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New York's Unwelcoming Harbor: The New York Convention's Inapplicability to Claims Arising from Seamen's Employment

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APOLOGIES AND CORPORATE GOVERNANCE IN THE
JAPANESE CONTEXT – TATSUMI TANAKA’S *SONNA SHAZAI
DE WA KAISHA GA ABUNAI [APOLOGIZING THAT WAY WILL
ENDANGER YOUR COMPANY]*¹

*Reviewed by Colin P.A. Jones**

In his book about corporate governance and corporate social responsibility in Japan, Tatsumi Tanaka provides practical business advice with legal ramifications. The book, entitled *Apologizing that Way Will Endanger Your Company*, analyzes public apologies and the harm companies (and their managers) often inflict by apologizing the wrong way. Anyone familiar with Japanese news programs have likely seen footage of corporate executives standing up and bowing toward the cameras while apologizing for a company mistake. For example, leaked customer information, defective products, some type of fraud, or perhaps employees behaving badly. Many viewers—foreign and Japanese alike—regard these scenes as part of a quaint Japanese ritual. Tatsumi Tanaka shows that these corporate apologies involve much more than the ten or fifteen seconds of bowing that people see on television. Far from being a mere ritual, an apology is a serious matter. Apologies serve an important role during a company’s response to a crisis. A corporation must be prepared for a number of issues that might arise in a potentially lengthy press conference: unpleasant questions, difficult disclosure issues, and the proper way to manage the public airing of a corporation’s dirty laundry. A company must handle all of these issues properly to minimize the risk of future legal sanctions, damage to reputation, and other potential harms.

* Professor, Doshisha University Law School, Kyoto, Japan. This book review is a non-academic work and is part of a series providing insights into the way the Japanese public understands the Japanese legal system. To read prior works in this developing series, see Colin P. A. Jones, *Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM L. & POL’Y J. 363 (2006) (reviewing TAKASHI MARUTA, *SAIBAN’IN SEIDO [THE LAY JUDGE SYSTEM]* (2004)) and Colin P. A. Jones, *Kaoru Inoue’s Shihō no Shaberisugi (Blabbermouth Judiciary): Moral Relief, Legal Reasoning and Judicial Activism in Japan*, 19 EMORY INT’L L. REV. 1563 (2005) (book review).

¹ TATSUMI TANAKA, *SONNA SHAZAI DE WA KAISHA GA ABUNAI [APOLOGIZING THAT WAY WILL ENDANGER YOUR COMPANY]* (2006). All translations from Japanese to English are by the reviewer or editors of the *BYU International Law & Management Review* unless otherwise noted.

Thus, there is an art to apologizing; a badly executed *mea culpa* can doom a company or its high-level executives. Tanaka should know; a graduate of Keiō University's prestigious faculty of law, he was once an employee of Recruit, a company that was ground zero in the late 1980s for one of the worst political corruption scandals in post-war Japan.² Furthermore, in an interesting display of candor, Tanaka also notes that he learned how to handle difficult situations by first watching his natural mother, then two successive stepmothers try to deal (unsuccessfully in the case of the first two women) with his challenging and sometimes violent father. This openness extends to his case studies. For the most part he names the companies and executives involved, which is infrequent in Japan because the boundaries of defamation are extensively gray. For this reason the book is also a useful overview of Japanese corporate (and political) scandals that have made the news in recent years. These scandals include products liability cases, negligently-caused deaths, influence peddling, bid-rigging, financial scandals, and other forms of corporate malfeasance. But beyond simply reviewing corporate scandals in Japan, Tanaka's book provides thoughtful analysis to explain why certain apologies fail and what effective apologetic methods can be used to ensure reconciliation with the public after a corporate mistake.

I. INEFFECTIVE APOLOGIES

In his first chapter Tanaka describes ten types of the "bad" apologies.³ Using one or more case studies for each example, Tanaka explains why the methods employed by these companies failed to achieve the desired results: forgiveness and the preservation of the apologizing company's reputation. A summary of each type is given below.

