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Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?#

Luke Nottage* & Yoshitaka Wada**

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* This is a revised version of our paper presented at the Annual Meeting of the Law & Society Association held at Snowmass Village at Aspen, Colorado, June 4-7, 1998 (available at Luke Nottage's website at <http://www.law.kyushu-u.ac.jp/~luke/pladrfinal.html>), and which formed the basis for Luke Nottage's comments at the workshop on "Adaptation of Legal Cultures [Changing Legal Cultures III]" held at the International Institute for the Sociology of Law, Oñati, June 25-27, 1998. A slightly shorter version was published in 6 ZJAPANR 49 (1998).

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Naturally we are strictly liable for any remaining defects in this work. The manuscript was submitted in late June, and some revisions completed in September 1998. As we hope to continue researching and publishing in this area, both in English and Japanese, however, we particularly welcome further comments (to luke@law.kyushu-u.ac.jp) or wyo-lw1@mbox.nc.kyushu-u.ac.jp).

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D. An Interim Appraisal
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I. Introduction

Boy Dies Suffocating on "Konnyaku Jelly", Settlement for 50,000,000 Yen: Manufacturer Admits Product Liability (Asahi Shimbun, November 4, 1997).

Long-term Smoking Caused My Cancer: Seven Patients Sue the Government and Japan Tobacco Corporation - Each Seeking 10,000,000 Yen (Asahi Shimbun, May 16, 1998).

These newspaper headlines symbolise the ongoing importance of product liability ("PL") law and dispute resolution in Japan today.

The first records just one example of a major and well publicised out of court settlement.¹ *Konnyaku* is a common viscous root vegetable in Japan, which food processing companies began turning into bite-sized jelly-type sweets, only to discover their distressing tendency to get caught in the throats of small children. Following claims by victims or their families and considerable media publicity, the number of manufacturers has dropped from around 200 to around 50 firms over the last three years.² Manufacturers have developed "softer" jelly and placed warnings on the outer packet which the sweets are retailed in, but they now sell very cheaply in Japanese supermarkets. More manufacturers may go out of business, or simply stop manufacturing these sweets altogether. In the product liability debate in the United States and elsewhere, similar instances of the potential impact of product liability rules on product innovation and product safety have been bemoaned by industry,³ and welcomed by consumer advocates.⁴ Japan in the 1990s is not insulated from such questions.

Rather, developments overseas are increasingly important. News travels

¹ For a full account by the parents' lawyer, see Taishi Sato, *Konnyaku Zeri Shibo Jiken Hokoku* [Report on the Konnyaku Jelly Fatality Case], 26 PLHO-HODOKOKAI NYUSU 2 (1997).

² Asahi Shimbun, September 13, 1997.

³ See, e.g., PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 153-164 (1988); cf. THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter Huber & Robert Litan, eds., 1991). See also the examples listed in Anita Bernstein, *How Can a Product Be Liable?*, 25 DUKE L.J. 1, at 47-48 (1995), and Victor Schwartz & Mark Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support its Enactment Now*, 64 TENN. L. REV. 595, at 596-597 (1997).

⁴ RALPH NADER ET AL., NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE (1997).

fast in today's world. The second newspaper headline follows in the wake of a media campaign led by a citizens' group to attract plaintiffs for PL litigation against the government and tobacco companies.⁵ This campaign was initiated shortly after an article appeared in Japan's leading commercially published law journal,⁶ reporting on the major tobacco litigation settlements in the United States. As a result of the latter, tobacco companies are finding themselves under increasing pressure in many other countries; but the problem is potentially particularly acute in Japan, where government regulation has been comparatively lax.⁷ In the suit brought on 15 May 1998, the plaintiffs have made it clear that while they are keen to obtain compensation for harm to their health from smoking, they want to bring about a major change in the government's policies with respect to tobacco and to preserve younger generations from similar harm. Already, there have been calls for the government to at least require much stricter health warnings on cigarette packs. In April this year, the tobacco industry finally agreed to completely stop advertising on television and radio, having agreed last year to stop sales from vending machines late at night.⁸ Again, there are interesting parallels with "public interest" tobacco litigation in the United States.⁹

In this article, we first locate such striking developments in the context of emerging empirical support for the proposition that PL is playing an increasingly important — if not necessarily revolutionary — role in Japan today. This leads us to ask why earlier commentators appear to have seriously underestimated the significance of the enactment of new product liability legislation in Japan. This seems to result from inappropriate comparisons of substantive law, but

⁵ ASAHI SHIMBUN, October 18, 1998.

⁶ Koichiro Fujikura, *Amerika ni okeru Tabako Sosho no Tenkai to Zenmen Wakai* [Developments in U.S. Tobacco Litigation and Comprehensive Settlements], 1118 JURISTO 60 (1997).

⁷ Mark Levin, *Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan*, 8 STAN. L. & POLY. J. 99 (1997).

⁸ Editorial, ASAHI SHIMBUN, May 16, 1998; see also YOMIURI SHIMBUN, May 17, 1998.

⁹ See, e.g., Robert Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992). There are also interesting contrasts, of course, such as the scale, timing, and results of litigation in the U.S., determined in part by a different legal profession. Cf., e.g., Marc Galanter, *Sometimes the Dragon Wins! The Tobacco Settlement and the Legal Profession*, in PROCEEDINGS OF THE CONFERENCE ON THE SO-CALLED GLOBAL TOBACCO SETTLEMENT: ITS IMPLICATIONS FOR PUBLIC HEALTH AND PUBLIC POLICY, held at the University of Wisconsin-Madison Law School, October 15-17 1997 (Institute for Legal Studies, ed., 2nd reprint March 1998). An international conference on tobacco litigation took place at Kyoto University Law Faculty on November 14, 1998; enquiries can be directed to Prof. Takao Tanase (<g53516@sakura.kudpc.kyoto-u.ac.jp>).

especially from strong pre-conceived views as to the lack to consumer consciousness and indeed legal consciousness in Japan even in the late 1990s (Part I.A). These pre-conceptions also appear to underpin broad-brush criticism of industry-association (product-specific) PL ADR Centers which have been established in the wake of the enactment of the new legislation. A closer analysis of their establishment, in the context of broader changes in Japan over the last two decades, suggests that they are certainly more than just bureaucracy-driven attempts to divert consumers into opaque forums to prevent them from asserting their rights to resolve product accident problems, “bureaucratic informalism”, nor mere “industry informalism” to the same end, nor even a combination of both (Part I.B). We think this view provides a more balanced starting point for our analysis of how the Centers have actually begun to operate, our major interest. Even in these more informal processes, we begin to perceive a quite different type of Japanese consumer, actively engaging with legal norms — “consumer informalism” (Part II). Also, of more general theoretical interest, is the tension — but sometimes the complementarities — between formal and informal norms in an evolving institutional setting. These and other insights for general legal and social theory, then, must also be added to the equation in considering dispute resolution in Japan into the 21st century. To this end, we conclude with some directions for future research (Part III).

A. The New PL Law and its Impact: Comparatively Less Favourable to Consumers?

Behind the trend in Japan towards more claims against manufacturers, epitomised by the *konnyaku* jelly case and renewed tobacco litigation, lies the enactment of a new strict liability Product Liability Law in June 1994.¹⁰ The PL Law draws on the 1985 E.C. Directive,¹¹ but with some significant differences. One criticism of the PL Law from commentators outside Japan, particularly from those in the U.S., is that it is comparatively less consumer oriented.¹² In

¹⁰ Law No. 85, 1994. Compare the translation by the Ministry of International Trade and Industry (at <http://www.jef.or.jp:80/news/guidepll.html>) with that by Nottage in Appendix A (also at <http://www.law.kyushu-u.ac.jp/~luke/pllaw.html>). See also Olaf Kliesow, *Das neue Produkthaftungsgesetz in Japan: Einführung, Übersetzung und Anmerkung* [The New Product Liability Law in Japan: Introduction, Translation, and Comment], 5 ZJAPANR 163 (1998).

¹¹ Council Directive 85/375.

¹² Andrew Marcuse, *Why Japan's New Products Liability Law Isn't*, 5 PAC. RIM L. & POL'Y. J. 365, at 382-394 (1996).

fact, comparisons with the E.C. Directive, and the Australian amendments to the Trade Practices Act in 1992 which also drew on the Directive, reveal this not to be so.¹³ Certainly, the PL Law does allow claims for consequential damage for all types of property, including property intended for or used more in business, and lost profits; and a number of cases filed under the PL Law have involved such claims by businesses. The E.C. Directive limits consequential property damage claims to private or personal property (art. 4(b)). In this respect, the PL Law is less focused purely on the goal of “consumer” protection. Yet while some of the claimants so far have been small businesses in Japan (*see, e.g.,* Appendix B), some of them may deserve “protection” along with purely private individuals — an argument given partial legislative recognition in other jurisdictions (e.g. in Australia under the exception to the exclusion in section 4(2) of the Contracts Review Act 1980 (NSW)). And in other respects the PL Law is more favourable to victims of accidents, both private and business. These include:¹⁴

- a possibly more extensive definition of liable “manufacturer” (art. 3(2));
- claims allowed for the defective product itself, as long as there is some consequential damage to other property (art. 3);
- extended limitation period for “toxic tort” situations (art. 5(2));
- no minimum claim amount (cf. art. 9 of the Directive); and
- no total liability cap for manufacturers (cf. art. 16(1) thereof).

Such ill-conceived criticism of the PL Law, then, may have arisen from adding — to a comparison of E.C., and especially U.S. law, with the final PL Law finally enacted in Japan in 1994 — a comparison with law reform proposals mooted mainly by scholars in Japan back in the early 1970s. Those proposals

¹³ Luke Nottage, “Global Harmony and Disharmony in Accident Compensation: Japan’s New Product Liability Legislation compared to the E.C. Directive and Part V.A. of the Australian Trade Practices Act” (unpublished manuscript, November 1997, on file with the authors and the editors of this journal).

¹⁴ *See also* Tsuneo Matsumoto, “Recent Developments in the Law of Product Liability in Japan” (Paper presented at the Fifth Annual Conference on Consumer Law, 25–27 May 1995, Osgoode Hall Law School, York University), and <<http://www.law.kyushu-u.ac.jp/~luke/compl.html>>. Cf., comparing an earlier draft of the PL Law, Hiroshi Kodama, *Der aktuelle Stand der Produkthaftungsgesetzgebung in Japan* [*The Present State of Product Liability Law Enactment in Japan*], in VOM NATIONALEN ZUM TRANSNATIONALEM RECHT [FROM NATIONAL TO TRANSNATIONAL LAW] 53 (Karl Kroeschell & Albrecht Cordes, eds., 1995). And see now the debate, admittedly precipitated by the political salience of the Mad Cow Disease outbreak, about amending the EC Directive to cover also unprocessed primary agricultural products: Note, *La responsabilité du fait des produits défectueux* [Responsibility for Defective Products], 1998/1 REVUE DU MARCHÉ UNIQUE EUROPÉEN 132 (1998).

were based on overseas developments at the time, such as European initiatives before a decade of debate and compromise resulting in the 1985 Directive. Criticism may also stem from a rosy view of U.S. product liability law, one already outdated in the light of indications that the tide turned there too since the early to mid-1980s: a “quiet revolution” — or counter-revolution — in the sense of fewer PL suits and more decisions favouring manufacturers.¹⁵ Since the 1970s, state product liability legislation has also become much more favorable to defendants.¹⁶ Somewhat paradoxically,¹⁷ this now underpins strident calls for federal PL legislation in the same direction,¹⁸ or at least more detailed rules in a new Restatement from the American Law Institute.¹⁹

Explicitly, or more often implicitly, critics thus appear to be holding the actual Japanese law to an idealised view of U.S. product liability law. Amongst U.S. and other foreign commentators on Japanese contracting, there has been a similar tendency to Japanese contract practices and law with an idealised perception of foreign law.²⁰

Of most concern, such criticism of the PL Law appears to follow from strong pre-conceived views as to a purported lack of consumer consciousness in Japan. This is usually linked to broader assertions as to limited “legal consciousness”, in turn said to be derived from a traditional cultural aversion rooted in Confucian deference to superiors and promotion of harmony.²¹ Starting from

¹⁵ James Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990); Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 L. & SOC. INQUIRY 497, 537-540 (1996). See also Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992) (on the consistency which has emerged even in punitive damages awards); and more generally Stephen DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995), and [1998/1] Wisc. L. REV. (special issue on punitive damages).

¹⁶ Ellen Wertheimer, *Unknowable Danger and the Death of Strict Liability*, 60 U. CINN. L. REV. 1183 (1992)

¹⁷ Ellen Wertheimer, *The Products Liability Shell Game: A Reponse to Victor E. Schwartz and Mark A. Behrens*, 64 TENN. L. REV. 627 (1997).

¹⁸ Schwartz & Behrens, *supra* note 3.

¹⁹ James Henderson & Aaron Twerski, *What Europe, Japan and Other Countries Can Learn from the New American Restatement of Products Liability*, TEXAS INT'L. L.J. (forthcoming 1998; Paper presented at the Symposium on “Products Liability: Comparative Approaches and Transnational Litigation”, February 19-20, 1998, University of Texas).

²⁰ Cf. Takashi Uchida, *The New Development of Contract Law and General Clauses: A Japanese Perspective*, in JAPANESE AND DUTCH LAWS COMPARED 119, at 122-124 (The Organising Committee of the Symposium, ed., 1992); and the more general criticism of such idealism compared to U.S. contract law “in action”, in Stewart Macaulay, *The Reliance Interest and the World Outside the Law Schools' Doors*, [1991] Wisc. L. REV. 247.

²¹ Mark A. Behrens & Daniel H. Raddock, *Japan's New Product Liability Law*, 16 U. PA. J. INT'L. BUS. L. 669, at 671-672 (1995); Anita Bernstein & Paul Fanning, *Weightier than a*

such premisses, it is all too easy to end up analysing the PL Law as comparatively anti-consumer in orientation, and unlikely to hold any lasting significance.

Such preconceptions began to take hold among foreign commentators in the late 1960s and early 1970s. Important works by Japanese scholars were translated in foreign languages and often misread, in line with the turn to cultural relativism.²² Their persistence in the 1990s demonstrates engrained and broad-brush “legal orientalism”.²³ In fact, the notion of limited legal consciousness because of deeprooted “cultural” traits has long been criticised as contrary to such facts as litigation rates which were higher before than after World War II. Instead, Haley and others have stressed that institutional barriers to litigation are major important determinants of low litigation rates.²⁴ Ramseyer has added that nonetheless the greater predictability of the Japanese legal system may allow for and encourage more settlement out of court.²⁵ He showed how Japanese victims of traffic accident disputes do assert claims (disrupting harmony), and reach settlements consistent with legal standards (overcoming institutional barriers).²⁶ Common to both is an image of Japanese as rational decision-makers, not cultural automatons brainwashed by Confucian ideas. As

Mountain: Duty, Hierarchy and the Consumer in Japan, 45 VAND. J. TRANS. L. 45, at 60-67 (1996).

