Law* (Kluwer, The Hague, 2006) forthcoming, section II.B, which also should be consulted for more details and full footnote references.

⁴ *Osaka Alkali K.K. v. Sotomura et al.*, Great Court of Judicature, 22 Minroku 2474, Dec. 22, 1916.

⁵ In the *Niigata Minamata* case, for example, the Niigata District Court (29 November 1971, 642 Hanrei Jiho 96) not only required “facilities incorporating the highest possible technology” but, if necessary, the “reduction or even shutdown of the operation[or exercise]” of the enterprise, in view of the serious risks to the life and health of the victims. In one of the cases in the SMON mass-injury litigation (mentioned in (d) below), the Tokyo District Court (3 August 1978) found for the plaintiffs on the basis of the obtainability or accessibility, for the defendant drug

This is reinforced by requiring higher standards of care for professionals, especially those impacting on others' life and health, rather than the usual standard of the reasonable average person. Further, for example in medical misadventure cases, Japanese courts have presumed negligence when certain factors are present, thus requiring instead the defendant to prove lack of fault.⁶

As for the second requirement of “unlawfulness” to establish a claim under Article 709, the original provision had stated that the plaintiff had to prove infringement of his or her “rights”. That contrasted with French Civil Code Art 1382, which merely required “loss”, and had been justified in discussions before enactment of Article 709 on the ground that “loss” would be too broad and would prompt a flood of tort litigation. However, another early precedent changed and widened the interpretation of this requirement, replacing proof of “infringement of rights” with the more flexible requirement of “unlawfulness” or “illegality” (*ihosei*).⁷ Around the same time, then authoritative commentators, who had introduced the “illegality” theory from Germany, supported this judgment and proposed that “unlawfulness” or “illegality” should be judged by balancing the nature of the interest infringed and the way in which the tort is committed.⁸ That approach became the well-established view both in the case law and in academic circles, lowering the barrier to obtain remedies in tort. Recently, under legislation in 2004 primarily to modernize the language of the entire Civil Code (mostly by changing the script to more contemporary style), Article 709 was updated to reflect this clearly prevalent view. New words were added requiring the plaintiff to show any infringement not only of “rights”, but also any broader “benefit to be protected by law”.

The third requirement under Article 709 is that the plaintiff must prove a causal relationship between the defendant's negligence or intentional (in)action and the resultant harm. The tendency here too has been to relax this requirement, especially in mass-torts situations such as environmental pollution, where inexpert plaintiffs generally find it especially difficult to prove causality. In the *Niigata Minamata Disease* case, for example, once the plaintiffs had proven (a) their illnesses and the substance (methyl mercury) causing it, and (b) the mechanism by which the substance was transmitted from the defendant's factory, (c) causation was virtually presumed, shifting the burden onto the defendant to show that it had not in fact emitted the substance.⁹ In addition, statistical or epidemiological causation (*ekigakuteki shomei*) was allowed in the *Yokkaichi Air Pollution case*, the *Itai-itai Disease (Cadmium poisoning) case*, and other contexts.¹⁰ In a later case of medical misadventure, the Supreme Court indicated support for the “doctrine of indirect counter-proof” (*kansetsu shomei*) derived from civil procedure law, whereby the

company, of a report on the harmful side-effects of clioquinol, even though it was written in Spanish in an Argentinean journal held by the library of distant Tohoku University. Similar moves, to demand high standards of care, are emerging in some medical malpractice case law: Yoshihisa Nomi, 'Proportionality in Tort and Contract Law' in Hondius (ed.) *Modern trends in tort law: Dutch and Japanese law compared* (Kluwer Law International, The Hague; Boston, 1999) 209. See also the Snapper Fish Case (PL Case No. 29), below Part III.

⁶ Hiroshi Oda, *Japanese law* (2nd ed., Oxford University Press, Oxford, 1999) pp 197-9. See also the *Matsushita TV* case (outlined in (d) below).

⁷ *Daigakuyu* case, Great Court of Juridicature, 28 November, 1925, 4 Minshu 670.

⁸ Thus, if the infringed interest is serious, even a small breach may be unlawful: Hiroshi Oda, *Japanese law* (2nd ed., Oxford University Press, Oxford, 1999) pp 200-1.

⁹ Above note 5.

¹⁰ See Shiono et al. v. Showa Yokkaichi Oil K.K. et al., Yokkaichi Branch of Tsu District Court, 672 Hanrei Jiho 30, July 24, 1972; Ohno et al. v. Showa Denko K.K., Niigata District Court, 22-9/10 Kaminshu Separate Volume 1, 29 September 1971; and generally Luke Nottage and Masanobu Kato, 'Product Liability' in Taylor (ed.) *CCH Japan Business Law Guide* (CCH (looseleaf), North Ryde, NSW, 2000). “Probabilistic causation” was also allowed by some courts in the early 1990s in a third wave of Minamata disease litigation, allowing reduced damages for groups of victims with less than 50% probability of having contracted the disease from the defendants: Yoshihisa Nomi, 'Proportionality in Tort and Contract Law' in Hondius (ed.) *Modern trends in tort law : Dutch and Japanese law compared* (Kluwer Law International, The Hague ; Boston, 1999) 209. pp 213-4.

plaintiff proves “indirect facts” from which a causal connection to the loss can be inferred, unless the defendant then proves contrary facts.¹¹

(b) Specific Provisions: Towards Strict Liability

Several specific provisions are also particularly important in Japanese tort law. First, joint liability has also been developed by Japanese courts to assist plaintiffs, especially in environmental pollution cases. Art 719(1) states that:

“where several persons have jointly caused loss to another by a tortious act, each is liable jointly and severally. The same applies when it is impossible to specify which of the joint perpetrator actually caused the loss.”

Causation mentioned in the first sentence generally has been relaxed, by requiring only that the (in)action of each perpetrator be “related” to the joint act that directly causes the loss. The *Yokkaichi Air Pollution* judgment held that if a polluting industrial complex involved “weak cooperation” among the companies, discrete causation for each perpetrator could be presumed once causation between their joint (in)action and the harm could be proved by the plaintiffs. This made each perpetrator severally liable for all the damages, unless it could prove its more limited causal relationship to the harm. Further, if “strong cooperation” was involved (close unity of operations in light of functions, technology or economic reality), all defendants had to pay the total amount jointly no matter how much each had contributed to the harm.¹² However, more recent air pollution cases tend to adopt the view that the second sentence of Art 719 (quoted above) should be applied to situations of “weak cooperation”. This would allow courts to reduce (rather than completely reject or admit) joint perpetrators’ liability, by each proving the non-existence or limited degree of contribution vis-à-vis discrete causation.¹³ Joint liability under the second sentence has also been extended to medical misadventure cases. One example was when a driver harmed the victim in a car accident, but a doctor then provided poor treatment and the victim died in hospital. Both the driver and the doctor were held liable even though it could not be shown whether the accident or the malpractice was the real cause of death.¹⁴ Developing such reasoning also may allow Japanese courts to provide relief, for example, to potential victims of mesothelioma caused by even a single asbestos fibre entering their lungs, which could not be traced definitively to one of several employers that had them working with asbestos products.¹⁵

Secondly, Article 715(1) is now interpreted to provide vicarious liability of employers towards a harmed plaintiff, premised on proven negligence of their employees committed “in the course of a business” (now broadly construed). It is now extremely rare for courts to uphold the statutory defence allowing the employer to prove reasonable care in selecting and overseeing the employee, or that even without such care the loss could not have been avoided. So Article 715(1) effectively imposes strict liability.

¹¹ Miura et al. v. Japan et al., Supreme Court, 29-9 Minshu 1417, 24 October 1975. See further eg Hiroshi Oda, *Japanese law* (2nd ed., Oxford University Press, Oxford, 1999) pp 202-3.

¹² Ibid. p 212.

¹³ For example, Nakajima et al. v. Godo Steel K.K. et al., Osaka District Court, 1383 Hanrei Jiho 22, 29 March 1991.

¹⁴ Yamamoto et al. v. Isami Transportation K.K. et al., Tokyo District Court, 18-5/6 Kaminshu 607, 7 June 1967; Hiroshi Oda, *Japanese law* (2nd ed., Oxford University Press, Oxford, 1999) p 212.

¹⁵ Cf eg *Fairchild v. Glenhaven Funeral Services Ltd.* [2002] All E.R. (D) 139. The House of Lords reached this conclusion by overturning the English Court of Appeal’s traditional view of causation doctrine, which had exempted all employers from liability. The majority judgments emphasised that justice underpinned causation tests, so they should not be applied mechanically. More narrowly, Lord Hutton justified departure from strict tests of causation on the basis that proof could be inferred from the facts. On the uproar in Japan about asbestos, particularly since 2005, see generally eg Masao Awano, *Asubesuto - Kokkateki Fusakui no Tsuke [Asbestos - The Price of a National Failure to Act]* (Shueisha, Tokyo, 2006) and below Part V(b).

