

Global Harmony and Disharmony in Accident Compensation: Japan's New Product Liability Legislation compared to the EC Directive and Part VA of the Australian Trade Practices Act

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**Global Harmony and Disharmony in Accident Compensation:
Japan's New Product Liability Legislation compared to the EC Directive
and Part VA of the Australian Trade Practices Act**

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1. Introduction
2. Strict Liability Legislation in Japan, Europe and Australia
 - 2.1 Purpose
 - 2.2 Definitions
 - 2.3 Product Liability
 - 2.4 Exemptions
 - 2.5 Limitations of Time
 - 2.6 Application of Civil Code
 - 2.7 Procedural Law and the Overall Civil Justice System
3. The Tensions of Harmonisation and Globalisation of Law

1. Introduction

It has been a great pleasure, both intellectually and in our everyday interaction, to work with Professor Toshimitsu Kitagawa over the last few years at Kyushu University. Professor Kitagawa became the first Professor in the Chair of Transnational Law upon its creation in 1995, and I joined him as the first Associate Professor from April 1997. The Chair was initially grouped with other "public law" (*ko ho*) Chairs, including public international law; these are now grouped as "international legal studies" (*kokusai kankei ho*). Yet the

* Associate Professor of Law, Kyushu University, Fukuoka, Japan (homepage: <<http://www.law.kyushu-u.ac.jp/~luke/index.html>>; e-mail: luke@law.kyushu-u.ac.jp). I gratefully acknowledge financial support in 1997-1998 from the Matsushita International Foundation for this and related ongoing research, in collaboration with Professor Gary Schwartz (UCLA Law School) and Professor Toshimitsu Kitagawa. I also thank Professor Kitagawa for liberal access to his extensive personal library of materials related to Japanese product liability law and practice. I particularly thank Mr Ross Milner (Ministry of Consumer Affairs) and Mr Richard Tait (my former LLM(Hons) student at Victoria University of Wellington, now in practice in Buddle Findlay) for making available the Report which provided a starting point for this article and related research.

interests of Professor Kitagawa and myself have always lain more in the law and practice of international business transactions — aptly enough, in light of the very broad definition of “transnational law” first proposed by Philip Jessup.¹ In particular, building on work during his career in Toshiba Corporation,² Professor Kitagawa has retained and expanded interests primarily in international anti-trust and GATT/WTO issues, alongside the law and practice of product liability. My own research and practice has been primarily in contract law and practice, but has grown to overlap with Professor Kitagawa’s interests in product liability. Since late 1997 we have collaborated in two joint research projects to develop “product safety guidelines”, based on — but fleshing out — principles of product safety law in comparative perspective.³ As part of this ongoing joint effort, my contribution to this special issue in commemoration of Professor Kitagawa’s energetic service at Kyushu University compares Japan’s new strict liability Product Liability Law (the “PL Law”)⁴ with the EC Directive of 1985 in the European Union,⁵ and amendments in 1992 to Australia’s Trade Practices Act 1974 (“TPA”, Part VA).

Although other law can ground product liability claims in the EU, Australia and Japan’s these three legislative regimes provide a useful core of legal principles from which to begin constructing product safety guidelines. My comparison, however, also teases out some interesting differences even among these regimes. Although rather similar, since both the Australian and Japanese legislation drew significantly on the EC Directive, a closer analysis (Part 2) reveals some interesting disharmony as well as harmony.

¹ Jessup, P *Transnational Law* (New Haven, Yale University Press, 1956). See also Berman, H “World Law” (1995) 18 *Fordham Int’l LJ* 1617.

² Kitagawa, T and Nottage, L “Globalization of Japanese Corporations and the Development of Corporate Legal Department: Problems and Prospects” (paper presented at the conference on “The Emergence of an Indigeneous Legal Profession in the Pacific Basin” at Harvard Law School, December 11-14, 1998).

³ For an early attempt, see eg Toshimitsu Kitagawa, “*Seizobutsu Sekinin Ho no moto ni okeru Seihin Anzen Gaidorain no Kochuku no Kokoromi* [An Attempt to Construct Product Safety Guidelines under Product Liability Law]” (1995) 63/3-4 *Hosei Kenkyu* 951.

⁴ Law No 85, 1994.

⁵ Council of the European Communities, Directive 85/374/ECC (25 July, 1985). European Economic Community (now European Union) member states were obliged to incorporate the Directive into domestic law by the end of July 1988. All have now done so, although many were late. The most tardy was France, which only enacted a corresponding new Article 1386 to its Code Civil on 19 May 1998, following two proceedings brought by the EC Commission. See generally Gotoh, M “*Furansu ni okeru Seizobutsu Sekinin Ho no Seiritsu* [The Enactment of a Procluct Liability Law in France] ” (1998) 1138 *Juristo* 72.

On the one hand, this offers more material from which to eventually develop product safety principles. On the other, however, it leads to some doubts as to the ease of harmonisation of law in this field (Part 3). This is of particular interest for jurisdictions like my native New Zealand. Specifically, in October 1995 a Report was presented to the Ministry of Consumer Affairs recommending that consideration be given to adding a statutory strict liability regime to the existing law covering personal injury and consequential damages caused by defective products. Partly, this was based on the need for harmonisation with the regimes in New Zealand's major trading partners such as Europe, Australia and Japan.⁶ This idea may find renewed interest following very significant revisions in December 1998 to New Zealand's no-fault compulsory accident compensation scheme.⁷ By further undermining the principles on which this scheme was enacted in 1972, it may prompt calls for a return to a right to sue under tort law, including now strict liability principles like those overseas.

More generally, this tension between harmony and disharmony raises some very difficult issues as to the nature of globalisation of law and business relations. Space constraints, however, will permit only a brief review of these by way of broader conclusion.⁸

2. Strict Liability Legislation in Japan, Europe and Australia

Generally, the following analyses first the current PL legislation in Japan, compared to the EC Directive and then the TPA in Australia. The focus is on the Japanese legislation, including original translations of key statutory provisions and some related material, since commentary and translations in English remain of variable standard.⁹

⁶ Tait, R *Report to the Ministry of Consumer Affairs: Product Liability* (October 1995, Wellington) § 5.1, 5.40, 5.45.

⁷ Nottage, L "New Zealand Law Through the Internet: The Commonwealth Law Tradition and Socio-Legal Experimentation" (1999) 12 *Kokusai Kaihatsu Kenkyu* (Nagoya University) 55; in updated form in (1999) 6/1 *Murdoch University Electronic Journal of Law* (<<http://www.murdoch.edu.ac/elaw/issues/v6n1/nottage6l.html>>).

⁸ Some of these issues are developed in a longer version of this article, completed and distributed to several colleagues in late 1997 and available from me upon request. That version was prepared using the citation style for the *Waikato Law Review*. Accordingly, this contribution departs from the Harvard Blue Book citation style now recommended by this *Hosei Kenkyu* journal. I thank the editors for their understanding on this point.

⁹ One semi-official translation together with a short overview of the PL Law is available on the internet on the "News from MITI" homepage (<http://www.jef.or.jp:80/news/guidepl.html>). The translation is reproduced in the authoritative commentary by the Economic

The comparison also draws mainly on the legislative provisions themselves together with a number of reliable commentaries for each regime. After all, most businesspeople and even their legal advisors will probably have to work from similarly limited resources; and they are the ones whose interests are often invoked by many advocates of the need for, and potential of, harmonisation of law. Further commentary and legislative history, however, may shed additional light on some problems raised in the following comparison. Equally, nonetheless, it may raise other problems or further confuse the picture, particularly since commentary is voluminous but cannot draw yet on much reported caselaw on the PL Law.¹⁰

Yet even a three-way comparison drawing on such material will reveal many differences, minor and major. The analysis quickly raises questions of disparate interests, especially a tension — but arguably also some potential commonality of interest — between consumer and business interests. And although the Australia PL legislation appears the most pro-consumer in orientation, even this is not obviously or uniformly so. The relative orientation of the EU and Japanese legislation, overall, is even more unclear. Anyway, the comparative analysis ultimately leads beyond a comparison of the provisions of PL legislation; to questions about other accident compensation schemes and private law generally; to procedural law and each jurisdiction's civil justice system; and ultimately to the role of law generally in complex industrialised

Planning Agency ("EPA"), the government agency primarily responsible for consumer policy in Japan, in Keizai Kikakucho Kokumin Seikatsu Kyoku Shohisha Gyosei Daiikka (ed) *Tsuijo Kaisetsu Seizobutsu Sekinin Ho* [Article-by-article Commentary on the PL Law] (1994) 140-42 [hereinafter cited in footnotes as "EPA ed"]. In my translating, I have also benefitted from a translation with some commentary produced by participants in a seminar series run at Tokyo University Law Faculty by Prof Noboru Kashiwagi and Prof Gerald MmAllin (Aoyama Gakuin University), to whom I extend my thanks.

¹⁰ In Japan, see eg Kato, M (ed) *Seizobutsu Sekinin Ho Soran* [Product Liability Law Overview] (1995). As of late as 1996, there were no reported cases applying either the EC Directive related legislation, or TPA amendments: Vranken, M "The First Decennium of the European Product Liability Directive: A Cause for Celebration?" (1996) 4 Tort LJ 225. Apparently there has been one unreported English judgment: Stapleton, J "Products Liability in the United Kingdom: The Myths of Reform" (Paper presented at the Symposium on "Products Liability: Comparative Approaches and Transnational Litigation", February 19-20, 1998, University of Texas). A judgment of the Federal Court of Australia, applying the TPA amendments, has just been rendered in February 1999: *Australian Competition and Consumer Commissios v Blendale Chemical Products Ltd; Barnes v Glendale Chemical Products Ltd* 40 IPR 619 (1999) [hereinafter *ACCC/Barnes v Glendale*]; see also Malkin, I "Products Liability Under the Trade Practices Act and at Common Law" (1998) Torts LJ 204. This article will draw on this pathbreaking recent case in comparing the Australian legisla-tion.

democracies.

2.1 Purpose (Article 1)

Article 1 of Japan's PL Law lays out the purpose of the legislation as follows:

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.

Some foreign commentators have criticised this Article, and indeed the PL Law as a whole, as unduly downplaying the goal of consumer protection compared to that of economic development.¹¹ Certainly, as discussed below (Part 2.3), the first expressed goal is of protecting harmed "persons", which can include sole proprietors suffering personal injuries in the course of their business and companies suffering consequential property damage. Yet such sole proprietors are also protected under the Directive and Australian law. Thus the difference lies in consequential property damage — often a much less significant aspect, compared to personal injuries from defective products.

