JAPAN'S 1995 PRODUCT LIABILITY LAW: WILL THE ADOPTION OF STRICT LIABILITY ALTER THE FUTURE OF LITIGATION IN JAPAN?*

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I. Introduction

After 20 years of debate and delay, the Japanese government in mid-1994 enacted Japan's first statute ever specifically addressing product liability law.[1] Under the law, which became effective July 1, 1995, strict liability, or liability without fault, is imposed upon manufacturers and importers of defective products. However, while on paper the statute represents a departure from Japanese law's traditional favoritism of industrial interest over consumer concerns, in reality there will likely be little change in the frequency or success of product liability suits in Japan.

The new product liability law was adopted as the result of pressure and mounting criticism from both inside and outside Japan.[2] Its stated goal is "to contribute to the stabilization and improvement of the people's life and to the sound development of the national economy."[3] In fact, the enactment of the law resulted more from pragmatic concerns than from abstract philosophical principles. Inside Japan, consumers had become increasingly aware of lawsuits in which Japanese manufacturers had paid large product liability judgments to foreign consumers. Outside Japan, the adoption in 1985 by the European Economic Community ("EC") of a directive aimed at imposing strict product liability throughout the EC underscored the widening gap between product liability standards in Japan and those in other highly industrialized nations.[4] At the same time, Japanese manufacturers, fearful of unleashing an American-style litigation avalanche, vigorously opposed adoption of the law.[5] These forces shaped the debate and compromise that culminated in the enactment of the new product liability law.

II. Background: Recovery for Injuries from Defective Products Under the Former Japanese System

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As a civil law country, Japan relies for the adoption of new legal standards and concepts initially upon statutes drafted by the bureaucracy and enacted by the legislature. When the language of a particular statute does not itself provide a resolution of a dispute which has arisen, the express statutory provisions are supplemented by court decisions. New legal questions are answered by reference to earlier court decisions interpreting the relevant statute,[6] thus giving courts significant power in the Japanese system of codified law.[7] Many statutes, including tort law as codified in the Japanese Civil Code, are intentionally phrased in generalities to permit subsequent development and refinement through court decisions. The 1995 product liability law contains only six articles and, in its English translation, is less than two pages long.

Before the product liability law took effect, claims based on the sale of defective products could be pursued only by contract or traditional, fault-based tort law. Contract law claims alleging product defects are governed by article 415 (Liability for Incomplete Performance of Obligation) and article 570 (Warranty of Latent Defect) of the Japan Civil Code and may be pursued only against the seller of a product. Manufacturers are protected from such claims because of the strict requirement of privity between plaintiff and defendant.[8] Ordinary and special damages, including economic loss, may be recoverable under contract claims.[9] Such claims are subject to the Civil Code's ten-year limitation period for claims arising out of commercial transactions,[10] and to a twenty-year statute of repose.[11]

Tort law claims, on the other hand, traditionally had to be brought under article 709 of the Civil Code, which provides that "[a] person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom."[12] In order to recover under that article, a plaintiff must establish that the product was defective as a result of the defendant's conduct, and that plaintiff suffered an injury caused by the defect in the product. In addition, a plaintiff must prove that the defendant's conduct causing the plaintiff's injury was intentional or violated the expected standard of care.[13] Under the Civil Code, tortfeasors are required to "make compensation [for intentionally or negligently caused injuries] even in respect of a non-pecuniary damage."[14] and plaintiffs may be awarded compensation for loss of profit or income, medical and funeral expenses, loss of time and earning capacity, damage to property and pain and suffering.[15] Attorneys' fees also may be recovered.[16] The statute of limitations is three years from the time the injured party had notice of the damage and the identity of the person who caused it.[17] The statute of repose is twenty years.[18] Under both tort and contract law, the plaintiff has the dual burden of proving the manufacturer's fault and that the manufacturer had reason to know of a possible problem and was negligent in failing to correct it.

