

Mass Accidents: A Challenge for Tort Law
Comparative Analysis of Alternative Compensation Schemes
in Japanese and French Law

*Jonas Knetsch**

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I. INTRODUCTION

The modern legal system faces numerous challenges as it addresses social changes and technological innovations. This is particularly true of the rules governing the compensation of damages. In fact, the emergence of collective catastrophes has disrupted the traditional approach to the compensation of damage.¹ Whereas in former times, victims of mass injuries could only sue the tortfeasor by bringing a tort law action before a court of justice, new legal mechanisms have been developed in response to mass accidents.

The main objective of this article is to analyse how public health crises and technological or industrial accidents in France and in Japan have changed the legal mechanisms used to address mass damages. At first glance, both legal systems seem to present many differences in this respect. In France, the usual way to compensate for the damage caused by mass catastrophes continues to be judicially triggered civil liability.² In contrast, Japanese law seems to be characterised by a long tradition of extra-judicial compensation of damages via administrative no-fault compensation schemes.

* LL.M., Professor of Civil and Comparative Law, University of Reunion Island, Saint-Denis, France.

1 For an overall perspective on mass accidents in tort law and civil liability systems see e.g. R. NAGAREDA, *Mass Torts in a World of Settlement* (Chicago 2007); M. FAURE/T. HARTLIEF, *Financial Compensation for Victims of Catastrophes – A Comparative Legal Approach* (Vienna/New York 2006); A. GUÉGAN-LÉCUYER, *Dommages de masse et responsabilité civile* (Paris 2006) and C. VON BAR, *Empfehlen sich gesetzgeberische Maßnahmen zur rechtlichen Bewältigung der Haftung für Massenschäden?*, in: *Verhandlungen des 62. Deutschen Juristentages 1998*, Vol. 1, Part A.

2 See especially GUÉGAN-LÉCUYER, *supra* note 1.

Yet appearances are misleading. As is often the case in comparative law, we will see that the basic tendencies in French and Japanese law are similar. The analysis presented in this paper suggests that the limitations of traditional tort systems are increasing, as is the impact of collective catastrophes on both societies.³ It is nevertheless suggested that the different social and political contexts in Japan and France affect the way mass compensation claims have been regulated in those two countries.

Before addressing the main subject, Part II overviews the civil code remedies for mass accidents, highlighting the noticeable differences between French and Japanese law. Part III analyses the role of tort litigation in defining public compensation policies. Part IV addresses the decision of Japanese and French public authorities to shift victim compensation from a private to an administrative scheme. Finally, Part V explains the remaining difficulties and evaluates in a prospective manner the potential of compensation funds to regulate future mass accidents.

II. THE CIVIL CODE REMEDIES FOR MASS ACCIDENTS IN FRENCH AND JAPANESE LAW

When one draws up a list of mass torts caused by collective catastrophes in Japan and in France, one may be surprised that the causes of those accidents have various similarities. In both countries, massive injuries have arisen from defective pharmaceutical products,⁴ blood donation accidents,⁵ asbestos⁶ and – especially in Japan – environmental⁷ and,

3 For a sociological point of view, see H. VOLLMER, *The Sociology of Disruption, Disaster and Social Change* (Cambridge et al. 2013); the various contributions in: *Esprit* 343 (2008) (special issue “Le temps des catastrophes”) and G. CLAVANDIER, *La mort collective – Pour une sociologie des catastrophes* (Paris 2004).

4 During the 1950s, the anti-nausea drug thalidomide was marketed in Japan. Due to negligence in the drug design, pregnant women to whom the drug had been prescribed gave birth to severely deformed babies. 62 families brought suits against the two drug manufacturers and the Japanese Ministry of Health and Welfare. For a discussion of the thalidomide cases, see “Diary of Plaintiff’s Attorney’s Team in the Thalidomide Litigation,” in: *Law in Japan* 8 (1975) 136 and Y. OTTLEY/B. OTTLEY, *Product Liability Law in Japan: An Introduction to a Developing Area of Law*, in: *Georgia Journal of International and Comparative Law* 14 (1984) 29, 47–50. In France, several families claimed compensation for the death of their children because of Creutzfeldt-Jakob disease related to extractive growth hormones, F. VIALLA, *Le versant civil du drame de l’hormone de croissance*, in: Leca/Vialla (eds.), *Le risque épidémique* (Aix-en-Provence 2003) 447. More recently, the use of the drug Mediator in France has been linked to more than one thousand deaths attributable to heart-valve insufficiency, see the official report: INSPECTION GÉNÉRALE DES AFFAIRES SOCIALES, *Enquête sur le Mediator* (Paris 2011).

5 In both countries, HIV had been transmitted in the 1980s through contaminated blood products, especially those used by hemophiliacs. See the comparative analysis in E. FELDMAN, *Blood Justice: Courts, Conflict, and Compensation in Japan, France, and the United States*, in: *Law & Society Review* 34 (2000) 651. In more recent years, compensation claims have been brought to courts for post-transfusion hepatitis. For French law, see M. BACACHE, *Chronique de législation française*, in: *Revue trimestrielle de droit civil* 2010, 386, 389.

more recently, nuclear pollution⁸. In all those cases, victims have encountered the shortcomings of the traditional civil liability system. Nevertheless, in France and in Japan, a person who believes to have been injured as a result of a mass accident can still pursue a legal remedy under the law of torts.