² The Recruit scandal involved the issuance of Recruit Cosmos' pre-IPO shares that dramatically increased in value when the company went public. Recruit Cosmos, a Recruit Group company, issued the shares to key political figures, including a number of Diet members, one of whom was then-Prime Minister Noboru Takeshita. The scandal and other revelations of corruption and influence peddling resulting from the scandal ultimately caused the downfall of Prime Minister Takeshita's government. See, e.g., William Stern, *Uniqueness and Sleaze—Japan's Recruit Scandal*, NAT'L REV. June 2, 1989, at 23, available at http://www.findarticles.com/p/articles/mi_m1282/is_n10_v41/ai_7633677.

³ See TANAKA, *supra* 1, ch. 1, *Konna Owabi Wa Urusarenai* [Such Apologies Will Not Be Permitted].

A. Apologies that Include Rebuttals or Excuses

At the outset, Tanaka states that if you are going to apologize, do so without trying to justify improper behavior or deflect blame.⁴ In 2003 a hot spring resort hotel refused service to a former Hansen's disease (leprosy) patient, resulting in serious media criticism. The president of the cosmetics company that controlled the hotel apologized, but in his apology he noted that the hotel's management had acted "perfectly naturally" given the circumstances. He also tried to blame others for hiding the Hansen's disease issue at the time the reservation was made. This led to growing public criticism that not even the closure of the offending hotel could halt. From this case Tanaka derives the moral: "The first thing you say in an apology can never be deleted."⁵

Tanaka also covers the case of Nippon Ham, which during the height of the mad cow disease scare in 2002 was found to have been labeling beef imported from the United States as Japanese.⁶ The managers excused themselves in their apology on the company's behalf with a trite "we didn't know about it." Tanaka points out that this type of explanation only serves to further destroy public confidence, revealing a lack of sufficient oversight and the desire to discover problems within the company before they reach the consumer.⁷

B. Apologies that Include Lies or Deception

Apologies that include lies or deception often have a detrimental impact on a company since they can result in a rapid and sometimes fatal loss of public trust.⁸ The cases Tanaka explores illustrate the

⁴ *Id.*

⁵ *Id.*

⁶ For an overview of the mad cow disease crisis in Japan (including a short discussion of some of the corporate scandals which resulted from it), see Tatsuhiko Kamisato, *BSE Crisis in Japan: A Chronological Overview*, 10 ENVTL. HEALTH & PREVENTIVE MED. 295 (2005), available at http://www.jstage.jst.go.jp/article/ehpm/10/5/295/_pdf.

⁷ In the United States, liability for failure to maintain adequate disclosure controls may result when a senior executive of an SEC-registered company makes the statement "I didn't know." See Colin P. A. Jones, *Sarbanes-Oxley and the Inch-thick Contract*, 5 RICH. J. GLOBAL L. & BUS. 1, 2-4 (2005).

⁸ See TANAKA, *supra* note, at 1, ch. 1, sec. 2, *Usoto Inpei wo Fukumu Shazai* [Apologies Include Lies and Hidden Implications].

importance of using apologies to convey accurate corporate information to stakeholders. For example, Mitsubishi Motors became synonymous with corporate deception by systematically hiding defects in its automobiles and continuing to do so even after being caught and apologizing. The ongoing series of scandals were disastrous and resulted in the company recalling hundreds of thousands of defective automobiles twice in the space of four years.⁹

C. Apologies that are Vague

Even if there is no intent to deceive listeners, an apology that leaves doubts as to what message it conveys can also have a negative effect, or at least cause people to question the company's motive for apologizing. Accurate information disclosure—including what the apology is for—is critical to a meaningful apology. Tanaka gives the example of food business giant Ajinomoto. In 1997 Ajinomoto published an apology in newspapers for unspecified wrongdoing and promised to never let it happen again. In fact, the incident in question involved payments made by Ajinomoto employees to corporate extortionists (*sōkaiya*).¹⁰ Since the published apology did not mention details, however, the average reader would likely think that it referred to problems with Ajinomoto products, a disastrous result for a food products company. Even worse, the wording of the apology was so oblique that it was singled out by a major newspaper editorial as an example of convoluted writing suitable for a school entrance exam problem. Thus, by apologizing vaguely, Ajinomoto generated additional negative publicity beyond that resulting from the underlying incident.

