

Comparing Product Safety & Liability Law in Japan



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Overview of the book

- Ch. 1: 'Re-orienting' Japan and its Law
- Ch. 2: PL Still-birth and Re-birth in Japan
- Ch. 3: Comparing the PL Law '94 with other 'SL' regimes in EU, Australia, and US
- Ch. 4: The PL Law in Action
- Ch. 5: The Future of PL in Japan: Reformulation [$>$] Reform [$<$] Re-reg'n
- 5 Appendices (incl. PL suits filed, ADR)

Ch 1. 'Re-orienting' Japan

- How to interpret 'summer of living dangerously' (then TV, auto recalls) in '00?
 - Negatively (*Economist*): Japan still pro-biz
 - Positively (*Fin Times*, etc): now pro-Consumer!
- Similar diverse perceptions of:
 - Japan, its products and Cers, its law, its PL
- Approach [also PhD] - broad comparisons:
 - Multiple reference points: EU, Oz, not just US
 - Law in context, not just black-letter law

Ch 2. Comparing PL: History - US

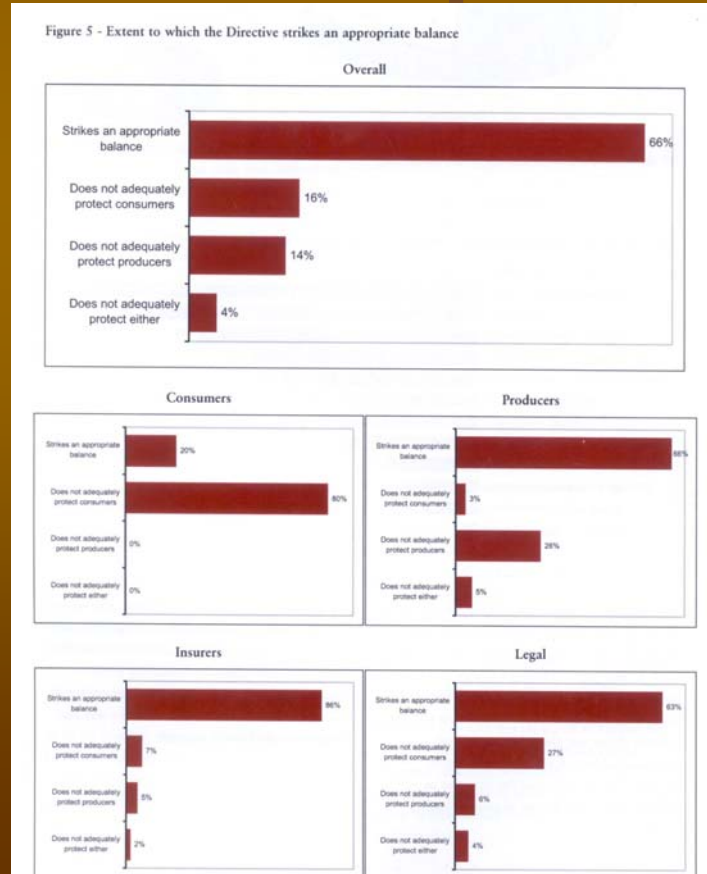
- 19C Strict liability “implied warranty” of “merchantable quality” in Sales of Goods
- Such K law liability extended, first to defective foods, then eg cars (*Hennington* '60)
- Then simply in tort vs makers (*Greenman* '63)
- So s402A of *Restatement 2^d Torts* ('65) PTO
- Quite small doctrinal adjustment, yet this SL remedy in tort started to catch on from '70s (broader shifts)
- Backlash began from 1980s, ‘tort reform’ (restricting especially at state levels) continued over 1990s
- Restatement 3d of PL ('98) reinstates negligence for design and warning (cf manufacturing) defects!

History – EU: more consistent

- Thalidomide disaster in 60s (no Ks)
- 1978 Pearson Report: SL for defective products (but not no-fault compo scheme like NZ)
- Derailed in UK eg by poor economy, neo-liberal Thatcher from '79, joining EU '73
- 1975 draft EU Directive, vs strong opposition
- 1985 Directive compromise (eg exclusion for ag, dev't risks - "no one could know" - defence)
- Ltd but significant effects (case law cf safety)
- Broader program: PS Directive(s), C'er Prot'n

Lovells for Commission (2003)

- Some disharmony, but not huge problem
- “General happiness with current balance” [?]



