Drafts of the Japanese Strict Product Liability Code: Shall Japanese Manufacturers Also Become the Insurers of their Products

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Drafts of the Japanese Strict Product Liability Code: Shall Japanese Manufacturers Also Become the Insurers of their Products?

Current Japanese product liability law is based primarily on negligence theory, rather than strict liability. Since around 1990, however, there has been an outcry for the enactment of strict product liability law in Japan.1 As European Community (EC) countries enact strict product liability laws,2 the demand for a similar code is growing stronger in Japan.3

Plaintiff lawyers and consumer groups argue that without strict liability law, similar to laws in the EC and the United States, Japanese consumers do not always receive compensation when a defective product causes injuries.4 Consumer groups also fear that the relaxation of previously strict government safety standards5 will permit defective goods to enter the market, and consequently argue for increased consumer

3. NIKKEI 12/22/90, supra note 1.
4. Id.
5. Henshuu Iinkai, Tokushū Seizōbutsu Sekinin no Genjō to Kadai [Special Topics: Present Status and the Future Problems of Product Liability], 41 JIYU TO SEIGI [FREEDOM AND JUSTICE] (No.10) 7 (1990). (Jiyu to Seigi is a magazine written in Japanese for the Japan Federation of Bar Associations. A copy of the issue listed here is available from the author.)

The Japanese government lowered safety standards on products in response to allegations by Western countries that Japan's strict safety standards amounted to a non-tariff trade barrier. "[I]t has been estimated that over one-half of the non-tariff barriers in Japan are related to health and safety standards and regulations." David Cohen & Karen Martin, Western Ideology, Japanese Product Safety Regulation and International Trade, 19 U.B.C. L. REV. 315, 319 (1985) (footnote omitted).


The Ministry of International Trade and Industry (MITI) has opposed proposals to enact strict product liability law. The MITI seems to consider product liability law similar to that in the U.S. undesirable. Japanese manufacturers and insurance companies also oppose strict liability law proposals. Japanese industries reportedly fear that "introduction of such a law would increase product costs and impair their product development capability . . . ."

Despite conflicting views on the need for a strict product liability statute, several organizations—including the Group of 1990 Private Law Academy, the Special Committee for Consumers' Problems of the Tokyo Federation of Bar Associations, Shakai-tō (the Japanese Socialist Party), and the Japanese Kōmei-tō Party—have prepared proposals for reform. These proposals, aimed at protecting consumers, share sev-

7. NIKKEI 12/22/90, supra note 1. See also Nader Blames Politics for Sheepish Consumers; Pessimism, Lack of a Forum and a 'Conspiracy of Silence' Hinder Japanese Activists, NIHON KEIZAI SHINBUN, Nov. 17, 1990, available in LEXIS, Nexis Library, Current File [hereinafter NIKKEI 11/17/90] ("[T]he Japan Federation of Bar Associations has suggested changes in product liability law that would make it easier for consumers to win suits. However, the revisions are opposed by the Ministry of International Trade and Industry." (emphasis added))
8. "I don't think there is any great imperative for enacting such a law," explains Yasuhumi Ozawa of MITI's Consumer Protection Division. "There are many other ways to protect consumers against defective products than legislation like in the U.S." Japanese Lack Protection Against Defective Products, KYODO NEWS SERVICE, Oct. 17, 1990, available in LEXIS, Nexis Library, Current File [hereinafter KYODO 10/17/90]. ("A survey conducted by the Economic Planning Agency last year showed more than half of major Japanese makers dead set against such a [strict product liability] law.")
9. Id. See also Small- and Medium-Size Enterprises in Japan Unprepared for Planned Product Liability Regulations, COMLINE NEWS SERVICE, Aug. 9, 1990, available in LEXIS, Nexis Library, Current File [hereinafter COMLINE 8/9/90]. ("The Japan branch of AIU Insurance Co. of the United States, recently conducted a survey . . . targeted at 10,000 small- and medium-size manufacturers (with annual sales ranging from 100 million to 1 billion yen) in various industries. The survey [showed that] 74% did not welcome enactment of such laws.")
11. As of January 22, 1991, major proposals include: GROUP OF 1990 PRIVATE LAW ACADEMY, SEIZÔBUTSU SEKININ RIPPÔENO TEIAN [PROPOSAL FOR LEGISLATION OF PRODUCT LIABILITY LAW] (1990) [hereinafter GROUP OF 1990'S DRAFT]; SPECIAL COMMITTEE FOR CONSUMERS' PROBLEMS, TOKYO FEDERATION OF BAR ASSOCIATIONS, SEIZÔBUTSU SEKININ HÔ SHIAN [TENTATIVE PROPOSAL FOR PRODUCT LIABILITY LAW] (1989) [hereinafter TOKYO FEDERATION OF BAR ASSOCIATIONS' DRAFT]; SHAKAI-TÔ [JAPANESE SOCIALIST PARTY], SEIZÔBUTSU SEKININ HÔ HÔAN YÔKÔ [PROPOSAL FOR AN OUTLINE OF A PRODUCT LIABILITY LAW BILL] (1990), [hereinafter SHAKAI-TÔ DRAFT] (Shakai-tō, the Japanese Socialist Party is the leading opposition party in the Japanese Diet); KÔMEI-TÔ PARTY, SEIZÔBUTSU SEKININ HÔHÔN YÔKÔ [OUTLINE OF PRODUCT LIABILITY LAW BILL] (1990) [hereinafter KÔMEI-TÔ DRAFT] (the Komei Party is the second largest opposition party in the Japanese Diet). The author relied upon the assistance of Legal Department of Fuji Heavy Industries, Ltd. for the collection of these proposals. Japanese documents of these proposals are available from the author and the legal department of Fuji Heavy Ind., Ltd.
eral common elements: they eliminate negligence as an element necessary for recovery, shift the burden of proof for defects and causation from plaintiffs to defendants, provide joint and several liability, and allow the set-off of damages only when plaintiffs are grossly negligent. In addition, the Tokyo Federation of Bar Associations Draft provides for punitive damages, which are not recognized under traditional Japanese law.

This Note will examine the current proposals to reform Japan's product liability law and will argue that reform of substantive law is not the most effective means of compensating injured consumers. Section I will describe current Japanese product liability law. Section II will explain the major elements of the current proposals for reform. Section III will explain why strict product liability law is inappropriate for Japan. Section IV will critique the proposals and argue that they will not compensate injured persons effectively or efficiently. Section V will propose an alternative solution, a no-fault compensation fund comparable to the system currently used in New Zealand.

I. Current Japanese Law

In Japan, an injured person is likely to use one of two main theories to seek a remedy from a wrongdoer. The first is based on tort; the second on contract. This Section will describe both theories.

A. Tort Theory

As Japan does not recognize a strict product liability theory, a plaintiff must prove negligence under Article 709 of the Civil Code. Under Article 709, the plaintiff must prove: 1) the intentional or negligent act of the defendant; 2) that such act violates another person's rights;
3) causation between the damages and the intentional or negligent act; and 4) damages. Japanese negligence, which resembles American negligence theory, constitutes a violation of the duty of due care.\textsuperscript{18} The duty requires one to foresee harmful results.\textsuperscript{19} The standard for this duty varies.\textsuperscript{20} In multiple injury cases, like asbestos cases in the U.S., manufacturers of food or drugs owe a very high standard of care “tantamount to liability without fault.”\textsuperscript{21} With this high standard of due care, Japanese courts presume the existence of negligence in mass injury cases, though the Japanese Code does not formally recognize such a presumption.\textsuperscript{22} In single injury cases such as car accident cases, however, a presumption of negligence has not been recognized, and a plaintiff must prove the defendant’s negligence.\textsuperscript{23}

A plaintiff also must show that the negligent act of the defendant caused his or her injury. In Japan, the plaintiff must prove causation by “[a conviction] beyond a reasonable doubt.”\textsuperscript{24} Although scholars have argued “that the degree of proof be reduced to that of probability,”\textsuperscript{25} Japanese courts seldom relax the standard.\textsuperscript{26}

Bystanders, as well as consumers of products, may maintain a cause of action because “tort law which is based on negligence applies to any type of person aggrieved by defective products.”\textsuperscript{27} A plaintiff may recover personal injury damages, lost profits, pain and suffering, and damages to products other than the subject product, but may not recover for damage to the product that caused the injury or punitive damages.\textsuperscript{28} A plaintiff’s misuse of a product may trigger the application of comparative negligence\textsuperscript{29} provided under Article 722, paragraph 2,

\begin{itemize}
\item \textsuperscript{19} Id.; Cohen & Martin, \textit{supra} note 5, at 328.
\item \textsuperscript{20} See Cohen & Martin, \textit{supra} note 5, at 331-32.
\item \textsuperscript{21} Kitagawa, \textit{supra} note 18, § 4.05[5]. \textit{See also} Fujita, \textit{Japan}, \textit{supra} note 11, at 16-17.
\item \textsuperscript{22} Kitagawa, \textit{supra} note 18, § 4.05[5]. \textit{See also id.} § 4.05[5] n.18 (citing Japanese court decisions finding presumption of negligence).
\item \textsuperscript{23} See Cohen & Martin, \textit{supra} note 5, at 329-30.
\item \textsuperscript{24} This is called “conviction” (hakushin) theory. Kitagawa, \textit{supra} note 18, § 4.05[5].
\item \textsuperscript{25} Id.
\item \textsuperscript{26} There are exceptions. For example in pollution cases, plaintiffs can use the so-called “epidemiological causality doctrine.” Kitagawa, \textit{supra} note 18, § 4.05[5]; Cohen & Martin, \textit{supra} note 5, at 331; Fujita, \textit{Japan}, \textit{supra} note 11, at 14. Under this doctrine, circumstantial evidence is enough to prove causation. Kitagawa, \textit{supra} note 18, § 4.05[5] n.20. See Cohen & Martin, \textit{supra} note 5, at 331 & nn.69-70. In medical malpractice cases, plaintiffs may use statistical data to show causation. Kitagawa, \textit{supra} note 18, § 4.05[5]; Cohen & Martin, \textit{supra} note 5, at 331 & nn.69-70; Fujita, \textit{Japan}, \textit{supra} note 11, at 14.
\item \textsuperscript{27} Kitagawa, \textit{supra} note 18, § 4.05[6][a][ii]. \textit{See also} Cohen & Martin, \textit{supra} note 5, at 327-28; Fujita, \textit{Japan}, \textit{supra} note 11, at 12-14.
\item \textsuperscript{28} Kitagawa, \textit{supra} note 18, § 4.05[7][a].
\item \textsuperscript{29} Id. § 4.05[8] & n.37.
\end{itemize}
Plaintiff's consent or assumption of risk may reduce the amount recovered, or even exculpate the defendant.\footnote{31}

B. Contract Theories

An aggrieved person may also choose to use two contract theories to prove liability in product suits.