D. Apologies by the Wrong People

Depending on their intended application, apologies must be made by the right people—ideally the company president or another senior executive. This is not just a matter of appearing to take the situation seriously (and thus appearing sincere); the more senior the person leading the show of contrition, the more likely that person will be able to obtain the information necessary to make the apology meaningful.

⁹ See, e.g., Anthony Faiola, *New Cover-up Allegations Hobble Japan's Fourth Largest Automaker*, WASH. POST, Jul. 6, 2004, at E01.

¹⁰ For an explanation of *sōkaiya*, see KENNETH SZYMKOWIAK, *SOKAIYA: EXTORTION, PROTECTION AND THE JAPANESE CORPORATION* (2002).

For example in 2004, a newspaper scoop revealed that extortionists had compromised the personal information of millions of Softbank BB customers. Although Softbank cooperated fully with the police investigation and doubtless considered itself the primary victim of the affair, the company managed to annoy the media at its initial press conference by sending only the head of public relations to apologize. Sending someone of this level to explain one of the most serious customer information leaks in Japanese history was compounded by the employee frequently responding to reporters' questions with "I don't know" or "I can't say." This press conference generated such bad will that two additional conferences were held, the last one finally featuring the company's president, Masayoshi Son. But by this time Softbank BB's standing with the media was already damaged, resulting in negative press that might have been avoided.¹¹

In a more tragic case, a six-year-old boy was crushed to death in the revolving door of the recently opened Roppongi Hills building in 2004. Mori Building, the company that owned the building, held a press conference presided over by a managing director who revealed that similar (though less serious accidents) had occurred in the past. This led to a series of press conferences where it became clear that the number of prior accidents was uncertain because the company had not treated them seriously enough to keep detailed records. In addition, the company indicated that while it intended to cooperate with the police investigation and would try to ascertain what caused the accident, it did not expect any member of its management team to resign as a result. These announcements may have made sense from Mori Building's perspective, particularly as the company considered the accident to be the fault of Sanwa Shutter, the door's manufacturer. However, from the point of view of the victim's family and many sympathizers, the failure of Mori Building's president to formally apologize for the incident, combined with the company's early preemptive refusal to contemplate anyone at the company taking responsibility and resigning, bordered on cruelty. Perhaps as a result of this "insincere" response by Mori Building (and Sanwa), within four days of the accident the police initiated criminal investigations of both companies, possibly fearing that the companies would try to hide or destroy relevant evidence.¹² Having the wrong person apologize, and

¹¹ See TANAKA, *supra* note, at ch. 2, sec. 1, cl. 3, *Kisha Kaiken wa Tada de aru* [Press Conferences are Free of Charge].

¹² Ultimately, Mori Building paid a settlement to the boy's family. Three executives, two from Mori Building and one from Sanwa Tajima Corporation, were

using the wrong language only makes the problem worse.

E. Misdirected Apologies

As Tanaka notes, it is important that a show of contrition be directed to the appropriate people. The purpose of a corporate apology is to prevent public anger by focusing on its potential source. While it is easy to understand why a company facing a crisis might be focused primarily on appeasing disgruntled business partners or government regulators who are upset by the incident, the victims of most corporate malfeasance—as well as the source of the anger—are usually consumers or taxpayers who should not be ignored. As an example, Tanaka mentions an apology published in 2002 by Marubeni Chikusan, a meat producer and retailer, which was written in language that would be difficult for targeted consumers to understand. Tanaka discovered that the language was copied largely from an order by Japan's Fair Trade Commission (FTC) directing Marubeni Chikusan to stop incorrectly labeling the country of origin for the poultry it produced. The company was thus apologizing to the FTC rather than to consumers, the actual victims of its unlawful conduct. Directing apologies to the right people can help companies improve their standing after making mistakes.

