Document Production in Japanese Strict Product Liability Cases*

การเรียกพยานเอกสารในคดีความรับผิดในสินค้าที่ไม่ปลอดภัยในประเทศญี่ปุ่น

*Norman T. Braslow***
นอร์แมน ที บราสโลว์

Independent Researcher
นักวิจัยอิสระ
1910 130th Ave SE Bellevue, WA, 98005, The United States of America
Corresponding author Email: nbraslow@yahoo.com
(Received: July 19, 2021; Revised: September 2, 2021; Accepted: October 18, 2021)

Abstract

The 1994 Japanese product liability law was amended to eliminate the plaintiff's requirement to prove negligence or intent on the part of the defendant. However, the plaintiff still must prove the product was defective. Does the current law of civil procedure enable the plaintiff to do so effectively? Using a hypothetical automobile accident case wherein documents held by the manufacturer are essential to prove defective design or manufacture, we conclude it will be very difficult for the plaintiff to obtain the documents as prove the defect.

* This essay is dedicated to the memory of Professor Yasuhiro Fujita.

** J.D., 1985, Southwestern University School of Law, LL.M., 1993, Ph.D., 1997, Asian and Comparative Law, University of Washington School of Law. Trial practice in Hawaii, Washington State, and California. Affiliate Assistant Professor of Law, University of Washington School of Law, 1998-2000, Adjunct Professor of Law, University of Southern California School of Law, 2004.

Besides other production issues, the critical sections of the Code of Civil Procedure preventing effective document production are Sections 196 and 220 which shield documents from discovery containing “trade secrets” and documents created for the use of the holder. Some efforts to expand the scope of discovery as recommended in the 2001 Justice Reform Council have not effectively eliminated or reduced this problem.

We suggest significant modification and expansion of discovery in product liability cases is necessary, in particular regarding CCP sections 196 and 220. The underlying institutional opposition to wider discovery is partly the minimal role of the parties and the active role of the judges in Roman law based civil law jurisdictions. The other more important opposition is the fear of discovery abuse as thought to be in the United States. We believe these objections are surmountable.

United States experience indicates discovery abuse can be prevented in large part by coordinated actions by both the judiciary and the Bar Association. The judiciary would have to be given the power to impose sanctions of both contempt of court for egregious discovery abuse, as well as monitory penalties. The Bar Associations then would have to become active in imposing professional sanctions on attorneys based on judicial contempt orders.

Keywords: Discovery, Document production, Contempt of the court.

บทคัดย่อ

แม้กฎหมายว่าด้วยความรับผิดจากสินค้าไม่ปลอดภัยของประเทศญี่ปุ่นจะถูกแก้ไขเพิ่มเติมในปี ค.ศ. 1994 โดยยกเลิกบทบัญญัติซึ่งบังคับให้โจทก์ต้องพิสูจน์ความจงใจหรือประมาทเลินเล่อจำเลยออกไปแล้ว แต่โจทก์ก็ยังคงต้องพิสูจน์ว่าสินค้าที่พิพาทนั้นมีความชำรุดบกพร่องอยู่ดี ประการนี้นำมาสู่ประเด็นปัญหาที่ว่าบทบัญญัติกฎหมายวิธีพิจารณาความแพ่งในปัจจุบันเอื้อต่อการพิสูจน์ดังกล่าวอย่างมีประสิทธิภาพแล้วหรือไม่ ทั้งนี้ เมื่อพิจารณาจากอุทาหรณ์เกี่ยวกับอุบัติเหตุ

ที่เกิดกับรถยนต์ ซึ่งเอกสารภายในของผู้ผลิตรถยนต์มีส่วนสำคัญมากต่อการพิสูจน์ความบกพร่องในการออกแบบรถยนต์ การนี้ทำให้เห็นว่าโจทก์จะมีความยากลำบากในการเรียกพยานเอกสารในกระบวนการพิสูจน์ความชำรุดบกพร่องไม่น้อย

นอกเหนือจากประเด็นดังกล่าวแล้ว ยังมีบทบัญญัติของประมวลกฎหมายวิธีพิจารณาแพ่งที่เป็นอุปสรรคต่อการได้มาซึ่งเอกสารการพิสูจน์ความชำรุดบกพร่องอื่น ๆ อีก ได้แก่ มาตรา 196 และ 220 ซึ่งปกป้องการได้มาซึ่งเอกสารที่มีข้อมูลอันเป็นความลับทางการค้าของปัจเจกชน ทั้งนี้ความพยายามในการขยายขอบเขตการเรียกพยานเอกสารให้ครอบคลุมกรณีเหล่านี้โดยความเห็นของคณะกรรมการปฏิรูปกระบวนการยุติธรรม (the Justice Reform Council) ในปี ค.ศ. 2001 ก็ยังไม่สามารถขจัดปัญหาเหล่านี้ไปได้

บทความนี้นำเสนอความจำเป็นในการแก้ไขเพิ่มเติมและขยายขอบเขตของการเรียกพยานเอกสารในข้อพิพาทเกี่ยวกับสินค้าไม่ปลอดภัยข้างต้น โดยเฉพาะที่เกี่ยวข้องกับมาตรา 196 และ 220 แห่งประมวลกฎหมายวิธีพิจารณาแพ่ง โดยความคิดเห็นที่โต้แย้งแนวคิดดังกล่าว ได้แก่ ความพยายามจำกัดบทบาทหน้าที่ของผู้พิพากษาอันเป็นผลมาจากนิติวิธีในระบบกฎหมายซีวิลลอว์ ซึ่งมีพื้นฐานมาจากระบบกฎหมายโรมัน และการจำกัดขอบเขตในการอนุญาตให้คู่ความเข้าถึงเอกสารของผู้อื่นได้ ตลอดจนความกังวลว่าการเข้าถึงเอกสารเช่นนี้จะก่อให้เกิดการใช้สิทธิโดยมิชอบเพื่อเข้าถึงเอกสาร ดังที่คาดว่าจะเกิดขึ้นเหมือนในประเทศสหรัฐอเมริกา อย่างไรก็ตาม ผู้เขียนเห็นว่าข้อกังวลเหล่านี้เป็นข้อกังวลที่พอรับมือได้

ประสบการณ์จากประเทศอเมริกาบ่งชี้ว่าการใช้สิทธิโดยมิชอบเพื่อเข้าถึงเอกสารของผู้อื่นเช่นนี้เป็นสิ่งที่สามารถป้องกันได้ ทั้งนี้ โดยความร่วมมือกันระหว่างศาลและสภาวิชาชีพนักกฎหมาย อาทิ การให้อำนาจศาลในการกำหนดสภาพบังคับอย่างจริงจัง ทั้งการกำหนดความผิดฐานละเมิดอำนาจศาลและความผิดลหุโทษอื่น ๆ เพื่อลงโทษการใช้สิทธิโดยมิชอบเพื่อเข้าถึงเอกสารของผู้อื่น ส่วนสภาวิชาชีพนักกฎหมายนั้นก็ต้องมีความตื่นตัวในการกำหนดสภาพบังคับในทางวิชาชีพต่อนักกฎหมายที่ใช้สิทธิโดยมิชอบเพื่อเข้าถึงเอกสารของผู้อื่นตามที่ศาลสั่งด้วย

