Conversation 4

What Can We Learn from the Okawa Elementary School Tsunami Litigation?

ABSTRACT

This chapter focuses on the litigation that followed the tsunami, which hit the Okawa Elementary School. The tsunami resulted in the death of the children visiting the school. The following litigation concerned the question of whether appropriate safety measures had been put in place at the school before the tsunami occurred. The two lawyers leading the litigation for the parents of the children report on how they used innovative approaches in the litigation proceedings. The legal innovation employed concerns the composition of the litigation team, the involvement of the children's parents, the creation of witness statements addressing the emotional aspects of the disaster, the identification of the entity that should be liable, the doctrine determining liability, digitalisation of litigation and the distribution of risk in modern societies.

Speakers	Kazuhiro Yoshioka and Masahiro Saito
Moderator	Mihoko Sumida
Comment	Mikiharu Noma
Concluding Conversation	Felix Steffek and Mihoko Sumida
Questions for Further Thought	Felix Steffek

INTRODUCTION

Sumida: In October 2019, an innovative final judgment was handed down that would realise a legal remedy for victims who suffered damage that could have been avoided – the decision of the Sendai High Court awarding damages to bereaved families in a case seeking damages from the state in relation to the Okawa

Elementary School children tsunami incident. Today we have Mr Kazuhiro Yoshioka and Mr Masahiro Saito, the lawyers who won that landmark judgment, to talk about the nature of the legal innovation and what happened behind the scenes.

STUDYING LAW TO SOLVE NOVEL EMERGING PROBLEMS

Sumida: Today we will have an interview-style class with Mr Kazuhiro Yoshioka and Mr Masahiro Saito as guest speakers. They won a landmark court decision as attorneys representing the bereaved families in a lawsuit seeking damages for the Okawa Elementary School children tsunami incident.

A few years ago, the then-prime minister Abe delivered the following message to the world: Japan is a forerunner facing a range of challenges. As you are aware, Japan faces various challenges including being a developed country simultaneously having the fastest ageing population in the world, resulting in an ongoing population decline, depopulation in rural areas and an excess concentration of its population in urban centres. As a result, Japan has no choice but to become a leader in solving these emerging problems ahead of the rest of the world.

I would like you to consider that, in the rapidly changing society we live in, the social framework must also change. The Civil Code, which is my area of expertise, establishes the basic framework for civil society, but it is totally unclear if we can solve our problems by merely following the precedent the Code sets.

We have planned a series of conversations to invite you to think about the following issues together: in this current era of rapid change, what should lawyers be? Who are the ideal lawyers needed to develop the future of our society?

Here is *my* tentative idea of what an ideal lawyer should be. In addition to merely knowing all sorts of laws, where they can be found, every single past court ruling, being able to extract this relevant knowledge when consulted and to clearly convey that knowledge to people in need, lawyers must be able to dynamically and boldly blaze the way with novel legal theory based on new ideas in anticipation that sticking to what has been done so far might not work in the future. In other words, my image of an ideal lawyer is a lawyer who makes innovation happen and attacks new frontiers in the world of the law. An excellent example of this are today's guests, the lawyers who won the landmark case we will discuss. By inviting them, I hope we can gain a better understanding on how to address novel legal issues.

DEVELOPING NEGLIGENCE LIABILITY IN JAPAN, A NATURALLY DISASTER-PRONE COUNTRY

Sumida: Now we are moving on to today's topic, the lawsuit seeking damages for the Okawa Elementary School children tsunami incident. First, let me briefly introduce the challenges our guests faced in making their case. In this case, the directly contested

issue was the existence of liability for negligence in the context of the 'principle of private autonomy', which is one of the three basic principles of the Civil Code.

The first issue was whether it is possible to hold someone legally liable for losses caused by a natural disaster. Mr Yoshioka has stated that since it was such a difficult case, he wanted the bereaved families to consult with another lawyer.[1] Based on the principle of private autonomy, I suppose that the starting point was that it would be difficult to hold someone legally liable for losses caused by a natural disaster. It is probably most people's gut feeling that a natural disaster is an act of God and cannot be remedied by the law.

That said, there was a case that might provide assistance – the Supreme Court's decision on a lightning strike during a football game.[2] In 1996, during a high school football competition, a game was not suspended by the coach during a thunderstorm. One of the players was hit by lightning and was seriously hurt. In 2006, the Supreme Court reversed the lower courts' decisions which denied possible liability for negligence on the part of the coach and rejected the case.

At this point, it is worth stopping to consider what 'negligence' is. The basic principle is that negligence is a failure to do what should have been done. From the aspect of the football case, 'what should have been done' means that 'the coach should have suspended the game at that time'. In that case, foreseeability and the duty to avoid risk were important elements. It was argued that it would have been possible for a person who led the team to foresee the immediate danger of the thunder, so he should have stopped the game and made the players evacuate the field.

Nonetheless, the decision in the Okawa Elementary School case adopted a new concept of 'organisational negligence', instead of adopting the logic that a specific person (i.e. the coach of the football team) should have been able to foresee the risk. This case is said to be groundbreaking because it did not adopt the logic of previous cases that a reasonable decision after a natural disaster occurred is sufficient to ward off liability for negligence.[3] Now, why did the lawyers in the Tsunami case go out of their way to try a new method instead of following the favourable precedent of the Football case? Mr Yoshioka and Mr Saito will be able to give us an answer.

THE ESSENCE OF INNOVATION

Sumida: I apologise for the long introductory remarks, but I would like to ask Mr Yoshioka and Mr Saito to introduce each other rather than themselves to better approach them as innovators. According to Ikujiro Nonaka, Professor Emeritus at

[1] Kazuhiro Terada, 'Two Lawyers Who Ventured into the "Okawa Elementary School" Lawsuit – Reason Why They Still Face the Bereaved Families after the Decision' (March 2021) <https://creators.yahoo.co.jp/teradakazuhiro/0200093049> accessed 1 November 2023.

[2] Decision of the Supreme Court on 13 March 2006, *Hanrei Jiho* No. 1929, p. 41; *Hanrei Times* No. 1208, p. 85.

[3] Shigeto Yonemura, 'Disasters and the Law of Damages' (2013) 6 Ronkyu Jurist 64; Takayuki Ii, 'Okawa Elementary School Tsunami Lawsuit and Its Significance', *The Newsletter of Senshu University Law Institute* No. 62 (February 2021), p. 65 et seq.

Hitotsubashi University and an authority on innovation research, the key to innovation is an interaction between non-conforming elements. In other words, he indicated that the key is for different people to work together. In that sense, I am interested in hearing how our guests introduce each other.

Professor Nonaka also says that innovation happens when the contradiction of binary opposition between analogue 'tacit knowledge' and digital 'explicit knowledge' is dialectically overcome. Given that legal theories can be considered 'explicit knowledge', how can innovation happen? Professor Nonaka also says that by grasping two extremes in terms of the big picture while keenly detecting comprehensive points and mutually expanding them, the two extremes will be united to sublate (*aufheben*, in German) them into something greater. Contradiction of binary opposition is a 'rational contradiction' and cannot be solved merely by a theory. What is needed is 'sensitivity'. Conflict of digital rationality, together with analogue sensitivity, will allow dynamic integration at a higher level. I would like to hear the story of the lawyers with this dynamism in mind.

Now, may I ask you, Mr Yoshioka, who actually created the scenario leading up to the winning of this landmark decision, to explain the scenario and the whole story about working with Mr Saito?

THERE WERE ALSO VICTIMS OUTSIDE THE SCHOOL

Yoshioka: Hello everyone. When I heard from Professor Sumida about this planned conversation series, I envied the students at Hitotsubashi University. You hardly ever meet a professor who brings up a case such as the Okawa Elementary School tsunami case in a Civil Code class. The case does not fall in the typical framework of this type of class, and considering this, it is audacious but certainly an example to follow. So, my first impression was that you are so lucky to be in such an environment.

As requested by Professor Sumida, I would like to explain why I asked for Mr Saito's help. The tsunami that hit Okawa Elementary School affected not only the elementary school but also killed about 200 local residents living around the school. How can one assert that the death of 74 children at Okawa Elementary School alone was a human-made disaster when 200 adults were killed in the vicinity of the school? Many people said that this would be an extremely reckless way of pursuing the case and that it would be difficult to win. In order to take on such a case, I thought it was essential for me to get help from Mr Saito who specialises in the State Redress Act, so I asked him to be co-counsel in this case.

Also, we could not tell those who had everything washed away by the tsunami to pay legal fees for the lawsuit. Some of them were living in temporary housing with only the barest necessities. However, lawyers need money from their clients to maintain their practices, so there were not many people I could ask to be co-counsel when there would not be any compensation and we did not know whether we would win. At the same time, I believed that this was an extremely important issue that somebody had to take on, and I hoped Mr Saito would be willing to work with me.

I once worked with Mr Saito in a state compensation case involving Toyota Shoji. Throughout this case, I saw that Mr Saito is highly skilled when it comes to the topic of state compensation. However, filing the lawsuit in this case meant he would have to travel from Tokyo to the scene of the incident many times and that would be a heavy burden, but I still thought that Mr Saito would show spirit and accept my request. If he did not have tremendous enthusiasm, he would not have agreed to work with me.