F. Apologizing Too Late

Tanaka notes that due to the influence of the United States and its “litigation society,” some lawyers recommend against apologizing too early since it may result in a disadvantage at trial.¹³ Tanaka declares that such advice is twenty years out of date. With increased consumer

found guilty of criminal negligence and given suspended prison sentences. See Masami Ito, *Execs Avoid Prison over Roppongi Hills Fatality*, JAPAN TIMES, Oct. 1, 2005, <http://search.japantimes.co.jp/cgi-bin/nm20051001a3.html>.

¹³ This may also explain why companies seem compelled to use phrases like “taking moral responsibility” to explain actions they take in connection with an apology. Tanaka gives the example of the Seibu Railway Company chairman who resigned after several senior executives were arrested for making illegal pay-offs to *sōkaiya* extortionists. The fact that the chairman's resignation came more than a month after the president of the company resigned for the incident, coupled with the statement that he was resigning “to take moral responsibility,” turned the apology into a public relations disaster for everyone involved. See TANAKA, *supra* note, at ch. 1, sec. 6, cl. 2, *Kikanshien de Okureta? Seibu Tetsudo Kaicho no Jinin Kaiken* [Late because of Bronchial Pneumonia? Interview with the Seibu Railway Company Chairman's Resignation].

activism and heightened protections set forth in Japan's products liability statute,¹⁴ a late apology in cases where consumers suffer harm can result in withering criticism and other adverse effects. Again, a company's ability to quickly collect and disseminate accurate information is a key aspect of apologizing effectively.

Here it is worth noting the role of media in corporate governance. To Tanaka, the media is the principal vehicle by which social sanctions are imposed upon a company. Paradoxically, although it lacks any ability to compel a company to disclose information, once the media has reported that a company is unethically concealing information, subsequent coverage may become even more critical, which often prompts the police, regulators, or other investigatory bodies to take action.¹⁵ This is rarely a positive development for a company in crisis. And as noted below, social sanctions will almost always be preferable to defending a legal action.

Corporate scandals can snowball with alarming speed, making a timely apology vital. In 2002, Snow Brands Food Company (*Yukijirushi Shokuhin*), a subsidiary of food giant Snow Brands (*Yukijirushi Nyūgyō*), was caught falsely labeling imported beef as Japanese to take advantage of the Japanese government's program of buying up and destroying Japanese beef in response to a mad cow disease scare. With earlier Snow Brands scandals involving food poisoning from tainted milk still in the public's memory, Snow Brands products disappeared from supermarket shelves and Snow Brand Foods Company was liquidated within three months of the labeling scandal first being reported. In a similar scandal, Duskin, the owner of the Mister Donuts fast food chain, spent over a year and a half equivocating in response to a food adulteration case before finally apologizing. One result of this delay was the arrest and prosecution of several company executives.¹⁶ Apologizing late can lead to disastrous results for a company and its employees.

¹⁴ Japan did not have a general products liability statute until 1995. See *Seizōbutsu Sekininhō* [Products Liability Law], Law No. 85 of 1994 (enacted in 1995).

¹⁵ Media companies that have caused harm also need to apologize. For example, in January of 2007, the producer of a popular quiz show from Kansai Telecasting Corporation used fabricated data, including false information about the effectiveness of certain foods in dieting, to make the show more interesting. The show was cancelled after the use of fabricated data was discovered, and a round of corporate apologies ensued. *Cancelled TV Show had History of Phony Data*, ASAHI SHINBUN, Jan. 29, 2007, at 19.

¹⁶ For an overview of how various scandals affected Snow Brands, see *Snow Brand Milk Posts 71.74 Billion Yen Net Loss*, JAPAN TIMES, May 24, 2002, <http://search.japantimes.co.jp/cgi-bin/nb20020524a3.html>.