Further, the primary goal is protection of such interests, namely to set forth a new remedy in damage. "Stability and improvement in consumer life" is a secondary objective, which the legislators hoped would follow this primary goal.¹² "Consumer life" (*shohi seikatsu*) is hard to translate. As well as the everyday life of consumers as individuals, it arguably has the broader connotation of "living in contemporary consumer society or the consumer economy", which might include the perspective of manufacturers and so on operating within that environment. Nonetheless, the focus may remain more on consumers, rather than the latter. That, after all, has been the focus of the activities of local government-run *Shohi Seikatsu Senta*, literally translated as "Consumer Living Centers" but sometimes simply as "Consumer Centers".¹³ In addition,

¹¹ Marcuse, A "Why Japan's New Products Liability Law Isn't" (1996) 5 Pac Rim L & Pol'y J 365, 382-83.

¹² Hence the word "thereby (*motte*)". Cf Marcuse, *ibid*, who does not distinguish between such primary and secondary goals, nor analyse their content in this way.

¹³ See eg Hamada, K, Ishida, H and Murakami, M "The Evolution and Economic Conse-

the other secondary goal which legislators hoped would follow was the “*sound* development of the national economy” (emphasis added). Legislative history and authoritative commentary show clearly that what was meant here was the fair apportionment of risks stemming from increasingly complex technological processes, by changing the basis of liability and damages to strict liability.¹⁴ In other words, the goal was to encourage product safety and provide compensation by “internalising externalities”.¹⁵ Some have been concerned that Japanese judges may begin one day to limit damages awarded to businesses for consequential property loss, and that this may lead to curtailment of damages awarded to consumers as well.¹⁶ However, a judge wanting to avoid this consequence can find much to justify that stance even in Article 1 of the PL Law, as well as other provisions, legislative history and commentary.

Moreover, the PL Law is not necessarily less consumer protection driven than the EC Directive. The latter’s preamble includes far more than “a single reference to economic matters”.¹⁷ Its first paragraph or recital states that harmonisation is needed “because the existing divergences may distort competition and affect the movement of goods within the common market”. To similar effect, the third to last recital refers to “the correct functioning of the common market”, as well as “adequate protection of the consumer”. Further, the second recital argues that the proposed strict liability regime is “the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production”. The seventh recital then states that “a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existing of certain exonerating circumstances”, later listed in Article 7 (and discussed below at Part 2.4). The tenth and eleventh recitals talk of limitation periods being in the interests of both the injured person and the producer. Thus, throughout the preamble —

quences of Product Liability Rules in Japan” in Saxonhouse, G and Yamamura, K (eds) *Law and Trade Issues of the Japanese Economy: American and Japanese Perspectives* (1985) 83, 85-87. See *infra* Part 2.7.

¹⁴ EPA ed, *supra* n 9 at 40-45, 55.

¹⁵ Cf eg Calabresi, G *The Cost of Accidents* (1970).

¹⁶ Matsumoto, T “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) 13.

¹⁷ Marcuse, *supra* n 11 at 383.

and indeed the Directive — there is a balancing of interests of consumer protection *and* of the contribution of manufacturers to economic development. This is also readily apparent from the legislative history of the Directive.¹⁸ It is also clear in Australia,¹⁹ although understandably there is no separate statement of purpose only for Part VA of the TPA.²⁰

Of course, the balance — or, more negatively, the political compromise — struck in Japan, Europe or Australia may be relatively more or less consumer protection orientated. But it is expecting too much to determine that solely from even a closer reading of Article 1 of the PL Law or the Directive's preamble. The particular legislative provisions must first be carefully compared as a whole.

2.2 Definitions (Article 2)

(1) “Product”

Article 2(1) of the PL Law defines “products” to which the law applies as, simply, “manufactured or processed movables (*dosan*)”. In turn, Articles 85 and 86 of the Civil Code define movables as all tangible property other than real property. Electricity, as intangible property, is therefore excluded, backed by the rather unconvincing policy argument that the manufacturer is usually also the supplier, with a direct contractual relationship to the consumer.²¹ Article 2 of the Directive also defines products as movables, but specifically includes electricity. Part VA of the TPA applies to “goods”, defined in s 4 to include gas and electricity.

More importantly, the PL Law in effect excludes most primary agricultural products. “Manufacturing” is sometimes used in a very broad sense in Japanese legislation, including any form of “producing”. To clarify that “manufactured”

¹⁸ Howells, G *Comparative Product Liability* (1993) 29-30.

¹⁹ *Ibid*, 279-289.

²⁰ Overall, the object of the TPA is “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection (s2).

²¹ EPA ed, *supra* n 9 at 58. By the same logic, a number of other movables could have been excluded. This goes against a principle underlying PL legislation such as this Law, namely that liability should not be determined solely because of the lack of a legal relationship such as contract or, for that matter, ownership.

is intended to take a narrower definition, while maintaining broad coverage, Article 2(1) adds the notion of “processing”. The latter is seen as involving the adding of some new attribute to the product. Thus, heating or flavouring (salting etc) would mean the goods had been “processed”; but not, in principle, simply cutting, freezing, chilling or drying them.²² Piped water, as in a contaminated municipal supply, may therefore be included if chemicals have been added to try to purify it. Bottled mineral water with no chemical additives, by contrast, may not be subject to the PL Law if found to contain mold (as in some water exported from New Zealand to Japan several years ago) — unless that defect was due to the bottling process or the containers themselves. In addition, one authoritative commentator has recently suggested that some products subjected to bio-technological development may be covered by the PL Law.^{22a} However, in the absence of court decisions and more debate, all these interpretations are tentative. Ultimately, decisions may be based on more general principles such as consumer protection versus fair allocation of risk or economic development, just discussed.²³ But the requirement that goods be processed, if not necessarily manufactured, means that most primary agricultural produce is excluded from the Law’s coverage.²⁴

Initially, Article 2 of the Directive seems clearer. It specifically excludes “primary agricultural products and game”, and defines the former as “products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing”. Thus, piped water and gas are included.²⁵ Confusingly, however, recital 3 of the preamble states that strict liability should apply “only to movables which have been industrially produced”, and that it should be excluded for agricultural products and game, “except where they have undergone a processing of an industrial nature which could cause a defect in the product”. British commentators have pointed out that “initial” processing is not necessarily the same as “industrial” processing.²⁶ Even taking the latter

²² Ibid, 60-61.

^{22a} Masuda, J. “*Seizobutsu Sekinin* [Product Liability]” (1998) 1126 *Juristo* 146, 149.

²³ See also Nottage, L. *Law in Japan Today: A Changing Interface with Business and Government* (1995) 12-14, especially fn 38.

²⁴ EPA ed, *supra* n 9 at 61; see also *ibid*, at 32.

²⁵ Geddes, *A Product and Service Liability in the EEC: The New Strict Liability Regime* (1992) 12.

²⁶ Howells, *supra* n 18 at 33-34, 92 (citing the late Lord Denning in 1987, in the House of Lords’ debate on the Bill proposed to incorporate the Directive into UK law).

concept as determinative, Geddes suggests that both freezing and drying — where this could cause a defect in the product — may bring agricultural products within the scope of the Directive and UK law.²⁷ In those two respects, then, the scope of the PL Law, as currently interpreted, may be narrower.

Further, Article 15(1)(a) of the Directive permits member states to provide, in its legislation implementing the Directive into national law, that “product” shall extend to primary agricultural products and game anyway. In fact, only Luxemburg and now France did so.²⁸ After the outbreak of “mad cow disease” (BSE) in Britain, however, the Commission began seriously investigating the inclusion of agricultural produce within an amended Directive.^{28a} That would result in a most striking contrast with coverage under the PL Law.

Moreover, s 4 of the TPA unambiguously and invariably defines “goods” to include animals (including fish), minerals, trees and crops. Correspondingly, section 75AA defines “manufactured” very broadly for the purposes of Part VA, as meaning “grown, extracted, produced, processed and assembled”. Thus, Australia, Luxemburg and now France clearly have the broadest coverage; all other EU countries (which have implemented the Directive) retain one quite ambiguous exception for certain agricultural products; and Japan retains a similar exception, with authoritative commentary allowing what seems to be a broader exception (i.e. even narrower coverage). Outside Australia, Luxemburg and France, moreover, all this is largely still conjecture.

(2) “Defect”

Article 2(2) of the PL Law defines “defect” as:

²⁷ Geddes, *supra* n 25 at 13, 17-18 respectively. See also Oughton, D and Lowry, J, *Textbook on Consumer Law* (1997) 195.

²⁸ Geddes, *supra* n 25 at 103; Gotoh, *supra* n 6 at 75 (Article 1386-3).

^{28a} On 1 October 1997, the Commission proposed extending the Directive to include primary agricultural products. The proposal was supported by most delegations to the European Council and welcomed by many interest groups. The European Parliament held its first reading on 4-5 November 1998, approving the Commission’s proposal, as well as recommending substantial modification of the several other points in the Directive (limitation periods and monetary limits on liability: see *infra* Part 2.5). Legislation may be enacted this year, and in any event the Commission will carry out its next full review of the Directive in 2000. See Communication from the Commission: Second Bi-Annual BSE Follow-up Report (Brussels, 18 November 1998; available by searching the Commission’s website at <<http://europa.eu.int>>) pp. 24-5.

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.

Article 6 of the Directive is more specific :

- (1) A product is defective when it does not provide the safety which a person is entitled to expect, taking all the circumstances into account, including:
 - (a) the presentation of the product;
 - (b) the use to which it could reasonably be expected that the product would be put;
 - (c) the time when the product was put into circulation.
- (2) A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

One difference which may be significant is that safety is judged as that which “a person is entitled to expect”. More than the phrasing in the PL Law, this highlights the question of *whose* expectations are dominant. Howells argues that they are those of the hypothetical average consumer, noting that recital 6 of the Preamble refers to the expectations of “the public at large”. However, manufacturers are also part of the general public. This question is a long-standing bone of contention.²⁹

Section 75AC of the TPA also defines defectiveness primarily in terms of safety such as “persons generally are entitled to expect”; but this is interpreted as the standard of “the community generally”, which presumably does not mean that of *consumers* generally.³⁰ In this respect too, however, one’s view (or that

²⁹ See eg Schwartz, G “Product Liability and Medical Malpractice in Comparative Context” in Huber, P and Litan, R (eds) *The Impact of Liability Law on Safety and Innovation* (1991) 28, 42.

³⁰ Kellam, J *A Practical Guide to Australian Product Liability* (1992) 13. However the main argument seems to be that this is in contradistinction to judging safety in terms of subjective considerations, peculiar to the injured party. See also Harland, D “The Legal System on Product and Service Liability” (1995) 11 *Ritsumeikan L Rev* 205, 208 (and fn 9); and *ACCC / Barnes v Glendale* (supra n 10), where in discussing “Defect” Emmett J referred to the explanatory memorandum to the TPA amendments and said “The level of safety required is that which the community is entitled to expect. It is thus the objective knowledge and expectations of the community which are to be assessed, not the subjective knowledge and expectations of an injured party”. In Japan too, therefore, a party suffering a particularly extensive injury due to some idiosyncrasy may be better off claiming under standard Civil Code negligence. See the recent decision of the Supreme Court allowing full losses to be claimed by a traffic accident victim with an exceptionally long neck: Judgment of 29 October 1996 (3rd Petty Bench), reported in (1996) 1593 *Hanji* 58.

of a court) will depend significantly on the balance between consumer protection and the manufacturers' or overall economic perspective as regards legislative intent.