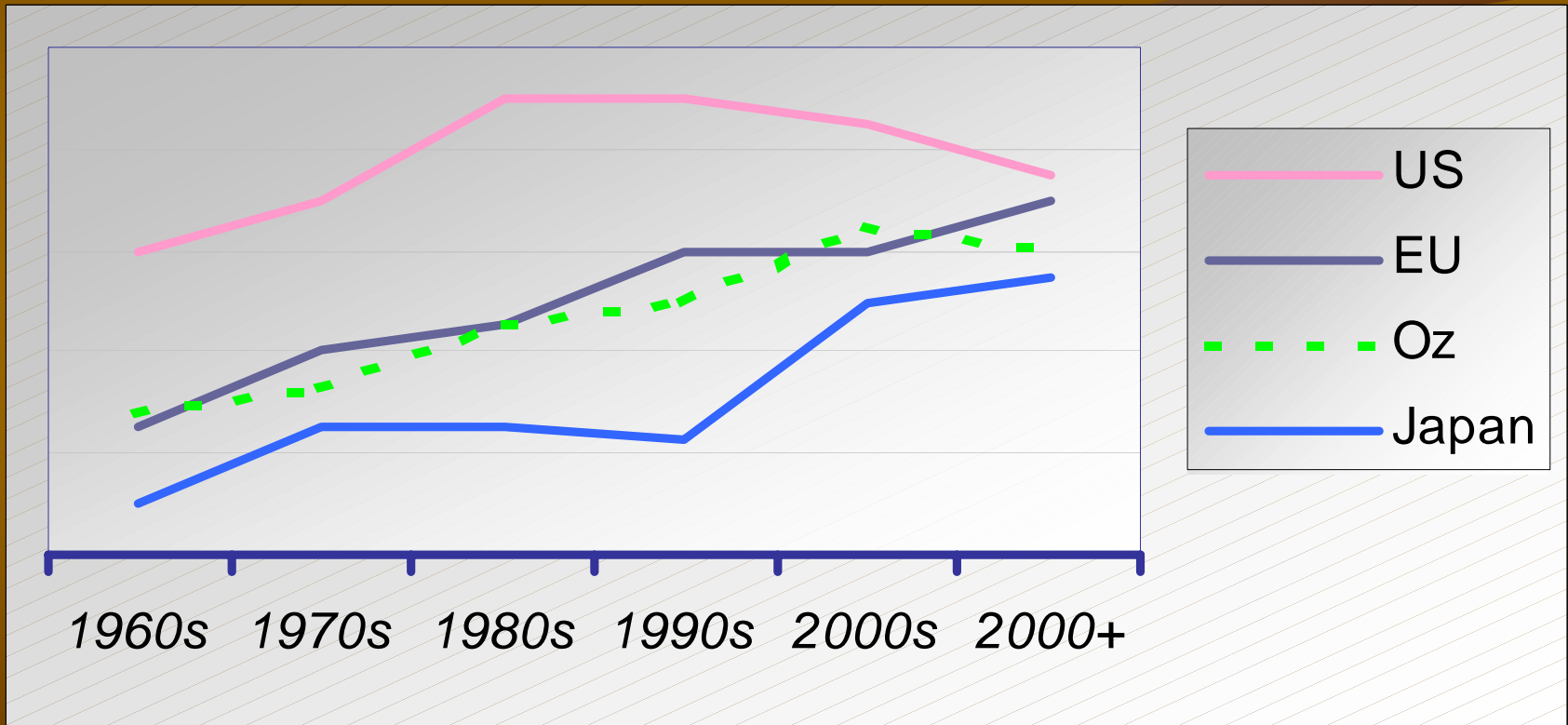
History – Australia: hybrid dev't

- No thalidomide; but some problems in case law, surveys in 80s ... and especially
- EU Directive '85 as (legal *and* political) model
- Cf '89 ALRC: "harm arising from how gds acted"
- Opposition from business (& conservative govt)
- Compromise: Part VA added to TPA in '92, based on (more pro-Consumer) variant of EU Directive
- Even more pro-Cer proposals (eg 20-year "period of repose" for toxic tort situations) lost from view
- "Tort reforms" from 2002 (beginning with NSW)

