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Law and translation: the story of *Taniguchi v. Kan Pacific Saipan, Ltd.*

*Colin P.A. JONES**

> This case arises from a personal injury action brought by petitioner Kouichi Taniguchi, a professional baseball player in Japan, against respondent Kan Pacific Saipan, Ltd., the owner of a resort in the Northern Mariana Islands. Petitioner was injured when his leg broke through a wooden deck during a tour of respondent's resort property. Initially, petitioner said that he needed no medical attention, but two weeks later, he informed respondent that he had suffered cuts, bruises, and torn ligaments from the accident. Due to these alleged injuries, he claimed damages for medical expenses and for lost income from contracts he was unable to honor[1].

So begins the brief recitation of facts in *Taniguchi v. Kan Pacific Saipan, Ltd.,* an unimportant 2012 case in which the U.S. Supreme court devoted valuable docket time and institutional resources to deciding the seemingly trivial issue of whether "translator" means the same thing as "interpreter" for purposes of 28 U.S.C. § 1920. This statutory provision allows a federal judge to tax the losing party in a case with certain of the prevailing party's costs. In the interests of avoiding needless suspense, the court's answer was "no": interpretation costs do not include translation fees.

This article is not about translation, interpreting or even the holding of the case, which is not particularly interesting. Rather it is an attempt to use an obscure, case to illustrate some basic features of the American legal system. It also represents an effort to illustrate some of the fascinating

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* Professor, Doshisha Law School (Kyoto). I would like to express my gratitude to my friend Tim Roberts of Dooley Roberts & Fowler, LLP, counsel to the defendant/appellee in the case for involving me in the first place and for kindly reviewing and commenting on a draft of this manuscript and other assistance.

1) Taniguchi v. Kan Pacific Saipan, Ltd., 132 S.Ct. 1997, 182 L.Ed.2d 903, 80 USLW 4375 (2012), 132 S.Ct. 2000.

things about a case that can get left out by the time it reaches the Supreme Court.

By sheer chance I was involved in the litigation in an unusual way — I was the translator whose fees were at issue[2]. However my day job is as an American-trained lawyer on the Faculty of a Japanese law school. In this capacity I teach graduate and undergraduate students about American law. Most of these students are Japanese and are exposed to the subject of law primarily through the Japanese legal system. Despite being an obscure case over a minor point of law, *Taniguchi v. Kan Pacific* has provided me with a valuable resource for explaining the peculiarities of the American legal system. Furthermore, the facts of the *Taniguchi v. Kan Pacific* are much more interesting than the minimalist sketch presented in the case as reported. Knowing these additional facts can help students appreciate the case as a story about a living judicial process that affected the lives of actual people, rather than the simple conclusion about the meaning of a word in a statute for which it will likely be remembered (if it is at all). This article will thus attempt to both fill out the story behind the case while illustrating the aspects of it I consider particularly noteworthy when explaining it in a comparative law context. Hopefully it will also illustrate some of the complexities involved in litigating even the simplest of cross-border cases.

The facts of the case and why they didn't matter

Let us start with the Supreme Court's recitation of the facts quoted at the opening of this article. They are very similar to the one given in the 2011 opinion of the Ninth Circuit Court of Appeals:

> During a tour of property owned by Kan Pacific, Taniguchi, a professional baseball player in Japan, fell through a wooden deck. Immediately after the accident, Taniguchi stated that he did not need medical attention.
>
> Two weeks after the incident, Taniguchi informed Kan Pacific that he had sustained various cuts, bruises, and torn ligaments from the fall. As a result of these injuries, Taniguchi allegedly incurred various medical, hospital, and rehabilitative expenses and was compelled to

2) Don't worry; I was paid long before any court decided anything about the issue of costs.

cancel contractual obligations, resulting in a loss of income[3].

Both descriptions are interesting in that they are wrong about a very basic fact. At the time of the accident Taniguchi was not a professional baseball player in Japan (or anywhere). Rather, he was an ex-professional baseball player, having retired from the game in 2002, a fact that was disclosed on Taniguchi's Japanese blog at the time (it has since been deactivated) and in English newspaper articles (though it is unlikely that anyone in the upper levels of the judiciary was a regular reader of the *Saipan Tribune*)[4]. More importantly, Taniguchi's status as a former professional baseball player would have been abundantly clear from reading the various submissions made by the parties to the case.