I repeatedly asked Mr Saito to come to see the scene of the incident, but he was reluctant at first. However, he was in tears when he first heard the victims' testimony. He is such a warm-hearted lawyer. At the same time, he has a cool head. It is hard to find a lawyer who has a warm heart and cool head at the same time. There are many lawyers in the Sendai Bar Association, and I could have asked one of those lawyers to work with me. However, all things considered, I asked Mr Saito for help because I thought he would be the best partner, and he agreed to work on the case with me. That was the story of how Mr Saito became co-counsel on this case.

Sumida: Thank you. Next, Mr Saito, we would like to hear from you.

Saito: Mr Yoshioka, thank you for your compliments. You are far too kind. I was also educated at the Faculty of Law at Hitotsubashi University, but it has been almost 50 years since I started studying here. Looking back on the lectures at the Faculty of Law in those days, as Mr Yoshioka said, I am also envious of you all who can attend a conversation series like this one by Professor Sumida.

I would like to start by explaining how I became involved in the state compensation case involving Okawa Elementary School. I was asked to be part of this case by Mr Yoshioka many times for more than six months when I met him at meetings of committees of the Japan Federation of Bar Associations. He kept asking me to come to see the scene of the incident, but I thought it would be hard to go there from Tokyo and it took a while for me to make up my mind. I believe it is very important for lawyers to visit the scene of an incident, and I am sure Mr Yoshioka thinks the same. I believed that once I visited the scene and got a sense of what happened there and what the facts were, I would be compelled to think that I have to act and I could not sit by idly. I therefore hesitated, thinking that once I gave in to Mr Yoshioka's invitation and visited the scene, I would feel compelled to accept this case.

In the end, at the end of the year before we filed suit, I went to the scene with Mr Yoshioka, visited the bereaved families, heard their stories and carried out various associated investigations. In the course of those processes, I felt that this was not an issue that we could wrap up by advising that there is no recourse for the victims because it was a natural disaster. This was an unprecedented, human-made accident at a school that was caused by people who were charged with protecting the lives of the children of Okawa Elementary School but who failed to take appropriate measures. As Professor Sumida indicated, the complete lack of a remedy would be absurd and unjust. I felt that without our civil suit, the seventy-four children who lost their lives would not be able to rest in peace.

It was indeed an honour for me to be asked to work with Mr Yoshioka because he is an extremely talented lawyer who has a sense of artistry and at the same time is

able to come up with and realise specific, dispassionate and reasonable strategies. I have not met many lawyers who are as capable as Mr Yoshioka in building legal scenarios. I had my eye on Mr Yoshioka since I first became a lawyer. I thought we could win this case, and I wanted to help, even if it would be only in a small way. That is how I became involved and worked with him on this case.

THE BEREAVED FAMILIES SERVED AS 'DE FACTO COUNSEL'

Sumida: Mr Saito mentioned that Mr Yoshioka is an unrivalled scenario builder and strategist. Mr Yoshioka, when you were consulted and decided to accept this extremely challenging case, what scenario and strategy did you have in your mind?

Yoshioka: There have actually been around fifteen tsunami-related lawsuits filed other than the Okawa Elementary School case. Some cases were filed just after the earthquake, but none of them have been successful. It was believed that a natural disaster is an act of God and that it would be impossible to win a lawsuit claiming compensation for damage caused by the tsunami. At the same time, the bereaved families wanted to know about the final moments of their children's lives; however, the school would not give out any information. So, the only option left was filing a lawsuit. Although it would be a difficult case, the bereaved families wanted to uncover the truth. To fulfil their wishes, I instinctively thought that it would not be possible to approach this case as an ordinary case. If we went by the book, 30–50 lawyers would theoretically have had to work together on a case like this …

Sumida: Excuse me, can I just ask about this number? Do you mean 30–50 people would be needed to collect evidence in such a large case?

Yoshioka: That's right. The larger the case, the more lawyers are needed. Having multiple people examine the case can certainly be useful. However, in the Okawa Elementary School case, the evidence had been washed away by the tsunami. For example, if a lawyer were to appear out of the blue to speak with residents who were on the scene, the residents would be reluctant to talk because they would not want to get involved in a conflict. However, if those residents were approached by, for example, the father of a boy they knew in the neighbourhood instead of a lawyer, they would tell him what they know such as what the boy was doing at a specific time. Then the bereaved families could ask those residents to share the stories they heard in that way with the lawyers, and the residents would be comfortable telling the stories to the lawyers. In other words, it was necessary to have an arrangement allowing us to create an environment for interviews to be conducted in an order in which the bereaved families would first find relevant witnesses and then the lawyer would appear. The fewer lawyers there were, the easier it was to convince the bereaved families to use their connections and try to collect evidence from witnesses one by one. If there had been dozens of lawyers retained by the bereaved families in this case, the bereaved families would have left the case to the large counsel team and would not have been involved. I therefore offered the bereaved families to be 'de facto counsel' for the deceased children in place of additional professional lawyers in

this case because, as I said earlier, much evidence had been washed away by the tsunami and many witnesses were difficult to find.

Also, viewed from another side, parents who have lost a child tend to blame themselves, asking themselves things like 'why did I not go to pick up my daughter?' or 'why did we send our child to that school?' They blame themselves thinking that the death of their child is entirely their fault. That is definitely not the case, but parents who have lost a child often feel stigmatised and at fault for the death of their child. I thought that the bereaved families could do something as parents for their deceased children by serving as counsel for the children, collecting evidence and voicing their feelings of resentment in court. This is another reason why I thought that the bereaved families should become 'de facto counsel'. I was able to build a case where, unlike a normal trial in which the lawyers stand in the front, in the Okawa Elementary School tsunami case, the lawyers stepped back and instead the bereaved families acted as 'de facto counsel' for the children by collecting evidence and facing the defendants in court.

This allowed the bereaved families, many of whom had not been able to even leave their beds out of grief, to stand up to fight for their children. The bereaved families started to get together and have discussions every night. They were able to collect a lot of good evidence by talking through the night about things like who would ask what kind of questions at a parents' explanatory meeting scheduled for the next day, or inconsistencies between the answers given at the last explanatory meeting and those given at the meeting before that. In that way, we were able to collect abundant evidence before trial. I think that the bereaved families' activities as 'de facto counsel' also improved the mental health of the families. In this sense as well, I think that appointing the bereaved families as 'de facto counsel' was one of the keys leading us to success in the case.

There is one more thing to add. When a lawyer visits a municipal office to ask questions, he or she is normally turned down, but if a family member of a deceased child asks questions at the information desk at a municipal office, the person working there would usually do his or her best to respond. That is only natural. There were ten explanatory meetings for the bereaved families, and each of them lasted for around four or five hours. It would not have been possible to have that many explanatory meetings if lawyers had taken the lead in the case. In fact, almost all of the evidence we relied on during the trial was revealed during questions and answers in those explanatory meetings for the bereaved families.

I think that our strategy of arranging to have the parents serve as 'de facto counsel' for the children was the key to success. Nonetheless, that is something normal lawyers would think is foolish; on reflection, it might have been far from a planned strategy and more of a gut feeling.

Sumida: Even though some believed that strategy was far-fetched, it succeeded. Mr Saito, would you like to comment on that?

Saito: As Mr Yoshioka said, I think that the bereaved families made a great effort. At first, shouts were exchanged during the questions-and-answers parts in those

explanatory meetings. Ishinomaki City forcefully suspended the explanatory meetings of the bereaved families, and following that, the third session was held about six months later at the protest and strong request of the bereaved families. From the third explanatory meeting onwards, we started to see a change. The parents of the children who were victims were able to develop a list of questions by getting together in advance of each meeting, reviewing the records of exchanges at the previous explanatory meeting (minutes and videos), sharing their common understanding and discussing issues as well as asking questions. By sharing the roles and deciding who would ask questions and going through the explanatory meetings carefully and with patience, the bereaved families were able to elicit new evidence.

Further, there were witnesses at the scene and survivors who were near Okawa Elementary School when the tsunami hit, or who had gone to the school to pick up their children but had already left the school when the tsunami hit. Many of those people moved to different places following the earthquake. Nobody knew who had gone where, but the bereaved families searched for those people and spoke with them. As Mr Yoshioka mentioned earlier, if there were any people who were willing to talk to us, Mr Yoshioka and I visited them, listened to and recorded their stories and turned them into written statements. This is the process we have applied throughout this process.

NO LARGE COUNSEL TEAM

Saito: We did not build a large counsel team. Having many lawyers is advantageous in many ways, but at the same time, opinions will be split, including opinions on how best to proceed, which legal theories offer the best prospects of success and how the evidence is to be interpreted. That is not a bad thing; it happens because each lawyer thinks that they must win somehow. However, confrontations can arise due to these different views. Of course, because each person is a lawyer and is headstrong, discussions can get heated, take time and become wasteful. To find the shortest way to a conclusion, it is necessary to start by fostering a shared understanding of the accident or incident; otherwise, it is not possible to have discussions on the basis of a common understanding. However, just building a basis for discussion requires a great deal of time, effort and money because someone in charge needs to prepare summaries, make reports for an hour or two and confirm the common understanding before starting discussions on how to approach the issue.