คำสำคัญ : การเรียกพยานเอกสาร, การทำและส่งสำเนาเอกสารให้คู่กรณีตามคำสั่งศาล, ความผิดฐานละเมิดอำนาจศาล

Before the 1994 Japanese Product Liability Act[1] any person injured by defective consumer products was compelled to prove that the defendant acted either intentionally or negligently.[2] The 1994 Act in Article 3 introduced into Japanese tort law the principle of strict liability in tort, eliminating the necessity to prove negligence or intent. [3] The two general purposes of the 1994 law were stated in Article 1 as follows:

The purposes of this Act are to protect victims of an injury to their lives, persons, or property which is caused by a defect in the product by establishing the liability of manufacturers, etc. for damages, and thereby contributing to the stabilization and improvement of the life of the citizens, and to the sound development of the national economy.[4]

The first purpose is justice for the injured citizen. The Act is intended to "protect the victim of an injury to lives, persons and property" by compensating the victim for all injuries. The universal symbol of justice is the "scales of justice" on the *bengoshi* badge worn by Japanese attorneys, wherein the facts and law of a controversy are impartially weighed. In order for the holder of the scales to render justice, the scales must contain all the relevant facts in contention, fairly derived and presented in full. To fail to include all the facts is to defeat the purpose of the scales to evaluate and weigh the evidence in order to determine the truth and render justice.

The 1994 law is also intended to "to contribute to the stabilization and improvement of the life of the citizens (国民生活) and to the sound development of the national economy (国民経済)." This second purpose of the statute deserves considerable thought. The drafters of the statute recognized that compensation for injured members of the public will contribute to the general welfare and thus

---

[1] Seijōbutsu Saikinin Hō (Product Liability Law), Act No. 85 of 1994.

[2] MIMPŌ [CIVIL CODE] §709.

[3] Article 3 of Seijōbutsu Saikinin Hō (Product Liability Law)

[4] Ibid., article 1

advance the economic development of the nation. The law balances the interests of the individual members of the general public (expressly not just those who are victims of defective products) with that of the industrial development of the nation.[5] The Diet anticipated that protecting the interests of the injured party will have the secondary effect of contributing to the betterment of the general public, and promote the industrial development of the nation as a whole.

To test if the first purpose, that of protecting the interests of the injured citizen can be achieved, we will present a hypothetical product liability case of an automobile accident caused by manufacturing or design defect. The compensation of the plaintiff will also test the effectiveness of the statute to contribute to the stability of society and the economic development of the nation. This paper will discuss if the Code of Civil Procedure sections 163, 197, 220, 221, and 222 will enable this plaintiff to obtain evidence that will enable the plaintiff to identity the defect in the automobile.[6] Our focus will be on what we consider the most important aspect of litigating a personal injury products liability action, namely obtaining documents held by the defendant regarding the design, testing and manufacturing of the automobile.

The 1994 Law of Product Liability

As in any product liability action, the product must be defective.[7] Article 3 of the Act mandates that the product must be defective, therefore it naturally follows that the plaintiff must prove the existence of the defect that was the proximate or legal cause of the accident.

---

[5] The duty of the attorney to both the client and society is also in the Attorney Act, Act No. 205 of June 1949, Article 1, that states the attorney is entrusted with protecting fundamental human rights and achieving social justice.

[6] MINJI SHOSHŌHŌ (CODE OF CIVIL PROCEDURE) [MINSHŌHŌ] Act No. 109 of June 26, 1996.

[7] It is interesting to note that, unlike Section 84 of the Thai Civil Procedure Code, the Thai law of product liability shifts the burden of proof and provides that the defendant must prove that the product was safe. (13 February 2551 B.E. Section 7: The entrepreneurs shall not be liable for damages arising from an unsafe product if it can be determined that . . . the product was not unsafe.) The author believes this approach can create more proof problems than it solves.

The manufacturer . . . shall be liable for damages arising from the infringement of life, body or property of others which is caused by the defect in the product . . . .[8]

The definition of a defect appears to have been influenced by United States product liability law, in that Section 2 (2) of the Act provides that,

The term "defect" as used in this Act shall mean a lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable manner of use of the product, the time the manufacturer, etc. delivered the product, and other circumstances concerning the product.[9]

Defining the defect in the product and then determining if that the defect was the proximate cause of the injuries is, in the final analysis, the single most important element of any product liability action. The best, and in many cases the only proof of the defect is in the defendant's written records. By way of illustration, we will present the following hypothetical product liability lawsuit litigated in Japan. A defectively designed or manufactured automobile caused an accident that resulted in the plaintiff being seriously injured. The design and engineering of the automobile involved highly sophisticated cutting-edge technology developed in secrecy by the research and development department. We will assume that the defendant is in possession of documents proving the defect, and crash tests that confirmed the defect. The automobile was completely destroyed and reverse engineering is now impossible.[10] Without the research, engineering and manufacturing records, the plaintiff will be unlikely to prove any defect, and thus be unable to meet the burden of proof under the Product Liability Act of 1994.[11]

---

[8] Article 3 of Seijōbutsu Saikinin Hō (Product Liability Law)

[9] Ibid., article 2 (2)

[10] We will also ignore examining another identical car to determine a design fault. If the car was defectively manufactured, such an examination would be of no probative value.

[11] The fact of the accident cannot be relied upon to base a claim. We note in one case the Osaka District court did just that. In *Osaka Taishi Kensetsu Kōgō KK v. Denki Sangyō* Osaka Chihō Saibansho [Osaka Dist. Ct.] March 29, 1994, 842 Hanrei Taimuzu [Hanta] 69 (Osaka Dist. Ct. March 29, 1994) a television set caught fire. The court held that if the television was used in a reasonable manner, there was a presumption of a defect. The holding in *Osaka Taishi* bears a passing similarity to the American tort doctrine of *res ipsa loquitur*. However,

The Obligation to Establish an Effective Procedure

By enacting the new product liability law, the Diet assumed the affirmative duty to the injured citizen and the nation to assure that procedural law will be effective in implementing the law.[12] In this paper we argue that the current Code of Civil Procedure has structural impediments to production of the documents proving the defect, thus preventing injured persons from obtaining a remedy. The failure to do justice to the injured party has the secondary effect of defeating the other purpose of the law to promote public stability and economic development. To enact substantive law without an adequate procedural law would be, as Winston Churchill commented, like "a battleship being launched without a bottom."[13] We suggest that a more assertive discovery regime is required to achieve both purposes in complex product liability claims.[14] Yet, for reasons that are in part justified, there is substantial resistance within the Japanese judicial system against expanding discovery within the Code of Civil Procedure. As the Diet has recognized that defective products have a deleterious impact on the general public and the national economy alike and provided a remedy, it follows that in like manner the procedural means to effectuate that remedy is also needed.