The PL Law's reference to the "nature" of the product is likely to go beyond the question of its inherent or obvious dangerousness or otherwise, as in the simple case of a knife or firearm. No doubt in the light of discussions leading to enactment of the Law, the commentary by the Economic Planning Agency (EPA) suggests that several factors are captured by this concept, including (i) the probability and extent of harm arising (eg in the context of someone's peculiar physical attributes); (ii) warning and instructions; and (iii) "price vs effect" (the notion that the good should have at least the average safety expected of a similar product in a similar price range).³¹

The first of these seems somewhat out of place. In the context of the Directive, a similar issue can be addressed more naturally in discussing the abovementioned question of whose "expectations" are relevant.³² The second and third factors are usually discussed in the context of Article 6(1)(a) of the Directive, "presentation" of the product.³³ Some commentators on the PL Law argue that by not spelling out the latter as a factor to be considered in judging defectiveness, Japanese consumers are comparatively disadvantaged.³⁴ To some extent, this is so. Presentation of the product in contemporary consumer societies can raise expectations about the product, including safety expectations, by stressing its advantages and promoting consumer confidence in it.³⁵ This opens the way to greater scope for reasonable disappointment, and hence liability for harm suffered. On the other hand, if presentation includes warnings and instructions, these may become increasingly detailed, allowing the argument that expectations were or should have been diminished. Expectations, and scope for liability, can also be reduced by making it clear that certain designs are standard, compared to others at a higher price range.³⁶

Section 75AC(2) of the TPA neatly illustrates this ambivalence. Para-

³¹ EPA ed, *supra* n 9 at 172-174, 68-69.

³² Howells, *supra* n 18 at 36-27.

³³ *Ibid*, 37-38.

³⁴ Matsumoto, *supra* n 16 at 14.

³⁵ Howells, *supra* n 18 at 37.

³⁶ *Ibid*, at 37-38.

graphs (a), (b) and (c) refer even more specifically than the Directive to “the manner in which, and the purpose for which, the goods have been marketed”, their packaging, and marking, as respectively being relevant to determining safety and hence defectiveness. These all tend to heighten expectations, thus working in favour of those harmed. Paragraphs (d) and (e), however, refer respectively to “any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the goods”, and “what might reasonably be expected to be done with or in relation to the goods”. These factors may tend to work the other way.³⁷

This is well illustrated by the Federal Court’s judgment in *ACCC/Barnes v Glendale*, in its discussion of defectiveness. The plaintiff Barnes had bought caustic soda at a supermarket to try to unblock a shower outlet in his home. He read the label’s instructions that it should be mixed with water and protective clothing worn; but he followed the advice of a friend met at the supermarket and first poured boiling water down the outlet before tipping in the caustic soda, without wearing special clothing. The soda reacted violently with the hot water, sending boiling water back up into his face causing severe injuries. The Court focused on the admission that Glendale was “marketing the product for the purpose for which it was in fact used” by Barnes, namely to clean household drains (cf paragraph (a)). Accordingly it could then more readily declare that “it is not unreasonable to expect that a householder could pour very hot, even boiling water down a drain in order to dislodge a blockage” (cf paragraph (e)). Having previously compared some of warnings circulated by other manufacturers in relation to the use of caustic soda (cf paragraph (d)), the Court concluded:

The question is whether it could reasonably be expected that a substance marketed for the purposes of cleaning drains could possibly have been used in a way in which it was used by Mr Barnes. In other words, would it be reasonable to expect that a consumer, despite the directions on the label, albeit not in the form of a warning, would use the substance in a different way for much the same purpose.

Persons generally are entitled to expect to be warned of a danger or

³⁷ Cf Kellam, *supra* n 30 at 14.

lack of safety in respect of a use to which goods might reasonably be expected to be put. The description of the method for using caustic soda to make a cleaning liquid for the removal of grease from drain pipes and gully traps contains no hint of warning that caustic soda should only be used in that way for cleaning drains. While there is a warning that the contents of the container are corrosive and that contact with eyes and skin should be avoided, that is not adequate having regard to the nature of caustic soda and the purpose for which it was marketed.

In this case, the defendant's admission in relation to the paragraph (a) factor seems to have played an important role in finding defectiveness in the product; but in other cases there may be more argument, making the defendant's counter-arguments on factors (d) and (e) more likely to prevail. By contrast, by not specifying to such an extent the factors to be considered, the PL Law may leave so-minded judges greater scope to give judgments favouring consumer interests. In fact, during the final stages of the debate leading to its enactment, pro-consumer interests sharply criticised proposals to spell out detailed factors in defining "defect"; instructions and warnings were some of them.³⁸

Article 6(1)(b) of the Directive equates to the factor of "normally foreseeable manner of use" in the PL Law, and uses very similar wording to s75AC(2)(e) of the TPA: "what might reasonably be expected to be done with or in relation to them. If the product has instructions or warnings, however, this may arguably reduce the scope of normally or reasonably expected uses. By not specifically listing the former as a factor to be considered, the PL Law may reduce the possibility of such arguments, again potentially favouring consumer interests.

Article 6(1)(c) of the Directive requires consideration of "when the goods were put into circulation". This is similar to the factor of when the product was "delivered", provided by the PL Law, which is even more reminiscent of when the goods were "supplied by their manufacturer" under S75AC(2)(f) of the TPA. Some questions of interpretation of the three differing concepts are mentioned below (at 2.3). More importantly, in focusing on the time of marketing rather than the time of injury or trial, each of the regimes invites a comparison of the

³⁸ See eg Asaoka, M "Seizobutsu Sekinin Ho Seitei ni itaru Nichibenren no Torikumi [The Involvement of the Japan Federation of Bar Associations Leading to the Enactment of the PL Law]" (1995) 46 *Jiyu to Seigi* 23, 28-29.

“state of the art”: judging the defectiveness or otherwise of the product in the light of then available alternatives.³⁹

Article 6(2) of the Directive reinforces the importance of such a comparison. Although it states that the fact that a better product was subsequently put into circulation should not be the sole reason for finding a product defective, evidence of a change of design could still be led to help prove that an alternative design was feasible when the latter product was put into circulation.⁴⁰ Section 75AC(3) of the TPA is an almost identical provision. It helps lessen the burden on a consumer which can be introduced by bringing in state of the art considerations when attempting to prove that a product was defective.⁴¹ The PL Law contains no equivalent provision; by not including this factor, it may have instead prejudiced consumer interests. However, particularly where a manufacturer is found to have improved features of its product following a complaint or claim, the manufacturers themselves have tended to accept liability.⁴² Japanese courts may remain willing to give weight to such evidence even without a specific provision in the new PL Law.

Section 75AC(4) of the TPA identifies a further factor that may assist consumers, not to be found expressly in the Directive or the PL Law.⁴³ Although not in itself enough, another inference that goods contained a defect can be drawn if, although there was compliance with a “Commonwealth mandatory standard” for them, that “was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied.” However, under ss 75AK(1)(b) or (c) respectively, the manufacturer can rebut any such inference by proving that the goods were defective only

³⁹ Howells, *supra* n 18 at 39-41 (adding that, in contrast to the development risks defence, this can be conceptually distinguished as affecting the utility side of the risk/utility equation at the heart of the “consumer expectation” test, at least in relation to conscious design choices and alleged defects). See also EPA ed, *supra* n 9 at 70-71.

⁴⁰ Howells, *supra* n 18 at 39.

⁴¹ Cf *ibid*.

⁴² See eg Sekine, M “*Kekkan Jidosha Higai no Kyusai Okiku Zenshin! Futatsu no Jiken de Wakai Seiritsu* [Big Progress in Compensation for Harm from Defective Automobiles! Two Cases Settle]” (1994) 14 PL Ho Nyusu 2, 3.

⁴³ Compliance or otherwise with governmental safety standards may still be “an important factor to consider” under the PL Law (EPA ed, *supra* 59 at 72-73). Specifically, compliance with such standards is not thought to necessarily preclude finding the product defective. See eg Mori, J “Japan” in Kellam, J (gen ed) *Product Liability in the Asia-Pacific* (1995) 113, 118. In some circumstances, it may be enough for a Japanese court if the injured party can show that the standards were not very high, rather than “not the safest possible” as required under the TPA.

because they complied with a “mandatory standard”,⁴⁴ or that “the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered”.

(3) “Manufacturer”

Article 3(2) of the PL Law defines “manufacturer etc” in three paragraphs. Article 2(3)(1) first defines as a “manufacturer” “any person who produces, processes or imports a product as a business”. “As a business” is thought to mean carrying out similar acts repetitively or with intent to do so. If so, there is no need for the goods in question to be produced for commercial gain. Hence trial products distributed for free, and public (*koeki*) activities of schools or hospitals, would be covered.⁴⁵

Rather similarly, Article 3(1) of the Directive defines “producer” as “the manufacturer of a finished product” or “the producer of any raw material”. However the injured party does not have to show that such a producer was in business. Under Article 7(c), the latter can avoid any liability by proving that it did not manufacture or distribute the product in the course of its business; *and* that it did not manufacture the product “for sale or any form of distribution for economic purpose”. The former requirement is interpreted in a similar way to the “as a business” requirement in Japan. However, adding a second requirement means that a truly one-off sale for commercial gain would be subject to the Directive, but arguably not the PL Law.

It would also attract liability under ss 75AD-AG of the TPA (discussed further at 2.3 below), since this is premised on supply “in trade or commerce” defined in s 2 as “within Australia or between Australia and places outside Australia” and expansively interpreted.⁴⁶ Section 74A(4) adds that a corporation will be deemed to have manufactured such goods when they are “imported into Australia by a corporation that was not the manufacturer” *and* “at the time of the importation the manufacturer of the goods does not have a place of

⁴⁴ Defined in s 75AA as including a standard of a State or Territory, not just of the Commonwealth. In this respect, the explanation is misleading in: Kellam, J “Australia” in Kellam (gen ed) supra n 48, 15, 24-25.

⁴⁵ EPA ed, supra n 9 at 82.

⁴⁶ Kellam, supra n 30 at 13.

business in Australia”. Although provisions of Part VA are expressed to apply only to “corporations”, these are defined broadly under s 2, and the legislation also extends to other persons in cases involving eg inter-state trade or commerce (s 6(2)-(4)). Further, if the manufacture did have a place of business in Australia when the goods were imported, it is likely still to do so when the claim is brought or tried, in which case it will often be more practical for to sue the manufacturer rather than the importer. However, the second requirement is not found in either the PL Law or the Directive, and thus blocks an avenue of recourse open to the injured party.

Article 2(3)(2) of the PL Law next defines any “manufacturer” (as defined in paragraph 1) to include:

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.