²² Luke Nottage, *Contract Theory and Practice in Japan: An Antipodean Perspective*, in JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM 197 (Harald Baum, ed., 1997); also in substantially revised, updated form in 31 HIKAKUHO ZASSHI [JOURNAL OF THE INSTITUTE OF COMPARATIVE LAW IN JAPAN] 55-113 (1998).

²³ Veronica Taylor, *Beyond Legal Orientalism*, in ASIAN LAW THROUGH AUSTRALIAN EYES 47 (Veronica Taylor, ed., 1997). See also Veronica Taylor & Michael Pryles, *The Cultures of Dispute Resolution in Asia*, in DISPUTE RESOLUTION IN ASIA 1 (Michael Pryles, ed.).

²⁴ John O. Haley, *The Myth of the Reluctant Litigant*, [1978] J. JAP. STUD. 359; John O. Haley, *The Politics of Informal Justice - The Japanese Experience 1922-1941*, in 2 THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES, 125 (Richard Abel, ed., 1982); restated in JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* (1991). See also Luke Nottage & Christian Wollschläger, *What Do Courts Do?*, [1996] N.Z.L.J. 369 (comparing civil litigation in Japan from 1875-1994). For other recent reinterpretations of Japanese legal history, see, e.g., Dimitri Vanoverbeke, *Tradition and Law in Conflict - Farm Tenancy Conciliation and Social Change in Interwar Japan*, 64 HOSEI KENKYU F11-F85 (1998) (revisiting the Taisho era: showing how landowners tried to invoke Civil Code provisions in their favour through the court process, and how institutioning mediation may have exacerbated the weakness of tenant farmers but also allowed for norms to develop which sometimes worked in their favour); HERMANN OOMS, *TOKUGAWA VILLAGE PRACTICE: CLASS, STATUS, POWER, LAW* (1996) (revisiting the Tokugawa era: showing active invocation of legal norms despite structural barriers); and Charles Holcolme, *Ritsuryo Confucianism*, HARV. J. OF ASIATIC STUD. 543-573 (1997) (revisiting the Heian era: reconceptualising the “administrative state”).

²⁵ J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, [1988] J. JAPANESE STUD. 111.

²⁶ J. Mark Ramseyer & Minoru Nakazoto, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEG. STUD. 262 (1989).

Foote has pointed out, the emergence of a predictable and efficient system of compensation may nonetheless reflect some value judgments as to the primacy of this rather than individualised justice.²⁷ But this does not necessarily equate with the usual cultural stereotypes, and the weight of this preference is debatable. Tanase has also pointed out major latent instabilities in the current automobile dispute resolution system,²⁸ building in part on his pathbreaking study on pro se litigation in Japan,²⁹ and revealing a more complex model of human agency than that of *homo economicus*. Some preliminary work by Wada in this area,³⁰ and in areas such as tenancy disputes,³¹ supports this more “embedded”, yet still pro-active model of human agency, despite continued structural barriers in the legal system in Japan — as indeed in many other modern industrialised societies. This is also consistent with recent comparative empirical studies of Japanese contract law and practice.³² Thus, although stereotypes about Japanese law and society dating back to the early 1970s may have had some basis at the time, they are increasingly belied by recent research and new theoretical perspectives in the late 1990s.

Preconceptions as to both limited legal consciousness and, in particular, weak consumerism in Japan are also belied by events since the PL Law came into force. In addition to cases like the *konnyaku* jelly settlement mentioned at the outset where manufacturers have settled without the plaintiffs even having to file suit, a steady stream of claims has been filed in courts around the country.³³ While no court has yet rendered judgment under the new law on claims filed, this is not surprising given that the PL Law only applies to defined

²⁷ Dan Foote, *Resolution of Traffic Accident Disputes and Judicial Activism in Japan*, 25 L. IN JAPAN 19 (1995). See also Robert Leflar, *Personal Injury Compensation Schemes in Japan: Values Advanced and Values Undermined*, 15 U. Haw. L. Rev. 743, 751-753 (1993).

²⁸ Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 L. & SOC'Y. REV. 621, 679-687 (1990).

²⁹ TAKAO TANASE, *HONNIN SOSHO NO SHINRI KOZO* [THE TRIAL STRUCTURE IN PRO SE LITIGATION] (1989).

³⁰ Yoshitaka Wada, *Merging Formality and Informality in Dispute Resolution*, 27 VICTORIA U. WELLINGTON L. REV. 45 (1997).

³¹ Reproduced in YOSHITAKA WADA, *MINJI FUNSO KOSHO KATEI RON* [CIVIL DISPUTE NEGOTIATION PROCESS THEORY] 178-198 (1991).

³² Luke Nottage, *Economic Dislocation and Contract Renegotiation in New Zealand and Japan: A Preliminary Empirical Study*, 27 VICTORIA U. WELLINGTON L. REV. 59 (1997); Luke Nottage, *Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project*, [1997] N.Z. L. REV. 482; Luke Nottage, *Bargaining in the Shadow of the Law, and the Law in the Light of Bargaining: Contract Planning and Renegotiation in New Zealand, Japan and the U.S.*, in INTERACTION OF LEGAL CULTURES [CHANGING LEGAL CULTURES II] (Johannes Feest & Volkmar Gessner, eds., 1998).

³³ See Appendix B.

“products” causing personal injury or consequential property loss, delivered by specified “manufacturers” (including importers) after the law came into effect on July 1, 1995. In European countries, which incorporated the 1985 E.C. Directive into their domestic law in the late 1980s and early 1990s, the first reported and even unreported court decisions applying the new legislation are only just beginning to surface.³⁴ In Australia as well, no cases have yet been reported since the 1992 amendments.³⁵ Yet manufacturers there have become much more aware of — and careful in — quality control techniques, warnings and so on, and product recalls.^{35a} This reinforces how the much more extensive product liability litigation in the US is crucially determined by a number of deep-rooted institutional features there, especially the comparative availability of punitive damages, contingency fees (for a large and vigorous body of trial lawyers), and multi-party actions.^{35b} But it also demonstrates that such extensive litigation is not in itself an absolutely essential — or even completely desirable — means to promote optimal product safety, while consumers are not necessarily significantly disadvantaged by less litigation-friendly regimes.^{35c}

In Japan, claims can also still be brought — and are being brought — under other legislation for goods delivered before July 1, 1995, or otherwise outside the

³⁴ See, e.g., Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, TEXAS INT'L. L.J. (forthcoming Paper presented at the Symposium on “Products Liability: Comparative Approaches and Transnational Litigation”, February 19-20, 1998, University of Texas); and Gerhard Hohloch, *Produkthaftung in Europa [Product Liability in Europe]*, 2 ZEUP 408 (1994), 439 (citing only two court decisions of German superior courts).

³⁵ Martin Vranken, *The First Decennium of the European Product Liability Directive: A Cause for Celebration?*, 4 TORT L.J. 225 (1996).

^{35a} See, e.g., Patrick Kelly & Rebecca Attree, *Practical Steps To Be Taken by Producers and Suppliers to Manage Product Liability and Safety Risks*, in EUROPEAN PRODUCT LIABILITIES 517 (Patrick Kelly & Rebecca Attree, eds., 2nd ed. 1997); JOCELYN KELLAM, A PRACTICAL GUIDE TO AUSTRALIAN PRODUCT LIABILITY 52-72 (1996); Michael Pryles, *Product Recalls in Australia*, 69 AUST. L.J. 211 (1995).

^{35b} On these comparative institutional differences, see, e.g., Christopher Hodges, *Product Liability in Europe: The Reality*, [February 1998] INT'L. BUS. LAWY. 55 (1998); George Menzies, *Variations in Damages*, [February 1998] INT'L. BUS. LAWY. 75 (1998); Colin Loveday, *Multi-Party Rules: U.S., Canada, Australia, and the U.K.*, [February 1998] INT'L. BUS. LAWY. 77 (1998). Such factors, of course, have long been welcomed also by “forum-shopping” litigants from abroad preferring to bring their product liability suits before U.S. courts. See, e.g., Russell Weintraub, *The United States as a Magnet Forum and What, If Anything, To Do About It*, in INTERNATIONAL DISPUTE RESOLUTION 213, 216-219 (Jack Goldsmith, ed., 1997).

^{35c} As Hodges points out (*id.*), it is not just a problem of limited access to justice: “... European consumers are vocal and not stupid. Consumer organisations have considerable vigour and the media is always on the lookout for a good story. If there was widespread dissatisfaction over the level of safety of consumer products generally, or even of particular types, you would expect to see more headlines about unsafe washing machines or electric keyboards or cars than the actual headlines which usually relate to other aspects of health — such as whether chocolate, beef and alcohol are bad for you.”

scope of the PL Law. The main cause of action is in negligence under the general tort (*fuhokoi*) provision of Article 709 of the Japanese Civil Code, enacted almost a century ago. But claims under other provisions of the Code, both in tort and contract, have also seen some success. Including 33 appeals, around 250 major reported decisions on product liability under various legal theories have been identified, with an accelerating number (about 50 of this total) reported since 1991.³⁶ Recent examples of courts finding in favour of plaintiffs include well-publicised cases involving television sets catching fire.³⁷ Filing of claims under the old law appears to have grown apace. Settlement, particularly in favour of plaintiffs, also seems to be increasing.³⁸ These trends are likely to continue as amendments to the Code of Civil Procedure, in effect from 1 January 1998, reduce — or at least formalise lower — barriers to bringing and pursuing claims in court.³⁹

A number of empirical studies also offers some sense of what is happening further down the “dispute resolution pyramid”.^{39a} An annual survey of households in Tokyo in 1996 showed that 69% knew of the PL Law and its contents, compared to 39% the previous year. Similarly, even a nation-wide survey showed that households that had not heard of the PL Law had dropped from 32% in 1995 to 16% in 1996.⁴⁰ Between July and December 1996, the number of product quality complaints brought to government sponsored Consumer Living

³⁶ See Masanobu Kato, *Japanese Product Liability Law*, TEXAS INT'L. L.J. (forthcoming Paper presented at the Symposium on “Products Liability: Comparative Approaches and Transnational Litigation”, February 19-20, 1998, University of Texas).

³⁷ See e.g. Judgment of the Osaka District Court, 29 March 1994 (translated at <<http://www.law.kyushu-u.ac.jp/~luke/tvcase.html>>) and Judgment of the Osaka District Court, 18 September 1997 (noted by Toshiaki Hasegawa, *Terebi Shukka Songai Baisho Seikyu Jiken Hanketsu no Kento* [An Analysis of the Judgment in the Case Claiming Damages from a TV Catching Fire], 628 N.B.L. 27 (1997)).

³⁸ See Appendix C. See also Masato Nakamura, *Seizobutsusekinin Ho Shiko 1-nen to sono Jittai - Kekkan Shohin 110-ban no Gaiyo* [The PL Law In Effect for One Year and its Actual Impact: An Outline of the Defective Products Free-Dial Service] 596 N.B.L. 23 (1996); Mie Asaoka, *Seizobutsu Sekinin Ho to Kekkan* [The PL Law and Defects], in *SEIZOBUTSU SEKININ HO O UKASU TAME NI - HIGAI NO BOSHI, KYUSAI TO ANZEN JOHO NO KOKAI* [TO GIVE LIFE TO THE PL LAW: AVOIDING AND COMPENSATING FOR HARM, AND MAKING PUBLIC SAFETY INFORMATION] 5, at 9-10 (Nihon Bengoshi Rengokai Shohisha Mondai Taisaku Iinkai, ed., 1995).

³⁹ See generally Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan: A Procedure for the Coming Century?*, 45 A.J.C.L. 767 (1997).

^{39a} See generally William Felstiner, Richard Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 14 L. & SOC'Y REV. 631 (1980-81).

⁴⁰ Chie Mori, *PL Ho Shiko kara 1-nen - Jiko Boshi no tame ni Do Kawatta ka* [A Year after the PL Law Came into Effect: How Have Things Changed to Prevent Accidents?], 120 TASHIKA NA ME 18 (1996).

Centers ("CLCs", *shohi seikatsu senta*) increased to 1596 cases, about 2.5 times more than in the same period in 1995. Of these, 1014 complaints involved consequential damages, and 155 involved products actually put into circulation after July 1, 1995.⁴¹

In addition, a survey of consumer complaints officers in 360 companies and organisations in the food, chemical, petroleum and electric machinery industries was conducted in June 1996. 154 of 217 respondents (71%) said that they had received "more" complaints than in 1994, before the PL Law came into effect, with 84 saying the number of consumer complaints filed with them had increased more than 30 percent.⁴² This trend seems to be accelerating, since only 45% of respondents in a 1995 survey had reported more complaints. The number of companies facing consumer compensation claims for defective products increased from 24 out of 217 in 1995 to 76 in 1996, with 27 percent of these having PL insurance and either having paid out compensation or reportedly planning to do so. 23 percent of respondents considered that consumers' understanding of the PL law had improved; but a similar proportion thought that there was instead more misunderstanding, some adding that consumers were claiming under the PL Law for all sorts of alleged problems.⁴³

This has had an impact on manufacturers, which have responded with a range of measures.⁴⁴ There are efforts to improve product safety at the level of the individual firm; new committees and guidelines on improving labelling and instructions instituted by industrial associations; more monitoring of accidents by associations; and, albeit to a much lesser extent, issuance of new guidelines on recalls and customer "after care".⁴⁵ Individual firms are expanding their legal section personnel to deal with PL issues.⁴⁶ In a survey of 1320 listed and unlisted companies surveyed in July 1995, about 80% had set up new posts to respond to PL issues. Around 75% of these had taken out PL insurance,

⁴¹ Motoyoshi Shizui, *Keizai Kikakucho ni okeru Seizobutsu Sekinin Seido kanren Shisaku e no Saikin no Torikomi Jotai* [*The Economic Planning Agency's Recent Involvement in Measures Related to the PL System*], 596 N.B.L. 18 (1996).

⁴² JAPAN TIMES, DECEMBER 25, 1997.

⁴³ ASAHI SHIMBUN, November 24, 1997.

⁴⁴ For an earlier study of Japanese firms' product safety activities, see generally Hiroshi Sarumida, *Comparative Institutional Analysis of Product Safety Systems in the United States and Japan*, CORNELL INT'L. L.J. 79 (1996).

⁴⁵ Ryuichi Ito, *Tsusho Sangyosho ni okeru Seizobutsu Sekinin Ho Shiko 1-nen to Shoshisaku* [*The PL Law In Effect for One Year and Measures in MITI*], 596 N.B.L. 12 (1996).

