

# Assault from the Kafkaesque Citadel of *Oh'oka Sabaki*

## Vague and Ambiguous Definition of Defectiveness in Japan's PRODUCT LIABILITY ACT

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### 1 Introduction

Japan, as an advanced nation based upon democracy, should respect the rule of law (*See* Oda, 2009: 27). Unless the rule is clear, the people would be forced to live in the world like Franz Kafka's "THE TRIAL." Therein, without having been informed of the content of the applicable law, "Mr. K." is suddenly charged, decided, and punished. To eschew this Kafkaesque unfairness, the art of legal drafting usually recommends removing ambiguity for most and vagueness as much as possible (Dickerson, 1986: Ch. VI). An action as done by "the Roman tyrant Caligula, [who made] his laws inscribed upon pillars so high that the people could not read them," must be avoided (Felsenfeld & Siegel, 1981: 176).

Unfortunately, however, the definition of defectiveness under the Japanese SEIZŌBUTSU SEKININ HŌ [PRODUCT LIABILITY ACT, Law No. 85 of 1994] is so open-ended that it does not show any useful test as follow:

The term 'defect' as used in this Act [] mean[s] a lack of safety that

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the product ordinarily should provide, taking into account [i] the nature of the product, [ii] the ordinarily foreseeable manner of use of the product, [iii] the time when the manufacturer, etc. delivered the product, and other circumstances concerning the product.

PRODUCT LIABILITY ACT Article 2(2) (official tentative trans.) (emphasis added).

The purported definition of defect is unworkable because it is tautological. This tautology is inherited from Article 6(1) of the Council Directive 85/374 of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States [c]oncerning Liability for Defective Products [hereinafter the “EC Directive” or “1985 EC Directive”] (See Stapleton, 1999: 53). It answers a question by another new question. Thus, for example, the Japanese robot engineers who try to produce daily life-support robots for consumers’ welfare hesitate to put their products in an open market. An American lawyer joke that I modified as shown below might illustrate the problem:

**Robot Engineer:** May I ask some questions for a fee, Mr.?

**Bengoshi:** [一弁護士—Japanese lawyer]: Yes, of course. Three questions for one hundred and no/100 dollars (US\$100.<sup>00</sup>).

**Robot Engineer:** That’s expensive. It’s like a robbery!

**Bengoshi:** Yes, I’m a lawyer.

**Robot Engineer:** Okay, I understand, Counselor. Then, please tell me what product defect is? Unless I know the standard *ex ante*, I could not design a robot at an optimal price that a consumer could afford to pay.

**Bengoshi:** It’s an easy question: you shall just design a product that provides the safety that the product ordinarily should provide.

**Robot Engineer:** . . . ? Then, what is the safety that the product ordinarily should provide?

**Bengoshi:** I’m sorry, but you’re asking the forth question — I cannot answer it for only the \$100.

In this piece, I will concentrate my explanation on Japanese cultural reasons behind the ACT’s vague and ambiguous definition of defectiveness, though there are other reasons than the cultural ones. In Section 2, I will explain the intent of the Japanese judicial bureaucrats who co-drafted the bill for the ACT. In Section 3, I will explain the Japanese culture that allows a “rule of man” rather than the rule of law.

## 2 THE INTENT OF THE JUDICIAL BUREAUCRATS' CO-DRAFTERS OF THE BILL FOR THE PRODUCT LIABILITY ACT

### 2.1 Old Fashioned §402A and EC Directive

Long before legislation of the Japanese PRODUCT LIABILITY ACT, the two major models of products liability rule in the advanced nations had been (i) the American RESTATEMENT (SECOND) OF TORTS §402A (1965) [hereinafter “RST §402A” or simply “§402A”] and (ii) its offspring of the 1985 EC Directive. Therefore, it was natural, for example, that a famous proposal of legislation in 1975 by Dr. Sakae Wagatsuma with some of his colleagues (Madden, 1996: 300) resembled very much the §402A. It was also understandable that another proposal of legislation by some Civil Law scholars in 1990 (*See* Hirano, 1992: 649) was a “photocopy” of the 1985 EC Directive.