The first contract theory is "non-performance of obligation under contract"\footnote{32} provided under Article 415 of the Civil Code. "If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may claim damages; the same shall apply to cases where performance becomes impossible for any cause for which the obligor is responsible."\footnote{33} Thus, a customer who bought a defective good that failed to perform its essential purpose and who suffered injuries may seek recovery from the direct seller of the good.\footnote{34} Under Article 415, the plaintiff need not prove the defendant's negligence; the defendant-seller is liable unless he or she can show the lack of fault.\footnote{35} Under this theory, a plaintiff may recover damages not only for personal and property loss, but also for economic loss.\footnote{36}

Nonetheless, Article 415 requires an important element that excludes many plaintiffs. Since this Article is based on contract, a plaintiff must be in privity of contract with the defendant.\footnote{37} In addition, manufacturers may disclaim liability under the terms of the contract.\footnote{38}

The second contract theory is "the warranty of latent defect"\footnote{39} pro-

\footnote{30. Article 722, para. 2, provides: "If there is any fault on the part of the injured party, the Court may take it into account in assessing the amount of the damages." CIVIL CODE OF JAPAN, supra note 15, at 152.}

\footnote{31. Where the injured assumes or is presumed to assume and consent to the risk and injury, the wrongdoer's illegal act is exculpated, and he or she is not liable at all. 19 CHUUSHAKU MINPO [DETAILED EXPLANATION OF THE CIVIL CODE] 355 (I. Kato ed., 1965). For the concept of consent or presumption of consent, see Tatsuahi Maeda, Law of Torts in General, in 7 DOING BUSINESS IN JAPAN, § 1.05[e][v] (Z. Kitagawa ed., 1989).}

\footnote{32. KONSAISU ROPPO, SHOWN 62 NENBAN [CONCISE COMPENDIUM OF LAWS - 1987] 375 (Hanrei Roppõ Henshû linkai ed., 1986). See Kitagawa, supra note 18, § 4.06[1]; Cohen & Martin, supra note 5, at 333; Fujita, Japan, supra note 11, at 6-9.}

\footnote{33. Article 415, CIVIL CODE OF JAPAN, supra note 15, at 91.}

\footnote{34. Kitagawa, supra note 18, § 4.06[1].}

\footnote{35. Ottley & Ottley, supra note 11, at 43; Cohen & Martin, supra note 5, at 333; Fujita, Japan, supra note 11, at 6-7.}

\footnote{36. Ottley & Ottley, supra note 11, at 43. For the recoverable damages under this theory, see Fujita, Japan, supra note 11, at 7-8.}

\footnote{37. Thus, "a bystander or ultimate user who is not in privity of contract with the seller cannot enforce the provisions of the article." Ottley & Ottley, supra note 11, at 44. Privity is not required, however, in certain cases. Fujita, Japan, supra note 11, at 6.}

\footnote{38. Ottley & Ottley, supra note 11, at 44-45. Nonetheless, disclaimers against public policy are void as in the American Uniform Commercial Code. Id. Fujita, Japan, supra note 11, at 9. See also U.C.C. § 2-719 (1977).}

\footnote{39. KONSAISU ROPPO, supra note 92, at 399. See also Ottley & Ottley, supra note 11, at 44; Cohen & Martin, supra note 5, at 333; Fujita, Japan, supra note 11, at 4-5.}
vided under Articles 570 and 566 of the Civil Code. These articles, however, also require privity, and allow the seller to disclaim liability in advance. Moreover, “damages recoverable thereunder are limited to the subject matter itself or counter-value [contract price].” In addition, “[i]f the seller can prove that the buyer had knowledge of the defect, the buyer will assume the risk, and this assumption of risk will be taken into account in calculating damages.” These unfavorable requirements often lead plaintiffs in Japanese product liability lawsuits to rely on tort theory.

II. Proposals to Reform Product Liability Law

Proposed drafts for a strict product liability law in Japan have been prepared by the Private Law Academy Reporters’ Group of 1990, the Tokyo Federation of Bar Associations, and leading opposition political parties such as Shakai-tō (Socialist Party) and Kömei-tō. Although the details of the proposals differ, these fundamental elements are the same: 1) they provide a strict liability theory; 2) they presume the existence of defects and the existence of causation in certain situations; and 3) they allow reduction of damages only if the plaintiff’s negligence is gross. In addition, the Group of 1990’s draft clearly provides that manufacturers’ liability will not be lessened even if damages are caused jointly by the manufacturer and by other defendants. The Tokyo Federation of Bar Association’s draft provides for punitive damages, and would require a discovery system similar to the system under the Federal Rules of Civil Procedure in the U.S.

A. Strict Liability Theory of the Proposed Reforms

This Section of the Note will describe the proposed reforms. All of the drafts discussed in this Note include strict liability theory. For example, Article 2 of the draft prepared by the Group of 1990 states: “Manufacturers owe a duty to compensate for damages caused by defects of a
product.”"50 Titled “Non-negligence Liability,” Article 2 eliminates negligence as an element for recovery. Under current Japanese tort law,51 plaintiffs cannot recover—even if the subject product is defective—unless they prove that the defendant was negligent in placing the defective product onto the market. It is, however, difficult for plaintiffs to prove the defendant’s negligence in view of complicated production processes and complex streams of commerce.52 Consequently, the purpose of this Article and comparable articles in other proposals appears to depart from traditional Japanese negligence theory and to require only proof of a “defect,” an objectively clearer standard.53

The drafts require plaintiffs to show defectiveness in order to recover.54 Article 4 of the draft prepared by the Group of 1990 explains that “‘defect’ means lack of the safety a person legitimately expects in light of all of the circumstances including the items listed as follows: 1) Reasonably expected use of product, and 2) Explanation, indication, warning, and other labels regarding the product.”55 The Japanese drafts adopt the “consumer’s expectation test.”56 Products that deviate from a consumer’s expectation of safety would be considered defective. Therefore, even a product that does not deviate from its design could be considered defective.

According to Japanese custom, a product is not defective insofar as it was manufactured in accordance with its design.57 When a consumer...
is injured because his or her use was not in accordance with a manufacturer's expected use, the injured consumer is to blame under the traditional Japanese approach. The manufacturer's expectation, not the consumer's expectation, sets the standard of defectiveness. Though the reforms would compensate some injured consumers, they do not indicate what level of safety should be legitimately expected by consumers. The drafts use the phrase "reasonable use," but defining that term is problematic. The drafts also consider warnings, instructions and labels as factors relevant in determining defectiveness. Thus, failure to warn or inadequate instructions could provide the basis of a claim of defectiveness, even when the subject product has no design or manufacturing defect.

The draft of the Group of 1990 would deny defenses based on development risks. Development risks address the question of the extent to which "producers should be held strictly liable for defects that were not yet discernable when the product was put into circulation, because of the state of scientific and technological knowledge at the time." The caveat in Paragraph 4 of Article 8 of the draft states that "[t]he fact that this draft does not address development risks shows the intention that the defense of the development risk will not be allowed." The failure to recognize a defense based on development risks is problematic because holding manufacturers liable for these risks "would inhibit innovation, increase industry costs, contribute to the structural unemployment problem, and weaken . . . industries' competitive position in the world market."

B. Presumption of Defect as Well as Causation

The Japanese reform proposals presume both defectiveness and causation. For example, paragraph 1 of Article 5 of the Group of 1990's draft states, "It is presumed that there is a defect on a product when damage occurs by using the product in a reasonably expected manner and if such damage does not usually occur in such use." Under the Restatement

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58. Id.
59. See infra notes 155-65 and accompanying text.
60. Id.
61. Id.
62. See infra note 64 and accompanying text.
64. GROUP OF 1990'S DRAFT, supra note 11.
66. "It is presumed that there is a defect in the product when the product lacks such safety as other products manufactured in the same production process have." GROUP OF 1990'S DRAFT, supra note 11, art. 5, para. 2. This provision seems to define a manufacturing defect. Although no other draft has a similar provision regarding the manufacturing defect, the other drafts contain provisions similar to paragraph 1 of Article 5 of the Group of 1990 Draft. See KÔMEI-tô DRAFT, supra note 11, art. 8, para. 1; SHAKAI-tô DRAFT, supra note 11, art. 5; TOKYO FEDERATION OF BARS ASSOCIATIONS' DRAFT, supra note 11, art. 5.
of Torts, plaintiffs must prove that a defect, i.e., an unreasonably dangerous condition, existed at the time when the product left the defendant's hand.67 Under the draft, however, plaintiffs must show only that unusual damage occurred in spite of a reasonable use of the subject product.68 Given that plaintiffs under current Japanese law must prove the subjective fault of defendants, the draft, which does not require the proof of existence of defectiveness at the time the product left the defendants' hands, to say nothing of the proof of negligence, is two-steps stricter than current Japanese law.

As for causation, Article 6 of the Group of 1990's draft provides, "When damage similar to that which usually occurs because of a defect occurs, that similar damage is presumed to be caused by the defectiveness of that product."69 Instead of proving that a specific defect caused a specific injury, plaintiffs need only prove that their damage is similar to other damage that usually occurs due to a defect.

Under the current law, plaintiffs must prove actual causation,70 a burdensome task. In some cases it is impossible to produce scientific proof of causation. Nonetheless, under the current law, unless plaintiffs prove causation, they must bear the economic and non-economic burdens of their injuries. The Group of 1990's draft, however, shifts the burden at the expense of manufacturers. Under this draft, even when neither the plaintiff nor the defendant can prove or disprove actual causation, manufacturers would be liable if plaintiffs can show similarity of damage. Even though this will not help plaintiffs when there has been

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67. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the condition that it was then defective, the burden is not sustained. RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1966).