Our conclusion is that given a vigorous defense the likelihood of the plaintiff obtaining the documents that will prove the defect is quite unlikely to the point of near impossibility. We submit that without the documents as foundational evidence, other efforts to identify the defect will be limited in usefulness. Consequently, our plaintiff with a factually valid case will be less likely to obtain any remedy, much

---

nothing like *res ipsa* was codified in The Code of Civil Procedure, or in the new Product Liability Law of 1994.

[12] The statute identifies the interests of both individual citizens and the development of the national economy, or industry, which can be in conflict. The Diet should determine how to balance these interests.

[13] Sir Winston Churchill, **The Hinge of Fate**, (Boston : Houghton Mifflin Company, 1950), Chapter III, Penalties of Malaya p.92. Churchill as Prime Minister of Great Britain at the outbreak of World War II made this observation when he was told that Fortress Singapore, although superbly prepared for naval assault, had no effective landward defenses. Thus, Singapore fell.

[14] We are drawing a distinction between complex product liability claims and other types of litigation. It can be argued that current procedural practices may be sufficient in mundane tort and contract cases.

less a full measure of damages. This result is directly contrary to the first purpose of the 1994 Product Liability Law to provided justice for the injured person, and cannot "contribute to the stabilization and improvement of the life of the citizens and to the sound development of the national economy."

Documents as the Foundation of Product Liability Litigation

Our study focuses primarily on the obtaining of documents from the manufacturer that tend to prove that a product was defectively designed. In United States litigation experience demonstrates without documents to serve as a "reality check" interrogatory responses can be, and usually are, incomplete and misleading. Pretrial depositions, unknown in Japan, are likewise ineffective without documents and accurate interrogatory answers. Interrogatory answers are not the words of the party, but rather the carefully crafted words of the responding party's attorney, thus they can be quite misleading.[15] In trial, original documents created by the parties without the assistance of counsel can serve as the concrete foundation for examination by the parties and the judge, which will strongly encourage the witnesses to be more truthful and non-evasive.

Documents and contemporary records are essential to adequately prepare a product liability case for trial. The oral testimony of witnesses, in particular corporate officers, can be inherently unreliable without documents and records as a foundation. Academics and legal professionals who are not involved in litigation generally live in an "ivory tower" of legal theory, and do not fully grasp two essential realities of litigation.[16] First is that being human, we are all prone to error and faulty memories, thus the general doctrine that eyewitnesses can be unreliable, regardless of their sincerity. The second is the simple and irreducible fact of human nature that humans will often hide the truth, twist the truth, and not infrequently outright lie.

---

[15] American lawyers pride themselves on the ability to interpret and answer interrogatory questions in such a manner as to avoid disclosing any relevant information. Japanese lawyers, many who have earned LL.M. degrees in the United States, will not be slow in developing this lawyerly skill.

[16] In the United States, even though law professors are admitted to practice law it is unusual for most law professors to have actually done so.

Witnesses will misrepresent the truth or outright lie for a multitude of reasons. They will do so to avoid embarrassment, to avoid liability, to falsely brag, or whatever. In cases involving major corporations, executives may lie to protect the corporation, to defend the public image of the corporation in order to maintain its stock value and retain its customers, or to maintain personal credibility with their board of directors. Corporate parties in particularly contentious litigation with substantial financial exposure will not voluntarily disclose information that is harmful to corporate interests, and it is equally inconceivable that a corporation will freely hand over information that is beneficial to plaintiffs. In short, it is too much to expect of human nature that the parties, or independent and non-interested witnesses for that matter, will be upright and strictly honest. Documents created before the onset of litigation will act to forestall this at times unconscious bias of witnesses.

In 2001, the Justice Reform Council made a number of recommendations for a justice system to support Japan in the 21st century.[17] In the preface, the Council stated that the "fundamental philosophy" of the reform of the judicial system is to define clearly "what we must do to transform both the spirit of the law and the rule of law into the flesh and blood of this country, so that they become "the shape of our country" and do "what is necessary to realize, in the true sense, respect for individuals (Article 13 of the Constitution)."[18] "Justice is expected to correct illegal actions and to provide a remedy for injured persons' rights in concrete cases."[19] "The concept of the rule of law, most clearly appears in the fundamental nature of the justice system" where "an impartial third party makes a decision based on fair and clear legal rules and principles through fair procedures."[20]

---

[17] The Justice System Reform Council, Recommendations of the Justice System Reform Council, For a Justice System to Support Japan in the 21st Century, June 12, 2001, [online] Available from: https://japan.kantei.go.jp/judiciary/2001/0612report.html [19 June 2021]

[18] Ibid.

[19] Ibid.

[20] Ibid.

The Council made some pointed recommendations on evidence: "with regard to litigation, the aim is to reduce the current duration of proceedings by about half . . . with the intention that users can obtain proper, prompt and effective remedies. For that purpose . . . the process to collect evidence shall be expanded."[21] "Examples of such measures to reinforce and speed up proceedings include... expanded procedures for collection of evidence are expansion of the order to produce documents and introduction of a system for interrogatories to the parties concerned."[22]

Document Production Process

Does the current Code of Civil Procedure meet these goals of the Justice Reform Council? Article 219 states that the party seeking the production of the document must request that the court order the production of the document.[23] Article 220 identifies four situations where a party cannot refuse to produce the document to the requesting party.[24] If the party refers to the document in the litigation[25] if the requesting party has the right to inspect the document[26] if the document was prepared for the benefit of the requesting party[27] and if the document is not subject to several itemized exceptions.[28] There are two relevant exceptions to this study. The first exception is if the document was created for the use of the possessor.[29] The second exception, referred to in section 220 (iv), is if the document falls into a privilege cited in Article 196 that excludes trade secrets.[30]

---

[21] Ibid.

[22] Ibid.

[23] Article 219 of MINJI SHOSHŌHŌ (CODE OF CIVIL PROCEDURE) [MINSHŌHŌ]

[24] Ibid., article 220

[25] Ibid., article 220 (i)

[26] Ibid., article 220 (ii)

[27] Ibid., article 220 (iii)

[28] Ibid., article 220 (iv)

[29] Ibid., article 220 (iv)(d)

[30] Ibid., article 197 (iii)

Article 221 sets forth the format of the Article 219 request to the judge to order the production of the documents.[31] First, the plaintiff must identify in general what the document indicates. [32] Second, they will have to present a summary or essence of the document.[33] In the event the plaintiff cannot adequately identify the document or provide its summary, the plaintiff may provide such details as much as possible to allow the responding party to do so.[34] This provision would require the responding party to, in effect, assist the requesting party, which is highly unlikely. Then, the plaintiff must identify who possesses the document.[35] The plaintiff must state the facts that the document will prove.[36] Finally, the grounds for the duty to produce the document.[37] These requirements beg the question: how can a party comply without seeing the documents?

