PRODUCTS LIABILITY THROUGH PRIVATE ORDERING: NOTES ON A JAPANESE EXPERIMENT

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INTRODUCTION

We suffer in the law from a failure of imagination. We assume that if we do not ban insider trading, insiders everywhere will trade. We assume that if we do not force firms to disclose their financials, no one will. We assume that if we do not mandate strict products liability, consumers will rarely recover against firms with dangerous products.

Our blindness is the public's loss. In fact, if we allowed insider trading, we have every reason to think that some (perhaps many) firms would ban it anyway to attract investors who preferred firms without the practice.¹ Before 1933, we did not require financial disclosure, but many firms disclosed their financials to court investors who valued the information.² And before 1995, Japan did not mandate strict products liability, but many Japanese firms voluntarily subjected themselves to the rule to attract buyers who wanted the protection such a rule gave.

In this short Article, I outline the voluntary products liability regime in Japan: strict liability by private ordering. I begin in Part I by summarizing the dubious case for mandatory strict products liability. I explain in Part II how the privately ordered Japanese system worked and in Part III discuss the resulting claim levels.

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¹ See Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 857-58 (1983) (analyzing arguments in favor of prohibiting insider trading); David D. Haddock & Jonathan R. Macey, *A Coasian Model of Insider Trading*, 80 NW. U. L. REV. 1449, 1449 (1986) (considering whether shareholders would permit or prevent insider trading, if given the option).

² See George J. Stigler, *Public Regulation of the Securities Markets*, 37 J. BUS. 117, 120-21 (1964) (finding a lack of real evidence that the SEC regulatory scheme actually achieves its goal of protecting investors).

I. MANDATORY STRICT PRODUCTS LIABILITY

Modern products liability law may be well-established, but it is notoriously hard to justify.³ Essentially, it imposes on consumer sales contracts a broad panoply of nonwaivable terms. It forces sellers (or manufacturers) in specified consumer sales contracts to agree to compensate buyers (and specified third parties) for specified damages caused by specified defects in specified products. Restated, it forces sellers to bundle insurance contracts with the goods they sell.⁴

Basic theory, however, suggests that if some buyers want bundled insurance contracts, then in unregulated markets some sellers will offer them. When customized sales contracts are feasible, sellers will offer insurance contracts tailored to specific buyers. And when customized contracts are infeasible, market competition will still drive some sellers to bundle some insurance contracts with some products. Consumers who want the products-liability protection will buy the bundled insurance-product package. The rest will buy the unbundled product.

As a result, a legal regime that forces sellers to bundle products-liability coverage with the product sold almost necessarily lowers consumer welfare.⁵ Granted, consumers who want the insurance-

³ It may not be quite so well-established as many of us have thought (for example, there is considerable local judicial variation and statutory intervention). See generally James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990) (demonstrating that in products liability law, changes in judicial decisionmaking are occurring and that current trends favor defendants).

⁴ A point made more elegantly by several others. See, e.g., Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 517 (1984) (noting that "the tort system may be viewed as a system of compulsory insurance, with terms of coverage determined largely by the private choices that generate court decisions" (footnote omitted)); Richard A. Epstein, *Products Liability As an Insurance Market*, 14 J. LEGAL STUD. 645, 646 (1985) (examining "the extent to which the want of privity between manufacturer and consumer makes it necessary for the law to construct its general liability rules to take into account the standard insurance risks that voluntary markets seek to overcome"); George L. Priest, *Can Absolute Manufacturer Liability Be Defended*, 9 YALE J. REG. 237, 242 (1992) (asserting that manufacturer liability "can be regarded as providing a form of insurance to consumers for product-related losses through a third-party insurance mechanism").

⁵ Many observers forcefully make this point. See, e.g., PAUL H. RUBIN, *TORT REFORM BY CONTRACT* 4-5 (1993) (noting that consumers prefer not to insure against nonpecuniary loss such as loss of life); W. KIP VISCUSI, *REFORMING PRODUCTS LIABILITY* 77 (1991) (noting that in many situations "the amount that would have to be added to the price," to insure the product, "would greatly exceed the value of the

product bundle will still obtain it in the now-regulated market. Those who do not want it, however, will need either (1) to buy insurance worth less to them than the price they must now pay or (2) to do without the product, given the higher bundled price. Again, it is no answer to say that consumers will generally want the insurance. If consumers value it more than it costs, sellers in unregulated markets will still offer it.

