THE MANAGEMENT OF DISPUTES: AUTOMOBILE ACCIDENT COMPENSATION IN JAPAN

TAKAO TANASE

We often ask why the Japanese are nonlitigious and look into the unique culture that may explain it. It is more appropriate to ask why Japan has maintained a complex industrialized society without much reliance on law. For the nonlitigious society does not come about spontaneously. Instead, it was made possible only by careful management. I elaborate this process of management through the detailed analysis of automobile accident compensation disputes in Japan.

I. INTRODUCTION

The Japanese are nonlitigious compared to the people in other industrialized countries. For example, by any measure, courts are used less often in Japan than in the United States. If we look at ordinary litigation in courts of general jurisdiction, in which the mobilization of legal resources is the most intense, the per capita litigation rate in Japan was 9.8 per 10,000 population in 1986, while in California it was about 10 times higher, reaching 95.4 (for total caseloads, see Table 1).[1] The difference is all the more striking if we look at the litigation rates broken down by types of cases. For example, fewer than 1 out of 100 automobile accidents (0.9) involving a death or an injury in Japan produces a litigated case; in the United States, the comparable figure is 21.5.[2] A similar disparity arises for cases in which the legality of an administrative action is contested: in Japan, only 1,003 new cases were filed in 1986 (Saiko Saibansho Jimu Sokyoku, 1986: 202, 212), while in the United States in federal courts alone the government was named as a defendant in 31,051 cases (Administrative Office of the United States

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[1] For the caseload of Japan, see Saiko Saibansho Jimu Sokyoku (1986: 6), and for population, Asahi Shimbun-sha (1988: 143). For the caseload in California, see Judicial Council of California (1988: 79), and for population, U.S. Bureau of the Census (1986: 12).

[2] For the caseload in the United States, see Kakalik and Pace (1986: 14). For the number of accidents, see U.S. Bureau of the Census (1987: 580).

Table 1. Court Mobilization by Type of Case, 1986

A. Rates for Japan and United States

	No.	Rate per 10,000
Japan	1,780,323	147.5
United States (California)	1,751,338	649.1

B. Japan

	District Courts		Summary Courts			Family Courts	
Type of Case	No.	Rate per 10,000	No.	Rate per 10,000	Type of Case	No.	Rate per 10,000
Ordinary litigation[a]	118,908	9.8	210,688	17.5	Disputed[d]	7,340	0.6
Bankruptcy	14,563	1.2	—		Nondisputed	295,664	24.5
Nonlitigation[b]	6,653	0.6	—		Mediations	87,217	7.2
Provisional attachment	50,837	4.2	15,519	1.3	Total	390,221	32.3
Auctions, executions	246,635	20.4	—				
Uncontested							
Debt collection[c]	10,875	0.9	648,800	53.7			
Mediations (civil)	1,769	0.1	64,855	5.4			
Total	450,240	37.3	939,862	77.9			

C. United States (California)

Type of Case	No.	Rate per 10,000	Type of Case	No.	Rate per 10,000
Personal injury	137,455	50.9	Small claims	537,600	199.3
Other civil complaints	119,954	44.5	Other civil	577,020	413.9
Eminent domain	1,516	0.6	Total	1,114,620	213.9
Petitions	138,452	51.3			
Family law	173,146	64.2			
Probate, guardianship	66,195	24.5			
Total	636,718	236.0			

SOURCES: *Japan*: Saiko Saibansho Jimu Sokyoku (1986): 6); Asahi Shimbunsha (1988: 143). *California*: Judicial Council of California (1988: 79); U.S. Bureau of the Census (1986: 12).

NOTE: 1986 population figuress: Japan—120,720,000; California—26,981,000.

[a] Includes family litigation (6,274 cases) and administrative litigation (697 cases) both of which are handled only in district courts.

[b] Cases dealt with by the special, more informal proceeding.

[c] Includes special proceedings for commercial papers, ex parte collections (summary courts only), and compromise cases (to confirm the out-of-court agreements, summary courts only).

[d] Family court cases are under statute divided into two types according to the extent to which the potential conflicts are involved. In disputed cases, mediations are attempted before the hearing.

Courts, 1986: 12). The data are clear, but why do the Japanese resort to courts so infrequently?

II. MODELS OF NONLITIGIOUSNESS

A. Attitude Model

The most popular explanation attributes nonlitigious behavior to a nonlitigious attitude in the mind of the Japanese people. While the explantion has many variations, Kawashima (1967: 139) has thus far given the most explicit formula. He notes, "for Japanese, the right is indeterminate, conceived as something situationally contingent. Consequently, the people are repelled by the judiciary, which takes rights as being fixed." In other words, under the conventional social order of Japan, acknowledgment of a claim depends so much on the particular relation of one party to the other that the only appropriate way to handle the claim is through negotiations, during which the complicated web of interconnecting relationships is brought out and given due consideration.

Functionally, this contingent character helps embed the ideas of "equity and solidarity" into the social relationship, whereas the concept of justice, which is blind to the very person who asserts the right, is considered a menace to the integrity of the community.[3] Therefore, the Japanese, who live in a closely knit community, naturally developed the concept of contingent rights, and concurrently abhorred the idea of legalistic justice. That the Japanese often refer to such legalistic justice as "inflexible" and its claimant as "egotistic" attests to this attitude.

Although this conventional social order is no longer found in its pure form in contemporary Japan, it still lives in the minds of the people, more as an aesthetic sense than as a straightforward ideology. Therefore, according to Kawashima, attitudinal nonlitigiousness represents an element of traditional culture carried over into modern society long after the underlying structure has changed.[4] Popular acceptance of this cultural-lag model was aided by its appearance just at the time when the vestiges of a premodern "feudalistic" order were clearly visible in all aspects of social life, and "modernization" was a national goal.

As Japan developed, however, the portrayal of Japan as clinging to her premodern order was more and more at odds both with the reality of an economically prosperous society and an emerging self-consciousness of the people. If the behavior pattern of the Japanese is different from that of westerners, it cannot be so much a manifestation of the remaining feudalistic elements as a reflec-

[3] For an analysis of how legal formality contradicts with the twin ideals of equity and solidarity, see Unger (1976: 202–9).

[4] Although Kawashima did not use the concept of the cultural lag explicitly, it is apparent from the many articles he wrote on the subject that he relied on the model. See, e.g., Kawashima (1960: 713–29).

tion of the deep-rooted sociopolitical, as well as cultural, structures unique to Japan, which have proved stable enough to survive the impact of modernization, or more positively, have enabled Japan to industrialize, if not to modernize, herself. Therefore, within the same attitude model, this shift of general perspective precipitated a search for unique properties of Japanese society which are conducive to the observed nonlitigiousness.

The search for unique-culture explanations proves elusive. Not only does the analysis of the cultural element supposedly underlying nonlitigiousness fail any vigorous scientific test, but because no macro theory, like Kawashima's modernization/time-lag theory, places the chosen cultural element into a wider theoretical framework, the whole effort is something of an ad hoc process whereby concepts are created to suit the explanation at hand. Moreover, the concept of litigiousness itself confuses the analysis, for it refers both to the innate propensity and to the observed behavior of the people. Thus, nonlitigiousness as observed behavior is easily "explained" by positing nonlitigiousness as an attitude of the people.[5] The unique-culture type of explanation is always in danger of degenerating into, and in fact often does fall into, the circular "the Japanese do not litigate because they are not litigious in nature" type of explanation.

B. Institution Model

The institution model rejects attitudinal explanations for low rates of litigation in Japan. According to this perspective, the Japanese are not nonlitigious at all, at least in the sense of loving peace and harmony and of readily sacrificing their own interests for the sake of others' well-being. In a radical departure from Kawashima, a leading proponent of the institution model, Haley (1978: 359) notes that the Japanese requlary engage in a great deal of fierce, cutthroat competition as well as many rancorous disputes not amenable to easy solutions. If the Japanese are in nature not different from other human beings, an explanation of the observed nonlitigiousness must be sought elsewhere. Citing the fact that there was more litigation in the prewar period than in the postwar period as evidence that directly contradicts the attitude model (especially its cultural-lag version), Haley offers an alternative explanation for the paucity of litigation in postwar Japan. According to his institution model, the Japanese refrain from litigation because the institutions are structured to discourage it. For example, the Japanese judiciary is clearly understaffed; the number of judges per capita population has remained low or even decreased in the postwar period. Moreover, the Japanese judiciary is ineffective in enforcing the law and its decisions (Haley, 1982a: 265). Therefore,

[5] For some efforts to overcome this weakness inherent in the attitude model, see Miyazawa (1987).

the people who would be interested in pursuing their rights in court are discouraged from doing so.

While Haley's observations about the availability and efficacy of the courts are correct and potential disputants no doubt take a utilitarian view of courts when deciding whether to litigate, we must still ask why the judiciary remains understaffed and ineffective. If judicial services do not meet the needs of the Japanese public, why has the defect not been cured? Haley answers that it is a deliberate policy of the government elite. The Japanese government intends to keep court utilization low. The court-annexed mediation, established in the 1920s and 1930s, reflects this policy. As is well documented by the remarks of government officials at the time, the government established mediation to curb the increasing assertiveness of the people and to deflect disputes away from the courts (Haley, 1982b: 125-47).[6] But why has the Japanese elite wished to establish and carry out such a policy? And why has the elite been so successful in implementing its policy? Is the elite so all powerful as to be able to force on the public what it wants? On these questions, Haley remains silent. Moreover, he seems to be too hasty in denying entirely the role that culture plays in bringing about the observed nonlitigiousness. The Japanese may not be so different in their egotistic motives, but certainly they have their own image of the good social order, which in some significant way affects the shape of institutions that channel individual behavior.

In this regard, Ramseyer (1985: 604) has offered an interesting hypothesis that while the low utilization of courts is in fact created by the ineffectiveness of the Japanese judiciary, the people attribute it erroneously to their own cultural preferences, thus perpetuating the myth of nonlitigiousness. Here, the power elite not only reaps the benefits of low court utilization—of reducing both the cost of dispute management and the risk of governmental policies challenged in court—but also gains from the very myth of nonlitigiousness. The image of a harmonious, dispute-free society which this myth embodies gives government bureaucrats the appearance of being technocratic rulers, above political strife, and hence free from active, participatory democratic controls. It is this elite's concern for legitimacy that is the key to understanding why contemporary Japanese collectively entertain the myth of nonlitigiousness despite the contradictory manifestations of their underlying individual claims-consciousness. Presumably the government elite is implicated in fostering this myth.[7]

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[6] Kawashima (1959: 55–117) also noted the deliberate policy of this prewar period to deflect disputes away from the courts. But he still placed this within the framework of the cultural-lag model in that the assumption of the new modern consciousness was thus delayed further.