History – Japan: another hybrid

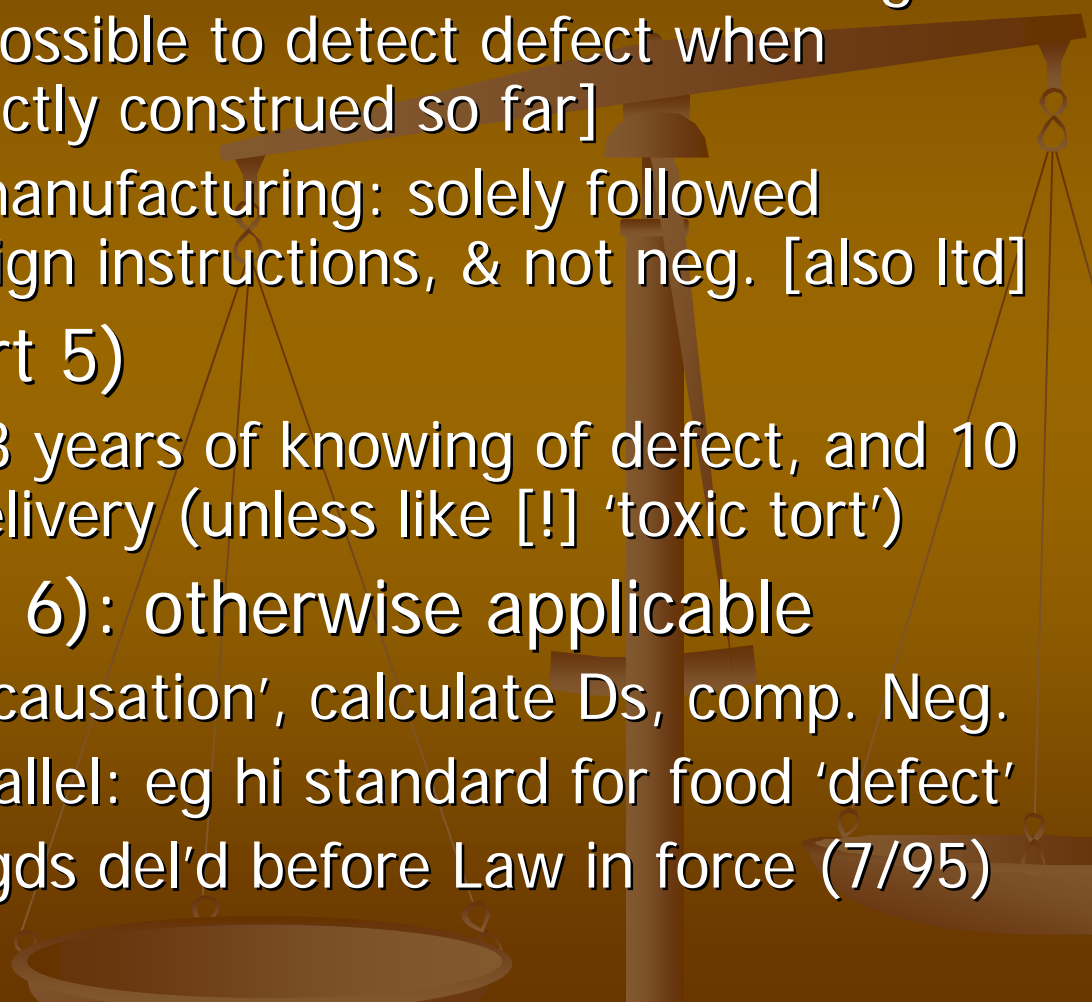
- Tort, untrammelled by “privity of contract”
- But mostly negligence (1898 Civil Code art 709)
- “Big Four” PL cases over 60s (incl Thalidomide)
- Various responses led to “still-birth” of PL in 70s:
 - Collective action & legal problems (eg autos - design)
 - Government formalism (better safety laws)
 - Bureaucratic informalism (broader Cer Protn)
 - Industry informalism (1st party insurance scheme etc)
- “Re-birth” from late 80s -> 1994 PL Law :
 - (Revived?) accidents, EU as model
 - int’l trade pressure (US, WTO), political fragment’n ’93

Summary Comparison: Pro-consumer PL?