When it came into force, the French Civil Code of 1804 (*Code civil*) established civil liability rules in articles 1382 to 1386. Article 1382 proclaims the fault principle;⁹ article 1383 then defines fault to include negligence. The remaining three articles, 1384 to 1386, impose liability based on the defendant's relationship to some other person or thing. The French legislature has retained these articles, basically unchanged, since the time of Napoleon. Despite the existence of special liability rules for injuries inflicted by aircraft,¹⁰ nuclear-powered plants,¹¹ motor vehicles¹² and defective products,¹³ the core of liability still resides in articles 1382 to 1386, which have been considerably amended by the courts.¹⁴

Japanese tort law provisions can be found in articles 709 to 724 of the Japanese Civil Code (*Minpō*). These articles were enacted in 1896 and were strongly influenced by the French *Code civil*¹⁵ and a preliminary version of the German Civil Code of 1900 (*Bür-*

- 6 See T. TANASE, The Role of the Judiciary in Asbestos Injury Compensation in Japan, in: Engel/McCann (eds.), *Fault Lines – Tort Law as Cultural Practice* (Stanford 2009) 233 and, for French law, C. GUETTIER, *Le fonds d'indemnisation des victimes de l'amiante*, in: *Responsabilité civile et assurances 2002*, chr. 19 and 22.
- 7 For a discussion of the “big four” environmental pollution claims (the Toyama *itai-itai* disease case, the Niigata *minamata* disease case, the Yokkaichi case and the Kumamoto *minamata* disease case) and the 1973 enacted Pollution-Related Health Damage Compensation System, see J. GRESSER/K. FUJIKARA/A. MORISHIMA, *Environmental Law in Japan* (Cambridge 1981) 55 and 285.
- 8 The compensation of the victims of the nuclear incident at Fukushima is still subject to legal debate. See J. RHEUBEN, *Government Liability for Regulatory Failure in the Fukushima Disaster: A Common Law Comparison*, in: *Pacific Rim Law & Policy Journal* 23 (2014) 113; E. FELDMAN, *Fukushima: Catastrophe, Compensation, and Justice in Japan*, in: *DePaul Law Review* 62 (2012–2013) 335 and M. FAURE/J. LIU, *The Tsunami of March 2011 and the Subsequent Nuclear Incident at Fukushima: Who Compensates the Victims?*, in: *William and Mary Environmental Law and Policy Review* 37 (2012) 129.
- 9 English translation: “Any loss caused to a person through the behavior of another must be repaired by the person whose fault it was that the loss occurred.”
- 10 Art. L. 6131-2 of the French Transportation Code (*Code des transports*).
- 11 See Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy.
- 12 Law No. 85-677 of 5 July 1985 Intended to Improve the Situation of Road Traffic Accident Victims and Speed up Compensation Procedures.
- 13 Art. 1386-1 to 1386-18 *Code civil*.
- 14 For an overview of the part of case-law (jurisprudence) in the birth of modern French tort law rules, see S. CARVAL, *La construction de la responsabilité civile* (Paris 2001).
- 15 Regarding the French influence on Japanese civil law legislation in the Meiji Era, see C. STEVENS, *Modern Japanese Law as an Instrument of Comparison*, in: *American Journal of Comparative Law* 19 (1971) 665 and K. HATOYAMA, *The Civil Code of Japan Compared with the French Civil Code*, in: *Yale Law Journal* 11 (1902) 403, 418.

gerliches Gesetzbuch).¹⁶ Like the French model, the fundamental principle underlying damage compensation is the liability based on fault stated in article 709 (known as *fuhō kōi* rule),¹⁷ whereas, in contrast to French law, the principles of strict liability have a more subsidiary role in Japanese tort law. Some provisions in the Japanese Civil Code prescribe stricter rules regarding an employer's liability for the conduct of employees,¹⁸ an occupier's liability for defective immovable objects¹⁹ and liability for animals²⁰. However, victims of most of the mass injuries mentioned above did not have a choice, but had to invoke article 709 to seek compensation from the tortfeasor.²¹

Given the prevalence of fault liability under Japanese and French law, victims of mass accidents bear the burden of proof for three, if not four, elements which determine whether or not the court can award damages based upon the claim. Actually, in both legal systems, the plaintiff has to establish that he or she suffered damage (1), that the defendant acted intentionally or negligently (2) and that there was a causal relationship between the defendant's acts and the plaintiff's damage (3). In addition to this common core of civil liability, Japanese tort law requires that the defendant must have infringed "any right" or a "legally protected interest" of the plaintiff²² (4).

The procedural layout of mass accident litigation transforms the conditions for proving liability into an almost insurmountable hurdle. The least one can say is that the few victims that have pursued a legal remedy have shown courage in bringing their compensation demands before the courts. While the proof of damage did not raise any particular difficulties, the most important obstacle for the plaintiffs has been the identification of the tortfeasor and the establishment of an illicit behaviour and a causal link. Surprisingly, despite those legal barriers, most of the plaintiffs in mass injury claims have been awarded considerable compensatory damages, and thus, have contributed toward making notable changes to the Japanese and French tort law regulations.

16 M. URAKAWA/C. VON BAR, Verschuldens- und Gefährdungshaftung im japanischen Recht, in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 43 (1979) 147, 148–152 and STEVENS, *supra* note 15, 666.

17 "A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence." (This (unofficial) translation is provided by the Japanese government: <http://www.cas.go.jp/jp/seisaku/hourei/data/CCI.pdf>.)

18 Art. 715 Japanese Civil Code.

19 Art. 717 Japanese Civil Code.

20 Art. 718 Japanese Civil Code.

21 See S. UEKI, Umweltschutz- und Produzentenhaftung in Japan, in: *Recht in Japan* 18 (1999) 148, 162 and A. MORISHIMA/M. SMITH, Accident Compensation Schemes in Japan: A Window on the Operation of Law in a Society, in: *University of British Columbia Law Review* 20 (1986) 491, 496.

22 The expression "legally protected interest" was added after a terminological revision of the tort law provisions in 2004. See M. MEKKI, La place du préjudice en droit de la responsabilité civile, in: *Hokkaido Journal of New Global Law & Policy* 5 (2010) 151, 154.