[7] Upham (1987) also noted the Japanese elite's interest in nonlitigious-

C. Management Model

Although Ramseyer's model has a unique strength in acknowledging the persistence of a nonlitigious culture, while positing the institutional defect as a major determinant of low court utilization, it is still limited in that the elite seems to wield a free-handed control over the people. Clearly, the elite is not omnipotent. If an elite is to be effective in leading a society, it cannot depart too radically from the aspirations of the people. Especially in a highly developed society like Japan's, where the people enjoy the protection accorded by the legal order and where they freely express their policy preferences through various political channels, the elite's manipulation of the people's propensity to sue must be a subtle one, subtle in the sense that people must be led to feel that they themselves wish for the level of opportunity the elite has provided. In fact, to limit the supply of judicial services when an unmet demand does exist would strain the very notion of a harmonious, dispute-free society. Thus, in order to hold down court utilization while avoiding any discontent by disputants who are denied effective access to the courts, a restricted supply must be accompanied by a limited demand. The notion that the demand must be controlled leads to the management model, which I propose in this article as an alternative explanation for Japanese nonlitigiousness.

The control of demand should not be equated with its suppression, or substitution. The disputants must be provided with real alternatives to fulfill their needs and secure full satisfaction. From the very definition of what should be disputed to the provision of accessible forums for dispute resolution, the disputants must be guided toward alternative means of satisfaction.

However, as the word "alternative" implies, this involves an evaluative aspect—reckoning different things as being of equal value. Therefore, for management, the value premises of the people also must be controlled. But in contemporary Japan, compromising claims for the sake of peace and harmony does not appeal to the people, who are no longer so ready to relinquish their entitlements. To curb the demand for court utilization, a more subtle technique must be employed; that is, a differential weight must be given to the costs and benefits of utilizing judicial as opposed to alternative services. If the differential weighting is so arranged as to make the disputants "find" judicial services less efficient and alternative services more satisfactory, then the state, without any coercion, can effectively induce the people to voluntarily use fewer judicial services. In the end, when the demand is diverted to alternative services, the elite also vanishes from the fore. The people now believe that the system is created only to benefit them,

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ness, assuming the rule/judge-centered law model as inimical to the elite's retention of discretionary power.

not contrived by an ill-willed agent with a hidden agenda. Control is maximized when the people are unaware that they are controlled. When the choice becomes so natural that the disputants innocently start saying, "I will not use the court, for I do not need it," management has succeeded in controlling demand. It is the creation of this "myth of functionalism" that is the ultimate goal of dispute management.

This article demonstrates through a detailed case study of dispute settlement in Japan that management, rather than litigants' attitude or institutional barriers, provides the best explanation for why the Japanese rarely litigate. By sublimating demand and eliminating apparent agency, management recreates the nonlitigious society in a contemporary setting. Before beginning this analysis, however, two explanations are necessary, one on the operational measure of litigiousness and the other on the choice of a particular dispute for illustration.

D. Measure of Litigiousness

The most obvious measures of litigiousness are counts of the number of litigated cases per capita, or per total number of disputes. Although these measures give us a first approximation of the propensity of the people to use the courts, on a closer look, they have some inherent weaknesses. First, a large portion of the lawsuits filed are resolved before ever reaching the trial stage. Further, the extent to which judicial services are used in such pretrial stages differs significantly according to the type of civil proceedings adopted by a particular nation's judicial system. In Japan, for example, when a suit is filed, court proceedings begin immediately, and intermittent hearings ensue, usually at the rate of one hearing per month or two, with about 30 percent of the cases going the entire way to a final decision. In the United States, on the other hand, the number of cases that go on trial is much more limited, and there is a long interval between the filing of a complaint and the trial, during which the involvement of the judiciary is minimal. Thus, comparisons depend heavily on whether one measures the number of lawsuits initiated or the number of cases that reach the hearing stage (see Table 2).[8]

An even more serious problem is how to treat cases when disputants mobilize the law but not the courts. We can avoid the problem by simply defining litigiousness to exclude out-of-court settlements and by looking only at actual cases of court utilization. However, such a definition would blind us to subtle differences in the readiness of the people to assert their legal rights in extrajudi-

[8] For example, while the filing rate for civil cases in California is six times the filing rate in Japan, the trial rate in California is four times the Japanese trial rate. The difference between the filing rate and the trial rate is all the more striking for auto accidents—thirty times in the former as contrasted to three times in the latter.

Table 2. Court Utilization by Filings and by Trials

A. Japan[a]

	Total No. of Filings	Dispositions (%)				Rate of Court Utilization[b]	
		Dis-continued	Defaulted	Settled	Tried	Filing Rate	Trial Rate
All civil	118,481	18%	21%	33%	25%	9.8	2.1
Auto accidents	4,519	8	2	59	29	0.6	0.2

B. United States (California)[c]

	No. of Filings	Dispositions by Trial	Court Utilization[b]	
			Filing Rate	Trial Rate
All civil	159,441	14.1%	60.5	8.5
Auto accidents	58,332	3.5	19.1	0.7

SOURCES: *Japan*: Saiko Saibansho Jimu Sokyoku (1986: 126); Asahi Shimbun-sha (1988: 143). Sori-fu (1986: 111). *United States*: Judicial Council of California (1988: 92); U.S. Bureau of the Census (1986: 12).

[a] Data for 1986, district courts in Japan.

[b] Data for 1986: for all civil cases, number of cases per 10,000 population; for auto accidents, number of cases per 100 persons injured or killed.

[c] Data for 1986-87, California superior courts: personal injury cases and civil complaints only (family, probate, eminent domain and civil petitions omitted).

cial settlements. Disputants in some settings consciously refer to the law in reaching settlements, while disputants in other settings rarely do so. Some negotiations, especially those assisted by lawyers, are so finely attuned to what the court would have done that court utilization is said to have been preempted by such an alternative law mobilization.

Even if it is not possible to measure directly the extent to which legalistic justice is invoked in each type of dispute resolution, it is still possible to approximate a society's use of legalistic justice by measuring the resources invested in the legalistic resolutions of disputes. One indicator is the use of lawyers' services. Since a disputant must engage the services of a lawyer not only to win a court battle but also to mobilize those legal arguments that will attain the most favorable resolution legally possible in an out-of-court negotiation, the use of legal services fairly sensitively reflects the disputant's determination to use the law. To ordinary people, the critical decision is not whether to file a suit but

whether to retain a lawyer; the decision to file is often a matter of strategic choice counseled by the lawyer. In this sense, dispute management that controls litigiousness in a given society should, above all, hold down the total consumption of legal services. In this article, I consider mainly the level of lawyer involvement in dispute resolution to see how the demand for such services abates in the process of dispute management.

E. Focus on Automobile Accidents

I focus here on automobile accident compensation for two reasons. First, it is one of the most common disputes in which the public uses lawyers' services. Every year in Japan as many as 12,000 persons are killed and more than 600,000 persons are injured in automobile accidents. The majority of these accidents hold the potential for disputes between two parties regarding compensation. In addition, such disputes are mostly between strangers and often involve sizable damages. Therefore, people are likely to be less restrained in seeking redress and in getting needed legal services. Furthermore, personal injury cases are often handled on a contingency basis, thus reducing the costs to a potential plaintiff.[9] The sheer weight of legal services in automobile accident compensation should naturally precipitate the elite's intervention for the efficient management of the system. Note, however, that lawyers are sensitive to any system change that may affect adversely their continued involvement, and thus management efforts must involve political conflict.

A second reason to focus on automobile accidents is that management to scale down the use of legal services has been most successful in this area. As Japan plunged into motorization in the 1960s, personal injury cases rose sharply to reach the postwar peak of 12,624 in 1971. But various measures in the late 1960s began to undercut this upward trend and reduced litigation by two-thirds in just a decade (3,626 cases in 1981).[10] Now, less than 1 percent of total accidents end up in court,[11] and the rest are resolved in out-

[9] In Japan, according to the bar association's fee guidelines, lawyers' fees are equally split into an initial retainer fee and a contingent fee on the successful consummation of the case. However, in practice, lawyers tend to charge a smaller retainer fee to make the initial cost less burdensome to potential clients.

[10] This decrease was due in part to a drop in the number of automobile accidents. But if we take the number of lawsuits per 100 accidents involving death or bodily injuries, we get a rate of 0.7 in 1981, which is less than half of that in the peak year (1.8 in 1971). For accidents and casualties, see Sori-fu (1986: 111). For the figures before 1969, see *ibid.* (1975: 2, 4). For litigation, see, annually, Saiko Saibansho Jimu Sokyoku (e.g., 1986: 100, 102).

[11] Out of 579,190 accidents involving a bodily injury in 1986, 5,693 new cases were filed in courts. In addition, there were 5,331 cases in mediation (Saiko Saibansho Jimu Sokyoku, 1986: 104, 132, 225, 231; Sori-fu, 1987: 89). If the number of persons injured (including those killed) is used as a parameter, which was 712,330 in 1986, the litigation rate becomes still lower, 0.8 percent.

of-court negotiations, where lawyer involvement is minimal (estimated to be less than 2 percent).[12] By comparison, in the United States, 21 percent of all claims were litigated, and another 29 percent were represented by lawyers in out-of-court settlements.[13] Thus, while in the United States, except in minor injuries, people routinely bring their claims to lawyers, in Japan nearly all the injured parties handle compensation disputes themselves without the aid of lawyers. Only when they encounter extraordinary difficulty and feel that, as a very last resort, they will have to use the court, do the Japanese ask the help of lawyers. Hence, auto accident cases provide an ideal ground to test whether prudent management can explain the current state of low consumption of legal resources.

III. THE NONCONFRONTATIONAL COMPENSATION SYSTEM

To manage the disputes so that legal services are not used, or to stimulate people to say, "I will not use a lawyer (or court) for I do not need it," three interrelated measures are necessary; (1) the system must enhance the capability of the victims to prosecute the claims on their own; (2) it must simplify the law so that professional services are not needed; and (3) it must provide alternative forums in which the unresolved disputes can be settled short of full legal war. Concretely, the first measure is taken in Japan by providing extensive free legal consultation, the second, by standardizing the compensation scheme, and the third, by establishing court-annexed mediation and a special forum.

These measures are bolstered by the norm in Japanese society, which demands that the injurer take a personal responsibility for the accident. When attention is diverted from strictly legal ar-

[12] Unfortunately, there are few reliable figures on the extent of legal representation in out-of-court settlements. However, two nationwide surveys done by Japan Federation of Bar Associations provide some estimates. In one survey (in 1980), automobile accident compensation cases were found to comprise 5.6 percent of the total number of cases Japanese lawyers were then currently handling (Nihon Bengoshi Rengo-kai Bengoshi Gyomu Taisaku Iinkai, 1987: 277). If court cases are subtracted from this figure, representation by lawyers for claimants in out-of-court settlements can be estimated at 1.7 percent. Another survey on the public need for legal services (in 1985) gives a still lower figure (a reanalysis of the original data; cf. Nihon Bengoshi Rengo-kai Bengoshi Gyomu Taisaku Iinkai, 1986: 336): 164 persons (7.1 percent of a sample of 2,315) replied that they or their families were victims in traffic accidents during the last five years. Of these, only 3 (1.8 percent) consulted a lawyer. However, such consultation did not necessarily result in the retention of a lawyer. Two of the 3 said they did not pay for the consultation, and the third person filed a suit using a lawyer. Thus, the use of lawyers in out-of-court negotiations was zero for this particular sample.