Because of this straightforward case against strict products liability, scholars inclined to justify it turn to a series of questionable empirical claims: that given the informational and computational difficulties in determining the risk levels of complex products, consumers wildly miscalculate accident costs; that given cognitive dissonance, consumers systematically underestimate health risks; that given the small value associated with insurance coverage in any one contract, manufacturers will not find the coverage cost-effective; that given the difficulties in distinguishing high- and low-risk consumers, adverse selection will preclude a private insurance market; or that given the need to deny the risks in their own products, firms will rarely convey realistic information even about the risks of their competitors' products.⁶

To illustrate some of these arguments, take an entirely hypothetical discussion of disposable cigarette lighters. Suppose, on average, that three in every ten million lighters explode and cause bodily injury of about \$150,000 per individual. Even if rational consumers would want to protect themselves against such an injury, argue

insurance to current consumers of the product"); John E. Calfee & Paul H. Rubin, *Some Implications of Damage Payments for Nonpecuniary Losses*, 21 J. LEGAL STUD. 371, 372 (1992) ("Damage payments that transfer wealth from situations in which there is no accident to situations in which there is will therefore tend to reduce total utility, and informed consumers would not want to pay the actuarially fair price for such transfers (which amount to involuntary insurance)."); Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2214 (1989) (arguing that products liability laws preclude bargains that would work to consumers' advantages); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1524 (1987) (attributing the current insurance crisis to modern tort law's expansion of liability); Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM L. REV. 819, 820 (1992) (arguing for a market default for risk allocation because free contracting increases consumer payoff); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 355 (1988) (arguing that the law should reflect consumers' risk-allocation preferences).

⁶ For a representative example of such claims, see 1 AMERICAN LAW INST., REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 203-32 (1991).

many observers, they could not correctly calculate the cost given the minuscule odds and the gruesome injuries.

Moreover, these proponents continue, a firm would earn only a trivial competitive advantage by bundling insurance with its products. After all, the cost of the risk itself is only $\$150,000 \times 0.0000003 = \0.045 per lighter. No firm will undertake the managerial costs necessary to design a bundled contract when the returns are so small. And since no firm will want to call attention to the risks associated with its own products, no firm will be able to advertise cost-effectively any liability insurance it did bundle.

Hence the conclusion: even though consumers prefer insurance against defective lighters, the vagaries of consumer irrationality and imperfect competition will inevitably create a world without it. Accordingly, the law can improve the lot of both sellers and buyers by forcing sellers to bundle insurance. Strict products liability law does just that, by holding sellers or manufacturers liable for personal injuries caused by defective products. As William M. Landes and Richard A. Posner put it in one of the most sophisticated and articulate justifications for products liability law:

[W]e take up the fundamental economic puzzle of products liability law: the injurer and the victim have a contractual relationship, so why shouldn't they be left to work out the optimal combination of safety precautions contractually? Why isn't no liability optimal?

The answer is that contracts are costly to make and that the costs may well exceed the benefits, relative to regulation by tort law, when the contingencies that would be regulated by contract—death or personal injury from using a product—are extremely remote. It hardly pays, when buying a case of beer, to enter into a contract specifying rights and duties in the event that one of the bottles of beer explodes in your face.⁷

Yet, is the empirical premise right? If pop or beer bottles occasionally exploded in consumers' faces, would bottlers really find that contracting for liability did not pay?⁸ Consider tentative evidence from Japan.

⁷ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 280 (1987) (citations omitted).

⁸ Scholars skeptical of the example on theoretical grounds include Patricia M. Danzon, *Comments on Landes and Posner: A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 569, 572 (1985) (arguing that the Landes-Posner logic does not apply in the case of repeat-purchase consumer products), and Epstein, *supra* note 5, at 2204 (stating that Landes and Posner overemphasize imperfect information).