In Japan, there is no doubt that the “big four” pollution cases (the Toyama *itai-itai* case, the Niigata *minamata* case, the Yokkaichi case and the Kumamoto *minamata* case) that were brought to the courts between 1967 and 1969²³ substantially affected the development of Japanese environmental law. With the support of a team of scientists, some 250 victims sued the presumed polluters for compensation and opened the way for massive lawsuits which resulted in hundreds of judgements in favour of pollution victims.²⁴ More recently, Japanese courts had to rule on several pharmaceutical accidents and asbestos injury claims. Although asbestos-related illnesses are mainly compensated through workers’ compensation administered by the national government,²⁵ the discovery of a link between asbestos exposure and mesothelioma pushed more and more patients to file claims against their former employers under Article 709 of the Japanese Civil Code and to even sue the government with the aim of obtaining compensation based upon either civil or state liability.²⁶

The Japanese litigation experience arising out of mass accidents reveals several similarities to what has happened in France since the late 1980s. A nationwide scandal about HIV-contaminated blood products (“*scandale du sang contaminé*”) led to compensation claims specifically against the national health administration in spite of compensation rules that were not adapted at that time to address such complex accidents,²⁷ and even against the private parties who caused the traffic accidents that made the fatal blood transfusion necessary.²⁸ In contrast to Japan, environmental pollution cases have not played a very important part in tort litigation until recently.²⁹ However, the disclosure of negligence

23 See references, *supra* note 7.

24 For details about the number of plaintiffs and the average amount of awarded damages, see UEKI, *supra* note 21, 159.

25 See TANASE, *supra* note 6, 233.

26 In a 2012 judgement, the Yokohama District Court dismissed a damages suit filed by 87 former construction workers or members of the families of victims of asbestos-related illnesses against the government and 44 construction material makers. The ruling suggests a compensation fund approach. See K. HARTLEY, Japanese Court Rejects Asbestos Claims by Construction Workers, and Suggests a Compensation Fund Approach, 29 May 2012, <http://www.globaltort.com/2012/05/japanese-court-rejects-asbestos-claims-by-construction-workers-and-suggests-a-compensation-fund-approach/>.

27 For a discussion of the French blood scandal of the late 1980s, see M. STEFFEN, The nation’s blood – Medicine, Justice and the State in France, in: Feldman/Bayer (eds.), *Blood feuds: AIDS, Blood, and the Politics of Medical Disaster* (Oxford 1999) 95 and the legal analysis of J.-M. PONTIER, L’indemnisation des victimes contaminées par le virus du SIDA, in: *Actualités Législatives Dalloz* 1992, 35.

28 See Y. LAMBERT-FAIVRE, De la poursuite à la contribution: quelques arcanes de la causalité, in: *Recueil Dalloz* 1992, chr. 311.

29 The most important environmental law case in recent years is probably the Erika oil spill case, judged by the Parisian Court of Appeal in 2010 and partially confirmed by the *Cour de cassation* in September 2012. One of the achievements of this case is the introduction of the concept of environmental loss (*préjudice écologique*) in French tort law. For a recent discussion of this point in English, see V. REBEYROL, Erika Case: an Incitement to Rewrite the

by the state in failing to inform the public about the danger of asbestos exposure encouraged thousands of workers to sue their employers and the French state for a compensation better than the lump sum awarded pursuant to workers' compensation statutes.³⁰

One can assert that mass accident litigation in Japan and France has led to an improvement of the plaintiffs' situation. Not only have most of the plaintiffs been awarded considerable compensatory damages, but the lawsuits have also given them a public forum in which the tortfeasors' wrongdoing could be exposed and confronted.³¹ While recognising this amelioration, one must, however, admit that the successful lawsuits were accompanied by high court fees and (often extremely) long procedures. In Japan, victims of drug-related neurological dysfunctions (SMON cases) and defective intramuscular injections had to wait nine years before being awarded compensation by first-instance courts.³² As for the French plaintiffs in the blood scandal cases, the French state has been found liable several times by the European Court of Human Rights for overly long procedures.³³

III. THE INFLUENCE OF MASS ACCIDENT LITIGATION ON TORT LAW

In both legal systems, mass accident litigation has contributed to the evolution of tort law provisions. Several long-standing features of the Japanese and French compensation schemes under tort law (*fuho kōi* or *responsabilité civile*) have been refined in order to facilitate the establishment of defendants' liability. Most of the improvements created by the courts in mass litigation procedures have integrated the common core of tort law that has been established over the years and have enriched the actual compensation regime in Japan and France.

The most enlightening example of an innovative approach employed by the courts in subsequent, non-mass accident procedures, is the modern understanding of legal causation in Japanese tort law. In fact, during the major environmental pollution cases, Japa-

CLC, in: *European Energy and Environmental Law Review* 22 (2013) 33. See also the recent report about the legislative confirmation of this concept, entitled "Pour la réparation du préjudice écologique" and presented on 17 September 2013 to the Minister of Justice, http://www.justice.gouv.fr/art_pix/1_rapport_prejudice_ecologique_20130914.pdf.

30 See e.g. the Conseil d'Etat judgments against the French state on 3 March 2004 (*RFD adm.* 2004, 612). For a discussion of the concept of *faute inexcusable*, which conditions a supplementary compensation payment, see *infra* and P. BECHMANN, *L'indemnisation des victimes de l'amiante*, in: *Environnement – Actualité du droit public, privé et pénal de l'environnement 2002*, chr. 3.

31 K. FUJIKURA, *Litigation, Administrative Relief, and Political Settlement for Pollution Victim Compensation*, in: Foote (ed.), *Law in Japan – A Turning Point* (Washington 2008) 384, 387 and 399.