In contrast, this case had only two lawyers, who had been friends for forty years and knew each other and what the other thinks. So, although this was an extremely serious and difficult case, we could progress with the case without internal conflict. Even though this was such a major case, it only took six years from the first trial to the Supreme Court's final decision, which is incredibly speedy. All of this was done by the two of us. I think this can be attributed to Mr Yoshioka's strategy.

Sumida: Generally, a person who has gotten into trouble will consult with a lawyer and have the lawyer represent him or her. However, in the Okawa

Elementary School case, the bereaved families were assigned the role of counsel and the lawyers took a step back. This is ingenious, but how did you come up with that idea? Not to be a nag, but I still want to know the secret about that strategy.

CREATING STATEMENTS WITH TYPOS THAT STIR THE EMOTIONS OF THE JUDGES

Yoshioka: Besides collecting evidence, another advantage of having the bereaved families serve as counsel was to move the judges in a hard-to-win case; it allowed us to appeal to the judges' emotions. The Okawa Elementary School case and the Football case mentioned earlier by Professor Sumida were both caused by a natural disaster, so the judges in charge of the Okawa Elementary School case had the Supreme Court decision on the Football case in mind. We assumed that the judges would have the mindset of comparing this case with the Football case as the trial proceeded, and we needed to appeal to the judges' emotions to think that they must give the bereaved families a win because the judges would not be moved by exclusively legal reasoning by the lawyers. Instead, the judges would be more touched if the parties concerned looked them in the eye and awkwardly spoke to them directly. For example, bereaved families usually express their feelings to judges through examinations of witnesses and the other party. However, if there are many victims, it is difficult to convey all of their voices to the judges. In those situations, one approach is to submit a 'written statement', or plainly put, writing a letter to the judges. However, it tends to be unusual for people to write written statements, and that is even more so these days when people send short messages by smartphone. So, when we asked the families to write statements to the judges, they were rather hesitant. In order to ease the bereaved families' minds about writing statements, I said to them, 'please write at ease whatever you feel because the judges like typos and omissions more than anyone – handwriting would be even better.'

Sumida: I see, so they did not use a word processor, right?

Yoshioka: To make them confident in writing a statement, I said, 'don't worry about any issues such as if your sentences are not connected. If you write the thoughts you want to communicate to the judges as a parent, they will take that seriously. Typos and omissions will make the judges think that the statements were written by the people involved and they have not been edited by lawyers, so please write whatever you want to tell the judges, including personal comments about your children.' They showed that they were parents full of love for their children. The statements were excellent, and Mr Saito and I could not read them without tears. I am sure that the judges were also moved by those statements.

Sumida: The credibility of the emotions was secured by typos and omissions . . .

Yoshioka: Yes. Rather than the coherent and dispassionate writing drafted by lawyers, these letters describing the emotions of the parents who lost their children needed to be written in the parents' own voices to appeal to the judges. We therefore worked out a strategy of having the bereaved families speak in court on each trial

date about the pain and agony they were suffering from the loss of their children. The bereaved families' appeals in court made the courtroom audience sob each time, and I am sure that moved the judges' hearts as well.

SUBSTANCE IS NOT NECESSARILY THE POINT AT ISSUE

Yoshioka: Another issue was identifying our core argument, or how to contest the case. The essential point of this case was that none of the evacuation manuals or crisis management manuals contained a clear indication of where to evacuate when a tsunami was approaching. Therefore, after the teachers evacuated the children to the schoolyard, they were confused and did not know where to go. As a result, they kept the children in the schoolyard for fifty minutes. The bereaved families at first asked us to focus on the point that the manuals were insufficient. However, we wondered whether we would really get a win from the judges with this argument if we sued for negligence based on wrongdoing that took place before the earthquake occurred. We thought that instead it might be better to make an accusation of negligence after the occurrence of the earthquake because the teachers did not evacuate the children even though a tsunami alert had sounded at a specific time after the earthquake. Some people warned the teachers that the tsunami was coming and told them to evacuate to the mountain behind the school. It was also possible to listen to the radio announcing that the tsunami was coming. Of course, we understood that the fact that there was no clear evacuation manual before the earthquake was also an essential point in the case, but we thought that the focus should be on the negligence after the earthquake occurred.

Sumida: You are talking about the first trial in the district court when you filed the first lawsuit, right?

Yoshioka: Yes. In the first trial, we made assertions about both the inadequate manuals before the earthquake and negligence after the earthquake, but we focused on asserting and establishing negligence after the earthquake. If we had started the first trial arguing the inadequate manual, we would probably have lost the case. I think that because we were able to win the first trial by asserting negligence after the earthquake, the High Court could expound with confidence the theory of organisational negligence in normal times before the earthquake.

Sumida: Was there any significant difference between the court of first instance and the High Court?

Yoshioka: Actually, a number of facts were revealed in hearings before the court of first instance, such as the fact that the school principal had previously said that the school would not withstand a 5-meter tsunami. While there had been no mention of 'tsunami' in the original evacuation manual, that term had been added about two years before the earthquake. Ishinomaki City also made a disaster plan in around 2002 envisaging a tsunami. Based on those facts, we came to think that they were prepared for a tsunami before the earthquake. So, why could they not implement those measures when the earthquake occurred? Backed by those facts, we decided to

focus on negligence after the earthquake in the first trial. As a result, we won the first trial by using that strategy, but the judges in the High Court saw the record of the first trial and came to think that, rather than negligence after the earthquake, the blame might be on the school principal, head teacher, the board of education and the department at Ishinomaki City in charge of crisis management, who did not do their jobs properly before the earthquake. The point is that this was a dynamic trial. While we indicated in the written complaint the facts showing negligence both before and after the earthquake, we asserted, with varying intensity, negligence after the earthquake during hearings in the first trial and organisational negligence before the earthquake due to a lack of preparation in ordinary times in hearings before the High Court. We changed the emphasis and the point in dispute between the first trial and the High Court.

WHO SHOULD BEAR LOSS RESULTING FROM A NATURAL DISASTER?

Sumida: The court of first instance held that there was negligence after the earthquake, and you won a landmark judgment. Then the High Court issued a ruling finding that what should have been done was not done before the earthquake, and the fault was not that of a specific person such as a supervisor or coach in the case of the Football case, but of an organisation based on the theory of organisational negligence. I will ask you to explain the process leading to that judgment later. First, Mr Saito, could you tell us a little about organisational negligence?

Saito: Sure. I think the concept of negligence is quite difficult to understand for the students who have recently enrolled. This might overlap with the explanation of negligence given by Professor Sumida at the beginning of the session, but liability for negligence is based on a failure to do what is expected to be done. However, there is a question at the very root of how to understand negligence: why does legal liability for damage arise where there is negligence? In the cases where someone is held to account for damage caused by a natural disaster, that fundamental problem is extremely important and difficult.

In our society, if someone incurs loss, does that person have to bear all the loss and is that person unable to hold anyone accountable? That is not the case, and the basic concept is that the person who caused the loss that has been incurred by another should provide compensation for that loss. As a basis for that concept, if someone was at fault (negligent) with respect to damage, it would be fair to hold that person legally liable to compensate the damage. This approach, the 'fault liability principle', is a basis of our society and is historically recognised as a basic concept in modern civil society.

In other words, in principle, the liability of a person who was at fault (negligent) is the starting point to consider the issue of damages. You will study the concept of tort under the Civil Code and that is structured according to individual-based liability.

Sumida: For example, if a patient dies due to a surgical error, the doctor who conducted that surgery will be liable for the death because the doctor failed to meet the relevant medical standards. Is that what you mean?

Saito: That's right. However, while the judgment of the High Court was based on the assumption that there were people who acted negligently in a certain incident, it did not conclude that the damage was caused due to the fault of specific individuals. Is it acceptable to treat the issue as an individual matter by saying that a person in a relevant position was required to or should have done some specific act, or that that person should have taken some specific measures – but failed? Should the organisation to which that person belongs have dealt with the issue systematically and across the entire organisation to ensure that things would be handled properly, in a way that ensured that no loss or harm would be caused? How about reframing the duties of specific people who are members of an organisation as the duties of a more abstract subject that is to be owed by people in proper positions or duties in the organisation, or reconstructing the liability for a breach of duties related to the entire organisation or system? I think that approach led to the High Court decision in this case.

The structure of modern society is extremely complicated. We have seen many events that cannot be prevented by individual power or responsibility and that cannot be simply attributed to individual persons, especially where there is immediate danger to our society – such as large-scale disasters like the Great East Japan Earthquake and the recent COVID-19 pandemic.

That does not mean that no one should be responsible no matter what happens. The greater or more serious the danger is, the more it is necessary to consider that as a responsibility for society as a whole, or specifically, the organisation to which the relevant people belong, or the people involved in building structures that are supposed to protect others.

