Japan Should Beware Copying U.S. Product Liability System

By Robert C. Weber

In the past few years a chorus of voices has urged the Japanese government to adopt a strict product liability law akin to that in effect in the United States. The chorus calling for reform is remarkably diverse, and brings together some of the strangest bedfellows ever found in a Japanese political coalition.

These partners in reform include the Japanese Federation of Bar Associations, Japan's nascent consumer and "green" movements, and leftist political parties, along with more mainstream societal voices such as respected newspapers and journalists and the Economic Planning Agency. They also include foreign observers such as Ralph Nader, and trade representatives of both the United States and the EC. Given the steady refrain of the reformers, it appears that some such legislation is all but inevitable in the near future.

Lost in all the political noise, however, is the fact that there is no urgent need for Japan to reform its product liability laws. And even if some reform is deemed necessary for political reasons, it would be a great mistake for Japan to model its reform on the American product liability system, since that system works neither efficiently nor effectively.

Peculiarly American

The American product liability system evolved more by default than by design in the courts of the 50 states in response to a number of peculiarly American legal, social and political traditions.

For example, the American legal culture is premised on an entrepreneurial claimants' bar, a constitutional right to trial by jury, the widespread acceptance of the legal fiction that money damages may serve as compensation for any type of loss or injury, and the idea that lawyers working for a contingent fee advance societal interests by acting as private attorneys general.

The social and political culture which fostered this doctrine included an absence of any comprehensive social insurance for disability or injury, a central government which at the time played only a minimal role in issues of product safety, and a widespread public belief in the efficacy of litigation as a suitable means of pressing and resolving grievances.

A justifiably criticized effect of American-style product liability law relates to unanticipated imposition of liability in such amounts as to disrupt consumer or insurance markets.

Steps can be taken to minimize such effects, such as (1) adopting a ceiling, as the EC has done, for damage liability arising from any one manufacturing activity; (2) providing, as has the EC, that product liability legislation only apply to products produced after the effective date of legislation; (3) providing, as have the EC and some U.S. states, for a "statute of repose" which eliminates so-called "long-tail liability" for all products including chemical and pharmaceutical goods. This prevents liability claims on products after they have been in circulation for some set period of years; (4) considering making damage to property, including environmental damage, non-recoverable under product liability because the magnitude and unforeseeability of such problems are so great that they are better dealt with by direct governmental regulation; (5) considering making workplace disease a non-recoverable injury under product liability for the same general reasons; and (6) limiting damage awards by not permitting punitive damages or awards for pain and suffering. Japan traditionally has not embraced punitive damages as a facet of its civil law, and the goals of a strict liability system present no reason now to turn to such damages.

As a practicing lawyer who has counseled multinational companies on product liability matters for many years, I believe that Japan needs to adopt an American-style product liability system about as much as the United States needs to adopt a Soviet-style food distribution system. Indeed, the United States has far more to learn from Japan on this issue than vice versa.

There are several strong but often overlooked reasons which should give Japan great pause before proceeding down this path toward American-style reform.

First, Japan's current system for compensating injured consumers operates more efficiently and comprehensively than is generally recognized. In contrast with their American counterparts, Japanese consumers can often receive compensation without access to the judicial system by using informal dispute resolution procedures administered by public or private entities.