Nonetheless, the situation has changed dramatically since around 1992 when a newly proposed test for defectiveness became public at the American Law Institute (ALI). Thereafter, the §402A was officially being labeled as “old” (*See* Henderson & Twerski, 1992: 1513) and its offspring of the EC Directive was inevitably destined to follow the same path of the “old-fashioned.” (*See generally* Henderson & Twerski, 1999: 1–20) *See* the table of “Chronological Developments in Definitions of Defectiveness in US, EC, and Japan” in the following pages.

As the table indicates, the new test proposed at the ALI, which later became with some modifications the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) [hereinafter the “PRODUCTS LIABILITY RESTATEMENT”], was neither open-ended nor tautological. The new test was fine-tuned and functional; therefore, it was definitely much better than the old §402A and EC Directive.

This author kept Japan informed of the then latest movements at the ALI where the old §402A was being revised and replaced by the fine-tuned and functional test of defectiveness. Actually, the titles of several pieces written by the author concerning the new American proposals were listed in *MITI Commentary* as parts of the works considered by the governmental drafters when they prepared the bill for the Japanese PRODUCT LIABILITY ACT (*MITI Commentary*, 1994: Appendix at 282). Moreover, in 1993, Professor James A. Henderson, Jr., the Co-Reporter of the PRODUCTS LIABILITY RESTATEMENT, kindly came over to Japan, in response to the request from the author and his colleague scholars, and directly gave precious lectures on the revision of the §402A in *Kasumigaseki* (霞ヶ関: the place where the administrative branch offices are concentrated) and *Nagata-chō* (永田町: the place around the Diet

**Table: Chronological Developments in Definitions of Defectiveness in US, EC, and Japan**

Years	Nations / Areas	Events	Core concepts of defectiveness (focusing upon design defect)
1965	US	RESTATEMENT (SECOND) OF TORTS §402A	<p>“(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if . . . .</p> <p>(2) The rule stated in Subsection (1) applies although</p> <p>(a) the seller has exercised all possible care in the preparation and sale of his product, and . . . .</p> <p>Comment:</p> <p>. . . .</p> <p><i>i. Unreasonably dangerous.</i> . . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics.”</p> <p>RST §402A &amp; cmt. <i>i</i> (emphasis added) (a consumer expectations test).</p>
1975	JPN	Dr. Sakae Wagatsuma’s Legislation Proposal	<p>“ ‘defect’ means a product’s <i>kashi</i> (瑕疵 : flaw in quality) causing unreasonable danger to life, body, or property at ordinarily foreseeable use of the product . . . .”</p> <p>Seizōbutsu Sekinin Kenkyūkai, <i>Seizōbutsu Sekinin Hō Yōkō Shian</i> Article 2(3) [Products Liability Research Group, Model Products Liability Act] (1975) (author’s trans.) (a proposal by nine scholars of Civil Law, Commercial Law, and Civil Procedure led by Dr. Sakae Wagatsuma) (influenced by the consumer expectations test).</p>
1985	EC	EC Directive	<p>“A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, . . . .”</p> <p>EC Directive Article 6(1) (emphasis added) (a [neutral] person’s expectations test).</p>
1990	JPN	Some Civil Law scholars’ Legislation Proposal	<p>“ ‘defect’ means a lack of the safety that a person legitimately expects in light of all of the circumstances including (1) reasonably expected use of the product and (2) explanations, indications, warnings, and other labels regarding the product.”</p> <p>Shihō Gakkai Hōkokusha Gurūpu, <i>Seizōbutsu Sekinin Rippō heno Teian</i> [A Reporter Group of 1990, Japan Association of Private Law, A Proposal for Products Liability Legislation] (author’s trans.) (a photocopy of the EC Directive).</p>

After 1992	US	Proposal to amend §402A	<p>“Liability . . . may be based on . . . ;  <b>(b) a design defect if the foreseeable risks of harm presented by the product could have been reduced by the adoption of a reasonable, safer design by the seller . . . ; or . . .</b>”</p> <p>RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY §101(2)(b) (Preliminary Draft No. 1, Apr. 1993) (emphasis added) (a functional test based upon comparison with an alternative design).</p>
1994	JPN	Japanese PRODUCT LIABILITY ACT	<p>“ ‘defect’ . . . mean[s] a lack of safety that the product ordinarily should provide, taking into account . . . .”</p> <p>Japanese ACT Article 2(2) (emphasis added).</p>
1998	US	RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY	<p>“A product . . . is defective when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design [RAD] by the seller . . . , and the omission of the alternative design renders the product not reasonably safe”</p> <p>PRODUCTS LIABILITY RESTATEMENT §2(b) (emphasis added) (RAD / dual requirement).</p>