Looking at this case from that perspective, we developed the idea that advance measures should have been taken to prevent the loss of human life due to a tsunami. Due to the absence of those measures, the children's lives could not be saved when the earthquake actually occurred and the tsunami hit. Therefore, the fault lies in the failure of exercising duties that should have been exercised. So, who should have taken those measures? It was not an individual, and in this case, it was the parties related to the school, of course the school principal and head teacher who were responsible for the operation of the school, the board of education and more broadly, the city department in charge of disaster prevention. They all must share the responsibility. The High Court decision did not clarify things in this regard, but it acknowledged organisational liability based on that perspective. My explanation might be a little complex, but I hope you understand.

WAS THE UNPRECEDENTED DISASTER FORESEEABLE?

Sumida: The students might be concerned that no one could foresee what would happen, because the tsunami was an unprecedented disaster. How did you address that issue?

Saito: This relates to how we understand 'foreseeability' on which liability for damages is based. In the example mentioned earlier, for individual liability, the

starting point would be that the individuals must have specifically recognised a risk of harm to the persons whose security must be protected – in this case, the children of Okawa Elementary School.

However, when viewed from the aspect of the fault of a system or an organisation instead of individuals, the issue becomes more abstract: what risk should have been dealt with by the organisation in advance? If we see the issue as 'what should have been done as an organisational response' in order to protect the lives of the children at schools in general, it is possible to think about the issue in broader terms.

The area around Okawa Elementary School in Ishinomaki City, Miyagi Prefecture, was also affected by the Miyagi offshore earthquake in 1978. Based on this experience, the prefecture and the city recognised that Miyagi offshore earthquakes are quite cyclic. In fact, historically, offshore earthquakes have occurred in the Miyagi Prefecture every 26–43 years. Given this background, it was necessary for the entire organisation to properly consider how to respond to the next offshore earthquake.

The question is not whether it was foreseeable that an earthquake would actually occur, a tsunami would hit Okawa Elementary School and the children would be engulfed by a tsunami and die. Rather, it was foreseeable with high probability that an earthquake of that size would occur in the future. However, the timing and epicentre of the earthquake were not specifically known. Nonetheless, if it was possible to foresee somewhat abstractly what the consequences of an earthquake would be if one occurred, then the harm caused by the tsunami was 'foreseeable' in relation to the duties to be exercised by the organisation. This may be a little difficult, but in the case of organisational fault, the event that needs to be foreseen is somewhat generalised.

However, for the court to acknowledge liability, it is necessary to find that (1) the incident was foreseeable, (2) there was a duty to act to protect the children's lives based on what could be foreseen, (3) this duty was not properly exercised, and (4) there is a reasonable causal relationship in legal terms between (1), (2) and (3) on the one hand and the loss of the children's lives on the other hand. (1) and (2) are elements of 'negligence' and (3) is an element of 'illegality' under the State Redress Act. The relationship in (4) is called 'reasonable causation'. In the case of organisational negligence specifically, organisational liability is not established unless reasonable causation is proved between the loss of lives and that the lives could have been saved if the organisation had exercised its duty. However, I think that the High Court took the approach I have explained earlier.

Sumida: This was a landmark decision. It was groundbreaking in that, while we are all at a loss at how to deal with unprecedented disasters or the COVID-19 pandemic, which is a crisis we faced for the first time in human history, it was pointed out in the decision that something needed to be done in order to protect people at the school from danger. Thank you, Mr Saito.

Mr Yoshioka explained earlier the general background of arguing in a trial based on the theory of organisational negligence. I would now like to focus on a decisive

moment: there must have been a trigger for a breakthrough, so please share that episode with us. It seems to me that the approach you took was not a generally popular idea in Civil Code theory, so please tell us what encouraged you to argue this case based on that approach.

INTERPRETATION OF 'LOWER COURT DECISION IS TO BE REVIEWED'

Yoshioka: When Mr Saito and I undertook this case, we both understood that it was important to work with the media. It is necessary in cases like this to have the media stir up public outrage, and thankfully, we received a lot of media coverage on each trial date. When an appeal was filed with the High Court after the first trial, the judges of the High Court probably read the record from the lower court. In addition to the record, if they watched the daily news, I think the judges at that time saw the true nature of this case.

In fact, the judges' first words on the first appeal hearing date were 'the lower court decision is to be reviewed.' Following that, they asked the following cryptic question:

> We ask both sides to submit documents about the following scenario: You receive a notification from the Board of Education before your child enters an elementary school saying, 'Send your child to Okawa Elementary School.' Under the current legal system, you cannot say 'I do not want my child to go to Okawa Elementary School' or 'I want to send my child to another school.' This is a problem of the so-called school district system and you would be subject to a penalty if you did not follow the Board of Education's decision. Accordingly, under circumstances in which you are told by the Board of Education to send your child to Okawa Elementary School and you are not allowed to say no, how would you interpret the provision of Article 29 of the School Health and Safety Act ('A school shall prepare a crisis management manual providing specific details and procedures to be taken by the school employees in the event of danger based on the situation of each school for the security of the school children'), namely, the provisions requiring the school to prepare a crisis management manual? How is that provision relevant to this case, or, to put it the other way around, how should Article 29 be interpreted? Please submit a statement on this question by the next hearing date.

I think that the words of the judge that they would 'review the lower court decision' made the counsel of the other side happy because they lost the first trial. However, we were also happy because our interpretation was that the question by the High Court asking about the interpretation of Article 29 of the School Health and Safety Act indicated that the High Court would consider not only negligence after the earthquake but also how a crisis management manual should have been prepared before the earthquake, and in the case of a failure to prepare a manual, whether Article 29 merely provides an obligation to make efforts or whether a violation of Article 29 would be the basis of a breach of a legal duty by the school.

Sumida: I see. So, both sides were happy.

Saito: As Mr Yoshioka mentioned earlier, I think the bereaved families strongly felt that their children would not have died if the school had taken appropriate measures in advance. For example, schools are obligated to build a system to properly transfer every single child to their parents if something happens, but the principal of Okawa Elementary School failed to do that.

In addition, the school should have had an emergency contact network, but it did not have one in place. After an earthquake occurs, it is necessary first to take cover under a desk until the tremors stop (primary evacuation), then evacuate to the school playground (secondary evacuation), followed by evacuation to higher ground if a tsunami alert is issued. However, Okawa Elementary School's crisis management manual did not specify the evacuation site or how an evacuation was supposed to be carried out, and, in addition to that, emergency drills had not been properly carried out. Considering all those factors, the bereaved families were convinced that the entire school was liable.

THE COURT OF FIRST INSTANCE DID NOT ACKNOWLEDGE ORGANISATIONAL NEGLIGENCE

Saito: We therefore asserted in the written complaint filed at the beginning of the first trial that the school was liable for a failure to perform its duty to prepare a manual under the School Health and Safety Act. However, at the same time, we thought we could not win with this assertion. The approach taken by the judges on the court of first instance was not embracing this direction. We could see that as the trial proceeded.

In fact, the judges of the court of first instance also presided over a tsunami case for a driving school in Yamamoto Town in the same prefecture. The driving school was held liable in that case, but we found that this ruling was only based on negligence immediately before the incident, so we thought that in this case the issue of duties in advance of the incident would not become a point of contention. As a result, we had in-depth discussions and decided on a theory of organisational fault, but that happened only in the following High Court case. Mr Yoshioka and I had discussions and felt that, although we mentioned a breach of duties in advance of the incident in the court of first instance, this was not the main issue. Nonetheless, we asserted this point in the court of first instance.

Partly because of that, we specifically asserted this point in the final brief of the first trial. We asserted it as a legal theory as well, but ultimately the facts are most important. Okawa Elementary School, the scene of the incident, is about 4 km away from Oppa Bay, a bay on the Pacific Ocean, into which the Kitakami River flows. For a tsunami to hit Okawa Elementary School, it would have to go up the river for 4 km. In other cases, this would mean that a major tsunami would travel upstream for quite a long distance. However, it should be noted that the Kitakami River, which is a large river, passed right in front of the school.

One could argue that a tsunami going upstream would not be a problem if there was a proper riverbank and the school was, therefore, not liable. However, this was not an issue. Based on our in-depth investigations of tsunamis going upstream after an earthquake in the past, tsunamis travel upstream not by themselves but as a result of a preceding earthquake. Hence, it was necessary to discuss the risk of a tsunami going upstream based on the vulnerability of the riverbank. We made a lot of arguments based on these facts in the first trial.

The important thing is what the presiding judge of the High Court said on the first date for oral arguments. I took notes when I heard it:

> As to who owes what duty of care in the school as an organisation, the question in State Redress Act cases is whether individual teachers were at fault in an accident or injury suffered by a student in a swimming pool or on a school playground. However, this case is on a different level. It is not necessary to consider how to look at the fault of public officials in the school organisation, namely, a breach of duty of care. Responsibilities are divided in organisations, and it might be necessary to consider breaches of the duty of care of public officials based on this. This is beyond the scope of the responsibilities of each individual public official and is an issue of the responsibilities of the public school organisation and is, therefore, different from the case for the lower court judgment. Accordingly, the previous judgment does not serve as a useful reference. In that sense, the deliberations in the court of first instance were not sufficient and this decision is to be reviewed.