32 See the statistics in Y. NOMI, *Haftung für Massenschäden in Japan*, in: *Recht in Japan* 10 (1996) 87, 90.

33 See ECHR, 31 March 1992, *X. v France*, no. 18020/91; 26 August 1994, *Karakaya v France*, no. 22800/93 and 30 October 1998, *F. E. v France*, no. 38212/97.

nese courts expanded the concept of “epidemiological evidence,” which allowed judges to make presumptions of a causal link between the victims’ damage and the contamination of certain areas of Japan.³⁴ Beginning with the *itai-itai* case, the courts accepted a departure from the requirement of strict scientific causation and held that a causal link is established if there is a strong correlation between the appearance of a similar type of injuries and the exposure to a harmful substance in a geographically delimited area.³⁵ In other words, the judges held that it was unfair to require the plaintiff to strictly prove the scientific mechanisms of a causal chain that is not yet within human knowledge while there were sufficient indications in favour of a link.³⁶ The court’s holdings in the *itai-itai* case subsequently have been transformed into a new evidentiary rule in Japanese tort law (known as *jūjitsu-jō no suitei*).³⁷

Comparable innovations have been made in French tort law, although they did not reach the same depth as the concept of epidemiological evidence under Japanese law. Among those innovations, one can point out the introduction of a special element of non-pecuniary damage (called *préjudice spécifique*) established during the procedures initiated by the victims of HIV-contaminated blood products.³⁸ In the famous *Courtellemont* case,³⁹ the Parisian Court of Appeal held that the “cruel specificity and exceptional gravity” of the injury “justifies a special compensation [that takes into account] the social and psychological impact of an AIDS infection” and the inevitable evolution of an HIV infection which is equivalent to “an announced death.”⁴⁰ Despite its rather vague consistency, the concept of *préjudice spécifique* has been frequently reused in other mass damages cases like asbestos, terrorism or hepatitis C-contaminated blood products.⁴¹

34 For a general perspective on “epidemiological evidence,” see MORISHIMA/SMITH, *supra* note 21, 498–499; NOMI, *supra* note 32, 95 and (with many details and references to Japanese sources) UEKI, *supra* note 21, 184–192.

35 For a detailed discussion of this evidentiary presumption, see A. STEWART, Japan’s 1987 Amendment to the 1973 Pollution-Related Health Damage Compensation Law: Tort Reform and Administrative Compensation in Comparative Perspective, in: *Harvard International Law Journal* 29 (1988) 475, 477–479; S. SOBLE, A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution: A Model Act, in: *Harvard Journal on Legislation* 14 (1977) 683, 709–712 and, more generally, M. DORE, A Proposed Standard For Evaluating the Use of Epidemiology in Toxic Tort and other Personal Injury Cases, in: *Howard Law Journal* 28 (1985) 677.

36 MORISHIMA/SMITH, *supra* note 21, 498.

37 *Id.*

38 See generally F. CHABAS, La notion de préjudice de contamination, in: *Responsabilité civile et assurances* 1998 (special issue) 20; Y. LAMBERT-FAIVRE, Principes d’indemnisation des victimes post-transfusionnelles du sida, in: *Recueil Dalloz* 1993, chr. 67 and J. KNETSCH, Le droit de la responsabilité et les fonds d’indemnisation (Paris 2013) no. 471–474.

39 The *Courtellemont* case was decided by the Court of Appeal of Paris, 7 July 1989 (the original version of the judgment is published in *Gazette du Palais* 1989, jur. 752).

40 Author’s translation established on the basis of the original judgment.

41 For cases of hepatitis C-contaminated blood products, see the references in J. JULIEN, Contamination sanguine et responsabilité civile: Variations sur un même thème, in: *Droit de la*

Moreover, mass accident litigation before the French courts has helped to sharpen other legal concepts and to extend them in favour of damage compensation. Indeed, the *Cour de cassation* dispensed a series of ground-breaking judgements in asbestos compensation cases. As a matter of fact, the French workers' compensation regime allows employees to obtain full compensation only after having established the so-called *faute inexcusable*, i.e. the inexcusable negligence, of their employer. Prior to 2002, this condition had rarely been fulfilled, and therefore, asbestos victims were seldom able to get any compensation in addition to the ordinary pension under social security regulations. On 26 February 2002, the *Cour de cassation* considerably relaxed the definition of *faute inexcusable* and, as a result, improved the procedural situation of thousands of victims of asbestos-related diseases.⁴² From that day on, an employer has been held to have committed inexcusable negligence if he or she fails to respect his or her obligation to guarantee (*obligation de résultat*) the prevention of professional diseases related to products fabricated or used in his or her company while being aware of their danger.⁴³

Yet those three examples of legal concepts elaborated or extended in mass accident litigation must not result in the conclusion that the achievements in Japanese and French law have the same importance. In fact, the legal concept of "epidemiological evidence" used by Japanese courts in the *itai-itai* case goes much further than the more episodic modifications of French tort law resulting from asbestos or HIV-contamination cases. Moreover, some of the provisions adopted by French courts have not survived because of their incoherence with the rest of the tort law system.⁴⁴ In short, the level of improvement resulting from mass accident litigation differs from one country to another and appears to be much higher in Japanese law than in French tort regulation.⁴⁵