G. Disorganized Apologies

A corporate apology that involves the necessary people but does not have them all speaking with one voice also reflects poor crisis mismanagement. Tanaka gives a couple of examples (Snow Brands and Mitsubishi Motors) showing how corporate officers openly disagreed with each other at press conferences, or expressed surprise at statements made by their colleagues. “President of company finds out at his own press conference” is a terrible headline, that may result from a company inadequately prepared for the apology process.

H. Apologies Preceded by Offers of Compensation

While one purpose of financial compensation is, of course, to make others whole for their injuries, other important motivations for providing compensation make it critical for apologies to come before compensation offers.¹⁷ In Tanaka’s view, other compelling motivations for offering compensation include obtaining forgiveness, restoring public trust, and preserving corporate reputation. Compensation, therefore, should only come after an apology has been made, resignations have been tendered, and disciplinary and other actions have been taken in response to corporate wrongdoing. Approaching victims first with offers of compensation is a terrible mistake; not only does it set the floor for future negotiations, but it risks offending victims and their families, making a settlement that much harder to achieve.

Rushing to compensate can lead to disastrous results for other reasons as well. For example, in 2002 a manager newly transferred to one of the grocery stores in the Seiyū chain noticed that imported meats were being labeled and sold as having originated in Japan. He reported it to his superior and the store immediately started to offer cash refunds to customers who had purchased the offending products. The store was so eager to fix the problem, however, that it did not even require a receipt or other proof of purchase before giving refunds. Word spread over the Internet and the store was soon inundated with putative purchasers demanding cash refunds. With management overwhelmed, the store temporarily closed and also terminated the refund program, an action that resulted in scuffles between store staff and the assembled customers, as well as police intervention and

¹⁷ See TANAKA, *supra* note, at ch. 1, sec. 10, *Hia to Chiri no Shazai* [Quick Apologies].

disastrous publicity.¹⁸ While compensation can be key to apologizing, it must be handled correctly for a company to maintain its reputation.

I. Apologies Without Other Action

Because there are many important steps a company should take to manage a crisis, apologizing alone will rarely be adequate. There must be other action, namely disciplinary action appropriate to the nature of the harm caused. The level of disciplinary action reflects the sincerity of the company's apology and how well it recognizes the extent of its wrongdoing.

For example in 2003, it was revealed that some of the questions on one of the national automotive mechanics certification examinations had been leaked to affiliates by a manager at Toyota who also served on the exam oversight committee. Given Japan's extensive culture of examinations and qualifications, this was a serious matter, even more so because it was a national exam administered by the Ministry of Land, Infrastructure and Transport. After this information became public, Toyota's president and senior management held a press conference at which they apologized. But following an internal investigation, the only other steps the company took were to suspend the manager who leaked the problems and several employees for seven days, together with a few other minor punishments. At the same time, however, all those at Toyota affiliates who had taken and passed this very difficult exam (having a pass rate of less than five percent) were asked to retake it.

In Tanaka's view, Toyota's response was inadequate given the relatively light punishment imposed on those responsible for the scandal compared to the burden imposed on the victims—those forced to retake the exceptionally difficult test. Action taken in connection with an apology must reflect the company's awareness of its own sins. Unfortunately, one of the most common steps taken by a company's management as a show of contrition—the voluntary return of a bonus or other compensation—is inadequate precisely because it is voluntary. Beyond simply apologizing, a company must take additional meaningful action to make the apology effective.

¹⁸ The store tried to apologize again by selling meat below cost. This effort also managed to annoy customers, as it resulted in large lines and rapid depletion of meat in stock. *Sapporo Store Says Sorry with Meat*, JAPAN TIMES, Oct. 26, 2002, <http://search.japantimes.co.jp/cgi-bin/nn20021026b2.html>.

J. Apologizing Too Soon

While apologizing too soon may not be as bad as doing so too late, it can still result in unexpected damage to a company.¹⁹ The issues, again, are sincerity and transparency. Apologizing too early can make a company seem guilty even where you are not, or suggest that a company is treating the problem frivolously. It can also be a sign of poor information control, which often results in misreading a serious situation.