⁴⁶ NIKKEI WEEKLY, November 17, 1997.

reviewed instruction booklets etc., and/or generally improved product quality management.⁴⁷

In 1996, Fukaya and his students conducted a random mail survey of 500 listed companies in Japan, receiving 115 valid responses (mainly from companies in the primary sector, food products, textiles, chemical, medical, lacquerware/wood products, machinery, electrical appliances, and transport industries).⁴⁸ They found that many companies had initiated new measures from the early 1990s, but particularly in 1994 (when the law was enacted) and 1995 (when it came into force). New positions dealing with PL issues had been established in 25% of companies in 1994 and 43% in 1995. PL education programmes had been initiated, respectively, in 18% and 53%, albeit not necessarily very comprehensively (only 22% provided such education to all employees). In 1994, 7%; in 1995, 56%; and in 1995, a further 7.8% companies, amended instruction booklets etc. provided with their products, particularly as to how to assemble (28%) and use (74%) them and in respect of warnings (87%). The new legislation and almost all commentaries had highlighted potential liability for inadequate information supplied with a company's products. Further, by 1996, 68% of companies were in industries which had industry safety standards, and 70% had their own specific standards (70%). 14% in total noted that one set or the other had been established after enactment of the PL law; and 44%, that these had been made stricter (although 9% did not respond, and 33% thought there was no relation between the Law and the standards). Only a total of 12% considered that they stopped producing goods (1-4 cases per annum) due to the risk of accidents, while 43% reported no cases of this (and 46% said that this whole issue was unrelated to enactment of the PL Law); but 42% said the number of suspended product lines per annum was unclear, probably implying that a significant proportion of products are being at least redesigned in the light of risks of accidents. Almost 90% of companies had taken out private PL insurance, mostly in 1994 (8%) and in 1995 (52%), as well as joining various industry

⁴⁷ Mori, *supra* note 40, at 19. *But cf.* YOMIURI SHIMBUN, February 20, 1997 (reporting that a director of a major Japanese insurance company estimates that about 40% of large companies currently take out PL insurance, while only about 10% of small to medium sized firms do so).

⁴⁸ Itaru Fukaya, *Seizogyosha ni yoru Seizobutsu Sekinin Taisaku ni kansuru Jittai Chosa* [An Empirical Study of Measures taken by Manufacturers in relation to Product Liability], 29 SEINAN GAKUIN DAIGAKU HOGAKU RONSHU 43 (1997).

based insurance schemes. By 1996, 64% of companies had specific consumer advice or complaints sections, dealing mainly problems with the goods themselves (76%) and how to use them (52%), but also more obviously with PL Law matters: consequential property damage (16%), minor physical harm not involving medical services (14%), minor physical harm involving medical services (11%), and major physical harm (5%: multiple responses possible). 58% of respondents claims involved less than Yen 1,000,000 (U.S.\$8000), but 39% did not respond, suggesting perhaps that the quantum may also have been difficult determinate (and possibly quite large). 60% had a company manual setting out how to resolve disputes (51% dealing specifically with product "accidents"), and 50% referred claims to a specific lawyer when a "dispute" arose (presumably going beyond that).

Of course, all these indications of considerable claiming by consumers, and significant responses by manufacturers in the context of the PL Law enactment, do not necessarily add up to a revolution in products liability of the scale experienced — or at least perceived — in the U.S. in the 1960s and 1970s. But compared to the minimal impact of the E.C. Directive, for instance,⁴⁹ the PL Law continues to play a significant role in maintaining the considerable momentum in consumer consciousness which became apparent from the early 1990s, and in strengthening product safety activities in Japanese corporations.

B. The Birth of PL ADR Centers: Mere "Bureaucratic Informalism"?

Despite this, pre-conceptions of weak consumerism and legal consciousness persist in analyses of PL in Japan, particularly from commentators outside Japan.⁵⁰ It is also related to a second criticism of the PL Law, again particularly by U.S. commentators, which we will focus on in this paper: the emergence of industry-based PL ADR centers in the wake of the enactment of the PL Law.

⁴⁹ Stapleton, *supra* note 34.

⁵⁰ More considered views are beginning to emerge now, however. See Glenn Melchinger, *For the Collective Benefit: Why Japan's New Strict Liability Product Liability Law is 'Strictly Business'*, 19 U. HAWAII L. REV. 879 (1997) (arguing that the PL Law has a decidedly pro-business bias and will probably not affect corporations; but covering well the literature in Japanese, and correctly conceding in conclusion views that the enactment of the Law represents a great step forward for consumers, or at least a small step in a lengthy process of getting business to change its modes of operation); Jason Cohen, *The Japanese Product Liability Law: Sending a Pro-Consumer Tsunami through Japan's Corporate and Judicial Worlds*, 21 FORDHAM INT'L. L.J. 108 (1997) (summarising some of the recent empirical evidence indicating significant effects on Japanese corporations; although the title of his work, at least, overstates the case in the other direction).

Bernstein and Fanning,⁵¹ for instance, have suggested that these Centers are another good example of “bureaucratic informalism” in Japan. They assert that the pattern is similar to the government’s response to environmental pollution in the 1960s and early 1970s, and in a number of other areas vividly portrayed by Frank Upham.⁵² That is, a powerful pro-business bureaucratic machine swinging into action to minimise social disruption, by diverting grievances “into an official response center designed to ameliorate and conciliate, rather than set precedents related to rights”.⁵³

Behind this view, as well, we can sense an idealised standard of comparison, namely the U.S. court process ignoring all the problems it has developed in actually resolving accident disputes to the satisfaction of all involved.⁵⁴ This idealisation of the formal court process can generate a particularly strong aversion to alternative dispute resolution procedures, and a focus on substantive law rather than procedure and the process of resolving disputes. This tendency can be seen readily in the products liability arena in the United States. The vast literature generated since the 1970s has focused almost exclusively on substantive law issues, with only mass tort dispute resolution focusing mainly on procedure and process, and only one article — to our knowledge — carefully analysing possible interaction between PL law and ADR.⁵⁵ Although some serious discussion about ADR emerged in the mid-1980s as part of proposals for federal PL legislation,⁵⁶ ADR is only included in a very weak form in the latest proposals, raising criticisms that it is “utterly trivial” and simply a “meaningless sop to consumer groups”.⁵⁷ Such a focus on substantive law and the formal court process is not unique to the U.S.; “modern” legal systems rooted in 19th century ideals tend to lead to this focus even today, and Japan is no exception.⁵⁸

⁵¹ *Supra* note 21, at 70-72.

⁵² FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987).

⁵³ Bernstein & Fanning, *supra* note 21 at 70; see also Marcuse, *supra* note 12, at 367, 397.

⁵⁴ See e.g., PETER BELL & JEFFREY O’CONNELL, *ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW* (1997) (especially chs. 1-2 and 7, portraying vividly the U.S. system “in action”, with extensive further references). More generally on the stultifying forms of legal analysis that tends to emerge from the court process, and academic commentary based thereon, see ROBERTO UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996).

⁵⁵ Frances Zollers, *Alternative Dispute Resolution and Product Liability Reform*, (1988) 26 AMERICAN BUS. L.J. 479. For a much shorter and less sophisticated analysis, see Malcolm Wheeler, *Comparative Aspects of Dispute Resolution in Particular Areas: Product Liability*, 17 CANADA-U.S. L.J. 359 (1991).

⁵⁶ Zollers, *supra* note 55, at 493-499.

⁵⁷ Wertheimer, *supra* note 17, at 643.

⁵⁸ Wada, *supra* note 30, at 53.

Yet it seems comparatively strong in the U.S., where court process has long been awarded equal status with legislative process, compared to parliamentary democracies like Japan or the United Kingdom.⁵⁹

We believe that the view of Japanese PL ADR Centers as mere “bureaucratic informalism” is inconsistent with the process by which the PL Law was enacted, and the path leading to the establishment of the various Centers.⁶⁰ If it were accurate, one would have expected the Ministry of International Trade and Industry (“MITI”) to have developed, promulgated, and implemented quite detailed ideas on how to establish and run industry-based ADR centers, early on during the debate over enactment of the Law. One would also have expected MITI’s views to have strongly encouraged diversion of disputes into opaque private forums. In fact, this did not happen. In December 1992 the *Seihin Anzen Kyokai* (Product Safety Association) under the auspices of MITI did initiate a study into the possibility of PL ADR in general, which reported in March 1993.⁶¹ The media quickly reported that the idea of industry association based Centers was being mooted.⁶² Pro-consumer groups, such as one formed in May 1991 to push for enactment of the PL Law, repeatedly made known their concerns that these maintain minimum standards so as not to serve only industry interests.⁶³ The more pro-consumer Economic Planning Agency (“EPA”, in charge of consumer policy) also entered the scene by organising another study group which reported in March 1994,⁶⁴ providing a counterweight (or threat thereof) to excessive intervention by MITI.

Skeptics might see this as a minor turf war, in fact underlining the continued importance of the bureaucracy as a whole, with a significant commonality of

⁵⁹ See generally PATRICK ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 298-315 (1987). For a call for more weight to be awarded to more democratic institutions, see e.g. Jeremy Waldron, *Dirty Little Secret*, 98 COLUM. L. REV. 510 (1998).

⁶⁰ The following is only an outline of some key events and determinants; we plan to tell the full story elsewhere. See generally Catherine Dauvergne, *The Enactment of Japan's Product Liability Law*, 28 UBC L. REV. 403 (1994); Susumu Hirano, *Drafts of the Japanese Strict Liability Code: Shall Japanese Manufacturers Also Become Insurers of their Products?*, 25 CORNELL INT'L. L.J. 643, 648-655 (1992).

⁶¹ See Tsusho Sangyosho Sangyo Seisakukyoku, Shohikeizaika, ed., *PL TAISAKU HANBUKKU - KIGYO TAIO NO JISSAI* [PL MEASURES HANDBOOK: THE REALITY OF COMPANIES' REPOSSESSES] 187-203 (1994).

⁶² See, e.g., NIKKEI SHIMBUN, March 4, 1993.

⁶³ See 1 PL HO NYUSU (1991) at 1; 8 PL HO NYUSU (1993) at 1; 15 PL HO NYUSU (1995) at 2; 17 PL HO/JOHO KOKAI NYUSU (1995) at 1.

⁶⁴ See NIRA, ed., *SAIBANGAI FUNSO SHORI KIKAN NO ARIKATA NI KANSURU KENKYU* [STUDY ON ESTABLISHING AN OUT-OF-COURT SYSTEM FOR PRODUCT LIABILITY DISPUTE RESOLUTION] (NIRA Research Report No 930033, 1994).

interest in diverting social pressures into informal fora, thereby expanding each department's sphere of influence. But neither study group came up with detailed proposals which might have furthered any such objective, and pressure from consumer interests was ongoing. MITI publicised its views formally, in a circular (*tsutatsu*) to industry associations, only in late October 1994.⁶⁵ These contained very little further detail, and the *tsutatsu* was issued four months after the PL Law had been enacted. Moreover, the first PL ADR Center (for Housing Products) had already been established almost two months' previously, on September 1, 1994. Thus, the MITI *tsutatsu* might be interpreted rather as ex post affirmation of an industry initiative, emerging in a bureaucratic deadlock underpinned by significant pro-consumer sentiment. Further complicating the simplistic view that MITI was the major player in establishing PL ADR Centers, is the fact that a number of associations with which these are affiliated come under the jurisdiction of other ministries. Also acting against bureaucratic capture, the PL Law was enacted in the context of calls by the U.S. in the early 1990s, under the Structural Impediments Initiative, for a more level playing field in terms of liability regimes, and greater transparency.⁶⁶ It should also not be forgotten that MITI's *tsutatsu* was issued only after two Diet committees had publicised resolutions, as the PL Law itself was being enacted, which included urging creation of ADR institutions to better achieve the objectives of the new legislation.⁶⁷ The legislature therefore provided a green light on this point to both industry and many branches of the bureaucracy, with considerable involvement of legislators in all aspects of PL reform from the early 1990s.

Moreover, after the Centers were established, at least some of them (like the Gas Appliances PL Center) quickly and pro-actively developed various ways to manage their schemes. There is little evidence of much guidance from MITI or other agencies. Rather, a number of leading Centers (like the Housing Products

⁶⁵ See Tsusho Sangyosho Sangyo Seisakukyoku, Shohikeizaika, ed., *supra* note 61, at 84-97.

⁶⁶ Parallels can be drawn with the enactment of the PL Law, and the Administrative Procedure Act the year before. For the latter and a theoretical framework, see Masaki Abe, *Foreign Pressure and Legal Innovation in Contemporary Japan: The Case of the Administrative Procedure Act*, in THE PROCEEDINGS OF THE 1995 ANNUAL MEETING OF THE RESEARCH COMMITTEE ON SOCIOLOGY OF LAW (INTERNATIONAL SOCIOLOGICAL ASSOCIATION) "LEGAL CULTURE: ENCOUNTERS AND TRANSFORMATIONS", PAPARS SECTION MEETINGS II (Japan Committee for the RCLS95, ed., 1995).

⁶⁷ See Keizai Kikakucho Kokumin Seikatsu Kyoku Shohisha Gyosei Daiikka, ed., *TSUIJO KAISETSU SEIZOBUTSU SEKININ HO* [ARTICLE-BY-ARTICLE COMMENTARY ON THE PL LAW] 143-145 (1994).

PL Center⁶⁸) have been able to draw on decades of experience in managing industry-based, quasi-strict liability optional insurance and dispute resolution schemes.⁶⁹

The fact that funding for these Centers comes almost exclusively from the industry associations themselves, rather than MITI, gives the former potentially more clout than the latter in their operation. MITI's role may be largely limited to standing on the sidelines, holding a red flag which the Centers know it might wave — suspending their operations or requiring improvements — if they become too self-serving. With the EPA on the other sideline, and media and other consumer interests in the spectator box, this may constitute a realistic safeguard. A second role actually being played by MITI now, though, is to promote information flows between the different Centers. This role is quite limited too, however, and much of this information is or increasingly can be made available to those outside industry circles, directly or via the EPA and its satellite organisations like the CLCs. Rather than “bureaucratic informalism”, then, this may represent “industry informalism”. Certainly, it seems wrong to view these Centers as “official response centers”.⁷⁰

Those still wedded to pre-conceptions of weak legal consciousness and consumerism in Japan, premised on limited scope for human agency following the Confucian tradition, may retort that it does not really matter if the Centers are an instance of bureaucratic informalism and/or industry informalism with perhaps some last minute confirmation by legislative bodies. After all, when Frank Upham first comprehensively propounded his thesis that an elite in Japan diverted disputes away from the courts, he did not spell out whether this was driven by bureaucrats, business interests, or even the long dominant Liberal Democratic Party (the other side of the “iron triangle” often said to have governed post-World War II Japan).⁷¹ Those following Upham's primary thesis, however, have tended not to be so careful. Also, his influential work published in the late 1980s *can* be read as suggesting that the bureaucracy does

⁶⁸ See, e.g., Manabu Hayashida, *PL Mondai no Saibangai Funso Shori — Jutaku Buhin PL Senta o Rei to shite* [Settling PL Problems Out of Court: The Housing Products PL Center as a Case Study], 107 Ho no SHIHAI 21 (1997).

⁶⁹ In the case of this Center, the “Better Living” scheme: see generally J. Mark Ramseyer, *Products Liability through Private Ordering: Notes on a Japanese Experiment*, 144 U. PA. L. REV. 1823 (1996).