68. Although some American courts permit recovery where an inference that the relatively new product was defective can be drawn from proof that it functioned improperly in normal use, see, e.g., Greco v. Bucciconi Engineering, 407 F.2d 87 (3d Cir. 1969), this is only in the case of new products, and not all U.S. courts permit such an inference. For the issue of circumstantial proof of defects, see JAMES A. HENDERSON & AARON D. TWERSKI, PRODUCT LIABILITY: PROBLEMS AND PROCESS 18-25 (1987).

69. See also Kōmei-tō Draft, supra note 11, art. 9; Shakai-tō Draft, supra note 11, art. 6. The Tokyo Federation of Bar Associations' draft has a more plaintiff-oriented article as explained later in this section of this Note.

70. Japanese courts sometimes recognize epidemiological or statistical evidence in mass injury cases under the current negligence theory. See supra note 26 and accompanying text; Cohen & Martin, supra note 5, at 331; Fujita, Japan, supra note 11, at 16. In addition, in these cases the actual causal relation between defects and injuries was revealed in some reasonable degree by the government investigation. Hideyuki Kobayashi, Seizōbutsu Sekinin no Genjō to Tenbō: Kasuitsusekinin kara Genkakusekinin, Ingakankei no Shōmei o Chūshinni [Present State and the Future of Product Liability: Focusing on the Shift from Negligence to Strict Liability and Proof of Causation], 41 Jiyō to Seigi (No. 10) 5, 10-11 (1990).

For the indication of high transaction costs, see, e.g., Richard J. Pierce, Jr., Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 Vand. L. Rev. 1281, 1319 (1980).
no similar damage in other cases, the presumption clause is one-step closer to absolute liability than the current law.

Manufacturers liability—even when causation is unclear—is often based on the assumption either that manufacturers benefit by producing products or that they can allocate risk more effectively.

Although most of the Japanese drafts have a similar content, the Tokyo Bar’s draft is most pro-consumer. The Tokyo Bar’s Article 5 provides, “It is presumed that there was a defect in a product and that damage was caused by the defect when the injured party used, kept, transported, and disposed of the product in an expected manner and damage occurred.”71 Under this draft, manufacturers would be liable if the plaintiff could prove normal use of a product and occurrence of harm. Though the adversary may rebut this presumption,72 disproving the presumption is very difficult because the defendant is required to prove a negative—that the defect did not cause the harm.73 Thus, the plaintiff’s burden of proof in the prima facie case is dramatically lightened, and in this sense, the Tokyo Bar’s draft is closer to absolute liability than the other drafts under which the plaintiff must prove at least similarity of harm to gain benefit of a presumption of causation.

C. Reduction of Damages (Comparative Fault)

Article 13 of The Group of 1990’s draft provides, “Liability of manufacturers may be excused or lessened when damage occurred by both a defect of the product and gross negligence of the injured person.”74 The Caveat for Article 13 says: “‘1) reasonably expected use of product’ under the Article 4 is not the gross negligence provided for in this Article.”

Under Article 13 only the gross negligence of plaintiffs may result in the reduction of damages.75 In Japanese law, the concept of a defect

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71. TOKYO FEDERATION OF BAR ASSOCIATIONS’ DRAFT, supra note 11, at art. 5 (emphasis added).
73. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 1-3 (Feb. 1986) [hereinafter WORKING GROUP] (report presented to President Reagan by inter-agency working group established by the Attorney General and consisting of representatives of 10 agencies and the White House). Professor Huber also explains the difficulty of proving a negative:

Today’s epidemiologist may be quite certain that the large majority of cancers are not caused by exposures to chemicals or radiation, but the courts, once again, are lagging decades behind. The only convincing negative case in such lawsuits is an affirmative demonstration that some other factor caused the disease complained of—but such proof is unavailable in a day when the precise origin of most long-term disease is still untraceable.

74. GROUP OF 1990’S DRAFT, supra note 11, art. 13 (emphasis added).
75. See supra note 74 and accompanying text. Other drafts have similar articles.
KÔMEI-TÔ DRAFT, supra note 11, art. 10; TOKYO FEDERATION OF BAR ASSOCIATIONS’ DRAFT, supra note 11, art. 6; SHAKAI-TÔ DRAFT, supra note 11, art. 7.
usually contemplates a manufacturing defect. Thus, a product is not considered defective when an injury is caused by the consumer's misuse. Failure to warn or improper design for certain consumer uses is rarely regarded as a defect in Japan. Therefore, it seems that to extend compensation for those who misuse products, Article 13 of the Group of 1990's draft permits only plaintiffs' gross negligence to be considered a factor in reducing the set-off of damages. Current Japanese law allows a set-off that considers plaintiff's negligence.

Under the Group of 1990's draft, a consumer's simple negligence would not decrease compensation. Reasonably expected use would not be gross negligence that would decrease the damages under current law. Even misuse, if reasonably foreseeable, would not decrease the amount of compensation. This Article may give manufacturers an incentive to design safer products and give consumers more instructions and warnings. Overwarning, however, might occur because manufacturers would be liable for all damages caused by any misuse except gross negligence.

The Tokyo Bar's draft is even more pro-plaintiff than the Group of 1990's draft. Article 7 of the Tokyo Bar's draft states, "When the injured party is guilty of gross negligence, the court may consider this when determining the amount of damages." Although the manufacturer's liability may be "excused or lessened" under the Group of 1990's draft, the Tokyo Bar's draft does not permit courts to excuse the manufacturer's liability even if the plaintiff is guilty of gross negligence. Thus, a manufacturer might be liable even if an injured consumer used a product with knowledge of the defectiveness.

D. Joint and Several Liability

The draft of the Group of 1990 provides in Article 10, "When multiple parties owe a duty of compensation under this draft, each party shall owe joint and several liability." Article 12 of the draft adds "Manufacturers' liability shall not be decreased even when damage is caused by both a defect of the product and an act of a third person."

Current Japanese law has a similar joint and several liability clause. Article 719 of the Civil Code states, "If two or more persons have by their joint unlawful act caused harm to another, they are jointly and separately liable to make compensation for such damage . . . ." For example, when polluted water from factories damages crops, those factories

76. See supra notes 57-58 and accompanying text.
77. CIVIL CODE OF JAPAN, supra note 15, at 152.
78. For more on the issue of overwarning, see infra notes 145-46 and accompanying text.
79. TOKYO FEDERATION OF BAR ASSOCIATIONS' DRAFT, supra note 11, art. 7.
80. GROUP OF 1990'S DRAFT, supra note 11, art. 13.
81. GROUP OF 1990'S DRAFT, supra note 11, art. 10. Other drafts have similar articles, including: TOKYO FEDERATION OF BAR ASSOCIATIONS' DRAFT, supra note 11, art. 4; KÖMEI-TÔ DRAFT, supra note 11, art. 6; and SHAKAI-TÔ DRAFT, supra note 11, art. 4.
82. CIVIL CODE OF JAPAN, supra note 15, at 151.
are jointly and severally liable to the one crop owner. Under Article 719, each joint tortfeasor’s act must satisfy the elements of tort, but a concerted action, such as a conspiracy, is not required.

The Group of 1990’s draft does not change current Japanese law, which provides for joint and several liability. The other articles of this draft, however, when combined with joint and several liability may have dramatic effects upon Japanese manufacturers. Under each draft, if a manufacturer is found liable under other articles of the draft, then a manufacturer who is not at fault, or only minimally at fault, must still pay all damages. This system is similar to the present U.S. system where a person must pay irrespective of the degree of his or her fault. This is typical of a deep-pocket approach where those with money are forced to pay even if only slightly at fault or even if not at fault.

E. Punitive Damages
The Tokyo Bar Draft provides in Article 7: "When there is intentional wrongdoing or gross negligence on the part of manufacturer, a court may, at the request of the plaintiff, order the manufacturer to pay up to twice the value of the damages provided in Article 3 in addition to the damages in that Article." Only the Tokyo Bar Draft contemplates punitive damages, which could equal treble damages.

The threat of punitive damages may deter manufacturers from producing defective products. In addition, injured parties who have suffered minimal harm may be more likely to bring suits due to the possibility of receiving punitive damages in excess of the actual damages.

Current Japanese law does not permit punitive damages. This prohibition of punitive damages is “due to the clear-cut distinction between criminal sanctions and civil remedies.” The idea of punitive damages, which are paid not to the government but to private plaintiffs, is foreign to Japanese law as Japan does not allow punitive damages in other areas of law such as anti-monopoly law.

F. Discovery
The Tokyo Bar Draft, as well as the draft prepared by the Product Liability Research Group in 1975, proposes a discovery system similar to the

83. Fujiki et al., supra note 72, at 179.
84. Id.
85. See Working Group, supra note 73, at 64.
86. Id.
87. Tokyo Federation of Bar Associations’ Draft, supra note 11.
88. Kitagawa, supra note 18, § 4.05[7][a].
89. Id.
90. Although the Japanese antimonopoly law is modeled on the American antitrust law, Japan’s version does not provide for treble damages. As in other civil law countries, public issues in Japan are exclusively litigated by the government. The concept of a “private attorney general” is foreign to Japan. See Ottley & Ottley, supra note 11, at 40.
discovery system established by the Federal Rules of Civil Procedure. The Tokyo Bar proposes to adopt depositions, interrogatories, demands for production of documents, and demands for confession. An expansive discovery system will help plaintiffs receive the information necessary to prove their cases.

Under the current Japanese law, plaintiffs cannot obtain materials leading to evidence at trial compulsorily from defendants. Although the Japanese Civil Procedure Code permits proof-taking prior to the commencement of an action or prior to the trial, "this is [only] an extraordinary device different from discovery practiced in American courts." This is one reason why Japanese consumer-plaintiffs have a difficult time winning tort cases.

Under current Japanese law, where plaintiffs must prove negligence, the lack of discovery makes this burden of proof hard to fulfil.


Some elements of the Japanese proposals for a strict product liability statute are stricter than both the U.S. law and the EC law in some respects. The strictness of these proposals may be a response to the difficulty of compensating consumers through litigation in the present Japanese legal system. Nevertheless, this Note argues that stricter substantive law, given the Japanese legal system, may not provide effective compensation. In Japan, civil procedure rules do not favor plaintiffs and the number of lawyers is very small. Consequently, if Japan wants to compensate plaintiffs more effectively, it must either institute major reform to its legal system or rely on an alternative compensation system similar to New Zealand's. This Section will analyze why the present Japanese legal system does not adequately provide compensation.