[13] For bodily injury claims (excluding no-fault, first-party claims), see Hammitt (1985: 61). The ratio was still higher in New York: 40 percent litigated, and another 40 percent were represented out of court (Franklin *et al.*, 1961: 10).

guments to moral concerns, the lawyer offers less specialized authority in obtaining restitution. In the following section, I look in detail at how these techniques are used to manage the compensation disputes in Japan.

A. Legal Consultation

When legal knowledge exists as a system of abstract rules, persons extracting relevant rules from such a system and applying them to specific situations provide an indispensable service. While these services are supplied almost exclusively by private pratitioners in the United States, in Japan they are provided extensively by free legal consultations. Consequently, the disputants need not retain lawyers in Japan to obtain legal information. This massive use of legal consultation is illustrated in Table 3.

Although in sheer numbers the insurance companies and the police are the most conspicuous providers, in terms of the quality of the information provided the two most important consultation centers are the local government centers and the bar association centers. The government consultation centers provide free consultation by special traffic accident counselors (there are 361 such counselors in Japan; they are nonlawyers and most are retired governmental officials) (Sori-fu, 1988: 278). These centers are usually located at government office buildings and, in large cities, are open daily. The consultation, lasting typically 40 minutes to an hour, covers all aspects of compensation. When a complex legal issue arises, clients are referred to a lawyer of the general legal consultation center usually located in the same building.[14] The local bar association's consultation center provides consultations exclusively with lawyers, and in addition it offers mediation services in which the consulting lawyer contacts the other party on behalf of the client and tries to resolve the dispute. (In 1986, 723 cases, or 4 percent of all consultation sessions, led to mediation services, and two-thirds of these were resolved by the mediation.) In addition, the Legal Aid Society and the Traffic Accident Dispute Resolution Center together provided 3,000 consultations by lawyers. In all, these four organizations offered close to 180,000 consultations, 13 percent of which were provided by lawyers. Since lawyers are retained privately by the injured in approximately 3 percent (about 18,000 cases) of the accidents involving death or injury,[15] these spe-

[14] In Kyoto, for example, only in 2 percent of all consultation cases were clients referred to a lawyer. Kyoto City Government (1984: 1, 9).

[15] For cases concluded in 1986, plaintiffs were represented in 88 percent of litigated cases and 46 percent of mediated cases (Saiko Saibansho Jimu Sokyoku, 1986: 110, 134, 228, 234). If these percentages are multiplied by the number of filings in litigation and in mediation, respectively, and then divided by the number of bodily injury accidents (see note 11), we get an estimate of 1.3 percent. Adding to it 1.6 percent, an estimated rate of legal representation in out of court settlements (see note 12), we obtain a rough estimate of 3 percent.

Table 3. Legal Consultations on Traffic Accident Compensation Provided by Various Organizations

Organization	No.
Traffic Accident Consultation Center:	
By local governments[a]	157,653
By bar associations[b]	17,276
Legal Aid Society[b]	900
Traffic Accident Dispute Resolution Center[b]	1,930
Administrative Grievances Office	4,115
Human Relations Commission	2,388
Consultations by police offices	229,441
Consultation Centers:	
Compulsory Insurance Office	6,285
Association of Casualty Insurances	88,903
Consultation by insurance companies	449,297
Total	958,188

SOURCES: Sori-fu (1988: 279–82); *rows 3 & 4*: data on file with the author; *rows* 8, 9, & 10: Jidosha Hoken Ryoritsu Santei-kai (1987a: 9).

[a] About 2 percent of the consultations were referred to general legal consultations by lawyers.

[b] Provided by lawyers.

cialized organizations provided ten times as many consultations as did private practitioners. Lawyers working in these consultation centers provided 30 percent more consultations than did those in private legal services.

Some government bodies also give free consultations regarding automobile accidents in connection with services they regularly provide. The police also give extensive consultations. As many as 230,000 drivers or victims sought such services.[16] Moreover, insurance companies offer free consultation as a consumer service. Two quasi-public organizations in the insurance business provided 95,000 consultations, while insurance companies provided 450,000 such consultations. In total, these services offer an enormous amount of information, almost two consultations per accident, free of charge so as to meet the disputant's need for individually tailored information.

1. Function of Legal Consultations. Table 4 shows the content of consultation sessions given at different centers. Each center assumes a partly overlapping but slightly different role. Typically a police officer is the first person the victim is likely to contact concerning an accident, and thus is the person who gives overall guidance as to how to proceed in handling the accident. But the po-

[16] The Japanese police have a long tradition of assisting people in solving problems not related to law enforcement (Bayley, 1976: 87).

Table 4. Content of Consultations Based on a 1983 Survey

	Local Government	Police	Bar Associations
How to proceed with negotiations	20%	41%	22%
How to claim a compulsory insurance	26	9	5
Legal issues:			
Liability	5	9	4
Victim's fault	5	—	12
Damages	36	5	32
Other	3	—	—
Victim assistance	2	3	—
Criminal/administrative sanctions	1	6	—
Other	1	27	25
Total	100%	100%	100%

SOURCES: Kyoto City Government (1984: 6); Keisatsu-cho (1983: 74); and data on file with the author.

lice do not usually provide specific legal information. Such information is provided by both local government and bar association centers. Here, we should note that lay consultants are viewed as sufficiently competent to give an independent opinion concerning such legal issues as the liability of the parties and the proper amount of damages. Although this trust is related to the fact that the Japanese in general have great confidence in government and its officials, the standardization of compensation payments (discussed in the next section) plays an important part. Timing is also important: 45 percent of all visits to these centers take place within a month of an accident, and 65 percent within three months (Kyoto City Government, 1984: 4). So, as the authority first contacted for specific legal advice, these centers have a great deal of influence on the course the dispute will take.

There are no readily available data on the total cost of these consultation services. However, if we tentatively assume that one consultation session with a lawyer costs 5000 yen,[17] and with a nonlawyer 2,000 yen, the expenses born by public organizations and insurance companies add up to 2 billion yen, which is 0.2 percent of the total amount paid to the injured. Although we do not know exactly how much these free consultations cut the demand for private legal services, certainly they account at least partly for the relatively insignificant earnings of Japanese lawyers in representing the disputants in automobile accident cases; legal fees comprised only 2 percent of the total compensation paid to the in-

[17] That is, a standard fee for one consultation session set by the bar association (Nihon Bengoshi Rengo-kai, 1983: 194).

jured.[18] If we compare this with the U.S. figure (legal fees amounting to 47 percent of the net compensation received by the injured),[19] the savings of potential costs are enormous. Even if all the consultations are with lawyers, still their involvement is limited and their expertise is offered at a discounted price within the consultation system;[20] thus their active participation in the system hardly contributes to an overall increase in the demand for legal services.

Conceivably, however, the consultation system could act as a springboard to more intense involvement of lawyers at a later stage. An injured party informed of his legal rights at a consultation center could as a result define the dispute essentially as a legal matter and begin seeking full legal recourse by retaining counsel. In fact, to encourage this development, some local bar associations have lifted the traditional ban on taking a private case directly from a public consultation session. However, this channeling function of consultation has not yet materialized. In fact, the norm is to divert disputes away from the legal system. For example, in Osaka, where the bar association is most aggressive in promoting the program, in only 2 percent of the free legal consultations was the consulting lawyer later retained privately.[21] In a

[18] This is an estimate based on the extent of legal representation in litigation, mediation, and out-of-court settlements. Such data as the number of cases in which lawyers represented either or both parties and the amount awarded (in both litigation and mediation) were easily obtained from *Shiho Tokei Nenpo* (Saiko Saibansho Jimu Sokyoku, 1986, 1987). Less than 2 percent of representation in out-of-court settlements was distributed proportionally for each type of injury, assuming that the patterns of representation were similar in both mediation and out-of-court settlements. These numbers were multiplied by the average legal fees. For more detailed estimation, see Tanase (1981: 24–27).

[19] Based on the U.S. Department of Transportation report (Bombaugh, 1971: 229). In 1968, the injured got a net recovery of $2,059 million, while lawyers received $974 million in fees. Another estimation (as of in 1985) by Kakalik and Pace (1986: 72) yielded $3.5 billion as total legal fees, 63 percent of the net compensation paid through litigation. (These authors use another estimation: $6.1 billion as legal fees, which was 72 percent of the net compensation. Furthermore, two-thirds of the total compensation was paid without lawsuits, for which the legal fees were unknown in this study). For comparison, 2 percent legal fees in Japan means 22 billion yen in 1986, or $160 million.

[20] Moreover, in these consultation services, lawyers are at a disadvantage in competing with nonlawyers. In fact, consultation with lay consultants is still less expensive. For example, in Osaka City (in 1984), ten consultants handled 9,035 cases with an annual budget of 20.4 million yen, yielding a little over than 2,000 yen a case (Osaka City Government, 1984: 48). In a society in which lay consultants are considered as competent as lawyers, it is understandably difficult for lawyers to insist on providing costly professional services.

[21] In 1982, out of 31,589 free legal consultations, only 643 (2 percent) were directly referred to consulting lawyers as private cases (the population in Osaka was 8,326,000). For fee-charging legal consultations, the referral rate was 11 percent (581 out of 5,393 consultations). Free legal consultations are offered mostly by local governments at their office buildings. The governments are reluctant to allow the consultation lawyer to take a case directly, because they want to avoid becoming involved in potential disputes between the lawyer and the client over the quality or cost of legal services provided. This is one

society in which lawyers do not yet handle a significant portion of such traffic accident disputes, the extensive legal consultation system fills the information gap and thus reinforces the tendency of people to do without lawyers. As a survey on pre- and post-consultation behavior reveals (Table 5), one-third of disputants who visited one of the bar association's fee-charging, general legal consultations had already received free legal consultations (on average 1.5 sessions per person). After the consultation, 30 percent planned to or did attend yet another consultation session. Apparently disputants were not inclined to seek full legal recourse merely on receiving advice about their legal rights.[22] Rather, disputants returned to consultation at successive stages of their negotiations, or visited several institutions to shop around for information to enhance their bargaining positions or, more modestly, to guard against losing entitlements at the hands of a shrewd opponent. Note in Table 5 that many of these disputants themselves read law books. They seemed to view legal consultations essentially as a means enabling them to resolve the dispute by themselves.