II. PRODUCTS LIABILITY LAW IN JAPAN

A. Basic Products Liability

Until 1995, Japanese consumers bought products in a world governed by a general negligence regime.⁹ To sue on an accident involving a product, plaintiffs had to prove not just that the product had been defective but also that its manufacturer had been negligent. Effective July 1, 1995, the Japanese government changed the rule.¹⁰ With enormous hullabaloo, it substituted for negligence a strict liability standard for defective products. In fact, the change may have been less significant than the hullabaloo would suggest. In some spheres, Japanese courts had imposed standards close to strict liability already,¹¹ and the concept of "defect" in the new law will probably still incorporate a cost-benefit approach resembling the classic Hand formula.¹²

Why the Diet enacted the change is unclear. Some of the pressure for the change came from scholars, journalists, and politicians arguing that consumers had been "exploited" by profit-hungry businesses.¹³ Some of the pressure came from "public interest" lobbyists determined to maximize their own appeal. Some came from foreign firms claiming that Japanese firms gained an "unfair" advantage by selling in a home market without strict products liability.¹⁴ Elementary public choice analysis suggests that

⁹ See MINPŌ § 709.

¹⁰ See Seizōbutsu Sekinin Hō [Products Liability Act], Law No. 85 of 1994. For a "tentative" official translation, see SEIZŌBUTSU SEKININ HŌ NO KAISETSU [EXPLANATION OF THE PRODUCTS LIABILITY ACT] 184-88 (Tsūshō Sangyō Shō ed., 1994) [hereinafter 1994 MITI EXPLANATION].

¹¹ See Judgment of Feb. 14, 1986 (K.K. Tokiwa Shōji v. Yamamoto), Chisai [District Court], 1196 HANJI 32 (Japan) (involving an action against a toy bow-and-arrow maker by a child blinded in an accident); Judgment of Dec. 19, 1978 (Kigura v. Kasaoka), Chisai [District Court], 928 HANJI 87 (Japan) (involving an action against a restaurant by heirs of a kabuki grand master killed by eating blowfish liver).

¹² See 1994 MITI EXPLANATION, *supra* note 10, at 76 (official commentary). See generally Mark Geistfeld, *Manufacturer Moral Hazard and the Tort-Contract Issue in Products Liability*, 15 INT'L REV. L. & ECON. 241, 255 n.23 (1995) (noting the difference between strict liability and strict products liability); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435 (1979) (discussing the development of the requirement of "defect" in products liability law).

¹³ For position papers by various political parties and other groups, see the materials collected in 1994 MITI EXPLANATION, *supra* note 10.

¹⁴ See *id.* at 16; MANABU HAYASHIDA, PL HŌ SHINJIDAI [NEW PRODUCTS LIABILITY ACT AGE] 56-59 (1995); CHIKUJŌ KAISETSU SEIZŌBUTSU SEKININ HŌ [ANNOTATED PRODUCTS LIABILITY ACT] 41-50 (Keizai Kikaku Chō ed., 1994) [hereinafter 1994 EPA ANNOTATION].

some of the pressure must have come from firms with a cost advantage in safety who could now use products liability law to gain a competitive advantage over their rivals. Whatever the reason—interesting as the issue is, it lies beyond the scope of this short Article—the Diet imposed strict products liability.

B. *The SG System*

Unbeknownst to most Western observers for nearly two decades, many Japanese firms had already subjected themselves—voluntarily—to a strict products liability regime. In 1973, the Diet enacted the Consumer Products Safety Act and through it established the Product Safety Council.¹⁵ The Act itself explicitly authorized only a small mandatory regime. It authorized the Council to establish safety standards for a few hazardous categories of products and to ban those products that did not meet the standards. Within a short time, the Council had designated eight categories of such products: motorcycle helmets, baby beds, pressure cookers, baseball helmets, roller skates, mountain climbing ropes, carbonated soft-drink bottles, and bottle caps. Under the system, if a product met the safety standards, the Council let it use the “S” (for Safety) label. If the product failed to meet the standards, the Council forced it off the market.¹⁶

Simultaneously, though, the Council began coordinating a separate, privately ordered products liability regime. Although the government had organized the Council, this second system was almost entirely extralegal. The 1973 Consumer Products Safety Act did not mandate it, and private firms did not need a statute to organize it. As noted below, firms in some industries have since organized similar systems completely independent of the Council.¹⁷

This voluntary regime had four components: safety standards, testing, insurance, and a distinctive legal rule. Consider initially the first three components. First, the Council set safety standards for a variety of products. By 1994, it had established standards for 103

¹⁵ See Shōhi Seikatsu Yō Seihin Anzen Hō [Consumer Products Safety Act], Law No. 31 of 1973.