A. Higher Degree of Proof

The higher degree of proof required in current Japanese civil actions does not allow plaintiffs to receive compensation as easily as in the U.S.

In Japan, there are no jury trials. Judges determine the facts by

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91. See Masahisa Yamaguchi, Tokyo Bengoshikai Seizobutsu Sekinin Hō Shian no Mondaiten [Problems of the Product Liability Act Proposed by the Tokyo Bar Association], 16 Kigō Kankō (no. 5), 1, 11-12 (1990).
93. Code of Civil Procedure 77, art. 343 (Supreme Court of Japan trans., 1950) [hereinafter Civ. Pro. (Sup. Ct.)].
94. Hatiori & Henderson, supra note 92, § 6.03.
freely evaluating the evidence.\textsuperscript{96} The Japanese civil procedure code does not define the degree of proof required; therefore, opinion on this point varies.\textsuperscript{97} Some argue that "a preponderance of evidence" is sufficient, but the prevailing view requires proof "beyond a reasonable doubt."\textsuperscript{98} 

The burden of proof borne by American plaintiffs is lower than the burden of Japanese plaintiffs. Under U.S. law, plaintiffs may generally satisfy their burden of proof by a "preponderance of evidence" in civil cases.\textsuperscript{99} Only in criminal cases, is "proof beyond a reasonable doubt" required.\textsuperscript{100} Thus, the burden for plaintiffs in Japan makes recovery more difficult than in the U.S.

B. High Litigation Costs

High litigation costs in Japan are another reason why lawsuits are not an effective device to compensate the injured. In Japan, plaintiffs must, at the time of filing, affix to the complaint revenue stamps required by law; the amount of the revenue stamps depends upon the value of the claim.\textsuperscript{101} The more plaintiffs seek in their complaint, the more they must pay at the time of filing.\textsuperscript{102} For example, a plaintiff must affix 257,600 yen revenue stamps when he or she seeks 50,000,000 yen in

\textsuperscript{96} HATTORI & HENDERSON, supra note 92, § 7.05[13].

\textsuperscript{97} Id.

\textsuperscript{98} Id. Under the prevailing view:

[T]he judge . . . is required to be convinced at least to such an extent that people in general might behave in daily life, relying on his finding with full satisfaction. The judge can find a certain fact true only when he has been convinced that it is ninety-nine per cent true; he may not, when he has been convinced it is seventy per cent true, but thirty per cent untrue.


\textsuperscript{100} Id. at 657.

\textsuperscript{101} Id. at 657.

\textsuperscript{102} Id. at 657.
High court costs discourage litigation.\(^{104}\)

C. Low Probability of Victory and the Burden of Costs

In Japan, losing parties must pay not only their own litigation costs but also their adversaries' costs.\(^{105}\) Thus, the risk of initiating lawsuits is great when the probability of winning is low. Since generally, in Japan, the probability for plaintiffs to win in litigation is low,\(^{106}\) the risk that they may owe huge litigation costs is great. Consequently, some organizations are proposing changes in the substantive law which will permit plaintiffs to win more frequently.

D. Small Number of Lawyers

The paucity of lawyers\(^{107}\) in Japan also contributes to the lack of protection for consumers.\(^{108}\) Nevertheless, this does not justify the proposed strict product liability law reform, which would encourage an increase in

103. Michiko Kamiyama, Yamaguchi Kyōju no Hihan ni Kotaete (In Response to Professor Yamaguchi's Criticism), 16 KIGYO KANKYO (No. 5) 15, 23 (1990) (A copy of this article, written in Japanese by M. Kamiyama, a lawyer, in response to Professor Yamaguchi's criticism against the strict liability statute draft prepared by the Tokyo Bar is available from the author.) For the same lawsuit seeking 50,000,000 yen damages, the plaintiff must also bear actual expenses of about 300,000 yen for photocopies of documents. Id. Besides these costs, the plaintiff must pay, in advance, lawyer's initiation fees. See infra note 110.

104. High "lawyer's expenses, courts costs, particularly filing fees which are graded by the size of recovery claimed" work as deterrents. Takeyoshi Kawashima, Dispute Resolution in Contemporary Japan, at 285, n.24, citing comments of Thomas Blackmore made at a conference on Japanese law held at Harvard Law School on September 5-9, 1961, in THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS, (H. Tanaka ed., 1976). "These are recoverable by the winning party, but the necessity of hazarding new capital on the chance of winning the suit is a serious deterrent. The deterrent factor varies directly with the degree of uncertainty as to liability and the amount of probable damage." Id.

105. HATTORI & HENDERSON, supra note 92, § 10.01 & n.4. Article 89 of the Code of Civil Procedure provides that "[t]he costs of the suit shall be borne by the party defeated." Civ. Pro. (Sup. Ct.), supra note 93, at 21. See also HATTORI & HENDERSON, supra note 92, § 10.01 (footnote omitted).

[These] litigation expenses include all costs incurred in prosecuting an action or proceeding . . . .[T]he prevailing party is [also] entitled to recover . . . the cost of preparing the complaint or other [filing] documents, . . . the cost of travel to file them, and the cost of travel to retain a lawyer to commence or oppose an action. Preparatory expenses also include costs of collecting evidence and interviewing indispensable witnesses.

106. KYODO 10/17/90, supra note 8. Thus, Japanese lawyers do not want to represent injured consumers in litigation. Id.

107. "The proportion of practicing lawyers is quite small compared with other developed countries. While in West Germany, for example, there is one lawyer for every 2,300 people, in Japan the ratio is one to 10,000." HATTORI & HENDERSON, supra note 92, § 2.09. The Japanese ratio reflects those lawyers licensed for commercial practice. Ray August, The Mythical Kingdom of Lawyers, A.B.A.J., Sept. 1992, at 72, 73.

108. "In speaking to the Japanese consumer groups, [Ralph] Nader said . . . . '[t]here are only a handful of malpractice and product liability lawyers there. How can you redress imbalances of power with so few lawyers?' " NIKKEI 11/17/90, supra note 7.
the number of lawsuits. The shortage of lawyers results in high lawyers' costs. Since the number of lawyers is small, Japanese consumers, including plaintiffs, must "purchase their legal services in a cartelized market... Faced with the [legal] industry's cartel, plaintiffs in Japan incur... higher costs to litigate." Minimum fee schedules established by the Japanese Federation of Bar Associations and local bar associations raise prices, and thus "make legal services less accessible."

The shortage of lawyers may also contribute to the lack of concern by lawyers for helpless consumers. Professor S. Yoshimi pointed out that "Japanese lawyers are quite reluctant to take up product liability cases." Consumers injured in single-accident injury cases have little hope of succeeding in litigation unless there is some clear evidence of negligence and causation. Thus, lawyers who have little hope of profiting from these consumers are reluctant to take such cases.

E. Lack of Contingent Fee System

The fact that contingent fees are uncommon in Japan may also render litigation ineffective as a compensation device in Japan. In the
U.S., contingent fees encourage both injured plaintiffs and their attorneys to bring lawsuits against "deep-pocket" defendants.\textsuperscript{116} Even indigent injured persons can receive legal services needed to obtain compensation.\textsuperscript{117} Nevertheless, many critics of contingent fees suggest the system encourages frivolous suits and increases verdict awards as well as settlement amounts.\textsuperscript{118} Currently, Japan has neither the problems nor the benefits of a contingent fee system. Ordinary persons, who must pay legal fees without a contingent basis, are less encouraged to bring lawsuits than if contingent fee agreements were more common.

F. Lack of Legal Aid

Lack of legal aid for civil cases is also given as reason for the unavailability of a lawsuit as a dispute-resolution device.\textsuperscript{119} The Code of Civil Procedure in Japan allows sosho kyuujo (assistance-in-litigation),\textsuperscript{120} which excuses plaintiffs "from prepaying litigation costs."\textsuperscript{121} Courts, however, do not extend sosho kyuujo to plaintiffs who have average incomes.\textsuperscript{122} Therefore, plaintiffs with average incomes must pay the high Japanese litigation costs before obtaining damages.

G. Lack of a Jury System

The lack of a jury system in Japan\textsuperscript{123} may explain why plaintiffs in Japan cannot receive as much compensation as their American counterparts. The jury system in the U.S. is said to encourage large recoveries.\textsuperscript{124} Juries' emotional responses and large awards are said to be causes of a tort crisis in the U.S.\textsuperscript{125}

IV. A Critique of the Drafts of Strict Product Liability Law

Today, while some U.S. legislators are trying to restrict the pro-plaintiff

\textsuperscript{116} See Leibman, supra note 63, at 809-10.
\textsuperscript{117} "In the United States, there are legal scholars who hold the view that the contingent fee system helps indigent victims seek a court settlement through legal actions or through attorneys and that it plays the role of public legal aid." Ishimura & Kaminaga, supra note 115, at 116 (footnote omitted).
\textsuperscript{120} Civ. PRO. (Sup. Ct.), supra note 93, at 25 (art. 118).
\textsuperscript{121} Hattori & Henderson, supra note 92, § 2.10. This assistance does not cover attorneys' fees. Id. For additional explanation of assistance-in-litigation, see id. § 10.09.
\textsuperscript{122} Kamiyama, supra note 103, at 23.
\textsuperscript{123} Fujita, Japan, supra note 11, at 3.
\textsuperscript{124} Cortese & Blaner, supra note 118, at 176-77; Leibman, supra note 63, at 811.
\textsuperscript{125} Leibman, supra note 63, at 802, 811.
trend in products liability cases, organizations in Japan are demanding strict product liability to protect consumers. Some proponents of Japanese legal reform argue that the current proposals will deter manufacturers from distributing defective products; others argue that such reforms are necessary to adequately compensate injured persons. Groups favoring strict product liability law, however, have neither shown the public the disadvantages of their proposed legal reforms nor presented viable alternatives, such as a no-fault compensation system.