Building) in a very tight schedule. Therefore, the drafters of the bill for the Japanese ACT were supposed to know that the ALI was proposing the new defectiveness’ test that was better than the old and open-ended §402A or its offspring of the 1985 EC Directive. Nonetheless, as explained below, the co-drafters of the judicial bureaucrats of the bill for the Japanese ACT seemed to disregard intentionally the new and better test of defectiveness proposed at the ALI.

## 2.2 MOJ’s Strong Resistance to the Rule of Law

The PRODUCT LIABILITY ACT was based upon the legislative bill introduced by the Cabinet (*kakuhō*: 閣法 or 内閣提出法案, hereinafter simply referred to as the “Bill”). The Bill was submitted to the Diet after the Liberal Democratic Party (LDP) had been suddenly ousted from the Government as the first time since the World War II. Seven parties, which had never so far thought of being able to take the power, made a coalition party. The coalition party was driven by populism and very unstable; therefore, it wanted to prepare and pass the Bill in a hasty manner because it sounded like “pro-consumers.” Although the coalition party lasted *only for nine months*, the Bill was submitted to and passed, without any revision, both Houses of the Diet.

Economic Planning Agency (EPA) in charge of National Life Council, Ministry of International Trade and Industry (MITI) in charge of Industrial Structure Council, and Ministry of Justice (MOJ) in charge of Legislative Council were the three major and influential bureaucratic agencies that participated in drafting the Bill under *Pī Eru Hō Renritsu Yotō Purojekuto* [the Ruling Coalition Party's Product Liability Legislative Task Force] (Kawaguchi, 2006: 22). Among them, for example, MITI, through its Industrial Structure Council, had argued for clarifying defectiveness as much as possible and criticized vague and ambiguous definitions proposed by, for example, some Japanese Civil Law scholars in 1990 such as “a lack of safety that a person legitimately expects in light of all of the circumstances. (author's trans.)” (See *MITI Commentary*, 1994: Appendix at 69–70.)<sup>1</sup>

MOJ resisted, however, through its Civil Law Committee of Legislative Council, clarifying the definition by stating as follow (Shapo, 1995: 651 & n. 107): “it is practically difficult to stipulate a definition provision [for defect] . . . . [I]n order to realize adequate resolution on tort liability in the case of accidents resulting from defective products, it is appropriate to leave interpretation to the application of practice. (emphasis added)” Support from the Japanese judicial circle [*hōsō*— 法曹 —] to this queer attitude of MOJ is further reflected in the following Diet Record regarding the Bill.

**Witness Ichirō Katō (President of Seijō Gakuen):** I'm Katō [that now introduced by the Committee Chair Katsuhiko Sirakawa, LDP]. My field of expertise is the Civil Law, especially torts remedies. . . . / . . . . / I assumed the chairpersons at both National Life Council [of EPA] and Civil Law Committee of Legislative Council of Ministry of Justice, through which I participated in the discussions of this Bill. The Ministry of Justice [through its Civil Law Comm.] has reported that it is unnecessary to define defectiveness in a detailed manner or to set forth factors to be considered [i.e., three factors in the definition] because it is well understood from the common sense what the defect is.

The current MINPŌ [民法 : CIVIL CODE] does not define the *kashitsu* [過失 : negligence] . . . .

Hearings about judges' impressions reveal that, in the ends, it would become hard for a judge to render a fair and appropriate decision if his/her hands are bound. Rather [than the defectiveness

<sup>1</sup> As to proposals from, *inter alia*, some of the Civil Law scholars and opposition political parties, see, e.g., (Hirano, 1992: 644–45, 648–55).

is determined in a detailed and clear manner by the legislature], a judge wishes that his/her hands are not bound and that [only] a general principle is determined, i.e., the general principle of a shift from negligence to defectiveness is determined [by the legislature] so that the judge may conduct a trial of a particular [contextual] case in accordance with the general principle.

[Y]ou do not have to draft details of the definition of defect.

.... / ....