¹⁶ See SEIZŌBUTSU SEKININ TO BAISHŌ RIKŌ KAKUHO [PRODUCTS LIABILITY AND THE ASSURANCE OF COMPENSATION] 54 (Keizai Kikakuchō ed., 1988) [hereinafter 1988 EPA REPORT].

¹⁷ Hypothetically, the firms might have designed the system to forestall a mandatory products liability regime. There is, however, no evidence of that.

If the government played an important role in starting the voluntary products liability regime, that role was at most one of overcoming coordination problems.

products, ranging from baby buggies, bunk beds, disposable lighters, and bicycles to pop bottles. Table 1 lists the most commonly certified products.¹⁸

Second, the Council tested products submitted to it by manufacturers. If a product met the safety standards the Council had just set, the firm could attach an "SG" (for Safety Goods) label. If the product failed the test, the firm simply sold it without the label. The firms involved paid the costs of these tests.

Firms had a choice of two types of tests. Most simply, they could submit a batch of the products to the Council. The Council would then test the batch, and if it passed, the firm could apply the SG mark to all items in that particular batch. More practically for mass-produced goods, the firm could ask the Council to inspect their product design and manufacturing processes. If a firm passed the test, it could apply the label to all of the items it produced using that design and process.

Within Japan, the Council retained several specialized testing organizations (for example, the Japan Electrical Appliance Testing Institute). At the outset, importers could use only the batch-testing process. By the mid-1980s, however, the Council had established testing arrangements with foreign testing organizations (for example, the Underwriters Laboratories). Foreign firms could have their designs and manufacturing processes certified as well.¹⁹

Third, the Council insured those products for which it authorized the SG seal through a private carrier. It charged premiums that averaged about 0.5% of a product's retail price.²⁰ As the mandatory S-label system provided no insurance, S producers who wanted to offer products liability coverage could also certify their products under the SG system. Many did, as the prominence of motorcycle helmets, pop bottles, pressure cookers, and roller skates on Table 1 attests.

¹⁸ See PL TAISAKU HANDBOKKU [PRODUCTS LIABILITY POLICY HANDBOOK] 71 (Tsūshō Sangyō Shō ed., 1994).

¹⁹ See SEIZOBUTSU SEKININ SEIDO WO CHŪSHIN TO SHITA SŌGŌTEKI NA SHŌHISHA HIGAI BŌSHI KYŪZAI NO ARIKATA NI TSUTE [REGARDING THE PROPER COMPREHENSIVE MEASURES FOR THE PREVENTION OF AND COMPENSATION FOR CONSUMER HARMS, CENTERED AROUND A PRODUCTS LIABILITY SYSTEM] 201-02 (Keizai Kikakuchō ed., 1993) [hereinafter 1993 EPA REPORT].

²⁰ See 1988 EPA REPORT, *supra* note 16, at 56.

TABLE 1: Most Commonly Labeled SG Items²¹

Item	Amount sold (million)
Disposable cigarette lighters	5882.2
Cotton swabs	2251.8
Carbonated soft-drink bottles	1285.2
Adhesive hooks	201.9
Motorcycle helmets	47.4
Automobile jacks	45.2
Oil filters	42.6
Can openers	40.7
Windshield washer fluid	24.8
Bathtub lids	24.6
Aluminum pans	24.2
Metal stepladders	17.3
Metal baseball bats	15.5
Pressure cookers	13.9
Roller skates	13.4
Baby buggies	12.5
Hot water bottles	12.1
Baby carriers	10.5

Note: The table gives a simple count of the number of items sold with the SG label as of August 1992.

Under the SG insurance, the Product Safety Council paid specified amounts to users injured by defective SG goods. Those firms that wanted to bundle a products-liability insurance contract with their goods could thus submit the products to the Council and pay a fee. The Council would test the products and, if they met its safety standards, would compensate users injured by them. Those firms that did not want to bundle products-liability insurance with

²¹ See HAYASHIDA, *supra* note 14, at 136-39.

their products could sell their wares independently. The rate of coverage varied by industry.

C. *A Private Legal Regime*

In effect, firms used the SG system to *raise* the legal standard by which they would be bound. Voluntarily, they replaced the negligence requirement in tort with a rule that allowed a user to recover if he or she could show three things: (1) that the product had been defective, (2) that he or she had been injured, and (3) that the defect had caused the injuries.²² For that process, the firms hired the Council to serve as judge, jury, and insurer.