This is thought to capture even those who do not themselves manufacture, process or import the goods. The first clause captures those who add to the product a statement that it is “manufactured by [the person in question]” or “imported by [that person]”. The second clause captures those who do not state their name etc in this way on the product, but somehow — judged objectively — give that impression, eg by just stamping their name on the product with no further details.⁴⁷ Article 2(3)(3) further includes:

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.

In turn, this is interpreted to include those who are not actual manufacturers or importers, but who instead add to the product some statement that it is “sold by [that person]” or “distributed by [that person]”, and where the general public can think of that person as the manufacturer or where that person is the sole supplier of the product. The manner in which the product is manufactured or processed might extend to whether the person manufactured or processed other

⁴⁷ EPA ed, *supra* n 9 at 82-83.

similar products, and include whether it had production or testing facilities for the product or undertook final pre-shipment testing. The manner of importation might include consideration of whether the person divided the product into smaller lots or repackaged it. The manner of sale might include whether the person received manufactured or imported products and supplied them to the domestic market as a sole distributor.⁴⁸

Again, all such interpretations have yet to be tested. The distinction between paragraphs 2 and 3 still does not appear clear. The EPA itself, for instance, has suggested that a supplier which contracts another company to manufacture a product it developed, and then distributes it exclusively under its own original brand without stating the manufacturer, may be caught by the second clause of paragraph 2 if it makes some representation suggesting it is the manufacturer. It would instead be caught under paragraph 3 if the supplier were more actively involved in the management decisions of the manufacturer with respect to product. Similarly, in Original Equipment Manufacturing (OEM), the company affixing its brand name on products manufactured by another may be liable under paragraph 2, or arguably paragraph 3 if it has been involved more actively in the manufacturing process. As the PL Law is intended to establish liability for producing or importing products, however, paragraph 3 is thought not to apply even if there has been some representation of involvement merely in supplying or distributing the product, if common sense suggests that the person responsible is clearly not involved in production or importing at all and that there is a separate manufacturer or importer. Thus, a department store which merely sells others' branded products in packages marked "specially selected by [that store]" is thought unlikely to fall within these extended definitions.⁴⁹ Although the scope of application of each may still be uncertain, these two paragraphs combined certainly broaden the definition of "manufacturer" in the PL Law.⁵⁰

Article 6(1) of the Directive simply includes "any person who, by putting his name, trade mark or other distinguishing feature on the product, presents

⁴⁸ Ibid, 83-84.

⁴⁹ Ibid, 85-86.

⁵⁰ Foreign licensors of trademarks may also be captured by either paragraph 2 or 3. See Mori, *supra* n 43 at 116.

himself as the producer". It is not clear whether "own-branders" may remove themselves from this definition by prominently displaying that the manufacturer is someone else.⁵¹ Article 2(3)(3) of the PL Law, being more specific, may make this more difficult.

Section 74A(3)(a) of the TPA includes "a corporation which holds itself out to the public as the manufacturer". This arguably goes beyond affixing some identifying mark on the goods themselves. It could include generic advertising by the corporation, for instance. Indeed, s 74A(3)(c) extends coverage to a corporation which causes or allows a third party to promote goods holding out the corporation to the public as their manufacturer. Further, s 74A(3)(b) spells out that corporations are covered when they cause or permit a third party to affix an identifying mark on the goods, coverage which is only implicit in the wording of the PL Law and the Directive. In discussing "Glendale as manufacturer" in *ACCC/Barnes v Glendale*,^{51a} the Federal Court rejected the defendant's contention that s 74A(3) "cannot have effect in circumstances where there is a clear statement to the effect that Glendale did not manufacture the product but that the product was merely packed by it". It concluded that this was contrary to the clear meaning and intent of the section, supported by policy reasons on the part of the legislator, namely: "... if a corporation is prepared to lend its name to a product by having its name or its logo affixed to the product, an individual injured by defect in that product need look no further than that corporation". Overall, the wording of all three paragraphs in 75A(3), together with this indication of how Australian courts will interpret the section, suggests that the TPA will provide the greatest coverage (although it again only applies to "corporations", as discussed just above).

Although the PL Law may hold a distributor or supplier liable particularly under Article 2(3)(3), albeit probably in restricted circumstances as discussed above, a person suffering harm in Japan does not enjoy the protection of a provision like Article 3(3) of the Directive or s 75AJ of the TPA. Although the TPA provision is more specific in scope, both deem a supplier to be the producer or importer if the latter is unidentifiable or unknown, and the supplier does not respond to a request from the injured person to identify the supplier's supplier or

⁵¹ Howells, *supra* n 18 at 31.

^{51a} *Supra* n 10.

the producer or importer. Rather unconvincingly, the EPA argues that this was not included in the PL Law because it would have inconsistently introduced a more “subjective” element into what should be objective, strict liability tort legislation; and because it has no precedent in other Japanese legislation.⁵²

2.3 Product Liability (Article 3)

This is the key provision in the PL Law, stating that:

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.

The requirement that the product be “delivered” is interpreted in accordance with Article 178 of the Civil Code, requiring intentional transfer of possession.⁵³ Products stolen from the manufacturer’s premises and causing harm to third parties therefore would not be covered.⁵⁴

Article 1 of the Directive establishes that “the producer shall be liable for damage caused by a defect in his product”. In judging defectiveness, article 6(1) (c) refers to “the time the product was put into circulation”, and Article 7(a) provides an outright defence if the producer can prove that it “did not put the product into circulation”. The latter clearly applies to a case of stolen goods. However, British commentary indicates uncertainty as to whether the defence may also extend to trial products.⁵⁵ As mentioned above (2.2 at (3)), trial products are likely caught under Article 2(3)(1) of the PL Law if intended to be manufactured in a repetitive process: the only test is whether manufacturing is “as a business”.

More important differences lie in the scope of damages covered. The only express exclusion in the PL Law is where the damage is solely to the defective

⁵² EPA ed, *supra* n 9 at 87.

⁵³ *Ibid*, 71-72.

⁵⁴ *Ibid*, 96-97.

⁵⁵ Howells, *supra* n 18 at 41 (citing a Department of Trade and Industry report in 1985 arguing that it does). See also Geddes, *supra* n 25 at 31.

product itself.⁵⁶ In that case, the injured person must invoke the general tort provisions and/or contract law provisions under the Civil Code. In tort, the principal cause of action is Article 709, phrased as liability upon proof of negligence. Concurrent actions in tort and contract are not excluded in principal, unlike French law⁵⁷ or the English law tradition until very recently (at least in some categories).⁵⁸ In contract, Article 570 provides for strict liability for latent defects (*kashi tanpo sekinin*); but only in the case of specific things (*tokutei butsu*), and excluding claims for any consequential damages. For generic or fungible goods (*shurui butsu*), Article 415 provides full contractual remedies, although in theory the seller can avoid liability by proving lack of fault.⁵⁹ However, where the product is destroyed *and* personal injury or consequential damage ensues, the injured party can invoke Article 3 of the PL Law. With its strict liability regime, it may be particularly useful where the damaged product was a specific good. Further, claims for lost income are covered, subject only to the requirement of causality implicit in Article 3.⁶⁰

By contrast, under Article 9 of the Directive, damage includes only:

- (a) damage caused by death or personal injuries;
- (b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property:
 - (i) is of a type ordinarily intended for private use or consumption, and
 - (ii) was used by the insured person mainly for his own private use or consumption.⁶¹

⁵⁶ By negative implication, damages for pain and suffering which do not involve interference with life, health or property will also not be covered by this legislation; but such cases are expected to be rare. See EPA ed, *supra* n 9 at 98. In the English law tradition, however, claims involving only mental trauma are very restricted. See generally Woollard, S "Liability for Negligently Inflicted Psychiatric Illnesses: Where Should We Draw the Line?" (1998) 27 *Anglo-American L Rev* 112. By contrast, in principle a claim can still be brought under general Japanese law.

⁵⁷ Nicholas, B *French Law of Contract* (2nd ed, 1992) 173.

⁵⁸ The possibility of concurrent claims has been opened up by the House of Lords' decision in *Henderson v Merrett Syndicates* [1995] 2 AC 145. This case involved only economic loss, however, and it seems its reasoning is not to be extended to cases of physical damages to property (as in *Simaan General Contracting Co Ltd v Pilkington Glass Ltd (No 2)* [1988] QB 758). See generally Peter Cane, "Contract, Tort and the Lloyd's Debacle" in Rose, F (ed) *Consensus Ad Idem* (London, Sweet & Maxwell, 1996) 96, 112-5.

⁵⁹ EPA ed, *supra* n 9 at 95-96., 102-104. In more detail, see Kitagawa, Z "Contract Law in General" in Kitagawa, Z (gen ed) *Doing Business in Japan* (1989) at Part II (1990) § 2.14[5].

⁶⁰ EPA ed, *supra* n 9 at 103.

⁶¹ A proviso adds that this "shall be without prejudice to national provisions relating to

Thus, where the product causes damage to itself as well as other harm, only the former can be claimed under Article 1. Another important restriction in the Directive's scope is that consequential damage is really only for "private" as opposed to "business" property.⁶² Like the new French legislation, the PL Law has no such restriction and there are already reports of claims being brought thereunder by businesspeople for lost profits stemming from a defective product, or harm to other goods arguably intended for or used more in business.⁶³ Moreover, it contains a threshold requirement as in Article 9(b) of the Directive. That was aimed at avoiding "litigation in an excessive number of cases", but has been difficult both to interpret and to justify.⁶⁴

The PL Law also does not provide for a limit (of no less than 70 million ECU or national equivalent) on "a producer's total liability for damage resulting from a death or personal injury and caused by identical items with the same defect", which can be set by any member state under Article 16(1) of the Directive. Five of the original 11 EU states which have so far enacted domestic PL legislation have adopted such a ceiling, which has also been criticised.⁶⁵

The TPA divides into four categories the type of damage for which a corporation is liable:

- (i) personal injuries to the plaintiff (s 75AD);
- (ii) personal injuries to the plaintiff *and* personal injuries to another which cause loss to the plaintiff, where the loss does not come about because of "business" relationship (including professional and employment relationships: s 75AE);
- (iii) consequential loss to other goods "ordinarily acquired for personal,

non-material damage". The effect of this is ambiguous, and a source of much potential disharmony within European jurisdictions. See Schwartz, *supra* fn 29 at 45-46. By clearly excluding mental trauma unassociated with one's own personal injury or loss, however, it is similar in effect to the exclusion thought to be established by the PL Law (*supra* n 56).

⁶² Cf Geddes, *supra* n 25 at 25. Howells, *supra* n 18 at 46-47.

⁶³ See eg, respectively, cases 1, 3, 5, 9, and 10 listed on the database of claims reported under the PL Law, maintained by Professor Kitagawa and myself, on my website at <<http://www.law.kyushu-u.ac.jp/~luke/pllawcases.html>>; see also Gotoh, *supra* n 6 at 75.