If you hear the word 'review' at the end, you may think that the higher court will come to a different conclusion, but this can be a big mistake.

Sumida: That is right.

Saito: The High Court judge was saying that the lower court's deliberations on organisational negligence were insufficient. Therefore, after we received the cryptic question at the beginning of the trial, we had a lot of discussions and sought the opinion of a prominent authority on the Civil Code, Professor Yoshio Shiomi of Kyoto University, to complement our knowledge, and we decided that the High Court would probably agree with the points we had asserted since the first trial as the major point of judgment or point of issue. We, therefore, put greater effort into further studies and investigations to buttress our argument.

A TSUNAMI GOING UP THE RIVER 27 YEARS AGO WAS THE KEY

Saito: As an aside, I would like to explain why the topic of the tsunami going up the river is important. The day on which the Middle Japan Sea Earthquake occurred in 1983 was the date for an examination of witnesses at the Niigata District Court Murakami Branch. The Joetsu Shinkansen had not been wholly opened yet, and I was scheduled to take an express train from Ueno Station early that morning to the Murakami Branch of the Niigata District Court. However, the train stopped at the station before Murakami Station because of the earthquake. I could not go back to Tokyo that day, and my client drove me to Niigata. When I turned on the TV at the

hotel, I saw the image of a tsunami going up the Murakami River with white-crested waves, which made a strong impression on me. From that memory, I actually thought from the very start when I was invited by Mr Yoshioka that this is an important point. One cannot say that it was foreseeable that tsunami will come to Okawa Elementary School without mentioning that tsunamis can go up rivers. I conducted a lot of research and argued this point from the first trial. I believe that the High Court judges said that they would review the lower court decision partly because of that.

Sumida: When the judges asked the cryptic question Mr Yoshioka mentioned earlier with a straight face, the defendant side and plaintiff side interpreted this question in completely opposite ways. Both were delighted, but as Mr Saito said, if you listened carefully, the judges properly stated their understanding of the issues. What happened after that?

CAN ADVISORY PROVISIONS BE LEGALLY BINDING?

Saito: At first, the High Court's cryptic question seemed extremely difficult. The court said that Okawa Elementary School is a public elementary school and the children at that school are required by law to go to that school. We were asked to examine the relationship between the requirement for the children to go to Okawa Elementary School and the School Health and Safety Act related to securing safety at schools in determining state compensation liability. One is an administrative law issue, but the State Redress Act, which also has an aspect of being a special law to the Civil Code, takes an approach that is similar to tort liability. Therefore, whether this legal starting point can form the basis of liability is a fairly difficult question.

We thought that measures to be taken by the school in advance could be a cause for liability and argued this point from the first trial, but there were no prior in-depth discussions as to the organisational negligence theory of liability mentioned by the Court. We, therefore, decided to ask for the opinion of a legal expert to cross-check our assertions and consulted with Professor Yoshio Shiomi of Kyoto University, who had assisted me previously. He said that he would make time to consult with us on what the High Court said, so we visited him at his office at Kyoto University and had a good talk with him. He prepared a written opinion for us in the end.

Yoshioka: Article 29 of the School Health and Safety Act provides that a school shall prepare a crisis management manual, but this is usually said to be a general advisory provision stipulating that schools must make an effort, so schools will not be held liable even if they fail to prepare a crisis manual.

Sumida: Are there any penal provisions, such as administrative punishment? Is this Act based on public law?

Yoshioka: We had to convince the judges that schools are legally liable to follow Article 29. In that regard, the written opinion of Professor Shiomi clearly indicated not only that Article 29 stipulates duties under public law but that it is also a provision providing for duties under private law to protect rights and interests.

The opinion proved compelling enough for the judges to follow this view in drafting their judgment, so we are very thankful to him.

THE TRIANGLE ZONE THE CHILDREN HEADED TO AT THE END

Saito: To add one more thing, it is difficult to assert that organisational negligence should be recognised unless it can be clearly said that the incident was foreseeable well in advance, i.e. that it was possible to evacuate when the tsunami was actually approaching. From this perspective, I thought that the riverbank would be the key if a tsunami goes upstream because the riverbanks are, contrary to their general image, structurally quite fragile.

Mr Yoshioka is not only a great strategist, he is one of the top experts in Japan on defective housing and well-versed in engineering, geology, soil analysis and architecture. Using his connections, we had geotechnics experts prepare written opinions on the rivers and riverbanks. It was demonstrated that a riverbank can indeed be destroyed by an earthquake. Specifically, the opinions analysed the parts of the riverbanks that were destroyed by the Miyagi offshore earthquake in 1978, which occurred before the Great East Japan Earthquake, and how the parts and the way they were destroyed coincided roughly with the parts of the riverbanks of the Kitakami River that were destroyed by the Great East Japan Earthquake and how they were destroyed.

Sumida: I see.

Saito: In terms of establishing foreseeability, even without taking advance measures by clearly specifying the evacuation places, it could be argued that there was no breach of duty as long as the riverbank is not destroyed. However, that is Mr Yoshioka's area of expertise, so it was possible to analyse this aspect based on the expert witness reports on how it happened, and this led to the decision that it might have been possible, to a certain extent, to specifically foresee the risk of the destruction of the riverbank and the approach of the tsunami and so there was a duty to take advance measures. Mr Yoshioka, could you please explain this a bit more?

Yoshioka: When we considered how to demonstrate foreseeability, we made requests for access to official files to local development bureaus established throughout Japan by the Ministry of Land, Infrastructure, Transport and Tourism, such as the Tohoku Regional Development Bureau and the Kansai Regional Development Bureau, on what damage was caused to the Kitakami River at the time of each earthquake. We were able to obtain materials showing, surprisingly, that almost the same places had been destroyed by every earthquake.

The data revealed that the triangle zone, which was where the children at Okawa Elementary School were to evacuate at the very end, had been destroyed by every earthquake. According to experts of the geotechnical society, this is due to the characteristics of the riverbank. Unlike the foundations of houses, riverbanks are large, long structures that extend for tens of kilometres and that must be formed with

materials of the same quality. However, it is difficult to collect soils of a uniform nature, and some parts necessarily become fragile. I think that we were lucky that we could devise ways of demonstrating, through expert evidence, that the riverbanks were in fact fragile even though they were made of concrete and looked robust.

ANGRY EXPLANATORY MEETINGS TURNED INTO A VENUE FOR EXAMINING WITNESSES

Sumida: This is amazing. You first adopted a strategy to give the bereaved families the roles of representatives, normally played by lawyers, with yourself remaining in the background. And then you examined several moves by the court and collected evidence to remove obstacles in the way of your objective. That is exactly the story of what lawyers do – collecting evidence to build persuasive logic – and you used your legal skills to work out great ideas and using your connections. Although being armed with theoretical backing is necessary, how to develop a strategy comes first, and I appreciate your valuable story about this. Is there any other ingenuity you took advantage of in the course of activities such as collecting evidence? Please tell us if there was anything else you did.

Yoshioka: As I briefly mentioned earlier, the parents of the children, who are the bereaved families, did a really great job of gathering evidence. When it was decided that Ishinomaki City would hold explanatory meetings on why the school caused the deaths of the children immediately after the incident, the city intended to end the meeting series after one or two meetings. The first meeting was turbulent with the bereaved families yelling in sheer exasperation 'give our children back' and 'bloody idiot'. This was in fact welcomed by the city because it would give them an alibi that they got the meeting done while looking down, keeping still and enduring the shouting for two hours. But those meetings were not intended to be the place for the bereaved families to release their anger but the place to elicit answers from the other party, and they had to ask questions despite their anger. To that end, it was better if only a few people held the microphone and asked selected and well-thought questions. In most cases, the other party would not give an immediate answer saying that they did not know or that they had not yet investigated the issue. We reacted by asking them to investigate those matters by the next meeting and we got them to set a date for the next meeting. At the next meeting, following the explanations on what they had investigated, we would ask further questions about the explanations as to specific figures, and if they could not answer, we asked them to hold another meeting, and in that way, we would get them to set a date for the next meeting. In this way, although Ishinomaki City intended to only hold two meetings of one hour each, in the end, ten meetings were held and they were as long as four to five hours each time.

In a normal trial, an examination of a witness takes half an hour or an hour, or two hours at the longest. However, in the Okawa Elementary School case, plenty of time

was spent by the bereaved families raising questions, and this enabled us to obtain the evidence equivalent to a lot of witness examinations in court. This was just a treasure trove. The judges ordered the City Board of Education to issue materials on the preparation of a crisis management manual, but this issue actually originated from the explanatory meetings for the bereaved families. The judges focused on this topic and asked the other party to submit such materials and found that the topic had been discussed a year before the incident. This led to the judges recognising that the lives of the children could have been saved if the people in charge had exercised their duties a year before the incident, if not sooner. In this way, the evidence collected by the bereaved families was the decisive factor in obtaining the favourable High Court decision in this case.