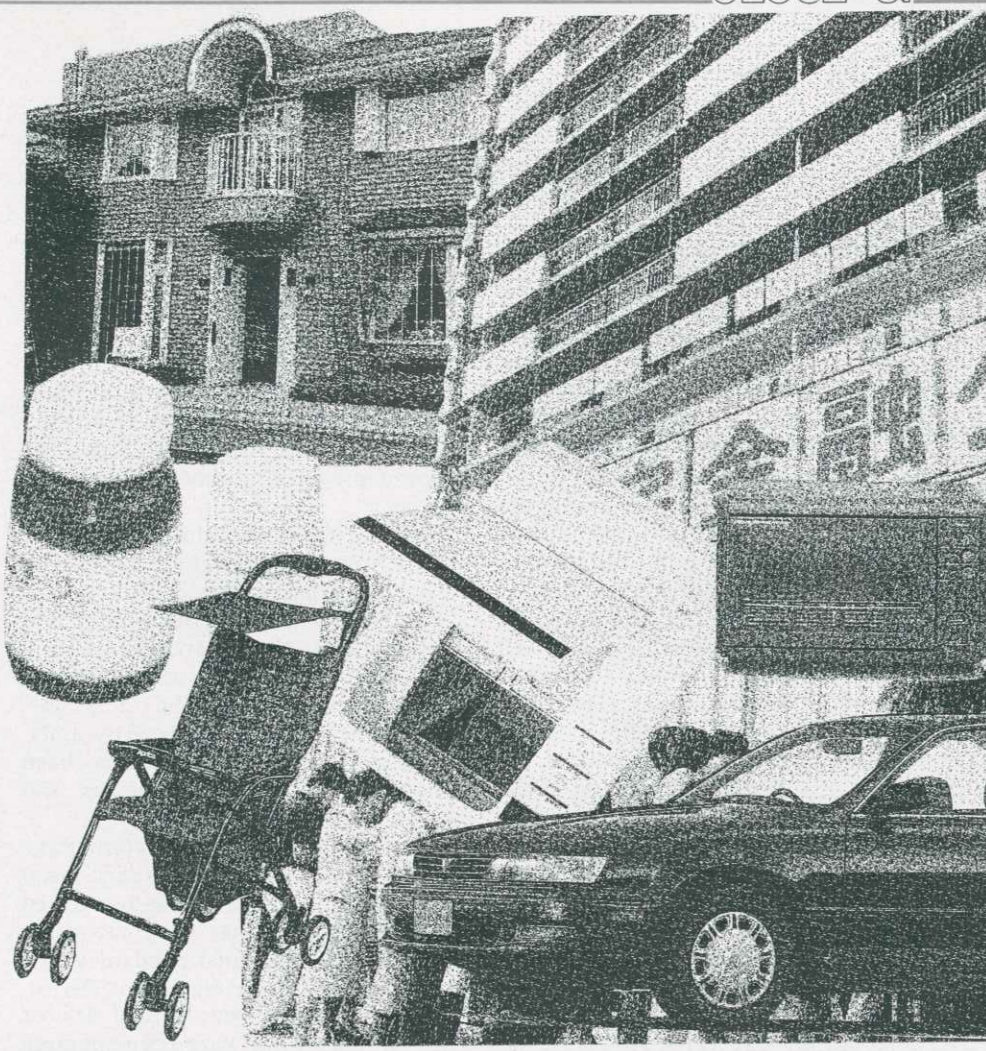
Nothing to emulate

For injuries involving pharmaceuticals, for example, consumers can obtain monetary relief from the Drug Side Effects Injuries Relief Fund, which can compensate victims or their families without resort to litigation. When litigation is instituted, the Japanese Civil Code permits a consumer to file a lawsuit seeking redress for a product-related injury.

Although the law is nominally based on negligence principles, cases involving environmental contamination or defective consumer products such as drugs or foodstuffs are governed by a "highest state-of-the-art" standard, which is largely indistinguishable from strict liability in the United States.

Second, the American system itself is nothing to be emulated. It has become a patchwork of inconsistency and unpredictability which, in its practical operation, is something of a parody of what an ordered and principled legal regime should be. It is an enormously expensive system to operate, with far less than 50% of the total cost of the system ever reaching the deserving victims.

The total cost of this system of dispute resolution imposes a hidden "tort tax" on



American manufacturers and the American economy greatly in excess of that deemed appropriate in any other industrialized democracy.

While the Bush administration made tort reform a domestic policy priority, fundamental reform at the federal level is unlikely in a Clinton administration, particularly because supporters of the Democratic Party traditionally have labeled such reform as being "anti-consumer" (not to mention the fact that the claimants' bar, through its comprehensive political fund-raising, was one of the major contributors to the Democratic Party in the recent elections).

Third, the legitimate goals of the consumerist reformers—compensation for victims and improved product safety in the domestic Japanese market—can be better served through more direct and efficient methods. The American experience has proved that product liability legislation is but the crudest of tools to effect improvements in product safety, as it regulates manufacturers in a haphazard and ad hoc fashion. Principled cooperation in Japan between insurers, consumers, industry and government can do far more toward developing meaningful consumer safety standards than can countless lawyers and product liability suits.

Additionally, truly deserving victims can be better compensated by abandoning the lottery mentality inherent in a product liability system and concentrating instead on more comprehensive first-party insurance schemes. There is, in short, no logic to compel the conclusion that America's idiosyncratic and lawyer-reliant response to the issues of product safety and consumer compensation is the preferred societal solution.

Fourth, adoption of a new product liability law in Japan would by itself accomplish very little of the reformers' agenda unless accompanied by more fundamental change of the legal system. As illustrated by the EC's experience with strict product liability, the mere enactment of such legislation will not have much practical effect on the lives of consumers when the overall legal system already in place is not "litigation friendly."