The Code recognizes that this is a legitimate problem. As stated above, Article 222 would allow the plaintiff to cite any particulars that would indicate to the defendant the identity of the document, and the general contents of the document.[38] In our opinion this provision is of little practical value, and expects too much from human nature. Competent corporate counsel would be reluctant to consider whatever information to be sufficient to enable them to respond. Even if the judge could intervene, without the judge having knowledge of the corporation and the nature of the corporate documents there is little possibility that the judge could deem the information is enough and order the document to be produced.

In order to obtain some information from the opposing party as to the documents, the requesting party would submit “inquires” pursuant to Article 163 to the opposing party. These inquiries could include questions that could satisfy

---

[31] Ibid., article 221

[32] Ibid., article 221 (i) (*bunsho no hyōji*, 文書の表示).

[33] Ibid., article 221 (ii) (*bunsho no shushi*, 文書の趣旨).

[34] Ibid., article 222 (1)

[35] Ibid., article 221 (iii)

[36] Ibid., article 221 (iv)

[37] Ibid., article 221 (v)

[38] Ibid., article 222 (1)

the requirements for production in Article 221. [39] This addition to the Code was intended, apparently, to be similar to interrogatories in the United States. However, there are serious, if not fatal, defects.

The parties are under no compulsion by the court to answer the questions. The answers are not under oath. Thus, accuracy may be questionable. Here, we are compelled to remind the reader of the observations above regarding the human tendency, to put it bluntly, not to tell the truth, the whole truth, and nothing but the truth. Even with that said, the inquiries are subject to several limitations under Article 163. Some of which are similar to some of the "objections" in American practice when the party declines to answer the question. There are (i) when the inquiry is not specific (vague, ambiguous or unintelligible)[40] (ii) were the inquiry is embarrassing or insulting (calls for irrelevant information not reasonably calculated to lead to the discovery of admissible evidence)[41] (iii) where the inquiry has been asked before (asked and answered)[42] (iv) the inquiry asks for an opinion (calls for speculation)[43] and (v) responding to the inquiry would be time consuming and expensive (unduly burdensome and vexatious).[44] The final and, in our study, fatal flaw is that Article 163 excludes information protected from disclosure under Articles 196 and 197.[45]

These may appear to be similar to the United States interrogatories but are far weaker and subject to easy avoidance. Questions that may embarrass the responding party, or confuses them or ask for an opinion can be refused. Inventive defense counsel will have little difficulty in seeking shelter under those excuses. Also, if responding to the inquiry is "expensive" that may act to avoid answering.

---

[39] Ibid., article 163

[40] Ibid., article 163 (i)

[41] Ibid., article 163 (ii)

[42] Ibid., article 163 (iii)

[43] Ibid., article 163 (iv)

[44] Ibid., article 163 (v)

[45] Ibid., article 163 (v)

Excessive costs could almost always be pled as a reason not to respond because in complex product liability cases it is frequently absolutely true. Finally, and this is critical to our study, if the information is "privileged" as defined by Section 196 or 197, that will preclude responding. Article 197 (1)(3) provides that confidential data and occupational, technical or trade secrets need not be disclosed.[46] These provisions shielding trade, industrial secrets and documents for internal use are in product liability cases the most mischievous privileges possible, because that is precisely where the documents proving the defect will be found.

Exemptions to Production

The documents in our hypothetical will certainly fall into one or more of the categories that will allow the defendant to decline to produce the documents. The documents were without doubt "prepared exclusively for the use of the person in possession . . ." and thus need not be produced.[47] In our hypothetical, the design, manufacturing and marketing documents can legitimately be claimed to be prepared for the benefit of the corporation. The same could be said about any crashworthy tests where the automobile failed. That these documents would be considered as prepared for the benefit of the manufacturer is confirmed in the seminal case of *Maeda v Fuji Bank.*[48] In *Maeda*, the plaintiff sought the production of the bank's "*ringisho*" which was the loan application documents. The Supreme Court held that production of the *ringisho* was exempt in that it was an internal document as defined by Section 220. Counsel for the defendant corporation would likely insist that the design plans, the report concerning corporate knowledge of the defect, and the crash test documents were intended for internal use.

The conclusive obstacle to our plaintiff in the hypothetical that would prevent him from obtaining the design, manufacturing and crash-worthy tests is that technical and professional secrets are not subject to production. The exclusions to

---

[46] Ibid., article 196 (1)(3)

[47] Ibid., article 220 (4)(d)

[48] Saikō Saibansho [Sup. Ct. 2nd Bench] Nov. 12, 1999, Heisei 11 (kyo) 1695 Hanrei Jihō [Hanji] 49.

production listed in Article 220 (4)(d) references Section 197, including subsection (3) that excludes "technical or professional secrets."[49] In our hypothetical, the automobile crash tests could, quite legitimately, be classed as trade or industrial secrets. Case law indicates that such claims will be recognized as legitimate and the documents need not be produced. In 2000 the Supreme Court agreed that an electrical circuit diagram constituted a technical secret and was not subject to production.[50]

Probability of Production

To answer our question as to the actual possibility of the critical documents in our hypothetical product liability action in Japan, we think the most likely conclusion is that the defendant would not disclose the existence or the identity of the documents. There is even less possibility that the defendant would actually produce the critical documents. The reason is simple and quite convincing: the critical documents will certainly be considered by the defendant as technical or professional secrets, and intended for their own internal use. The Code provision regarding technical and trade secrets, acting in concert with the internal use document exception, will prevent the effective implementation of the 1994 Product Liability Act. This cannot be considered unjust in the technical sense as the Code of Civil Procedure gives the defendant the express right to withhold the information in the documents and decline to produce the documents. Consequently, in our hypothetical the plaintiff will likely not be able to prove the existence of the defect, and will not be compensated for his damages. As a result, the other purpose of the statute to promote the stability of society and the development of the economy will not be achieved. In regard to complex product liability claims, the goals of the Justice Reform Council have not been met. To paraphrase Sir Winston Churchill, because of the current Code of Civil Procedure the 1994 Products Liability Act is a "battleship without a bottom."

---

[49] Ibid., article 220 (4)(d), article 197 (3).

[50] Saikō Saibansho [Sup. Ct.] March 10, 2000, Hei 12, no. 20, 54 Saikō Saibansho Minji Hanreishū [Minshū] 1073.

Expanding Discovery in Product Liability Cases

Japanese legal professionals are well aware of this seemingly intractable problem with product liability and other complex cases as the Justice Reform Council recommendations recognized. One obvious answer would be to expand the scope of discovery within the Code of Civil Procedure to enable product liability plaintiffs more options to identify and obtain critical documents. There is the possibility that the Diet could amend the 1994 Act to achieve the two stated purposes of the Act, without amending the Code of Civil Procedure itself.[51] However, there is considerable institutional opposition to broadening discovery, namely that discovery as in the United States is not within the Roman based Civil Law Tradition, that any expansion of current discovery will lead to much greater litigation costs, and the possibility of abuse that is supposedly a major problem in the United States.