2. Consensual Nature of Legal Consultations. Because consultations provide information that is consensual in nature, they contribute to the diverting function of the system. Generally speaking, two types of legal information for the pursuit of rights can be provided: partisan and consensual. The former attempts to provide a person with legal weapons to further his interests, while the latter attempts to promote agreement between the parties by providing both with the same legal information. When the information assumes a strong partisan character, the assertions of one party are more likely to conflict with those of the other and an intervening third party may be requested to adjudicate the conflicting claims. On the other hand, when the information is less partisan and more consensual, it moves the parties toward a middle ground and thus facilitates autonomous agreement.[23]

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reason why referrals from government-connected consultations are much fewer than those from fee-charging consultation services provided by the bar association. Besides, a disputant who decides to consult a lawyer by paying a fee, however small, is said to have already determined to engage in full legal recourse (Takahashi, 1983: 9). For the population of Osaka, see Asahi Shimbun-sha (1984: 37).

[22] Still, the percentage of disputants who proceeded to litigation seems to be much higher than the proportion of average disputants taking advantage of a free consultation. This can be explained by the selective use of fee-charging consultation services. Such services account for only a fraction of the total number of consultation sessions. In 1982, e.g., the three bar associations in Tokyo held only 94 fee-charging consultation sessions per month, while the Tokyo Metropolitan Government held on average 3,755 free legal consultations per month (Dai-ni Tokyo Bengoshi-kai Horitsu Sodan Senta, 1979: 9, 54–57).

[23] Although predictable court decisions are necessary to promote out-of-court settlements (Ramseyer, 1988), a means to disseminate the information is also important.

Table 5. Behavior Before and After a Bar Association Fee-Charging Consultation Session

A. All Consultations

Pre-consultation		Post-consultation	
Contact lawyers	14%	Litigated	15%
Free consultations (see part B)	35	Settled	26
Other professionals	14	Still in progress: negotiating own	16
Influential persons	4	Planned to or had another consultation	30
Friends, relatives	29	Did nothing	14
Read law books	36		
Did not consult	11		

B. Free Consultations

Consultation Provided by	Percent
Local government	87%
Bar associations	24
Traffic Accident Dispute Resolution Center	2
Police	8
Insurance, bank	12
Court	6
Other	10

SOURCE: Dai-ni Tokyo Bengoshi-kai Horitsu Sodan Senta (1979: 15–17).

NOTE: Based on survey of persons who had fee-charging consultations in an office of the Dai-ni Tokyo Bar Association in 1978. Since a person may have contacted more than one organization or person, except for the postconsultation data, the totals exceed 100 percent.

The consultation in automobile accident compensation has a consensual character in a double sense. First, since most consultations are provided by the government or insurance companies, they inevitably reflect the bias of their providers against legal action. As nonlawyers committed to the efficient handling of claims, government officials and insurance agents often express the view that lawyers unnecessarily complicate the case and, for the victim's sake, are to be dispensed with. But more important, the very nature of free consultations predisposes them to assume the consensual character. Since the consultant cannot do an independent investigation and relies entirely on information provided by a party, he naturally becomes cautious in giving legal advice too aggressively. Even if the consultant is a lawyer and does recommend aggressive legal action, he cannot provide close follow-up. The burden to put the legal strategy into effect falls on the lay party,

and thus the consultation counselor is discouraged from becoming a true partisan advocate. As a result, the consultation center, whether government or bar association, tends to provide consensual information to all parties, the injured and the injuring alike, and thus promotes consensual solutions among the parties.

Yet consensual consultation cannot work effectively unless the whole compensation system is constructed to keep partisan conflicts to a minimum. Otherwise, the information meant to provide a common legal framework would simply be discarded by disputants as being ineffective for their legal fights or would encourage them to pick only opportunistically favorable bits of information, lessening the integrity of negotiations. Therefore, we should expect the proliferation of consultation services in Japan as a way of managing disputes to be complemented by an effort to create a nonconfrontational compensation system.

B. Standardization

At the heart of the nonconfrontational system is standardized compensation, which, because of its simplicity and accessibility to the wider public, reduces the legal knowledge required to resolve compensation disputes. Thus, it neatly fits with the consultation system, avoiding the need to educate the people in the technicalities of the law.

1. Compulsory Insurance. Standardized compensation has come to Japan with nationwide compulsory insurance, which pays a overwhelmingly large percentage of overall compensation. This insurance, which every automobile owner must carry, covers up to 25 million yen ($180,000) for death or injury resulting in serious disability and up to 1.2 million yen ($8,600) for less serious injuries (Jidosha Hoken Ryoritsu Santei-kai, 1986: 78).[24] Amounting to 748 billion yen (5.3 billion dollars) a year in all, compulsory insurance accounts for 69 percent of the total compensation paid to automobile accident victims (1.1 trillon yen) (*ibid.*, pp. 99, 107). Although this insurance is liability insurance, in practice it closely resembles no-fault insurance in that the confrontation between the injured and the insurance company that inheres in ordinary liability insurance is conspicuously absent here.

The standards set for the assessment of damages by insurance companies are clearly defined and uniformly applied nationwide.[25] When fundamental data such as detailed accounts of medical expenses and the age and annual income of the injured party have

[24] I used 140 yen/dollar as the yen-dollar exchange rate.

[25] The standards are published officially as *Jidosha Songai-baisho Sekinin-hoken Songai Satei Yoko* (Guidance for Assessing Damages in Compulsory Automobile Liability Insurance). They are cited in many books, e.g., Nichibenren Kotsu-jiko Sodan Senta (1985: 85).

been collected, the amount of compensation, including damages for pain and suffering, is automatically calculated (see Appendix 1).

Furthermore, some precautionary measures are taken to handle any remaining controversial points. For instance, as to the liability of a driver, a very strict policy is taken. To absolve himself of liability, a driver must prove not only that he was paying due care to avoid an accident but also that he was strictly conforming to all traffic rules. Furthermore, while under Japanese tort law the degree of a victim's own negligence is calculated to offset the compensation he will receive, this comparative negligence rule is applied only sparingly. Under current practices, only if the victim's own fault is more than 70 percent is his fault considered an offsetting factor at all, and if it is, he receives only a 20 percent reduction. Altogether, less than 1 percent of the cases fall within this category. Thus, by tipping the liability scale in favor of the injured party, the compulsory insurance in Japan comes close to no-fault insurance (for example, in 1986, compensation was paid for as many as 80 percent of all persons who died in traffic accidents) (Jidosha Hoken Ryoritsu Santei-kai, 1987a: 17, 22-32).[26] From the management perspective, potential disputes are avoided by providing generous compensation to injured parties.

At the same time, documentation used to substantiate a claim must meet strict criteria. For example, only income authenticated by a copy of the person's tax returns or expenses clearly accounted for by medical receipts are taken into account. Although this places a strict burden of proof on the injured party and may create hardships in some cases, disputes are certainly minimized.

The elimination of disputes in insurance payment is also manifested in the peculiar place insurance companies occupy within the overall compensation system. An insurance company is, in the eyes of the injured party, not so much an adversary as an agent.[27] The insurance business has lost much of its private, profit-seeking nature and has been transformed into a quasi-official administrative organ. While insurance is sold through private companies, which are then individually responsible for payment, an independent organization assesses damages, and losses and profits are spread evenly among the insurance companies. In the case of compulsory insurance, all claims against individual companies must be processed first by the investigation office,[28] which then recom-

[26] In Michigan (in 1958), of those who suffered serious injuries in auto accidents, only 55 percent obtained settlements (Conard *et al.*, 1964: 182).

[27] This is the reason why insurance companies can provide such an extensive consultation service (comprising 57 percent of all consultations done in Japan). See Table 3.

[28] The investigation office has one central office, 68 branch offices, and approximately 2,300 staff members. They handled 1,014,586 claims in 1986, 92.5 percent of which were disposed of in one month, and 99 percent in three months. However, we must not overestimate their efficiency, for 60 percent of the claims in which the injurer carries voluntary insurance are first dealt with

mends to the companies the amount to be paid. Thus, individual companies lack discretion to negotiate compulsory compensation awards. In addition, the government holds 60 percent of all policy coverage through reinsurance, which further diminishes the private nature of the insurance. Although the purpose of reinsurance is presumably to even out losses among insurance companies in exchange for the compulsory underwriting of even high risk drivers under the same policy and premium, it also diffuses compensation disputes between claimants and individual insurance companies into the overall compensation system.[29] If an injured party wishes to fight individually for higher compensation, he must be prepared to challenge the system itself.

2. Optional Insurance. In Japan, through the standardized, quasi-administrative system, nearly three quarters of all compensation is paid routinely without incurring any serious disputes. This alone limits lawyers' involvement in automobile accident cases. In addition, the basic standardization techniques are also applied when optional insurance is involved, which further reduces the need for legal services. The paucity of compensation paid by optional insurance, which pays only that portion of assessed damages which exceeds the limits of coverage under compulsory insurance, is illustrated in Table 6. For example, while a death in a fatal accident is expected to be compensated, on the average, 27 million yen ($194,000), 70 percent of this amount is paid under compulsory insurance through its strictly standardized system, and thus any potential dispute with the insurance company is limited to the excess portion of 8 million yen. Note, further, that only 36 percent of the beneficiaries of compulsory insurance ever recover under optional insurance (Sori-fu, 1988: 224-29). The effect of this containment of potential disputes is more strongly felt in the case of minor injuries. In contrast to the 908,000 claims paid under compulsory insurance, only 313,000 of the injured in automobile accidents received any compensation from optional insurance, and over 70 percent of them got less than 500,000 yen ($3,600), an amount which would not encourage any lawyer to take the case.[30]

Furthermore, an insurance company which pays for the excess portion through optional insurance must avoid an assessment that is out of line with the compulsory insurance assessment. Other-

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by the claims-adjusting officer in the private insurance company concerned, with the amounts involved later being recovered internally from compulsory insurance (Jidosha Hoken Ryoritsu Santei-kai, 1987a: 22, 134–35).

[29] Further, the remaining 40 percent of premiums are also pooled so that loss is diffused among many insurance companies. And through the determination of insurance rates and premiums for reinsurance, profits are controlled to achieve a "no loss-no profit" level.

[30] Close to half (49 percent) the payments were for less than 100,000 yen ($720), and only 7 percent of all payments were 3,000,000 yen ($21,600) or more (Jidosha Hoken Ryoritsu Santei-kai, 1987: 77).

Table 6. Insurance Payments by Type of Injury, 1986

	Compulsory Insurance	Voluntary Insurance
Death:		
Cases	10,531	3,753
Per case payment (in 1,000's of yen)	19,350	8,080[a]
Injury:		
Cases	907,707	312,678
Per case payment (in 1,000's of yen)	650	640
Total payment (in billions of yen)	790[b]	305

[a] That is, the relative of a deceased who also recovered from optional insurance (3,753 cases) got a total of 27,430,000 yen on average (19,350,000 + 8,080,000).