Tanaka illustrates the ineffectiveness of apologizing too soon through the example of Japan Airlines (JAL). In 2001, two JAL flights almost collided in mid-air over the Izu peninsula. Sudden evasive action taken by one of the pilots caused injuries to a number of passengers. JAL initially responded with incorrect and misleading information, which resulted in media reports suggesting that the company suffered from poor labor relations. To remedy the situation, JAL's president held a press conference a mere two days after the accident and apologized to everyone. Even though evidence later showed that an air traffic control error caused the near-collision, JAL's poorly managed apology and press conference resulted in blame being focused on the pilot, who was eventually prosecuted (unsuccessfully) for professional negligence.

II. EFFECTIVE APOLOGIES

Tanaka devotes the second half of his book to explaining what is necessary for a company to apologize correctly:²⁰ the right combination of what Tanaka calls heart (*kokoro*), technique (*waza*), and organization (*karada*). He also emphasizes the importance of gathering and imparting information as a way for companies to make their apologies effective.

A. Heart

The "heart" Tanaka refers to relates to removing the natural fear of apologizing. For this attribute, Tanaka offers a few simple revelations:

- *A gracious apology is a one-in-a-thousand chance to raise your*

¹⁹ See TANAKA, *supra* note, at ch. 1 sec. 6 Osoi Shazai [Late Apologies].

²⁰ *Id.* at ch. 2, sec. 2, *Yurusareru tame no Shazai no "Waza" wo Manabe* [Study the Technique of Apologizing in Order to be Forgiven].

*standing as a person.*²¹ Some American readers may have trouble with using Bill Clinton's televised confession of his affair with Monica Lewinski as an example, but the former president still seemed popular at the 2004 Democratic convention, a fact which Tanaka attributes to the president's "manly" apology.

- *Accept social sanctions to avoid legal ones.*²² Tanaka notes (without substantiating his point) that Japanese judges and police alike will use the fact that a person has already been subject to social sanctions as a reason for declining to prosecute or impose further punishment. Companies should spend less time avoiding social sanctions and focus more on incorporating social sanctions into a strategy for avoiding legal punishments.
- *Press conferences do not cost anything.*²³ While most companies will eagerly spend significant amounts of money publishing apologies in major newspapers, company managers are much more reluctant to participate in press conferences. This is understandable; press conferences can be stressful affairs involving difficult, unpredictable questions and the public airing of corporate dirty laundry. Yet there is no dialogue in a published apology, meaning such apologies by themselves rarely achieve forgiveness or understanding. Press conferences cost nothing, and if done properly, such public apologies can project a sincere, human quality during a company's response to a crisis.
- *Press conferences are a form of batch processing.*²⁴ Returning to the role of the media and information, Tanaka notes that when a problem affecting the public occurs, (a case of tainted food products, for example), the media has three missions: (1) to prevent further injuries, (2) to prevent the reoccurrence of similar incidents, and (3) to satisfy the public's right to know. In order to fulfill these missions, the media will first try to obtain whatever information it can from the company responsible for the problem. If the company is not forthcoming, reporters will do whatever is necessary to acquire the facts, becoming increasingly annoyed in the process. If a lack of information prompts reporters to ambush a company's president or employees in front of their homes or on their way to work, that image will make the news. As unpleasant

²¹ *Id.* at ch. 2, sec. 1, *Shazai ni Nozomu "Kokoro" no Hokyo wo Seyo* [Prepare your Heart before Apologizing].

²² *Id.*

²³ *Id.*

²⁴ *Id.*

as it may be for the managers who must participate in press conferences, they are a highly effective means of disseminating necessary information to the press in a single try (hence the analogy to batch processing).