Just months before the 1995 product liability law was passed, a verdict in a product liability case that shocked companies doing business in Japan was rendered by the Osaka District Court. The case arose out of the sale of a television and its use in the plaintiff's office building. The television caused a fire, destroying a significant portion of the office.[19] Under the Civil Code, the plaintiff had the burden of proof as to the manufacturer's negligence and the causal relationship between the defect and the damage to the plaintiff's property. Nevertheless, once the plaintiff proved the existence of a defect in the television, the court held that because a defect

existed, "the negligence of the manufacturer can be presumed."[20] The court awarded the plaintiff ¥4,420,000 (approximately $44,200), and the defendant decided not to appeal this decision.[21] Some commentators have opined that this case foreshadowed a more general easing of plaintiffs' burden of proof in product liability cases under the Civil Code, and that this development ultimately may prove to be more important to expansion of liability for defective products than the 1995 product liability law.[22]

III. The 1995 Product Liability Law

The fundamental concept underlying the 1995 product liability law, and its greatest departure from the contract and tort law provisions of the Civil Code, is the adoption of a product defect-based liability principle rather than a fault-based liability principle. A plaintiff alleging a claim under the new statute must prove that: (1) the product is covered under the law; (2) the defect was present at the time the product was delivered; (3) there was injury or damage; and (4) there was a causal relationship between the damage and the defect.[23] Not surprisingly in light of the fact that a desire for conformity with emerging international notions of product liability was one of the prime motivations for the its enactment, the new Japanese law is modeled to a large extent on the EC directive on strict liability, which likewise adopted a system of liability without fault.

A. Products Covered Under the 1995 Product Liability Law

The new Japanese law employs a facially broad definition to the term "product." A product is "movable property manufactured or processed" that was delivered after the law's effective date.[24] Movables are defined as "all corporeal things, other than land and things firmly affixed to land."[25] Fixtures that were movable at the time they entered the stream of commerce, such as bricks or lumber, are included in the definition of movables;[26] and items are considered to have been processed if they have been, for example, heated, ground, squeezed or had flavor added to them.[27] While these definitions answer some broad questions about the scope of items subject to the law, they clearly allow significant room for interpretation as they might apply to specific types of products. For the present, the meaning of "defect" under the law must to a large extent be gleaned from debates and discussions prior to and during the passage of the new product liability law, and from the government' s official guide to it.[28]

In a guide to the new law, Japan's Ministry of International Trade and Industry ("MITI") offered examples of the types of items that are not covered by the law: unprocessed or unfinished goods, livestock, services, information, software application programs, electricity and immovables products, such as real property.[29] Further, agricultural, forestry, marine and mineral products that are not artificially processed are not covered by the product liability law. The term "processed" does not include cutting, freezing, refrigerating and drying.[30]
Two products which were a considerable cause of debate were housing and blood. In the end, housing was excluded from the product liability law.[31] This is consistent with the EC product liability directive, but contrary the current law of most American jurisdictions. In deciding to

exclude housing from coverage under the law, the Diet cited "the accumulation of precedents" in favor of this approach.[32]

The opposite outcome prevailed with respect to blood and related products. All forms of blood used for medical purposes, including plasma, plasma derivatives and live vaccines, are considered products under the new product liability law.[33] The rationale for inclusion was that blood products and vaccines have been subject to processing, such as through the adding of preservatives and anticoagulants.[34] This result, too, is consistent with the EC directive but not current United States law.[35] Although a few such products were expressly considered in connection with the adoption of the new law, however, in the vast majority of cases the question of whether a particular product will be covered will be for the courts to determine "considering the relevant circumstance and how such product is commonly viewed."[36]

B. Definition of "Defect" Under the New Law

Unlike the tort provisions of the Civil Code, which required that a plaintiff prove defendant's fault, the central showing required of a plaintiff under the new product liability law is that there was a defect in the product. The law defines a defect as a "lack of safety that the product ordinarily should provide, taking into account the nature of the product," its "ordinarily foreseeable manner of use," the time of delivery by the manufacturer and "other circumstances concerning the product."[37]

The MITI guide to the new law expands upon the meaning of this provision. According to MITI, the "nature of the product" implicates such considerations as the product's effectiveness and usefulness, the safety standards of comparably priced products, probability and severity of accident from the product, and its ordinary life span.[38] The product's "ordinarily foreseeable manner of use" includes reasonably foreseeable uses of the product and the possibility that the user may prevent or avoid the damage.[39] The assessment of defectiveness as of the time the manufacturer delivered the product makes relevant the safety level required in society, previous safety regulation and alternative design capabilities as of the time the product was delivered.[40] Courts will be required to refine the definition of "defect" using the criteria specified in the statute and weighing them in the contexts of specific lawsuits,[41] as well as other matters such as how inherently unsafe products will be treated under the new law.[42]