[b] In addition, from the reinsurance premium, the government paid 3.7 billion yen for victims of hit-and-run drivers as well as for victims involved in accidents with uninsured motorists.

wise, a dispute may arise with the company handling the compulsory insurance over the assumption of losses. Therefore, the insurance company generally has a strong incentive to apply the standardization scheme utilized in compulsory insurance to the optional insurance also. In practice, if a driver has an optional insurance policy (about 60 percent of all drivers), the insurance company, on behalf of the driver, directly negotiates with the injured party and later reclaims internally from the overall compulsory insurance system the amount to be borne by compulsory insurance. So, naturally, the insurance company tries to keep in line with the assessment made under the compulsory insurance system so that this internal reclaiming process will go smoothly.

The fact that compulsory insurance is sold as private insurance by the same companies that sell optional insurance makes this transfer all the easier. With this identical representation in mind, the claimant generally regards the insurance company not so much as an opponent with its own interest in keeping the assessment as low as possible, but rather as a third party that dispenses justice while maintaining a neutral stance toward the injured and the injuring parties alike. In other words, the private, interested-party character of insurance companies is effectively checked by their transformation under this quasi-public system. This transformation is precipitated by close governmental supervision over the entire insurance industry which, on the one hand, restrains companies from taking unfair advantage of weak claimants, and on the other, enables the company to diffuse potential disputes into the system as a whole. This quasi-public nature can be no more clearly revealed than by the common expression that an injured person gets compensation by "following the instructions" of

the insurance company. It is no wonder people feel this way if the information obtained independently from legal consultation is identical to that given by insurance companies.

3. Discretion and Containment of Contentiousness. Optional insurance, however, does not always produce the idyllic rapport described above. Unlike compulsory insurance, which is meant, as a matter of government policy, to provide only basic protection to injured parties, optional insurance must cover the remaining compensation for the injured party, and thus must take into consideration potentially conflicting issues.

As a result of this expanded scope of concern, the standards used to set the amount of compensation are relaxed. Although, as in the case of compulsory insurance, the nationwide uniform guideline approved by the Ministry of Finance is used as the payment policy for companies regarding voluntary insurance, it is not legally binding on the parties, and leaves room for further adjustment. Phrases like "to pay the amount which is socially acceptable" or "to take into consideration the trend of judicial decisions" are often added in the payment standards here. Take, for example, a person who has suffered a permanent injury and has thus lost some ability to work. Under compulsory insurance, a set percentage of work-ability loss, which is set forth in a table (classifying first the type of injury into twelve categories and then giving each type a definite figure for work-ability loss) is uniformly applied. Under optional insurance, using the same table, the determination of lost ability is made by taking into consideration not only the type of injury but also such factors as the seriousness of a particular injury, the age, sex, and occupation of the injured, and the actual decrease in income.[31]

Such discretion is not only inevitable in the case of optional insurance, which covers total liabilities mandated by tort law, but also indispensable as a safety valve for the rigidity of the standardized scheme itself. For example, it may be argued that if two persons each have lost an arm, justice requires paying them the same amount of consolation money for their losses. Alternatively, it may be argued that if two persons differ in the extent of the particular worth of the arm, justice requires that this difference be reflected in the amounts paid to them. Standardized compensation in Japan assumes that the first version of justice, namely, that two similarly injured persons should receive the same amount of compensation, resonates more with the equitable sense of the Japanese than the alternative version. Moreover, to the Japanese, whose idea of fairness means above all "fair share" rather than "fair play" (Vogel, 1979: 117-18), individualized treatment smacks of ar-

[31] The guidelines for both compulsory insurance and voluntary insurance are reproduced in the guidebook published by the three Tokyo bar associations (Tokyo San Bengoshi-kai Kotsu-jiko Shori Iinkai, 1986: 91).

bitrariness, for the resulting award rests with the disputant's ability to assert and prove the merits of his case as well as with the intuitive determination of the judge (or jurors) concerning the monetary value of the individual's sufferings. The Japanese would view the resulting irregularity of compensation as a sign of the inherent weakness of the system, rather than as the inevitable price of dispensing justice properly.

It is undeniable, however, that pain and suffering do vary according to the individual involved and the particular circumstances of the accident. Thus, if standardized compensation is followed too closely, it may on occasion conflict with the public's sense of justice. Furthermore, strains on the system may arise if obstinate claimants try to obtain excess payments alleging special circumstances. A certain leeway to pay the so-called nuisance value (Ross, 1970: 204) forestalls unnecessary contention, thus lowering transactions costs.

On the other hand, if the public perceives that discretion is widely exercised, injured parties will be stimulated to seek higher settlement awards, and the very effort to standardize compensation awards in order to contain potential contentiousness will come to naught. To avoid this, two related measures are required. First, the court itself must endorse standardized compensation; otherwise, court decisions will constantly disturb standardization efforts carried out by the government and insurance companies. Second, the injured must be discouraged from attempting to profit from possible discretion, for contentiousness depends in large part on the perception that aggressiveness will produce a sufficient payoff.

In Japan, the standardization of court awards has been pushed to the limit. In fact, the courts took the initiative in standardizing traffic accident compensation awards. In 1962, in response to a drastic increase in traffic accidents, a Traffic Section was set up within the Tokyo District Court. The section developed a unified policy for handling traffic accident cases, standardizing the amounts awarded by that court.[32] Further, judges in the section communicated the standards to other courts by writing articles as well as through the usual channel of case reporting. As a result, judicial handling of traffic accident cases was swiftly standardized throughout the country.[33] The Traffic Section consisting of one presiding judge and several associate judges acts as a unit with one unified, guiding policy. In the background, the central judicial ad-

[32] Concerning the establishment and early practice of the Traffic Section, see Traffic Section of the Tokyo District Court (1964: 6).

[33] Judicial leadership in standardizing the compensation law was most apparent in the 1960s. Having completed the groundwork, however, the judiciary withdrew. Aware of the criticism that by announcing in advance the standards to be applied in court the judiciary had assumed a quasi-legislative role, the judges stopped publishing the standards directly. Instead, they now hold conferences regularly with the bar associations, which in turn edit and publish their own standards (Fujiwara and Hosoi, 1988: 38).

ministration (the Supreme Court Secretariat and the Directorate of Tokyo District Court) acted as the stage manager of this standardization, by establishing the Traffic Section and by sending to it for disposition all traffic accident cases and also by subtly approving the court's policy. Moreover, career judges themselves, who are bureaucratically organized, tend to value uniform treatment more than individualized treatment. The pursuit of individualized justice would, of necessity, encourage attention to the individual character of the presiding judge, an outcome these judges would not be prepared to accept. Thus, the judiciary and the government form a natural pair in bringing about standardization, which illustrates of the maxim that the dispute management requires a unified, concerted effort of the societal elites.

This subtle coordination is further manifested in the effort to make the inevitable discretion in payment as invisible as possible. Here such a crude measure as withholding information from potential litigants does not suffice. It would be far more effective to design a compensation system in which it is difficult to take advantage of existing discretion, and induce the people to believe in the uniformity of standard payments. That is, even if an injured party learns of such discretion and decides to exploit it, the system is so organized as to make the party's opportunistic behavior to press a case and to contend through the courts very burdensome. At the same time the system enables such a party, without a lawyer, to recover in out-of-court negotiation a rough approximation of what he would have obtained in court. As individual parties are thus discouraged from exhausting the possibilities of discretionary benefits, the system as a whole in effect eliminates discretion.

4. Disposition of Factual Disputes. Along with the relaxation of standards, the indeterminacy of the facts is another explosive factor in optional insurance which may lead to an increase in contentiousness. Three schemes are used to minimize the potential factual disputes.

The first effort is to give special weight to the police report of the accident. Under the Road Traffic Act (*Doro Kotsu Ho*, art. 72) the parties to an accident, even a minor one involving only property damage, are under a duty to report the accident to the police. If the accident is not reported to the police, the insurance company may refuse to pay compensation. This reporting obligation is well known to Japanese drivers and is widely obeyed. Ordinarily, when such a report is made, several policemen specializing in traffic accidents immediately come to the scene of the accident, conduct a detailed investigation, record the testimony of the parties involved, and report on their findings. This reporting system greatly reduces contention concerning the facts of a case, for the police report is accorded such weight that the facts as recorded are hardly ever challenged later in court. Indeed, because the parties and the

police, and often the witnesses as well, consult at the scene of the accident as soon as possible, and the police adjust differences in factual assertions of the parties and hammer out a consensual story as to what happened to which the parties agree and formally endorse by signing, it is very difficult for the parties later to refute the facts recorded in the police report.

Factual disputes are also avoided by standardizing the offset ratio used to allocate comparative negligence. Since there is no objective way to assess exactly the level of negligence of each party, in practice the determination of the comparative negligence is simply entrusted to the arbiter, a procedure not conducive to the containment of contentiousness. To handle the problem, the Tokyo District Court's Traffic Section adopted a standardized classification system in which accidents are classified into a manageable number of patterns using only the facts apparent in the police accident report; each pattern is assigned, in a sense arbitrarily, a set percentage for the negligence of each party. This classification scheme has been modified somewhat since first introduced, and is now used in all courts in Japan (see Appendix 2).

The third scheme set up to contain contentiousness deals with the practice of bill padding employed by some injured parties. The continuation of unnecessary medical treatment not only inflates medical bills but also results in excessive payments for matters like work missed and consolation money, since under standardized compensation the calculation of such awards is mechanically linked to the period over which medical treatment is received. Therefore, insurance companies are interested in contesting such claims. However, to contest an injured party's claim endorsed by a physician, however dubious the medical judgment in a particular case, is at odds with the whole effort of objectifying the dispute, for under the system whereby documentation is to be given great weight for efficiency, the opinions of the police and physicians must play a central role in fact finding. Thus, rather than contest the claim on an individual basis, a systemic approach to forestall possible abuses is adopted. Insurance companies, keeping in close contact with the central office for compulsory insurance, regularly refer suspicious cases to a nationwide investigating network. The Compulsory Insurance Investigative Bureau engages physicians from among the larger national hospitals as consultants (47 physicians) and designates authorized hospitals to carry out reexaminations (211 hospitals nationwide). On request of an insurance company, these physicians and hospitals are commissioned in dubious cases to give an expert opinion on the physical condition of an injured party. Moreover, because it processes practically all personal injury cases occurring in Japan, the bureau also investigates on its own and gives informal guidance to hospitals that are suspected, based on statistics, of providing excessive medical treatment ("excessive" in the sense of charging statistically significantly larger

fees for a given type of accident than the average hospital does). Further, the bureau regularly consults with medical associations to request that internal controls be applied to such hospitals. Currently the bureau is working out a plan with the Japan Medical Association to standardize the medical fees charged to the injured in traffic accidents (Jidosha Hoken Ryoritsu Santei-kai, 1987a: 32-37).[34]

C. *Nonjudicial Forum*

In spite of these efforts, some claims do erupt into full-fledged disputes. But even in these cases, a lawsuit is rarely instituted or a lawyer called in, for there is another buffer. Extrajudicial machinery often settles the dispute before it escalates into a full-scale legal war.