Objections Founded on the Civil Law Tradition

Much opposition to more expansive discovery is derived from the adoption of the German and French civil law tradition principles during the period Japan modernized the legal system at the time of the Meiji Restoration. French and German legal principles were in turn based on Roman law and legal procedure, wherein discovery was absent. Let us first examine Roman law procedure, such as it was.

The Roman law of *damun iniuria datum* (essentially a tort action) was broad enough to include disputes that would have warranted discovery if the case required. However, that does not appear to have occurred. In a simple case like damage to persons or property we can safely assume that the elements of the claim and assessment of the damage was pretty straightforward. An oxcart ran over the plaintiff's foot, the plaintiff fell in a well dug by the defendant, the parties got drunk and into a fight, and so on. Such cases do not need much discovery.

---

[51] If enacted, this proposal would be a kind of "trial run" which would enable the legal community to evaluate the advisability of expanding discovery to general litigation procedure.

After reviewing Roman law, we are compelled to conclude that there was no systematic or even informal discovery scheme. Officials called *Praetors* accepted the filing of a dispute and determined the applicable law.[52] Then the *Praetor* selected an individual who had expertise or knowledge regarding the general nature of the claim who would function as a fact-finding judge, called the "*Iudex*". The *Iudex* was expected to discover the facts through personal inquiry in an inquisitional manner much as the judges in Japan. The *Iudex* would conduct a kind of informal discovery of the facts, and render his decision. This somewhat informal discovery system appears to have functioned adequately, and, most importantly, it set historical precedent restricting the power and authority to conduct discovery to the *Iudex,* a citizen appointed by the government. The judicial control of the litigation in Japan fits comfortably within the Roman system of control by the *Iudex*.

The absence of a discovery regime in Roman law cannot, however, provide an entirely rational academic or practical basis for the rejection of more extensive product liability discovery in Japan. The doctrine of strict products liability in the United States developed in tandem with advances in manufacturing complex products. The foundational products liability case was *Greenman v Yuba Power Products*.[53] In *Greenman*, the nature of the defect was an improperly designed retaining screw on a wood lathe that allowed the wood to fly off the lathe and strike the plaintiff. Perhaps the best-known product liability case was the Ford Pinto, where the defective design on the fuel system caused the automobile to catch fire in otherwise minor traffic accidents.[54] In *Grimshaw*, extensive discovery as to

---

[52] The *Praetor* in Republican Rome was an official elected by the senate to function as a magistrate to administer the law. Under the Empire he served as an imperial administrator. There were not nearly as many *Praetors* as one would expect, being only twelve under Augustus (27 BC to AD 14) and sixteen under Tiberius (AD 14 to 37 AD). This may indicate that lawsuits were not all that common.

[53] Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (Cal.1963).

[54] *See* Grimshaw v. Ford, 119 Cal. App3d 757, 174 Cal. Rptr. 348 (1981). It should be noted that the technical nature of the defect, that is the fuel tank being improperly positioned behind the rear axle, was not uncommon with other automobile manufacturers. The lawsuit and ensuing publicity caused recalls of the defective cars, and was instrumental in improving the designs of cars to be much safer.

the defect was essential in the litigation. More importantly, the publication of the Ford interoffice memoranda regarding the prior knowledge of the defect exerted a powerful and continuing impact to this day in the development of safer automobiles.[55]

In Rome the most technically advanced objects were such objects as aqueducts, apartment buildings and merchant ships. The failure of an aqueduct could hardly generate an action against the state for obvious reasons. In regard to apartments, the owner and builder as responsible parties was clear. As for ships, maritime law developed in an independent manner that an experienced maritime merchant *Iudex* could deal with. The basic point is that without widespread consumer-unfriendly complex objects, there apparently was little need for discovery thus the concept never developed. Given that the Romans were imminently practical, if there was a need it is more than reasonable that they would have developed a responsive doctrine that would have met the needs of Roman society. In Japan, however, the Diet has determined the need for strict products liability, which is unlike any Roman legal doctrine. The absence of any discovery in Roman law, therefore, cannot be relied upon as justification for restricting discovery in Japanese product liability cases.

Discovery Abuse

Abuse of discovery can be defined as any discovery proceeding not intended to discover the truth but to force the opposing party to spend an inordinate amount of time and expense, in order to get the opposing party to drop the action entirely, to drop claims, or to "encourage" settlement.[56] The usual tactics are to propound far too many interrogatories then the nature of the claim or defense justifies, request for the production of voluminous records, propounding unnecessary requests for admissions, conducting unnecessary and lengthy depositions, and about anything

[55] The interoffice memo was an estimation of the costs of all possible litigation and the cost to recall and correct the defective design. The costs of recalling and correcting the defect were determined to be greater than the costs of litigation, so Ford executives decided not to recall the automobiles.

[56] Another goal is to increase "billable hours."

that inventive counsel can think of. Abuse can also be in responding to requests to produce by producing masses of unorganized documents, intentional destruction of documents, intentional delay in answering interrogatories, and filing of multiple protective orders.

Without being quite this direct, it seems an unstated fear amongst Japanese legal professionals that if lawyers have more discovery power and responsibility, they will abuse that power as freely as lawyers in the United States reputedly do. There seems to be a general consensus amongst lawyers that discovery abuse is rampant across the United States.[57] This may not be the case. A 1975 study by the Federal Judicial Center cited by Abraham Sofoer has some interesting data.[58] In the city of Atlanta, Georgia, in some 2055 cases in 55% there were no discovery disputes, and of those 73% were resolved with no difficulty. In the city of Chicago, of some 2,569 cases in 62% there were no discovery disputes, and of those 72% were amicably resolved.

The roots of discovery abuse may be found in the benchmark Supreme Court case of *Hickman v. Taylor*, where the plaintiffs sought independent witness statements gathered by the defendant's counsel. The plaintiff had the ability to interview the same witnesses, but presented no argument or proof that they could not do so. Without these witness statements, the plaintiff claimed the defendant could use the statements to "ambush" the plaintiff in the trial with surprise testimony.[59] The request was denied as the statements were privileged attorney

---

[57] *See, e.g.*, Maurice Rosenberg, Warner King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, BYU L. Rev. Vol 1981, Issue 3, 9-1-81; Richard W. Sherwood, *Curbing Discovery Abuse: Sanctions under the Federal Rules and California Code of Civil Procedure,* Santa Clara L. Rev. Vol 21, Number 3 1-1-81; Abraham Sofoer, *Sanctioning Attorneys for Discovery Abuse under the New Federal Rules: on the Limited Utility of Punishment*. St. John's L. Rev, Vol 59, Summer 1983, Number 4; John H. Beisner, *Discovering a Better Way, the Need for Effective Civil Discovery Reform*, 60 Duke L.J. 547, (2010).

[58] Abraham Sofoer, *Sanctioning Attorneys for Discovery Abuse under the New Federal Rules: on the Limited Utility of Punishment*. St. John's L. Rev, Vol 59, Summer 1983, Number 4, at 697, and footnote 67, citing C. Ellington, A study of Sanctions for Discovery Abuse, 17, (1979).