**Representative Fukushima Nukaga (LDP):** As to the most important issue of defect in product liability, . . . I heard that the National Life Council, for which Witness Katō assumed the [leading] role, opined that it was desirable to clarify as much as possible the standard for determining defect. I also heard that as a result of the adjustment of opinions thereafter with the Ministry of Justice, the current legislative language was drafted. . . ., please let me know your opinion, as an [neutral] attorney,<sup>2</sup> [about the definition].

**Witness Kōhei Nakabō (Ex-President of the Japan Federation of Bar Associations (JFBA-*Nihon Bengoshi Rengōkai*-)):** . . . . I think that the language of “a lack of safety that the product ordinarily should provide” [without any other detailed descriptions about factors] is enough as the definition. I think it is rare as statutory language to stipulate clearly considering such factors as the nature [of the product] and other circumstances for determination [of the lack of safety] . . . .

....

**Representative Fukushima Nukaga (LDP):** You think that the statutory language should be more simplified. I think you mean that a judge should be allowed to determine finally [what the defect is] through adversarial discussions [between the parties] and based on factual evidence.

**Witness Kōhei Nakabō (JFBA):** Yes, exactly as you indicated.

**Representative Fukushima Nukaga (LDP):** . . . , now let me ask Witness Katō . . . .

**Witness Ichirō Katō:** In my opinion, definition does not have to state details such as factors to be considered.

However, among relevant ministries, there were opinions that detailed descriptions [of defectiveness] should be written [in the

<sup>2</sup> [Author's Note:] It is very much doubtful whether we should regard the Japanese bar associations as “neutral” or not. To say the least, they were pro-plaintiff.

Bill]. . . . Thus, we respected those opinions and [the National Life Council and the Bill reflected somehow this history of discussions]. But in the discussions at the Ministry of Justice, we thought the bill need not describe such details. An allegation that detailed descriptions would become biased toward the industries and simple ones would become biased toward the consumers mistakes the means for the end<sup>3</sup> — The *prima facie* [required] element is defectiveness for which, like [a conventional concept of] negligence, there are various theories. But finally at court each party may [freely] argue for his/her case — It is the judge who finally determines what the defect is.

When a judge determines [the defect], he/she will take it as natural to consider such factors as written herein [*i.e.*, the three factors written in the Bill]. Therefore, if you'd draft details, you'd end up in writing only factors to be taken as natural. If so, in my opinion, you do not have to write them down.

(Diet Rec., No. 6, Com. Comm., H.R., 129th Diet, June 6, 1994, at 8, 13) (statements of Witness Ichirō Katō of both National Life Council and Civil Law Committee of Legislative Council, Witness Kōhei Nakabō of JFBA, and Representative Fukushirō Nukaga of LDP) (emphasis added) (author's trans.)

Meanwhile, the Diet Record and official comments on the legislation reveal clearly that the three factors plus “other circumstances” in the statutory text represent all circumstances including but not limited to nine sub-factors plus *x* such as, among others, utility and benefit of the product, cost-benefit [of the product], probability of the injury and its magnitude, technological feasibility, and an anomaly/variation in manufacturing (*i.e.*, ‘*ausreißer*’ [in German] or a manufacturing flaw) (Diet Rec., No. 5, Com. Comm., H.R., 129th Diet, June 3, 1994, at 19 (statement of Witness Yūji Kiyokawa of MITI); *MITI Commentary*, 1994: 89–91; Madden, 1996: 308–11). Another important Diet Record, however, clearly indicates that the burden of proof on the three factors does **not** lie on the plaintiff and that the plaintiff's burden is to prove “a lack of safety that the product ordinarily should provide.” (Diet Rec., No. 7, Com.

<sup>3</sup> [Author's Note:] Pro-plaintiff groups “insisted the definition allow for latitude based upon common sense rather than being too detailed or too narrow . . . , [hoping that] courts will construe the definition of defect liberally in favor of” the plaintiff (Green, 1996: 565). They alleged that “the injured would [be forced to] bear heavy burden if they have to plead and prove categories of defect. (author's trans.)” (*MITI Commentary*, 1994: Appendix at 161). They showed strong antipathy to the American new functional test of defectiveness revising the out-of-dated §402A.

Comm., H.R., 129th Diet, June 10, 1994, at 11 (statement of Witness Jun Masuda of MOJ)) In this way, the core statutory rule of the defectiveness continues to be vague and ambiguous.