Unfortunately, I lack the details on some of the program's more intriguing aspects. The Council apparently did not publish regulations or records of its decisions. We, thus, have only the rough outlines and second-hand accounts of some of its practices. Caveats about the lack of good data on some matters aside, the Council seemed to follow what for anyone but a lawyer would seem to be a straightforward approach: if a product broke in the course of normal use, the Council would pay damages; if it performed as a consumer should expect it to perform, or if a consumer ignored ordinary precautions, the Council would not. For example, if a little girl broke her leg because the wheels fell off her roller skates in normal use, the Council presumably would pay. If she broke her leg because it was her first time skating and she tried to skate down too steep a hill, the Council presumably did not. Consumers found the lack of detail acceptable because of the Council's—and the manufacturers'—interest in preserving future business.

By design, SG justice was cheap. The Council dispensed with much of the detailed proof courts demanded, and victims, therefore, could recover with less evidence either of a product's defect or of causation. From time to time, observers complained about the SG system, but usually they complained only that more products should be covered by the system.²³ They rarely complained that the Council interpreted concepts like causation or defect too restrictively.

²² See *id.* at 133.

²³ See 1994 MITI EXPLANATION, *supra* note 10, at supp. 29, 38; 1994 EPA ANNOTATION, *supra* note 14, at 275; 1993 EPA REPORT, *supra* note 19, at 91.

TABLE 2: Litigated Products Liability Cases As of March 1994
(Published Opinions Only)²⁴

Item	Suits filed	Plaintiff victories	Mean years to judgment
Pharmaceuticals	19	17	6.0
Food products	14	11	5.3
Household machinery	10	5	4.6
Automobiles	17	6	4.4
Industrial machinery	20	13	4.8
Gas stoves	21	16	4.2
Chemicals	9	5	6.4
Real estate	22	20	6.2
Other	5	1	3.6

SG justice was also fast. The Council paid claims quickly. Sometimes, it even paid within a month.²⁵ Indeed, if a claimant could show serious personal injury, unless he or she was clearly and exclusively responsible for the injury, the Council immediately paid ¥600,000 as interim aid.²⁶ Even if the claimant later failed to prove his or her claim, he or she could still keep the ¥600,000. By contrast, as Table 2 shows, a claimant who sued in court commonly waited five years.²⁷

²⁴ See 1994 MITI EXPLANATION, *supra* note 10, at supp. 248-51.

²⁵ See 1993 EPA REPORT, *supra* note 19, at 13. Claimants under the BL—Better Living, as discussed below—system can apparently expect to resolve their dispute within three months at the new BL dispute resolution center. The BL administrative mechanism has apparently been perceived as less impartial than the Consumer Product Safety Council. See HAYASHIDA, *supra* note 14, at 181-83.

²⁶ As of March 1996, \$1 = ¥106.2; thus, ¥600,000 = \$5649.72.

²⁷ Three obvious but crucial caveats apply. First, one would expect litigated cases to differ from cases in the SG system in a variety of important ways. Table 2 does not imply that claimants who in fact proceeded through the SG system would also have waited five years if they had proceeded through the courts instead. Second, Table 2 deals only with cases that resulted in published opinions, but published opinions appear in only a small subset of all suits filed. Third, the proportion of plaintiff victories among suits filed (Column 2/Column 1) tells us nothing about the extent to which a legal rule favors the plaintiff—for reasons detailed in George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4-5 (1984) (discussing the impossibility of reaching conclusions about legal bias based on verdict rates).

TABLE 3: Calculated Decedent Lost Earnings,
by Age and Sex (¥ million)²⁸

Age	Male	Female
10	33	18
20	48	27
30	45	25
40	39	22
50	30	17
60	21	11

Note: Calculated using standard judicial principles: (1) an age of 67 at expected retirement date, (2) mean wages, and (3) a 50% deduction for living expenses. The relatively simple (indeed, simplistic) computation method is standard to the Tokyo District Court as used in traffic accident cases.