1. Court-annexed Mediation. The most important extrajudicial machinery is the court-annexed mediation (*chotei*). At its peak in 1971, 16,396 disputes were submitted to it; and in 1986, 5,374 were submitted, accounting for 0.9 percent of the total number of automobile accident cases. Lawyer participation in mediation has increased in recent years to about 46 percent for plaintiffs and 23 percent for defendants. Still, in most cases, the parties are not represented and mediation is used by parties who have attempted in vain to settle the matter of compensation by themselves, and continue to try to resolve it without resorting to litigation or to lawyers.

The advantages for claimants of resorting to mediation rather than litigation are indicated in Table 7. On the average, it takes 6 months to conclude a case by mediation, in contrast to 14 months for litigation. Furthermore, since a lawyer's average fee is less in a mediation case, more than half of the mediation claimants are not represented by a lawyer, and the amount claimed as compensation is also smaller in mediation, the total costs borne by a disputant in mediation are one-seventh those of litigation. But mediation carries its own costs—the risk of not being able to reach a settlement and the likelihood of compromising a legitimate claim for the sake of settlement. These risks are reflected in two measures: the settlement/win ratio (the percentage of cases settled or found for plaintiff), and the recovery ratio (the amount awarded divided by the amount claimed). Here mediation naturally trails behind litigation. Moreover, in every type of injury the amount awarded in litigation is higher than that awarded in mediation. It is difficult, however, to determine whether these costs are balanced by the greater efficiency of mediation. If we consider the interest that would accrue on a mediation award (between the time of filing and

[34] See also the article written by an officer in the central office of compulsory insurance (Ito, 1985: 52–58).

Table 7. Comparative Merits of Litigation and Mediation

	Litigation	Mediation
Duration (months)	14	6
Fees (in 1,000's of yen):		
Filing fee	80	20
Lawyers' fee:		
All cases	3,110	480
Represented cases	3,470	1,150
Settle/win ratio	81%	60%
Recovery ratio	89%	82%
Amount claimed (1,000's of yen):		
All cases	15,610	4,180
Represented cases	17,370	7,680
Amount awarded (1,000's of yen):		
All cases	NA	3,880
Death	35,660	21,590
Injury:		
Disability	12,280	5,740
No disability	2,360	1,180

NOTE: These data are taken mostly from Saiko Saibansho Jimu Sokyoku (1986, 1987). Lawyers' fees are estimated to be 20 percent of the amount claimed for a litigated case and 15 percent for a case involving mediation. The amounts awarded in litigation, broken down by type of injury, are given in Jidosha Hoken Ryoritsu Santei-kai (1986: 61–62).

that of settlement in litigation) as well as the difference in costs (court costs plus lawyers' fees), the difference in awards between litigation and mediation decreases. If mediation is pursued without the help of lawyers, the financial advantage of litigation, except in serious injury cases, almost disappears. In such cases when an injury involves permanent disability, aggressive use of the law produces a higher settlement because of the uncertainty involved, while in the rest of the cases, mediation pursued by the claimant himself produces as satisfactory a result as litigation.

2. Traffic Accident Dispute Resolution Center. An additional institution, the Traffic Accident Dispute Resolution Center, deals exclusively with automobile accident disputes in Japan and offers mediation outside the official court setting. It was first established in 1974 as a nonprofit corporation, financed by investment profits from compulsory insurance. It now has eight branch offices in major cities. As it is a new, private institution, it lacks to some degree the authority and acceptance by the public that court-annexed mediation enjoys. However, by tactful management, and by assuming a quasi-public character, it has gained a strong foothold within the automobile accident compensation system. Annually more than 4,000 disputes are brought before the center (4,166 cases in 1986),

and approximately 40 percent of them are settled there.[35] Although it focuses on mediation, the center is unique in that it incorporates elements of legal consultation and of adjudication in order to cater to individual needs as well as to facilitate a settlement.

In about two-thirds of the cases, serious efforts are not made by center consultation lawyers to settle disputes, because the time is not ripe for conciliation (e.g., the injured party is still in the hospital, or substantial negotiation has not yet taken place with the other party) or because the center was visited only to obtain advice on how to proceed with a claim or to get an objective, third-party estimate of damages. The center's ability to offer such consultation services nonetheless contributes to its overall effectiveness by enabling it to become involved in diverse cases at early stages. In that way the still relatively weak center can carefully cultivate a clientele among the general public, as well as acquire cases for its mediation services.

The center is unique in furnishing adjudicatory services. In difficult cases in which the parties cannot reach agreement even with the help of a lawyer-mediator, the center refers the case to adjudication by its own panel of legal experts. For example, in 1981, mediation was attempted in 1,181 cases (37 percent of the new cases), out of which 751 cases (64 percent) reached agreement (typically involving multiple sessions, an average of 4.9 sessions per settled case, before an agreement was reached). In addition, 91 cases (8 percent) were referred to adjudication.[36] Although the judgment rendered by the center's panel is not legally binding, it is regularly honored by insurance companies as a matter of courtesy. Furthermore, claimants very seldom challenge decisions, for the decision rendered by the tripartite panel of a retired judge, a lawyer, and a legal scholar seems to have, at least in the eyes of the lay disputants, the authenticity of a "correct" legal decision, and hence to be impervious to lay challenge. In fact, this aura of authenticity is the very policy of the center. In order to reproduce a judicial decision as accurately as possible, the center not only tries to apply legal standards meticulously but also to update its judgment standard by systematically collecting judicial decisions and holding periodic conferences with judges working in the traffic section of the courts. As this effort to simulate a judicial decision is completed, any net gain to be derived from full-scale litigation diminishes rapidly so that an incentive for pursuing formal litigation is lost. Through this center injured parties can obtain at low

[35] For cases up to 1982, see Matsushiro (1984: 515). The later cases are on file with the author.

[36] The number of cases settled as well as those referred to adjudication has increased since then. In 1986, of 4,166 new cases, 1,671 (40 percent) were successfully settled by mediators, and another 202 cases (5 percent) were adjudicated before the panel.

cost (i.e., without a lawyer) the benefits which the judiciary would otherwise be called on to provide at a higher cost.

Thus, in Japan, not only is confrontation between injured parties and insurance companies kept to a minimum, but the occasional confrontation that arises between the parties themselves is mostly absorbed by these extrajudicial institutions, leaving only a few cases to be resolved by full legal measures.

D. Moral Confrontation

Paradoxically, however, there remains deep-rooted confrontation between the injured party and the injurer over the moral responsibility for the accident (i.e., the injured trying to hold the injurer morally accountable for the accident), which further biases the parties against bringing lawyers into the dispute.

This unique type of confrontation comes from the sense of justice or moral reasoning held by the Japanese. In Japan, where the maintenance of good social relationship is given the highest consideration, "giving trouble to others" is in itself considered a serious offense. Therefore, a person who has inconvenienced another, for whatever reason, by his own fault or not, is obliged to fulfill his moral duty to make up for the inconvenience independent of his legal obligation to do so. This duty, above all, requires the inconveniencing party to repeatedly express his sincere apologies for the inconvenience.[37] In automobile accidents, this necessity to apologize is best represented by the frequent use of the word "sincerity." For example, if an injurer takes an "insincere" attitude by failing to inquire after the injured party at the hospital or fails to offer condolences to the deceased's relatives, the injured party or his relatives will harden their attitude, and negotiations will become very difficult or may even deadlock.

In this respect, Japan contrasts sharply with the United States, where the insurance company literally acts as a proxy for the injurer in attempting to reach a settlement. Since insurance companies in the United States take charge of handling all the injurer's responsibility, including not only liability for compensation but also the responsibility of carrying out negotiations, the injurer usually remains completely uninvolved in the dispute over compensation. It is not at all unusual for the injurer to be unaware of the final outcome of his own dispute (Conard *et al.*, 1964: 297).[38] The injured party himself regards the dispute purely as a matter of monetary compensation, and while allowing the injurer to remain completely uninvolved in the negotiations, he entrusts his

[37] In Japan, the apology means less an admission of guilt than an expression of a continued commitment to live by the given social order. Thus, people are obsessed with apologizing while being unconcerned about its legal consequences (Wagatsuma and Rosett, 1986).

[38] Almost half of the respondents did not know or misstated the outcome of the case.

own part of the negotiation to an attorney who has no emotional involvement in the accident.

On the other hand, in Japan, strong resentment toward the injurer on the part of the injured party, which is refueled by a moralistic interpretation of responsibility for the accident, makes it difficult for the injurer to remove himself from personal involvement in the negotiations. The injured party himself is anxious to take part in negotiations and keeps demanding the injurer to express his "sincere" apologies for the accident. Of course, in compensation disputes where a large monetary stake is involved, the demand for sincerity does not simply mean a verbal apology. In practice, it also means "show your sincerity through generous compensation," requiring that the insurance company, sharing the moral burden of the original injurer, add a little to the standard payment, or as is quite often the case, requiring the injurer himself to pay in addition some consolation money out of his own pocket. But no matter how calculating a motive may underlie the demand for sincerity, as long as the process of negotiations is couched in terms of moral responsibility, lawyers cannot satisfactorily take over the role of the disputants. Or to put it differently, lawyers' special expertise can have little relevance in these highly moralistic negotiations.

IV. A PARADOX OF MANAGEMENT

A. The Successes and Failures

The nonlitigious society of Japan has not developed spontaneously. Instead, it has been cultivated by well-planned management. Under the ostensibly efficient Japanese compensation system, the people seem content with what they get and do not resort to law to recover damages. Moreover, the myth of functionalism prevails; people apparently believe in the benevolence of the system, and have not seriously challenged it in courts or in legislature. They have even looked down on the occasional campaign against the system waged by Japanese lawyers,[39] suspecting it to be motivated by their parochial interests. In view of the apparently satisfied public, the system is not likely to change its basic structure in the near future.