### 3 UN-DEMOCRATIC CULTURE GIVING VAST DISCRETION TO A “CAREER JUDGE”

Especially, the following portion in the statement cited above, “it is well understood from the common sense what the defect is (emphasis added),” reminds me of a notorious dictum in an American First Amendment case, “I know it when I see it.”<sup>4</sup> This attitude of the Japanese co-drafters of judicial circle astonishes me because Japan has to be a modern democratic nation that must respect the ideal of the rule of law. In Japan, most of the judges, who are referred to as “career judges,” are pure bureaucrats of legal profession elected *not at all* by the sovereign people (Oda, 2009: 74). Thus, it is very far away from democracy to let the judge with his/her vast discretion decide the core rule of very importance. From a cultural viewpoint, however, this author can identify some Japanese peculiarities that could explain why the un-democratic Bill was accepted.

#### 3.1 Harmony, Context, Judicial Activism, and Non-Strict Interpretation of Statutory Language — Judicial Broad Discretion

It has been indicated that harmonious society is the Japanese law’s objective as evidenced by Prince Shōtoku’s JŪNANA-JŌ KENPŌ [SEVENTEEN ARTICLES CONSTITUTION], which begins its text by stating “*wa wo motte tōtoshi to nasu*” (以<sub>レ</sub>和為<sub>レ</sub>尊 : harmony is to be valued) (Port, 1994: 662 n. 78; Kawashima, 1967: 168)<sup>5</sup>, in and around the seventh century. This harmonious culture seemed to affect unconsciously the Japanese judicial bureaucrats who co-drafted intentionally the vague and ambiguous definition of defectiveness.

As Professor Carl E. Goodman analyzes (Goodman, 2008: 497–512), to

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<sup>4</sup> I credit Professors James A. Henderson, Jr. and Aaron D. Twerski with this metaphorical expression. (Henderson & Twerski, 1999: 18 & n. 92 citing *Jacobellis v. Ohio*, 378 U. S. 184, 197 (1964) (Stewart, J., concurring)). Professors Henderson and Twerski are the leading products liability experts and the Co-Reporters of the PRODUCTS LIABILITY RESTATEMENT.

<sup>5</sup> Kawashima’s culturalist theories, which were once criticized by institutionalists, seem to have been rehabilitated recently. See, e.g., (Cole, 2007: 103, 113) (supporting “social-cultural explanation” of Japan’s low litigation rates).

achieve and preserve harmonious society, the Japanese court reads statutory language very flexibly not bound by “strict interpretation of words” so that a judge can reflect in his/her judgment “a ‘common sense of judgment of society’ or ‘consensus of the public’ or ‘norms of society’ ” or the “context,” or what the people desire, perceived by the judge. The Japanese legislative branch also helps the judicial branch’s flexible discretion by “resolving” only “broad policy issues” and allowing a judge to decide a particular dispute in line with “the common sense of society” perceived by the judge.

On the part of a judge who is given such large discretion, he/she seems to have an ability to fill in the broad gap between abstract statutory lines of language, even though a statute shows only a general principle without setting forth a specific standard. As an example of this ability, Professor Daniel H. Foote illustrates the Japanese automobile accidents formulae created by some judges who studied extensively precedents in order to expedite uniform remedies of losses caused by such accidents that suddenly skyrocketed due to rapid motorization of the Japanese society (Foote, *reprinted in* Milhaupt et al, 2006: 182–85). As the judges intended, the formulae thereafter have been widely applied in courts as well as out-of-court settlements including various ADR (alternative dispute resolution). Evaluating this standardization as evidence of Japanese judicial activism, Professor Foote indicates as follow:

[T]hese formulae did not simply come about through a straightforward application of fixed principles of the Civil Code. Nor did they result from a legislative effort to define the standards. . . . Rather, the automobile accident standards serve as a testament to the creativity of Japanese judges — one of the foremost examples of conscious and deliberate judicial activism in Japan.” (*Id.* at 182.)