THE SECRET TO OVERCOMING DIFFICULT OBSTACLES: BEING GOOD AT PRAISING PEOPLE AND DIGITISED DOCUMENTS

Sumida: Thank you. This story is really impressive, as the bereaved families worked together and built the case you developed.

Saito: In addition to his skills at building scenarios, Mr Yoshioka is also very good at letting each person play a role. I think that he has a gift for praising people. When the bereaved families did their homework properly, he said nice things such as 'well done' or 'you did well', making them happy and encouraging them to try to do their best again. In addition to the activities of the bereaved families mentioned by Mr Yoshioka, they did other helpful things, such as asking the city to disclose evidence in accordance with the Information Disclosure Ordinance. They got used to the process and became quite good at gathering evidence without needing instructions from us. For example, information on earthquakes and tsunamis was found in materials such as PR magazines issued by the city. When we asked the bereaved families to collect such information at the library by the following day, they complained a bit but they did their best to collect information and carry out research. We sometimes asked them to do a considerable amount of work, and they did it well. I think it was because of Mr Yoshioka praising them effectively.

There is one more thing to add, which is a technical matter. The files for the trial records for this case would physically fill three or four shelves of a large locker. I normally have to take all of those materials to meetings and trial dates. However, it was impossible for me because I went to the Court from Tokyo by Shinkansen, so I turned all of those records into electronic data at the beginning. Therefore, one USB memory stick was enough, and that was very useful.

Reading evidence thoroughly is important in a trial. The volume of evidence submitted just by us, the plaintiffs, was approximately 400 documents, and it was necessary to carefully read all of those in detail, as well as the records submitted by the other party. Nevertheless, there were occasions where the judges pointed out something we had not noticed and surprised us. Having digitised all the materials

made it possible to retrieve the data and made things substantially easier, though that is a technical matter and it might not be essential.

Sumida: Well, I think that is quite important for future lawyers. I also think that Mr Yoshioka's gift of praising people is another important point, because building a case based on empathy is considered a key to effective management.[4] Hearing this, I begin to think that empathy is the starting point and driving force for innovation and that is true in law as well as in management.

Saito: I think we were able to get as far as we did because of a bit of ingenuity.

Sumida: Thank you. I think this covers almost the entire story up to the landmark decision that found organisational negligence. Now I would like to consider this case from a high-level perspective and ask if there are any issues you would like to raise with respect to the decision and what you think is the significance of the decision.

HOLDING THE FIST THAT HITS LIABLE RATHER THAN THE BRAIN THAT GIVES ORDERS

Yoshioka: Previously, negligence was usually found at the point that arose closest to the accident. However, come to think of this, mistakes made by people at the scene may in fact be induced by instructions by or the fault of people who have given these instructions or made plans. Despite this, in past cases, courts have focused on the most recent point only and have not questioned the liability of those in charge of planning or giving instructions. To compare this to the human body, for example, if I hit Professor Sumida, in the past the fist I used to hit her would have been blamed. However, I hit her because my brain told my fist to do that, so the brain is to blame. I understand organisational negligence in this way.

It is not the people at the scene who are to blame, it is the instructing or planning departments or divisions that induced that fault – this perspective is not limited to school disaster prevention but will develop into various places such as disasters caused by corporations and other natural disasters, as well as medical and hospital errors. In the future, trials from the perspective of holding the entire organisation accountable, rather than each individual person, will become more commonplace. I also think that the approach will be changed from finding fault in actions taken after an earthquake occurs to questioning what measures should have been taken before the earthquake. In this highly complex society, placing blame on organisations rather than individuals will become a normal way of pursuing negligence claims.

Sumida: Thank you. You mentioned 'highly complex society' as a key word, and I had the impression that, in such a society, it is increasingly important to integrate and successfully manage the abilities of various experts. Mr Saito, what do you think?

[4] Ikujiro Nonaka and Akira Katsumi, *Kyokan Keiei ('Empathy-Based Management')* (Nikkei Inc. 2020).

WHAT DOES IT MEAN TO FILE A COMPLAINT ONE DAY BEFORE THE DEADLINE UNDER THE STATUTE OF LIMITATIONS?

Saito: We held a meeting in Sendai to report and examine the decision and at that meeting, Professor Shigeto Yonemura of Tokyo University commented at the end that 'without this Appeal Court decision, the Great East Japan Earthquake, with the loss of 17,000 people's lives due to the tsunami, would not have taught any lesson to Japanese society' and that 'this decision is the salvation of the children of Okawa Elementary School and the 17,000 people who died and also serves as an important step in changing Japanese society.' I could not agree more. Mr Hideaki Tadano, one of the bereaved family members, said that he only wanted to find out what happened. Why then did he have to file a lawsuit? I think the significance of the action and the resulting Appeal Court decision lies in those questions.

We have to take a real look at the consequences of the Appeal Court decision because it was obtained in exchange for many lives. However, regrettably, under the Japanese legal system, everything must be taken in terms of money in order to hold parties at fault accountable. Money is the only way to compensate for lives in the court system under the laws of Japan. Sadly, there are some people who think that those who want to find out who is responsible do so because they only want money. However, as Mr Tadano said, the bereaved families in no way decided to bring the action for that purpose. They wanted to clarify where responsibility lies for the fact that the children were left at the school for forty-five minutes. They also wanted to know how their children were at the end, even though knowing that would be hard for them. They had no choice but to file a lawsuit to know these things. You can also see the painful decision mentioned by Mr Tadano on the date on which the complaint was filed. In fact, the complaint in this case was filed one day before the deadline under the Statute of Limitations ran out, which was to expire three years after the incident.

Sumida: I will give an additional explanation here as our students have not studied the Statute of Limitations. The Statute of Limitations enshrines a legal principle that states that a claim may no longer be filed after three years from the time of the tortious act in question, the time the plaintiff became aware of the damage due to the tortious act, or the time the plaintiff became aware of the identity of the person who caused the damage. In other words, the bereaved families lost their children in the tsunami and were not satisfied with the explanations by the school or the city but were still reluctant to file a lawsuit – but they finally arrived at the decision that they had no choice but to file a lawsuit.

Saito: Yes, but there were people who took that the wrong way. This case received a lot of media attention, partly because of our strategy, but it also caused a strong public backlash, and that means that the bereaved families were victimised three times: the first time when they lost their children in the tsunami, the second time when they were harmed by the responses by the city and the prefecture and the third

time when they brought this lawsuit. They were bashed, libelled and slandered – more than that: they even received a death threat. It is a serious problem that asserting legally protected rights can involve a heavy burden, including dealing with public backlash. We cannot allow libel, slander and intimidation. Such acts turn the foundation of society upside down. Therefore, when taking action or filing lawsuits, we should consider how to prevent those problems – and I think that this case as a whole and the Appeal Court decision were significant in that sense.

THE PURPOSE OF LIABILITY FOR ORGANISATIONAL NEGLIGENCE IS TO SAVE HUMAN LIVES

Saito: Let me add one more thing at the end. The significance of arguing for organisational negligence in this case is that we can apply a lesson learned from this case in the future. If a large disaster, not just the Great East Japan Earthquake, occurs, is it possible for us to calmly and reasonably deal with that in the moment of the actual harm and danger? Under the current law, a person who was present at the scene and who was at fault would be held liable, but this might make it impossible to find out who is really liable. On the other hand, if organisational negligence is recognised, that would mean that no harm or danger would be caused or turned into reality, or even if it is caused, lives could be saved, as long as the rules established in advance are followed even if there is panic at the scene. This is not just an issue of liability for damages. If damage and harm do not occur when there is a disaster, the lives of more people can be saved. I think that the approach shown by the High Court is extremely significant in this regard.

Sumida: Thank you. The second topic covered by Mr Saito also connects to what Mr Yoshioka said. He said that if he hits me with his right fist, the focus used to be only on the fist but the focus should be on the brain, which ordered the fist. Mr Saito also brought up that the human nature of being inevitably filled with dismay after an earthquake should be taken into account. He said that focusing only on a specific fault at the scene after a disaster occurred or dealing with the issue from a micro-viewpoint was insufficient. That is something that looks easy once it has been done, like the egg of Columbus. The more brilliant and dynamic a new idea is, the simpler it is. Because it is extremely simple, people take it for granted once it is implemented.[5] Organisational negligence is such a new theory that captures the essence of reality, that is very convincing, and that can make a real difference in the world. In that sense as well, I am grateful for having these two innovators here today.

Also, I agree with Mr Saito that 'the bereaved families were victimised three times' is a deep-rooted problem in Japanese society. Having said that, I personally doubt

[5] See Bruno Munari and Masayo Abe (tr), *Simpuru ni Matomaeru noha Yori Mutsukashi Koto* ('To Complicate Is Simple, to Simplify Is Complicated') *Munari no Kotoba* (originally published as *Verbale Scritto*) (Heibonsha 2009) 67.

whether we should only look at the negative side of Japanese society in this regard. As can be seen in the handling of COVID-19, while many countries took compulsory lockdown measures, Japan has managed to make society work on its own way without taking such measures. There are diverging views on this, but I think that the Japanese people are self-disciplined in their own way and that this discipline benefits society. While we have seen or heard about the turmoil caused by widespread looting in other countries during the confusion after the occurrence of a disaster, Japan rarely has had such a major panic and is admired throughout the world for this.