In fact, the automobile accident compensation system has been applied to other disputes as well. For example, in medical mal-

[39] The biggest campaign was the one against the establishment of the Traffic Dispute Resolution Center. At first, the Japan Federation of Bar Associations induced the minister (Director-General of the Prime Minister's Office which is in charge of traffic safety policymaking) to pledge not to open the center unless the parties involved reached an accommodation. However, because of subtle pressure from the public urging an effective policy to aid traffic accident victims, the bar yielded in exchange for the enhancement of bar's influence on its management. About the history of the center, see, e.g., Hasebe (1976: 47–54) and Yonezu (1977: 20–31).

practice, where the number of disputes has sharply increased, a third-party reviewing panel was recently established. A doctor against whom a complaint is lodged must report the complaint to the local medical association, which reviews the complaint and recommends whether the insurance should be paid. If either party or the insurance company is not satisfied with the local association's finding, the case is referred to a central reviewing panel, the Medical Dispute Investigation Council, which consists of representative members of the Japan Medical Association and the insurance companies along with members of the bar. Although the findings of this panel are not legally binding, insurance companies regularly honor them. Interestingly the panels, both in local associations and in the central body, review the case in closed sessions, based not on the adversary arguments of both parties but only on a report compiled by the special staff of the medical association. Furthermore, in view of the strong supervisory power of the Ministry of Finance over insurance companies and that of the Ministry of Public Welfare over the medical associations, this seemingly private panel in reality assumes a semiofficial character. In other areas as well, such as product liability, construction disputes, environmental pollutions, real estate transactions, and unpaid wages, similar dispute management has been designed and sanctioned by the government,[40] although implementation has not been uniformly successful.

Note that these nonconfrontational systems are also consonant with the cultural heritage of Japan.[41] Two cutural themes especially recur throughout dispute management: authority and morality. Although in the United States authority often carries a negative connotation, in Japan it has an intrinsic value; it breeds a sense of orderliness in an otherwise chaotic social world. While an authoritarian person is disliked in Japan just as in any other society, the authority figure can expect respect so long as he cares for and guides subordinates properly. The resulting hierarchical order makes the nonconfrontational system work. The government, through admininstrative guidance, directs insurance companies; the judiciary, which is itself hierarchically organized, unifies the interpretation of the law; and the police authoritatively determine the facts on the spot. The third-party neutrals also rely implicitly on this hierarchical control when they set forth the just resolution to the parties.

Morality is also important. In the United States, because morality is left entirely to individuals and cut off from meaningful

[40] One of these dispute-resolving organizations is described by Rosch (1987). He emphasizes that the successful operation of these organizations make the received culture of nonlitigiousness alive in modern Japan.

[41] M. Kato (1987) also points out that the very institutional framework that diminishes the litigiousness in Japan is at a deep level determined by the unique culture of Japan.

community sanctions, it has lost much of its binding force. Moreover, as people are overwhelmed by the legal consequences, they are discouraged from showing such fundamental human concern for the victims by, for example, expressing sincere apologies for their fault. By contrast, in Japan, not only is the moral dimension of the accident clearly retained, but also all actors in the system are mutually bound by moral obligations.[42] If the insurance companies did not genuinely honor, or at least, appear to value, morality above legality, and hence live up to the people's expectations, the liability insurance could not have been transformed into the quasi-public system. Judges also activate moral concerns. Although committed to maintaining the standardized compensation system, judges nevertheless step beyond the neutral umpire role and urge insurance companies to settle at higher levels when the standardized compensation would work a hardship in a particular case. Otherwise, the rigidity and unconcern for individual plight often associated with bureaucratic justice would strain the system too much. Morality, then, adds a touch of "social justice," if not individual justice, to an otherwise efficient but rigid bureaucratic justice, encouraging support for the system from the people of Japan.

Behind the appearance of consensus and stability, however, one can detect some inherent structural weaknesses in the compensation system. The very effort to create a nonconfrontational system produces problems, for a system which does not employ legal resources is defenseless against overly aggressive parties. The result is a series of irregular payments when persistent claimants wield undue influence or, more troubling, when innocent claimants are subtly induced to accept lower than standard payments. Moreover, the very paucity of litigation weakens the legal system. Only daily experience with law, testing its premises under different circumstances through vigorous, partisan advocacy, can invigorate the law, adapting it to an ever changing society. As the standardized compensation system itself stands on the principle of tort law, this stagnation of the law may in the long run diminish the public support for the system.

Although at the moment only a few critics have noted these systemic defects, if the nonconfrontational system harbors the seeds of its decay, it is possible that in the future, when the underpinnings of cultural consensus further erode, and when people with an emerging law consciousness deem the system less satisfactory, the system may collapse or evolve into another form. It is too early to predict any major change, but the recent upward turn of litigiousness may reflect the growth of this divergent consciousness. Since 1983, the litigation rate has continued to climb, and

[42] This unique Japanese conception of social relationships is also revealed in their ideas about criminal punishment (Hamilton and Sanders, 1988).

mediation is increasingly legalized; the claimants are represented more often, and their cases are less likely to result in settlement (see Fig. 1). If the problems of unjust compensation and the weakening of the law, which inhere in the system of management, do in fact explain these developments, dispute management has an insoluble contradiction in it; as the mangement is perfected, it creates the problems that undermine the very foundation of management.

B. Unjust Compensation

The first problem, unjust compensation, comes about when parties, unaware of any possible leeway in compensation, fail to mobilize available advocacy resources. For example, in a fatal auto accident case, the insurance company first offered 25,000,000 yen which, on subsequent negotiations, was raised to 35,000,000 yen.[43] However, the plaintiff (the widow who undertook the negotiation) considered this inadequate, and consulted a lawyer, who took the case to the Traffic Accident Dispute Resolution Center and settled for 50,400,000 yen. The issue in dispute was whether the economic loss of the deceased (a 38-year-old truck driver temporarily employed) should have been calculated on the basis of his actual income or of the average income for all workers of the same age, which was substantially higher than his income. The insurance company relied on the payment standard in the official guideline for optional insurance, that compensation should be made on the basis of actual income. However, the lawyer argued for a higher compensation (68,000,000 yen), relying on the Japan Federation of Bar Associations' handbook, which elucidated the alternative principle that "as a general rule, lost income should be calculated on the injured party's actual income. But if it is probable that such party would, in future, receive the average income for all workers in the same year bracket, the compensation may be calculated on such an average income" (Nichibenren Kotsu-jiko Sodan Senta, 1985: 12).

We are struck by the enormous difference in the two figures, both of which are derived from authoritative standards. Without the help of the lawyer, the plaintiff could not have learned of the proviso spelled out in the bar's handbook and would have been forced, albeit reluctantly, to accept the standard shown by the insurance company as "the law."[44] At most, she would have asked

[43] The case is taken from I. Kato (1985: 20–21, 29–30).

[44] The bar associations publish their own versions of the standards, two of which are widely circulated: one by the Traffic Accident Consultation Center of the Japan Federation of Bar Associations (Nichibenren Kotsu-jiko Sodan Senta, 1985), and the other by the Joint Committee of three Tokyo bars on Traffic Accident Compensation (Tokyo San Bengoshi-kai Kotsu-jiko Shori Iinkai, 1986). These bar standards, designed for practicing lawyers, are more detailed and endorse the interpretations slightly more favorable to the victims than the official *Guidelines Assessing Damages* which insurance companies

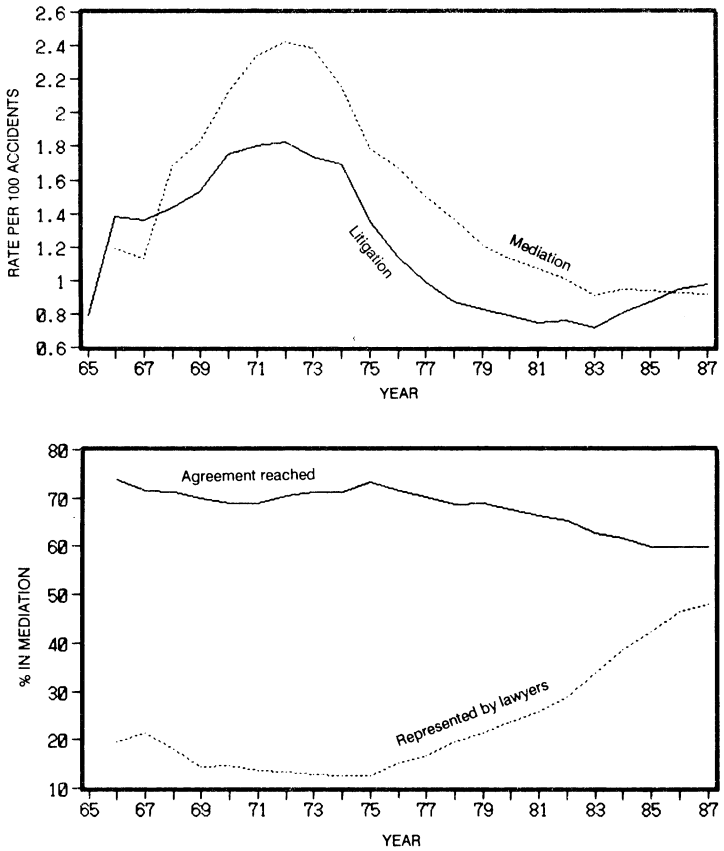

Figure 1. Trends of litigation and of mediation, 1965–1987

the company as a favor to go a little above the "standard" compensation.

Herein lies a major paradox. Since ordinary people lack the resources to utilize the sysytem by themselves, they must engage a lawyer if they wish to obtain the most advantageous settlement. However, to be interested in obtaining legal services they must at first know the possible leeway in compensation that could yield a net increment of compensation. It is a chicken-and-egg problem. How could an injured person know, before engaging a lawyer, that it would pay to engage a lawyer?

The situation could be rectified by a policy that would make this leeway more widely known. It is doubtful, however, that the government with a vested interest in dispute management will voluntarily adopt a policy of informing the public of leeway even in a

use. The bar thus tries to exercise its leadership in shaping the compensation law in Japan (Sasaki and Takano, 1988: 31, 35).

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limited way. Instead, the policy in Japan is to limit individualized adjustments and to foster a kind of false consciousness among the public that the leeway in compensation is very limited, more limited than is actually the case. Thus, in a recent case study of seven fatal accidents in a local city, a lawyer was retained in only one case. Although several parties in these cases remarked angrily that "the insurance company negotiated high-handedly by alleging the fault of the deceased," or that "the economic loss was calculated by the low wage scale in Akita Prefecture," nonetheless they accepted less compensation by saying that "that's the way it is. It can't be helped" (I. Kato, 1985: 49-51).

While an image of standardization with little leeway discourages some valid claims from being pressed, the structure of the management system tolerates some overgenerous awards. When a claimant is overly assertive, the relative nonassertiveness of the insurance company may produce an overgenerous payment. This passivity by the insurance company comes directly from the system of compulsory insurance. Since insurance companies must provide the compulsory policy to every person at a uniform rate regardless of the insured's particular risk, the national government reinsures 60 percent of all such policies and the remaining 40 percent is shared among all insurance companies. As any individual loss is thus spread out among all automobile insurance companies, an insurance company has little motivation to fight overzealous claimants.[45] Moreover, as a repeat player with a good corporate reputation to maintain, an insurance company will be more motivated than will an individual one-time claimant to behave like a "good Japanese" by refraining from aggressiveness.