Ch 3. Comparing Japan's PL Law [+ Book's Appendix A]

- Purpose (art 1): ltd use (except EU?)
- Defns (art 2):
 - Product: manuf'd/processed movable [broad]
 - Defects: 'safety it ought to have', eg nature, normally foreseeable manner of use, time deliv'd
 - Manufacturer: incl importer, own-brander, [!] etc
- [Strict] Liability (art 3):
 - on 'manufacturer' for D caused by 'defect' in 'product', interfering with another's life/health or [!] property; except if D only to product itself

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- Exemptions (Art 4):
 - Development risks: state of tech/sci knowledge such that impossible to detect defect when delivered [strictly construed so far]
 - Component manufacturing: solely followed another's design instructions, & not neg. [also ltd]
 - Time limits (Art 5)
 - Claim within 3 years of knowing of defect, and 10 years from delivery (unless like [!] 'toxic tort')
 - Civil Code (Art 6): otherwise applicable
 - Fill gaps: eg 'causation', calculate Ds, comp. Neg.
 - Always in parallel: eg hi standard for food 'defect'
 - Essential for gds del'd before Law in force (7/95)

Substantive law < context!

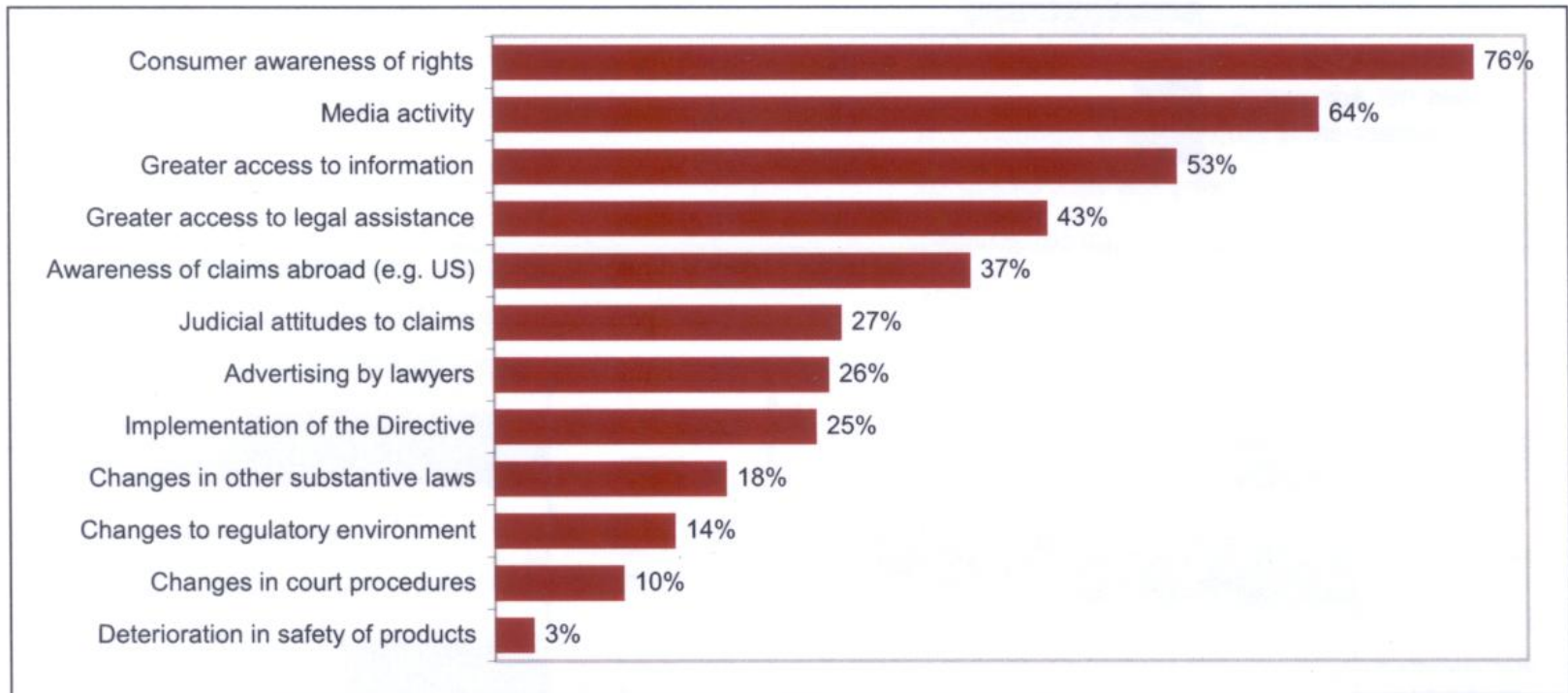
[+ Handout, Table]