A. Enormous Transaction Costs

Some consumer groups, scholars, opposition parties, and plaintiffs' lawyers, claim strict product liability is needed because injured persons are not adequately compensated in Japan. A desire to better compensate the injured has been the motivating force behind the drafts. Nonetheless, they have failed to recognize that strict product liability is not an effective system for compensating the injured. The underlying policy of strict product liability law in the U.S. is to spread risk through a small increase in the price of consumer goods. Manufacturers can buy product liability claim insurance from insurers and pass on the insurance costs by adding the cost of the premiums to the prices of their products. Thus, rather than leaving injured parties without any compensation, the U.S. system compensates them even when a manufacturer's clear fault cannot be proven. Under this system, the prices of goods include product liability insurance fees. Consumers essentially buy compulsory product liability insurance whenever they buy goods. Because of the enormous cost of product liability "insurance," however, product costs rise.

127. Iinkai, supra note 5, at 4.
128. One of the reasons given for the need for legislation of a strict product liability statute in Japan is the necessity of an incentive to maintain the safety of products. Zadankai: Seizobutsu Sehinin no Genjô to Kadai [Round-Table: The Current State and Problems of Product Liability], 41 JIY TO SEIGI (No. 10) 57, 59 (1990).
129. See KYODO 10/17/90, supra note 8.
130. See NIKKEI 12/22/90, supra note 1. No Japanese plaintiff lawyers or opposition parties refer to the possible benefits of the New Zealand compensation system. Most Japanese jurists seem to follow this trend. Only Professor H. Kobayashi mentioned that a social security system might be more cost-effective than quasi-absolute liability in light of the transaction costs. Kobayashi, supra note 70, at 8.
131. NIKKEI 12/22/90, supra note 1.
132. See Yamaguchi, supra note 91, at 11-12. A copy of this article is available from the author.
133. For justifications of strict product liability, see Judge Traynor's concurring opinion in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).
134. WORKING GROUP, supra note 73, at 30-33.
135. See id. at 31 n.24.
136. For every $1 compensation, the tort system requires the consumer to pay approximately $3 in premiums . . . , while that same $1 of compensation can be obtained through first-party health and disability insurance for only
1. **Lawyers Benefit**

A strict product liability system is not only expensive for consumers, but also ineffective for injured persons. According to the Report of the Tort Policy Working Group:

*[For every dollar awarded to plaintiff, 34 cents on the average is lost to legal fees and an additional 5 cents is lost to legal expenses. . . . In some cases, legal fees alone amounted to as much as 45% of plaintiff's awards . . . .] It is . . . difficult to justify such costs when the costs often are borne largely by the seriously injured and by consumers who ultimately must pay for these costs through higher prices for goods and services. The only clear beneficiaries of this system appear to be lawyers.*

Due to the shortage of lawyers, the transaction costs of strict product liability law in Japan may be even higher than in the U.S. As explained earlier, since the number of lawyers in Japan is quite small, they can maintain cartel prices. If legal reforms encourage injured parties to bring suit, they will increase the demand for lawyers' services. Since the drafts do not, however, concomitantly propose to increase the number of lawyers, the current monopoly price for lawyers would skyrocket. Higher lawyers' fees would increase the transac-

$1.25 . . . It is highly ironic that many proponents of no-fault liability argue that such liability is in the best interest of consumers. In fact, since consumers ultimately pay the premiums of whatever compensation scheme is devised, quite the contrary is the case.

*Id.*

[This kind of tort liability tax] accounts for 30% of the price of the stepladder and over 95% of the price of childhood vaccines. [The tax] is responsible for one-third of the price of a small airplane. . . . [It] adds more to the price of a football helmet than the cost of making it.

*Huber, supra note 73, at 3.*

137. Cortese & Blaner, supra note 118, at 176 ("Because of high transaction costs, victorious plaintiffs recover only 20% to 50% of the damages ultimately awarded.").

138. *Working Group, supra note 73, at 45.*

Out of every dollar paid by consumers to cover the relevant liability costs, less than fifty cents - estimates vary downward from forty-five cents to thirty cents - are returned to the consumers in benefits. Most of the rest - between fifty-five and seventy cents out of every premium dollar - goes to pay lawyers, adjusters, and the like. If I were a cynic, I would say that this is a social insurance scheme, . . . [that] is being run primarily to benefit the trial bar.


139. *See supra* note 107 and accompanying text.

140. *See supra* notes 110-13 and accompanying text.

141. The purpose of preparing these drafts, for some Japanese organizations, is to compensate injured persons more than they are compensated now through litigation. *Nikkei 12/22/90, supra note 1.* Because the drafts propose to make winning easier for plaintiffs, logically the number of lawsuits will increase.

142. "[Former Supreme Court Chief Justice Takaaki Hattori noted, 'lawyers themselves often have opposed, or at least have been reluctant to see, an increase in the size of the bar for fear of excessive competition.']" Ramseyer, supra note 112, at 515 (emphasis added) (quoting Takaaki Hattori, *The Legal Profession in Japan: Its Historical Development and Present State, in Law in Japan* 111, 145 (A. von Meheren ed., 1963)).
tion costs necessary to obtain compensation. The transaction costs would be passed on to consumers in higher prices for goods. Assuming that changes in the current system are needed, the proposed drafts are highly inefficient. The transaction costs would absorb a huge amount of money that could be used to compensate injured people and to prevent the production of defective products.

2. Defensive Actions Cause Counter-Effects and Large Costs

A strict liability system also wastes money by encouraging "would-be defendants to take perverse [and defensive] action." For example, manufacturers may put too many warnings on their products because they want to avoid liability. Excessive warnings waste money.

In addition, excessive warnings may confuse the user. Although manufacturers know that "overwarning" can decrease the overall effectiveness of warnings, they continue to "overwarn" in order to decrease their exposure to suits.

An excess of detail undercuts the value of the warning in practice; to warn of everything is to warn of nothing, and in a torrent of new data the really crucial bits of information are likely to go unread. Overstatement is worse still. An overly lurid warning that causes . . . a mother to forgo vaccinating her young child, can cause considerably more harm than the omission of a warning of some obscure side effect that does occasionally materialize . . . . And other consumers learn to adjust for overstatement by ignoring warnings altogether. There was a fable once about crying wolf, but it apparently went unheeded when modern warning doctrine was being framed.

Overwarning could occur in Japan if a strict product liability law is adopted. Since the definition of "defect" contained in the draft proposals includes warnings, labels, and instructions, and since manufacturers could more easily become liable under the drafts than under current law, Japanese manufacturers may behave more defensively and put too many warnings on their products. The potential advantages of the

Mr. Hattori continues: "[The] bar fears the competition that would arise from expanded opportunities for admission . . . ." Id. at 515 n.64 (emphasis added) (quoting Hattori, supra, at 147).

143. Thus, without accompanying proposals to change the social or legal system with a plan to increase the number of lawyers, the drafts are not acceptable. By stirring up litigation without increasing the number of lawyers, Japanese lawyers would benefit greatly, without significantly benefitting consumers.


145. See id.

146. Id. at 583.

147. HUBER, supra note 73, at 15-16.

148. GROUP OF 1990's DRAFT, supra note 11, art. 4.

149. No comparison has been made between the response to warnings by Americans and by Japanese. This is probably because in Japan the concept of defects has not included the failure to warn. For the Japanese concept of defects, see supra notes 57-58 and accompanying text.
drafts would not be met if they forced manufacturers to pay more attention to defending themselves than to the safety of consumers.

In a strict liability system, manufacturers are also forced to fight all claims so that they do not easily become "target defendants."\textsuperscript{150} This is because the number of frivolous claims increases when a defendant readily satisfies all claims. "[T]he defendant and its insurer have a strong financial interest in fighting claims . . . . Giant enterprises who are 'repeat player' defendants may view aggressive litigation as a strategic investment aimed at avoiding a reputation of being an easy mark."\textsuperscript{151} Manufacturers must attempt to control litigation by "producing wasteful internal documentation which engineers thought unnecessary—but lawyers insisted on."\textsuperscript{152} These costs are added onto the prices of products.

While a strict product liability law would give manufacturers an incentive to produce safer products, manufacturers might also have to increase the amount spent on litigation. Such resources would be better allocated to more socially desirable expenditures such as compensation for the injured or the prevention of defects in the products themselves.

B. Strict Liability Does Not Work as a Deterrent

Some consumers, scholars, plaintiff lawyers, and political parties argue that strict product liability is needed because of the relaxation of the governmental safety standards.\textsuperscript{153} Some argue that strict product liability will deter the manufacturer from distributing defective products;\textsuperscript{154} through this deterrent effect, consumers would be protected effectively.

Professor Sugarman doubts this deterrent effect of tort law. As one of the reasons for this doubt, he pointed out that tort law is "unpredictable . . . [because of] doctrinal complexity, rapid legal change, . . . and the perceived lottery-like nature of secret jury decision-making, the vagaries of trials, and pervasive rough-and-ready settlement practices."\textsuperscript{155} Because of the unpredictability, even professionals in certain industries may be "unaware of required standards of conduct."\textsuperscript{156} This unpredictability is especially troubling in the design defect or failure to warn cases. Professor Henderson has noted that manufacturers cannot find a reliable safety guidance to follow because of inconsistent safety

\begin{itemize}
\item \textsuperscript{150} Sugarman, \textit{supra} note 144, at 584.
\item \textsuperscript{151} \textit{Id.} (emphasis and note omitted).
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{See supra} note 5.
\item \textsuperscript{154} For example, "Masahisa Yamaguchi, a professor of law at Yokkaichi University . . . expressed . . . 'If a law similar to that of the EC is enacted in Japan . . . firms would be more cautious an [sic] pay more attention to producing safe goods.'" \textit{Nikkei} 12/22/90, \textit{supra} note 1.
\item \textsuperscript{155} Sugarman, \textit{supra} note 144, at 566. \textit{See also id.} at 587 (indicating that current court decisions do not offer "design and production criteria for the firms").
\item \textsuperscript{156} \textit{Id.} at 566 n.34.
\end{itemize}
Japanese designers are not the exception to this problem. Of course, Japanese designers are familiar with U.S. governmental safety standards; as soon as or before the standards change, they receive and act upon the changes. Nonetheless, they cannot understand which designs will be rendered defective, or to what extent they should provide warnings, and why innovative design or equipment should not be exported to the U.S. Complying with clearly defined safety standards does not guarantee a favorable finding in American courts. Designers are understandably upset when they design cars and prepare instructions and manuals only to learn that the design they believed to be safe was found to be defective.