This may seem a minor thing to quibble about. Yet by referring to Taniguchi as a "pro," both opinions probably give the reader a mistaken impression about the amount of damages to which he might have been entitled. Since the monetary value of damages is often one of the most important factual issues in a cause of action for negligence, the failure to describe Taniguchi's professional status accurately is not a completely trivial omission.

Furthermore, both recitations of the facts likely give the impression that Taniguchi both suffered the full effects of his injuries and brought a formal claim almost immediately after the accident — that he had a very busy "two weeks after the incident." This was not the case: although Taniguchi's accident happened on November 6 of 2006, his first formal claim through a lawyer did not occur until over two months later. It was not until February 11, 2008 that he actually commenced litigation by filing a complaint with the U.S. District Court for the Northern Mariana Islands alleging injuries resulting from Kan Pacific's negligence and seeking damages for pain and

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3) Taniguchi v. Kan Pacific Saipan, Ltd. 633 F.3d 1218 (C.A.9 (N. Mariana Islands), 2011), at 1219; vacated: Taniguchi v. Kan Pacific Saipan Ltd., 688 F.3d 984 (C.A.9, 2012).

4) Brad E. Ruszala, *Kids get tips from former pro,* in: SAIPAN TRIBUNE (July 26, 2006), at http://www.saipantribune.com/newsstory.aspx?cat=2&newsID=59674; Brad E. Ruszala, *Baseball clinic this afternoon,* in: SAIPAN TRIBUNE (Aug. 8, 2006), at: http://www.saipantribune.com/newsstory.aspx?cat=2&newsID=60031 ("After spending 10 years playing pro ball in both the Japanese and American major leagues, Koichi Taniguchi has since retired, but today he is bringing his wealth of experience to the youngsters of Saipan." Emphasis added).

suffering and lost income, compensation for medical expenses and punitive damages[5].

That the nation's highest court, let alone the Court of Appeals for the 9th Circuit could be so . . . *sloppy* with the facts of the case may be a surprise. Yet it reflects a basic reality of the case: being about a point of law — the meaning of words in a statute — the facts probably did not matter very much. While the Ninth Circuit dealt with one other point of law, all the Supreme Court needed to do was decide whether "translator" meant the same as "interpreter" under 28 U.S.C. § 1920. For purposes of making this determination it was irrelevant whether Taniguchi was still a professional baseball player, the length of time between injury and claim and indeed, whether he was actually injured at all — a factual allegation that was never adjudicated.

The preceding explanation is probably blindingly obvious to American law students and lawyers. Yet it may not be to students in Japan or other countries where the absence of a jury system means the need to separate factual issues from legal ones is not so important for procedural purposes. Japanese trial court judgments can be quite tedious to read because they contain extensive findings of facts. But Japan does not have a civil jury system, so formal fact finding is part of the court's job. The same is true of courts at the first level of appeals; Japanese High Courts can hear new evidence, entertain new legal and factual arguments, and conduct a de *novo* review of virtually all aspects of the lower court's decision. Not having a jury system means that there are no constitutional issues with an appellate court judge intervening in the fact finding of a lower court, something that would violate the Sixth Amendment to the U.S. Constitution.

In *Taniguchi v. Kan Pacific,* however, the facts — particularly the salient facts of negligence and damages — were never really at issue once the case moved to the appellate stage. As we shall see, Taniguchi's counsel attempted to make new evidentiary claims on appeal but was unsuccessful. In fact there was little fact-finding at the District Court, which on December 22, 2008 granted the defendant's motion for cross-summary judgment. The following day it issued an additional order closing the case file on the grounds that a judgment on the merits of the case having been issued, all

5) Complaint and Summons at 3, Civil Action No. 08-0008 (D.C.N.M.I., Feb. 11, 2008).

matters before the court having been resolved. In fact, the case file actually had to be re-opened in order to consider the disposition that resulted in the case going to the Supreme Court — the defendant's motion for a bill of costs, demanding that Taniguchi be ordered to reimburse Kan Pacific for my translation fee and certain other expenses.