In that sense, there are both light and dark sides in Japanese society, and I think that Mr Saito raised an extremely important issue on the dark side. Basic social rules should continue to be set based on various legal rules and theories such as the Civil Code, and in the course of considering that, the issue raised by Mr Saito will be a very important theme.

THERE IS A CRACK IN EVERYTHING, THAT IS HOW THE LIGHT GETS IN

Sumida: I am going to speak about one more thing in relation to today's theme, 'innovation'. This is from a book written by Taiwan's digital minister Audrey Tang.[6] I think she is quite famous among young people. She quoted a passage from a song by the Canadian singer Leonard Cohen, 'there is a crack in everything, that's how the lights get in'. She wrote:

> If you feel angry or impatient about some injustice or something that attracts no attention, try to change the anger or impatience into constructive energy. Then ask yourself questions like this. What can I do for society to prevent that injustice from ever happening? Keep asking those kinds of questions. In this way, you will be able to turn your anger into constructive energy. Then, you will be able to keep yourself on a path to create a prototype for a new positive future instead of attacking or criticising someone. By inviting others to the crack you found and let them join, the light will get in another way.

The world is not perfect as you all may agree. The world has flaws and challenges. I think lawyers are there to face them. 'To earnestly address those issues is the reason we all exist here.' This is what Audrey Tang wrote in that book, and I genuinely feel empathy for those words.

By the way, I am pursuing research with a particular interest in 'AI and law'. Technology such as AI is going to evolve considerably in the future and might be able to learn things such as court precedents much quicker than humans and give us advice such as 'according to the precedent of . . .' or 'how about this as an issue?' Something like this might even turn into a smartphone application. However, it

[6] Audrey Tang, *The Future of Digital Innovation* (President Inc. 2020) 251 et seq.

might only be able to notice the cracks in the world rather than creating new lights in the future, as I mentioned earlier. From what we have heard from Mr Yoshioka and Mr Saito today, the key word 'sensitivity' is crucial. I think lawyers are expected to have the ability to come up with strategies that resonate and appeal to human sensitivity.

Now, I would like to conclude today's class by conveying a message to you, who are just starting to study law, from these two great lawyers and me: 'Do not be a poor-performance robot.' Thank you very much for taking time today out of your busy schedule.

COMMENT

Human Resources for Legal Innovation

Noma: A wave of disruptive technological innovation is creating new goods and services – significantly different from the existing ones. As a result, there are ever more cases where current laws and regulations cannot be applied directly to these new goods and services, requiring new laws. In addition to the need to formulate new laws and regulations, today's technological innovation is also impacting the world of law.

Artificial intelligence (AI) dispute resolution and online dispute resolution are illustrations of this development. In fact, some corporations have already implemented these services to handle disputes. However, today's innovative technologies are gradually encroaching on many aspects of the world of law and bringing about various changes in the legal landscape – this raises issues related to how the legal profession should operate, for example, and the business environment surrounding the judicial system.[7] Legal innovation is being driven by technology directly affecting the world of law.

The purpose of this column is to consider the human resources that create legal innovation. My awareness of this issue derives from the fact that the use of technology has not yet spread to Japan's legal world. When compared with Britain, Japan lags far behind in its use of technology in the legal world. Going forward, technology use in Japan's legal world is expected to increase significantly. At the same time, however, the encroachment of legal innovation, which has evolved through interaction with technology advancements, into Japan's legal world is, without question, a challenge to be addressed by Japan's legal community. I hope that those engaged in the legal profession today, including lawyers, judges, prosecutors and researchers, as well as students wishing to enter the legal profession, will consider not only legal innovation but also the human resources necessary to create such innovation.

[7] See, e.g., Simon Deakin and Christopher Markou (eds), *Is Law Computable? Critical Perspectives on Law and Artificial Intelligence* (Hart Publishing 2020).

I will first look at some examples of technological innovation in the automotive industry and the relevant laws. I will then discuss the human resources required for legal innovation by applying the findings of innovation studies in new product development to legal innovation.

Technological Innovations in the Automotive Industry and the Relevant Laws

Noma: The automotive industry is undergoing a once-in-a-hundred-year transformation brought about by technology called CASE, which refers to 'connected', 'autonomous', 'shared & services' and 'electric'. In Japan, legislative amendments have been recently made in response to new innovative technologies, particularly autonomous driving technology, and our policymakers are currently discussing how to regulate autonomous vehicles.[8]

The Road Traffic Amendment Act and the Road Vehicles Amendment Act took effect in 2020 to create a legal framework enabling regulators to expeditiously establish safety standards for Level 3 and Level 4 autonomous driving.[9] With regard to the concept of car accident liability involving autonomous vehicles, considered in the context of damage insurance, the General Insurance Association of Japan, a trade association representing licensed general insurance companies in Japan, published a report titled 'Legal Issues Concerning Autonomous Driving'.[10] This report provides an overview of the legal issues related to autonomous driving. Moreover, a government study group under the Ministry of Land, Infrastructure, Transport and Tourism's Road Transport Bureau has been discussing the issue of damage liability pertaining to accidents involving autonomous vehicles.[11]

Governments around the world are currently developing new laws and regulations that govern autonomous driving. This is not the first time that the world has experienced automotive technology innovation and that laws and regulations have been established in response to these innovations. An exploration of automotive history shows that when vehicle ownership began to increase around 150 years ago,

[8] For discussion of the relationship between law and autonomous driving, see K Akita and others, 'Roundtable Discussion – Autonomous Driving: Current Status, Challenges and Prospects' (October 2020) 89 Law & Technology 1.

[9] According to the guidelines issued by the Ministry of Land, Infrastructure, Transport and Tourism, the levels of autonomous driving are defined as follows: Level 0: No Driving Automation; Level 1: Driver Assistance; Level 2: Partial Driving Automation; Level 3: Conditional Driving Automation; Level 4: High Driving Automation; Level 5: Full Driving Automation. Levels 0 through 2 and Levels 3 through 5 differ in how driving safety is supervised and who takes control of the vehicle. With Level 0, Level 1 and Level 2, the driver is required to supervise safety and take control of the vehicle. With Level 3, Level 4 and Level 5, the autonomous driving system does both.

[10] General Insurance Association of Japan, Legal Issues Concerning Autonomous Driving (2016).

[11] Ministry of Land, Infrastructure, Transport and Tourism, Road Transport Bureau, 'Safety Technology Guidelines for Autonomous Vehicles' (September 2018).

governments moved to enact new laws and regulations governing vehicles that applied new technologies, very much like governments today.

After Henry Ford introduced the Ford Model T to the world in 1908, automobiles became ubiquitous in society, so much so that the twentieth century is called the 'Century of the Automobile'.[12] In the second half of the nineteenth century, about 40 years before Model T was first produced, the Locomotive Act, also known as the Red Flag Act, was enacted in Britain in 1865 requiring a crew of three – a driver, a stoker and a man with a red flag walking at least 60 yards ahead – to operate a self-propelled vehicle. The Act applied not only to steam-powered vehicles, which were emerging at this time in Britain, but also to gasoline-driven vehicles. The Act was repealed in 1896, but, until that point, hindered the growth of Britain's automotive industry.[13] The background to the Act's enactment shows a lobbying campaign by the stagecoach industry, afraid that the spread of cars would lead to job losses in the industry.

The Red Flag Act requiring a vehicle to be preceded by a person carrying a red flag is both odd and absurd when viewed today. Given the negative impact on Britain's automotive industry and its ultimate repeal, it is clear that the Act was a failure. The fundamental cause of its failure was the hidden agenda of the stagecoach industry that feared the loss of jobs with the rise of automobiles. In other words, policymakers prioritised the interests of the stagecoach industry and failed to recognise the common good for society.

Leaders Who Create Legal Innovation

Noma: There are two abilities required of leaders who create legal innovation. In this section I will discuss the human resources necessary to create legal innovation by referring to two studies by Nonaka and Takeuchi that discuss the process of developing new products[14] and consider 'wise companies' and 'wise leaders'.[15]

First, legal innovation requires the ability to create new knowledge through interaction with people of different occupations, ways of thinking and behaviours, including businesspeople or entrepreneurs and engineers. Those who play leading roles in the legal sector are largely graduates from law school. By contrast, many entrepreneurs are MBA holders, and the engineering sector attracts people with

[12] See T Origuchi, *Jidosha no Seiki ('A Century of Cars')* (Iwanami Shoten 1997).

[13] *Dai 68 kai: Gekidou no Eikokusha Kouboushi: Chirijirininatta Eikou no Burando* (Issue 68: The Turbulent History of the Rise and Fall of British Cars: Scattered Glorious Brands) <www.webcg.net/articles/-/42365> accessed 1 November 2023.

[14] Hirotaka Takeuchi and Ikujiro Nonaka, 'The New New Product Development Game' *Harvard Business Review* (January 1986) 2.