Thirdly, even more clearly imposing strict liability, Art 717 paragraph 1 and 2 make liable the owner of a defectively constructed or maintained structure on land (again, quite widely construed) causing loss to another, if its possessor proves reasonable care to prevent such loss. The owner is not excused even if not negligent provided there is a “defect”, ie the condition of the structure is such that it lacks the degree of safety that it should possess as that type of structure. The rationale behind Article 717 is understood as the theory of “responsibility for risks” (*kiken sekinin*). This is the idea that an owner of especially hazardous facilities in socio-economic life should assume liability resulting from their use, to achieve a fair allocation of losses. A similar rationale has been proposed for strict liability under the PL Law of 1994.¹⁶

There are clear and deliberate conceptual parallels between respectively Articles 715(1) and 719(1), and Articles 1 and 2 of the State Compensation Law of 1947, discussed in Part V(a) below.

(c) Remedies

Damages are available in the form of monetary compensation or restitution. The primary remedy for a tort is monetary compensation (Article 722(2)), generally paid in one lump sum. Restitution is only available if there is party agreement or a specific legislative provision (eg Art 723, allowing for apologies to be ordered for defamation). Injunctions are not generally awarded, although there have been exceptions particularly in environmental law cases, and specific legislation (notably in the field of intellectual property rights).

The key to the scope of damages permitted for breaches of civil obligations is Art 416: “losses that would normally arise from non-performance”, plus “losses arising from special circumstances that parties had foreseen or should have foreseen”. This provision comes from 19th century French, and then English, contract law; and was not originally intended to extend to tort damages claims. However, in the early 20th century Art 416 was subjected to “theory reception” from Germany, with scholars and courts applying the test of whether the loss claimed had a relationship of “adequate causation” to the tort committed. In 1926, the predecessor to the Supreme Court held that the tortfeasor should indemnify the victim for not only the damage that would occur most commonly as a result of the infringing behaviour, but also any special damages that he or she could foresee from it.¹⁷

In principle, adequate causation requires a relationship of cause and effect between the infringing act and the harm incurred, and a general possibility that harm of the same sort will occur. If such an act occurs, the tortfeasor should indemnify the victim for all losses incurred if the same act occurs. Courts nowadays take into account various factors such as the importance of the infringed right, the amount of the loss, and the type of tort committed.¹⁸ Reasonable lawyers’ fees can be included in a victim’s award of damages, if there is adequate causation judged in light of the case’s difficulty, the amounts of the damages claimed and awarded, and other circumstances, provided the victim had no real choice but to engage a lawyer to protect their rights.¹⁹ Overall, despite the elasticity of this test of adequate causation, tort damages awards in Japan are characterized by considerable standardization and

¹⁶ In the *Snapper case* (mentioned further below, Part III), the Tokyo District Court also gave that theory as one rationale for strict PL: Luke Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (RoutledgeCurzon, London, 2004) p 79.

¹⁷ *Fukimaru case* (Osaka Commercial Ship K.K. v. Muragane Shoten K.K.), Great Court of Judicature, 5 Minshu 386, 22 May 1926. See further eg, Yoshihisa Nomi, ‘Proportionality in Tort and Contract Law’ in Hondius (ed.) *Modern trends in tort law: Dutch and Japanese law compared* (Kluwer Law International, The Hague ; Boston, 1999) 209, pp 216-8.

¹⁸ Hiroshi Oda, *Japanese law* (2nd ed., Oxford University Press, Oxford, 1999) p 204, referring to Professor Yoshio Hirai’s observation that damages can be extended to almost all losses for intentional or reckless conduct, but not necessarily so for mere negligence.

¹⁹ Takashi Tsuburaya, *Fuhokoiho, Jimukanri, Futoritoku [Tort Law, Management of Affairs without Mandate, and Unjust Enrichment]* (Seibundo, Tokyo, 2005) p 154. Oddly, from an Anglo-Commonwealth lawyer’s perspective, a losing plaintiff in such situations does not have to pay the successful defendant’s reasonable lawyers’ fees.

hence some predictability, more as in the Anglo-Commonwealth law tradition and in clear contrast to US law.²⁰

Damages awarded are divided into pecuniary damages and non-pecuniary damages. Pecuniary damages encompass both positive (actual) loss, and negative (anticipated 'profit') loss. The former, in practice, is calculated by adding up damages for discrete items such as property damage (expenses for repairs, buying alternatives, etc.), medical expenses, funeral expenses, travel expenses for hospital visits by near relatives, etc. For the latter, if the victim dies, the negative loss is calculated by the following method. Remaining years for earning income are determined based on average life expectancy (using tables from the Ministry of Health, Labor and Welfare), and then multiplied by annual earnings at the time of death. Living expenses that the deceased would have needed are then deducted. In case of bodily injury, a victim can claim loss of income or profit during medical treatment, based on the actual decrease in income compared to the income that the victim would have earned without injury.²¹

A solatium (*isharyo*), namely non-pecuniary losses for pain and suffering, is available for infringements of rights to one's person, liberty, reputation or property rights (Art 710), and is quite frequently awarded. It is perceived as aligning legal remedies more closely with socio-economic expectations in a particular case, and should be determined in light of the extent of the infringement, characteristics of both parties (assets, ages, occupations, and social positions), and all other circumstances, without the plaintiff having to prove a specific amount. Although there is no objective standard for calculating non-pecuniary damages, estimated payments have been standardized because of frequent claims and payouts in traffic accidents. In addition, where more than one relative is entitled to a solatium for the death of another (Art 711), courts seem to have determined each solatium in light of the total amount of damages. To a lesser degree, standardization has also extended to solatium payments awarded particularly to smaller corporations (and substantially similar unincorporated associations or foundations), for intangible losses to their business reputations.

Moreover, at least in some types of tort cases and especially in solatium payments awarded to individuals, there is some concern that average and median amounts are now quite low. The Final Report of the Judicial Reform Council in June 2001 recommended that further studies be undertaken and that:²²

“damage determinations continue to be made in line with the circumstances of each individual case without being bound by the so-called ‘market rate’ of past cases. (In this connection, the new Code of Civil Procedure [amended 1996, new Art 248] states that, when proving the amount of [pecuniary] damages is extremely difficult, the court may decide the amount deemed as appropriate at its own discretion, and has thus reduced the burden of proof.)”

It remains to be seen whether Japanese courts will take this cue to begin raising the amounts particularly of solatium payments, as in Germany in recent years. In addition, some courts continue to be faced with claims for higher payments impliedly or expressly seeking “punitive damages” (eg PL Law Case No 27 – Snowbrand milk; No 52- Mitsubishi). Japanese courts have consistently refused expressly to allow such damages, invoking the clear doctrinal distinction between civil and criminal liability. That was also mentioned in the Final Report, but it also urged further study into the possibility of punitive damages in Japan. Meanwhile, it is also possible that solatium payments may increase partly to punish – or at least

²⁰ This is particularly true for the formula for calculating anticipated lost income of individuals harmed or killed in traffic accidents J. Mark Ramseyer and Minoru Nakazato, 'The rational litigant: settlement amounts and verdict rates in Japan' (1989) 18 *Journal of Legal Studies* 263, T. Tanase, 'The Management of Automobile Disputes: Automobile Accident Compensation in Japan' (1990) 24 *Law and Society Review* 651. But cf eg David A. McI Kemp and Peter Mantle, *Damages for personal injury and death* (7th ed., Sweet & Maxwell, London, 1999) (very detailed and authoritative commentary in the UK).

²¹ Japan v. Soga et al., Supreme Court, 21-9 Minshu 2352, 10 November 1967.

²² Translated at <<http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>>, Ch II Pt 1 s7(4)(a).

more strongly deter – Japanese defendants, but without expressly adopting that still doctrinally difficult rationale.²³

Losses awarded are first set-off against any ‘benefits’ received due to the same tort (*son-eki sosai*), although there is no express legislative provision on this point. Examples regularly followed by the courts are living expenses and (5 percent) interim interest in lump-sum compensation payments for a deceased’s estate. However, life or liability insurance payments are not offset.