If Japan adopts one of the proposed strict product liability drafts, similar confusion could occur in design and failure to warn cases because the standards for safety design in these areas are vague. As Professor Henderson noted: "more specific guidelines than 'reasonableness under the circumstances'" are needed. Of course, when dealing with manufacturing defects the drafts would give manufacturers incentive to invest more money in the safety of their products. This is because in manufacturing defect cases a defect is usually more objective and obvious than in design or failure to warn cases. Manufacturing defect cases question the deviation of a product from the standard of

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157. Professor James A. Henderson testified as follows: "[T]he courts are unable to reach consistent results without more specific guidelines than 'reasonableness under the circumstances.' What has emerged is a multibillion dollar-a-year social insurance scheme providing little or no guidance to manufacturers regarding how they should be designing their products to avoid liability." *Hearings, supra* note 138, at 24.

158. Based upon the author's experience. See infra *after* note 240.

159. Meeting the federal safety standards does not necessarily mean reasonably safe in trial. See, e.g., *Wilson v. Piper Aircraft*, 577 P.2d 1322 (Or. 1978). For the safety standards for motor vehicles:

The National Traffic and Motor Vehicle Safety Act of 1966 specifically provided that 'Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.' 15 U.S.C. 1397 (c) (1990). The committee reports and debates specify that the purpose of this provision was to insure that 'state common law standards of care' and the principles of 'product liability at common law' would continue to be viable, and that the legislative safety standards were not 'to affect the rights of parties under common law . . . .*' S.Rep. No. 1301, Committee on Commerce, 89 Cong., 2d Sess.1966, p.12.

Volkswagen of America, Inc. v. Young, 321 A.2d 737, 746 (Md. 1974).

160. Professor Sugarman noted that pro-plaintiff lawsuits in the United States often lead defendants' engineers to "perceive litigation as unjustified. As a result managers and professionals become demoralized by participation in discovery and trial as well as by unfavorable outcomes. They often claim [that] the tactics of plaintiffs' lawyers and the findings of uninformed jurors unjustly impugn their product or reputation." *Sugarman, supra* note 144, at 584 (emphasis and footnotes omitted).


162. *Huber, supra* note 73, at 41. "Manufacturing-defect cases are straightforward. They are also comparatively rare. Far more difficult are cases in which the product is said to be defective in design, where there is no such simple point of comparison. Fully eighty percent of product liability cases today are of this kind." *Id.*
other products manufactured in the same design. For example, a soft
drink bottle may have a crack, even though the other bottles manufac-
tured in the same design did not. Thus, the product in question is obvi-
ously inferior to the others, and it is easy to find such a defect. Although
under the mass-production process some defective products are inevita-
bly manufactured and distributed to the market without negligence, it is
justifiable to hold manufacturers liable because it is not fair that only the
unlucky injured person should bear that cost.163

In design defect or failure to warn cases, however, the subject prod-
uct did not deviate from other products and may even have satisfied gov-
ernment safety standards. Thus, the determination of a defect in this
product is rendered by a jury (or a judge in Japan) by applying the vague
standard of whether the product is unreasonably dangerous (in Japan,
the lack of safety one expected in light of reasonable use, instruction,
warning, and other labels).164 Because determinations of whether there
is a defect varies in each case of design defects or failure to warn, manu-
facturers cannot know what is a safe design or adequate warning. In this
way, lawsuits would not effectively deter design defects or failures to
warn. In other words, strict products liability does not work effectively
as a deterrent because it lacks precision in reliably determining what
constitutes a defect.165

In addition, tort law is not effective as a deterrent because the time
lag between the manufacture and distribution of products and the deter-
mination that the products are unsafe is too long.166 A manufacturer
often may have ceased to produce the product long before the products
are held to be unsafe. Under this scenario, a court decision arrives too
late to deter.

In Japan, where litigation is even more prolonged than in the U.S.,
the problem may be much worse:

The Japanese legal system has never developed procedural and remedial
incentives to litigation to the extent that they exist in the United States.
One principal procedural deterrent to complex litigation in Japan is the
long delay in proceeding. Unlike trials in the United States which, once
started, proceed continuously until completed, trials in Japan are marked
by intervals of a month or more between days of hearing. While the pur-
pose is to encourage the parties to reach a resolution through compro-
mise, the result is that the judges have no incentive to expedite a trial.
Instead, they prefer to delay and to wait for the parties to settle the

163. Applying strict liability to manufacturing cases was also the intention of the
drafters of section 402A of Restatement (Second) of Torts. George L. Priest, Strict
164. See id. at 2326 (indicating that "[section 402A of the Restatement (Second) of
Torts and its comments] provided no definitive guidance as to sensible standards for
design defects").
165. HUBER, supra note 73, at 167-69. ("Not all consumers are alike; the prescrip-
tion that is needlessly unsafe for one may save the life of another. In all but the
simplest cases, accidents originate not in defective deigns but in the unwise conjunc-
tion of particular design with a particular use and user.")
166. Sugarman, supra note 144, at 567.
In other words, dispute resolution through litigation is less effective in Japan than in the U.S. due both to weaknesses in the Japanese legal system and also the Japanese people’s negative opinion of litigation.\textsuperscript{168} Thus, the deterrent effect of lawsuits is less than that in the U.S. Professor Sugarman also notes that some wrongdoers intentionally breach the safety requirements of tort law; tort law, therefore, is useless as a deterrent to these wrongdoers.\textsuperscript{169} As he points out, “real fly-by-nights are tempted to act dangerously even with tort law; indeed, they have little incentive to carry liability insurance.”\textsuperscript{170}

The Japanese drafts will not deter unestablished firms. Fly-by-nights are not large companies but are normally small-to-medium com-

\textsuperscript{167} Ottley \& Ottley, \textit{supra} note 11, at 38-39 (footnote omitted). An example of this procedural deterrent can be seen in the Thalidomide cases which were first filed in November 1964. The hearings continued at intervals until December 1974 when an out-of-court settlement finally was reached. \textit{Id.} at 39.

\textsuperscript{168} It is not extremely uncommon for civil cases to drag on for several years . . . Parties . . . will not be back in the courtroom more often than one day each month until judgment . . .

While there are probably many reasons for delay, it has been suggested that one factor may be judicial hesitancy to attribute clear-cut victory and defeat to the respective parties. After all, Japanese judges, as creatures of their society, are interested in harmony and compromise. It is a fact, that a drawn-out, piecemeal trial allows the parties’ emotions to cool and give an opportunity for private settlement of the dispute.

Although the population has more than tripled since the Meiji Era [1868-1912], the total number of judges has not increased much in Japan. The caseload of each judge is quite heavy by Western standards. Many cite this situation as another significant cause of delay in the disposition of cases before courts.

Thomson, \textit{supra} note 102, at 35.

\textsuperscript{169} Professor Ramseyer indicates that a shortage of judges also contributes to delays of the Japanese judicial proceeding. Ramseyer, \textit{supra} note 110, at 633-34, 634 n.180. He says “during the 1970s a typical federal district judge had a caseload of 325 cases, a typical California superior court judge had a caseload of 964 cases, and a typical Japanese trial court judge had a caseload of 1708 cases.” \textit{Id.} at 634 n.180.

Professor Tanaka indicates that the shortage of attorneys in Japan also hampers the preservation of justice as follows:

Given the very limited availability of the legal services provided by lawyers, the effective administration of justice may be seriously hampered in rural areas, with little prospect of improvement in the provision of legal protection to the rural population. As a matter of fact, it has been pointed out that because of the very limited availability (in some cases, total absence) of lawyers, some summary courts and branches of district courts are having difficulties in docketing hearings and trials or in appointing state assigned counsels for the accused. Thus the lack of lawyers poses a serious problem for an effective and fair administration of justice. The situation, therefore, calls for urgent measures . . .


\textsuperscript{170} \textit{Id.}
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panies. In Japan, there are many small-to-medium companies.\textsuperscript{171} Since many small-to-medium companies have not yet considered the effects of the proposed product liability statute,\textsuperscript{172} the probability that they do not have insurance may be great.

It might be argued that small-to-medium companies should be excused from a strict products liability law due to harshness.\textsuperscript{173} This argument, however, eviscerates the deterrent objective of tort law.

C. Anti-competitiveness and Anti-innovation

The proposed drafts for a strict products liability law in Japan are also anti-competitive as well as anti-innovative. Since this drawback is generally recognized in the U.S.,\textsuperscript{174} tort reform has progressed in many states.\textsuperscript{175}

Many companies in the U.S. reportedly withdrew products from the market to avoid becoming involved in lawsuits even though they did not believe that their products were unreasonably dangerous.\textsuperscript{176} "A recent survey of chief executive officers by the Conference Board . . . showed that uncertainty over potential liability had led almost fifty percent to discontinue product lines and nearly forty percent to withhold new products."\textsuperscript{177} For example, a major manufacturer of a vaccine decided

\textsuperscript{171} Since there are many such small businesses in Japan, MITI is reluctant to adopt strict products liability. Concerning the adoption of a strict-liability statute, MITI showed reservation by stating that "damages caused by the enforcement of such a law would be too large for small businesses." See infra note 195.

\textsuperscript{172} The Japan branch of AIU Insurance Co. of the United States, recently conducted a survey . . . .

\dotsc showing that while manufacturers are aware of plans for product liability legislation, they are not yet seriously thinking of taking any concrete measures . . . . The survey was targeted at 10,000 small- and medium-size manufacturers (with annual sales ranging from 100 million to one billion yen) in various industries . . . .

\dotsc Asked if they had made a serious attempt to study the proposed product liability legislation . . . only 25\% of respondents had taken any special measures in preparation for the proposed legislation . . . .

\textsuperscript{173} Kamiyama, supra note 57, at 32. This idea that those companies without enough money must be excused from the proposed law reflects the "deep pocket theory" or "having large corporations become the insurers of their products." If compensation rather than deterrence is the purpose of the proposed law, however, a social security system is preferable as it would avoid the proposed law's large transaction costs. See supra notes 131-52 and accompanying text.

\textsuperscript{174} See, e.g., Cortese & Blaner, supra note 118, at 167-205; Huber, supra note 73; Working Group, supra note 73.