Meanwhile, before Professor Goodman analyzed that a Japanese judge is not bound by “strict interpretation of words,” Professor Takeyoshi Kawashima had indicated same analysis in his famous *The Legal Consciousness of the Japanese* (Kawashima, 1967: 33–43). Professor Kawashima’s ground for his argument is, however, different from Professor Goodman’s; the reason Professor Kawashima relies upon is the Japanese people’s perception of the Japanese language as inherently vague and ambiguous. He analyzes that, while a meaning of statutory language must be adjusted more or less to the change of society in any jurisdiction, the Westerners’ (*i.e.*, German, French, and American) judiciary tries to keep and perceive statutory language as definite and fixed. On the contrary, the Japanese one conceives that the meaning of language is indefinite and unfixed. Thus, even in such a case

where a dispute is extremely out of a statute's scope, a Japanese court states that the statute applies to the dispute; the court tends to treat statutory language as an Aladdin's Magic Lamp that enables to settle any dispute rather than to urge to revise the out-of-dated statute. Then, Professor Kawashima adds that in Japan a statute is very rarely revised compared with French one that is amended so often because French judiciary perceives statutory language as fixed and definite and as having limitation that needs to be amended periodically.

These analyses of using such key words as harmony, context, judicial activism, and non-strict interpretation of language, in combination could explain why the PRODUCT LIABILITY ACT's definition of defectiveness was drafted in a vague and ambiguous manner. For example, the Japanese law's objective, which puts high priority on harmony, leading to a judge's tendency to reflect the "common sense of judgment of society" in his/her decision, can explain the statement, "it is well understood from the common sense what the defect is." (emphasis added) Moreover, the indication that (i) the Japanese legislative branch resolves only broad policy issues to give a judge enough discretion to take into consideration the "context" and that (ii) the Japanese judicial branch has judicial activism because of which it can create judicial standard by itself can explain some other portions of the statements in the Diet Record quoted hereinabove as follows:

it is unnecessary to define defectiveness in a detailed manner or to set forth factors to be considered (emphasis added) [;] a judge wishes that his/her hands are not bound and that [only] a general principle is determined, i.e., the general principle of a shift from negligence to defectiveness is determined [by the legislature] so that he/she can conduct a trial of a particular [contextual] case in accordance with the general principle (emphasis added) [; and] [i]t is the judge who finally determines what the defect is. (emphasis added)

Professor Kawashima's analysis that a Japanese statute is not revised so often can also explain why the judicial bureaucrats' co-drafters of the ACT resisted defining clearly and in a specific manner the defectiveness. The co-drafters might be unable to predict that the ACT could be revised in future so often that it could catch up with the change of social norms, because actually the torts provisions of the CIVIL CODE had not been revised since 1896(!); therefore, the co-drafters of judicial bureaucrats might be forced to define the defectiveness so abstractly that it could survive the future change of social norms, even though they knew that the ALI was proposing a better

and workable test of defectiveness. Actually, the ACT's co-drafters of judicial bureaucrats seemed to treat the PRODUCT LIABILITY ACT like the CIVIL CODE's torts provisions, especially Article 709, which had lasted for more than a hundred years. Article 709, which is referred to as the "general [principle of] torts," sets forth that "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. (emphasis added)" (MOJ, JPN. L. Trans.) As the Diet Record quoted hereinabove states, the "negligence" (*kashitsu* : 過失) is not defined at all in the CIVIL CODE. This lack of definition of negligence, the core element of the general principle of torts, was one of the reasons why the ACT's co-drafters of judicial bureaucrats argued *against* specific and clear definition of defectiveness. Because products liability is categorized as a part of torts and defectiveness is the core element thereof, the ACT's co-drafters of judicial bureaucrats seemed to apply by analogy vague and flexible concept of Article 709's negligence to the ACT's defectiveness. And interestingly, Article 709 is said to have been "intentionally [drafted as] abstract in order to give sufficient discretion to the courts in their interpretation." This enables the courts to cope with newly emerging problems such as pollution. (emphasis added)" (Oda, 2009: 42, 180) Given this "intentionally abstract" nature of Article 709, the ACT's co-drafters of judicial bureaucrats seemed to prefer restraining from defining clearly the defectiveness.