Art 722(2) clearly allows the court to reduce damages awarded if there was any fault on the part of the victim. Japanese courts often exercise their discretion to apply this principle of comparative negligence (*kashitsu sosai*), and can even do so even ex officio. To be subject to the principle, victims need not have full capacity, only an ability to understand basic logic (*jiri benshiki noryoku*). Negligence of their associates (like parents or guardians) can also be taken into account. Comparative negligence is also applied if a victim has a psychogenic predisposition. The Supreme Court has held that it may also take into account a pre-existing disease. However, more recently, it did not apply comparative negligence where a victim had an unusual bodily characteristic (a long neck resulting in instability of the vertebrae).²⁴ One of the reasons for the expansive use of the principle, however, remains that there is no other Civil Code provision to adjust damages through deductions.²⁵

(d) PL Cases under the Civil Code

PL law first gained prominence in Japan only in the late 1960s, as indicated by **Table 1** below. Until then, there had only been 11 reported cases claiming civil liability for defective products since World War II. Although almost all were decided in favour of the plaintiffs, they did not attract much commentary from lawyers or scholars.

Period	1950-59	1960-64	1965-69	1970-74	1975-79	1980-84	1985-89	1990-94	1995-1999	2000-03
Key Feature	Academic Theories		Case Law (ending in Still-birth)		Case Law		Legislative Reform (Re-birth)		Post-PL Law	
Automobiles			1	9	13	3	2		5	5
Machinery				6	7	9	6		6	7
Medicine	1		1		10	7	5	1	2	1
Food	1			2	6	7	7	1	2	3
Household Goods			1		3	4	1	2	6	4

²³ Cf eg Catherine Sharkey, 'Unintended Consequences of Medical Malpractice Damages Caps' (2005) 80 *N.Y.U. Law Review* 391 (showing statistically that as punitive damages were limited in the US, “general damages” awarded rose). Cf also the SMON drug litigation, mentioned at (d) below, particularly Yokozawa et al. v. Japan et al., Tokyo High Court, 1271 Hanrei Jiho 3, 11 March 1985.

²⁴ Fukakusa v. Kinoshita et al., Supreme Court, 50-9 Minshu 2474, 29 October 2000.

²⁵ Takashi Uchida, *Minpo II Saiken - Kakuron [Civil Law - Vol 2. Specific Obligations]* (Yuhikaku, Tokyo, 1997) p 409. Yoshihisa Nomi, 'Proportionality in Tort and Contract Law' in Hondius (ed.) *Modern trends in tort law: Dutch and Japanese law compared* (Kluwer Law International, The Hague ; Boston, 1999) 209, pp 214-6 suggests three broader reasons for this sort of propensity towards growing “proportionality” in Japanese tort (and indeed contract) law: (i) fair allocation of loss (especially, relaxing the fault requirement but reducing damages), (ii) “outcome control” rather than “entrance control”, and (iii) situational justice and judicial discretion.

Gas (etc) Appliances			4	7	5	7			1	0
Real property		1	1	5	5	11	11	3	19	9
Agricultural goods				3	1			2	1	1
Other					1	2	5	1	5*	0
Trans-border				2	2	2	2	1		
Total	2	1	8	34	53	52	39	11	47	35
Average	0.2	0.2	1.6	6.8	10.6	10.4	7.8	2.2	9.4	8.75

* These include claims concerning defective airplanes and vessels of a non-transborder nature, not included in the

data for 1950-1994. (Adapted from Masanobu Kato, *Seizobutsu Sekininho Shiko kara 10-nen - Doho Shiko no Igi [A Decade Since the Enforcement of the PL Law: Its Significance]*, Kokumin Seikatsu 6 (July 2005) p7)

Especially over the late 1960s and early 1970s, however, four PL mass injury cases attracted particular social concern and media attention. Large groups of litigants mobilised nation-wide to sue regarding Morinaga powdered milk, the pregnancy drug Thalidomide, chionoform (or clioquinol) used in drugs that led to the SMON (Subacute Myelo-Optico-Neuropathy) nervous system disorder, and Kanemi rice-bran cooking oil. This litigation piggy-backed on the even more controversial “Big Four” environmental pollution cases around that time. The bounds of traditional tort law were extended as some Japanese courts began developing strict standards of care and sometimes reversing the burden of proof for negligence, as well as developing creative solutions concerning causation and scope of damages. Also significant was the uncovering of potentially widespread defects in automobiles. However, those generated collective action problems and more complex issues for legal doctrine at the time, so that social movement ultimately stalled.

Other causes also lay behind this “still-birth” of PL in Japan – compared to Australia, the EU, and especially the US over the 1970s (after a slow start there to strict-liability PL introduced in 1965 by s402A of the *Restatement Second – Torts*). Judicial innovation faltered. This may have been due to more general conservative reactions both within Japan’s judicial administration, as well as an economy and society afflicted by the Oil Shocks. However, case law development of PL law in Japan also slowed because compensation schemes were established to address the injuries identified by the “Big Four” PL cases. More generally, legislators and bureaucrats strengthened some product safety regulations, enacting for example the Consumer Product Safety Law (No 31 of 1973, the “Safety Law”), while industries introduced some improved product safety measures. In addition, intensive legal scholarship was initiated in the late 1960s and early 1970s, which then carried through to the late 1980s. Specific law reform proposals died away, but also left much to rebuild from quite rapidly over the 1990s.

This “rebirth” of PL in Japan was again underpinned by a variety of external and internal factors. Reports of product defects emerged in the late 1980s, and in 1993 the conservative Liberal Democratic Party (LDP) lost its virtual monopoly on political power since 1955. Consumer groups and the Japan Federation of Bar Associations (*Nichibenren*) mobilized to keep enactment of the PL Law on the legislative agenda. Legal scholarship blossomed again, looking particularly closely at the EC PL Directive, which had proved popular even beyond Europe, despite PL’s retrenchment in the US (reflected and further cemented by the *Restatement Third – Products Liability* or “R3d”, promulgated in 1998). The

Directive also therefore provided a politically palatable compromise “global standard”, as trade liberalization accelerated in Japan over the 1990s.²⁶

Amidst all this, the Osaka District Court pushed along the debate by ruling that a defective “Panasonic” brand TV set produced by Matsushita attracted liability even under the negligence test of *Civil Code* Article 709. This was important in signalling that at least some judges were agreeable to the law developing stricter standards even for one-off claims, especially for the more complex household goods that are often considered “typical” for contemporary PL litigation,²⁷ and not just for the mass-torts scenarios they had helped address in the late 1960s and early 1970s. The case stood out not only because of its timing – at a crucial juncture in the debate on enacting the PL Law – but also because in other areas, particularly involving more complex household products that are seen as more “typical” PL claims and hence a target for new liability rules like the PL Law of 1994,²⁸ Japanese plaintiffs had continued to experience difficulties when suing under the Civil Code.

In particular, although plaintiffs suing for defective foodstuffs were generally successful, these mostly involved the unique *fugu* (blowfish) served in restaurants, or mass-torts like the Kanemi rice bran oil case. There was also a high success rate in drugs cases, with courts again imposing a high standard of care given the potential human health issues involved, although causation tended to be harder to prove. On the other hand, the success rate regarding automobiles was much lower. Indeed, the plaintiff prevailed in only one case against the actual manufacturer. Likewise, there were hardly any cases where plaintiffs prevailed against manufacturers of sports equipment, tools and other implements²⁹

The plaintiff in the *Matsushita TV* case, a small firm, was awarded 4.4 million yen (plus interest) out of a claim for 7.2 million yen when its business premises were destroyed and other losses were suffered, after first noticing smoke emerging from behind the set. The Court focused on a manufacturer’s “duty to ensure the level of safety that is usually expected in the light of the standard accepted by society”. It linked the case-by-case assessment – that is, whether the product was defective or unreasonably dangerous – to factors such as “the character and use of the product, the extent of the duty of care to be exercised by a consumer, and the state of contemporary science and technology”, but made it clear that a high standard was expected for this category of complex household goods.³⁰ The Court emphasised that the duty did not extend to situations where the product was used in an unreasonable manner not foreseeable by the manufacturer, but held that the plaintiff’s use of the television set (including leaving it on “standby” mode) was acceptable. As discussed below, this approach is very similar to that finalized soon after in the PL Law.

On the other hand, the Court insisted that “who shares, and under what conditions, the damage caused by the use of a product should be determined by a national consensus regarding the distribution of risks arising out of society”, so it refused to accept outright “the rule of strict liability”. Nonetheless, as in some earlier mass-torts cases and even a few one-off situations involving for example brakes failing soon after a vehicle inspection, it ruled that negligence would be presumed if the plaintiff proves the product is defective. The reasoning was that if a defect is found in a widely marketed product at the time of use,

²⁶ For further details, see Luke Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (RoutledgeCurzon, London, 2004) chapter 2.

²⁷ Itsuko Matsuura, 'Product liability law and Japanese-style dispute resolution' (2001) 35 *University of British Columbia Law Review* 135 pp 143-5, 167-72.