This negation of private interests necessarily weakens defenses against fraudulent claims. For those who are not well integrated in the community and influenced by its norms, the insurance companies' self-restraint offers ample opportunity for exploitation. The persistence of unsavory settlement brokers (*jidanya*) in Japan behind the elaborate, well-managed compensation system best attests to this weakness. Some disputants, who are themselves motivated to take unfair advantage of the companys' nonassertiveness, voluntarily refer their cases to such a broker, anticipating that he will fix a settlement larger than that due to them. Thus, the system produces an anomalous situation in which one claimant achieves less than full realization of his entitlement due to his ignorance of the possible leeway in compensation, while another extorts a larger settlement by taking advantage of the overrestraint of the insurance company. The compensation system, which is predicated upon noncontentiousness, rests on a

[45] It is said that some companies even deliberately overlook the bill padding of the claimants in order to please their policyholders, to expedite the processing of claims, or even to shift the loss which otherwise must have been paid through optional insurance (Suzuki, 1985: 9–18).

fragile balance of the negotiating powers of the parties and is maintained not so much by the parties' strength as by their restraint. If one party acts unreasonably, the system easily dissolves, making the less insistent the prey of the more aggressive.[46] Although third-party machinery such as legal consultations and the Traffic Dispute Resolution Center, which occupy an integral part in Japan's compensation system, work to ward off such a disjuncture of negotiating powers, their success is limited. As neutral agents working generally to hold down contentiousness, they are not well equipped to assist the weak party to regain control of negotiations and fight against the predatory party.

C. *Weakening of the Law*

Inadequate investment of legal resources, however, does not merely affect the appropriateness of compensation. It may also affect the very maintenance of the whole compensation system by weakening the evolution of law. Without sufficient input from party initiatives, the law stops growing and soon loses its vitality. No law ever achieves perfection, and the standardization scheme in Japan is no exception. By making litigation superfluous, it forfeits the opportunity to adapt itself to the ever changing society. This hindrance of doctrinal development is best illustrated by the ironic admonition of a former judge of the Traffic Section at Tokyo District Court: "lawyers should litigate more and argue more aggressively before the court than now to get the award which best suits for the individual case at hand. The standard should not be applied mechanically" (Zadankai, 1982: 114). But people do not advocate purely for abstract rules. Private parties sue for private gains, and lawyers do litigate if it is worth doing. By litigating out of self-interest, they nonetheless contribute to the growth of law by constantly putting the law in a new light. The arguments made with great partisan zeal imbue the law with new life experiences. In fact, the precedent is only a tip of iceberg. Without the infinite number of arguments, most of which are never recorded formally, the law would never evolve. And if the vigor of law is lost, the whole compensation system that derives its ultimate legitimacy from it must collapse from public disfavor. After all, the viability of the standardization scheme rests on the recognition, not only by the public but also by the legal profession, that it is the correct representation of the true tort principles. Once the faith is shattered, the standardization scheme is nothing but an elite ploy to suppress demand for efficiency's sake.

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[46] If matters go too far, insurance companies may take a hard line against overly assertive claimants. For example, in Osaka, where the people are said to be the most claims-conscious, and where the branch offices of the insurance companies sustain the worst loss ratio, the insurance companies do not hesitate to take a hard line. Consequently, there are more litigations per 100 accidents in Osaka than in any other region in Japan (Fujiwara and Hosoi, 1988: 36).

Again, within the system, there is no cure for this problem. The Japanese judiciary, deeply committed to standardization, is unlikely to encourage the party initiative. In fact, unlike the situation in the United States, where people talk about too much law and the overlegalization of the government,[47] in Japan, at least to some critics, bureaucratization of the judiciary is considered a problem. Critics contend not only that the government is insufficiently subjugated to judicial control but that the judiciary itself assumes an administrative outlook toward disputes. That is, the judiciary is accused of actively directing its efforts toward the noncontentious resolution of disputes (Kawabata, 1980: 38), implicitly rejecting the aggressive assertion of legal rights. If the law thus becomes stagnant, it does more than just weaken the compensation system. It weakens the entire legal system. As the people become less vigilant in defending their rights, the legal order slackens, and an abuse of power may ensue. Although this weakening of the legal system may be precisely what the government elite wishes to have, still the price is high; it impairs the very power to govern the society. The people accept forcible enforcement of the government policy only when they at the same time are given the protection accorded by the law. In that sense, the current mixture in Japan of strong administrative guidance (*gyosei-shido*) on one hand, and weak regulative power on the other, as rampant tax evasions and widespread insider tradings in Japan attest to, may be simply a choice by default (Haley, 1982a), which satisfies neither the government nor the people.

If the people in Japan, increasingly sophisticated about law, someday find informal guidance more obtrusive than useful, it will be all the more difficult for the government to regulate the society without law. Thus, if the government assumes an even more aggressive role in regulating the society today, the check-and-balance function required of the courts must be an equally aggressive one. This much, of course, is known to the elite in Japan, and at least to the degree that the people would not be offended, it avoids the appearance of naked power in exercising its governmental authority.[48] More important, just as insurance companies refrain from exploiting the unwary disputants, the government is trying hard not to abuse the power, which after all is in its self-interest. But to

[47] E.g., see Tribe (1980) (too much law burdens the law enforcement and thus counters the ideal of rule of law); Bardach and Kagan (1982) (legalism in regulation deprives bureaucracy of the capacity to pursue the regulative purpose).

[48] Young (1984) indicates that the effectiveness as well as the legitimacy of administrative guidance rest ultimately on the social consensus to hold down the overly legalistic claims of the parties. If the government persists in its regulatory interest beyond the limit set by the consensus, its discretionary power is taken away. Note, however, that he thinks that through subtle legal doctrines the Japanese judiciary has succeeded in containing the exercise of governmental power within this legitimate boundary.

strike the right balance is not an easy task. The bureaucratic management used to create the nonlitigious society tends to go to extremes. Paradoxically, then, the very success of the Japanese elite in disarming the legal weaponry of the people inadvertently breeds the seed for its failure: the loss of legitimacy.

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APPENDIX 1

Calculating Compensation in Case of Death or Injury

For calculating compensation, in case of death, for example, the following formula is used:

A: Monthly income, or (a) if income is uncertain, or in the case of a housewife, or of a student over 18 years old: average income in the same year taken from the Census (a fixed table is given, with separate figures for males and females), or (b) if unemployed, or under 18: whichever higher, the average income of an 18-year-old of the same Census or 50 percent of that of the same age.

B: The amount necessary for subsistence; 35 percent of monthly income for persons with a family to support (or without a family to support, 50 percent)

C: New Hoffmann coefficient: calculated to multiply the years the decedent could have worked and then subtracting intermediate interest (a fixed table is given).

D: Pain and suffering: for the decedent's estate, 2.5 million yen and for relatives; if one, 4 million yen; two, 5 million yen; three or more, 6 million yen; plus 1 million yen if economically dependent upon the deceased.

E: Funeral: 450,000 yen.

Therefore total compensation is:

$$\underbrace{\frac{(A \times 12 \times (100 - B)/100) \times C}{}}_{\text{net economic loss}} + \underbrace{\frac{D}{}}_{\text{pain \& suffering}} + \underbrace{\frac{E}{}}_{\text{funeral}}$$

Some specific examples:

(1) For a man of 50 with a wife & two children, and a monthly income of 450,000 yen:

$$(450{,}000 \times 12 \times 100 - 35/100) \times 12.077 + 9{,}500{,}000 + 450{,}000$$
$$= 52{,}340{,}000 \ (\$377{,}000)$$

(2) For a housewife of 30 with a husband and a child:

$$(193{,}900 \times 12 \times 100 - 50/100) \times 20.625 + 7{,}500{,}000 + 450{,}000$$
$$= 29{,}880{,}000 \ (\$215{,}000)$$

In the case of injury, first, we must determine whether the disfigurement (including chronic pain such as that resulting from whiplash) is involved and how serious it is (classified as one of twelve degrees). This degree of seriousness correspondingly gives the following two figures:

F: Loss of work ability (capacity to work): a fixed percentage set for each category of permanent injury

G: Pain and suffering for disfigurement

Furthermore, in common with the injury without disfigurement;

H. Medical costs: paid to doctors, attendant fees, miscellaneous fees (itemized).

I. Economic loss of work days: 3,700 yen per day lost

J. Pain and suffering: 3,400 yen per day in the hospital or under continuous treatment at home.

Therefore, compensation for a nonfatal injury is:

$$\underbrace{\frac{(A \times 12 \times (100 - B)/100) \times C \times F)}{}}_{\text{economic loss}} + \underbrace{\frac{G + J}{}}_{\text{pain \& suffering}} + \underbrace{\frac{H}{}}_{\text{medical}} + \underbrace{\frac{I}{}}_{\text{economic}}$$

A specific example:

(3) 17-year-old boy, loss of a leg (the fifth degree seriousness): 30 days in the hospital, with medical expenses of 1,000,000 yen.

$$(130{,}000 \times 12 \times (100 - 50/100) \times 23.75 \times 79/100 + 5{,}010{,}000$$
$$+ 3{,}400 \times 30 + 1{,}000{,}000 = 20{,}746{,}750 \ (\$149{,}000)$$

APPENDIX 2

Classification Scheme for Comparative Negligence

Excerpted from Nichibenren Kotsu-jiko Sodan Senta (1985: 34–35, 38–39

. . .

II. Collision between two cars

1. At the intersection

A. Two cars both driving straight ahead

(1) . . .

(2) No traffic signal

a) Two roads are the same width (Chart 5)

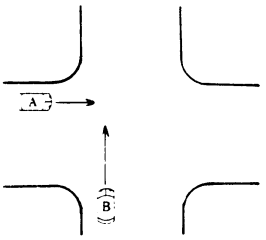

CHART 5

	Negligence of A		Negligence of B
	Basic	Add if	Basic
i. When both A and B not reducing speed or both reducing speed	40%	good visibility/ at night --- truck	60%
ii. A not reducing, B reducing	60%	same as above	40%
iii. A reducing, B not	20%	same as above	80%
b)–d) . . .		. . .	
e) violation of stop sign: A not violating, B violating	20%	not reducing speed/truck	80%

. . .

C. Other Type

. . .

(4) One car is turning right (left), when the following car collides

. . .

b) Turning car (B) not having moved to the center, when the following car (A) collides (Chart 15)

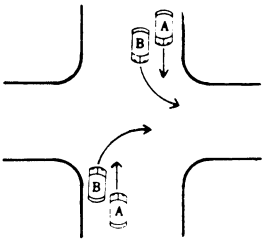

CHART 15

	Negligence of A			Negligence of B
	Basic	Add if		Basic
i. B having difficulty in moving to the center	30%	excessive speeding/ not looking ahead carefully	not reducing speed/no turn turn signal (or delayed)/ sharp turn	70%

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