⁷⁰ Bernstein & Fanning, *supra* note 53.

⁷¹ UPHAM, *supra* note 53, at 14-15.

have the upper hand,⁷² although his most recent studies reveal a more restricted role.⁷³

We do not propose to resolve here the perennial question of “who governs” Japan.⁷⁴ We do suggest, however, that the emergence of the PL ADR Centers may represent a good example of a pluralistic process of bargaining among a range of government agencies, industry itself, the legislature, and pro-consumer interests. This accords with recent reinterpretations of contemporary Japanese democracy,⁷⁵ as well as the declining role of MITI since the mid-1970s and perhaps even earlier.⁷⁶ At least there is enough evidence in the establishment of the Centers to suggest that they do *not* represent either mere “bureaucratic informalism”, or some combination of industry and bureaucratic informalism which overwhelms Japanese consumers with an engrained weak consciousness of rights and the rule of law.⁷⁷

Accordingly, in the rest of this article, we investigate instead the suggestion that the PL ADR Centers “never empower” consumers,^{77a} by looking at how they are already operating in practice. We draw on interviews conducted at nine major Centers between August 1995 and August 1997, and data released by them then and subsequently. We briefly sketch three main features of their operations overall; but in developing our interpretation of some of this data we focus mainly on the activities of one Center, the Gas and Petroleum Appliance PL Center. The latter was one of the first to be established, which may indicate this industry’s relatively genuine commitment to access to justice and autonomy

⁷² See, e.g., *id.* at 26; and Yoshiharu Matsuura, *Law and Bureaucracy in Modern Japan*, STAN. L. REV. 1627 (1989).

⁷³ Frank Upham, *Privatizing Regulation*, 20 FORDHAM INT’L. L.J. 396 (1996).

⁷⁴ See also CHALMERS JOHNSON, *JAPAN: WHO GOVERNS? THE RISE OF THE DEVELOPMENTAL STATE* (1995); J. MARK RAMSEYER & FRANCES ROSENBLUTH, *JAPAN’S POLITICAL MARKET-PLACE* (1993).

⁷⁵ See, e.g., BRADLEY RICHARDSON, *JAPANESE DEMOCRACY: POWER, COORDINATION, AND PERFORMANCE* (1997).

⁷⁶ SCOTT CALLON, *DIVIDED SUN: MITI AND THE BREAKDOWN OF JAPANESE HIGH-TECH INDUSTRIAL POLICY, 1975-1993* (1995); see e.g. Takamichi Mito, *Business-Government Relations in Japan: MITI and the Petroleum Industry during the High Economic Growth Era*, 9 RESEARCH BULLETIN OF THE INTERNATIONAL STUDENT CENTER OF KYUSHU UNIVERSITY 147 (1998). Cf. CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982).

⁷⁷ Cf. Yoichi Ohashi, *Jigyosha Dantai no Katsudo [Activities of Industry Associations]*, 1139 JURISTO 123 (discussing contemporary interrelationships between industry and regulators, primarily in a consumer context, although perceiving more possibility of bureaucratic influence in the establishment of PL ADR Centers). For a discussion of contemporary rights-consciousness in Japan, see, e.g., Eric Feldman, *Patients’ Rights, Citizens’ Movements and Japanese Legal Culture*, in *COMPARING LEGAL CULTURES* 215-236 (David Nelken, ed., 1997).

^{77a} Bernstein & Fanning, *supra* note 53.

from MITI. This Center is also quite uncharacteristic in regularly making public very useful information. However it is representative of the three aggregate trends described in Parts II.A, II.B, and III.C *infra*. Moreover, data from other Centers and interviews there suggest that it reveals important mechanisms and processes at work in other Centers too, although we are continuing to analyse this burgeoning amount of data and a definitive view will first require us to systematically survey and interview the actual claimants at these various Centers. We must also bear in mind, of course, that claimants even to such Centers may be unrepresentative of the general population in Japan; but the total number of claimants is significant. More importantly, there do remain structural constraints and other problems for those interacting these Centers, including the Gas and Petroleum Appliance PL Centers. In Part III.D in particular, and a concluding section (IV.), we address some of these.

Nonetheless, we think our preliminary analysis amounts to a quite vivid picture of Japanese actively engaging with legal norms, in quite sharp contrast to the abovementioned stereotype; a picture instead closer to that painted by Tanase, Wada and Nottage in other areas. We also believe that Japan's industry-based PL ADR Centers can continue to play a valuable role in supporting this important dimension of human agency. Indeed, we hope it may inspire scholars and policy makers outside Japan to consider the potential of such ADR mechanisms in their legal systems and ongoing debates about PL law.

II. Japan's PL ADR Centers In Action: More Than Meets the Eye?

The PL Centers we visited, mostly in December 1996, had been operational for more than a year. A distinctive pattern had begun to emerge. It was consistent with patterns noted in late 1997,⁷⁸ and mid-1996,⁷⁹ and already starting to emerge in a study by the Japan Federation of Bar Associations in mid- to late 1995.⁸⁰ The pattern seems quite stable, and likely to persist over the next few

⁷⁸ See Hayashida, *supra* note 68 (including summary data for 13 Centers).

⁷⁹ See Ito, *supra* note 45 (reporting on 6 Centers).

⁸⁰ See Nihon Bengoshi Rengokai Shohisha Mondai Taisaku Iinkai, ed., *SEIZOBUTSU SEKININ HO O UKASU TAME NI - HIGAI NO BOSHI, KYUSAI TO ANZEN JOHO NO KOKAI - SHIRYO HEN* [TO GIVE LIFE TO THE PL LAW: AVOIDING AND COMPENSATING FOR HARM, AND MAKING PUBLIC SAFETY INFORMATION - REFERENCE MATERIAL VOLUME] 120-180 (1995) (reporting

years. However, three important features readily apparent from published data require closer examination. While these features remain significant after closer scrutiny, this points the way to some more positive aspects in the operations of the PL Centers, and especially towards a more vibrant image of consumerism and legal consciousness in Japan today.

A. Many Inquiries, but Very Few Clearly Covered by the PL Law

The first feature apparent from the data made available from the Centers, and often mentioned in interviews, was that the Centers have been quite active, dealing with between 1000 and 2000 inquiries per year. All the Centers are situated in metropolitan Tokyo, sometimes in out of the way neighbourhoods, so almost of all enquiries are dealt with over the telephone — almost all offer a free dial service. Considering that so far all are open only on weekdays and many individual inquiries can require follow-up, this keeps the Centers quite busy. Although almost all services are free, this level of activity may surprise skeptics, since whether and to what extent to use the Centers is a voluntary decision.

An important related aspect, however, is that only a tiny minority of these inquiries relate to product liability cases in the strict sense: involving damage to other property or personal injury caused by a defective product. Another small proportion relate instead to damage only to the defective product itself (excluded by the proviso to art. 3 of the PL Law), or otherwise not covered by the new legislation, particularly where a service provided is involved (art. 2). The large majority of inquiries, however, are just that: general inquiries about the PL Law itself or safety standards from consumers and businesses, requests for general information (e.g. from researchers like ourselves!), and so on.

For instance, in its first full fiscal year of operation (April 1996–March 1997) since opening in June 1995, the Daily Necessities (*Seikatsu Yohin*) PL Center dealt with only 23 cases involving “accidents” within the scope of the PL Law, representing 3.1% of all inquiries received; 68 cases involving “product claims” not covered (8.1%); and 744 cases of “general discussion and inquiries” (88.7%). In fiscal 1997, this tendency became even more pronounced: 11 (1.5%),

on 10 Centers) [hereinafter cited as Nichibenren, ed.]. See also Toshihiro Mitsui & Hideo Aizawa, *Product Liability in Japan*, [February 1998] INT'L BUS. LAWYER 59 (1998), at 62, 68. For a list of the PL ADR Centers, with further background details, see <<http://www.law.kyushu-u.ac.jp/~luke/pladrlist.html>>.

39 (5.2%), and 693 cases (93.3%) respectively.⁸¹ For the Consumer Life Products (*Shohi Seikatsu Yo Seihin*) PL Center,⁸² dealing mainly with products in the SG Mark optional insurance system run by the industry association in question (*Seihin Anzen Kyokai*), the corresponding figures for fiscal 1996 were 16 (1.6%), 22 (2.2%), and 962 (96.2%). The Gas and Petroleum Appliances PL Center, inaugurated in January 1995, recorded cases for fiscal 1997 as follows: (a) "accident claims", 41 (out of 2338 = 1.7%); (b) "quality claims", 56 (2.4%); (c) "general advice", 863 (36.9%); and (d) "inquiries", 1378 (58.9%). Like this Center, most Centers have recorded a steady increase in the absolute number of cases dealt with, yet only a still very small percentage of cases clearly covered by the PL Law. Most expect this to slowly increase in absolute terms and in particular in relative terms, as the number of general inquiries decreases along with growing familiarity with the PL Law itself.

The way in which Centers categorise cases, however, can be somewhat misleading. Responding to some critiques, the Daily Necessities PL Center has recently clarified the basis of their categorisation. In particular, "quality complaints" include not only cases where damage has occurred solely to the product itself, with no consequential damage, hence outside the scope of the PL law (article 3). They are also defined as including cases of damage (including consequential damage) "thought to be due solely to misuse or negligent use" or where "the cause is unclear".⁸³ As the former sub-category shows, in particular, this means that the Center exercises a value judgment in deciding whether to categorise a case as an "accident" claim under the PL Law or not. This may be a problem in the light of their comment recently that many disputes arise because claimants "have no knowledge of the ways in which the product is used":⁸⁴ they may be passing judgment on the basis of their own, unrepresentative experience. Skeptics of PL ADR Centers' potential to empower consumers might indeed interpret this as an indication of industry and/or bureaucratic informalism designed to suppress valid consumer complaints alto-

⁸¹ See Seikatsuyohin PL Senta, ed., *HEISEI 9-NENDO SEIKATSU YOHIN PL CENTER JIGYO HOKOKUSHO* [DAILY NECESSITIES PL CENTER REPORT OF ACTIVITIES FOR FISCAL 1997] (1998).

⁸² See Naoaki Deguchi, *Shohi Seikatsu Yo Seihin PL Center ni Tsuite* [On the PL Consumer Life Products PL Center], 108 HO NO SHIHAI 15 (1998)

⁸³ Seikatsuyohin PL Senta, ed., *supra* note 81, at 2.

⁸⁴ *Id.*

gether. However, the fact that such comments are published may indicate that a *deliberate* strategy, at least, is less likely. Further, even if there is such a strategy, or at least some *prima facie* psychological barriers on the part of staff in this Center which are revealed by this sort of comment, we must examine how extensive they are, the extent to which they are then mobilised to actually prevent consumers from obtaining something of value from their interaction with the Center, and the degree to which the latter can nonetheless override or sidetrack all this. From this perspective, developed more fully as we turn to the broader needs which consumers bring to the Gas and Petroleum Appliances PL Center, in particular, a second reason advanced by Daily Necessities PL Center staff, to explain why disputes arise, is of interest: “people may want to obtain some *emotional security* through finding the cause elsewhere rather than criticising themselves”.⁸⁵ While this in itself may again not convince skeptics, sensibility to this factor may be easier to interpret as having a positive side. More generally, we and others⁸⁶ have been impressed by the genuine attempts of the “veterans” in this Center to assist consumers in raising and resolving problems with the products it deals with.

Similarly, some cases categorised by the Gas and Petroleum Appliances PL Center under category (b) or category (c) *supra* are arguably PL Law cases, but have not been categorised under category (a). Although not spelled out, perhaps this is because they involve low value damage,⁸⁷ or the claim seems spurious from the outset,⁸⁸ or some investigations reveal that liability will not arise under the PL Law.⁸⁹ A court, of course, might disagree with such assessments. Thus, if we are interested in how many accidents giving rise to potential PL Law claims are being dealt with by these and other Centers, we may have to look beyond claims listed by them as “accidents”, and include at least some of those listed instead as “quality” claims. Even so, the combined total may still

⁸⁵ *Id.*

⁸⁶ Even, e.g., Nichibenren, ed., *supra* note 80, at 80-81.

⁸⁷ See, e.g., 97/11-B.1 (old cooker, burned rice), 98/2-C.1 (gas grill sensor failed, frypan deformed). “97/11-B.1” refers to the first case reported under category (b) in the Gas and Petroleum Appliances PL Center newsletter for the month of November 1997; cases mentioned below are coded similarly. All these newsletters are available from or through us on request; or directly from the Center, c/o Gasu Sekiyu Kiki Kaikan, Kanda-cho 2-11, Chiyoda-ku, Tokyo 101.

⁸⁸ See, e.g., 98/2-C.2 (neighbour’s bathtub alleged to be emitting low frequency sounds affecting claimant’s health).

⁸⁹ See, e.g., 98/2-C.6 (user misuse = no causation, or at least comparative negligence: portable grill left in front of kerosene heater, grill gas cylinder exploded).

seem low, both in absolute and relative terms.

Again, however, we can take the analysis further. Some cases listed under (c) may in fact have involved an accident, but the inquiries are framed in general terms.⁹⁰ Moreover, cases listed under categories (b), (c), and even sometimes (d), can involve general enquiries (e.g. as to how long the usable life is of for the product in question), but these quite frequently are precipitated by particular problems with the product. These may, or more often may not, amount to a defect under the PL Law at the stage of the initial or even a subsequent inquiry. But the *risk* of accidents may often then have been identified, while the Gas and Petroleum Appliance PL Center's responses help to prevent them arising. At that stage, claims under the PL may also be much more probable, and perhaps more likely to succeed. Other Centers we visited also found much of their work, and their *raison d'être*, to consist of such accident prevention activities.

Many cases dealt with by the Gas and Petroleum Appliance PL Center, furthermore, involve claims of arguably defective services provided, not covered by the PL Law. Such services include (i) installation;⁹¹ (ii) servicing;⁹² and (iii) repair.⁹³ Most obviously in the case of repairs, but also in some cases of servicing, these cases could stem from defects in the product which might give rise to PL Law claims. Until the Center has investigated, it cannot be sure. But anyway, like other PL Centers, it sees its role as providing a forum for consumers to air their complaints and raise questions even in cases where the only issue is the quality of the service provided, not the product itself. Even where this is apparent, the Center continues to provide information to consumers and/or mediate between consumers and manufacturers. They become aware of

⁹⁰ See, e.g., 94/4-C.1 (company asking for information about cases of accidents involving gas appliances arising from using wrong gas type and how to respond to this, especially the basic concepts and standards for paying solatia [presumably this is with a view to settlement of an actual accident, rather than just e.g. adding appropriate warnings to future products in the light of possible risks as indicated by Center information]).

⁹¹ See, e.g., 98/3-B.6, 98/4-B.2 (new gas water heater and bath unit installed; claim for discoloured water; possibly water pipe problem), 98/4-B.3 (gas leak when rebuilding carport; told natural gas leak from pipes but possibly the result of carport rebuilding, gas bathtub unit checked and ok).