²⁸ Ibid. especially pp 143-5; cf Masanobu Kato, 'Seizobutsu Sekininho Shiko kara 10-nen - Doho Shiko no Igi [A Decade Since the Enforcement of the PL Law: Its Significance]' (July 2005) *Kokumin Seikatsu* 6 (noting that early judgments even after PL Law enactment tended to be rather “atypical”, but that this appears now to be changing).

²⁹ Itsuko Matsuura, 'Product liability law and Japanese-style dispute resolution' (2001) 35 *University of British Columbia Law Review* 135 and Luke Nottage and Masanobu Kato, 'Product Liability' in Taylor (ed.) *CCH Japan Business Law Guide* (CCH (looseleaf), North Ryde, NSW, 2000) para 85-920.

³⁰ Taishi Kensetsu Kogyo Co., Ltd. v. Matsushita Electrical Industrial Co., Ltd., 1439 Hanrei Jiho 29, Osaka District Court, 20 March 1994 (using the translation in Kenneth L. Port and Gerald Paul McAlinn, *Comparative law: law and the legal process in Japan* (2nd ed., Carolina Academic Press, Durham, N.C., 2003) pp 954-7).

there is “a high probability that there existed a cause for the defects when the products were put on the market”, so “it should be presumed that there was a breach of some type of duty of care in the course of designing or manufacturing the product”. Accordingly, the Court explained, “the user does not have any duty further to elucidate the specifics of the cause of the defect or the breach of the duty of care”, observing also that users generally would be unable to do so since they lack special knowledge or skill compared to manufacturers, especially where the product itself is destroyed.³¹

Again, particularly regarding the degree of specificity required for the plaintiff to establish an actionable defect, this touched on important issues remaining in the debate on PL Law enactment, and indicated that at least some Japanese judges were prepared to extend similar concepts from that debate into at least some cases decided under conventional tort law anyway. The plaintiff’s lawyers, who had deliberately run this as a test case to try to secure a clear victory in a more “typical” PL claim, immediately called a press conference and the judgment was extensively covered in news media around 30 March 1994. Momentum was maintained by success in another test case brought against a Matsushita subsidiary regarding a bicycle whose handlebars broke (twice), almost injuring the plaintiff – an Italian diplomat – and causing him mental stress. On 27 May 1994, the Tokyo District Court awarded him Yen 1,800 (the cost of new handlebars) and installation costs, Yen 50,000 in attorneys’ fees (as opposed to Yen 850,000 claimed for the 12 well-known PL lawyers who had supported this case for two years), and Yen 200,000 for pain and suffering (not the 4 million yen claimed partly as “punitive” damages). However, the defendant manufacturer conceded it would be liable for failing to find the defect by inspecting parts made by other companies, meaning that the judgment only dealt with damages and whether the handlebars had broken during normal use. This case was also much less widely reported and commented on, during a year when media interest in PL was peaking. Nonetheless, both judgments sent a message to consumers and manufacturers – even well-known companies producing household goods – that products must be safe or risk liability even under the Civil Code, and “helped lead to the enactment of the legislation on 22 June 1994”.³²

On the one hand, consumer interests were heartened by the willingness of at least some judges to extend lines of reasoning in other categories of PL cases, giving hope that some pro-consumer judgments would ensue under the new PL Law even if the latter did not include, for example, legal presumptions of defectiveness or causation as called for by various consumer, lawyers’ and political groups. On the other hand, some business interests – or, more likely and relevantly, their expert representatives on various deliberative councils – may have felt that it was better to give up the fight against enactment, rather than to allow courts to extend such newfound judicial activism into other types of PL cases and even other areas of tort law. Indeed, other judgments under the Civil Code around that time and especially in the late 1990s were not so favourable to plaintiffs, particularly regarding the degree of specificity that had to be established (eg in automobile defect disputes). Anyway, like other countries in the civil law tradition, Japan lacks a strict doctrine of binding precedent. Nonetheless, the bicycle case and especially the judgment of Osaka District Court’s in the TV case did create important links to the tradition of the earlier mass-torts cases as well as some pro-plaintiff tendencies in other categories of PL litigation under the Civil Code, and to the development of Japanese law through the legislative process. Further, although even the TV case may have been quite unusual for the mid-1990s, it has become quite a pathbreaker for further pro-consumer developments even under the PL Law of 1994, as the next Part indicates.

³¹ Ibid p 955. On Japanese cases developing a doctrine similar to *res ipsa loquitur* in Anglo-American tort law, namely a rebuttable presumption that the defendant was negligent when the plaintiff shows that the causality of the accident was within the former’s exclusive control and that the accident is one that does not normally occur without negligence, see also Luke Nottage and Masanobu Kato, 'Product Liability' in Taylor (ed.) *CCH Japan Business Law Guide* (CCH (looseleaf), North Ryde, NSW, 2000) para 86-100.

³² Itsuko Matsuura, 'Product liability law and Japanese-style dispute resolution' (2001) 35 *University of British Columbia Law Review* 135 p 172; Giannico Reteru v. National Jitensha Kogyo, K.K., 1498 Hanji 102, 27 May 1994, 1498 Hanji 102.

III. Legislative Liability for Defective Goods³³

The main legislative liability regime is increasingly the PL Law of 1994. Although modelled on the EC Directive, it is mostly more favourable to plaintiffs. It is less so compared to the Australian strict-liability regime, but sometimes even more pro-plaintiff than recent US law. This emerges not only from an analysis of the PL Law's provisions, legislative history and authoritative commentary, but also from a body of significant case law indicating the Japanese judiciary's ongoing commitment to providing proper redress to consumers injured by defective goods. However, although the PL Law is now being fleshed out in this way, there remains ample scope for unanswered questions to be addressed by commentary and case law from other jurisdictions, particularly those following the EU model. **Table 2** provides a summary comparison of the regimes in Japan, the EU, Australia and the US:

Topic	PL Law	EC Directive	TPA	R 3d ²
Purpose	art. 1	Recitals 1, 2, 7, 10, 11, 16	n/a (S. 2)	§ 2 Comment a
Product	art. 2(1)	art. 2	S. 4	§ 19
Defect	art. 2(2)	art. 6	S. 75AC	§ 2 (plus §§ [3-4] generally, and §§ [5-8] for particular products)
Manufacturers etc.	art. 2(3)	arts 3(1) and 7(c), 3(2), [3(3)] ¹	Ss. 2 (in trade or commerce), 74A(4), 74A(3) [75AJ]	§ 20 (sells or distributes), § 14 (another's product as own)
Liability	art. 3	art. 9 (16(1))	Ss. 75AD, AE, AF, AG	§ 1, 21 (economic loss)
Development Risks Exemption	art. 4(1)	Arts. 7(e), 15(1)(b)	S. 75AK	n/a (but implicit in § 2 etc)
Component Manufacturing Exemption	art. 4(2)	art. 7(f)	S. 75A	§ 5
Limitations of Time	Arts. 5(1), 5(2)	Arts. 10(1), 10(2); 11	S. 75AO	n/a
Other regimes	art. 6 (Civil Code)	Arts. 13 (other liability systems) [5 and 8(t) (joint liability), 8(2) (comparative negligence), 12 (limitation clauses)]	Ss. 75AR (other rights), [75AM, 75AN, 75AP] [75 AQ (right of Trade Practices Commission to bring suit)]	§ 2 Comment n [§ 9 (harm from misrepresentation) ; § 10 (post-sale failure to warn); § 11 (post-sale failure to recall); § 12-13 (successor liability); § 15 (causation); § 16 (increased harm); § 17 (apportioning responsibility); § 18 (disclaimers)]

NOTES:

1. Provisions identified in square brackets contain no express equivalent in the PL Law.
2. Topic references for the *Restatement Third* are to the major ones only.

(Reproduced from Luke Nottage, *Product Safety and Liability Law in Japan* (2004) p77.)

³³ This Part largely reproduces Luke Nottage, 'Product Liability and Safety Regulation' in McAlinn (ed.) *Japanese Business Law* (Kluwer, The Hague, 2006) forthcoming, section II.C.