Summary Judgment

In my experience summary judgment is one of the most difficult features of the American system to explain to Japanese students. This is because summary judgment is often linked to what *doesn't happen* if a motion for one is granted: a jury trial. Although Japan does not have a civil jury system my students are usually able to grasp how a jury trial works. Most have watched enough of the American legally-themed movies and television shows that are shown in Japan to have become acquainted with the basic concepts. Furthermore, since Japan adopted a jury-like "lay judge" system for use in serious criminal trials starting from 2009, civic participation in court proceedings has been a subject of great popular interest in recent years[6]. A group of citizens participating in fact-finding is thus not an alien concept.

What may be difficult to appreciate, however, is the numerous ways in which the underlying assumption that there will be a jury trial shapes the structure of the judicial process in the United States, even though in the great majority of cases such a trial never takes place. The need to separate factual issues from legal ones, to have a baroque system of evaluating and possibly excluding evidence before it can be seen or heard by jurors, and to have concentrated proceedings so the jury can be sent home as soon as possible; these are not necessary in a system that does not rely on juries.

Japanese judges are career professionals who can be expected to fairly and dispassionately evaluate the evidence. In the Japanese system there is less need to fight over what evidence can be used, and the judges will see it even if they decide not to use it. Without a jury there is no need to have proceedings in a single concentrated trial and no need to sort out various

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6) *See, e.g.* Setsuko Kamiyama, *First lay judge trial kicks off in Tokyo,* THE JAPAN TIMES (Aug. 4, 2009), http://www.japantimes.co.jp/news/2009/08/04/national/first-lay-judge-trial-kicks-off-in-tokyo/#.Ujg2DOqCjIU.

issues before the trial starts. A Japanese civil trial can be held once a month for as long as it takes, with new evidence and claims being introduced along the way. Moreover, since Japanese judges hearing a trial will decide on both issues of fact and law, there is less need to distinguish between the two as there is in the American system where judges decide law and juries decide facts. There is thus no need for a procedural tool such as summary judgment through which a judge decides that as a matter of law there is no need to have a trial about the facts and that as a result it would be a waste of time and resources to empanel a jury (because there would be nothing for it to do).

My students are often surprised to learn that most "case law" in the American system is derived not from the conclusive results of trials (*i.e.*, whether the plaintiff wins or loses), but from summary judgments, directed verdicts, jury instructions, rulings on evidence and other dispositions in which a judge makes a determination about what the law means or how it should be applied. They are usually even more surprised to learn that the most famous American case (sometimes the only American case) they have heard of — "the one where that lady spilled hot coffee on herself at a McDonald's and got a million dollars" — cannot be found in any of the published case reporters precisely because it has no value as law; it was "just" a jury verdict[7]. By contrast, motions for judgment generate case law because they involve a judge deciding what the law is, and that based on that one party should lose regardless of the facts. Such determinations are potentially applicable in other cases whereas findings of fact usually are not.

To apply this abstract explanation more clinically to *Taniguchi v. Kan Pacific,* Federal Rule of Civil Procedure 56(a) states that a party is entitled to a motion for summary judgment if they are able to demonstrate to the court that *"there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."* When District Court Judge Alex Munson granted Kan Pacific's motion for summary judgment, he was making a decision that even if a jury found all the facts to be just as Taniguchi asserted them, as a matter of law they would have to return a

7) Stella Liebeck v. McDonald's Restaurants, P.T.S., Inc. and McDonald's International, Inc., 1994 Extra LEXIS 23 (Bernalillo County, N.M. Dist. Ct. 1994), 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. 1994).

verdict in favor of Kan Pacific. It would thus be pointless to even have a jury trial.

Having lost on summary judgment (for very good reasons, as we shall see), what were doubtless the most important aspects of the case to Taniguchi — Kan Pacific's possible negligence and the value of his damages — ceased to be issues for the court system. Taniguchi lost and did so decisively at the district court level.

Where (and what) is Saipan, and why Federal Court?

Having explained that the grant of summary judgment was based on a determination that Taniguchi must lose as a matter of law, the next logical step would be to look at the laws of negligence in Saipan. This will follow shortly, but a short detour is probably necessary in order to consider the geographical context of the case.