⁹² See, e.g., 98/3-B.3 (Aco gas air conditioner, serviceman said "these often leak CO₂" mistakenly thinking it was one of Bco's), 98/4-B.1 (7-year-old gas water heater checked, woman told "lots of CO emitted and poor burning, you should change it"; while former was true, visit was not check-up but instead "general business service" including sales promotion!).

⁹³ See, e.g., 97/12-B.1 (pilot lamp on gas water heater cleaned), 98/3-B.5 (7 servicemen responded to reported gas grill leak, no explanation to woman living on her own), 98/4-B.4 (gas water heater cleaned after "water dirty", then cleaned again, total Yen 60,000).

service providers as another potential source of liability, but more generally as participants in an overall dispute resolution process. Thus, as well as active consumer consciousness in a PL context, we begin to sense this in the broader context of consumer services. That is important in Japan today, since complaints have been increasing.⁹⁴ That trend has led to proposals to enact legislation regulating both certain contract terms, drawing on the E.C. Directive on Unfair Terms in Consumer Contracts (93/13/ECC of April 5, 1993), and the process leading up to conclusion of consumer contracts.⁹⁵ To parallel possible changes in the substantive law, a range of possible consumer contract dispute resolution procedures — in and out of “court” — is being investigated,⁹⁶ more systematically than for PL in the early 1990s. The role of industry associations in resolving consumer service problems, then, may continue to expand.

Another way in which PL Centers play an expanded role is by bringing retailers into the dispute resolution process. Retailers are only liable under the PL Law in limited circumstances (see art. 2(3)). But, as is often also the case in other jurisdictions with special PL legislation, they can still be liable under other legislation. PL Centers sometimes actively advance the possibility of retailer liability.⁹⁷ From other records, such as general requests for information on how many accidents occur with a particular product,⁹⁸ and from our interviews, we sense that the Center’s role is often more restricted, but still provides important information which consumers use, often in conjunction with information from other sources (e.g. CLCs), to pursue claims against retailers. Of course, retailers who pay out under such claims can initiate a chain of claims leading back to the manufacturers, so it makes some sense for industry associations (almost completely associations of manufacturers, not retailers or interme-

⁹⁴ Veronica Taylor, *Consumer Contract Governance in a Deregulating Japan*, 27 VICTORIA U. WELLINGTON L. REV. 99 (1997).

⁹⁵ See INTERIM REPORT BY THE CONSUMER POLICY COMMITTEE OF THE SOCIAL POLICY COUNCIL (SUMMARY) (Economic Planning Agency, ed., January 1998); Tsuneo Matsumoto, “The Development and Future Challenges of Self-Regulation in Japan, with Special Regard to Electronic Commerce” (Paper presented at the 25th Anniversary Conference of the Advertising Standards Authority of New Zealand, April 1998).

⁹⁶ See *Keikicho, Shohisha Torihiki o Meguru Funso Shori Kaiketsu no Chosa Kekka o Happyo* [EPA Publishes Results of Study into Resolving Disputes Involving Consumer Transactions], 641 N.B.L. 4 (1998).

⁹⁷ See, e.g., 98/2-A.3 & Comment (singer used together Aco portable cooker and Bco gas cylinder bought from same shop; latter’s possible liability being investigated by Center’s lawyer).

⁹⁸ See, e.g., 97/9-D.6.

diaries) to get involved in interactions between consumers and retailers. But the chain may often be broken, e.g. by exemption or limitation clauses protecting manufacturers or their greater commercial clout.⁹⁹ Rather than just by immediate industry/major manufacturer self-interest, then, the Centers' involvement appears driven more by a genuine concern for access to justice, although the overall image for the product (including the distribution process — like the servicing process) is probably also an important influence.

B. Often More Inquiries from Businesses and Public Bodies, Not “Consumers”

A second feature that stands out from published data for most Centers is that many inquiries are from “businesses” and “public bodies”, rather than “consumers”. Exceptionally, the Automobile PL Advice Center received 68.8% of enquiries in 1996 from consumers, with only 8.8% from businesses. More representative is the Daily Necessities PL Center, with only 31% of inquiries recorded as from consumers; 40% came from businesses, and 22% from public bodies. In 1997, the Gas Appliances PL Center recorded the following proportions: 28%, compared to 24% and 34%, respectively. The differing proportions of business enquiries probably reflect differences in industry structure. The Auto Center was established by a donation from an industry association consisting only of Japan's 13 major auto manufacturers, each of which has Legal and Technical Departments priding themselves on their knowledge of the law (including the PL Law) and relevant technological issues. The Daily Necessities PL Center deals everyday household use products, typically manufactured by much smaller companies, which may not even have any legally qualified personnel, and may merely be licensing technology or otherwise have a quite weak technological base. The Gas and Petroleum Appliances PL Center lies in between, with some large manufacturers (gas utility companies, with departments or subsidiaries producing gas appliances for retail and industrial use) but also some smaller manufacturers.

Before concluding from the generally high proportion of business and public body inquiries, however, that the Centers are primarily there for the benefit of

⁹⁹ See generally Akio Morishima, *Product Liability and Contract Between Corporations: The Japanese Situation*, in JAPANESE AND DUTCH LAWS COMPARED 169, at 177-178 (The Organizing Committee of the Symposium, ed., 1992).

businesses themselves and/or the government bureaucracy, the published data must be analysed more carefully. On the one hand, from the Gas and Petroleum Appliance PL Center data for instance, it even appears that some of the cases recorded as from “consumers” are in fact raised by “businesses”.¹⁰⁰ As mentioned in Part I, the PL Law does allow claims for consequential damage to “business” property, so arguably these can be characterised as involving “consumers”, in a broad sense consistent with the PL Law. But then one should perhaps distinguish between “business consumers” and “individual consumers”. We suspect that such instances of miscategorisation may arise because the claimant in the case, even if a business (e.g. a sole proprietorship or very small business), is in a relatively weaker position vis-à-vis the manufacturer, in many ways similar to an individual consumer. Again, this may be consistent with a possible underlying reason for the expanded scope of damages claimable under the PL Law. But if this is so, this should be disclosed more clearly in the published data. In any event, however, clear instances of this type of miscategorisation — recording cases as from “consumers” when in fact they are raised by “businesses” — do seem quite rare even now.

On the other hand, at least some cases raised by a “business” arise in the context of an actual dispute.¹⁰¹ If left to fester, there is a good chance that harmed “consumers” in such cases will eventually bring a claim to the Center anyway, provided consumers know that the Center actively gets involved in an open and fair manner. Under such circumstances, it becomes wrong to conclude simply from the proportion of cases recorded as (initially) brought by “businesses” that consumers are marginalised. Skeptics may question that realism of the assumptions as to information about, and fair operation of, PL Centers. But emerging evidence of results favourable to consumers even recorded as brought by “businesses”, at least at the Gas and Petroleum Appliances PL Center,¹⁰² suggests that such blanket criticism would be misplaced.

One reason why the assumptions seem more probable, and such results can emerge, is precisely the involvement of other public bodies, particularly CLCs. They are actively informing consumers of relevant industry based PL Centers,

¹⁰⁰ See, e.g., 97/9-A.2 (“industrial-use” gas dryer fire, damaged a rest home and harmed two employees).

¹⁰¹ See, e.g., 97/11-A.2, 98/4-C.3 (probably).

¹⁰² See, e.g., the resolution of the former case, id. (97/11-A.2).

and often approach the Centers with particular disputes on behalf of the person concerned.¹⁰³ In fact, CLCs' strong advocacy in particular cases may explain some instances of rather arguable categorisation, where e.g. the Gas and Petroleum Appliances PL Center has recorded a case as coming from a "consumer" despite mentioning "strong CLC urging" (which suggests that it should or could have been categorised as a "government" initiated inquiry).¹⁰⁴ More generally, there is considerable synergy between CLCs, which have advisors familiar with how disputes typically emerge and how best to resolve them, quite familiar with legal principles (or with or offering preferential access to expert advice), but often less familiar with technological issues — a major strength of the industry based PL Centers. Of course, there is a risk that this becomes just one-way traffic, with CLCs getting information but "losing" complainants to PL Centers. However the CLCs can themselves begin to build up industry-specific knowledge, and the fact that they introduced complainants or forwarded requests to PL Centers is almost invariably recorded (with manic Japanese bureaucratic "efficiency") and so can be followed up.¹⁰⁵ Thus, similar to the way MITI seems to have developed its ideas on how to encourage the development of PL Centers "in the shadow" of the EPA and possibly other public bodies (like the Construction Ministry), the PL Centers must operate "in the shadow" of the CLCs and other public bodies.

Yet, for this to occur in fact and this synergy not to turn into self-seeking supra-bureaucratic informalism, consumers must be active participants in the process. We think they are indeed fulfilling this role, in the ways they seek information,¹⁰⁶ and pursue possible liability of service providers and retailers,¹⁰⁷ as well as claiming in recorded "accident" cases clearly covered by the PL Law and possibly some "quality" claims (*supra* Part II. A.). Involving CLCs,¹⁰⁸ often

¹⁰³ See, e.g., 98/2-A.4 (gas oven, "burn" marks on floor).

¹⁰⁴ See, e.g., 97/9-B.2 (gas oven installation problem, dispute "resolved" in April 1997, but now re-emerging since victim claims a resultant ongoing "sensitivity to chemicals syndrome"; see also Comment (para 2) of 97/9 Center newsletter).

¹⁰⁵ Especially when disputes "re-surface", as in *supra* note 104 (97/9-B.2).

¹⁰⁶ See, e.g., 98/4-B.4 (dropped portable gas grill because scalded hand when trying to remove cannister; queries about recalls, etc.).

¹⁰⁷ See also 98/3-A.1 (gas burner about to explode, burned hand; claimed inadequate instructions from shop).

¹⁰⁸ See, e.g., 98/4-C.1 (petroleum heater reignited after switch being turned off, first checked with CLC what accidents/complaints there had been e.g. with respect to poor quality petroleum).

at different stages in the life (and rebirth) of a dispute,¹⁰⁹ can be seen as another aspect of this. While some may interpret claimants' approaches to agencies like CLCs for information, and as advocates, as a good example of "Confucian" deference to a superior (the government), this also can be appraised more positively as active — if not necessarily always "rational" — use of all available resources in a protracted negotiation game.¹¹⁰

C. Very Few Formal Mediation Cases; Much More Direct Negotiation (and Informal Mediation)

Adopting the latter interpretation casts new light on a third feature of all PL Centers' operations so far. Very few number of cases have actually moved to the stage of formal mediation procedures (various termed *chotei*, *assen*, *saitei*), involving some or all of a pre-selected panel of experts (lawyers, scholars, engineers, etc.). In 1996, the Automobile PL Advice Center had only six cases which proceeded to that stage, of which four settled. Most other Centers had fewer, constituting an even lower proportion of cases dealt with. Instead, the vast majority of cases are resolved by less formal negotiations between consumers and manufacturers. A first step is often to help the claimant identify the manufacturer of the product in question. At this or some later stage, the Centers may also provide some information in response to requests, or venture some of its own and/or some advice. All, however, see the preferred goal as consumers resolving their disputes to their satisfaction in negotiations with manufacturers, and this process is the most common. The Automobile PL Advice Center, for instance, received 348 complaints in 1996, and reports 323 as having been resolved satisfactorily by negotiations between complainants and the manufacturers.

Here too, however, it is important to look more closely at the various roles which PL Centers do or can play both in advancing negotiations through providing information, and in more actively mediating between the parties, albeit informally i.e. outside the abovementioned mediation procedures.¹¹¹ From Gas and Petroleum Appliance PL Center cases, it is apparent that its role

¹⁰⁹ Like *supra* note 104 (97/9-B.2).

¹¹⁰ For other instances of this, see, e.g., Tanase, *supra* note 28, at 661-665.

¹¹¹ See also Seikatsu Yohin PL Senta, ed., *supra* note 112 at 2.

can be extensive, but also vary considerably. In some cases,¹¹² the Center may respond to a request for information,¹¹³ and then pursue negotiations with the manufacturer — almost as advocate for the consumer.¹¹⁴ In other cases, it may still pursue negotiations with the manufacturer, but seeking some temporary solution.¹¹⁵ This can allow both parties to reassess options, sometimes still assisted by the Center, for instance meeting with the claimant to investigate the possibility of claiming under its fire insurance policy.¹¹⁶ In yet other cases, the Center may limit itself to supplying information, but make it clear to one or both sides that it is prepared to become actively involved in mediating the case if called upon. As a result of these various approaches, informal settlements of “accident” claims,¹¹⁷ and even “quality” claims are quite frequent,¹¹⁸ particularly when insurance is involved¹¹⁹ or the claimant is also in business.¹²⁰ As such settlements are publicised, particularly among industry association members, and the Center’s reputation as a vigilant and diligent participant — actual or potential — in claim settlement, negotiations begin to be conducted in its shadow as well. As mentioned above, consumers in Japan seem to be motivated to undertake such negotiations, and pursue them intelligently.

Another salient aspect of dispute resolution involving PL claims suggests the appropriateness of this palette of more informal mediation possibilities, along with supply of information, to advance negotiations between the parties. Monetary compensation is clearly an important factor.¹²¹ But many claimants quite clearly want more.¹²²

¹¹² See, e.g., 97/9-A.1 (outdoor gas grill leaked [on three occasions!] when changing cannister).

¹¹³ In this case (*id.*), prompted more by manufacturer misinformation after the complaint: see para. 1 of Comment in 97/7 Newsletter.

¹¹⁴ Often, as in this case (*id.*), seemingly having formed a view as to the consumer’s right to obtain redress.

¹¹⁵ See, e.g., 97/9-A.2 (rest home drier fire, got new drier installed).

¹¹⁶ As in this case (*id.*).

¹¹⁷ See, e.g., 98/4-C.1 (possibly).

¹¹⁸ See, e.g., 98/2-B.2; 98/2-B.3 (carport rebuilder and claimant split costs of repairing old gas pipes).

¹¹⁹ Cf., e.g., 98/3-A.2 (used portable grill, caught fire after put away, burned down half of small house rented for work, not yet insured).

¹²⁰ See, e.g., 98/2-A.7 (industrial fryer unit, safety cutoff feature not put “on” but anyway powered by dry cell batteries in contravention of JIS standards, settlement by replacing with another company’s fryer unit but no payment of consequential damages).

¹²¹ See, e.g., 97/12-A.2 (kerosene leaked into bathtub’s water pipe, killing carp [perhaps for resale?], U.S.\$0.25m claimed).

¹²² See, e.g., 98/3-B.6 (new gas oven installed, drilling hole for pipe without explanation, resulting in 10cm crack; after CLC intervened, claimant offered full repair, special discounts and solatium; but has refused).