B. Technique

For “technique,” Tanaka offers the following advice:

- *First, know your sins.*²⁵ One rarely hears about issues of morality in the mountainous volumes devoted to corporate governance. Yet soul-searching is at the core of apologizing properly—understanding and accepting what you and your company have done wrong. Tanaka gives an example from his own discussions with a group of meat companies that falsely labeled the country of origin on their products. He asks their managers, “What crime did you commit?” Their initial response is, “We violated labeling laws.” “Is that all?” he asks. Finally, he gets them to admit that they had committed fraud. He then follows through by advising them that the media will come after them as if they were attempted murderers. After all, given the various scares over mad cow disease and other problems that led to the scandal in the first place, they had been misleading the public about the safety of their food. “You can’t take the meat back. If a young child, an older person or an invalid eats it, they might die. You will be pursued as a person dangerous enough to kill people.”²⁶ This type of moral introspection and recognition of fault may be hard to build into a company’s system of controls and procedures, yet the step is crucial to apologizing effectively.
- *Set goals and lay a course.*²⁷ To Tanaka, risk management follows the same logic as war: according to Clausewitz, the successful prosecution of a war requires that goals be set and a course be laid toward reaching those goals.²⁸ Thus, a press conference at which an apology will be made should not be held until a management decision has been made as to where the company wishes to end up.

²⁵ *Id.*

²⁶ *Id.* at ch. 2, sec. 1, *Shazai ni Nozomu “Kokoro” no Hokyo wo Seyo* [Prepare your Heart before Apologizing].

²⁷ *Id.*

²⁸ *Id.*

- *Approach the apology after thinking about it analytically.*²⁹ According to Tanaka, there are four phases in an apology. First is the comfort (*iyasu*) phase. In the case of consumer claims, for example, it means going immediately to the affected consumers and gathering information. It also involves subjecting yourself to the emotions of angry and resentful victims (or their surviving family members). This can be difficult but is important for predicting how things will develop. Next comes the comprehension (*fu ni ochiru*) phase. This is where the disclosure of information becomes so important, since victims want to know what happened and why. According to Tanaka, one of the reasons why the victims of juvenile crime suffer particularly is because the trials are held in secret with little information made public.³⁰ The comprehension phase may take a significant amount of time but is important because it leads to the next phase: forgiveness (*yurusareru*) and closure. Having received implicit or explicit forgiveness is not enough, however, and attention must still be paid to the feelings of the victims until the final phase, which is the incident being forgotten (*wasureru*). Planning for each of these phases is important to making an apology succeed as a risk management strategy.

C. Organization

At the fundamental level of corporate governance, effective apologies come from companies organized in a way that allows them to apologize. The organizational aspects of being a company that can apologize properly are possibly most relevant to the subject of corporate governance.

- *Have wise men from other fields.*³¹ When a corporate crisis develops, it is usually a surprise to top level management, whose initial reaction will typically be anger toward the subordinates who allowed the problem to develop. With senior managers feeling like victims, it is difficult to get them thinking about apologizing, let

²⁹ See TANAKA, *supra* note, at ch. 3, sec. 1, cl. 1, *Sekinin no Okisa to Shozai* [The Size of the Responsibility Belongs with the Company].

³⁰ Juvenile criminal proceedings are not public, and victims (or their families) are only allowed access to the trial record in limited circumstances. *Shōnen Hō* [Juvenile Law], Law No. 168 of 1948, art. 5.

³¹ See TANAKA, *supra* note, at ch. 3, sec. 1, cl. 1, *Sekinin no Okisa to Shozai* [The Size of the Responsibility Belongs with the Company].

alone possibly resigning as part of an effective apology. It is thus crucial to have wise men (or women) to turn to who can view the problem from a broader perspective. Unfortunately, it is very hard to have such people in the same company, or even in the same industry. People close to the company may be overly sympathetic to the managers' dilemma. Also, people in the same company or industry may to a certain degree be rivals. These factors can complicate the information gathering and decision making processes, so it is crucial to find wise people from other fields to provide consultation.