Art 1 explains that the PL Law aims to compensate those harmed by defective products, thus contributing both to a secure “consumer lifestyle” and “the sound development of the national economy”. This “purposes” provision is less detailed than the Recitals to the EC Directive, and such provisions also play a much less important role in statutory interpretation compared also Preambles to Anglo-Commonwealth legislation. Nonetheless, in the “snapper fish” judgment (PL Case No. 29, in the online Appendix), the Tokyo District Court found in favour of the poisoned customers after citing generically both Arts 1 and 3 to propose three broad rationales for the PL Law: “responsibility for risks” (created by manufacturers), “responsibility for compensation” (because manufacturers benefit from producing goods), and “responsibility for reliance” (because users trust in their safety).³⁴

(a) Key elements: Product, Manufacturer, and Defect

Article 2 defines three crucial requirements. First, ‘products’ are defined as ‘manufactured or processed movables’. It is more or less clear that this excludes:

- (a) electricity (unlike for the EU, Australia, and perhaps the US);
- (b) defective information, for example recipes contained in books;
- (c) software (but cf. PL Law Case No. 11 [tax software]; and if for example defective software is incorporated into a final product like an automobile, the auto-maker can be sued for overall lack of safety causing harm);
- (d) services (see e.g. Case No. 46 [automatic vending machine] and No. 41 [facial treatment]; but contrast debates again in the EC and the US, especially about mixed ‘sales/services’ transactions);
- (e) real property overall (basically as in such jurisdictions; but the manufacturer can be sued for defective processed components supplied and built into such immovables, e.g. No. 31 [bamboo]);
- (f) unprocessed agricultural products (such as animals themselves – as in the EU until the Directive was amended on this point in 1999 following the BSE epidemic, and unlike Australia and the US regarding commercially supplied animals); and
- (g) waste products (but not necessarily second-hand products, as in some US case law; but proving the harm was caused by a defect in such products may be difficult – e.g. No. 47 [used car]).

On the other hand, Japanese courts have taken an expansive interpretation of ‘processing’, as encompassing not only the addition of some new attribute but also alternatively some ‘value-added’. Hence, for example, the poisoned snapper (Case No. 29) was subject to the PL Law after being merely cut up as *sashimi* raw fish. This reinforces a longstanding authoritative opinion that products developed through biotechnology should be covered too. Likewise, a vendor spraying bamboo logs with repellent, but which were found to be infested by insects before supply to a home-builder, was held to have ‘processed’ them (PL Law Case No. 31 [bamboo]). Further, after extensive political and other debate, both blood products and vaccines were widely agreed to be caught (unlike the US, especially under state legislation).³⁵ Generally, the attitude has been or become that the definition of ‘product’ should be widely construed, allowing courts instead to limit liability for types of product having high social utility or largely unavoidable risks by flexible interpretation particularly of the ‘defect’ requirement.

Secondly, article 2(2) defines a ‘defect’ as ‘the lack of safety a product ought to have, taking into account the nature of the product, its normally foreseeable manner of use, the time it was delivered, and all other circumstances relating to the product’. Although the safety expectations are not specifically limited to those harmed, Japanese case law so far (cf. e.g. PL Law Case No. 12 [cosmetics/foundation]) has suggested the latter rather than the expectations held by the manufacturing industry or experts, for example, insisting only that the general expectations be judged objectively rather than subjectively. The

³⁴ Luke Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (RoutledgeCurzon, London, 2004) p 79.

³⁵ *Ibid.*, pp. 82-90.

specific factors listed largely track those in the EU and Australia, and have generally been interpreted expansively by Japanese courts. Safety expectations in the light of ‘the nature of the product’, similar to its ‘presentation’ under the EC Directive, can be influenced by the existence or contents of warnings or instructions added (e.g. No. 40 [Chinese medicine No. 2]; cf. No. 35 [incompatible medical equipment]). The listed factor of ‘foreseeable mis(use)’, echoing the Matsushita TV judgment (outlined above), has been interpreted largely in favour of plaintiffs (e.g. PL Law Case No. 30 [food container cutter], No. 20 [car cover], and No. 35 [tracheotomy equipment]). Japanese courts have also tended to be quite robust in finding that the defect must have been present at the time of supply, especially for foodstuffs and even when later destroyed or unavailable for inspection (e.g. PL Case No. 29 [snapper fish], No. 28 [olives], No. 10 [orange juice], and No. 31 [bamboo]).

So far the courts have provided relatively little express guidance on specific ‘other circumstances relating to the product’ that might be important in determining appropriate safety standards and hence defectiveness. However, there are some indications that they are influenced by authoritative commentary suggesting for example: (a) the probability and extent of harm arising (e.g. in the context of peculiar physical attributes, like allergies: Case No. 12 [cosmetics/foundation]), (b) ‘price versus effect’ (at least the average safety expected of a similar product in a similar price range (both these factors being emphasized in some US case law)), (c) the product’s overall utility (e.g. No. 22 [school glass dish]), and (d) its normal duration of use (e.g. No. 40 [Chinese medicine No. 2]) – both these latter factors having been suggested in a joint government agency commentary. The PL Law contains no equivalent to EC Directive article 6(2), stating that the mere fact of a safer product subsequently being put into circulation does not necessarily mean that the original was defective. However, Japanese firms quite often settle in such circumstances, and at least one case has noted a subsequent redesign – along with other factors – when finding the manufacturer liable (e.g. Cases No. 20 [car cover] and No. 38 [Kenwood car stereo]). On the other hand, there is no requirement for the plaintiff to have to present a specific ‘reasonable alternative design’, as under the *Restatement – Third* in the US.

Likewise, unlike the Directive and Australian law, the PL Law does not provide an express defence for manufacturers complying with mandatory product safety standards set by the government. Non-compliance should lead also to civil liability (see e.g. Case No. 36 [Italian oven]). Although such standards are rare in Japan (as mentioned in Part II.E below), even compliance with them may not protect the manufacturer from liability. However, as the joint commentary pointed out, the manufacturer or even the harmed consumer may be able to claim against the government under the State Compensation Law (No. 124 of 1947) if: (a) deficient safety standards are directly linked to the manufacturer’s production of the goods judged to be unsafe, and (b) there was intent or negligence in administrative regulatory authority by a public official in a position to exercise governmental powers. On the other hand, the first requirement will be difficult to establish in the much more common situation where the government does not mandate a safety standard, but only sets a minimum. In addition, government commentary on the PL Law suggests that compliance with such standards should also be a factor in determining liability under the PL Law, even though not necessarily a definitive one. At least one judgment (Case No. 12 [cosmetics/foundation]) considered compliance with both minimum legislative requirements and an industry association’s voluntary standard in holding the manufacturer not liable.³⁶

Thirdly, article 2(3) of the PL Law defines a ‘manufacturer, etc.’ as someone operating ‘as a business’ (likely to be broadly construed: cf. e.g. Case No. 4 [O-157 in school lunches]) who is: (a) an actual manufacturer, or importer (e.g. Nos 14 [brain catheter] and 22 [glass dish]), (b) own-branders (affixing trade names or otherwise to create the mistaken impression of being (a)), or (c) any other ‘presenting its name, etc. on the product and who can be recognized as the manufacturer in fact, considering the manner in which the product is manufactured, processed, imported or sold or other circumstances’. This last category, more expansive than the EU model, is understood to encompass even those adding words such as ‘sold by [that firm]’ but where a consumer might still expect it to be the manufacturer, such as an exclusive distributor as in the SMON mass-injury case mentioned above. However, the PL Law does not go as far as extending liability to other retail suppliers (e.g. No. 34 [Mitsubishi Delica]). That was attempted by France, but ultimately struck down by the European Court of

³⁶ Ibid, especially pp. 90-98.

Justice as contrary to the EC Directive. It was also allowed traditionally under US PL case law, but legislation in many states has limited this avenue of redress since the 1980s.³⁷

(b) Damages and Proof

PL Law, article 3 then sets out the key operative provision:

‘The manufacturer, etc. shall be liable to compensate for damage arising from a defect in a product which it has delivered and manufactured, processed, imported or presented with its name, etc. in terms of article [2], and which interferes with another’s life, health or property. Provided, however, that the manufacturer shall not be so liable for damage occurring only to the product itself.’

One difference with the EC Directive and its Australian clone is that the plaintiff has the burden of proving a defect existed when the goods were delivered (cf. e.g. No. 5 [sea urchins]). Another major difference, which aligns Japan instead with US law, is that losses are not restricted to consequential losses to ‘consumer goods’ or property. Thus, if the Panasonic TV case had been brought after enactment, the plaintiff firm could have claimed from Matsushita the losses caused by the TV setting fire to its office supplies and so on. Several PL Law Cases have involved claims by firms against manufacturers, although often after first paying out claims from end-users harmed by the defectively manufactured goods (e.g. Nos 28 [imported olives] and 29 [snapper fish]), or including costs of recalls from consumers (e.g. No. 38 [Kenwood car stereo]). The only express exclusion is for damage solely to the defective product itself. However, there remains little guidance on how to distinguish that from other products, for example when it comprises part of another complex product. Anyway, if both are damaged, both losses can be claimed under the PL Law.

