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On the Routinization of Tort Claims:  
Takao Tanase's  
“The Management of Disputes”

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## On the Routinization of Tort Claims: Takao Tanase's "The Management of Disputes"

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In 1990, the *Law and Society Review* published an article by Takao Tanase entitled "The Management of Disputes: Automobile Accident Compensation in Japan."<sup>2</sup> This article was a milestone in sociolegal study of the Japanese legal system. It showed precisely how the calculated structuring of governmental and legal processes, not a cultural propensity toward harmonious social relations, accounted for the persistently low litigation rate in that country. But Tanase's "Management of Disputes" article has become a worldwide classic, read by countless students in hundreds of sociolegal studies courses, not merely because it teaches us about Japan, but because it is written with a theoretical clarity that made it invaluable to the *comparative analysis* of legal systems. I can think of no article that has taught me more about the fundamental characteristics of the *American* tort law system – simply by illustrating how the rules and institutional practices of Japanese *bureaucratic legalism* differ from those of American *adversarial legalism*.<sup>3</sup>

In Japan in 1986, Tanase observed, fewer than one percent of automobile accidents involving death or an injury resulted in tort litigation. In the United States, the comparable figure was 21.5 percent.<sup>4</sup> The disparity did not reflect passivity on the part of Japanese accident victims. They commonly made claims based on tort law and they received compensation from negligent drivers and their insurance companies. The litigation rate was low, Tanase explained, because Japan provides non-litigious methods of assessing fault, advising victims of their legal rights, determining the appropriate level of compensation, and ensuring payment.

First, the article pointed out, Japan invests heavily in *official investigation of accidents* to determine the facts and the relative responsibility of the parties.

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<sup>2</sup> Takao Tanase, "The Management of Disputes: Automobile Accident Compensation in Japan," *Law and Society Review* 24 (1990), 651.

<sup>3</sup> The terms "bureaucratic legalism" and "adversarial legalism" are explained more fully in Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, 2001), chapter 1.

<sup>4</sup> Tanase, "The Management of Disputes," 659.

Carefully prepared police reports are given great weight, and rarely are challenged in court. In assessing an accident victim's medical bills and permanent injuries, insurance companies and courts rely heavily on the victim's own treating physician, who is trusted because a "Compulsory Insurance Investigative Bureau" employs medical consultants to reexamine dubious reports and crack down on hospitals or physicians who seem out of line. So Japan's method of determining the facts is more hierarchical and more reliant on (and deferential to) expert judgment than the adversarial American system, where plaintiffs' and defendants' lawyers put forth conflicting versions of the facts, and juries must evaluate conflicting medical assessments made by "plaintiffs' doctors" and "defendants' doctors."

Second, Tanase described how, before a court case is filed in Japan, contested claims generally are resolved by *non-litigious dispute resolution mechanisms*. These include Traffic Accident Dispute Resolution Centers, which along with courts, provide mediation services. Claimants can also turn to a network of consultation centers operated by governments, the bar association, and insurance companies. The mediation services and advice centers work effectively because the Japanese judiciary works hard at developing clear, detailed rules that guarantee virtually automatic, predictable, moderate compensation for most accident victims. This contrasts with the American tort system, where the legal rules concerning both liability and non-economic damages ("pain and suffering") are stated in general terms, leaving a great deal to the judgment of constantly rotating lay juries – which in turn makes courtroom outcomes variable and difficult to predict.<sup>5</sup>

Third – and this is a very important point – Tanase's article noted that Japanese insurance companies, compared to their American counterparts, have much lower incentives to avoid full legal compensation. This is because the Ministry of Finance regulates insurance firms' rates, guaranteeing a reasonable return, and also established compulsory loss-sharing arrangements among motor vehicle insurers. This made the insurance system more like a quasi-public social insurance program, Tanase argued, guaranteeing moderate benefits for the injured.

The result was a system that is vastly more efficient and reliable in delivering compensation than the American tort system. Tanase estimated that legal fees comprised only two percent of the total compensation paid to injured persons and that mediating and claims process costs amounted to about 0.2 percent of the total. In the United States, according to a survey in the late 1980s, 24 percent of individuals hurt in motor vehicle accidents involving potential defendants hired a lawyer, and the figure went up to 57 percent for victims with

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<sup>5</sup> Sociological studies concerning the difficulty American lawyers have in predicting outcomes in tort cases are summarized in Kagan, *Adversarial Legalism*, 114-116, 122, 138-140.