### 3.2 Japanese Culture of "Trusting an Opinion of a Wiser Judge Rather Than a Verdict of Twelve Common Neighbors" — People's Trust of a Judicial Bureaucrat of a Judge

In the author's opinion, a Japanese tends to think that "I would rather trust my life, liberty[,] and property to an opinion of a great judge rather than a verdict of twelve common neighbors, for common neighbors are always not as wise as the great judge."<sup>6</sup> Without this special tendency of Japanese culture, it is hard to explain why the Japanese judicial bureaucrats could dare to say "let the judges — bureaucrats — define *ex post* the most important rule of the new products liability rather than the legislators — the representatives of the sovereign people — do the same *ex ante*." As evidence of this tendency, in Japan there has been no civil jury system; a judge handles matters of facts as well as law.

This special Japanese culture of trusting highly a judge (Goodman, 2008: 501) has been proven by the unpopularity of a criminal jury system that was

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<sup>6</sup> As to an American sentence that is just the opposite of the one in the text, see (Klein, 1986: 1340 n. 81).

first introduced to Japan in 1928. Whereas power of this jury system was limited, it was still a fruit of the then democratic imperial era of “*Taishō* [大正]” (1912–26). In only less than two decades of years, however, the criminal jury system was suspended in 1943. And until the last year of 2009, in Japan all of the criminal case proceedings, like the civil ones, have been conducted in bench trial only. While there are several speculations on the reasons for this unpopularity of the jury system, many scholars reportedly indicate a cultural reason as follow (Kiss, 1999: 269–70):

[T]he Japanese people prefer trial by ‘those above the people’ rather than by ‘their fellows,’ and this caused the Japanese to distrust juries from the beginning.[] People trust judges because they have a special sense of responsibility when adjusting cases and try to keep their moral standards high in order to ensure impartial trials.[] Therefore, citizen participation in the judicial process is ultimately not suitable for the Japanese people because citizens would simply prefer to have a judge decide their case rather than their fellow citizens. . . . / . . . Finally, Japanese respect for authority caused the Japanese people to prefer trial by experienced and honest judges rather than trial by their peers.  
(emphasis added)

After the long period of the bench-trial-only society, at last since May, 2009, a new system of lay participation in criminal felony trial has re-started. It is called the “*saiban'in*” [裁判員: a lay judge or lay assessor] system in which six lay assessors and three career judges sitting together to undertake a deliberation jointly (Weber, 2009: 157–61). Because the Japanese public looked “immature,” an autonomous jury-alone deliberation has not been adopted (See the 32nd Conf. Rec., Jud. Sys. Reform Council, 2000). Thus, in the *saiban'in* system, judges participate in a deliberation to “educate” the immature Japanese assessors. Even though the system had taken care of so much the immaturity of the Japanese citizens, still a large majority thereof showed very strong opposition to the burdensome participatory lay assessor system (Ito, 2009) because of “deep cultural aversion.” (Tabuchi & McDonald, 2009: 4)

### 3.3 Japanese Ideal of the “*Oh'oka Sabaki*” (大岡裁き: *Oh'oka Judgment*) — Desire for an Equitable Settlement Not Bound by Formalistic Legal Rules

In this author’s opinion, Japanese preference for the so-called “*Oh'oka Sabaki*” [大岡裁き: *Oh'oka Judgment*] supports high expectations of judicial

activism and creativity. The *Oh'oka* Judgment means wise settlements fictionally made by a real Judge, Tadasuke Oh'oka, the Lord of Echizen [大岡忠相, 越前守, 1677 to 1751], in *Edo* era (Edmonds, 1961: 7; Wigmore, 1982: 563). Especially, it is the equitable nature of the fictional judgment (decree) that seems to attract the Japanese popularity.

For example, “*Sanpō ichi-ryō zon*” [三方一両損: one “ryō”<sup>7</sup> loss in each of the three sides] is a famous and popular story of a lost and found (Aoki, 2005: 163–71). A plasterer happened to find three ryō on the road. Because he was so honest that he spent a whole day long, losing his earning opportunity of the day, to find finally the owner, a carpenter. The carpenter, who was also an honest man, refused to accept the money back, arguing that the plasterer should keep it because he found the same (and made endeavors to find the owner). Neither did the plasterer take the money; therefore, the case came to Oh'oka, the Lord of Echizen. Being very pleased to hear the parties' honesty, he offered his own pocket money of one ryō to reward them for their honest behaviors. As a result thereof, the total of the four ryō was able to be divided equally into two ryō for each of the plasterer and carpenter. Then, in the punch line, Oh'oka told as follow: “the plasterer lost one ryō because he had found three ryō and got two; the carpenter lost one ryō because he had lost three ryō and got two; and I, myself, lost one ryō; then, each of the three sides lost one ryō!”