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- famille 2003, chr. 10. For the use of *préjudice spécifique* in asbestos cases, see the judgment passed by the Labour and Social Security Law Chamber (*chambre sociale*) of the *Cour de cassation* in 2010 (11 May 2010, in: *Revue trimestrielle de droit civil* 2010, 564).
- 42 See the 29 judgments passed on the same day by the *chambre sociale* of the *Cour de cassation* (28 February 2002, in: *Environnement – Actualité du droit public, privé et pénal de l'environnement* 2002, comm. 73).
- 43 The court held that "en vertu du contrat de travail le liant à son salarié, l'employeur est tenu envers celui-ci d'une obligation de sécurité de résultat, notamment en ce qui concerne les maladies professionnelles contractées par le salarié du fait des produits fabriqués ou utilisés par l'entreprise" and that "le manquement à cette obligation a le caractère d'une faute inexcusable lorsque l'employeur avait ou aurait dû avoir conscience du danger auquel était exposé le salarié et qu'il n'a pas pris les mesures nécessaires pour l'en préserver." For a discussion of the consequences of this redefinition, see BECHMANN, *supra* note 30.
- 44 E.g. the attempt to split the payment to HIV-infected victims so that one fourth of the sum should not be paid until the conversion of HIV to AIDS (the so-called "*quart SIDA*"). See KNETSCH, *supra* note 38, no. 478–480.
- 45 For a sociological analysis of this discrepancy, see *infra* under IV.

IV. FROM LITIGATION TO ADMINISTRATIVE COMPENSATION

In contrast to other countries (like the United States), most of the mass injury claims judged before French and Japanese courts did not trigger a massive wave of similar endless lawsuits,⁴⁶ but instead opened up the way for administrative compensation schemes. Indeed, a comparative analysis of the mass injury compensation policy in both countries leads to an utterly surprising conclusion: In both countries, litigation seemed to be necessary to make compensation *without* litigation available.⁴⁷ Those of the mass injury victims who were not frightened away from bringing actions before the courts to obtain damages from their wrongdoers acted, in a way, as “pioneers” whose actions enabled others to obtain compensation payments more easily from administrative bodies such as compensation funds.⁴⁸

In fact, mass accident claims encouraged public authorities to engage in strong efforts to set up compensation systems that are disconnected from judiciary litigation and that offer quick and inexpensive relief.⁴⁹ In France, the prototype is the *Fonds d'indemnisation des transfusés et hémophiles*, created in 1991, which addressed the victims of HIV-contaminated blood products and granted compensation to almost 5,000 victims until the fund's absorption in 2004 by the larger *Office national d'indemnisation des accidents médicaux*.⁵⁰ By enacting the fund regulation in 1991, the French public authorities held that victims of the HIV-contaminated blood scandal should not bear the risks of a judiciary procedure and should be granted payments without proving elements other than the existence of their HIV infection and a blood transfusion on French soil. The costs of compensation were imposed on the state⁵¹ and the insurance companies of the blood transfusion centres.⁵²

46 Regarding the scarcity of lawsuits in asbestos cases, see TANASE, *supra* note 6, 237–239.

47 See FUJIKURA, *supra* note 31, 399 (“the courts served as a vital first step”) and TANASE, *supra* note 6, 238–239 (“in short, the final outcome is the establishment of a system of government-run compensation”).

48 Regarding the part of tort litigation in the *Minamata* cases, see E. ŌSAKA, Re-evaluating the Role of the Tort Liability System in Japan, in: *Arizona Journal of International and Comparative Law* 26 (2009) 393, 421.

49 One could even say that the threat of congested courts forced the public authorities to canalize mass accident claims outside of the judicial system. For a discussion of this factor, see KNETSCH, *supra* note 38, no. 161–164.

50 The absorption was necessary to adjust the fund administration to the decreasing number of claimants. See S. HOCQUET-BERG, L'ONIAM ou La grenouille qui veut se faire aussi grosse que le bœuf, in: *Responsabilité civile et assurances 2004, alerte 30* and the annual report of the *Fonds d'indemnisation des transfusés et hémophiles* for 2001 (FITH, *Rapport annuel d'activité 2001* (Paris 2002) 39).

51 French public authorities often accepted the budgeting of compensation funds as an implicit acknowledgement of their (co-)responsibility in the accidents. See KNETSCH, *supra* note 38, no. 157–159.

52 In 1992 and 1993, the insurance companies paid a total sum of 1.2 billion French francs, FITH, *Rapport annuel d'activité 2002* (Paris 2003) 19.

The French administration responded in the same way to the asbestos litigation in December 2000 by creating another *ad-hoc* compensation fund, the *Fonds d'indemnisation des victimes de l'amiante*,⁵³ whose structure and function are similar to those of the fund for HIV blood scandal victims that was set up nine years earlier. The fund budget is mainly financed by the social security system via employers' subscriptions to the workers' compensation regime and, incidentally, by direct state subsidies.⁵⁴ Compensatory payments are granted upon proof of an occupational disease that has been officially recognised to be caused by an exposure to asbestos fibres.⁵⁵

The reaction of the Japanese authorities to the environmental pollution litigation was quite comparable to the measures taken by the French administration. Yet one can emphasize that administrative compensation in Japan has had a significantly greater impact on compensation rules than the more isolated compensation funds created in France.⁵⁶ The 1973 Act for the Compensation of Pollution-Related Health Injury⁵⁷ set up a nationwide administrative compensation system that is supported by all major actors and – more importantly – is not restricted to the victims of the four injury cases addressed over the years, but is meant for victims of environmental pollution in general. The compensation system provides payments (financed by an emission charge levied on factories and a tonnage tax on automobiles) for victims of air and water pollution who live in designated areas presenting a high risk for pollution-related injuries.⁵⁸ In contrast to France, the system has not been created with the purpose of handling a mass accident that happened in the past, but with the aim of establishing a durable regulation in preparation for future environmental accidents.⁵⁹

53 For a general discussion on this compensation fund, see GUETTIER, *supra* note 6 and J. HARDY, La création d'un fonds d'indemnisation des victimes de l'amiante, in: La Semaine Juridique – Entreprise et affaires 2001, no. 605.