First, they seek information, partly to help pursue their claims, but partly because they think they are entitled to know. This is particularly important in cases where a service has also been properly supplied. The claim is often that the service was too expensive, especially when the product has broken down again subsequently,¹²³ but a parallel or latent concern is that the product itself may be unrepairable and unsafe (see also II.A. *supra*). Either sense of being wronged by is exacerbated when insufficient information is forthcoming. It lies at the root of many recorded disputes, and is one form of redress sought.¹²⁴

Secondly, claimants often are motivated by a concern that the accident they have suffered, or the problem they have with their product which they think might lead to an accident, does not happen to others as well. So some strongly urge the supplier of the product to stop carrying that product line.¹²⁵ This sense of responsibility for others is strong among those involved in local communities, like the president of an apartment block association.¹²⁶ In a similar vein, we were told in interviews at a number of Centers about cases being brought by mothers on the part of their grown children!

Sometimes claimants are motivated by personal pride, almost arrogance, like the former university professor (with a Ph. D. in engineering) who disputed a bill for U.S.\$30 for checking and cleaning a pilot lamp on his 3-4 year old gas water heater.¹²⁷ In this case, the dispute was probably brought about by poor personal skills or a lack of convincing explanation when the servicing was carried out, but it may also have been exacerbated by a lack of courtesy when he first made his claim. Lack of sincerity (*sei-i*) appears often in records of claims brought.¹²⁸ These more inchoate senses of being wronged bring with them requests for apologies.¹²⁹

The comparative importance of apology in Japan has been noted by

¹²³ See, e.g., 98/1.B-1, 98/4.B-4 (respectively, *supra* notes 93, 106).

¹²⁴ See, e.g., 98/3-B.1, 3, 5, 6 (see also Comment to 98/3 Newsletter).

¹²⁵ See, e.g., 98/3-A.1 (gas burner, was about to explode so thrown out the window, burning hand).

¹²⁶ See, e.g., 97/9-B.3 (many instances of bathtub heating breaking down, conducted survey, requested information from Center).

¹²⁷ See 97/12-B.1.

¹²⁸ See, e.g., 98/2-A.6 (portable grill burned tablecloth etc (minimal amount?), but disturbed "lack of sincerity" of initial response from manufacturer, asking "didn't you put too heavy a pot on the grill?").

¹²⁹ See, e.g., 98/3.A-1 (gas burner thrown out of window), 98/2.A.3 (singer shocked by grill/cannister catching fire, claiming solatium [*meiwaku-kin*] for "bothering her landlord" [see Comment in para. 2 of 98/2 Newsletter] as well as for her own shock).

others.¹³⁰ But we think that this, and the other abovementioned features of PL claims, will find resonance with empirical studies elsewhere as to what really drives claimants invoking tort law.¹³¹ It is important to stress that apology without more tangible compensation will almost never be enough in Japan:¹³² that will lack “sincerity”. An example is the *konnyaku* jelly case settlement mentioned at the outset (Part I), where both “profound apology” and Yen 50m in damages were agreed on, whereas the company’s conduct, following a director’s visit to the hospital when the child was still alive, was felt to have been “insincere”.¹³³ Yet such calls for moral vindication — along with other factors like a proper hearing, a sense that the dispute is not just about one individual but involves a network of others (other clients, local communities), prompt supply of relevant information, and so on — make disputes more amenable to a range of more informal as well as more formal processes. This we see emerging in valuable forms in PL Center dispute resolution, particularly in the Gas and Petroleum Appliance PL Center.

D. An Interim Appraisal

One of the premisses supporting the establishment of PL ADR institutions, including industry-based schemes, was that various structural barriers to litigation would prevent valid claims being brought through the formal court system, so more accessible means of dispute resolution would need to be made available in more informal forums.¹³⁴ At least to those wedded to formal dispute resolution processes and classical (or neo-classical) liberal rights discourse as ideals, even — or perhaps especially — in Japan,^{134a} at least the more formal mediation procedures provided by the PL Centers may seem preferable. For them, the limited number of cases so far under these procedures, then, signal the failure of

¹³⁰ Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC’Y. REV. 461 (1986).

¹³¹ Cf. also David Engel, *The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 L. & SOC’Y. REV. 551 (1984) (showing how claims, especially to courts, were made more by newcomers or outsiders to a community, and resisted or stigmatised by incumbent community members).

¹³² See also Tsuneo Matsumoto, Comment in “Synthesis and Prospects: Concluding Remarks by Participants” 15 U. HAW. L. REV. 764, 774-775 (1993).

¹³³ Sato, *supra* note 1.

¹³⁴ NIRA, ed., *supra* note 64.

^{134a} Adopting this perspective, see, e.g., Setsuo Miyazawa, *For the Liberal Transformation of Japanese Legal Culture: A Review of the Recent Scholarship and Practice*, 6 ZJAPANR 101 (1997), especially at 104-8.

these institutions. Our interviews and close analysis of the growing amount of data from at least some of the Centers, however, suggest how these institutions and the various actors involved in their activities are evolving. They are developing new roles,¹³⁵ creating a rich mosaic of sometimes quite unexpected interactions which renders problematic a prioritisation of more formal procedures or a simple “input-output” calculus for appraising these institutions.¹³⁶ In particular, we discover consumers actively engaging a range of actors and legal as well as social norms, in a variety of forums substantially of their own choosing. In these circumstances, the “remote control” function of PL ADR Centers in helping consumers and other actors, such as businesses and CLCs, to negotiate and renegotiate solutions or processes, among themselves, seems a sensible way forward.¹³⁷

More theoretically, such intermediate forums seem to be a feature of complex industrialised societies today, which is increasingly a focus of attention of legal theorists and policy-makers. They offer institutional frameworks to help mediate the tension between the factual and the normative, identified by Habermas and still being developed by others,¹³⁸ or at least provide functional mechanisms for effective “system coupling” between individual, consumer associations, business organisations, and the legal system.¹³⁹ An important specific aspect of this, deserving more study, is how the discourse about product “defects” often seems to be transformed by PL Center inquiry and dispute resolution processes into a new and possibly more abstract level of discourse, about product “safety”. In legal norm setting, such as E.C. rules as to product safety,¹⁴⁰ a similar trend seems to be quietly gaining momentum. Industry-

¹³⁵ As the Daily Necessities PL Center is well aware: see Seikatsu Yohin PL Senta, ed., *supra* note 81, at 2.

¹³⁶ For more theoretical criticism of these tendencies, see Wada, *supra* note 30.

¹³⁷ Cf. Ji Weidong, *On Reflexive Mechanism of Law Trial Implementation in China*, in WEGE ZEU JAPANISCHEN RECHT: FESTSCHRIFT KITAGAWA 753 (Hans Leser & Tamotsu Isomura, eds., 1992); Ji Weidong, *The Chinese Experience: A Great Treasure-House for the Sociology of Law*, in SOCIOLOGY OF LAW IN NON-WESTERN COUNTRIES, 15, 17 (Masaji Chiba, ed., 1993).

¹³⁸ Jürgen Habermas, BETWEEN FACTS AND NORMS (trans. Rehg, 1996). Cf. Takao Tanase, *Fuhokoi Sekinin no Dotokuteki Kiso [The Moral Foundations of Tort Liability]*, in GENDAI NO FUHOKOIHO - HO NO RINEN TO SEIKATSU SEKAI [CONTEMPORARY TORT LAW: THE IDEAL OF LAW AND THE LIFEWORLD] (Takao Tanase, ed., 1992).

¹³⁹ Cf. Gunther Teubner, *Autopoiesis and Steering: How Politics Profit from the Normative Surplus of Capital*, in AUTOPOIESIS AND CONFIGURATION THEORY: NEW APPROACHES TO SOCIETAL STEERING 127 (Roeland in 't Veld et. al, eds., 1993); see also Gunther Teubner, *Altera pars Audiatur: Law in the Collision of Discourses*, in LAW, SOCIETY AND ECONOMY 149 (Richard Rawlings, ed., 1997).

¹⁴⁰ See, e.g., Hans-Wolfgang Micklitz, *Product Liability and Product Safety - Standardisation*

based PL Centers may prove an important part of this, not only in Japan but also in Europe and the U.S., where the interface between private and public law norms (product liability law and administrative regulation) seems particularly “uncoupled”.¹⁴¹ Such transformation processes have been highlighted as an important feature to be nurtured in contemporary socio-legal systems, particularly on the borderline between law and technology.¹⁴²

Nonetheless, from our analysis so far, we have also begun to identify some existing or potential problems in operationalising such processes in the context of Japan's industry-based PL ADR Centers, which we put forward here for further debate as well. Firstly, and perhaps least controversially no matter what one's theoretical perspective and approach to the the existing data, it seems quite clear from the above discussion that Centers should break down more information, more carefully. This should better expose the complex interactions we have glimpsed arising among manufacturers, service providers, retailers, PL Centers, consumers, and a range of public bodies.

All such information should be publicly disclosed.¹⁴³ This is in line with legislative initiatives with respect to official information. Those initiatives, along with continued pressure from consumer interests reinforced by enactment of the PL Law, no doubt underpinned MITI's decision to disclose company names etc. in some cases (256 out of 1017) beginning with its September 1997 Accident Report, which will also henceforth be published three times rather than once annually.¹⁴⁴ A related factor pushing towards better disclosure is expanded discovery and interrogatory procedures under the amendments to the Code of

and Certification: The European Challenge, TEXAS INT'L. L.J. (forthcoming Paper presented at the Symposium on “Products Liability: Comparative Approaches and Transnational Litigation”, February 19-20, 1998, University of Texas).

¹⁴¹ See, e.g., Timothy Zick, *Reporting Substantial Product Safety Hazards Under the Consumer Product Safety Act: The Products Liability Interface*, 80 GEO. L.J. 387 (1991); Frances Zollers & David Barry, *A Regulation in Search of a Rationale: An Empirical Study of Consumer Product Safety Act Section 6 (b) and its Effect on Information Disclosure under the Freedom of Information Act*, 43 ADMIN. L. REV. 455 (1991).

¹⁴² See, e.g., Karl-Heinz Ladeur, *Post-Modern Constitutional Theory: A Prospect for the Self-Organising Society*, 60 M.L.R. 691 (1997); Karl-Heinz Ladeur, *The Integration of Scientific and Technological Expertise into the Process of Standard-Setting According to German Law*, in INTEGRATING SCIENTIFIC EXPERTISE INTO REGULATORY DECISION-MAKING 77 (Christian Joerges et al., eds., 1997).

¹⁴³ Lawrence Repeta & Jody Chafee, *Japanese Government Information: New Rules for Access - The Proposed Information Disclosure Law: Status and U.S. FOIA Comparison* (Japan Information Access Project Special Report, June 1998, also at <<http://www.unjc.org/jiap/specrpts/joho.html>>).

¹⁴⁴ CHUNICHI SHIMBUN, November 5, 1997.

Civil Procedure. These influences have already been expressly noted by some PL Centers,¹⁴⁵ or were mentioned in interviews and when making information available to us. As is often so in Japan, as long as a critical mass develops, information disclosure should therefore improve. However, information should not be collated for the benefit primarily of industry association members. We stress that this does not necessarily mean that Centers are doing this; on the contrary, we have no evidence indicating they are discriminating by supplying more limited information to non-industry parties. But it is clear that much information disclosure remains too limited; the Gas and Petroleum Appliance PL Center approach, refined in the light of preceding comments, should form a minimum benchmark.

In addition, however, there should be more attempt at follow-up to gauge how consumers experience their interactions with PL Centers. Random surveys of those who initially made contact should be undertaken, as the Gas and Petroleum Appliance PL Center has just started to do.¹⁴⁶ We are hoping to get involved in this and other survey research, but especially also in follow-up interviews — here we should reiterate that we have heard only half (or maybe two-thirds) of the story, and still need to hear more directly the voices of claimants.

Secondly, the Centers' role in trying to advance negotiations between the parties themselves, largely by "remote control" through advice over the telephone, needs to be reconsidered. Particularly in claims involving more "moral" issues, face-to-face interaction may be more effective even than free (-dial) telephone counselling and advice. It is important for dispute resolution agencies, particularly one with multi-faceted roles like PL Centers, to show a human face. In this sense, developing the ability to respond to questions through the internet — while a useful next step not yet taken, unlike e.g. in the BBB Auto-line scheme in the U.S.¹⁴⁷ — will not be enough. One option is to establish branches in major cities outside Tokyo, e.g. Osaka. Demarcation lines between various industry associations have spawned perhaps too many different Centers. While they

¹⁴⁵ See, e.g., Seikatsu Yohin PL Senta, ed., *supra* note 81, at p1)

¹⁴⁶ See 94/4 Newsletter.

¹⁴⁷ See <<http://www.bbb.org/complaints/BBBautoline.html>>. On the BBB, see briefly E. Johnson, Jr., et al., *Access To Justice in the United States: The Economic Barriers and Some Promising Solutions*, in I (Book 2) ACCESS TO JUSTICE: A WORLD SURVEY 913, 974 (Mauro Cappelletti & Bryant Garth, eds., 1978).

may not be prepared to merge now that they are established in Tokyo, perhaps they could join forces to set up branches together elsewhere. They should compare geographical dispersion of their claimants, and the nature of such claims. The Gas and Petroleum Appliance PL Center, which finds itself increasingly stretched when it gets a cluster of accident claims from different parts of the country over a short period,¹⁴⁸ could join with the Home Electronics PL Center, for instance. This would also make it easier for consumers to take an important step in resolving their disputes, namely sending the alleged defective product to the Center — for gas appliances, this can be expensive unless one is based near Tokyo.¹⁴⁹

Thirdly, the Centers should develop structures to better insulate the financial and personnel resources required to run the Centers. Examples of this are Banking Ombudsman schemes run by bankers' associations overseas, like in New Zealand.¹⁵⁰ We have been impressed by the genuine dedication on the part of those involved in the PL Centers, to resolving disputes in a balanced and sympathetic manner. But some Centers are much better than others. Even for the best ones, there is a potential problem of perception. However, this may not be the crucial problem that some pro-consumer interests had perceived.¹⁵¹ To some extent we can rely on MITI or EPA to ensure the Centers remain reasonably fair, and the marginal improvement from such reform may turn out to be minimal if we are correct in our view that consumers are often using Centers as just one more resource among many others in negotiations with manufacturers or a range of others to resolve their disputes.

A related, and perhaps more important improvement, is to nonetheless strengthen the formal mediation procedures offered by the PL Centers. In doing so, however, the aim should be to complement and promote the more informal processes we already see emerging, resulting in a more fluid overall system.¹⁵² One way to strengthen the more formal procedures is to transform the mediation procedure into (or add) an arbitration procedure, with awards binding on the

¹⁴⁸ See 98/3 Newsletter.

¹⁴⁹ See, e.g., 98/2-A.8 (sent from nearby Chiba); cf. 98/2-A.2 (not clear if ever in fact sent from Osaka).

¹⁵⁰ See Nadja Tollemache, *Taking the Ombudsman Concept into the Private Sector: Notes on the Banking Ombudsman Scheme in New Zealand*, 26 VICTORIA U. WELLINGTON L. REV. 233 (1996).