This equitable manner of decision (i) that is not based upon the formality of a rigid written rule; (ii) that hammers out an unbiased and plausible settlement; and (iii) that tries to save faces of the parties by refraining from deciding everything black and white (See Kawashima, 1967: 140, 163) seems to be what the Japanese typically expect of a judge. The Japanese might expect that the Japanese judges, even without any workable written statutory standard for defectiveness, could easily come up equitable standards suitable for various specific products liability cases so wisely as his honor, Oh'oka, the Lord of Echizen, did so in fictional but admired stories in *Edo* era.

## 4 Conclusion

Professor Kawashima criticizes the Japanese judicial tendency not to strictly interpret statutory language because the tendency hinders foreseeability of the rule of law (Kawashima, 1967: 42). Also Professor Goodman indicates

<sup>7</sup> The “ryō” or “ryōh” (両) is an old currency and a large gold coin in *Edo* era (1603–1867).

that the Japanese tendency has its danger because the social norms or context is the ones “perceived” by judges whose perceptions might be wrong and inconsistent (Goodman, 2008: 511, 521). The definition of defectiveness under the PRODUCT LIABILITY ACT was intentionally drafted so vaguely and ambiguously that a judge may enjoy much leeway to consider changing social norms. This legislative attitude, however, obstructs foreseeability of the sovereign people. To summarize this problem, I conclude this piece by the following “comparative law” joke.

**Robot Engineer:** The definition of the Japanese defect resembles the European one. Does it mean that the ACT has adopted the so-called “consumer expectations” test by which a product is to be found defective when it disappoints a consumer’s expectations, doesn’t it?

**Japanese lawyer (“*Bengoshi*”):** No, absolutely not. On the one hand, as you indicated, the Japanese definition sounds like a photocopy of the 1985 EC Directive, which states “[a] product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account . . . (emphasis added).” On the other, however, the Japanese Diet Record *obviously rejects* the consumer expectations test. The Record says that the consumer expectations test could be interpreted *subjectively* as the plaintiff’s expectations test; therefore, it continues that the defectiveness should be determined from the viewpoint of an ordinary person who is not biased toward a manufacturer or consumer (See Diet Rec., No. 1, J. Rev. Bd. of Com. Comm. and Spec. Comm. on Consumer Affairs, H.R., 129th Diet, June 6, 1994, at 22 (statement of Witness Michisato Sakamoto of EPA); Diet Rec., No. 7, Com. Comm., H.R., 129th Diet, June 10, 1994, at 14 (statement of Witness Michisato Sakamoto of EPA)).

**Robot Engineer:** Then, has the Japanese standard of defectiveness adopted a more fine-tuned test balancing various costs and benefits of a product against those of an alternative one, hasn’t it?

***Bengoshi*:** It hasn’t denied applying such a test. The official comments of the ACT explain that the statutory three-factors illustrations represent all circumstances including nine sub-factors; one of them is “technological feasibility,” which means “a possibility of an alternative design at a reasonable cost when the product was delivered.” (author’s trans.) (*MITI Commentary*, 1994: 81) (See also Madden, 1996: 309.)

**Robot Engineer:** I'm a little confused. Is there any consistency between those official comments and the chameleon-like black letter in the statutory text?

**Bengoshi:** Yes, the defect will be determined consistently by the social norms or, as you may call it, the “invisible air (*kāki*: 空気) of society” perceived by a judge. Because a Japanese judge is deemed to be so wise as he/she can correctly perceive the “invisible *kāki* of society,” he/she wouldn't be bothered even by the rule of law as “God” is not bothered by the same.

**Robot Engineer:** Then, please tell me the specific content of the “invisible *kāki* of society.” If I knew it, I'd be willingly to comply with it!!

**Bengoshi:** I'm sorry, but you're asking the forth question, again. Usually I answer a forth question for an additional fee; however, I cannot answer at this time. This is because you are asking what “God” will do; in other words, you're questioning an “oracle.” My job is not to predict an oracle, but to tell the rule of law — I'm just a lawyer, not a “prophet.”

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