The Council capped its liability for personal injury at ¥30 million and paid no compensation for property damages. The amount is low, but not egregiously so. It is the minimum coverage that automobile drivers must carry,²⁹ and it lets most women and some men (particularly if they were comparatively negligent—Japan has a comparative negligence regime) collect the bulk of the amounts they could collect in court. In this regard, consider Table 3: estimates of the mean value of lost earnings awards that courts award in wrongful-death actions under the Tokyo District Court's formula for traffic accident cases. Note that courts generally add awards for pain and suffering as well: about ¥24 million for breadwinners and ¥17 to 21 million for dependents or unmarried persons.³⁰

In effect, the system coupled (1) broader coverage and cheaper claim procedures with (2) caps on damage awards. Two analogies come to mind. First, the system closely resembles the voluntary nineteenth-century workers' compensation systems: there too, the parties privately negotiated arrangements that combined broader

²⁸ For computation methods, see KANDA, *supra* note 29, at 169.

²⁹ See YŌJI KANDA, KŌTSŪ JIKO NO SONGAI BAISHŌ GAKU [DAMAGE AMOUNTS IN TRAFFIC ACCIDENTS] 289 (1994).

³⁰ See *id.* at 185. The new Products Liability Act is subject, like Japanese tort law generally, to offsets for a plaintiff's own negligence. See 1994 EPA ANNOTATION, *supra* note 14, at 127.

TABLE 4: Claims and Payouts Under the SG System
(Through 1991)³¹

	A Categories Labeled	B Items Labeled (10 million)	C Complaints Filed	D Complaints Recognized	E Compensation Paid (¥1000)
1974	16	1.8	1	1	8
1975	28	7.7	12	9	525
1976	32	10.6	9	4	374
1977	38	12.7	20	12	2186
1978	43	27.3	21	14	11,953
1979	47	50.6	33	23	5051
1980	51	47.8	29	11	15,653
1981	54	56.3	30	21	32,142
1982	56	60.4	39	14	3039
1983	65	64.0	70	35	9317
1984	70	74.9	60	48	27,644
1985	72	83.7	62	21	4481
1986	73	63.1	66	20	1028
1987	75	74.8	62	22	2761
1988	76	77.7	44	20	19,041
1989	80	83.5	54	20	6245
1990	88	89.4	61	22	12,725
1991	91	96.7	54	22	1794

Total labeled goods sold: 9,829 million

Total complaints lodged: 727

Total meritorious complaints: 339

Total compensation paid: ¥156 million

Mean compensation paid: ¥460 thousand

Notes: The columns represent (A) the categories of products subject to SG labeling, (B) the number of items sold with the SG label, (C) the number of complaints filed with the Product Safety Council with respect to items sold with SG labels, (D) the number of complaints (C) which were judged to be meritorious, and (E) the total compensation paid.

³¹ See 1993 EPA REPORT, *supra* note 19, at 205.

coverage formulae with damage caps.³² Second, the system resembles many voluntary product warranties in the United States. Again, the warranties ease the process of proving claims, but in a variety of ways simultaneously limit the amounts recoverable.³³

Given its obvious appeal, the intriguing question may not be why Japanese manufacturers offered the SG system, as much as why American manufacturers do not—that is, why American warranties so often exclude personal injury claims. The answer probably lies (although the argument is speculative) in the hostility most American courts show toward disclaimers and liability caps. The SG firms could profitably offer the broader coverage in part because they could simultaneously limit awards. American firms can expand coverage, but cannot assume that courts will enforce any limits on awards they make pursuant to that broader coverage.³⁴ Given the anticipated judicial hostility to damage caps, American firms cannot profitably broaden coverage.

Table 4 details claims and recoveries under the SG system. From 1974 to 1991, victims asserted 727 claims. The Council recognized 339 complaints and paid aggregate compensation of about ¥156 million, or ¥460,000 per claim.

Table 5 details the products that gave rise to these claims. The most commonly recognized complaints involved disposable cigarette lighters. Others included baby buggies, swing sets, and step ladders.

Within a few years of the establishment of the SG system, firms in several industries outside the SG regime began similar but independent systems of their own. For instance, in 1974 the makers of large household items (for example, kitchen cabinets and integrated bathroom units) introduced the BL (Better Living) label. As of 1992, their system covered thirty-five products and paid up to ¥50 million per person and ¥500 million per accident.³⁵ Toy-makers now use the ST (Safety Toy) label and pay up to ¥10 million

³² See generally Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 800-03 (1982) (describing the general structure of workers' compensation plans).

³³ See generally George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1301-02 (1981) (noting that warranties often place limitations on remedies).