⁶⁴ Howells, *supra* n 18 at 47; Geddes, *supra* n 25 at 27.

⁶⁵ The five are Greece, Portugal, Germany and Spain (see EPA ed, *supra* n 9 at 382) and now France (Gotoh, *supra* n 6, at 75). One question raised by Geddes (*supra* at 26) and Howells (*supra* n 18 at 45-46) about the Directive limitation is whether plaintiffs claiming under such a ceiling should be compensated on a "first-come first-served" basis or not. This, and other criticisms, are also made by the EPA (*supra* n 9 at 105-06), in explaining why no ceiling was enacted.

domestic or household use” which the plaintiff has “so used or intended so to use” (s 75AF);

- (iv) consequential loss to “land, business or fixtures, ordinarily acquired for private use” which the plaintiff has “so used or intended so to use” (s 75AG).

The second makes it clear that certain “secondary” personal injuries can be claimed. This is only implicit in the wording of Article 3 of the PL Law or Article 9(a) of the Directive, which may also make it difficult to prove sufficient causal relationship to the original defect. The third and fourth categories adopt a similar but not identical definition of “personal goods”, and specifically state that consequential loss to certain real property may be claimed.⁶⁶ However their scope is wider than the Directive in including such property which the plaintiff has “intended to use”, as well as that actually used. Again, the major difference from the PL Law is that the latter allows claims for consequential loss to all other property, including “business” property, subject to proving a causal relationship.

2.4 Exemptions (Article 4)

Article 4 of the PL Law sets out two defenses or “exemption” from liability under Article 3. Although similar to those provided in the Directive and especially the TPA, their scope is not identical.

(1) Development Risks

Under Article 4(1), the first exemption arises if the “manufacturer etc” proves that:

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.

The EPA presents two arguments for allowing this “development risks” exemption. First, even if it had not been spelled out, manufacturers would likely raise

⁶⁶ Presumably, consequential damage to real property is also covered by the unqualified term “property” in both Article 9(b) of the Directive and Article 3 of the PL Law.

similar issues anyway under the guise of “non-foreseeability”, and plaintiffs and courts would end up addressing these anyway too.⁶⁷ Secondly, the exemption is needed to maintain the pace of technological research and development.⁶⁸ Pro-manufacturer interests commonly make this argument, of course. The EPA admits that advancement of technology and science is a premise of the PL Law, which is why the exemption refers to “scientific and technical” knowledge.⁶⁹ In that context, the word “knowledge” is expected to be interpreted consistently with relevant caselaw and other Japanese legislation where it has been used already.⁷⁰ This may resolve some problems of interpretation. For instance, the relevant knowledge is not that held (or otherwise) by the particular manufacturer, purely “subjectively”.⁷¹ But other issues remain, eg the extent to which other holders of information should be included in determining more “objectively” the relevant knowledge.⁷² Seemingly recognising these difficulties, the EPA adds that compensation for certain drug-related injuries is also available under a state-run scheme anyway, and that it expects a continued role to be played by social security or worker compensation schemes for other injuries.⁷³ Nonetheless, this itself highlights the inroad made into the PL Law scheme’s ostensibly broad coverage by allowing the development risks exemption.⁷⁴ The latter certainly represents a major means by which factors usually considered under the traditional negligence standard, in tort, can find their way back into a strict liability regime.

That has also been a major criticism of allowing the almost identically worded development risks defence under Article 7(e) of the Directive.⁷⁵ Article

⁶⁷ EPA ed, *supra* n 9 at 108-109. For instance, it cites recent US caselaw suggesting that actual or imputed knowledges is “implicit” in the notion of strict liability. *Ibid*, 112.

⁶⁸ *Ibid*, 108.

⁶⁹ *Ibid*, 109-110. See also *supra* Part 2.1.

⁷⁰ *Ibid*, 109-114. Examples are legislation regulating drugs, worker safety, and chemical products.

⁷¹ *Ibid*, 109.

⁷² For instance, by analogy with interpretations of the legislation regulating chemical products, where the knowledge of deliberative councils is added to that of the Minister (*ibid*, at 113), it is arguable that knowledge held by industry associations or even loosely affiliated research institutions should be added to that of a particular manufacturer. Another unresolved issue is whether unpublished research can be taken into account: cf *ibid*, 112-113 (labour safety legislation, as interpreted) with *ibid*, 110.

⁷³ *Ibid*, at 110-111. See *infra* Part 2.6.

⁷⁴ Cf Mori, *supra* n 96 at 118, who asserts that the development risks defence in Japan “will most likely be strictly construed by the courts, so that a manufacturer will still be subject to one of the highest standards of care in the world”. This speculation is unsubstantiated as yet.

⁷⁵ Geddes, *supra* n 25 at 32-33. Howells, *supra* n 18 at 13, 39 (arguing that the development

15(1)(b) allows an individual member state to derogate from this, disallowing the defense; but again only Luxemburg has done to fully.⁷⁶ Among those states that have incorporated the defense into domestic law, moreover, interpretations have differed as to the scope of relevant holders of knowledge in applying the defense. In the UK, s 4 of the Consumer Protection Act 1987 asks only whether knowledge was such as “a producer of products of the same description as the product in question might be expected to have discovered the defect”. Thus, a defendant manufacturer need only prove that those in that industry did not have sufficient knowledge. The European Commission favours a test based simply on discoverability, anywhere, and complained to the UK Government under Article 169 of the Treaty of Rome.⁷⁷ In late 1997, however, the European Court of Justice held that the UK could not be held to have infringed its incorporation obligations because there was nothing to suggest that UK courts would not be able to interpret s 4 to achieve the result intended by the Directive. In addition, the Court suggested that knowledge had to be *accessible* at the time the goods were put into circulation.⁷⁸

The development risks defense allowed by s 75AK of the TPA is also almost identically worded. But again interpretations may differ, depending eg on the way operative terms have been used in other legislation or caselaw. In particular, the test seems very strict in Australia. Although this conclusion was reached before the ECJ judgment just mentioned, it has been argued that “manufacturers must satisfy themselves [and prove] that there have been to advances — both theoretical and in practice — *anywhere in the world (even in other industries)* which impact on the safety of goods”, when they supply them.⁷⁹ Further, in *ACCC/Barnes v Glendale*,^{79a} after suggesting that “section 75AK also has some bearing on the construction to be given to s 75AC”, the Federal

risks concept relates back to the risks side of the risk/utility calculus characteristic of negligence liability: cf supra at fn 92).

⁷⁶ EPA ed, supra n 9 at 382. France has enacted an unusual compromise (Gotoh, supra n 6 at 73-4). A development risks defense in terms of the Directive is recognised (Article 1386-11), but not for human parts or products, or where a defect has become apparent within 10 years of being put into circulation and the manufacturer has not taken measures to prevent damage occurring (Article 1386-12).

⁷⁷ Howells, supra n 18 at 40, 92; Geddes, supra n 25 at 32-33; Vranken, supra n 130, 232.

⁷⁸ Milne, P “Hope for Manufacturers of Defective Products” (1997) 143 New LJ 1437.

⁷⁹ Kellam, supra n 30 at 18 (emphasis added). See also Harland, supra n 30 at 210.

^{79a} Supra n 10.

Court argued that “goods can have a defect even if a supplier was not aware of it, so long as scientific or technical knowledge would enable the defect to be discovered”. Although the ensuing discussion of warnings used by other manufacturers appears directed to the issue of defectiveness per se under s 75AC, it can also be seen as a rejection of the s 75AK defense by showing that technical knowledge allowed discoverability in a broader sense.

(2) Component Manufacturing

In Japan, Europe and Australia, defective components can also be a source of liability. Under Article 4(2) of the PL Law, however, a “manufacturer etc” of a component etc is exempted if it proves that:

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.

“Raw material (*genzairyo*)” cannot cover any raw material; the term must be used here in a narrow sense, namely something which has been already manufactured or processed to a degree. Otherwise, it would arguably fall outside the definition of “product”.⁸⁰ Most importantly, it would be inconsistent with the idea of being produced pursuant to instructions as to “design”. However, there is little authoritative commentary as to what differentiates a component or raw material from the product associated with it.⁸¹ Brakes in a car, for instance, are probably a component.⁸² This is important not only for the manufacturer of the brakes “to specification” of the car manufacturer; but also for eg the owner of the car injured by the brakes failing, because it allows a claim against the car manufacturer for any damage to the car itself, *ex hypothesi* another product. But is an electric refrigerator in a yacht also a “component”, so the same effects follow? What about a defective computer

⁸⁰ Article 2(1). See *supra* Part 2.2(1).

⁸¹ The EPA ed, *supra* n 9 at 115, only mentions that it is not determinative whether the manufacturer delivered the component etc with the intention of being used as such; it is still caught if actually so used in another product.

⁸² Cf eg Sekine, *supra* n 42.

programme incorporated into a vehicle that causes it to crash?⁸³ It is also important to note that even where what is meant by a component (or raw material) can be clearly delineated, this Article only applies if it is used in another “product”. Since the latter excludes buildings, a building component manufacturer (even “to specification”) cannot invoke the defense.⁸⁴

The component manufacturer must prove that the defect has arisen “solely (*moppara*)” due to following instructions.⁸⁵ Finally, it must prove that it was not negligent with regard to the defect. Thus, even if it followed instructions, the component manufacturer can still be held liable in the light of foreseeability of harm and ability to avoid it. Its personal circumstances, such as its contractual position and levels of technology, are thought to be relevant in this determination.⁸⁶ Yet again, notions of negligence are reintroduced into a strict liability scheme.⁸⁷

Article 7(f) of the Directive provides a similar but not identical defense to a component manufacturer, where:

the defect is attributable to the design of the product in which the component has been fitted, or to instructions given by the manufacturer of the product.

The distinction implicitly drawn between “raw materials” and “components” under the PL Law raises the question whether a sufficiently processed agricultural or mineral product, in terms of the Directive,⁸⁸ can be a “component” covered by Article 7(f) if it is only *just* sufficiently processed and more in the nature, arguably, of a raw material. Perhaps more importantly, Article 7(f) provides some guidance as to what differentiates a component from its associated product, by referring to the former being “fitted” into the latter, and Article 2 refers to products “incorporated” into another. But this may still not be enough. Geddes suggests that it may help to ask whether the latter product

⁸³ The PL Law’s ambiguity in this respect has led to publication of an entire book on PL for computer software manufacturers recently: Ishii, Y and Harada, H *Sofutowea Gijutsuka no tame no PL Ho Gaido* [A PL Law Guide for Software Engineers] (1996). It has also led to a major claim by a small Aomori company against lessors of a computer system and company which developed financial management software, for alleged defects leading to irretrievable overpayment of tax: see case 10, at supra n 63.

⁸⁴ EPA ed, supra n 9 at 115-116.

⁸⁵ The EPA’s English translation of this term is “substantially” (supra at 141). That is linguistically incorrect, and inconsistent with its own commentary on this point (ibid, 116).