[59] 329 U.S. 495 (1947). Why the plaintiff did not interview the witness is not in the opinion.

work product, but the court stated that it was "essential to proper litigation" for the parties to obtain all the facts possible from the opposing party without violating appropriate privileges.[60] The court did not foresee this theoretical ideal to avoid the unjust results of "trial by ambush" could lead to the extent of abuse that could occur.[61] If the *Hickman* court thought that attorneys would exercise restraint in seeking discovery, that notion was ill-founded.

Judges in the United States have the authority to firmly deal with discovery abuse, if they elect to exercise that authority.[62] In *Waller v. United Parcel Service* the court prohibited the taking of duplicate depositions.[63] In *Frost v. Williams* the court restricted the extent of discovery to be proportional to the nature of the case.[64] The court can impose monetary and procedural sanctions for violations as well. In *Hockey League v. Metropolitan Hockey Club* the Supreme Court approved the use of sanctions for both remedial purposes and as a deterrent.[65] In *Laclede Gas v. Warnecke Corp*. and *Dependahl v. Flagstaff Brewing Corp*. the court dismissed a counterclaim for willful refusal to answer interrogatories.[66] In *Malautea v. Suzuki Motors, Inc*., the defendant refused to produce documents that showed knowledge of a deadly defect, and the defendants were ordered to pay $5,000.00, and the attorneys were ordered to pay $500.00.[67] In *Kane v. The Grande Holdings, Ltd*., a party submitted a massive amount of documents in complete disorder, and was assessed $75,000.00 in costs for the opposing party to organized the documents.[68] Monetary sanctions were quite remarkable in what is known as the Du Pont Benlate

---

[60] Ibid., 507. The court did indicate that there were limits to discovery without elaboration.

[61] *Hickman* is a cautionary tale for the Japanese system in the event discovery is expanded in product liability cases, and for litigation in general.

[62] FRCP 26.

[63] 87 F.R.D. 360 (E.D. Pa. 1980).

[64] 46 F.R.D. 484 (D. Md. 1969).

[65] 427 U.S. 639 (1976). *Confirmed in* Roadway Express, Inc. v. Piper, 477 U.S. 752, 764-65, (1980).

[66] 604 F2d 561, 566 (8th Cir, 1979); 84 F.R.D. 416 (E.D. Mo. 1979).

[67] 987 F2d 1536 (1993).

[68] 198 Cal. App. 4th 1476, 130 C. Rptr. 3rd 751 (2001).

files or The Bush Ranch Litigation, regarding a weed killer chemical that was improperly marketed.[69] Counsel conspired with the defendant to withhold documents subject to court order, and counsel lied to the judge about the existence of the documents. Some $13,687,675.06 to pay for the plaintiff's costs were ordered, as well as over $100,000.00 in sanctions.[70]

Abuse can occur when a party complies with discovery requests so inadequately so as to render the responses meaningless. One common answer is that "discovery is continuing" (whether it is or not) so disclosure cannot be made at the time the answers are submitted to the opposing party. This can be seen as either the "art" of pretrial litigation, or simple obstruction of the process commonly called "hiding the ball" until the last possible moment. The result is that the opposing party must bring a "Motion to Compel" before the judge, requesting that the judge issue an affirmative order to the obstinate party. Continued refusal to respond can result in a default judgment, the party's defenses or claims being case being dismissed, costs of the motions, exclusion of evidence, holding the non-responding party and their lawyer in contempt, or any other relief that the judge deems just and appropriate.[71] In contrast to the federal rules, the current Japanese code provides for no such draconian sanctions, sanctions which will in the end usually succeed in compelling the responding party to respond properly to the discovery requests.

Commentators in the United States agree that a key issue in curbing discovery abuse could be the intervention of the trial judge.[72] However, the courts seem

---

[69] In re: E.I. Du Pont de Memours & Co, v. The Bush Ranch, et al., Number 95-9059 (1996).

[70] The sanctions were overturned on the basis that they were in reality punitive in nature, and not a civil sanction.

[71] This process takes time, as the moving party must upon the other party's refusal to respond to the order seek an "order to show cause" why the responding party should not be held in contempt of court, which results in another hearing.

[72] Maurice Rosenberg, Warner King, Curbing Discovery Abuse in Civil Litigation: Enough is Enough Brigham Young University Law Review Vol 1981, Issue 3, 9-1-81,

John H. Beisner, Discovering a Better Way, the Need for Effective Civil Discovery Reform, 60 Duke L.J. 547, (2010), Dominick W. Savaiano, Excessive Discovery in Federal and Illinois Courts: A Tool of Harassment and Delay? Loyola

reluctant to do so. First, there are legitimate Constitutional issue of due process if sanctions go too far. *In People ex. rel. General Motors Corp. v. Bua* a 1961 a defectively designed model Corvair automobile caused an accident. [73] The plaintiff requested voluminous records on the design manufacturing and testing of all Corvair automobile models from 1962 through 1965, to which defendant failed to comply as irrelevant. The plaintiff moved to hold GM in contempt and for default judgment. Defendant filed a writ of mandamus for review. In granting review, the Illinois Supreme Court held that sanctions were improper as there was no finding that the records were relevant, and to do so would constitute a deprivation of constitutional rights of due process.[74] Second, although the United States Supreme Court in *Hockey League v. Metropolitan Hockey Club*[75] approved of sanctions as deterrence, there is the question of at what point will deterrent sanctions against the client and the attorney become criminal sanctions. In that situation, constitutional criminal rights of due process would apply.[76]

Most discovery abuse is directly attributable to the unethically aggressive behavior of some American attorneys that violates their "duty of loyalty to the 'procedures and institutions' the adversarial system is intended to serve."[77] This violation of the attorney's primary obligation to the judicial system they are sworn to uphold can subject the attorney to professional state Bar discipline and ignominy, which in the final analysis may be the best solution to discovery abuse.[78] Several state Bars have imposed discipline for giving false information to the court regarding

---

University of Chicago Law Journal, Vol 11, Issue 4 Summer Discovery Symposium, 1980. "A major cause of abuse is the lack of judicial intervention in the discovery process." p.816.

[73] 37 Ill.2d 180, 226 N.E.2d 6 (1967).

[74] See Karl W. Kristoff, People ex.rel., General Motors v Bua: Discovery Sanctions-The Problem of Overkill, 1.J. Marshall J. or Prac. & Pro. 325 (1968), The John Marshall L. Rev. Volume 1, Issue 2 (1968).

[75] 427 U.S. 639 (1976). *Confirmed in* Roadway Express, Inc. v. Piper, 477 U.S. 752, 764-65, (1980).

[76] *See* Rosenberg, *supra* note (77) p.583.

[77] Mancia v. Mayform Textile Servs. Co, 253 F.R.D. 354, 362, 363, (C. Md. 2018). The attorney filed "boilerplate" form interrogatories and submitted evasive answers for the purpose of overwhelming the opponent.