³⁴ See, e.g., *Collins v. Uniroyal, Inc.*, 315 A.2d 16, 18 (N.J. 1974) (enforcing expanded warranty coverage but striking down damage limits pursuant to that coverage).

³⁵ The actual maximum amount depended on the product involved.

TABLE 5: SG Claims Paid As of June 1987³⁶

Item	Number of claims paid
Disposable cigarette lighters	49
Baby buggies	36
Swings	27
Metal stepladders	26
Pressure cookers	16
Bicycles	12
Roller skates	9
Baby beds	9
Slides	8
Bunk beds	7
Expanders	6
Walkers	5
Baby carriers	5
Motorcycle helmets	5
Tricycles	4
High chairs	3
Ovens	2
Ice shavers	2
Ladders	2
Others	8

per victim for injuries from defective toys. The label covers about ninety percent of all toys sold. Fireworks manufacturers and importers began an SF (Safety Fireworks) label system in 1977 and pay up to ¥100 million per accident. The fireworks trade association has apparently used its clout to make coverage universal.³⁷

³⁶ 1988 EPA REPORT, *supra* note 16, at 63.

³⁷ See 1993 EPA REPORT, *supra* note 19, at 13-14, 208; HAYASHIDA, *supra* note 14, at 134; HAYAWAKARI—PL NO SUBETE [EASY TO UNDERSTAND: ALL ABOUT PRODUCTS LIABILITY] 111 (Toshitsugu Matsumoto ed., 1992).

III. SG CLAIM LEVELS

There is a puzzle here. In nearly two decades, the Council has granted only 339 claims. As Table 4 shows, however, the harder puzzle is not the number of claims paid; it is the number of claims filed. In nearly two decades, only 727 parties have asserted any claims. By contrast, in the United States (with roughly twice the population of Japan), claimants file 14,000 products liability claims per year in the federal courts alone.³⁸

Initially, three points seem relevant to this puzzle. First, the reason for the low claiming levels does not seem to lie with any dramatically restrictive policies at the Products Safety Council. True, if most potential claimants knew the Council demanded high levels of proof, then fewer people would file claims. Because only victims with the strongest claims would file, the forty-five percent success rate (339/727) would disguise how restrictive the Council has been. As noted earlier, however, in all of the controversy over the new Products Liability Act, few observers of any political stripe have claimed that the Council has been too restrictive.³⁹

Second, a few big tort disputes skew the American products liability data. Perhaps half of the recent cases have been asbestos cases.⁴⁰ The Dalcon Shield and benedectin disputes stack the numbers higher still.⁴¹

Third, the right benchmark by which to measure claiming levels is the number of victims, and for that purpose the 14,000 federal suits are notoriously misleading. Put somewhat polemically, the right benchmark is not how many people can plausibly file claims; it is not how many can convince juries that a manufacturer ought to pay their medical bills; it is not even how many people suffer product-related injuries. The right benchmark is how many people are injured each year by *defective* products (granted, the phrase hides a thousand sins), and there are precious few reasons to think that the American data track that benchmark much at all.⁴²

³⁸ See W. Kip Viscusi, *The Dimensions of the Product Liability Crisis*, 20 J. LEGAL STUD. 147, 151 (1991) (calculating that claimants filed 14,145 personal injury products liability cases in the federal courts in 1987).

³⁹ See *supra* text accompanying note 23.

⁴⁰ See Viscusi, *supra* note 38, at 154-57 (discussing asbestos litigation and explaining that 55% of all products liability cases in 1987 were asbestos related).

⁴¹ See GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED 23 (1988).

⁴² See generally RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 225-45 (1995) (explaining the characteristics of the contemporary products liability scene).

Instead of arguing before six novices culled from department of motor vehicle records, suppose American trial lawyers had to make their cases to engineers from the Underwriters Lab. That, after all, is pretty much what happens in the SG system. Probably, most observers would conclude that plaintiffs would file dramatically fewer claims. Probably, many would also conclude that outcomes would be more accurate. Perhaps—not to put too fine a point on it—claiming levels are high in the United States because juries sympathize with accident victims and are easy to fool. They are low under the SG system because the fact-finders know what they are doing.