Japanese courts so far have tended to reinforce this pro-plaintiff orientation by not requiring high levels of proof about specific matters allegedly constituting the ‘defect’, despite largely following the German tradition of civil procedure that generally requires more than proof on the balance of probabilities. An important precedent is the ‘McDonald’s orange juice’ case decided by the Nagoya District Court on 30 June 1999 (Case No. 17), not only because it was the first judgment awarding damages under the PL Law but also because it favoured plaintiffs concerning this longstanding bone of contention. The Court found for the consumer who bought a meal from a McDonald’s outlet, took it back to her workplace, felt something get caught in her throat as she drank the orange juice, and was taken to hospital for treatment to a cut in her throat – where, unfortunately, the cup containing the rest of the juice was inadvertently thrown away. The Court decided that there had been relevant injury, caused by the orange juice (rather than, for example, any dental treatment), and therefore concluded briefly that.³⁸

‘Mixing into the orange juice extraneous matter, able to create such injury to the throat of people drinking it, can be said to constitute a lack of the safety that juice generally has. Accordingly we hold that the orange juice was ‘defective’ under the Product Liability Law. The extraneous matter was not discovered, and in the end it is still unclear what it was. According to the facts found [...], considering that probably the Plaintiff threw up the extraneous matter when she vomited the contents of her stomach, and that the orange juice was thrown away without having been examined, it is too severe to require the Plaintiff to determine the extraneous matter with any further specificity. Whatever it was, if extraneous matter is mixed into juice able to cause injury to people drinking the juice, it is clear that the latter lacks the safety that juice usually has. Because of the clarity of the fact itself that there was extraneous matter in the orange juice sufficient to cause injury to the throat of the drinker (i.e., that it had a ‘defect’), the point that the form of the extraneous matter is unclear, does not affect our abovementioned holding.’

This follows in the tradition of the Matsushita TV case, although some other judgments decided under the Civil Code over the 1990s and then under the PL Law have gone against plaintiffs (especially when lacking eyewitness evidence). The McDonalds orange juice case judgment aligns Japan with the

³⁷ Ibid, especially pp 105-110.

³⁸ Translated in *ibid*, p 221.

Restatement – Third (section 3), applied especially for situations where the inferredly defective product is no longer available for inspection, but also some emergent case law under the EC Directive.³⁹

(c) Defences – particularly “Development Risks”

A more pro-plaintiff stance on the part of at least some Japanese judges is also evident in its first interpretation of the conceptually important ‘development risks’ defence, provided in PL Law, article 4(1), namely that: ‘The state of the scientific or technical knowledge, at the time the manufacturer, etc. delivered the product, was such that it was not possible to detect that the product had a defect.’ Even compared to its counterparts in the EC Directive and Australia, it seems that it will be difficult for manufacturers to benefit from this defence. The knowledge has been defined as ‘all knowledge established enough to decide whether the relevant product was defective, building on the results of all disciplines related to science and technology’, objectively existing in society as a whole; and the applicable safety standard set as ‘the world’s highest standard obtainable when the product was delivered’ (PL Case No. 29 [snapper fish]).⁴⁰

Likewise, the ‘component manufacturing’ defence set out in article 4(2) does not yet appear to have been alleged in any reported Japanese case (cf. e.g. No. 38 [Kenwood car stereo] involving defective switches manufactured by Matsushita). It is also somewhat narrower than in the EC Directive, as it applies only ‘where a product is used as a component or raw material (of another product), the defect has arisen solely (*moppara*) because of having followed the other product’s manufacturer’s instructions regarding design, and the manufacturer, etc. is not negligent with respect to the defect’.⁴¹

In the last substantive provision of the PL Law, article 5(1) begins by setting the limitation period as three years from knowledge of harm and the party causing it, as under the Civil Code; but it imposes an absolute time bar of ten years following delivery of the goods. On the other hand, reflecting Japan’s history of mass ‘toxic torts’ from the 1960s, article 5(2) extends the ten years by calculating it from the time harm arises where it ‘is caused by a substance which becomes harmful to human health when it accumulates in the human body, or where the harm shows symptoms after a certain latency period’. This differs from the EC Directive and (still) Australia, and may prove to be important in ongoing litigation about tobacco products and more recent concerns about asbestos in Japan.⁴²

IV. Practice and Procedure

PL Law Article 6 stipulates that “unless otherwise provided for in this Law, the Civil Code ... applies to the liability of the manufacturer etc for compensatory damages due to a defect in a product”. This is not interpreted as precluding recourse to background tort law even where the PL Law provides partially for a legal issue. Thus, for example, plaintiffs in a non-toxic torts case otherwise time-barred under the PL Law’s ten-year period of repose can sue instead under the Civil Code (albeit usually in negligence) enjoying its 20-year period.⁴³ More straightforwardly, Article 6 opens the way to the Civil Code regime

³⁹ Ibid, pp 111-24. See also PL Law Case No. 28 [olives] and No. 33 [magnetic water current machine]; cf. No. 44 [Toyota Mark II] and No. 45 [propane gas fire].

⁴⁰ Again, there are parallels with the high degree of knowledge expected under general tort law in some cases such as SMON (Part II.B(a) above).

⁴¹ Ibid, pp 124-36.

⁴² Ibid, pp 134-7. Generally, on tobacco, see eg Eric Feldman, ‘The landscape of Japanese tobacco policy: law, smoking and social change’ (2001) 49 *American Journal of Comparative Law* 679; on Japan’s own asbestos controversy, see further Part V(b) below.

⁴³ Civil Code Art 724 provides that “the right to demand compensation for damages which have arisen from a tort shall lapse by prescription if not exercised within 3 years from when the victim or his/her legal representative becomes aware of such damage and of the identity of the person who caused it; the same shall apply if 20 years have elapsed from the time when the tort was committed”. The three years is a prescription period, capable of suspension (Art 147), whereas the 20 years has been interpreted as an absolute time limitation or period of repose. The starting-point for initiating the extinctive prescription period has been narrowly interpreted, partly because the extinctive prescription’s period of tort (3 years) is shorter than that of an obligation right (Art 167(1)). Knowing tortfeasors’ “identity” requires knowledge to the extent that the victim or representatives could claim damages by identifying all

for calculating types of damages, causation and comparative negligence (introduced in Part II.B above). Other regimes also remain available, such as workers' compensation, and any product-specific compensation schemes (eg for pharmaceuticals) mentioned further below (Part V(b)).

Courts and civil procedure in Japan were also based particularly on German models, although the Allied Occupation introduced the adversarial system and a more robust Supreme Court. Difficulties remain in pursuing tort litigation, particularly PL cases, compared to most common law systems. Reforms to civil procedure rules urged by some during the debate over enacting the PL Law were referred to the groups undertaking a broader review of Japan's equally venerable Code of Civil Procedure (Law No 29 of 1890). That experienced a comprehensive overhaul in effect from 1998; but true class actions, for example, were not introduced. Another round of reforms from 2004 may prove even more helpful to plaintiffs in PL suits. They aim to halve delays by stricter case management, and facilitate the presentation of expert evidence.⁴⁴

Tracking a slow but steady increase in contested tort cases generally over the 1990s, exacerbated by Japan's economic downturn and more competition among slowly rising numbers of practicing lawyers, PL filings and judgments picked up again from the mid-1990s, with most finding for plaintiffs. Many pro-plaintiff settlements were also reported, particularly in the mid-1990s. Other important trends include significant proportions of smaller claims, considerable geographical dispersal in litigation venue, a high proportion of claims for "consumer" (as opposed to "business") losses, and quite reasonable disposition times (at least for first-instance judgments, and especially for settlements).⁴⁵

Rather than more formal mediation services, PL ADR Centres established by industry associations in the mid-1990s have mainly provided a further avenue to obtain legal and technical advice for those with possible claims about product safety, including borderline situations involving just quality of the goods themselves or related services. Mostly these provide "shuttle negotiation" between those accessing the Centres (mostly by telephone) and the relevant manufacturers;⁴⁶ but there have been small increases in the use of formal mediation proceedings in some Centres particularly after the events of 2000. Local government counselling services, especially through CLCs also mainly engaging in "shuttle negotiation" (but more face-to-face), have seen distinctly more activity as well.