[78] In re Abbott, 925 A2d 482 488 (Del. 2007).

discovery requests,[79] counseling a client to destroy evidence,[80] suppressing evidence or failing to produce documents,[81] obstructing the opposing party's access to evidence,[82] and submitting false or altered documents.[83]

The author believes that some aspects of the nature of the American legal profession are such that this abuse came to be in the first place, and is too often tolerated.[84] The ethical obligation of "zealously" representing the client is used as an excuse for all kinds of excesses, forgetting that the advocacy must be within the bounds of social decency as well as the law. Observing some attorneys misbehaving in depositions, and at times in court, can be like watching immature children fighting in a grade school playground hurling insults at each other. Some of this bravado is to impress the client, some to try and intimidate opposing counsel and adverse witnesses, and some just because of the attorney's enjoyment of the fight for the personal satisfaction of the fight itself. These attorneys have a tendency to internalize their client's case and make it their own, and forget that they can only play the cards the client holds and cannot "stack the deck" by unethical behavior.

The reasons for this are beyond the scope of this paper, but we can postulate that it may partly be that there are too many attorneys in the United States chasing too few clients. Many lawyers in the United States come to the Bar not because of any deep interest or commitment to the law but simply because it is a business that had, at least at one time, the promise of financial stability and some

---

[79] In re Ivy 374 P.3d 374 (Alaska 2016), The Florida Bar v. Whitney, 132 So.3d .1095 (Fl 2013), The Florida Bar v Budnitz, 690 So.2d 1239 (Fl. 1997) disbarment for false statement to grand jury.

[80] Attorney Grievance Com'm v. White, 354 Md. 346, 731 A2d 447 (1999).

[81] In re Eisenstein 485 S.W. 3d 759 (Mo. 2016), Sullins v. State Bar, 15 Cal.3d 609, 125 Cal. Rptr. 471, 542 P.3d 631 (1975).

[82] Matter of Geisler, 614 N.E.2d 939 (Ind. 1993), In re Discipline of Turnow, 835 S.D. 61, 835 N.W. 2d 912 (2013), The Florida Bar v. Whitney, 132 So.3d .1095 (Fl 2013).

[83] In re Disciplinary Action Against McDonald, 2000 ND 87, 609 N.W.2d 418 (N.D. 2000), Disciplinary Counsel v. Neirmayer, 119 Ohio St. 3rd 99, 2008-Ohio-3824, 892 N.E. 2d 434(2008).

[84] The following critique is based on the author's own experience as a trial lawyer and discussions with other lawyers and law professors.

degree of social prestige. The graduates of second rate law schools that have an abysmally low Bar passage rate (top tier law schools have pass rates above 85%, whereas some of these lower tier schools may have a 5% or lower pass rate) put further pressure on the quality of the Bar.[85] The practice of law is supposed to be a "learned profession" but many attorneys see the practice as merely a profession like any other business. Financial sanctions imposed by the courts for misbehavior are seen as just a cost of doing business, which the client will in the end reimburse.[86]

State Bar discipline, on the other hand, if imposed, can act to deter discovery abuse, if the Bar deems that the misbehavior was serious enough. Deterrence can be in the form of admonitions and public censure, with the possibility temporary or permanent disbarment. Even the lowest level of bar discipline, admonitions and censure, will likely result in lost clients and dismissal from the attorney's law firm. Disbarment, suspended or temporary, will certainly result in the attorney being unemployed, as well as embarrassment within the legal community. Even the lowest level of discipline would also act to prevent the attorney's future employment in major law firms or corporations. However, this remedy is not widely used as state Bars will only take action if a particularly irate opposing counsel or annoyed judge files a grievance with the state Bar.

2004 Changes to the Japanese Bar

As a consequence of the 2004 changes to the Japanese Bar, the Bar may have inadvertently introduced into the legal system what the author believes is one of the fundamental reasons for the corruption of the American Bar: the excess number of lawyers. The goal of the 2004 changes to the Japanese Bar examination was to increase the number of lawyers, supposedly to provide more available legal

[85] California has particularly lax standards for state (not ABA) accredited law schools, most of which fail within a few years of operation. For graduates of these law schools it is not uncommon to fail the Bar over twenty (20) times.

[86] Many retainer agreements provide for this reimbursement.

services outside of the major metropolitan centers.[87] The 2001 Justice System Reform Council recommended that by the year 2004 there should be 1,500 new bar admission, with that number increased to 3,000 per year by the year 2020.[88] Data from the Japanese Federation of Bar Associations indicate that in 2006 new Bar admissions were 1,009, increasing to a peak of 2,044 in 2012, and steadily declined to 1,253 in 2017.[89] Bar membership increased from 22,021 in 2006 to 38,980 in 2017.[90]

Even though the projected increase in the Japanese Bar did not materialize, the damage to the legal profession might have been done. In a 2016 article by Mitsuru Obe in the Wall Street Journal entitled, "Japanese lawyers can't make case for why they are needed in low litigation climate" Obe notes that the civil claims have not increased "in decades", that the crime rate is falling, and as a result lawyers are losing income.[91] Moreover, he quotes Kozo Fujita, a former president of the Hiroshima High Court, that "Fewer people and especially fewer high quality people, are coming to the legal profession. This is a very serious problem." This observation mirrors to a certain extent the situation in the United States regarding many American attorneys who regard the law merely as a means of livelihood and not a "learned profession".

This recent development in Japan may give rise to a more competitive attitude that could result in Japanese lawyers more aggressive in attracting and

---

[87] Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century - June 12, 2001, The Justice System Reform Council, p.12: "In order to achieve the above roles in the 21st century, the existence of a larger stock of legal professionals, sharing the concept of the rule of law." And ". . . the necessity to redress the imbalance in lawyer population across geographical regions, referring to the "zero-one regions" with regions with one lawyer or no lawyer at all. p.51.

[88] Ibid., p.14.

[89] White Paper on Attorneys, 2017, Japan Federation of Bar Associations, p.12.

[90] Ibid., p.17.

[91] Mitsuru Obe, "*Japanese lawyers can't make case for why they are needed in low litigation climate*," (The Wall Street Journal, April 3, 2016). Obe also refers to the lack of discovery, "so it is difficult for people suing a corporation to find incriminating evidence."

retaining clients as lawyers in the United States.[92] If so, unless there are other institutional restraints, the possibility of improper behavior, including discovery abuse if wider discovery is allowed, may well increase. From a cultural viewpoint, it seems unlikely that Japanese attorneys would intentionally disobey direct court orders as occasionally happens in the United States. As we noted above, the disobedience of court orders (with the excuse of zealous representation) in the United States really only results in rather modest financial sanctions. Even Bar discipline for violating court orders in regard to discovery or other matters, although in the end effective in that it can result in the removal of the attorney from practice, is not really all that effective in that so few grievances for disobeying court orders (contempt) are filed. For the year 2015 in California, out of an attorney population of about 270,000, there were 15,796 grievances, with 421 disbarments.[93] The vast majority of grievances concern financial improprieties, with less than 6% contempt or disobedience of judicial orders.[94]

A review of Bar data in the 2017 White Paper on Attorneys published by the Japanese Federation of Bar Associations indicates that although the number of lawsuits initiated from 2006 to 20010 represented a sharp increase from approximately 143,000 to 212,000 cases, the number dropped to what appears to be the statistical standard of 148,000 in the year 2015.[95] Attorneys were involved in about 75% to 80% of the cases. This tells us is that Obe and Judge Fujita may well be correct: there is a growing number of attorneys but no commensurate growth in the litigation rate. Of importance to this study is the Bar discipline data. We can observe that the numbers of grievances have risen since 2006 at 1,367 to 2012 at 3,890, and leveling off at that level to 3,480 in the year 2016. Bar sanctions have

---

[92] We note that many Japanese lawyers are obtaining LL.M. degrees in American law schools and cannot avoid being exposed to this behavior.