Even given all this, the most important reasons that the Japanese SG claim figures fall far below the American products liability figures lie elsewhere: the reasons lie in the facts that the SG system (1) covers only a small segment of the Japanese economy and (2) disproportionately covers the safer products at that. After all, a *total* count of Japanese products liability claims would not just include SG claims; it would include the large number of claims against products not covered by the system. And there are many such claims. Firms in the health-care and recreational-products industries, for example, report over 200 claims a year.⁴³ The Japan Federation of Bar Associations' Product Liability Hotline handles over 1000 calls annually.⁴⁴ The Citizen Life Center—an organization heavily concerned with consumer affairs—handles nearly 1200 product-safety complaints a year.⁴⁵ And in 1993 alone, the restaurant industry paid ¥22 million to over 8000 patrons.⁴⁶

Necessarily, moreover, the SG system will disproportionately cover the safest products. To see why, ask why Japanese consumers would want to pay for SG certification. They hardly want the insurance for its own sake. Japanese citizens are heavily insured: all Japanese are covered by the national health insurance system, and many carry elaborate life insurance policies in addition. Even if they wanted more insurance, why buy insurance tailored narrowly toward product-related accidents? Those Japanese consumers who want the SG certification are therefore relatively less likely to be consumers who need more insurance, than they are to be those who prefer safer products. For them, the value of insurance lies in the

⁴³ See 1994 EPA ANNOTATION, *supra* note 14, at 273-74.

⁴⁴ See 1993 EPA REPORT, *supra* note 19, at 154.

⁴⁵ See 1994 MITI EXPLANATION, *supra* note 10, at 189.

⁴⁶ See HAYASHIDA, *supra* note 14, at 112.

way it makes credible the manufacturer's assertions about safety. Effectively, by facilitating claims against the manufacturer, the SG system helps a firm "put its money where its mouth is." Effectively, it helps the manufacturers of the safest products make their promises about safety believable, and thereby gives them an advantage in the product market.⁴⁷ And precisely because the SG system covers the safest products, it generates relatively few claims.

CONCLUSION

There is a moral here. It concerns the flexibility of firms, the rationality of consumers, and the possibility of privately negotiated law in unregulated markets. From time to time, proponents of strict products liability assert that absent a mandatory regime manufacturers will rarely compensate buyers for defective products. Stated so baldly, the assertion is wrong on the facts: in many product markets, some buyers want to purchase products carrying insurance against personal injury, either for the insurance itself or for their safety. To attract them, some firms have an incentive to offer that coverage—and in Japan many firms did.

One should be careful. The Japanese experience does not show that producers offered the "optimal" level of insurance, and I do not know how one would measure that level anyway. The Japanese experience does show that some producers voluntarily subjected themselves to a strict products liability regime. Consumers who wanted products liability protection (or the safest products) bought from those producers; consumers who preferred to take greater risks and pay less for the product presumably bought from the others.

⁴⁷ For insightful discussions of the informational content of warranties (but making slightly different points), see Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 509-13 (1981) (discussing warranties, consumer information, and enforcement costs); Priest, *supra* note 33, at 1303 (discussing the signal theory of warranties which "maintains that warranty terms provide information to consumers about the mechanical reliability of the product"); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1390 (1983) (explaining that firms react to consumers' lack of knowledge about market opportunities by supplying appropriate warranty terms).

Furthermore, one suspects—the SG system itself provides no data on point—that the SG firms, like the more reputable American firms, handle the most serious product defects outside of the official claim procedures through straightforward product recalls.

Traditionally, we have compared two worlds: a world where courts hold all producers to strict liability, and a world where producers escape with a laxer standard. The Japanese experience suggests our debate has been unreal. The true alternatives are instead a world where courts hold all sellers to a strict products liability regime and a world where consumers can choose—a world where they choose between producers of low-priced goods who are subject to a lax standard and producers of higher-priced goods who voluntarily agree to subject themselves to strict liability.⁴⁸

Whatever the reason and whatever the wisdom, Japan now mandates strict products liability for all goods. Readers nursing beers in Tokyo sushi bars can take comfort in their newfound security: the new beer bottles sport a label that would make the American Trial Lawyers Association proud. Do not apply too much pressure to the bottle, the label warns. It might break. And broken bottles, it proceeds to warn beer drinkers, can cause injury.

⁴⁸ I do not address the relative merits of “opt-in” systems (like the SG system) and “opt-out” systems (traditionally allowed on a limited scale, for example, with respect to some disclaimers under the UCC).