- Civil procedure & civil justice system
 - Scope of damages (eg punitive? Juries? Claim lawyers fees if win?)
 - Evidence and proof (standard, re liability [eg *specific* defect?] or damages [eg unclear?]? Pre-trial discovery? Other info disclosure, eg from govt agencies?)
 - Access to courts etc
- Nature of entire legal system!

Ch 4. Multiple Effects in Japan [=EU (Lovells), Australia (+ Handout)]

- Litigation [Appendices B-D]
 - Nos of suits: slow but steady increase in Japan (faster, more than Australia, most EU?)
 - Pro-plaintiff settlements: more, esp. mid-90s
- ADR [Appendix E]
 - Industry associate based PL Centres
 - Local govt "Consumer Living Centres"
- Product safety activities by manufacturers
 - Complaints handling, compliance
 - Design/warning improvements, insurance

Figure 4 - "Major factors" which have contributed to an increase in product liability claims



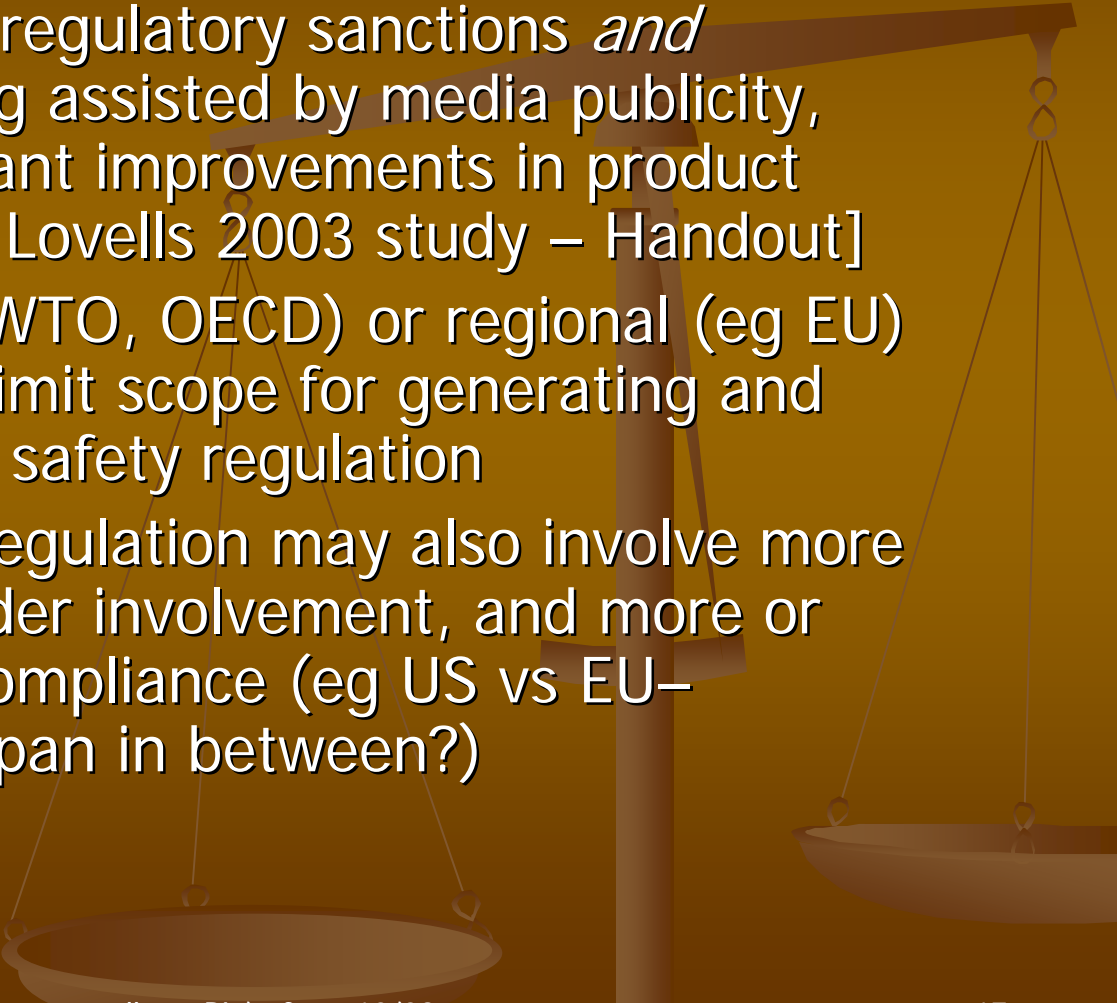
Ch. 5. Future of PL in Japan

- External and internal dynamics confirm role of consumers/law transformed, 50s ('Minamata') to 90s ('mad cows')
- However, ongoing recession etc led to 'summer of living dangerously' in '00
- Aftermath has focused on (gov't) 're-regulation', rather than (PL Law) 'reform', although scope for more or integrated 'reformulation' (esp by Cts)

[Ongoing research]