Saipan is the largest and most populated island of the Commonwealth of the Northern Mariana Islands (the "CNMI"). While sharing the same cultural roots as the neighboring U.S. territory of Guam, the CNMI has followed a much more tortured route to U.S. sovereignty, going from part of the Spanish empire to a German possession to part of Japan's colonial empire to one of the U.S.-administered Trust Territory of the Pacific to its current status as a commonwealth in political union with the United States. In 1944 Saipan was the site of one of the bloodier amphibious campaigns in the Pacific theater of World War II and was one of the first Pacific islands invaded by U.S. forces that had a significant Japanese civilian population. Some of these famously committed suicide by jumping off a cliff into the ocean. That cliff is now a very moving tourist attraction known as "Banzai Cliff."

The CNMI became a U.S. territory through the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (commonly called the "Covenant"). The Covenant came into force in 1978 and is codified as part of federal law at 48 U.S.C. § 1801 et. seq.

The status of territories like the CNMI is another one of those subjects that can complicate an explanation of the American legal system since they are not states, yet exist within a federal system under a constitution devoted almost exclusively to defining the relationship between the states and the federal government. In fact CNMI and the other non-state territories exist

in a fascinating and esoteric universe of American law known as "territorial law." The easiest way to make students understand the issues involved in this area of American law may be to have them to read the U.S. Constitution and every time they see the word "state" ask "what if you are not a state (or in one)?"

Even though in a constitutional sense territories are fundamentally different than states, in practice the legal system does its best to treat them the same. Just as in any state there is a U.S. District Court on Saipan in the CNMI. For a number of reasons it is actually different from a District Court in a state in a number of important respects[8]. The only thing that matters for purposes of this article, however, is that Taniguchi filed his suit in federal court, rather than the Commonwealth Superior Court, the "local" court system in the CNMI. The complexity of the U.S. judicial system is another area that it is sometimes a struggle to get my students to understand. Having state courts that interpret and apply state law and federal courts that interpret and apply federal law and the federal constitution is easy enough to grasp. As is the fact that just as with the federal legislature, federal courts have only the limited jurisdiction granted to them by the Constitution. Diversity jurisdiction, the ability of federal courts to hear cases that would otherwise be in state court simply because of the residency (or incorporation) of the parties is more difficult to follow. I find it often helps to explain the possibility of state judges favoring citizens from their state at the expense of outsiders[9]. Students start to nod when I tell them how many states (and territories) have elected judges or at least judges who after an initial appointment must be vetted in a retention

8) Among other things, given the CNMI's small population, the court only has a single judge and performs all of the functions of what in state federal judicial districts would be different courts: a district court, a bankruptcy court and a tax court. Also, the federal judge in the CNMI federal district court apparently does not exercise the judicial power of the United States, as he is appointed for only a ten year term rather than "for good behavior" as required by Article III of the U.S. Constitution. 48 USC § 1821.

9) Interestingly, the legal system of feudal Japan in the 18th and 19th centuries reportedly had a comparable system, with the courts of each fiefdom trying cases involving only parties who were subjects of the domain's lord, and the courts of the Shogunate (the national feudal overlord) hearing cases between subjects of different domains. HIROSHI ASAKO *ET. AL. EDS*, NIHON HOSEISHI [History of the Japanese Legal System] (2010), 222-223.

election to continue in judicial office[10].

Such digressions aside, Taniguchi was in federal court because he met the statutory requirements for bringing suit in a federal court[11]. He was a citizen and resident of a foreign nation (Japan) and he was suing a company incorporated in the CNMI for an amount in excess of the minimum statutory threshold necessary for a federal court to exercise diversity jurisdiction over a case that would otherwise go to a local court: $75,000[12]. The venue was in Saipan because that is where the accident took place and where the defendant Kan Pacific had its corporate domicile.