\textsuperscript{175} "Reacting to what many see as 'crises' brought on by courts extending liability too far, state legislatures have enacted breathtakingly large numbers of changes in product liability law, ranging from the trivial to the drastic to the draconian." Henderson & Eisenberg, supra note 126, at 480 (footnote omitted).

\textsuperscript{176} Id. at 581.

to withdraw its products from the market because of “skyrocketing and unpredictable tort liability.” Although strict liability may have been intended to discourage the sales of hazardous goods, it has also raised the prices of goods and decreased the availability of many goods.

Strict liability also discourages innovation. This is because, under the strict liability regime, technology rather than human fault is subject to torts. Laypersons decide whether a technology is defective, but they tend to put the standards of technological legitimacy on “age, familiarity, and ubiquity . . . . [T]he more innovative and unfamiliar [technology] . . . is most likely to be condemned.” As to the warnings required under the strict liability law, “[h]oning a warning to a fine point of perfection requires years of market and litigation experience . . . , while innovative challengers are vulnerable.” In addition, the availability of reasonably priced insurance depends on the accumulation of actuarial experience—something that all established technologies have but no truly innovative one ever does.

178. Sugarman, supra note 144, at 582 n.115.

Because of the [tort liability] tax . . . , you cannot buy several contraceptives certified to be safe and effective by the Food and Drug Administration (FDA), even though available substitutes are more dangerous or less effective. If you have the stomach upset known as hyperemesis, you cannot buy the pill that is certified as safe and effective against it. The tax has orphaned various drugs that are invaluable for treating rare but serious diseases.

Because of the tax, . . . [y]ou cannot buy an American Motors 'CJ' Jeep or a set of construction plans for novel airplanes from Burt Rutan, the pioneering designer of Voyager. You can no longer buy many American-made brands of sporting goods, especially equipment for amateur contact sports such as hockey and lacrosse.

HUBER, supra note 73, at 3-4.

179. See HUBER, supra 73, at 3-4. For anticompetitive effects because of withdrawn American products, see Cortese & Blaner, supra note 118, at 188-89. See also id. at 199-201 (examples of withdrawn products).

180. For example, “[a] major U.S. manufacturer has disclosed it dropped plans to market a promising new insulation, not because it posed a safety problems, but because as a substitute for asbestos, it could inevitably attract speculative lawsuits.” American International Group, supra note 177.

181. HUBER, supra note 73, at 14.

The negligence standard had inquired whether the technologist—the human actor on the scene—was careful, prudently trained, and properly supervised. Who is most likely to pass a negligence test? The best and the brightest—the technologists working at the leading edge of their professions. It is at the frontiers of science, after all, that the best engineers, pharmacologists, doctors, and chemists typically congregate. Under the new legal standards, however, the people themselves, and their good care, good training, and good faith, were quite irrelevant. The new inquest concerned the product itself and its alleged defects. Where once human conduct had been its focus, the tort system now placed technology itself in the dock.

Id. at 157.

182. Id.

183. Id.

184. For the difficulty of obtaining insurance for innovative products, see Cortese & Blaner, supra note 118, at 190.
Under a strict products liability regime, "in the very markets where the legal pursuit was the most intense—on the trail of exotic drugs, contraceptives, pesticides, small planes and cars, hazardous waste disposal, and medical procedures"—innovation stops. Theoretically, strict product liability was supposed to impose "sharper liability [which] would spur more innovation . . . [but] the facts [are] otherwise . . . [T]he accepted theories were wrong." The prerequisite for the theory is:

a fine-tuned and highly predictable legal process which consistently disfavors more dangerous products and favored safer ones. The success of the new liability engine thus depended on great precision in the courts. But the legal assembly line relied on unskilled workers, heavily pressed for time and with many extraneous factors—sympathy for victim most especially—on their minds. This introduced a great uncertainty into the system. As a result, "the modern rule[s] [of strict product liability] do not deter risk: they deter behavior that gets people sued, which is not at all the same thing." Because of this anti-innovative effect of strict product liability law in the U.S., Japanese manufacturing companies do not usually export innovative products. Innovative products are vulnerable to legal attack because it is easy to second-guess the possibility of substitute designs or warnings.

D. Problems Raised by Ministry of International Trade and Industries

A representative of MITI's consumer protection division expressed the following views regarding the strict products liability statute:

- A law would raise product prices as companies are forced to adopt additional safe measures.
- No consensus is evident among consumers as to what priority safety should be given over cost.
- Many cases are settled out of court, indicating that existing consumer protection is enough.

185. HUBER, supra note 73, at 155.
186. See id. For example, "the United States, a leader in contraceptive research and marketing well into the early 1960s has today lost its edge and its hunger for progress." Id.
187. HUBER, supra note 73, at 156.
188. Id. at 156-57.
189. Id. at 164.
190. See WORKING GROUP, supra note 73, at 31-32 (The "tort system . . . increasingly imposes liability upon persons and companies that have done nothing wrong. This has been accomplished . . . by engaging in after-the-fact analyses that 'find' fault wherever there has been an injury." (emphasis added)).
Damages to be caused by the enforcement of a law would be too large for small businesses. 191

The Japanese must consider these points before enacting the proposed product liability statute. First, the statute would increase the prices of goods because manufacturers would spread risk by adding the price of insurance on their products. Thus, consumers would be forced to buy higher priced products, 192 and Japanese goods would be less competitive abroad.

Second, the Japanese must consider whether the existing consumer protection suffices. The fact that many cases are settled out of court may support this proposition. It may also indicate that Japanese people do not use the current litigation system both because of the non-litigious Japanese mentality and the ineffectiveness of the system, 193 not because people are satisfied with the compensation available through the current litigation system. If so, a compensation system that does not rely on litigation may be better able to compensate injured consumers.

The Japanese must consider the traditional Japanese sense of fairness when making legal reform. The foremost problem of adopting a strict products liability system in Japan is that the proposed system is not culturally appropriate for Japan. The proposed reforms contravene the traditional Japanese sense of fairness 194 because manufacturers who were not morally blame-worthy would be labeled “liable.”

Third, the Japanese must consider the effects of strict products liability law on their integrated economy. While the larger Japanese industries may be able to absorb the increased costs of such a law, the smaller Japanese companies—upon whose products the large companies depend—could not. 195 It would be extremely difficult to determine which companies should bear the increased costs of strict products liability, and it is questionable whether an adequate consumer compensation system could be developed when all companies do not share the expense.

The proposed drafts would not provide an equitable redistribution. Although it would be paid for through a general increase in product prices, the amount an injured person can recover would be based on unrelated factors such as the skill of that person’s attorney 196 and the

191. NIKKEI 12/22/90, supra note 1 (Statements of Professor Yasuhumi Ozawa).
193. See supra notes 167-68 and accompanying text.
196. HUBER, supra note 73, at 13-14.
wages the injured party earned prior to the accident. Injured persons would not always receive satisfactory benefits under a products liability statute because there is a "lottery" factor; some receive a lot, others receive nothing.

V. The Third Way: No-fault Compensation System

Although the drafts of the proposed strict product liability law contain many drawbacks, current Japanese law, which is primarily based upon a negligence theory, also has disadvantages because the plaintiff's burden of proof is difficult to meet.

This Note will argue that it is worth examining an alternative compensation scheme, such as the system currently used in New Zealand.

A. The New Zealand System

Under the New Zealand Accident Compensation System, those who suffer injuries or death caused by accidents can receive compensation without a showing of fault. They receive compensation from a national compensation fund but are prohibited from bringing personal injury or death actions.

The national compensation fund for employee injuries and deaths is maintained by levies upon employers and the self-employed. The compensation fund for car accident injuries and deaths is levied from car owners. Government resources cover injuries suffered by non-earners or by people who are not involved in car accidents.

Workers' compensation is provided under Sections 52 to 71 of the Accident Compensation Act, which generously allows compensation for lost earnings until retirement age. Medical expenses exceeding social security coverage are covered by the compensation system, which also covers dental treatment and other damages.

197. This is because compensation would be determined in part by lost wages, so a person who had earned high wages prior to an accident would recover more than a lower paid individual. See Sugarman, supra note 144, at 594.


201. Id. §§ 72-77.

202. Id. § 27. Under section 27, "[w]here any person suffers personal injury by accident in New Zealand . . . no proceedings for damages arising . . . out of the injury . . . shall be brought in any court." Id.

203. Id. §§ 38-46.

204. Id. §§ 47-48.

205. Id. § 66.

206. Id. § 75 (1)(b).

207. Id. § 76.

208. Id. § 77.
non-economic losses include loss of bodily function\textsuperscript{209} and pain and suffering.\textsuperscript{210} The system also provides rehabilitation\textsuperscript{211} and personal attendants.\textsuperscript{212}

The Accident Compensation Corporation, a governmental entity, administers the Accident Compensation Act.\textsuperscript{213} When a claim for compensation is denied, the claimant has a right to appeal the decision and to obtain judicial review.\textsuperscript{214}

B. The New Zealand System is Better than the Current Japanese Law

The New Zealand system is preferable to the current Japanese law because under the Japanese system some injured persons do not receive sufficient compensation. While Japan does currently have many compensation systems, like workers' compensation\textsuperscript{215} and strict liability for defects in fixed structures on land,\textsuperscript{216} and special statutes for certain accidents, such as the Automobile Accident Indemnification Guarantee Act,\textsuperscript{217} Consumer Products Safety Act,\textsuperscript{218} and Drug Side Effects Injuries Relief Fund Act,\textsuperscript{219} some injured persons are not compensated by this patchwork of special statutes. For example, assume that a consumer is injured because of a defective electric appliance which has a "S.G." (Safety Good) mark. Under the Consumer Products Safety Act, a S.G. mark is given to those products that passed the safety standards prepared by the Association for Product Safety.\textsuperscript{220} Injuries caused by products bearing the S.G. mark will be compensated by the Association, but this is done only when the Association determines that "the manufacturer is 'legally liable' for compensation."\textsuperscript{221} Thus, this system is not a valuable alternative to litigation.\textsuperscript{222} Moreover, only about seventy-six products bear the S.G. mark.\textsuperscript{223} Thus, some injured consumers must

\textsuperscript{209} Id. § 78.
\textsuperscript{210} Id. § 79.
\textsuperscript{211} Id. §§ 36, 37.
\textsuperscript{212} Id. §§ 80(2)(b), (3).
\textsuperscript{213} Id. §§ 4-10.
\textsuperscript{214} Palmer, supra note 198, at 400-02.
\textsuperscript{215} See generally Kitagawa, supra note 18, § 4.07[2] (explaining Japanese workers' compensation); Cohen & Martin, supra note 5, at 335-36.
\textsuperscript{217} Law No. 97, 1955. For the contents of the Act, see Kitagawa, supra note 18, § 4.07[4].
\textsuperscript{218} Law No. 31, 1973. For the contents of the act, see Kitagawa, supra note 18, § 4.08[1]-[2].
\textsuperscript{219} Law No. 55, 1979. For the contents of the act, see Kitagawa, supra note 18, § 4.08[1], [3]; Cohen & Martin, supra note 5, at 336-37.
\textsuperscript{220} Kitagawa, supra note 18, § 4.08[2]. See also Kamiyama, supra note 103, at 27.
\textsuperscript{221} Kitagawa, supra note 18, § 4.08[2]; Cohen & Martin, supra note 5, at 336.
\textsuperscript{222} Kitagawa, supra note 18, § 4.08[2]. For the criticism against S.G. mark, see also Kamiyama, supra note 57, at 27.
\textsuperscript{223} Kitagawa, supra note 18, § 4.08[2].
rely on conventional negligence tort/litigation system under Article 709 of the Civil Code.