The net result, unsurprisingly, is widespread survey and more anecdotal evidence of a considerable ratcheting up of product safety activities on the part of Japan's manufacturers over the mid-1990s, and more sporadic evidence of renewed efforts after the spate of recalls and other adverse publicity around 2000. Compared to other jurisdictions that have remodelled their PL regimes along the models of the EC Directive, significant numbers of judgments applying the PL Law have begun to emerge since 1999, mostly finding in favour of plaintiffs.⁴⁷

However, plaintiffs' lawyers still report serious impediments in pursuing PL litigation. The widespread recalls around 2000, and the tenth anniversary of the PL Law in 2004, led to some calls for legislative reforms to facilitate PL litigation in Japan, mainly to bolster compensation and deterrence effects. Many proposals paralleled those advanced by various groups during the reform discussions in the early 1990s, but were not adopted partly because inconsistent with the EC Directive model – the legal and political compromise standard for Japan, and many other countries at the time. Noting that a Diet

their names and addresses. Knowledge of "damage" has been very restrictively interpreted. Specific legislation has extended such notions in particular fields, such as mining and the 'toxic torts' provision in the PL Law.

⁴⁴ Ibid, pp 137-9. (See further Luke Nottage, 'Civil Procedure Reforms in Japan: The Latest Round' (2005) 22 *Ritsumeikan Law Review* 81, available via www.ssrn.com.)

⁴⁵ Ibid, at 162-7.

⁴⁶ Luke Nottage and Yoshitaka Wada, 'Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?' (1998) 6 *Zeitschrift fuer japanisches Recht* 40.

⁴⁷ Luke Nottage, 'A Decade of Strict-liability Litigation under Japan's Product Liability Law of 1994' (2005) 16 *Australian Product Liability Reporter* 65, available via www.ssrn.com and updated in Luke Nottage, 'Product Liability and Safety Regulation' in McAlinn (ed.) *Japanese Business Law* (Kluwer, The Hague, 2006) forthcoming, section II.D.

committee had revisited the PL Law in February 2005, the “PL Ombudsman Conference” advocated again (as in 2002) the introduction of: (a) presumptions for defectiveness and causation, (b) expanded pre-trial discovery, (c) punitive damages, (d) no development risks defence, and (e) new mechanisms for pursuing collective redress.⁴⁸ A well-known plaintiffs’ lawyer echoed these recommendations, also urging more specifically the introduction of class actions, as well as better legal aid and other measures for expert witness evidence. He also highlighted the unwillingness of some Japanese courts to follow the lead of the Matsushita TV case, loosening the standards of specificity required for plaintiffs to prove defectiveness, even in cases of other consumer electronics and especially in those involving automobiles.⁴⁹ A prolific academic commentator on comparative PL law has also criticised again the exclusion of real property from the scope of Japan’s PL Law, in light mainly of the considerable proportions of reported judgments that involve claims (under the Civil Code, particularly Article 717) about defects in such real property.⁵⁰

The response of policy-makers has been a quite deafening silence. Possible explanations are that the proposals seem “*déjà vu*”; they traverse many areas of law, other than the PL Law or even tort law itself; and some have been partially and/or are already being addressed in other forums (eg expert witness evidence), or probably may be left again to the courts (presumptions). There is also considerable momentum to “re-regulate”, although so far in response to particular safety problems (eg automobiles, asbestos, defectively constructed buildings, and consumer electrical goods) rather than updating general consumer product safety regulation as in the EU (and possibly soon Australia).⁵¹ Another reason may be the ongoing relative attraction of turning instead to Japan’s welfare state, including a still generous public health system, as well pursuing compensation claims against the state or turning to its sector-specific compensation schemes.

V. State Liability and Compensation Schemes⁵²

(a) State Liability

As mentioned in Part II.B(b) above, there are important conceptual parallels with specific tort provisions in the Civil Code, and Articles 1 and 2 of the State Compensation Law. Article 1(1) thereof provides that the Japanese government (or public entity) is liable to compensate for losses caused illegally (*ihoni*) to others due to the negligence or intentional (in)action of public officials in the exercise of their public duties. Many courts have ruled that such “exercise of public power” means all action except purely private action and the construction or maintenance of a structure provided by Article 2 of the State Compensation Law (mentioned next).

Article 2(1) of the State Compensation Law makes the government liable to compensate for losses caused by a defect in the construction or maintenance of roads, rivers or other public property. This liability is broader than liability under Civil Code Article 715 because the former’s “public structure” includes more than the latter’s “structure on land”. If damage occurs due to a defective structure on land owned by the government and it is not a public structure, plaintiffs can invoke Civil Code Article 717.

⁴⁸ Yoshiyasu Ota, 'Seizobutsu Sekininho - Shohisha no Kitai to Kadai [The PL Law: Consumer Expectations and Issues]' (July 2005) *Kokumin Seikatsu* 14.

⁴⁹ Mikio Sekine, 'Seizobutsu Sekininho ni yoru Soshō no Doko [PL Law Litigation Trends]' *ibid.* 18. See further Part II.B(d) above.

⁵⁰ Masanobu Kato, 'Seizobutsu Sekininho Shiko kara 10-nen - Dohō Shiko no Igi [A Decade Since the Enforcement of the PL Law: Its Significance]' *ibid.* 6, and see Table 1 above.

⁵¹ See Luke Nottage, 'The A.B.C.s of Product Safety Re-regulation in Japan: Asbestos, Buildings and Consumer Electrical Goods' (forthcoming) *Journal of Japanese Law*; and Luke Nottage, 'Reviewing Product Safety Regulation in Australia - and Japan? [Parts 1 and 2]' (2005) 16 *Australian Product Liability Reporter* 100, available via www.ssrn.com and updated in Luke Nottage, 'Product Liability and Safety Regulation' in McAlinn (ed.) *Japanese Business Law* (Kluwer, The Hague, 2006) forthcoming, section II.E(2).

⁵² This draws on Luke Nottage, 'Product Liability and Safety Regulation' in McAlinn (ed.) *Japanese Business Law* (Kluwer, The Hague, 2006) forthcoming, section II.E, which should be consulted for further elaboration and full references.

Both provisions of the State Compensation Law were inspired by, respectively, Civil Code Articles 715 and 717. An express requirement for illegality in Article 1(1) was added based on the then prevailing doctrine regarding the second requirement under Article 709 (outlined in Part II.B(a) above). This may explain the frequent invocation of the State Compensation Law by Japanese plaintiffs, seeing state responsibility as a core aspect of their post-War democracy, or it may reflect a more traditional (even Confucian) deference to bureaucrats and the government.⁵³ The provisions help offset relatively restricted avenues for administrative review, as well as broader control over administrative processes, at least until legislation enacted since 1993. Anyway, this Law and its extensive case law have tended to set comparatively limited hurdles to obtaining compensation from the state.⁵⁴ This also leads to more claims and considerable success for Japanese plaintiffs.

Indeed, seeking state compensation has tended to be seen as primary or co-equal to the pursuit of civil liability against the direct tortfeasors, compared for example to Germany where state compensation is seen more as a secondary avenue of recourse.⁵⁵ This is particularly evident in the mass claims for environmental pollution in the late 1960s and early 1970s, and the “Big Four” PL cases outlined above (Part II.B(d)), where state compensation claims were often brought against the government even when negligent firms appeared quite solvent. Since 2005, however, claims continue to be being brought against the government for lax overall supervision, not only against private certifying bodies, developers and owners of condominiums and other buildings, following revelations in 2005 of falsified private inspections meaning that the buildings fail to meet construction standards and need costly rectifications.

(b) State-supported Compensation Schemes

Like many other countries following large-scale environmental and PL disasters, the Japanese government brokered several major settlements and became involved in criminal prosecutions (as outlined in Part II.B(d) above), as well as enacting broader compensation schemes in particular areas. The most important of the latter is the Drug Side-Effects Injuries Relief Fund Law (No 11 of 1979). Manufacturers and importers of drugs must contribute specified levies to a Relief Fund, which reimburses medical expenses and provides allowances for side-effects caused by the drugs (as determined by the Minister of Health in consultation with the Central Drug Council). Those firms found to have caused the harmful side-effects must pay more than the standard levies to the Fund.⁵⁶ Also noteworthy was the Automobile Accident Indemnification Guarantee Law of 1955, which made minimum automobile

⁵³ Cf generally eg Takao Tanase, 'Nihonjin no Kenrikan/Keibatsu Ishiki to Jiyushugiteki Hochitsujo [Japanese Conceptions of Rights and Attitudes towards Punishment, and Liberal Legal Order]' (2005) 157 *Hogaku Ronso* 1, p 25.

⁵⁴ See eg Katsuya Uga, 'Kokka Baisho [State Compensation]' (2006) 304/305 *Hogaku Kyoshitsu* 98/17; cf generally Duncan Fairgrieve, *State liability in tort: A comparative law study* (Oxford University Press, Oxford, England, 2003).

⁵⁵ See generally Zadankai [Colloquium], 'Gendai ni okeru Anzen Mondai to Ho-shisutemu (Ge) [Contemporary Safety Issues and the Legal System (Part 2)]' (2003) 1248 *Jurisuto* 92, especially p 100 (remarks by Professor Hirose).