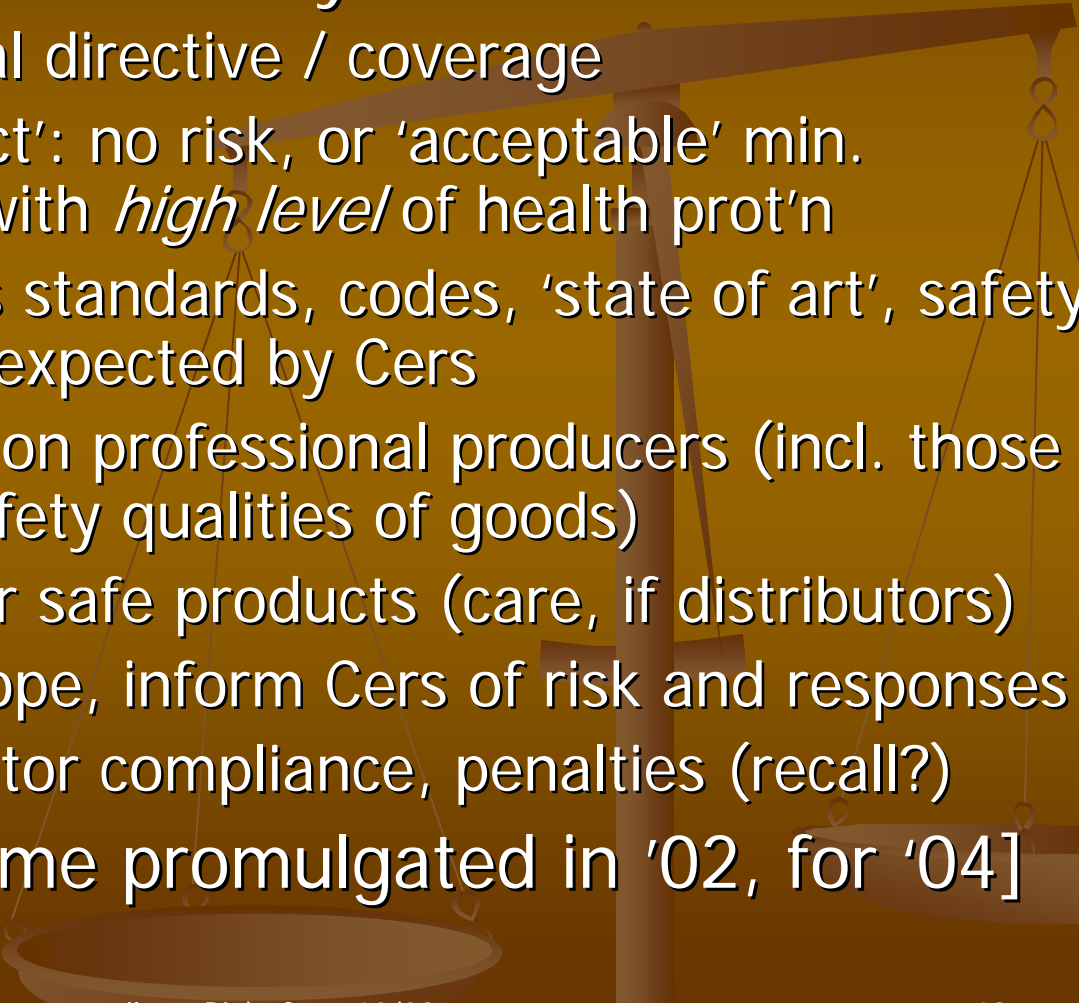
PL's Interface with regulation

- Generally:
 - PL designed as (ex post, indirect) control substituting for (ex ante, direct) public authority regulation
 - Yet can interact:
 - courts may refer to compliance with govt (or even voluntary industry) reg standards in deciding no 'defect' - but not bound to defer to them (unless mandatory govt standard – then excuse for compliant maker)
 - Non-compliance with (typically lower/minimum) govt standards usually attracts civil liability too

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- Empirical studies suggest that *combination* of (even quite ltd) regulatory sanctions *and* (effective) PL, eg assisted by media publicity, produce significant improvements in product safety [see also Lovells 2003 study – Handout]
 - Yet: global (eg WTO, OECD) or regional (eg EU) standards may limit scope for generating and enforcing public safety regulation
 - Product safety regulation may also involve more or less stakeholder involvement, and more or less voluntary compliance (eg US vs EU– Australia and Japan in between?)

Safety Regulation in the EU

- 'Vertical' EU Directives: '85 'new approach'
 - General clause
 - Essential safety requirements (annex)
 - Conformity: third-party, or *own* attestation *if* based on harmonised standards ...
 - ... then Free Movement (CE label)
 - Subject to "safeguard" clause, if risk found
- Since '95, considerable EU funding to ANEC to help consumer interest rep in CEN and other standard-setting bodies

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- 'Horizontal' Gen. Safety Directive '92