- *Foster subordinates who will speak to you frankly.*³² Since appropriate information is such a large part of effective apology, it is critical to have employees who will tell you the truth and provide straightforward opinions, no matter how unpleasant or unwelcome. Those on the ground have more direct knowledge of the events in question and if they have been trained as “yes men,” things will likely go badly in a crisis. Interestingly, Tanaka identifies a decline in the straightforwardness of Japanese corporate employees and attributes it to the decline in loyalty to a company corresponding to the erosion of Japan's once-famous lifetime employment system.
- *Choose outside experts based on their expertise.*³³ Just because a lawyer or an accountant is famous does not mean he or she has the necessary expertise for the particular problem facing your company. Furthermore, many Japanese lawyers and accountants do not consider apologizing as appropriate and have little experience doing so. Lawyers, in particular, will only worry about legalities and what an apology will mean within the limited universe of a trial (if there ever is one). Lawyers should never be allowed to make the decision about whether to apologize. Not apologizing for legal reasons can lead to a roasting by the media with possibly disastrous results.
- *Don't let your experts get too close.*³⁴ In addition to his experience with the Recruit scandal, Tanaka attributes his own success as a risk management consultant to his ability to provide clients with an impartial viewpoint. Once involved in a crisis, however, it can be very difficult for outsiders to remain objective, particularly in the context of a long-standing relationship that may have come to

³² *Id.*

³³ *Id.*

³⁴ *Id.*

include personal friendship. Thus, he recommends that companies keep their outside advisers at a certain distance. Drinking and playing golf with them should be limited. Large retainer fees should also be avoided, as they may keep the consultant from giving straight forward advice for fear of losing a lucrative contract.

- *Get rid of sycophants.*³⁵ With wise advisors to scold you, forthright employees, and outside experts to give you objective advice, what remains is to get rid of the sycophants. These are the people who will tell you what you want to hear, even though their advice may conflict with the company's or even your own best interests.

At the end of the day, apologizing well when your corporation does wrong is a matter of morality, honesty, and free flow of information—all refreshing topics in the subject of corporate governance.

D. Information

Tanaka returns repeatedly to the theme of information—both disclosure as part of an effective apology, as well the importance of promptly obtaining accurate information to determine how to apologize effectively. Without information, even the most abject apology—kneeling on hand and knee in front of the house of a victim's family—will still fail (as demonstrated by the president of Kansai Electric Power Company in connection with a 2004 power plant accident which killed several employees).³⁶

In the area of information gathering, Tanaka reveals some simple truths which may be overlooked when companies focus on internal procedures and government regulations:

The person [employee, etc.] who caused the problem and those on the ground will lie reflexively. To protect themselves they will minimize the extent of the damage in their reports. They may even make a show of being decisive in their optimistic evaluation of

³⁵ *Id.*

³⁶ The plan was taken out of service and finally reactivated in January 2007. *Reactor Reactivated 2 1/2 Years After Deadly Accident*, ASAHI SHINBUN, Jan. 11, 2007, available at <http://www.asahi.com/english/Herald-asahi/TKY200701110149.html>.

events. In any case, the result of either will be information at variance with the facts will be conveyed to top management.³⁷

and

The reason most companies fail at gathering information is that they rely on their ears for its collection. Rather than rushing to the scene, top management calls up their subordinates on the phone and gets a report. It is just like a doctor making a diagnosis or giving treatment without seeing the patient, but relying instead on the telephone or reports from his family member. It is stupid. Patients who are afraid of surgery will hide their true symptoms and family members who fear being discouraged will include optimistic observations in their discussions. People [in a company] at the scene of a problem will act the same way, and you must be ready to expect them to give you inaccurate reports.³⁸

Tanaka's book is an insightful addition to an area typically left to lawyers. Western practitioners may have something to learn about this seemingly "Japanese" approach to corporate wrongdoing and crisis management. After all, the desire for an apology and the need for closure on the part of victims are universal.

³⁷ See TANAKA, *supra* note, at ch. 1, sec. 6, *Osoi Shazai* [Late Apologies].

³⁸ *Id.* at ch. 2, sec. 2, *Shazai no Kakuron* [The Theory of Apologizing].