¹⁵¹ See, e.g., Nichibenren, ed., *supra* note 80; *supra* note 63.

¹⁵² Wada, *supra* note 30.

manufacturers only. There is a precedent for this already in Japan in the occurs — interestingly, *de facto* i.e. from informal norms — with the traffic Traffic Accident Dispute Resolution Center, established initially as a non-profit body, financed by investment profits by compulsory insurance. Although decisions rendered in cases before the most formal of its proceedings, before a panel of independent persons (retired judge, lawyer, and legal academic), are not legally enforceable by the individuals availing themselves of this Center, the insurance companies almost invariably abide by its decisions. But so do the individuals, partly because the legal precedents have become so predictable in this area, that presumably they see no benefit in taking the case to court — they will get the same or a similar judgment.¹⁵³ There is a precedent again in the New Zealand Banking Ombudsman scheme, although proposals recently to adopt such a scheme for Japanese banks have been met so far with deafening silence.¹⁵⁴

It is also the system in the BBB Auto Line scheme for auto defect disputes, run by the Better Business Bureau in the U.S., to which all of the main Japanese manufacturers are party.¹⁵⁵ This is ironic since the Automobile PL Advice Center in Japan does not bind the same companies in its mediation procedure, which is purely voluntary, and most of the products in question are presumably the same cars! This may indeed reflect the power of (very) big business in Japan to adopt a double standard, in its own interest, and the much lower threat value that disgruntled claimants have in Japan compared to the U.S. — at least in formal court proceedings. On the other hand, it may be that only the biggest Japanese auto manufacturers are confident enough to stand by their products in the U.S. under this scheme — and cannot afford negative publicity in not doing so — whereas the other smaller manufacturers in Japan were less so, and thus preferred the completely consensual procedure in the Automobile PL Advice Center. But this example also highlights a potential obstacle to adoption of

¹⁵³ See Tanase, *supra* note 28, especially at 676-678.

¹⁵⁴ See Tsuneo Matsumoto, *Kokyaku Manzoku to Ginko Omubuzuman Seido* [Client Satisfaction and the Banking Ombudsman System], 26 GINKO JITSUMU 3 (1996); Tsuneo Matsumoto, *Futsu no Kaisha to shite no Ginko Sabisu* [Banking Services as a Normal Company], 1439 KINYU HOMU JIHO 32 (1996). However, as those even passingly familiar with the successive scandals and poor economic performance still characterising Japan's financial sector will appreciate, it has remained mired in old ways and now faces a daunting restructuring of the financial system. See generally Luke Nottage, *Top Ten Changes and Continuities in Japanese Law and Society — 1997*, YEARBOOK 3: 1997, 611 (N.Z. Association for Comparative Law, ed., 1998), also uploaded onto Luke Nottage's website at <<http://www.law.kyushu-u.ac.jp/~luke/topten.html>>.

¹⁵⁵ *Supra* note 147.

such a one-sided arbitration scheme in a PL context in Japan: possible lack of adequate third party institutions able to objectively determine cause of accidents involving complex products like automobiles. It may be that the robust use of courts and experts in the U.S. creates more such expertise, which can be used in the BBB scheme to the satisfaction of manufacturers there; but that this has not yet emerged in Japan. This rationale should be explored, however, and in all relevant industries since it seems much less likely to apply to some (e.g. “daily necessities” manufacture).

III. Conclusions and Directions for Further Research

Despite such existing or potential obstacles to developing industry-based PL ADR institutions which “fit” a complex industrialised society like Japan, both normatively and functionally, we think such institutions can have an interesting role both in Japan and further afield. We hope to have indicated how — in their establishment, but especially in their operations so far — Japan’s PL ADR Centers do not represent mere bureaucratic informalism, nor even bureaucratic informalism merged with industry informalism; rather, they include a significant element of consumer informalism. Elsewhere we will develop further our arguments and include more comprehensive data (particularly in Parts I.B., II. and III.), and we hope now to provoke comment and debate. Already, however, we hope to have suggested a new paradigm — bureaucratic, industry, *and* consumer informalism — for analysing civil dispute resolution more generally in Japan in the late 1990s and beyond, a paradigm which transcends models often developed in the 1970s and 1980s.

Generally, our tentative analysis in Part I ties into the ongoing debate about seemingly deep-rooted cross-border differences in regulatory style;¹⁵⁶ and, more specifically, government-business relations in Japan. Ulrike Schaeede for instance, suggests that there remains significant continuity in those very intertwined relations because of (i) a tradition of elevating pragmatism above principles, and (ii) institutional arrangements supporting “consultative capitalism” in Japan, such as semi-public think tanks, “regulatory intermediaries”

¹⁵⁶ See, e.g., the introductory essay by Robert Kagan to the special issue on regulation, [1998] L. IN JAPAN.

which look like private firms but which actually regulate an industry, and the “old boy” (*amakudari*) system.¹⁵⁷ This perspective invites a closer look at the role of NIRA, for instance, in the process of establishing the PL ADR Centers,¹⁵⁸ and whether the industry associations for each can also be seen as institutional arrangements of consultative capitalism.¹⁵⁹ Yet, as shown by the increasingly vocal critique of *amakudari* relations and structural corruption (or increasing perceptions of it), Japan is in considerable flux.¹⁶⁰ Underpinned by, and underpinning, these developments, new principles affecting the Japanese state have been enacted and are being slowly bedded down.¹⁶¹ As Schaede also points out, from the late 1970s there was clearly a change from active bureaucratic control towards reactive consultation and control, as regulatory capacity was challenged by a more internationalised economy and so on.¹⁶² Further changes since the mid-1990s may be creating a new paradigm in state-business relations. Part of that, furthermore, appears to be the growing role of consumers, and consumerism itself.¹⁶³ This trend appears to be reflected, for instance, in the increasing workload of CLCs throughout Japan.¹⁶⁴ As the opening of Eastern European markets has shown, consumers can quite quickly learn to look out for themselves — albeit often the hard way, sadly; in Japan, too, any pre-conceived image of the perennially passive consumer therefore needs urgent reinvestigation.¹⁶⁵ This process can be supported by important ongoing reforms in, and re-thinking of, consumer law itself.¹⁶⁶ Such further analyses also promise to contribute to the

¹⁵⁷ Ulrike Schaede, *Change and Continuity in Japanese Regulation*, 1 ZJAPANR 21 (1996).

¹⁵⁸ *Supra*, text at note 64.

¹⁵⁹ *Cf. generally* Ohashi, *supra* note 77.

¹⁶⁰ *See, e.g.*, the special issue on these issues in 43/8 HOGAKU SEMINA [August 1998].

¹⁶¹ *See, e.g.*, Lorenz Ködderitzsch, *Das neue Verwaltungsverfahrensgesetz in Japan - Versuch einer ersten Bilanz* [The New Administrative Procedure Law in Japan: A First Attempt to Take Stock], 2 ZJAPANR 131 (1996); Ken Duck, *Now That the Fog Has Lifted — The Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance*, FORDHAM INT'L. L. J. 1686 (1996). *See also* the new principles being hammered out in the context of official information disclosure: *supra* note 143.

¹⁶² *Supra* note 157, 21-24. *See also supra* note 76.

¹⁶³ *See, e.g.* Luke Nottage, *The Still-Birth and Re-Birth of Product Liability in Japan: The Early 1970s versus the Early 1990s*, in ADAPTATION OF LEGAL CULTURES (Johannes Feest & David Nelken, eds., forthcoming 1999; outline on file with us, and the editors of this journal).

¹⁶⁴ *See, e.g.*, JCIC NEWS (1995-98, various issues), available through <<http://www.kokusen.go.jp/jcic3/e-hello.html>>.

¹⁶⁵ *Cf.* Thomas Wilhelmsson, *Consumer Images in East and West*, in RECHTSEINHEIT ODER RECHTSVIELFALT IN EUROPA? ROLLE UND FUNKTION DES VERBRAUCHERRECHTS IN DER EG UND DEN MOE-STAATEN [LEGAL UNITY OR LEGAL DIVERSITY IN EUROPE? THE ROLE AND FUNCTION OF CONSUMER LAW IN THE EU AND EASTERN EUROPE] 53 (Hans-W. Micklitz, ed., 1996).

¹⁶⁶ *Supra* notes 94-96. *See also* the wide-ranging special issue on consumer law in 1139 JURISTO [August, 1998].

reassessment of the role of the individual in contemporary Japanese law and society, although it must also be recognised that consumers face particular barriers to promoting their interests in the world of law.

More specifically with respect to the PL Centers, however, there are a number of interesting areas for further research. The initial motivation of some industry associations in setting them up, and the way in which they operate them, may vary. Both aspects may depend on the type of product. For instance, if some are already safe or can be readily made safer (e.g., because they tend to involve mere manufacturing defects rather than design defects, which require better corporate policies and judgement calls rather than isolated failures to otherwise safe products), then the relevant PL Center may be more balanced in its approach. Along these lines, for instance, Ramseyer suggests that the existing safety of the products covered by voluntary insurance schemes help explain why so few claims are brought and paid out on by the industry associations running such schemes.¹⁶⁷ Yet this explanation cannot be the only one in the case of the PL Centers, which cover a much wider gamut of products. Another determinant may be the increased extent of harm if a product proves defective, which may also related to the extent of background direct regulation — hence, perhaps, the Gas and Petroleum Appliances PL Center may adopt a particularly positive approach. The background regulatory framework impacting on the product sector in question, moreover, may create more scope for *amakudari*. This too must be investigated more closely in the case of each Center and its parent association, as well as more generally.¹⁶⁸ Yet such analyses should be sensitive to possible conflicting loyalties even for Center officials previously involved in government bureaucracies, and focus on personal and historical contingency,¹⁶⁹ as well as structural constraints on them such as pressures for transparency from *Nichibenren*,¹⁷⁰ seemingly increasingly active consumer organisations, the media, and so on. The actual roles of consumer organisations and the media should also be more closely reviewed as to their

¹⁶⁷ Cf. Ramseyer, *supra* note 69. We are also indebted to Setsuo Miyazawa for raising a point along these lines.

¹⁶⁸ We thank Bryant Garth for this suggestion.

¹⁶⁹ See generally Bryant Garth, *Culture and Legal Transplants: Notes on the Import and Export of Law and Legal Institutions*, Paper presented at the workshop on "Adaptation of Legal Cultures [Changing Legal Cultures III]" held at the International Institute for the Sociology of Law, Oñati, June 25-27, 1998 (on file with us and the editors of this journal).

¹⁷⁰ *Supra* note 80.

involvement when the PL Law was being enacted, and the Centers established.¹⁷¹ A comparative analysis of the media promises to be particularly interesting given the key role for it identified by Michael McCann and others in framing the PL debate in the U.S., and perceptions thereof.¹⁷²

Their study also highlights the importance of the social construction of knowledge, and hence teaches us about the need for a reflexive approach in the study of social and legal phenomena. Although we have concluded by identifying many directions for future research, we hope at least to have demonstrated the importance of their lessons also — or perhaps particularly — in comparative studies,¹⁷³ as well as providing some important points and an overall framework for ongoing empirical work into the actual activities of Japan's new PL ADR Centers.

¹⁷¹ See generally, e.g., Motoharu Okada, *Shinbun wa PL Ho o Do Tsutaeta Ka — Shohisha Mondai no Hodo o Fujitsu Saseru Tame no Obeogaki* [How Did the Newspapers Portray the PL Law? Notes Towards Deepening the Imparting of Consumer Issues], 1139 JURISTO 137 [1998] (although we should acknowledge his own admission that that analysis was based on reporting in the *Asahi Shimbun*, traditionally the least conservative of the main dailies); and Atsushi Omura, *Shohisha Dankai no Katsudo — Seikyo o Chushin ni* [The Activities of Consumer Organisations: Focusing on the *Seikyo*], 1139 JURISTO 130 [1998]. Although we would accept that consumer activity is particularly well organised in the United States, and for a long time Japan's organisations remained very much in the shadow of regulatory bodies (at least at their highest levels), in broader comparative perspective and in the light of Omura's study and other recent developments, it is increasingly unrealistic to marginalise their role in Japan. What is needed here, ideally, is a careful comparative study of the scale and sophistication of that undertaken by Cappelletti and others (*supra* note 147), for the late 1990s.

¹⁷² Michael McCann, William Halton & Judith Aks, *Media Framing of Products Liability Lawsuits and the Social Production of Knowledge*, Paper presented at the Annual Meeting of the Law & Society Association held at Snowmass Village at Aspen Colorado, June 4-7, 1998 (on file with us and the editors of this journal).

¹⁷³ For a similar starting-point in a comparative research project into Japanese contract law and practice, see Luke Nottage, *Contract Law and Practice in Japan: An Antipodean Perspective — Revisited*, 31 HIKAKUHO ZASSHI 55 [1998], expanding on and updating his chapter (seven) in *JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM* 197 (Harald Baum, ed., 1997).

Appendix A: Product Liability Law

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

Translated by Luke Nottage (©1998).

Article 1: Purpose

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

Article 2: Definitions

(1) "Product":

Manufactured or processed movables (*dosan*).

(2) "Defect":

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

(3) "Manufacturer":

1. Any person who produces, processes or imports a product as a business.
2. Any person who presents its name, trade name, trademark or other mark ("presents its name etc.") on the product as its manufacturer; or presents its name etc. on the product so as to create the mistaken impression that it is the manufacturer.
3. Any person, other than those listed in paragraphs 2 and 3, who presents its name etc. on the product and who can be recognised as the manufacturer in fact, considering the manner in which the product is manufactured, processed, imported or sold and other circumstances.

Article 3: Product Liability

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

Article 4: Exemptions

(1) Development Risks

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

(2) Component Manufacturing

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

Article 5: Limitations of Time

(1) The right to claim compensatory damages shall be extinguished by prescription (*jiko*) if not exercised by the harmed person or the latter's legal representative within 3 years of the time such person or representative knew of the harm and the person liable for the damage. The same shall apply after 10 years has elapsed from the time of delivery by the manufacturer etc.

(2) Where the harm is caused by a substance which becomes harmful to human health when it accumulates in the human body, or where the

harm shows symptoms after a certain latency period, the period set forth in the second sentence of Article 5 (1) shall be calculated from the time such harm arises.

Article 6: Application of Civil Code

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

Appendix B: Reported Case Filings under the PL Law

(As of October 1998. Thereafter this table will be kept updated at
<<http://www.law.kyushu-u.ac.jp/~luke/pllawcases.html>>.)

Sources:

- Toshimitsu Kitagawa, *Ho to Gijitsu no Hashiwatashi o Sagutte: Saikin no Seizobutsusekinin Soshō Kanren no Ugoki* [Searching for a Bridge between Law and Technology: Recent Trends in PL Related Suits], [September, 1998] ENGINEERS 18.
- **Shohisha Kujo Shori Senmon Iinkai Jimushitsu, ed., *PL SOSHO ICHIRAN* [OVERVIEW OF PL SUITS] (unpublished, dated 30 June 1998).
- *Seikatsuyohin PL Senta, ed., *HEISEI 9-NENDO SEIKATSU YOHIN PL CENTER JIGYO HOKOKUSHO* [DAILY NECESSITIES PL CENTER REPORT OF ACTIVITIES FOR FISCAL 1997] (1998).
- *Koka ga Dete Kita PL Ho* [PL Law Having an Effect], CHUNICHI SHIMBUN, NOVEMBER 5, 1997.