“serious injuries” (fractures, burns, or worse).<sup>6</sup> When the claimant hires a lawyer, the defendant or her insurance company generally employ a lawyer too. In consequence, according to two big studies of motor vehicle accident tort claims (not just lawsuits), payments to lawyers equaled 47 percent of the total personal injury benefits paid by liability insurers to third-party accident victims.<sup>7</sup> This expense drives up the cost of insurance to the point that huge numbers of drivers are uninsured or underinsured, which means that victims of their negligent driving will get little or nothing from the tort system.

All this makes Japanese bureaucratic legalism look very attractive from a comparative standpoint. But Tanase’s 1990 article, foreshadowing his more recent scholarship, questioned whether a legal system that emphasizes bureaucratic smoothness and efficiency, rather than the pursuit of justice and responsiveness to changing values, is all a society should aspire to. The Japanese system, he pointed out, enabled especially aggressive claimants to obtain disproportionately higher compensation. And he feared that the low litigation rate and the emphasis on standardization would result in the stagnation of legal development, since courts were not constantly pushed to consider new arguments and improve the law. Thus, Tanase concluded, “Paradoxically, the very success of the Japanese elite in disarming the legal weaponry of the people inadvertently breeds the seed for its failure: the loss of legitimacy.”<sup>8</sup>

Tanase elaborates on these themes in “The Moral Foundations of Tort Liability,”<sup>9</sup> in which he adds an additional threat to the legitimacy of this system. People, he argues, want not only compensation for serious injuries caused by the negligence of others. Just as importantly, they yearn for a more humane, “communitarian” response, “whereby tortfeasors face up to victims and reflect on how they may ease the victims’ pain and suffering.”<sup>10</sup> Yet one might wonder

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<sup>6</sup> Deborah R. Hensler, M. Susan Marquis, Allan F. Abrahamse, Sandra H. Berry, Patricia A. Ebener, Elizabeth Lewis, E. Allan Lind, Robert J. MacCoun, Willard G. Manning, Jeannette A. Rogowski, Mary E. Vaiana, *Compensation for Accidental Injuries in the United States* (Santa Monica, 1991), 24.

<sup>7</sup> Hensler et al., *Compensation for Accidental Injuries*, 137.

<sup>8</sup> Takao Tanase, “The Management of Disputes,” 687.

<sup>9</sup> From Tanase’s forthcoming book, translated by Luke Nottage and Leon Wolff.

<sup>10</sup> Tanase notes that “People manage this disjuncture [between the law’s emphasis on monetary compensation and the communitarian emphasis on interpersonal healing] by pursuing social action in tandem with legal claims for compensation.” (Thus in his 1990 article, Tanase stresses motor vehicle accident victims’ insistence on getting a personal apology from the negligent driver, even while seeking legal compensation from his or her insurance company). “However,” Tanase worries, “this bifurcated approach breaks down as society becomes legalized (*hoka*).” As many

whether Tanase's concerns, while normatively appealing, were and remain somewhat exaggerated.

### **Does Legal Routinization Inhibit Legal Development?**

One of Tanase's concerns was that the legal standardization of liability and money damages would result in the stultification of law and legal development. The concern seems to reflect two assumptions: first, that only a *high rate* of *adversarial* litigation will lead to judicial innovation, and second, that judicial innovation is crucial to legal development.

With respect to the first assumption, I cannot speak to subsequent developments in Japan, but I can think of important counter-examples from the American experience. In the United States, state-level workers compensation plans provide the closest approximation to the "bureaucratic legalism" of Japan's method for dealing with motor vehicle disputes. In state workers compensation programs, payments to injured workers is governed by simple and clear liability rules (compensation for work-related injuries regardless of fault) and prescriptive, detailed schedules for linking damages to types of permanent disability. Disputes are resolved by administrative tribunals, not by courthouse juries. Lawyers' fees are limited by statute. Only a tiny percentage of cases end up in the regular court system. But that has not foreclosed judicial innovation when compelling new issues arise.

In the late 1960s and early 1970s, as the number of workers suffering from asbestos-related diseases began to rise, a handful of entrepreneurial lawyers won court rulings enabling diseased workers to sue asbestos manufacturers in tort. Pretrial discovery in those few cases demonstrated that the manufacturers had not been responsive to mounting medical evidence that even small levels of exposure to asbestos particles could eventually be deadly. Based on those claims, a few appellate court precedents on asbestos liability ushered in a new era of "mass tort" litigation.<sup>11</sup> That experience indicates that within the same legal system, efficient "bureaucratic justice" for large numbers of routine claims and "adversarial legalism" for the exceptional case raising important new issues can coexist, or can be made to coexist.

Tanase's second assumption was that judicial innovation is crucial to legal development. I am far from fully knowledgeable on the subject, but Japan's low

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observe, Americans refuse to say "I am sorry" even if they cause an accident." (See also Kagan, *Adversarial Legalism*, 146 and 276.