Tort law, reception statutes and the Restatements

The other thorn in explaining diversity jurisdiction is that when it applies, federal courts may interpret and apply the law of the applicable state (or territory). Supposedly "superior" federal courts applying state law — being bound by it — is a concept that is understandably confusing to those unfamiliar with the quirks of our federal system. So is the notion that while state courts are able to "make" common law, particularly in those areas of Anglo-American law such as tort or contract that have developed primarily in the form of case law, federal courts are effectively *prohibited* from making new rules of common law, at least in diversity

10) This is the case for judges in the Commonwealth Superior Court, who after appointment to an initial term of 6 years must be approved by voters in a retention election. See Northern Marianas Islands Judiciary website at: http://www.justice.gov.mp/superior_court.aspx.

11) The CNMI district court exercises diversity jurisdiction through a specific grant contained in 48 U.S.C. § 1822(a). Note that the Constitution limits the jurisdiction of federal courts to, *inter alia,* controversies between citizens of a state "and foreign states, citizens or subjects" and this limitation is reflected in similar language contained in § 1822(a). Having been incorporated in a territory, however, *Kan Pacific* was not a state, meaning the dispute between Taniguchi and Kan Pacific was between a foreign citizen and a citizen, but *not* a "citizen of a state". This apparent constitutional defect is remedied by § 1822(e) which provides: "The word 'States', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." How a federal statute can be used to expand the scope of diversity jurisdiction to include suits involving a party who is not a citizen of either a state or a foreign country, without effectively being a statutory expansion of the constitutionally-limited jurisdiction of federal courts remains a mystery to me. See Marbury v. Madison, 5 U.S. 137 (1803).

12) 28 USC § 1332.

cases[13]. Confusing or not, the fact is that there is no federal general law of negligence for a district court to apply. So in Taniguchi's case, the law that was applied by the district court was the tort law of the CNMI.

As any first year law student knows, American tort law is rooted deeply in case law, including hoary old English precedents from centuries ago. Yet the English common law was always that — English. For it to become the law of other sovereign states — for people who were not English — required some sort of legislative action. Thus, just as is the case for common law countries such as Singapore or Australia, American states have "reception statutes" that adopt the English common law (and in some cases British acts of parliament) as the law of that jurisdiction[14]. Depending upon the timing and circumstances under which a state joined the Union, the nature of the reception statute may change. For example, Virginia — one of the original 13 colonies that became the United States — has a statute that (among other things) "preserves" "[t]he right and benefit of all writs, remedial and judicial, given by any statute or act of Parliament, made in aid of the common law prior to the fourth year of the reign of James the First"![15] By contrast, the reception statute of Hawaii, which joined the union as a state almost two centuries later, adopts "the common law of England, as ascertained by English and American decisions", a formulation that reflects the islands' history as an independent kingdom having great affinity to Great Britain before becoming a state[16].

Although the starting point may be similar for most states — a reception statute adopting some version of "the common law", what is the common law? With the courts of each state developing their own rules about basic areas of law such as contract, tort and property, it renders the subjects very difficult to discuss except in generalities. It makes it very easy for me to answering questions from students and colleagues about "American tort law" (for example), because "it varies by state" is usually a correct, albeit evasive, response.

However, thanks to the efforts of the American Law Institute, it is possible to point people to a systematic, well-organized description of "the

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13) Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

14) *E.g., Australian Courts Act of 1828,* 9 Geo 4 c 83, sec. 24 (Austl); *Application of English Law Act,* Act 35 of 1993 (Singapore).

15) VA CODE tit. 1-201, 202.

16) HAW. CODE § 1-1.

common law" as it exists in the United States — the Restatements. The Restatements are yet another feature of the American legal system that is very difficult to explain. They are drafted in the same format as statutes but they are not statutes. They reflect the principles enunciated in important precedents but are not precedential. They describe the common law as it probably applies in most of the states, but are not an indicator of how the law might actually be in any particular state. The Restatements are authoritative to almost everyone but binding on almost no one. They are cited in law review articles and court opinions as though they were law, but they are not quite law. It is very confusing.

Having explained — *tried* to explain — to students what the Restatements are and are not, that they are indicative of American common law but not law, to explain the law that applied in *Taniguchi v. Kan Pacific* I have to backtrack. I have to explain that in the CNMI the Restatements actually are law. This is because the territory's reception statute adopts not English law, but "the rules of common law, as expressed in the restatements of the law approved by the American Law Institute," absent statutory law or customary laws to the contrary[17]. This reception statute harks back to the days when the Northern Mariana Islands were part of the US-administered Trust Territory of the Pacific, and is similar to statutes passed by other Micronesian jurisdictions[18]. Since the Restatements are expressed in a statutory format, one could say that the CNMI adopted the common law by passing a statute that made them statutory!