Another potentially difficult burden which plaintiffs will bear under the new law is proving causation between the defect and the damage it caused. To the disappointment of Japanese consumer groups, the drafters of the product liability law declined to incorporate a presumption that a product is defective if it caused injury while being used in a reasonably foreseeable manner.[43] This lack of presumption, along with strict limitations upon available pretrial discovery, makes the plaintiff's burden of proof more formidable in Japan than in the United States.[44]

One issue virtually ignored in the 1995 law is whether a product may be considered defective due to the absence or inadequacy of warnings accompanying it. While the law contemplates the

relevance of the foreseeable uses of a product in assessing whether it is defective, it does not expressly require that manufacturers warn consumers of dangers or risks associated with such foreseeable uses. MITI's guide suggests that the "nature of the product," another factor to be considered in assessing defect, encompasses instructions and warnings regarding the use of the product;[45] and the adoption of the law already has prompted some manufacturers to augment and clarify existing warnings.[46] In the longer term, however, it will be for Japanese courts to decide whether, and to what extent, presale, or even postsale, duties to provide warnings regarding their products will be imposed upon manufacturers. These concepts already are well-established in the United States.

C. Definition of "Manufacturer" Under the New Law

In comparison to the Civil Code, the new product liability law expands the number of classes of persons who may be held liable for injuries caused by defective products.[47] A "manufacturer" as defined in the new law includes "any person who manufactured, processed or imported the product as [a] business," any person holding himself out as the manufacturer of a product "by putting his name, trade name, trade mark or other feature . . . on the product," and any person who "may be recognized as its manufacturer-in-fact" when taking into account manufacturing, processing, importing, sales and other circumstances.[48] In comparison, however, to the prevailing law in the United States, which imposes strict liability upon every entity in the chain of distribution of a defective product, the Japanese definition is slightly less inclusive.

IV. Manufacturers' Defenses and Limitations on Liability

Under the new Japanese product liability law, defendants may avoid liability, regardless of fault, through a number of statutory defenses and limitations upon liability. The available defenses closely resemble ideas that are already well-embedded in the product liability law of the United States and the EC.

As an initial matter, a manufacturer is liable only for personal injury or death, or for damage to property.[49] If the only damage is to the defective product itself, the manufacturer is not liable under the product liability law.[50] This concept is similar to the so-called "economic loss" doctrine, which precludes recovery in tort for injury to the product itself, or economic loss, in most American jurisdictions. The provision also has an analog in the EC directive, which likewise does not permit recovery where the only damage is to the product itself[51].

The new Japanese law contains statutes of limitations and repose applicable to product liability claims.[52] The limitations provision bars claims not filed within three years after the plaintiff becomes aware of the damage or injury and of the person liable for the damage.[53] The ten-year repose statute begins to run from the time the manufacturer delivers the product.[54] If, however, the damage or injury results from substances which cause deleterious health effects when they remain or accumulate in the body, or when symptoms of the damage appear after a latent period, the ten-year repose period does not commence until the injury is manifested.[55] Even if the consumer's claim is barred by the new product liability law's statute of limitations, a claim under

the Japanese Civil Code may be available if the limitations period applicable to that claim has not yet expired.[56]

Another defense which may be available to manufacturers under the product liability law is the so-called "development risk" defense. Under the law, a manufacturer is exempted from liability if it proves that at the time of the delivery of the product the existence of the defect in the product was not discoverable under the existing "state of scientific or technical knowledge."[57] As used in the law, "scientific or technical knowledge" refers to the total knowledge objectively held by society and not by the individual manufacturer.[58] This concept closely resembles what has been called the "state of the art" defense, which generally applies to negligence but not strict liability cases in the United States. The law also provides a "passive component" defense. That defense shields from liability a manufacturer of a component if the manufacturer can prove that a defect in the component was "substantially attributable to compliance" with the design or instructions of the manufacturer of the primary product into which the component is incorporated and that the component manufacturer itself was not negligent.[59] The EC strict liability directive affords a similar "passive" or "flawless component" defense.[60]