⁸⁶ EPA ed, supra n 9 at 116-117.

⁸⁷ Mori, supra n 96 at 118.

⁸⁸ See supra Part 2.2(1).

“would be ‘defective’ (in the sense of failing to achieve its required function) without the alleged function”, so that brakes in a car would be a component, but a refrigerator in a yacht would not.⁸⁹ Yet he admits that there are still difficult cases, and that the proper distinction will need to await refinement by the courts.⁹⁰ At least it is clear, from article 2, that this defense extends to any such “component” produced “to specification” even if incorporation into an immovable.

The Directive does not spell out, however, the extent to which the component producer seeking this exemption must prove it is working “to specification”. Commentators are left to speculate that instructions must have been very clear, and have left “no room to exercise [its] own judgment in such a manner as would have permitted him to avoid making a defective component”.⁹¹ The Directive also gives no guidance on the question of whether a component manufacturer can still be liable in producing a defective component which is inherently dangerous.⁹² Article 4(1) of the PL Law invites consideration of such issues, and generally favours the injured party more than Article 7(f) of the Directive.

Nonetheless, Article 7(f) does distinguish between two excuses: for following instructions, and for defects due to design of the finished products. In itself, the latter is seemingly unavaivable under the PL Law — there must be some instructions followed — unless a causation argument can be made under Article 3.

Reference to “instructions given by the manufacturer” under Article 7(f) of the Directive, however, are not spelt out as being those given to the component manufacturer as opposed to the consumer of the finished product. Presumably only the former are relevant, and “if a component was rendered dangerous by the instructions of the end producer, the component manufacturer would have the defence that the defect was attributable to the design of the end product, the instructions being an implicit element within the concept of design”.⁹³ Article

⁸⁹ *Supra* n 25 at 115.

⁹⁰ *Ibid.* Howells (*supra* n 34 at 34-35) also identifies that potential difficulties with faulty computer software etc, noting that such matters will need to await resolution by the courts. See also *supra* n 83 and accompanying text.

⁹¹ Howells, *supra* n 18 at 43. Cf Geddes, *supra* n 25 at 33, suggesting that defect must be the “inevitable” result of compliance with specifications.

⁹² Howells, *supra* n 18 at 43.

⁹³ *Ibid.*

4(1) of the PL Law suggests that only instructions to the component manufacturer are relevant since they are qualified as “relating to design”, presumably of the components ordered. However, by not extending an exemption to a component manufacturer for design of the end product, such a manufacturer would be left to argue causation under Article 3.

Section 75AK(d) provides a similar defense upon proof that if goods were comprised in other goods (“finished goods”), the defect in the (former) “action goods” was attributable to:

- (i) the design of the finished goods;
- (ii) the markings on or accompanying the finished goods; or
- (iii) the instructions or warnings given by the manufacturer of the finished goods.

Similar issues may arise as to the scope of such “action goods”, defined simply as “being comprised” in “finished” goods.⁹⁴ As in the Directive, there is a defence for defects due to the design of the finished goods. Paragraph (iii) highlights the component manufacturer’s defence for (inadequate) instructions or warnings given by the end producer to consumers, causing the defect. Paragraph (ii) presumably envisages the same situation, but where the end producer affixes some other “markings”. On the other hand, paragraph (iii) does not expressly provide a defence where the component has simply been manufactured in accordance with instructions by the end producer *to the component manufacturer*.

2.5 Limitations of Time (Article 5)

Article 5(1) of the PL Law can be translated as follows:

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.

The starting point for the 3-year limitation period is expected to follow the

⁹⁴ See eg Harland, *supra* n 30 at 209.

similar provision in Article 724 of the Civil Code, as interpreted by the Japanese courts. As well as the damage and the tortfeasor, the harmed person or representative will first need to know, as far as he or she is able, that the act or omission in question grounds a reasonable claim for damages in tort.⁹⁵ The period is the same as for tort claims under the Civil Code (Article 724). It is thought to be capable of suspension or interruption in various situations (Article 147, as interpreted by caselaw).⁹⁶

Although “the same” effect is said to apply after 10 years has elapsed from time of delivery, this period is treated similar to that in a “period of repose” (*joseki kikan*), setting a rigid maximum period within the claim must be made and not allowing for any form of suspension that might extend that period.⁹⁷ The analogous Article 724 of the Civil Code provides for such a period lasting 20 years. However, this was considered inappropriate for the PL Law given recent technological developments, the average periods manufactured products last for and are actually used for, and the period for keeping test documentation and so on, as well as provisions in legislation overseas.⁹⁸

Article 10(1) of the Directive sets a somewhat different three-year period, in that it runs from “the day on which the plaintiff became aware, *or should reasonably have become aware*, of the damage, *the defect* and the identity of the producer (emphasis added). Article 10(2) preserves the laws of member states regulating suspension or interruption of this period. Section 75AO(1) of the TPA is almost identical to Article 10(1); but the Australian law as to suspension or interruption will probably differ in significant respects from the likely mishmash of local European laws. Additionally, Article 11 of the Directive sets an absolute time bar, for bringing suit, of 10 years “from the date on which the producer put into circulation the actual product which caused the damage”. Section 75AO(1) of the TPA is almost identical. All but the last reason advanced in support of the PL Law’s time bar, just mentioned, have met strong criticism in the context of the Directive.⁹⁹

Article 5(2) of the PL Law attempts to lessen the potential disadvantage of

⁹⁵ EPA ed, supra n 9 at 119.

⁹⁶ Ibid, at 120.

⁹⁷ Ibid, at 121-122.

⁹⁸ Ibid, at 121.

⁹⁹ Howells, supra n 18 at 44.

a ten-year absolute time bar, to certain harmed parties, by providing that:

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. The former category reflects reported caselaw where injuries became apparent after more than 20 years, as well as cases of injuries from asbestos which became apparent after over 10 years in the US.¹⁰⁰ It will also cover injury from smoking cigarettes, now a contentious topic in Japan as well as elsewhere.¹⁰¹ Despite the very lax regulatory response to tobacco-related health problems on the part of the Japanese government,¹⁰² claims against tobacco companies as well as asbestos manufacturers or importers were and are expected to burgeon.¹⁰³ The second category in Article 5(1) includes such things as viruses such as HIV, which can develop into AIDS after a lengthy period.¹⁰⁴ This particular problem was vigorously debated through to the final stages of enactment of the PL Law in mid-1994.¹⁰⁵ Haemophiliacs and others had brought suits from 1989 after contracting HIV from blood products, and major settlements were reached only in March 1996, amidst even greater publicity following leaks also casting in bad light the Ministry of Health and Welfare itself.¹⁰⁶

The provision that the ten-year period should be calculated “from the time such harm arises”, in such cases, seems odd at first, in that “such harm” is arguably the initial harm (the first cigarette or the HIV-infected blood transfusion).¹⁰⁷ In fact, this is a term used in other Japanese legislation, where it has

¹⁰⁰ EPA ed, supra n 9 at 122-123.

¹⁰¹ See generally Yoshida, K “*Tabako Mondai to Gendaigata Sosho* [Tobacco Litigation and Contemporary Litigation] ” (1998) 1149 *Juristo* 75.

¹⁰² Levin, M “Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan” (1997) 8 *Stan L & Pol’y J* 99.

¹⁰³ Leflar, R “Personal Injury Compensation Schemes in Japan: Values Advanced and Values Undermined” (1993) 15 *U Haw L Rev* 743, 751-753.

¹⁰⁴ Cf EPA ed, supra n 9 at 123.

¹⁰⁵ *Ibid.*, 37-39. See also Asaoka, supra n 38, 30-31.

¹⁰⁶ Wada, Y “Merging Formality and Informality in Dispute Resolution” (1997) 27 *VUWLR* 45, 45-46. It is reasonably clear that even blood transfusion products will constitute goods attracting coverage under Article 2(1) of the PL Law; but the characteristics of these products arguably will have to be considered in judging their defectiveness under Article 2(2), and there may be a development risks defence open under Article 4(1): see Masuda, supra n 22a, 150; and on the last point contrast French law, supra n 76. In addition, of course, the PL Law only applies to products released after July 1995.

¹⁰⁷ Marcuse, supra n 11 at 393-394.

been interpreted to mean harm which has reached the stage of becoming apparent or tangible. In air pollution legislation, for instance, each illness that emerges forms a separate injury subject to the law. This approach is expected to be taken in interpreting the PL Law.¹⁰⁸

Neither the Directive nor the TPA attempts to address these problems in this way at all. Interestingly, the Australian Senate's Standing Committee on Legal and Constitutional Affairs had recommended in a report published in December 1992, just four months after Part VA had been added to the TPA, that the ten-year bar be amended to allow a court to extend the period if shown that, on or before the date it was supplied, the manufacturer knew or ought to have known that the product was defective.¹⁰⁹ In June 1994, the government responded that this appeared to go too far and that, since the Committee had been intending to assist victims specifically of "toxic harm", a specific exception for such cases should be introduced with the definition to be worked out upon further advice by the Office of Parliamentary Counsel.¹¹⁰ Thus, the way was opened to widen protection for injured parties along the lines of Japan's PL Law. In recent years, the Australian Law Commission has considered a "toxic tort" amendment, but little progress has been made.¹¹¹

2.6 Application of Civil Code (Article 6)

Article 6 of the PL Law provides simply that:

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.

Several important matters are not covered at all in the PL Law, and thus left to the Civil Code provisions, as interpreted for over almost a century by Japanese courts. One principle frequently applied in previous product liability cases reported in Japan is comparative negligence (*kashitsu sosai*: Article 722(2)).

¹⁰⁸ EPA ed, *supra* n 9 at 123. In cases of initially light injuries developing into unexpectedly heavy injuries, it may also be possible to take the later development as determinative (*ibid.*, 124-125). However this relies more heavily on caselaw and academic interpretation.

¹⁰⁹ Kellam, *supra* n 30 at 27-28.

¹¹⁰ *Ibid.*, 29.

¹¹¹ Personal communication from Professor David Harland, University of Sydney Law Faculty, 2 June 1999.

This is interpreted broadly to cover lack of care by the injured party.¹¹² The Directive expressly provides for reducing or disallowing liability of the producer when the damage is caused “both by a defect in the product and by the fault of the injured person *or any person for whom the person is responsible*” (Article 8(2), emphasis added). Except for this last emphasised phrase, s 75AN of the TPA is in similar terms.^{112a}

Secondly, the PL Law does not address the problems which can arise when multiple parties are involved in cases of defective goods, such as joint liability (Article 719 of the Civil Code), rights of recourse, and employee liability.¹¹³ Articles 5 and 8(1) of the Directive expressly provide some guidance on the first two, but without prejudice to provisions of a member state’s national law.

¹¹² EPA ed, supra n 9 at 127.