<sup>11</sup> Deborah R. Hensler, *Asbestos in the Courts* (Santa Monica, 1985).

litigation rate (when viewed in cross-national comparative perspective)<sup>12</sup> does not seem to have stultified legal development in Japan. The papers presented at this conference reflect striking changes in Japanese law in the 1990s and early 2000s. These include not only moves to expand the size of the practicing bar and the nature of legal education, but expansion of access to defense counsel in criminal cases<sup>13</sup>; the enactment of provincial and national freedom of information acts that have enabled litigants to expand the legal accountability of local government<sup>14</sup>; the enactment in 1994 of a Product Liability Law, modeled on an European Union directive on that topic, that added a new strict liability cause of action to the Japanese tort regime<sup>15</sup>; and amendments to the Civil Procedure Code in 1996, that were designed to make litigation more attractive and (by expanding pretrial discovery rights) more potent.<sup>16</sup>

These changes were enacted by legislatures, of course – not by courts responding to “law reform” litigation. But in most political systems, significant non-incremental legal change is the province of legislatures, not judiciaries. Given a reasonably responsive democratic government, legal development can co-exist with a non-litigious bureaucratic system for handling the routine disputes that arise from recurrent kinds of injuries and injustices – such as motor vehicle injuries, construction disputes, debt collection disputes, claims of arbitrary treatment in the workplace, medical injuries, and so on. That seems to have been

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<sup>12</sup> Tom Ginsburg and Glenn Hoetker, “The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation,” paper presented at the Sho Sato Conference, University of California, Berkeley, February 12-13, 2005.

<sup>13</sup> David T. Johnson and Satoru Shinomiya, “Emerging Rights in Japanese Criminal Justice,” paper presented at the Sho Sato Conference, University of California, Berkeley, February 12-13, 2005.

<sup>14</sup> Jonathan Marshall, “Taxpayer Litigation in Japan,” paper presented at the Sho Sato Conference, University of California, Berkeley, February 12-13, 2005; and Masaki Abe, “Mobilizing Rights Against Local Government: Recent Trends in Public Law Litigation in Japan,” paper presented at the Sho Sato Conference, University of California, Berkeley, February 12-13, 2005.

<sup>15</sup> Luke Nottage, “Comparing Product Safety and Liability Law in Japan: From Minimata to Mad Cows – and Mitsubishi,” paper presented at the Sho Sato Conference, University of California, Berkeley, February 12-13, 2005.

<sup>16</sup> Ginsburg and Hoetker, “The Unreluctant Litigant?”; Shozo Ota, “Reform of Civil Procedure in Japan,” *American Journal of Comparative Law* (2001), 561-83; Yasuhei Taniguchi, “Civil Procedure Reform,” in Dan Foote and Veronica Taylor, eds., *Law in Japan: A Turning Point?* (Seattle, 2005).

the story in the Netherlands, for example, where such measures are well-institutionalized.<sup>17</sup>

### **Failing Faith in Bureaucratic Justice?**

One reason legitimacy for the existing routinized handling of motor vehicle accident claims could fade, Tanase speculated, was that the Japanese public increasingly resent particularly aggressive claimants who obtain disproportionately generous monetary awards from a bureaucratized compensation system that is unprepared for adversarial conflict. Although I do not follow the popular press, the actual behavior of motor vehicle accident victims does not suggest popular discontent with Japan's system. Between 1990 and 2002, traffic accident lawsuits in summary courts increased from 4,056 to 6,712 annually (65 percent), but claims processed through the Traffic Accident Dispute Resolution Center and two centers operated by the Japanese bar increased even more – from 22,939 in 1990 to 40,218 in 2002 (75 percent).<sup>18</sup> The increase of claims in both forums suggests popular endorsement of the prevailing legal system rather than a sign that the dispute resolution centers or the courts are losing legitimacy.

Many of the recent statutory legal reforms mentioned above seek to facilitate adversarial legal challenges and judicial oversight of decisions that previously had been made by bureaucracies or had not been subject to legal control at all. But those reforms do not *displace* the management of disputes through more standardized, bureaucratic processes. Rather, they *supplement* those processes by authorizing legal challenge and judicial action as a mode of ensuring that the bureaucratic mechanisms remain responsive to legal values. Thus, the Product Liability Law is accompanied by the establishment of informal product liability dispute resolution centers.<sup>19</sup> Taxpayers suits and Freedom of Information Act claims, Jonathan Marshall has shown, must be *preceded* by claimants efforts to first obtain an audit of governmental expenditures or release of requested information from administrative review bodies.<sup>20</sup> Although public defense counsel will be made available to more criminal suspects, the criminal

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<sup>17</sup> Erhard Blankenburg, "The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in the Netherlands and West Germany," *Law and Society Review* 28 (1994), 789.