54 For recent statistics on the global funding of asbestos-related injury compensation, see the fund's annual report for 2014 (FIVA, Rapport annuel d'activité 2014 (Bagnolet 2015] 54, <http://www.fiva.fr/documents/rapport-fiva-2014.pdf>).

55 Art. 53 (1) of the Social Security Financing Law, Law No. 2000-1257 of 23 December 2000. Otherwise, the connection between asbestos exposure and the disease can be recognized by an internal commission (*Commission d'examen des circonstances de l'exposition à l'amiante*).

56 Except for the *Office d'indemnisation des accidents médicaux*, i.e. the national compensation organization for victims of medical accidents, whose field of action is particularly broad. Unlike the Japanese Pollution-Related Health Damage Compensation System, the ONIAM was not created in reaction to mass tort litigation.

57 *Kōgai kenkō higai no hoshō tō ni kansuru hōritsu*, Law No. 111/1973. For a discussion of the different provisions of this act, see GRESSER/FUJIKARA/MORISHIMA, *supra* note 7, 285 and J. GRESSER, The 1973 Japanese Law for the Compensation of Pollution Related Health Damage: An Introductory Assessment, in: Law in Japan 8 (1975) 91.

58 The act designated two types of areas: Individuals in class I areas suffer from air pollution and respiratory disease, whereas class II area individuals are affected by mercury poisoning, cadmium poisoning, and arsenic poisoning causally related to industrial or mining waste.

Despite temporary malfunctions revealed during the *Minamata* cases,⁶⁰ the administrative compensation system continues to play an essential part in Japanese environmental law and is seen to be one of the world's most advanced compensation systems for environmental damages.⁶¹ Moreover, it illustrates very clearly the extent to which traditional tort liability rules have been relativized in modern legal systems. Every time public authorities create an alternative compensation scheme in order to save some victims the walk to court, the decline of tort law becomes more acute. At the most, tort law provisions are used after the victim's compensation to determine whether the compensation fund may require a reimbursement of the payments from the tortfeasor.⁶²

From a more sociological perspective, one might wonder if there is any link between the massive shift from private to public compensation in Japanese law and the aversion to judicial dispute settlement which is commonly attributed to the Japanese. It is indeed commonplace in comparative legal research on Japanese law to point out the reluctance towards the formal mechanisms of judicial adjudication as a specific mark of Japanese society.⁶³ Yet an insinuation that there could be a connection between the importance of extra-judicial compensation and a certain state of mind would not be an accurate analysis. In fact, there are several arguments to refute the influence of the so-called "non-litigiousness" allegedly engrained in Japanese society.

Undoubtedly, an administrative compensation system is perfectly adapted to a society whose members do not show any particular propensity to take their claims before a

59 Among compensation funds, one can distinguish between those that are "prospective" and those that are "retrospective." For a discussion of this distinction, see KNETSCH, *supra* note 38, no. 140 and 17–177.

60 In reaction to those dysfunctions, an amendment was enacted in 1987. See STEWART, *supra* note 35, 475. See generally ŌSAKA, *supra* note 48, 406 and FUJIKURA, *supra* note 31, 390–391.

61 See STEWART, *supra* note 35, 475 ("this administrative compensation scheme put Japan at the forefront of industrial nations") and, more generally, H. WEIDNER, Japanese Environmental Policy in an International Perspective: Lessons for a Preventive Approach, in: Tsuru/Weidner (eds.), *Environmental Policy in Japan* (Berlin 1989) 489 ("pacesetter of environmental policy").

62 Regarding recourse claims as an instrument of damage prevention, see *infra* under V. See generally J. MESTRE, *La subrogation personnelle* (Paris 1979) no. 227 and, more sceptically, KNETSCH, *supra* note 38, no. 526–551.

63 The image of the Japanese as an exceptionally non-litigious people has been diffused especially by T. KAWASHIMA, *Dispute Resolution in Contemporary Japan*, in: von Mehren (ed.), *Law in Japan: The Legal Order in a Changing Society* (Cambridge 1963) 41. Other sources are cited in J. HALEY, *The Myth of the Reluctant Litigant*, in: *Journal of Japanese Studies* 4 (1978) 359 (note 1). See also Y. NODA, *La conception du droit des Japonais*, in: *Études juridiques offertes à Léon Julliot de la Morandière* (Paris 1964) 421 and, more recently, S. MIYAZAWA, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, in: *Law & Society Review* 21 (1987) 219.

court.⁶⁴ Regulating mass accident compensation via administrative schemes is much “smoother” than judicial procedures that imply a confrontation between the plaintiff and the supposed tortfeasor. However, recent studies show that the image of the Japanese as reluctant litigants is probably a myth kept alive in recent decades.⁶⁵ Sociological and empirical analyses not only show a strong increase in litigation due to the expansion in the institutional capacity for litigation,⁶⁶ but they also point out that distaste for litigation and a preference for informal dispute resolution are common to most societies.⁶⁷

Indeed, a comparison of alternative compensation regimes in Japanese and French law shows very clearly that the advantages of extra-judiciary settlements are appreciated in both countries. Implementing a faster, simpler and cheaper way to obtain compensatory payments and relieve the courts of the threat of a massive flood of compensation claims were the main grounds in Japan and in France for mass accident regulation beyond the scope of tort law.⁶⁸ What distinguishes Japan is the successful implementation of compensation funds for a broader category of victims.