Negligence of the plaintiff in causing his or her injury also may reduce the amount of any recovery. In Japan, as in most United States jurisdictions, a plaintiff's fault does not automatically preclude recovery. However, Japanese law employs a comparative fault concept, enabling the court to allocate the relative fault of the parties and to consider it in awarding damages.[61] Lastly, Japanese law generally does not recognize the "collateral source rule" applied in the United States. Thus, any amount received through social programs or workers' compensation must be offset against plaintiff's recovery.[62]

V. Recovery of Damages in Product Liability Cases

The 1995 product liability law provides that manufacturers of defective products "shall be liable for [all] damages caused by the injury."[63] The law does not elaborate upon the types of damages recoverable, and thus the prior Civil Code provisions regarding damages govern.[64] As discussed above, the Civil Code provides for compensation of consumer and business losses.[65] Manufacturers are jointly and severally liable for all damages, including pain and suffering and loss of support and loss of consortium.[66] However, damages awarded for pain and suffering are generally in the range of ¥ 500,000 to ¥2,000,000 (or approximately $5,000 to $200,000); and Japanese courts steadfastly have resisted plaintiffs' attempts to increase these amounts.[67] Moreover, consistent with its civil law tradition, Japanese society regards compensation, rather than punishment, as the aim of the law.[68] Thus, punitive or exemplary damages are unavailable to Japanese plaintiffs.[69]

VI. Impact of the Product Liability Law

Commentators who have predicted that there would be no product liability lawsuit explosion as a result of the new product liability law[70] have been correct thus far, although the law is barely a

year old and its long-term impact is impossible to gauge precisely. To date the most conspicuous result of the new law has been a dramatic increase in the demand for product liability insurance.[71] Insurance companies reported leaps in the number of businesses purchasing product liability insurance in the months preceding the effective date of the law.[72] Larger manufacturers, which until recently insured only their more popular products, are expanding their insurance coverage across their product lines. Insurers also have begun to provide to small and mid-size businesses affordable insurance coverage, which often was unavailable to them prior to the passage of this new law.[73]

Manufacturers and importers also have begun to take measures to limit product liability exposure.[74] Some have begun to more forthrightly advise consumers as to risks associated with the use of their products. Others have redesigned their products, or even gone so far as to discontinue production of high-liability risk items.[75] In general, manufacturers appear to have begun to look more closely at the safety of their products. One large manufacturing concern, for example, has instituted a policy to "double check and triple check" product safety as a result of the new law.[76]

With the urging of MITI, industries have begun to establish their own product liability centers to address consumer complaints and to mediate and arbitrate claims as an alternative to litigating them in court.[77] These centers have the authority to settle claims under the new law.[78] Any party dissatisfied with the results of mediation may have the matter arbitrated before a three-member panel consisting of a consumer specialist, a legal expert and an engineer. Any party dissatisfied with the result of an arbitration can commence a lawsuit.[79]

VII. The Future of Product Liability Litigation in Japan

The 1995 Japanese strict product liability law was adopted in an atmosphere of high anxiety and anticipation. Its short term effects have primarily been manifested not in a rise in the number of lawsuits filed, but rather in preemptive measures by manufacturers and an increase in the number of consumer inquires to the manufacturers.[80] The overwhelming majority of disputes that have arisen thus far have been resolved out of court. In fact, the first lawsuit under the new law was not filed until nearly six months after the law's effective date.[81]

A number of societal and legal factors lend credence to the notion that the absence of a precipitous increase in the filing of product liability lawsuits since the 1995 law came into effect reflects more than a temporary hesitancy on the part of potential plaintiffs. The Japanese legal system imposes significant institutional constraints upon an American-style product liability litigation explosion.

First and foremost, there is very little societal experience with product liability litigation in Japan. Only about 140 such claims have been filed and concluded since 1948.[82] In comparison, tens of thousands of new product liability suits are filed in United States courts each year. The small number of claims filed has generally been attributed to the Japanese avoidance of disputes and confrontations, and these cultural proclivities certainly have played a role in limiting the

number of product liability lawsuits. However, there are a additional factors that help more fully to explain these startling numerical comparisons.