^{112a} In *ACCC/Barnes v Glendale* (supra n 10), the Federal Court found that Barnes was not contributorily negligent at all. It noted that:

“The essence of the contention on behalf of Glendale is that Mr Barnes, being an adult who had no deficiency in comprehension of English, read the label twice, had plenty of time to consider his proposed course of action and seek a second opinion. Nevertheless, he chose to follow the suggestion made to him by Mr Phillips and in doing so, chose to ignore the warning about the use of safety glasses. When Mr Barnes read the label on the container of the product in the store he read the warning that it was corrosive and he read the direction avoid contact with eyes and skin. He also read the notation “Always wear rubber gloves and safety glasses when handling caustic soda”. He read it again at home shortly prior to the use of the product.

Mr Barnes said that he did not wear rubber gloves and safety glasses because he was not mixing the product. The explanation he gave as to why he did not wear rubber gloves and safety glasses, because as far as he was concerned he not mixing it and he did not think he was going to get splashed with the substance. On the other hand he conceded that he was “handling caustic soda”. Further, he knew what safety glasses were and that, although he did not have a pair of safety glasses he could quite easily have made searches at the Woolworths store or at the hardware store on the way home and got some safety glasses.”

Nonetheless, after finding that the defect under s 75AC was the failure to warn against the use of the caustic soda in a confined space, Emmett J concluded:

“...a reasonable consumer could be excused for assuming that the reason for the instruction concerning safety glasses was to prevent injury consequent upon contact between gloved hands or eyes or dust from the product rising and floating into the eyes. Even if Mr Barnes had been wearing safety glasses, he could be excused for having taken them off in order to peer down the drain to see the result of his efforts. The direction did not say that safety glasses should be worn even after the handling of the product was complete by being put into the drain. That is to say, the failure to wear safety glasses did not cause the loss suffered by Mr Barnes. The loss occurred because of the consequences of putting the product in the drain.

The suggested usage of the product cannot be construed as a warning by the supplier that that is the only way in which it should be used. I do not consider that use in the way in which it was used was unreasonable. I do not consider that it was an act which, in a relevant sense, resulted in the loss or damage. Nor do I consider that the failure to wear safety glasses in the act of examining the drain to see whether the treatment was effective was an omission which would attract the operation of s 75AN.”

¹¹³ EPA ed, supra n9, 127-128.

Section 75AM of the TPA provides uniformly for joint and several liability where two or more corporations are liable for the same loss.

Thirdly, the PL Law does not address exemption or limitation clauses. Under general Civil Law principles, these bind only those with whom the manufacturer deals directly. Even if displayed in packaging or instructions, raising the issue of their effect on such parties, it is thought that they will often be struck down as contrary to public order and good morals (*kojo ryozoku*: Article 90 of the Civil Code), at least when attempting to exclude liability for personal injuries.¹¹⁴ This view may prove overly optimistic in the case of consequential property damage, especially when the plaintiff is an experienced businessperson or firm, given the overall quite restrained application of this “general clause” by courts in post-War reported caselaw. Even in some such situations, however, exemption or limitation clauses may be struck down, at least in part.¹¹⁵ Given the possibility of a claim under Article 3 regarding the product itself, as long as there has also been some consequential property damage or personal injury, one reason a blanket prohibition on exemption clauses derogating from the PL Law has not been incorporated therein is probably that this would prevent manufacturers and others from restricting liability regarding damage to the product, traditionally allowed. Since Article 9 of the Directive does not allow claims for damage to the product itself, it can no doubt more readily prohibit exemption clauses derogating from that legislative scheme (Article 12).^{115a} Hence too, the more detailed prohibition in the TPA (s 75AP).

Fourthly, issues of causation are not clarified under either of the three legislative regimes. Under Article 3 of the PL Law, “damage arising from a defect in a product” must be established, and it clear the burden of proving this causal relationship lies on the person harmed. This is also implicit in paragraph (c) of ss 75AD-AG of the TPA. Article 4 of the Directive expressly states this requirement. But arguments as to epidemiological causation and statistical

¹¹⁴ Ibid, 128-129.

¹¹⁵ See generally Nottage, L “Form and Substance in US, English, New Zealand and Japanese Law” (1996) 26 VUWLR 247; and eg case cited at *ibid*, 278 fn 160.

^{115a} Interestingly, the new French law (which, like the PL Law, does not restrict coverage to “consumer goods”) prohibits limitation clauses except in the case of non-consumer goods (Article 1386-15).

probability, for instance, will need to be worked out under the background law.

Perhaps most importantly, beyond such matters — finding virtually no mention in the PL Law at all — the PL Law is also not seen as preventing claims for product liability under tort or contract law provisions in the Civil Code, despite the new “defect liability” regime established by Article 3. They can therefore be brought in parallel with claims under the PL Law. In other words, whichever claim sets the higher standard will apply. It is expected that a very high standard of care, bordering on strict liability developed by Japanese courts in some situations under those earlier Code provisions will continue to prevail.¹¹⁶ In fact, this result may not follow unambiguously from the wording of Article 6. If the plaintiff’s only argument is that negligent manufacturing of a product has caused harm, it might be thought that this amounts simply to a claim for harm arising from a “defect” in the product. That would be something “otherwise provided for in this Law” (namely Article 3), meaning the argument would have to be precluded. However, this is not the way commentators in Japan currently interpret Article 6.¹¹⁷

Article 13 of the EC Directive more straightforwardly preserves, alongside those provided under its scheme, any contractual, non-contractual or “special liability sysoem” rights existing when it was formally notified to member states. Likewise, the TPA preserves existing rights (s 75AR), such as those under Part V Division 2 (s 74D) for damage from goods in breach of the statutory warranty of merchantable quality.¹¹⁸ Retaining such alternative or multiple schemes can be justified from a consumer protection perspective, to prevent new legislation paradoxically reducing the scope of allowed remedies. If those other rights are extensive, however, this may further reduce the harmonising effect of even similarly worded legislative provisions.

On the other hand, workers’ compensation scheme rights displace the product liability rights in Part VA of the TPA (s 75AI). This eliminates the compli-

¹¹⁶ Marcuse, *supra* n 11 at 394-95, fn 234.

¹¹⁷ See eg Obo, H and Morikawa, H *Hayawakari Seizobutsu Sekinin (PL) Ho no Subete* [Quick to Understand: All about PL] (1994) 83; Yamaguchi, M *PL Ho Nyumon* [Introduction to the PL Law] (1994) 180. The EPA (*supra* n 9) makes no reference to this issue of interpretation.

¹¹⁸ Merchantable quality can include adequate safety, and damage can extend to consequential damages and personal injuries under normal private law principles. Incidentally, consistently with s 75AP, exemption clauses are prohibited except in limited situations (ss 75K and 75L).

cation of multiple or alternative schemes. But it means that a significant proportion of accidents from products, at the workplace, will be covered by different legislation. This reduces the harmonising effect of *product liability legislation* per se. To maximise overall harmonisation, other jurisdictions should also give priority to workers' compensation schemes, and the latter should be harmonised too. In Japan, however, the PL Law does not address at all the question of applicability of regimes other than the Civil Code, so it must be taken to permit any remedies provided by them, including significant workers' compensation schemes and drug side effects schemes.¹¹⁹ And as just mentioned, Article 13 of the Directive expressly preserves "special liability system" rights. Again disharmony results, from parallel or multiple regimes.

2.7 Procedural Law and the Overall Civil Justice System

Thus, the difficulties of harmonising substantive law should not be underestimated, in terms of both product liability legislation provisions themselves, and alternative or parallel private law and accident compensation regimes. Moreover, it is widely recognised that rules of procedure and aspects of a jurisdiction's civil justice system are also crucial to any convincing analysis of substantive liability rules.¹²⁰ Such matters, though, add to the difficulties involved in harmonising product liability regimes.¹²¹

Japan has been no exception in considering procedural issues alongside substantive law reform. Against the backdrop of various well-publicised "mass tort" suits, a Research Group on Product Liability (*seizobutsu sekinin kenkyukai*) was formed in 1973, led by the eminent Professor Sakae Wagatsuma of Tokyo University Law Faculty. Drawing on recent developments overseas, including Europe,¹²² in August 1975 the group completed a draft outline product liability

¹¹⁹ Matsumoto, *supra* n 16 at 6-7. See also Tejima, Y "Tort and Compensation in Japan: Medical Malpractice and Adverse Effects from Pharmaceuticals" (1993) 15 U Haw L Rev 728, 732-35; Drennan, DJ "Regulation and Response: Industrial Safety and Health Law in Japan (Parts I and II)" (1998) 64/4 and 65/1 Hosei Kenkyu F87 and F59.

¹²⁰ See eg Schwartz, *supra* n 29, 63-70.

¹²¹ See eg Kellam (gen ed), *supra* n 43. Each of the country reports devotes a substantial part to procedural issues. However, this exacerbates the "wide variations" between the jurisdictions, and consequent quite "dismal picture from a consumer's point of view": Goldring, J "Introduction", in *ibid*, 1 at 3.

¹²² See eg Morishima, A "*Jinshin Songai ni Kakaru Seisanbutsu Sekinin ni kansuru Oshu Joyaku*

law (*seizobutsu sekininho yoko shian*) proposing strict liability legislation.¹²³ Interestingly, a Postscript to the draft added that:

To achieve the aim of this law, it is desirable that the existing system be improved or newly created in terms also of civil justice remedial procedures, in accordance with the special features of injuries from defective products. In particular, the introduction of system along the following lines should be considered:

- (1) A system to force the other party or a third party to submit into Court means of evidence;
- (2) A system to provide relief for minor injuries;
- (3) A system that aims for relief through a particular person representing the interests of multiple injured persons, such as class actions;
- (4) A system for a defendant to bring into litigation a third party.¹²⁴

When the draft was debated that October at the annual conference of the Private Law Association (*shiho gakkai*), one of the five presentations focused on such procedural issues;¹²⁵ but they also formed a subcurrent in the four other papers, as well as the ensuing discussions. They also continued to be studied by later researchers,¹²⁶ although for various reasons the draft proposals did not result in legislation until almost two decades later.¹²⁷

The provisions of the draft, as well as the group's more general interest in procedural issues, were driven by a concern for consumer protection and access to justice.¹²⁸ When serious debate on introducing product liability legislation resurfaced around 1989-90, pro-consumer interests focused on procedural issues

Soan [The Draft Convention on Personal Injury from Product Liability]" (1975) 597 *Juristo* 38.

¹²³ Published in (1975) 597 *Juristo* 16.

¹²⁴ It is wrong, however, to deduce from this that "the provisions of the 1975 Draft Law [sic] incorporated ADR mechanisms ... [and] left the ADR mechanisms under the control and supervision of the courts" (Marcuse, *supra* n 11, 397 fn 256).

¹²⁵ 125 Takeshita, A, "*Seizobutsu Sekinin to Kyusai Tetsuzuki* [PL and Remedial Procedures]" (1976) 38 *Shiho* 106.

¹²⁶ See eg Takeuchi, A (ed), *Wagakuni Seizobutsu Sekininho* [Japanese PL Law] (1990).