V. COMPENSATION FUNDS: A PANACEA FOR MASS ACCIDENT VICTIMS?

The multiplication of administrative or quasi-administrative compensation systems is undeniably a sign of the decline of traditional tort law rules historically seen as the only compensatory instrument in accident law. Compensation funds, together with social security and private insurance, seem to have relegated tort law regulations to a position of secondary importance.⁶⁹ For instance, in France and most of the other western European countries, the use of tort law provisions is frequently confined to the question of whether social security providers or private insurance companies may take action against the tortfeasor after having compensated the claimant.⁷⁰ This consequence is not surprising, as one of the rationales for alternative compensation regulations is precisely to bypass the bipolar relationship between the victim and the tortfeasor so that the plain-

64 See, for example, the sociological study in F. UPHAM, *Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits*, in: *Law & Society Review* 10 (1975) 577.

65 See HALEY, *supra* note 63, 366 and T. GINSBURG/G. HOETKER, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, in: *Journal of Legal Studies* 35 (2006) 31.

66 GINSBURG/HOETKER, *supra* note 65, 36.

67 HALEY, *supra* note 63, 389.

68 See *supra* note 49 and the reference cited.

69 For a broader discussion of the “decline” of individual tort law, see e.g. G. VINEY, *Le déclin de la responsabilité individuelle* (Paris 1965) and A. TUNC, *La responsabilité civile* (2nd ed., Paris 1989) no. 90.

70 See, for example, H.-L. WEYERS, *Unfallschäden* (Frankfurt 1971) 401 (who qualifies tort law as a “*Recht der Regressvoraussetzungen*”, i.e., the law of condition for a recourse action).

tiff can receive compensatory payments directly from a “neutral” third party, e.g. a compensation fund.⁷¹

Highlighting those effects and the savings in time and money during the compensation procedure does not mean, however, that administrative compensation schemes are a panacea for mass accident victims, i.e. an ultimate improvement of compensatory regulation that is beyond any criticism. It is important to concentrate not only on the positive effects, but also the risks resulting from the disconnection of accident settlements from judiciary litigation. Transcending national boundaries, those risks relate in particular to the administrative costs of establishing the compensation scheme and to an insufficient regard for victims’ needs and damage prevention.

The legal consequences of the nuclear catastrophe of Fukushima in 2011 illustrate very clearly how difficult it is, in a short span of time, to establish an organisation that can handle thousands of compensation claims while offering a stable financial foundation.⁷² In fact, the choice of the Japanese government to finance the budget of the Dispute Resolution Committee via contributions of all nuclear power plant operators and a special government loan has provided enough grounds to delay the victims’ payments and destabilise the whole legal construction.⁷³ In French law, the installation of the *Fonds d’indemnisation des victimes de l’amiante* took more than two-and-a-half years;⁷⁴ similar delays hindered the compensation of HIV blood scandal victims.⁷⁵ Therefore, public authorities should seriously consider the legal risks that may occur during the establishment of administrative compensation systems in order to avoid compromising the objective of awarding quick payments.

Yet ensuring the relatively untroubled creation of a compensation fund is not enough to meet the requirements of a serious alternative to tort law based regulation of mass accidents. The claims the funds handle should also be treated in accordance with the standards of modern victimology research.⁷⁶ Unlike courts, existing compensation funds often treat compensation claims like an administration body handles a file, i.e., exclu-

71 One could speak more specifically of an appeasement function attributed to administrative compensation schemes. Whereas mass accidents tend to destabilize the society, the establishment of compensation funds seeks to interpose a neutral actor between the groups of tortfeasors and victims.

72 See FELDMAN, *supra* note 8, 340–353 and FAURE/LIU, *supra* note 8, 191–196. For a broader analysis of the Fukushima compensation scheme, see T. NAKAHARA, How Should we Treat Risks in Tort Law? – An Attempt at Comparison between France and Japan, in: *International Journal of Bioethics* (forthcoming).

73 *Id.*

74 The *Fonds d’indemnisation des victimes de l’amiante* started addressing compensation claims in June 2003, long after the establishment of the fund organization by the law of 23 December 2000. See FIVA, *Rapport d’activité 2002–2003* (Bagnole 2003) 5.

75 See FITH, *Rapport annuel d’activité 1992–1993* (Paris 1993) 7.

76 See e.g., R. ELIAS, *The Politics of Victimization: Victims, Victimology, and Human Rights* (Oxford 1986) and, among the French sources, G. LOPEZ, *Victimologie* (Paris 2010) and N. PIGNOUX, *La réparation des victimes d’infractions pénales* (Paris et al. 2008).

sively in writing and without any meeting of the parties involved.⁷⁷ To prevent alternative compensation schemes from becoming a source of suspicion and to contribute to the victims' reestablishment, it should be taken into account that the victims' needs concern not merely pecuniary reparation, but also social recognition and an opportunity to express their grievances before an authority.⁷⁸

Finally, one must bear in mind that mass accident regulation should not only concern the compensation of actual damages, but also the prevention of future accidents of the same type.⁷⁹ Primarily because of litigation costs, compensation funds are reluctant to assert claims for the reimbursement of compensation payments from the identified tortfeasor as a preventative measure.⁸⁰ Although it is doubtful that this self-restraint has a noticeable effect on accident prevention, it can send a false signal to the public that the compensation system is an instrument that guarantees the irresponsibility of the tortfeasor(s). In order to improve the preventive effect of alternative compensation systems, public authorities should rethink the rules for reimbursement claims and, more generally, associate compensation funds with multidisciplinary prevention strategies.⁸¹

VI. CONCLUSIVE REMARKS

The legal changes resulting from recent collective catastrophes in France and Japan are convergent in both countries. New legal instruments such as compensation funds and administrative compensation schemes have drastically changed the layout of modern compensation regulation. Although the importance of tort law provisions is constantly decreasing with the establishment of extra-judiciary mechanisms, currently, it would be incorrect to underestimate the remaining role of traditional tort litigation. In fact, mass accident litigation under tort law still provides an important incentive for public authorities to enact alternative instruments to accelerate the compensation process and to transfer

77 For a discussion of this point in French law, see KNETSCH, *supra* note 38, no. 429–432.

78 See PIGNOUX, *supra* note 76, no. 38; R. CARIO, *Victimologie*, Vol. 1: De l'effraction du lien intersubjectif à la restauration sociale (3rd ed., Paris et al. 2006) 228 and A. GARAPON, *La justice reconstructive*, in: Garapon/Gros/Pech (eds.), *Et ce sera justice – Punir en démocratie* (Paris 2001) 245, 287.