[93] California State Bar Office of the Executive Director, Annual Disciplinary Report of the State Bar of California, April 30, 2016.

[94] Ibid., p.19. The actual percentage is not given, but a chart roughly indicates this amount.

[95] White Paper, *supra* note 94 p.50.

increased likewise: admonitions rose from 31 to 60, suspensions from 33 to 49, but disbarments were quite rarely imposed, only 3 in 2006, 5 in 2011, 6 in 2014, and 4 in the year 2016. If the Code of Civil Procedure or the Product Liability Act included sanctions for discovery abuse, this data does not indicate that the Japanese Bar would be any more likely than the state Bars in the United States to be assertive in disciplining abusive attorneys.

Publication of the names of attorneys who have been disciplined by the Japanese Bar for discovery abuse may well be in itself an effective deterrence. In a recent article on the effect of the increase of lawyers in Japan on Bar discipline, Prof. Kyoko Ishida cites a revealing interview regarding the deterrent impact of Bar discipline.

Public notice of disciplinary decisions in the JFBA journal has a tremendous impact on lawyers. Every month they read that part first. Everyone thinks it is a shame to have his/her name published in such a way. Lawyers also learn what particular types of conduct can be subject to discipline through this public notice.[96]

Applying the consensus in the United States that the key to controlling discovery abuse is the intervention of the judge, we should consider if this would be possible in Japan. On one hand, it is said that the caseload of the judges is quite heavy, and that additional responsibly for sanctioning the lawyers would only add to the burdens of the judge. On the other hand, if the Product Liability Act relieved the judges of some of the discovery duties with the judge becoming involved only if there are discovery disputes, this might result in freeing up more of the judge's time. However, human experience indicates that simple exhortation by the judge may not be sufficient to encourage the attorneys to avoid abusing discovery. To accomplish this the judge may have to be given the power to hold the attorney in

[96] Kyoko Ishida, *Detriment or refinement? Impacts of an increasing number of lawyers on the lawyer discipline system in Japan*, Int'l J. Legal. Prof., 10, published online 11 May 2017, DOI:10.1080/09695958.207.1 324557. In the author's experience, this is what happens in the United States: attorneys will first read the list of disciplined attorneys, looking for anyone they know.

contempt of court, and to assess meaningful sanctions against the attorney. If the judges can hold the attorney in contempt, this contempt order could then be the basis for effective bar discipline.[97] The concerted action of both the Bar and the bench would in our view be an effective means to deter discovery abuse in both Japan and the United States.

Conclusion

Technical design and testing and marketing documents that are in the control and possession of the defendant are critical to the plaintiff's prosecution of a complex product liability claim. We believe that some degree of modification of the current document discovery process in product liability actions is essential to achieve the stated goal as set forth in the 1994 Product Liability Act of individual justice to the injured person, and the concurrent goals of stabilization of the lives of the public and the advancement of the national economy. However, although the current Code of Civil Procedure Sections 219 *et. seq*. in theory grant the plaintiff the right to obtain documents from the defendant, the documents will most likely never be produced or put into evidence.

The defendant will object to the identification and production of any documents that were drafted for internal use of the defendant under 220 (4)(d), and will object to the production of any documents that contain trade or professional secrets under 197 (3). It goes without saying that the critical documents that would prove the existence of the defect in design, manufacturing and marketing would, quite correctly, fall into one or both of these categories.

It appears that to enable the 1994 Act to succeed, some expansion of document discovery ought to be undertaken. Amending the Code of Civil Procedure to allow wider discovery in general litigation might be excessive and have a deleterious

[97] The grounds for Bar discipline are somewhat general, but would doubtless include contempt of court. The Attorney Act Section 56 includes behaving in a manner that damages the reputation of the Bar or behaves in a manner that impairs the attorney of the integrity of the Bar. Attorney Law [Law No. 205 of June 10, 1949].

impact. However, recognizing the specific need for documents in the possession of the defendant, production in product liability cases, consideration could be given to amending the 1994 Product Liability Act to provide for wider document discovery. We would suggest that the amendments in the Product Liability Act include the following. First, the strict requirements in section 221 regarding the identification and description of the requested documents should be relaxed to enable a general request for information. As for the "Inquiries" the provisions in Section 163 (iv) in reference to privileged information under Articles 197 could be revised allowing discovery of industrial secrets. Article 220 (4)(d) regarding the exclusion for documents intended for internal use would not be exempt from production. The trade secrets exclusion in Article 197 (3) should be removed or restructured to give the judge the authority to issue protective orders regarding safeguarding legitimate trade and industrial secrets. The Act should give the judge the authority to impose severe sanctions against both the client and the attorney to ensure enforcement of the protective order. In summary, the Product Liability Law should remove or significantly modify the impediments of the internal use and industrial and trade secrets exception to production.

The possibility of potential abuse if discovery is expanded is a serious issue which must be given considerable thought. Although not as pervasive in the United States as commonly believed, it does reflect poorly on Unites States litigation. Control of discovery abuse in the United States cannot be said to be much of a success. Even though American judges have considerable contempt power and can order financial sanctions against both the abusing attorneys and their clients, this does not appear to be as effective as it should. Although the state Bar associations can, and on occasion will, discipline an abusive attorney with sanctions including disbarment for repeated violations of court orders, state Bar discipline is quite rare.

In the event amendment of the 1994 Act to include wider discovery is considered, the lessons of United States discovery abuse could be instructive. Any amendment of the 1994 Act expanding discovery could give judges the power and

authority to impose significant civil sanctions and contempt citations against an abusive attorney. The Japanese Bar could be more assertive and pursue disciplinary action on attorneys who have been cited for contempt for discovery abuse. As Ishida's research implies, the potential of being held in contempt by a judge and then being disciplined by the Bar might well be an effective deterrent to discovery abuse. As in the United States, an effective combination of active judicial intervention and Bar discipline should act to prevent discovery abuse.

A carefully thought through amendment to the 1994 Product Liability Act providing for more effective production of documents to place on the Scales of Justice should materially enhance the Act's purpose of rendering justice to the injured victim. Doing so will thereby promote the wider goal of stabilizing and improving the life of the citizens and contributing to the sound development of the national economy.