[15] Hirotaka Takeuchi and Ikujiro Nonaka, *The Wise Company: How Companies Create Continuous Innovation* (Oxford University Press 2019).

computer science or mathematics degrees. Needless to say, many people also playing important roles in these fields have no such degrees.

Nonaka and Takeuchi's 1986 study examines a number of successful product development cases in the manufacturing industry in Japan and the United States. Using 'relay' and 'rugby' metaphors, the authors demonstrate that Japanese companies can develop new products flexibly and quickly. Developing new products involves various processes, including research and development, production and marketing. The 'relay race' approach, which is a linear approach, resembles a relay race where the runner passes on the baton to the next team member. Under this approach, each phase of product development is clearly segmented and the development project does not move from one phase to the next until all the requirements of the preceding phase are satisfied. On the other hand, under the 'rugby' approach, the phases are not clearly segmented and the baton is not passed on from one phase to the next. The 'rugby' approach is an overlapping approach under which each phase overlaps with the next, breaking down the barriers between the roles of the different teams involved and enabling them to work closely together in a product development project.

Focusing their attention on the manufacturing industry, Nonaka and Takeuchi argue that the 'rugby' approach is more effective. This argument can be applied to legal innovation as well. In essence, it is imperative for the legal profession to create new knowledge through interaction with people from other sectors who have different cultures, different ways of thinking and behave differently, including businesspeople and engineering professionals.

Second, legal innovation is based on the ability to make judgements from an ethical and moral standpoint while aiming to achieve high-order goals. Nonaka and Takeuchi's 2019 book calls leaders with practical wisdom 'wise leaders' and argues that 'every leader has to make judgments and take actions amid constant flux. Wise leaders, we believe, exercise judgment while taking a higher point of view and doing what's good for society.'[16]

At a time when disruptive technological innovation is gradually having a profound effect on the world of law, the ability to make sound judgements from an ethical and moral viewpoint in pursuit of higher goals is required. People who play important roles in the legal sector very likely already possess the ability to make judgments in pursuit of higher goals. I hope the leaders who create future legal innovation will also be 'wise leaders' in the sense that they take account of ethics and morality.

CONCLUDING CONVERSATION

Steffek: After this session, Mihoko asked me to suggest a role model of a legal innovator. This is a very interesting question that requires us to define legal innovation, identify the types of legal innovation we value and look at the long list

[16] Ibid., 97.

of people who have contributed to the law over the centuries. As I enjoyed thinking about his question, I also asked some friends for their opinion. The first reaction of all of them was, 'this is a difficult question!' I think this first reaction is already part of the answer.

Yes, it is difficult to identify role models for legal innovation. I have come up with three reasons why. First, legal innovations have to be evaluated against the background of their times; second, legal innovators are operating within and benefiting from a network of other innovators; and, third, the definition of legal innovation plays a major role.

Taking this in turns, legal innovation happens at all times and against the background of the then-current state of the art. Some might point to Johannes Gutenberg introducing movable-type printing in 1439 to Europe, starting the printing revolution that transformed the way law was made and communicated. Today, almost 600 years later, the paper Gutenberg printed on is losing significance as law becomes more and more digitised. But it is difficult to compare the relevance of printing law and the impact of digitising law as their significance is rooted in time.

Second, legal innovators do not operate in a vacuum as interaction and communication are essential features of law. Legal innovators, perhaps even more than their contemporaries, learn from others. Aristotle, a strong candidate for the list of most impactful legal innovators, is a good example. While Aristotle's contribution to justice theory was a major step into uncharted territory, his ethics build on the thoughts of Plato, his teacher.

Third, the question arises what legal innovation is and what legal innovators contribute to it. Perhaps some readers were surprised to see Gutenberg and Aristotle included in a discussion of legal innovators in the first place. An argument not to include them might be that they are ultimately not lawyers, but a printer and a philosopher.

Instead, one could point to legal innovators who contributed to legal doctrine such as Nobushige Hozumi, a law professor co-drafting Japan's Civil Code at the end of the nineteenth century and developing legal doctrines covering technology such as the telephone. Or one could focus on the legal profession instead and point to the invention of law reports or the virtual law office. Lawmakers at the national, international and transnational levels are also strong candidates for a list of outstanding innovators.

A further consideration is whether legal innovation can be measured. Perhaps by counting the number of applications of an innovation or the value it generated. Measuring legal innovation raises the issue of what we value in legal innovation even more pressingly. Is it just change that matters or only change that made people's lives better? Against the background of the challenges of measuring legal innovation, I hope you forgive me that I refrain from giving you my definitive list of top legal innovators.

Sumida: Of course, as you say, I knew that this question would be difficult and challenging. I was waiting for your answer with excitement, but I am still surprised to see Gutenberg and Aristotle come up. By the way, let me confirm one point. I knew that printing technology played a role in the religious revolution, but what do you mean when you say that it changed the way laws were made and communicated?

Steffek: I think the context is similar to the Reformation. The printing press democratised the availability of legal information and sped up the dissemination of legal information in society. This was a breakthrough for the legal world.[17]

Sumida: I see, you meant to bring the idea of 'democratisation of information' to the world of law. Indeed, this is a ground-breaking innovation that changed the whole world.

Hozumi Shigenobu was a jurist who gave birth to the study of law in Japan at the end of the nineteenth century and is also known as one of the compilers of Japan's Civil Code. Recently, I rediscovered that Professor Hozumi had written a very exciting paper entitled 'The Telephone and the Problem of Law', in which he had investigated the effect of a new communication tool that appeared in the nineteenth century, the telephone, on the principles of contract law. Thus far, the law distinguished the conclusion of contracts in the parties' presence from the conclusion of contracts where parties were in different places (for example, by letter). The question was whether a new category was needed for the conclusion of contracts by telephone or whether the existing legal principles could capture this.[18] After examining the debate that was dividing European academia at the time, he concluded that only two categories – in presence and in absence – were needed. This division, which is truly timeless, was also confirmed in legal reform in Germany at the beginning of the twenty-first century.

Thanks to this interpretive theory, civil jurisprudence has been liberated from the drudgery of having to enact new laws every time a new communication tool is introduced. It is difficult to know whether we should enact a new law or amend the Civil Code, which is the basic law of society, and whether we should change the interpretation of existing laws.

By the way, I asked for 'role models of legal innovators' because I think that the readers who will pick up this book are those who are currently in the legal profession, those who aspire to become legal professionals and those who are involved in

[17] See James Wilkinson, 'The Most Significant Innovation in Legal History?' (*Lexis Nexis Future of Law*, 27 April 2018) <www.lexisnexis.co.uk/blog/future-of-law/the-most-significant-innovation-in-legal-history> accessed 1 November 2023.

[18] For more detail, see Mihoko Sumida, *'Ishihyoji no Koryoku Hasseijiki Kitei no Gendaika – Riigaru Inobeshon Josetsu'* ('Modernization of Determination of Effective Time of Manifestation – Introduction to Legal Innovation') in Hiroki Okamoto, Masami Okino, Yasushi Toriyama and Akio Yamanome (eds), *Minpogaku no Keisho to Hatten – Nakata Hiroyasu Sensei Koki Kinen* (Succession and Development of Civil Code Study – In Celebration of the 70th Birthday of Hiroyasu Nakata) (Yuhikaku 2021) 211 et seq.

legislation. I thought it would be a good idea to create a more concrete model to guide their actions and thinking.

I completely agree that it is a Herculean task to rigorously define legal innovation and to rank it. But even if we cannot define it, we wanted to at least identify the direction we are aiming for and share it with our readers. What would you say, for example, if a law student asked you how they could become a law professor like you, doing cutting-edge research and contributing to society at the same time? Or, for example, how to tackle the challenge recently advertised in the *Financial Times*, i.e. to identify role models for solving legal problems together?[19]

Steffek: What is the road to legal innovation? This is another difficult question. I think there is more than one path. Some people may innovate on a whim, while others plan their research and use a rigorous methodology. Some people might innovate by having a conversation to clarify or summarise their ideas. Others may find inspiration alone, in an office or during a walk in nature.

But it is the willingness to be open, to have a passion for improving legal practice, to be able to transfer concepts from other disciplines into law, to find pleasure in new approaches, to learn from others, to try out ideas in practice and, last but not least, to try, fail and try again! This list is by no means exhaustive, but if you would like to know more about innovators, I would recommend taking a look at the empirical literature on the characteristics of innovators. Alternatively, you can take the initiative to innovate yourself.

QUESTIONS FOR FURTHER THOUGHT

- Who contributes to innovating the legal system?
- Which role do lawyers play as regards legal innovation?
- What is the role of the courts and litigation as regards legal innovation?
- What role do external shocks such as natural disasters and economic crises play in legal innovation?
- Is it possible to anticipate legal innovation such that new legal rules and reformed legal institutions are in place when they are needed?

[19] 'Wanted: Role Models for Solving Legal Problems Together' (*Financial Times* 13 May 2021) <www.ft.com/content/2024c7c4-e302-4d08-9ad2-958cd1027927> accessed 1 November 2023.