A rigorous licensing process severely restricts the number of practicing attorneys.[83] Only about three percent of the bar examinees pass each year.[84] Although the number has begun to expand in recent years,[85] as of late 1995, there were only 15,517 attorneys among Japan's population of 125 million. By contrast, the United States population of approximately 250 million included approximately 926,000 attorneys.[86] The relative scarcity of lawyers creates a market situation in which legal representation is both scarce and expensive.

In addition, potential Japanese plaintiffs must pay a retainer and a fee upon success of the claim. While contingent fee arrangements are not prohibited in Japan, even cases undertaken pursuant to such arrangements generally involve a sizable retainer.[87] The requirement that a plaintiff pay a sizable retainer prior to initiating a suit makes litigation virtually unaffordable for many claimants. It also forces plaintiffs to share the significant economic risks of litigation with their counsel.[88] In addition to high attorney fees, litigants also must pay court costs substantially higher than those in the United States.[89]

The characteristics of Japanese litigation itself also impose certain disincentives to the filing of product liability lawsuits. All cases, including product liability claims, are tried before a judge,[90] and the court initiates, directs and conducts the taking of evidence. Japanese procedure provides no effective means by which plaintiffs may take pretrial discovery in furtherance of building their cases.[91] Devices, such as written interrogatories and requests for admission widely used in the United States for pretrial discovery, are not available to Japanese litigants.[92] Other discovery methods, such as depositions and requests for production of documents, may be used only in limited circumstances. Trials are extremely time consuming.[93] Proceedings are often delayed due to a shortage of judges, and there are frequently intervals of weeks or months between hearing dates, ostensibly to encourage settlement.[94] The average length of a civil trial in recent years has been approximately a year, and the appellate process also can be protracted.[95]

At the end of the lengthy litigation process, the prospects for significant recovery is not nearly so great as in the United States. Juries, often perceived to be more inclined than judges to favor consumers in litigation against manufacturers and commonly used to hear such cases in the United States, are unknown to the Japanese legal system.[96] Moreover, as noted above, recoveries awarded by Japanese courts generally are substantially lower than those in the United States. The absence of punitive damages exerts additional downward pressure on the amounts likely to be recovered by Japanese plaintiffs, and means that potential plaintiffs have a correspondingly lesser incentive to file suit than do their American counterparts.[97]

Far more likely than a significant increase in the volume of product liability litigation in Japan is a continued increase in the utilization of alternative dispute resolution forums, such as the product liability centers, to address consumer complaints or injuries. This is so for a number of

reasons. First, alternative dispute resolution already was well-entrenched in the Japanese legal systems prior to the adoption of the 1995 product liability law, and well-developed methods of alternative dispute resolution are available to assist both claimants and defendants in resolving disputes privately and avoiding litigation in the courts.[98] Second, the cost of arbitrating or mediating the claim is much lower for the consumer. The cost to arbitrate a claim exceeding ¥1,000,000 ($10,000) is ¥10,000 ($100).[99] Third, the product liability centers perform much of the preliminary investigative work relating to a claim essentially for free. Fourth, resolution of disputes in these forums offers Japanese consumers the option of avoiding the courtroom while still holding out the prospect of recovery for their injuries[100] Thus, while alternative dispute resolution is completely voluntary, and largely funded by the manufacturers and industry groups, many would-be plaintiffs are likely to view it as their only realistic option due to the expense and time required to litigate a claim. Alternative dispute resolution may be significantly less appealing to foreign manufacturers and importers, however. Very few foreign mediators or arbitrators are available, and foreign manufacturers and importers are more likely to be familiar with and less anxious about formal litigation.

Ultimately, it seems likely that, as has been the experience to date under the EC's strict product liability directive, historical and societal influences will shape the impact of Japan's new product liability law. While the new law in theory provides injured consumers with significant new advantages in pursuing claims against manufacturers, the law will be implemented and applied by a legal system which historically disfavored claimants, and which continues to present substantial practical and procedural roadblocks to recovery. While the number of product liability suits almost certainly will increase to some extent, there is virtually no likelihood that Japan will witness the type of increase in product liability litigation witnessed in the United States following the widespread adoption of strict liability. As has already occurred, the new law almost certainly will continue to motivate manufacturers to focus more keenly upon safety issues associated with their products.

ENDNOTES