Nature of Suit	Amount Claimed (and US\$, at Yen 120): Breakdown*	Court	Date Suit Brought	Number of Hearings (as at end '97)*	Result
1. Restaurant owner cut finger opening tea drink container	Yen 910,000 (\$7583): Yen 10,000 medical expenses; Yen 350,000 lost earnings; Yen 500,000 non-pecuniary loss (<i>isssharyo</i>)	Niigata DC (Nagaoka Branch)	24/12/95	14	
2. osteopath (?) poisoned by packed cut bacon won at pachinko parlour	Yen 950,000 (\$7917): Yen 650,000 lost earnings; Yen 200,000 <i>isssharyo</i> ; Yen 100,000 lawyers' fees	Maebashi DC	18/11/96	6	**15/6/98: court-annexed settlement - solatium (<i>mimaikin</i>) paid after plaintiff accepted causality dubious and abandoned claim for <i>isssharyo</i>
3. Electric company claiming against pipe processing company for defect in snow melting machines	Yen 51,000,000 (\$425,000)	Sapporo DC	8/8/96 (in tort, under Civil Code); 11/96 (amended claim at third hearing; also under PL Law, for one machine delivered after 1/7/95)	12	

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4. 12 year old girl died from poisoning from 0-157 bacteria allegedly in school lunches	Yen 77,000,000 (\$641,667)	Osaka DC (Sakai Branch)	16/1/97	6	
5. Restaurant manager claiming from importer of raw sea urchins for food poisoning of 23 customers	Yen 33,000,000 (\$275,000)	Sendai DC	4/2/97	9	
6. 25-year-old woman developed skin trouble in hands, so couldn't sleep enough from itchiness, after using synthetic detergent in kitchen for 2 months	Yen 70,000 (\$584) [claimed against Kao Corp.]	Tokyo DC [1997 wa 7876]	5/2/97 (in Summary Court; transferred to DC in 3/97 at Defendant manufacturer / seller's request)	3	
7. 77-year-old woman killed while waiting for car, by iron car lift in parking building	Yen 18,150,000 (\$151,250)	Kyoto DC	13/5/97	5	
8. *Itchiness and hearing difficulties after using ear care product bought and used following instructions, the day after seeing TV ad	Yen 610,000 (\$5083): claiming purchase price, medical expenses, <i>issuaryo</i> , and lawyers' fees [against Medic Far East]	Sendai Summary Court [1998 wa 118]	22/1/98	?	**7/5/98: first settlement under PL Law, for Yen 250,000
9. **Air conditioner installed in leased apartment dripped water onto computer plug; short led to loss of much data and work delayed one year	Yen 4,200,000 (\$35,000)	?	2/3/98	?	

Appendix C: PL Claims Reported Since the Early 1990s

(As of October 1998. Thereafter this table will be kept updated at

<<http://www.law.kyushu-u.ac.jp/~luke/plclaims.html>>.)

Source:

PL HO NYUSU (later retitled PL HO/JOHO KOKAI NYUSU; both referred to here as "PLN"), issues 1-29.

*Indicates there is commentary on the case in that issue, not a mere listing.

Case No. (Reference)	[Date Suit Brought/] Case Citation & Court	Product & Details	Defendant	Result (Reference)
1. A-1 (PLN 1)	1991 (wa) 4761, Osaka DC	TV, burned down office: claimed Yen 78m	National	29/3/94, DC: awarded Yen 44m (PLN 12* = PLN 12)
2. B-1 (PLN 1)	1991 (wa) 1715, Osaka DC	TV, burned down house, grandma (83) died: claimed Yen 23m	National	9/94 settlement: Yen 18m (PLN 15*)
3. C-1 (PLN 1)	1991 (wa) 1716, Osaka DC	TV, burned down house, daughter (25) died: claimed Yen 22m	Sharp	18/9/97 DC: awarded Yen 11m per person = 22m in total (PLN 26) ; settled on appeal to HC for Yen 65m ¹⁷⁴
4. D-1 (PLN 1)	1991 (wa) 1707, Osaka DC	Video Deck, half of rented apartment burned down or water damaged, had to vacate: claimed Yen 10m	Victor	2/12/94 settlement: <i>mimaikin</i> (PLN 15*)
5. E-1 (PLN 2)	1992 (ha) 1914, Osaka SC	Lancia car, suddenly accelerated: argument over repair cost [Yen 0.38m, and buy back]	Hakko Karaunji	19/7/94, settlement: supplier responsible for repair, bought back at Yen 1.6m (originally 5.4m, x 3/10 years) (PLN 14*)
6. F-1 (PLN 2)	[21/10/] 1991 (wa) 392, Otsu DC	Pajero car, wheel came off, injured etc.: claimed Yen 4.6m against maker & garage	Mitsubishi; Konoe Mitsubishi Auto Sales Co.	9/2/96, DC: plaintiff lost (PLN 16* = PLN 16); 18/9/98, HC: lost on appeal (PLN 26)
7. (PLN 4)	[12/1988] Osaka DC	Telephone, infected with cockroaches, lost business	NTT	10/7/92, DC: lost; appealed to Osaka HC

¹⁷⁴ Nihon Keizai Shimbun, October 7, 1998. Note that the plaintiff claimed a total of Yen 95.5m on appeal to the High Court, much higher than the Yen 22m claimed originally in 1991, presumably because of the intervening decision of the District Court awarding Yen 44m on a claim of Yen 78m (*supra*, case 1).

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8. (PLN 4)	[28/8/1991] Otsu DC	Car, accelerated when parking, slightly injured	Honda	
9. (PLN 5)	[28/8/1991] Otsu DC	Car, accelerated, driver killed		
10. G-1 (PLN 5)	1991 (ne) 1266, Tokyo HC	Household fungicide	Johnson	Appeal from 28/3/92 judgment - 6/7/94, HC: ... (PLN 13); 10/4/97 SC judgment - plaintiff lost (PLN 24* = 24?)
11. H-1 (*PLN 5)	[6/12/] 1991 (wa) 17463, Tokyo DC	Hair dye, damaged eye: claimed Yen 13.5m	Helen Curtis Japan	3/3/94, settlement (PLN 12)
12. I-1 (PLN 5* = PLN 6)	1992 (wa) 774	Plowing machine, crushed farmer (60)	Mitsubishi Agricultural Equipment	
13. K-1 (PLN 5* = PLN 7)	[26/10/] 1990, Niigata DC	Stepladder, collapsed and farmer fell off, injured	Sankyo Aluminium Kogyo	2/3/98, settlement: Yen 3m (PLN 28* = 28)
14. "J-1" (PLN 6)	1992 (wa) 1523, Tokyo DC	[Not specified]	Showa Electric	
15. E-2 (PLN 6*)	Nagoya DC	Hard contact lenses, repeated disintegrated when washed: claimed Yen 0.2m for replacement costs paid to retailer	Hoya	26/4/95, DC: plaintiff lost (PLN 16)
16. J-1 (PLN 7 = PLN 7*)	[7/]1991 (wa) 1928, Nagoya DC	Mountain bike, front wheel came off, boy injured	Bridgestone	19/3/96 settlement: Yen 2.5m (PLN 19* = PLN 19)
17. L-1 (PLN 7)	[6/]1992 (wa) 10094, Tokyo DC	Bike, handlebars came off, injured	National Jitensha Kogyo	27/5/94, DC: Yen 0.25m (PLN 13*)
18. M-1 (PLN 8 = PLN 16*)	1992 (wa) 11828, Tokyo DC	Word processor, AC cord shorted, office/home half burned down	Minolta Camera et al.	
19. "N-1" (PLN 8)	1992 (wa) 12963, Tokyo DC	White ant pesticide, injured neighbours	Sankyo Shodoku et al.	
20. N-1 (PLN 13* = PLN 13)	1994 (wa) 10320, Tokyo DC	Ceramic heater, burned down new house	Matsushita, Morita Denko, Daiei	3/8/94 settlement (PLN 14*)
21. (PLN 14*)	[accident 11/93]	Car, burst into flames, killed driver	Nissan	10/94 settlement: "reasonable amount satisfactory to parties"

22. (PLN 15*)	1986 (wa) 199, Wakayama DC	Baby bed, baby caught between bed and mattress, suffocated	Bed subcontracter, own-brander wholesaler, Seihin Anzen Kyokai, Japanese government	27/10/94 settlement: express deep regret, ensure never repeated, Yen 26m
23. G-2 (PLN 15)	1992 (wa) 4216, Nagoya DC	Hair dye, injured eye	Riaru Kagaku et al.	27/2/97, DC: plaintiff lost
24. I-2 (PLN 15)	1993 (wa) 473/1993 (wa) 278, Fukushima DC	Counter table, crushed baby	Nihon Hatsujo	25/7/95, DC: plaintiff lost (PLN 17)
25. K-2 (PLN 15)	1994 (ne-o) 742, Supreme Court	Elevator, injured when foot caught in door	Mitsubishi	
26. L-2 (PLN 15)	1994 (ne) 1594, Tokyo HC	Automatic door, opened suddenly, old woman injured	Kagoshima Kensetsu	29/3/96 settlement: Yen 3m
27. M-2 (PLN 15)	1994 (wa) 1269, Okayama DC	Golf club, shaft came off and flew 100m when practising	Mizu Haku	
28. N-2 (PLN 15)	1994 (wa) 534, Shizuoka DC	Car, accelerated suddenly when backing out of garage, hit concrete wall and written off	Mercedes Benz Japan	
29. O-2 (PLN 15)	1994 (wa) 3817, Tokyo DC	New car, accelerated suddenly in parking lot	Jaguar Japan	18/2/98 settlement: Yen 2.1m (PLN 27)
30. P-2 (PLN 15)	1994 (wa) 4181, Nagoya DC	Tobacco: physical and non-pecuniary harm	Nihon Tobacco Sangyo	
31. Q-2 (PLN 15)	1994 (wa) 24472, Tokyo DC	Commercial refrigerator, burned down shop goods	Sanyo Denki	4/10/96 settlement: "not full, but quite acceptable amount" (PLN 23*)
32. R-2 (PLN 15)	1994 (wa) 25143, Tokyo DC	Car, burst into flames	Mercedes Benz Japan	25/9/95 settlement (PLN 17)
33. S-2 (PLN 15)	1994 (wa) 4182, Nagoya DC	Bench, child (8) caught, broke leg	Nagoya City	18/2/97 settlement (PLN 24)
34. T-2 (PLN 15)	1991 (wa) 811, Okayama DC	New gas grill, burned down house	Rinnai	
35. U-2 (PLN 17* = PLN 18)	[7/94] 1995 (wa) 807, Okayama DC	Car, fan belt broke, power brakes failed, injured	Toyota	
36. V-2 (PLN 18)		White ant pesticide, injuries the day after used	Kyatsu	22/7/96 settlement (PLN 21)
37. (PLN 20)		Car, mother and child poisoned by CO	Nissan	13/6/96 settlement (PLN 20)

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38. (PLN 21*)		Car, burst into flames, destroyed	Domestic car manufacturer	16/5/96 settlement: 85% of purchase price of Yen 3.3m (PLN 21*)
39. (PLN 21*)		Car, parents, child hospitalised by CO poisoning, dog died	Car manufacturer	6/96 settlement (PLN 21*)
40. (PLN 25*)	(via Osaka CLC)	Bike, front wheel jammed, boy injured	Bike manufacturer, retailer	Almost full settlement, including <i>isssharyo</i> (PLN 25*)
41. (PLN 25*)	(via Housing Products PL Center etc.)	"Sick Building Syndrome", dentist injured	Importer	Settlement: Yen 7m (PLN 25*)
42. Q-3 (PLN 26)	1997 (wa) 6774, Osaka DC	Car, burst into flames, driver burned to death	Mercedes Benz Japan, et al.	
43. R-3 (PLN 26)	1997 (wa) 5064, Osaka DC	Car airbag, injured when didn't inflate after hitting pylon straight on	BMW et al.	
44. S-3 (PLN 26)	1997 (wa) 10995, Tokyo DC	TV burst into flames: claiming Yen 2000m	Mitsubishi Denki	28/12/97 DC: plaintiff lost (PLN 27)
45. (PLN 26*)		Konnyaku Jelly, child (6) suffocated on 29/6/96, died 17/7/96		14/11/97 settlement: apology, Yen 50m (almost full claim amount, having dropped Yen 25m <i>isssharyo</i> claim since prompt settlement) (PLN 26*)
46. N-3 (PLN 26)	1996 (wa) 5613, Tokyo DC	Motor mower, blade in eye	Maruyama Seisakusho, et al.	
47. O-3 (PLN 26)	1994 (wa) 4776, Nagoya DC	Car, defect in cylinder led to loss of power, crashed into oncoming car, similar defect in other cars and manufacturer recall	Automobile Citroen	
48. S-4 (PLN 28)	1997 (wa) 4903, Nagoya DC	Lighter, exploded in bar, staff lightly injured, pandemonium	Tokai	
49. T-4 (PLN 28)	1996 (wa) 982, Yokohama DC	Blood product, imported without irradiation, patient developed GVHD and died	Japan Red Cross, hospital	
50. U-4 (PLN 28)	1996 (wa) 3758, Tokyo DC	Tropical fish tank, burst into flames, office half destroyed	Jacks Prasupa	
51. V-4 (PLN 28)	1995 (wa) 214, Saga DC	Acid treating machine, seaweed processor injured arm when clutch didn't work (on first day of operation) and roller continued rolling	Uchiyama Tekkosho	

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52. W-4 (PLN 28)	1995 (wa) 4179, Nagoya DC	Airplane lost balance when attempted to land manually, but autopilot did not cut off	Airbus Industries, China Airlines	
53. Y-4 (PLN 28)	1997 (ne) 495, Sapporo DC	Refrigerator, flames emerged from it and table top, home/barburned down; insurance company refused to pay claim arguing that arson	Fuji Kasai Kaijo Hoken, et al.	
54. Z-4 (PLN 28)	1998 (wa) 664, Nagoya DC	Tobacco, seeking prohibition of sales and production due to breach of Art. 22 of the Constitution	Phillip Morris	
55. a (PLN 28)	1998 (wa) 2888, Tokyo DC	Soyabean protein foodstuff, recommended to atopy sufferer as cure, developed severe skin disease after eating it	Miki Shoji	
56. (PLN 29)	1996 (wa) 2622, Tokyo DC	Car, smoke etc. emerged when driving, steering wheel froze, went onto left shoulder and crashed into lamppost, car heavily damaged	Checker Motors, Gareji Itariaya	8/7/1998, DC: plaintiff lost