⁵⁶ The Preventative Vaccinations Law (No 68 of 1948, as amended notably in 1976 following a Supreme Court judgment) obliges mayors etc of municipalities administering inoculations to compensate for harm caused, also as determined by the Minister and without requiring any fault to be shown; but this scheme does not impose liability directly on the manufacturers or importers of the vaccines. See T. Maeda, 'Tort Law in General' in Kitagawa (ed.) *Doing Business in Japan* (Matthew Bender, New York, 1989) looseleaf; and Akio Morishima and Malcolm Smith, 'Accident Compensation Systems in Japan: A Window on the Operation of Law in a Society' (1986) 20 *University of British Columbia Law Review* 491. Compare generally eg John Fleming, 'Drug Injury Compensation Plans' (1982) 30 *American Journal of Comparative Law* 297. Such schemes drew on the precedent of the Pollution-related Health Damage Compensation Law (No 111 of 1973), itself amended (narrowed) in 1987: see generally Akio Morishima, 'Environmental Liability in Japan' in Hondius (ed.) *Modern trends in tort law: Dutch and Japanese law compared* (Kluwer Law International, The Hague ; Boston, 1999) 183, pp 191-3.

insurance compulsory but made the state responsible where (as in hit-and-run accidents) the defendant could not be identified.⁵⁷

Such responses have developed in the context of quite extensive potential liability and frequent litigation under Japan's State Compensation Law, as outlined in (a) above. However, state-based no-fault schemes like those for drugs became more difficult to develop, as the Japanese economy deregulated particularly since the 1990s, and as diversification grew for the range of consumer products on the market (and subject to credible liability claims if defective).⁵⁸ For example, calls for expand schemes like those for drugs into new fields got short shrift during debates over enacting the PL Law. Nonetheless, even extensively liberalized market economies can sometimes still turn to state compensation schemes, as evidenced by the fund established in the US soon after the 9/11 terrorist attacks, and New Zealand's stout defence of its no-fault accident compensation scheme (abolishing almost all tort suits for personal injury from 1974, in exchange for payouts from the state financed by various levies). Japan too retains considerable state capacity, even as it reduces the scope of direct intervention in the economy, and its citizens still expect a prompt government response when a pervasive social problem emerges.

A good example of this rebalancing is the enactment of the "Law Providing Relief for Injuries from Asbestos" (No 4 of 2006). This followed a political uproar in mid-2005 when it became apparent that hundreds of workers (let alone others) were dying or suffering from cancers and other diseases caused by asbestos, without receiving compensation even from Japan's quite generous workers compensation scheme.⁵⁹ After the Law comes into effect by March 2006, such approved victims will be reimbursed for their out-of-pocket medical expenses not otherwise covered by health insurance and the like, receive a monthly health treatment support payment of 100,000 yen, and receive a 200,000 yen contribution towards funeral expenses. The families of those who died before the Law comes into effect will receive 2.8 million yen in condolence money. They will also receive 2.4 million yen per annum, in general, if the victim is a worker who dies and the family loses its right to claim compensation under workers' compensation due to extinctive prescription. The scheme is 50% financed by the central government, contributing the 38.8 billion yen initial endowment and then seeking subrogation from local governments of another 25%, and of the final 25% from employers who have either used asbestos extensively in their workplaces or engaged in commercial activities closely linked to asbestos. The main aims of the Law is to provide prompt and predictable compensation for extensive injuries that are typically latent for long periods, and difficult to attribute causality for, and the scheme will be reviewed in 2010.⁶⁰

However, this Law does not preclude recourse to compensation claims through the courts, particularly for example PL claims against asbestos manufacturers. The amounts so far envisaged are also lower than those commonly awarded, so tort litigation is still considered likely.⁶¹ Nonetheless, unlike the

⁵⁷ It also reversed the burden of proof, requiring the defendant to prove that s/he was not driving negligently. However, the Law also required the defendant to prove that the accident was caused by some third party's negligent or intentional act, and that the automobile was not defective. Virtual strict liability was thereby imposed on defendants Shozo Ota, 'Traffic Accidents in Japan: Law and Civil Dispute Resolution' in Hondius (ed.) *Modern trends in tort law: Dutch and Japanese law compared* (Kluwer Law International, The Hague ; Boston, 1999) 79. Combined with the mandatory insurance, this also contributed to the relative paucity of PL suits pursued against automobile manufacturers.

⁵⁸ Itsuko Matsuura, 'Product liability law and Japanese-style dispute resolution' (2001) 35 *University of British Columbia Law Review* 135.

⁵⁹ See generally D. J. Drennan, 'Regulation and Response: Industrial Safety and Health Law in Japan (Parts I and II)' (1998) 64/4 and 65/1 *Hosei Kenkyu* F87 and F59.

⁶⁰ See <www.kantei.go.jp/jp/singi/asbestos/dai5/5sankou4.pdf>. The detailed medical criteria for approving victims under the Law have proven difficult to elaborate.

⁶¹ Takao Tanase, 'Asubesutosu Higai Hoshō Shisutemu no Sekkei - Kokusai Hikaku kara [Designing a System for Asbestos Disease Compensation - International Comparisons]' (2006) 826 *N.B.L.* 20. See also eg "Asbestosis sufferer files suit against contractors for 33 mil. Yen", *The Daily Yomiuri*, Feb. 2, 2006, at <<http://www.yomiuri.co.jp/dy/national/20060202TDY02010.htm>> (suing two major construction firms for failing adequately to supervise the 37 sites at which he worked as a subcontractor – not as their employee; already receiving workers' compensation from employers since 1997 for his asbestosis).

US where asbestos disease compensation – unusually – has been addressed overwhelmingly by private tort litigation, Japan follows countries like France and even Australia recently in (equally belatedly) “bringing back the state”, particularly by establishing or brokering special compensation schemes.

VI. Legislation

Product Liability Law (*Seizobutsu Sekinin Ho*, Law No. 85, 1994)

Article 1: Purpose

By setting forth the liability of manufacturers, etc., for compensatory damages for harm to a person’s life, health or property due to defects in products, this Law aims to protect the harmed person, and thereby (*motte*) to contribute to stability and improvement in consumer life (*shohi seikatsu*) and to the sound development of the national economy.

Article 2: Definitions

(1) ‘Product’:

Manufactured or processed movables (*dosan*).

(2) ‘Defect’:

The lack of safety a product ought to have, taking into account the nature of the product, its normally foreseeable manner of use, the time it was delivered, and all other circumstances relating to the product.

(3) ‘Manufacturer’:

(1) Any person who produces, processes or imports a product as a business.

(2) Any person who presents its name, trade name, trademark or other mark (‘presents its name, etc.’) on the product as its manufacturer; or presents its name, etc. on the product so as to create the mistaken impression that it is the manufacturer.

(3) Any person, other than those listed in paragraphs (2) and (3), who presents its name, etc. on the product and who can be recognized as the manufacturer in fact, considering, the manner in which the product is manufactured, processed, imported or sold and other circumstances.

Article 3: Product liability

The manufacturer, etc., shall be liable to compensate for damage arising from a defect in a product which it has delivered and manufactured, processed, imported or presented with its name, etc. in terms of Article 2(3)(2) or 2(3)(3), and which interferes with another’s life, health or property. Provided, however, that the manufacturer shall not be so liable for damage occurring only to the product itself.

Article 4: Exemptions

(1) **Development risks**

The state of the scientific or technical knowledge (*chiken*), at the time the manufacturer, etc. delivered the product, was such that it was not possible to detect (*ninshiki suru*) that the product had a defect.

(2) **Component manufacturing**

Where a product is used as a component or raw material (*genzairyo*) of another product, the defect has arisen solely (*moppara*) because of having followed the other product’s manufacturer’s instructions (*shiji*) regarding design (*settei*), and the manufacturer, etc. is not negligent with respect to the defect.

Article 5: Limitations of time

(1) The right to claim compensatory damages shall be extinguished by prescription (*jiko*) if not exercised by the harmed person or the latter's legal representative within three years of the time such person or representative knew of the harm and the person liable for the damage. The same shall apply after ten years have elapsed from the time of delivery by the manufacturer, etc.

(2) Where the harm is caused by a substance which becomes harmful to human health when it accumulates in the human body, or where the harm shows symptoms after a certain latency period, the period set forth in the second sentence of Article 5(1) shall be calculated from the time such harm arises.

Article 6: Application of Civil Code

Unless otherwise provided for in this Law, the Civil Code (Law No. 89, 1896) applies to the liability of the manufacturer, etc., for compensatory damages due to a defect in a product.

(Important extracts from the Civil Code are given in Parts above.)

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