 - If no vertical directive / coverage
 - 'safe product': no risk, or 'acceptable' min. consistent with *high level* of health prot'n
 - Assessed vs standards, codes, 'state of art', safety reasonably expected by Cers
 - Obligations on professional producers (incl. those affecting safety qualities of goods)
 - SL to deliver safe products (care, if distributors)
 - If within scope, inform Cers of risk and responses
 - States monitor compliance, penalties (recall?)
 - [Stricter regime promulgated in '02, for '04]

...cf the US

- CPSC ('72) mandatory standards:
 - Incl funds to Cer bodies to develop (own or other) standards; vs ltd since '80s
- More voluntary standards:
 - Very decentralised, ltd Cer involvement
 - No link to mandatory system, as in EU
- But strong info, and post-market controls:
 - remedial action for 'substantial product hazard'
 - 'imminently hazardous consumer products'

...and cf Australia, Japan?

- Likewise, still ltd mandatory standards
- More indirect pressure from gov't on industry association standard-setters in Japan? But risk 'regulatory capture'
- Limited structured (or funded) Cer involvement in standard setting
- No general safety regulation, more industry/product-specific

[General Conclusions]

- Attraction of EU model, and similar effects, in Japan (and Asia-Pacific)
 - cf 'Americanisation' [ANJeL CLE, 7/'03]
- So broader lessons re 'glocalisation': pressures from globalisation to harmonise, vs local (regional?) variants
 - [related research in corp governance]
- Also re 'in/formalisation' tension
 - [especially arbitration, also contract]