Under the New Zealand system, however, all persons injured can be compensated, except people injured through illness.\textsuperscript{224} Thus, the New Zealand system is better than the current system of negligence lawsuits and the limited patch-work special statutes. Of course, the fact that the New Zealand system does not cover illness is problematic. Nonetheless, the New Zealand system more effectively compensates victims than the current Japanese laws.

C. The New Zealand System Is Suitable for Japanese Goals & Society

Although abolition of tort law and the right to sue would contravene an American's traditional sense of fairness,\textsuperscript{225} the Japanese would react differently.

Japanese people do not regard highly the right to sue.\textsuperscript{226} On the contrary, they try to avoid lawsuits as much as possible.\textsuperscript{227} They strongly dislike litigation and overwhelmingly favor alternative dispute resolution methods such as chōutei (extra-judicial dispute resolution) or private or official negotiations among parties.\textsuperscript{228}

In addition, the transaction cost is lower under the New Zealand system because litigation is not used. Moreover, the New Zealand system does not have the anti-competitive drawbacks of the strict liability system.

However, the New Zealand system may not achieve deterrence because it provides no incentive to cease the distribution of defective products.\textsuperscript{229} As a solution to this problem, Professor Henderson has

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\textsuperscript{224} The New Zealand compensation system does not cover illness not caused by accident. Palmer, supra note 198, at 249-70.

\textsuperscript{225} Professor Henderson is concerned about the abolition of the right to sue in tort in the United States though he admitted the lack of fairness in the current American tort system. Henderson, supra note 198, at 797-98. He states: [Though the tort system is not perfect,] the tort system creates the appearance, at least, of trying to reach individualized results that are fair to all concerned . . . . Moving from a properly functioning common law tort system to a system like that in New Zealand might cause many citizens to feel that traditional commitments to fairness had been compromised or even abandoned . . . . Although more victims of misfortune would be receiving benefits under the new regime, I would not be surprised to discover a general feeling in the community that fairness to the individual had been sacrificed in the name of the greatest good for the greatest number.

Id. at 797-98.

\textsuperscript{226} Nihon Bunka Kaigi Hen, supra note 194, at 103-06.

\textsuperscript{227} Id.

\textsuperscript{228} A poll regarding the legal consciousness of the Japanese conducted in 1976 showed that 84% favored “chōutei” or other private or official negotiations rather than litigation. Id.

\textsuperscript{229} Of course this lack of deterrence can be substituted by other methods such as safety regulation or gyōsei-shidō [administrative guidance]. For an explanation of gyōsei-shidō, see Ottley & Ottley, supra note 11, at 39 n.56.

As to the deterrent effect of torts litigation, it seems that the Japanese legal system has not played such an important role as the American one because the Japanese
proposed a system that requires manufacturers to contribute to the compensation fund in proportion to the risk created by those manufacturers.\textsuperscript{230} He states:

If the amount contributed to is appropriate, the proper balance between safe and risky activities will be achieved. The tort system consciously aims at attaching the appropriate price tags on risky conduct, but there is no reason in theory why a system providing universal compensation could not do the same thing.\textsuperscript{231}

To solve the deterrence problem under a New Zealand-type system, Japan should also consider imposing fines on manufacturers who distribute defective products and cause injuries. These fines may be allocated to the accident compensation fund. The government agency decision to impose fines must be based on evidence of fault and causation, and such evidence must be proved so that drawbacks (such as discouragement of innovation) would not occur.

In addition, it might be better to lessen the degree of proof required under the current Japanese law. In the area of manufacturing defects, the element of negligence might better be replaced by the concept of defects because: (1) the standard for determining defects can be more easily applied in manufacturing cases than in design defect and failure to warn cases,\textsuperscript{232} and (2) sometimes the proof of negligence beyond a reasonable doubt\textsuperscript{233} is very difficult to determine, even by those specialized agencies. In cases where negligence could not be proved, the result would be that the companies would not be required to contribute to the fund and, hence, would have no incentive to increase safety. In other words, the goal is to balance the necessities of giving incentives to manufacturing companies to invest more on product safety and incentive to continue manufacturing useful goods at reasonable prices.

It may be argued that risk allocation through fines might be costly, thereby taking away the advantages of low transaction costs under the New Zealand system. Nevertheless, the cost under the New Zealand regime would be lower than under the strict liability regime proposed by the Japanese drafts. Under the New Zealand system, a specialized government agency can professionally determine the defects, causation, etc., more efficiently than courts. Because courts are not specialized, they need to be educated\textsuperscript{234} in the facts of each case. Under the New Zealand system, specialized agencies deal with specific areas and do not...
need to be reeducated for each case. Thus, the cost of determining fines under the New Zealand system is lower than it would be under the strict liability litigation system.

In addition, Japanese people favor decisions made by okami (administrative agencies) over decisions obtained by individual lawsuits. This is partially because traditionally the government, without relying on lawsuits brought by private persons, has exclusive control of remedies to protect public health and welfare in the civil law countries. Also, the Japanese respect governmental decisions, motivated by public interest, more than the private-interest-oriented litigation decisions.

Conclusion
Current Japanese tort law is insufficient to meet injured plaintiffs' needs in product liability suits. The proposed drafts of strict liability would compensate the injured better than current law. Nonetheless, the drafts have many drawbacks. Even though discussion regarding the drafts seems limited to an "all-or-nothing" choice between adopting the drafts or retaining the status quo, Japan should consider a third option resembling the New Zealand system.

Of course there are some criticisms against the New Zealand system. For example, some argue that without tort law manufacturers will not be deterred from producing defective products. This drawback, however, may be remedied by strengthening the power of government agencies, which traditionally have had strong power in Japan.

Although "gyousei-shidou" or administrative guidance is achieved neither by ruling nor by adjudication but by "suggestion," all private

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235. In the United States private actions by persons actually injured often complement government sanctions . . . . Many statutes in the United States encourage private individuals to police matters by permitting large damage awards if a violation is found. The civil law, however, views intervention in areas that require protection of the public as the exclusive function of the government. In Japan this attitude is illustrated by the antimonopoly law which, although modeled on the United States antitrust law, contains no provisions for treble damages and by regulatory statutes such as the Act for the Prevention of Air Pollution . . . . The principal method used by these laws to deal with unsafe products is to grant the government the power to stop all sales of a product which is alleged to be unsafe until the manufacturer can prove that it is safe . . . . [T]he generally widespread use of exclusive governmental remedies . . . affects public attitudes in all areas of the law.

Ottley & Ottley, supra note 11, at 40-41 (emphasis added) (footnote omitted).

236. See generally, NIHON BUNKA KAIGI HEN, supra note 194, at 103-06, 112-14. The following excerpt shows that the Japanese like to solve disputes by relying on their superiors rather than by relying on individual rights gained under lawsuits. Exceptionally, the victim may seek reparation from the author of his loss, but even in this case he does not want to go to court. He resorts rather to the authority of some person such as a notable in the community or a police officer who has influence over the person who has injured him.

NODA, supra note 17, at 182 (emphasis added).

237. Ottley & Ottley, supra note 11, at 39 n.56, 40.

238. Id. at 39 n.56. See also Cohen & Martin, supra note 5, at 319 n.18 (explaining briefly "administrative guidance").
industries follow such suggestions.\textsuperscript{239} In addition, Japanese people favor this government-led method over private-interest-motivated litigation. Thus, safety control of manufactured goods can be achieved through administrative guidance.

There may be other criticisms of the New Zealand system. Nonetheless, it is worth considering or starting to analyze the use of this idea, even if a complete adoption of the system might be inappropriate for Japan.

In fact, the Ministry of International Trade and Industry (MITI) is reportedly\textsuperscript{240} considering the use of a compensation fund instead of product liability law. It is not clear whether MITI’s plan is similar to the New Zealand system, which would abolish tort lawsuits. Although it may take some time before the drafts or other options become effective, Japan must not forget that strict liability law as proposed by the drafts has many drawbacks and that there is a possible alternative, the New Zealand system, which may be more suitable to the Japanese culture and people.

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\textsuperscript{239} See Ottley & Ottley, \textit{supra} note 11, at 39 n.56, 40. Professor Tanaka states: “The fact that administrative guidance . . . can work fairly effectively may well be founded upon the Japanese reluctance to insist upon their legal rights.” Tanaka, \textit{supra} note 168, at 311.

\textsuperscript{240} \textit{NIKKEI} 12/22/90, \textit{supra} note 1. The newspaper states: [MITI], though studying the possibility of a product liability law, appears to have strong reservations . . . “A law is not urgently needed.”, said Ozasa [MITI’s Consumer Protection Division]. “What we’re considering instead is setting up some kind of a system outside of a product liability law to compensate consumers for the loss caused by defective goods.” He cited the possibility of establishing some kind of compensation fund.

\textit{Id.}

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