79 However, damage prevention has a cost that must be integrated into public decision-making. See G. CALABRESI, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, in: *Harvard Law Review* 78 (1974–1975) 713, 716.

80 The statement of the board of the *Fonds d'indemnisation des victimes de l'amiante* speaks for itself. In the annual report of 2004/2005, the fund organization confessed that it lacked the budget and personal resources intended for recourse claims, FIVA, *Rapport annuel d'activité 2004/05* (Paris 2005) 55.

81 For example, public authorities could use the information about damage causation that has been collected by compensation funds to develop more efficient prevention programmes. Alternatively, compensation organizations could intensify their own prevention initiatives, following the example of the French *Fonds de garantie des assurances obligatoires de dommages* in the field of motor vehicle accidents.

claims from the courts to an administrative body. The challenge for the future will be to improve fund regulation with regards to the socio-medical needs of victims and, in doing that, to increase the social acceptance of extra-judiciary compensation mechanisms.

SUMMARY

The modern legal system faces numerous challenges as it addresses social changes and technological innovations. This is particularly true of the rules governing the compensation of damages. Traditionally, tort law rules oblige the person by whose fault a damage to property or to a person's bodily integrity has occurred, to repair the harm caused to the victim. However, the emergence of collective catastrophes disrupts the traditional approach to the compensation of damage. The main objective of the study is to analyse how recent public health crises and technological or industrial accidents have changed the legal mechanisms used to cover mass damages. The focus will be on the comparison between developments in French law, representing the family of romano-germanic legal systems, and Japanese law.

As is often the case in comparative law, the first impression of a deep-rooted opposition between continental European and Far Eastern legal conception is misleading. Certainly, in 1973, the Japanese legislature enacted a comprehensive administrative compensation scheme for victims of massive environmental pollution damages, thus putting Japan in a pioneering role in the field of alternative compensation techniques, recently confirmed by the post-Fukushima legislation. Nevertheless, the situation is no different in France where numerous compensation funds form a serious counterpart to traditional tort law, even if they do not necessarily offer a fully equivalent alternative.

In addition to alternative compensation schemes, another consequence of massive environmental and public health catastrophes can be seen in the lasting changes of ordinary tort law regulations, due to serial tort law claims made both in Japan and France. Indeed, major environmental pollution cases brought to Japanese courts in the late 1960s took the cliché of the non-litigiousness of Japanese society, stressed mostly in European and North-American legal literature, to absurd lengths. Looking back, Japanese and French tort law regulations obtained important impetus for the softening of conditions for liability and the increase of the amount of damages, precisely because victims' associations initiated major tort lawsuits.

ZUSAMMENFASSUNG

Wie kaum ein anderes Rechtsgebiet ist das moderne Entschädigungsrecht Abbild der sozialen und technologischen Umwälzungen unserer Zeit. Das traditionelle Haftungsrecht strebt den Ersatz von Schäden an Personen oder Sachen an, die durch das Fehlverhalten eines Dritten oder dessen gefährlicher Handlung entstanden sind. Bei der rechtlichen Bewältigung von Massen- und Katastrophenschäden stößt das überkommene Bürgerliche Recht jedoch immer öfter an seine Grenzen. Ziel der folgenden Abhandlung ist es, die gesetzgeber-

ischen Ansätze zur Entschädigung von Opfern akuter Krisensituationen im Bereich der öffentlichen Gesundheit, des Umweltschutzes und der Anlagensicherheit zu untersuchen. Besondere Berücksichtigung findet hierbei die Rechtsentwicklung innerhalb des japanischen Rechts, die mit der des französischen Rechts verglichen werden soll.

Wie so oft auf dem Gebiet der Rechtsvergleichung trägt der Eindruck eines grundsätzlichen Gegensatzes zwischen kontinentaleuropäischer Gesetzstradition und fernöstlichem Rechtsverständnis. Zwar zeichnet sich das japanische Recht dadurch aus, dass bereits im Jahre 1973 Entschädigungskommissionen für Opfer von massiven Umweltverschmutzungen errichtet wurden. Japan nahm deswegen sehr früh eine Vorreiterstellung im Bereich der alternativen Kompensationsmodelle ein, welche durch die Post-Fukushima-Gesetzgebung jüngst bestätigt wurde. Nichtsdestoweniger bietet auch das heutige französische Recht mit zahlreichen Entschädigungsfonds eine (wenn auch nicht immer gleichwertige) Alternative zum herkömmlichen Haftungsprozess.

Neben der Errichtung alternativer Entschädigungsmechanismen ist jedoch auch das zivilrechtliche Haftungsrecht durch Haftungsprozesse in Folge von Umweltkatastrophen oder Arzneimittelkrisen in beiden Ländern nachhaltig beeinflusst worden. Das Bild des „gerichtsscheuen Japaners“, welches seit den 60er Jahren vor allem in Europa und Nordamerika propagiert wird, ist durch die grundlegenden Umwelthaftungsprozesse in Japan ad absurdum geführt wurden. Sowohl in Europa als auch im Fernen Osten haben es gerade derlei Großprozesse vermocht, wichtige Impulse zur Weiterentwicklung des Haftungsrechts zu geben, sei es auf dem Gebiet der Voraussetzungen oder hinsichtlich des Ausmaßes des zu leistenden Schadensersatzes.