¹²⁷ EPA ed, *supra* n 9 at 17-19. Reasons included the comparative lack of caselaw and theory development; the newness of the concepts and lack of consensus abroad; geographical dispersion of even mass tort victims and concomittant lack of political importance, especially when compared to "mass pollution" cases; and the introduction of various consumer protection schemes by Japanese industry and government. See Nottage, L "The Still-Birth and Re-Birth of Product Liability in Japan", in Feest, J & Nelken, D (eds) *Adaptation of Legal Cultures* (forthcoming).

¹²⁸ Matumoto, *supra* n 16 at 8.

for a further reason. To counter concern mainly by business interests, they stressed that any “litigation explosion” in the US was due to peculiarities of the latter’s civil justice system rather than substantive product liability rules.¹²⁹ Now that the PL Law is in place, however, attention has moved back to specific procedural issues important in the Japanese context. These include the implications of amendments to the Code of Civil Procedure (CCP), which came into effect from January 1998 after years of debate mainly among practitioners, eg as to specific discovery obligations.¹³⁰ Another overlaps with public law: access to official information under current law and various recent proposals.¹³¹

Nonetheless, the new PL legislation in Japan contains no “procedural” provisions. Partly this may have been due to opposition from pro-business interests. But another reason could have been that the abovementioned reforms to other legislation were underway anyway — and Japanese jurists retain a somewhat surprising formalist streak in maintaining boundaries between areas of law traditionally conceptualised as distinct.¹³² In any event, the EC Directive does not contain procedural provisions either. Quite unusually, for recent PL legislative regimes,^{132a} s 75AQ of the TPA does allow the Trade Practices Commission to commence a liability action on behalf of one or more persons identified in a written application. So far, however, the only action taken

¹²⁹ See eg Asaoka, *supra* n 38.

¹³⁰ See eg Tajima, J “*Seizobutsu Sekinin Soshō kara mita Shin Minji Soshō Ho* [The New Civil Procedure Law as seen from PL Litigation.]” (1997) 48 *Jiyū to Seigi* 52. For an overview of the CCP amendments, see Taniguchi, Y “The 1996 Code of Civil Procedure of Japan: A Procedure for the Coming Century?” (1998) 45 *AJCL* 767.

¹³¹ See eg Nihon Bengoshi Rengokai Shohisha Mondai Taisaku Iinkai (ed), *Seizobutsu Sekinin Ho o Ikasu 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] (1995) 120-180.

¹³² See eg Nottage, *supra* n 12 at 333-34.

^{132a} Exceptionally, under Taiwan’s Consumer Protection Law, enacted on 13 January 1994 and containing product liability provisions in Sub-Chapter One, provides that:

“...consumers may lodge complaints directly with the business operators, consumer protection groups, or the local government’s consumer service center. Business operators are given fifteen days to “properly handle” consumer disputes. If a complaint is not properly addressed, a consumer may complain to a consumer protection official of the local government. If neither of these two complaints is properly addressed, the consumer may petition for mediation by a Consumer Dispute Mediation Commission to be established by each local government.”

See Juang, C “The Taiwan Consumer Protection Law: Attempt to Protect Consumers Proves Ineffective” (1997) *Pac Basin L & Pol’y J* 219, 233. Juang criticises these provisions as unclear, however, along with the transparency of the accreditation process for consumer protection groups which, if qualified, can bring a class action suit on behalf of twenty or more consumers (*ibid.*, 235-7).

appears to have been in the very recent *ACCC/Barnes v Glendale* case.¹³³

Intriguingly, at the final stages of enacting the PL Law in Japan, committees of both the lower House of Representatives and the House of Councillors resolved that the government should, inter alia, take “appropriate measures” to strengthen or organise the out-of-court dispute resolution system in order to promote smoother compensation for and prevention of injury from defective products.¹³⁴ From September 1994, industry associations began to establish product-specific ADR Centers to deal with PL matters. Some have seen these as uniquely Japanese and as nefarious to consumer interests. Yet there are some interesting — if not exact — parallels overseas (such as the Banking Ombudsman schemes in New Zealand and Australia), and the operations of at least some of the Centers seems to evidence a valuable role also in consumer redress.¹³⁵ What these Centers do show vividly, however, is that product liability rules must be considered alongside government regulation at multiple levels; the civil justice system as a whole, including out-of-court dispute resolution processes; and even the way individuals in contemporary complex societies relate to all this.^{135a}

3. The Tensions of Harmonisation and Globalisation of Law

The foregoing brief overview of the recent legislative initiatives in Japan, Australia and the EU reveals two facets. On the one hand, since the first two were at least in part inspired by the EC Directive, both in the discussions leading to enactment and in the drafting of the legislation, a common vocabulary and shared concepts do emerge. To a significant degree, moreover, the more subtle differences — and even some of the more prominent ones, such as Japan’s extension of PL Law coverage beyond “consumer” product damages (supra Part

¹³³ Supra n 10. Note, moreover, that Barnes also brought separate proceedings before his local District Court of New South Wales in Tamworth (No 81 of 1997), which had to be consolidated with the ACCC’s proceedings before the Federal Court: see *ACCC v Glendale Chemical Products Ltd* (NG 934 of 1996, Federal Court of Australia, New South Wales District Registry, 1998 AUST FEDICT LEXIS 53, 17 February 1998, Emmett J).

¹³⁴ Respectively, resolution No 4 (15 June, 1994), and No 3 (22 June, 1994). See EPA ed, supra n 59 at 143-144.

¹³⁵ Nottage, L & Wada, Y, “Japan’s New PL Product Liability ADR Centers: Bureaucratic, Industry or Consumer Informalism?” (1998) 6 *ZJapanR* 45. Cf also supra note 132a.

^{135a} See Nottage, L “Proceduralization of Japanese Law in Comparative Context: Product Liability and Contract”, Paper presented at the Annual Meeting of the Law and Society Association, Chicago, 27-30 May 1999.

2.2(1)) or time limitation to toxic harm situations (Part 2.5) — in fact can help develop that common core of principle and debate. These in turn hold much potential for incorporation into more broadly based “product safety guidelines”, especially for industry concentrating on product safety activities,¹³⁶ although major practical and theoretical challenges remain in transforming these into “user-friendly” and “system-friendly” form.

On the other hand, even this brief analysis has revealed how the divergences do start to mount up. This shows that globalisation of law is not a simple process of convergence, a conclusion which ties into and invites recent theoretical and empirical research.¹³⁷ Further, even harmonisation of law seems likely to prove elusive, at least in the area of PL. All the more so, when we consider the problems that have arisen in implementing the Directive in EU member states themselves, such as France and the United Kingdom. And that Asia-Pacific jurisdictions other than Japan which have drawn on the Directive,¹³⁸ along with state-based PL law in the US,¹³⁹ have been almost entirely left to one side as well.

As the latter constitute further major trading partners for New Zealand, for instance, it certainly seems overly simplistic to argue — as the Report to its Ministry of Consumer Affairs did in 1995 — that “harmonisation of consumer protection laws between trading partners is an effective way of breaking down barriers to international trade”.¹⁴⁰ After outlining the development and contours of the EC Directive and Australian schemes, it had noted that the schemes: aimed to reduce barriers to trade. Through the adoption of laws that are consistent with the laws of their trading partners, countries can reduce barriers to trade with those countries.¹⁴¹

¹³⁶ Nottage & Wada, supra note 134.

¹³⁷ Nottage, L, “*Kokusai Shoji Chusai to Lex Mercatoria no Hensen* [The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria]” (1999) Ho no Shihai 18; Nottage, L, “Educating Transnational Commercial Lawyers for the 21st Century” (1999) 66/1 Hosei Kenkyu F1, Part II.C. See also now Weiss, L *The Myth of the Powerless State: Governing the Economy in a Global Era* (Oxford: Polity, 1998).

¹³⁸ See eg Kellam, J (gen ed) supra note 43; Harland, D “Recent Developments in the Law of Product Liability and Service Liability in the Asia-Pacific Region” (1997) 8/4 Aust PL Reporter 1.

¹³⁹ Schwartz, G “Considering the Proper Federal Role in American Tort Law” (1996) 38 Arizona L Rev 917. For a database of works discussing last year’s attempted Restatement of all this law, compiled with the kind assistance of Prof Gary Schwartz of UCLA Law School, see my website at <<http://www.law.kyushu-u.ac.jp/~luke/plus.html>>.

¹⁴⁰ Report, supra n 38 at § 5.1.

¹⁴¹ Ibid, § 5.40.

Adding that Japan's new Law "is modelled closely on the EC Directive", and after briefly summarising US developments,¹⁴² the Report concluded:

All of New Zealand's major trading partners operate in accordance with a strict liability system of product liability. At present New Zealand does not have such a scheme. An analysis of the economic effects of this difference is beyond the scope of this report. Further reports should consider the extent to which, if at all, trade with New Zealand's major trading partners might be enhanced by enacting some form of strict liability scheme in New Zealand.¹⁴³

The differences between the three main regimes which I have analysed above, and their broader legal framework, suggest however that the economic effects may be hard to gauge. A better approach for law reformers in New Zealand may be to begin with, and to mainly focus on, consumer protection per se – in fact another major thrust behind the Report's recommendation for the need to investigate strict liability PL legislation for New Zealand.¹⁴⁴ That may lead more naturally into much broader debate about "accidental justice":¹⁴⁵ values and principles as well as the empirical and economic evidence. Such debate seems increasingly necessary and likely to develop in New Zealand, following recent and ongoing major developments in its no-fault accident compensation scheme,¹⁴⁶ which may bring the Report back into the public gaze. It is also crucial for any complex industrialised democracy on the eve of a new millenium, including Japan, Australia and the EU.^{146a}

¹⁴² Ibid, § 5.42 and 5.43, respectively.

¹⁴³ Ibid, § 5.45.

¹⁴⁴ Ibid, § 1.1, 1.6-1.10, 3.19, 3.21, 6.26.

¹⁴⁵ Bell, P and O'Connell, J *Accidental Justice: The Dilemmas of Tort Law* (New Haven, Yale University Press, 1997).

¹⁴⁶ Nottage, supra n 7. Compare hitherto eg Epstein, R "Accident Compensation" in NZ Business Roundtable (de) *Accident Compensation: The Faulty Basis of No-Fault and State Provision* (1996) 3-18; with Palmer, G "Commentary" in ibid, 19-22. Indeed, as part of the Law Faculty's "Law Week" contribution to Victoria University of Wellington's centennial celebrations, an international "Colloquium on Accident Compensation" will be held on 7 July 1999 to discuss the future of the scheme and tort law generally.

^{146a} Supra n 135a. See also Nottage, L "The Centennial of Japan's Civil Code and the Future of New Zealand Contract Law: Form, Substance, and Neo-Proceduralism" (Paper presented at the Australian Law Teachers Association conference, Wellington, 4-7 July 1999), Part IV.