Unlike the United States, where contingent fees, broad discovery, jury trials and acceptance of large damages awards make the system an easy one for plaintiffs to use, the legal system in the EC and Japan has numerous barriers to litigation. Many of the domestic voices calling for reform in Japan, particularly those of the lawyers, are committed to using the product liability issue as a means of obtaining more fundamental liberalization of the Japanese courts and judicial system. In short, serious-minded observers of the Japanese legal scene must realize that the enactment of product liability reform is, in effect, only the first step of a far more ambitious and controversial reform agenda.

Japan's opportunity

The EC's adoption of American-style product liability laws has increased pressure for the adoption of a similar system in Japan, as has ongoing and vocal support from the United States Trade Representative and certain EC trade officials, who see Japan's failure to adopt a strict liability system as yet another unfair trade practice.

These calls for reform are further supported by liberal legal theorists who claim that strict product liability laws provide increased compensation for deserving consumers and bring about improved product safety.

Even if these claims were empirically supportable, which they are not, it would still be doubtful whether American-style—or EC-style—product liability could effect these benefits with any efficiency in Japanese society. It is, for example, both simplistic and wrong to assert that any improvement in safety or compensation, however slight, is worth any price, however great.

Surely there are many more efficient and cost-effective ways of improving product safety than adoption of a strict liability litigation system. Rational governmental regulation accompanied by appropriate enforcement tools can play a more focused role in bringing about

improvement, as can reliance on international standard-setting organizations, just to name two obvious examples.

Finally, the American reliance on litigation has little relevance to Japanese society, in which so-called "alternative dispute resolution" is not a late 20th century trend invented by American lawyers but instead is a timeless societal value.

Recent developments in Japan indicate that, as expected, efforts toward building a consensus on this issue are still continuing. If I were to hazard a guess as to the ultimate resolution of this controversy, I would suggest that, while Japan may well adopt substantive liability standards drawn from the United States law, it will likely follow the path of the EC and avoid adopting legal procedural tools of the type that have fostered litigation in the United States. Court filing fees will remain significant, contingent fees will not be legalized, and cost-shifting mechanisms will remain as deterrents to prevent litigation from becoming a growth industry.

By ensuring that product liability litigation will not assume anywhere near the importance it has in the United States, however, one wonders why the EC or Japan needed to adopt a strict liability system in the first place, and why it would not have been preferable simply to reject the American approach altogether and take an alternative path. There is always hope that Japan will develop an alternative path that brings fairness and predictability to the regulation of product safety. After all, the United States has proved itself constitutionally unable to do so.

Finally, if it is politically inevitable that some American-style reform be enacted, I hope that Japan takes pains to ensure that the reform avoids the most glaring problems with the American system.

Legal standards for what makes a product defective should be stated clearly and objectively, so as to avoid the ambiguity of American law, which has been the bane of product designers and risk underwriters.

Japanese product liability reform legislation should incorporate specific warning standards, perhaps using recognized international symbols or content approved by international standard-setting organizations. Just as significant, the legislation should provide a total defense for warnings which have been approved or required by appropriate government or international agencies, so long as there has been no fraud in giving agency approval.

Procedural rules should place clear limits on the amount of damages that may be awarded, and on what discovery may be had. Too often in the U.S. inflated damage claims and costly discovery sideshows combine to "blackmail" a manufacturer into overly generous settlements. Such settlements have widespread negative economic effects as they overcompensate undeserving plaintiffs, and thereby reduce the funds available for the truly deserving.

Need for clarity

Defenses based on a plaintiff's own negligence or assumption of the risk must be retained, so that Japan avoids the result, all too common in the U.S., in which drunken citizens recover damages from hapless manufacturers after the inebriated citizen causes an accident.

These examples are not, of course, a comprehensive list of all of the excesses of the American system of product liability, but the point should nonetheless be clear. A rational legal system must, at a minimum, contain rules that are clearly stated and predictably applied. Such an approach will differ significantly from the path chosen by the EC and will require greater attention to drafting. The effort will be worthwhile if the final legislation sets forth meaningful standards by which manufacturers can measure their conduct and by which consumers can govern their expectations.

We in America took our traditional approach of "leaving the details" to the courts and the lawyers. By doing so, we have created a system which really satisfies no one (other than the plaintiff's bar). It would be a sad irony if such a poorly executed legal concept was successfully exported to Japan. ■

Photo: Asahi Shimbun

A liaison conference seeking the establishment of a product liability law to protect consumers. This newly organized group started the nationwide debate on introducing such a law.

Robert C. Weber is a partner in the Cleveland office of the international law firm Jones, Day, Reavis & Pogue. He represents numerous multinational corporations on product liability matters throughout North America, Europe and Japan.