<sup>18</sup> Ginsburg and Hoetker, "The Unreluctant Litigant?," 34. While the increased number of claims in both forums may represent an increase in legal claiming per capita in Japan, one would not want to label that a sign of increased litigiousness without first knowing whether it also reflects an increase in the percentage of injury-causing motor vehicle accidents that result in legal claims.

<sup>19</sup> Nottage, "Comparing Product Safety."

<sup>20</sup> Marshall, "Taxpayer Litigation."

process is still likely to be dominated by the bureaucratic processing of cases by police and prosecutors' offices.

Do the new legal changes, authorizing more adversarial, judicialized ones, reflect a loss of faith among the Japanese people in bureaucratic processes? Perhaps, with respect to bureaucracies (local governments, ministries, agencies) that had been mostly opaque, not closely restrained by legal norms. In such instances, however, the legal reforms, as I understand it, stem from broader economic and political pressures for greater economic efficiency, openness and transparency – not from a loss of faith in the routine handling of routine cases, as in the case of the motor vehicle accident compensation system, where the governing law is prescriptive and detailed. Thus, the desire for more opportunity for legal challenge does not seem to reflect the *kind* of loss of legitimacy that Tanase wrote of in his 1990 article, where his concern seemed to be that aggressive advocacy would undermine faith in the fairness of bureaucratic legalism. Indeed, providing more readily available, more aggressive legal advocacy, as the abovementioned reforms provide, is likely to *increase* the disparity of outcomes between disputants (or potential disputants) who take advantage of such opportunities and those who do not – a price worth paying, if it increases legal accountability in general.

### **Bureaucratic Justice and Communitarian Justice**

Finally, what of Tanase's concern that current tort law, with its impersonal assignment of blame and routinized insurance-based compensation, clashes with popular conceptions of justice and morality, which call for personal responsibility for remedying harm and a more nuanced understanding of fault? Tanase is not alone in that regard. Recognition of such aspirations underlie John Braithwaite's advocacy of "restorative justice," in which the determination of responsibility requires mediation among a wider range of interested parties and legal remedies that entail behavioral change and ongoing care – rather than impersonal financial or criminal penalties.<sup>21</sup>

I find Tanase and Braithwaite's visions of communitarian justice very attractive, at least in principle. On the other hand, institutionalizing labor-intensive, time-consuming "restorative justice circles" for the tens of thousands of accidents disputes that arise in dense urban societies is an extremely ambitious and costly societal agenda. There is an empirical issue, in my view, about what most victims of accidents and injustices really want. I suspect that while many would like a sincere apology and chance to help frame a preventive remedy, just as many want legally-prescribed compensation, too. And many others, I suspect, want *only* financial compensation, preferring to move on with their lives, not to

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<sup>21</sup> John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford/New York, 2002).



spend any more time interacting with strangers who caused their injury. Knowing more about this empirical issue would help evaluate how much a society or a legal system should invest in structuring the human interactions that Tanase and Braithwaite call for.

After all, there is much to be said in favor of *efficiency* and *consistency* in responding to commonplace human tragedies and injustices, even if bureaucratic, standardized compensation systems fail to satisfy all dimensions of our yearnings for justice and morality. The transaction costs and delays of providing all aspects of justice may be too high, for some kinds of losses. Justice might better be served by providing some partial remedy – some money – and quickly, for a wider range of victims of harm. Motor vehicle accidents, after all, wreak financial as well as emotional havoc on tens of thousands of families each year. So do workplace accidents, and injuries caused by negligent or inattentive medical care. The impulse to provide some moderate financial relief for the affected families reflects what Tanase, following Lawrence Friedman calls the demand for “total justice.”<sup>22</sup> It is manifested in many of the institutions of the contemporary welfare-regulatory state. It will not go away. There is a good argument for trying to meet its costly requirements as efficiently and equitably as possible. Universally mandated “no-fault” self-insurance is one way. Taxpayer-financed social insurance, as exemplified by the New Zealand Accident Commission is another. The Japanese tort law system, as routinized in the way described in Tanase<sup>23</sup> is a plausible alternative – and perhaps one to be accepted, and perhaps improved, but without the more fundamental reservations he added.

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<sup>22</sup> Lawrence M. Friedman, *Total Justice* (New York, 1985).

<sup>23</sup> Tanase, “The Management of Disputes.”