While this territorial caveat about their nature makes the explanation of the Restatements even more confusing, their status as the law of the CNMI makes it very easy to identify the "law of negligence" that applied to Taniguchi's tort claim. It also makes it very easy to explain why he lost on this claim through the grant of a motion for summary judgment.

According to § 343 of the Restatement 2d of Torts:

> [A] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or

17) CNMI CODE tit. 7 § 3401.

18) Federated States of Micronesia: FSM CODE, tit. 1, The Republic of Palau, 1 PNCA § 303. The U.S. Virgin Islands, acquired in 1917 from Denmark (a non-common law nation), also became a common law jurisdiction in part through the adoption of a similar receptions statute. V.I. CODE tit. 1 § 4.

by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against danger.

This is the "law" on which Taniguchi's claim against Kan Pacific was based. Put simply, Taniguchi needed to establish that he had suffered injuries that were caused by a dangerous condition on Kan Pacific's property and that they were or should have been aware of the danger — a form of negligence. To win at trial, Tanigucihi would need to have proffered, *inter alia,* evidence of each of the elements of § 343, and a jury would have had to decide that such evidence was sufficient.

Unfortunately Taniguchi *never proffered any evidence of Kan Pacific's negligence:* evidence either that Kan Pacific reasonably should have known about the dangerous condition of the deck or failed to exercise reasonable care to protect him from danger. There being no evidence of negligence to evaluate, there was no way all of the elements of a cause of action for negligence could have been established of trial. Even if there had been a trial the judge would probably have been compelled to give instructions to the jury directing them to deliver a verdict in Kan Pacific's favor because that was what the law required.

While it was not the job of the judge to evaluate the evidence, he did need to decide whether a jury trial would be a waste of time. Furthermore, Kan Pacific for their part *did* introduce evidence that it exercised reasonable care prior to the accident (weekly inspections, repainting every six months) and that there had never been any complaints about unsafe conditions, supporting their assertion that there was an absence of evidence to support Taniguchi's case. This is why he lost at summary judgment — he "failed to fulfill his burden to create a genuine issue for trial[19]."

Many who read the brief recitations of the facts given above may be instinctively surprised by this result. As a paying guest at their resort Kan Pacific did owe Taniguchi a duty of care. Since he did have an accident on their property it is easy to assume that there was some sort of negligence.

19) Order granting Defendant's Motion for Cross-Summary Judgment at 4, Civil Action No. 08-0008 (D.C.N.M.I., Dec. 22, 2008).

That certainly seems to have been the plaintiff's assumption. As noted by the trial court "[p]laintiff seemingly relies on the undisputed fact that the break happened as evidence of the unreasonable condition and Defendant's failure to adequately protect Plaintiff[20]." But to paraphrase Freud's famous quote about cigars, sometimes an accident is just an accident. Every one is not someone's fault.

Arguably Taniguchi was unable to present any evidence of negligence because there was none. Taniguchi's counsel made just such an argument, trying to bolster it with a motion for sanctions against Kan Pacific on the theory that the company was guilty of spoliation of evidence — discarding the broken pieces of the deck after it was repaired. This argument came late in the game and was supported by little more than assertions. In any case it was probably not reasonable to expect Kan Pacific to have preserved what little evidence there might have been. In a declaration submitted by Kan Pacific's counsel, the assistant general manager of the resort stated that he would be able to testify that:

> I was a witness to Mr. Taniguchi's accident on November 6, 2006. Mr. Taniguchi said he was fine. He said he did not need to go to the doctors. We apologized, he accepted our apology, and he left. Japanese people hardly ever sue over matters like this, especially when they are not hurt[21].

Taniguchi did not allege any injuries resulting from the accident until two weeks later on a subsequent trip to Saipan. He did not communicate formally with Kan Pacific through his lawyer until January 22 of the following year and did not file his complaint with the court until a year later. It is hardly surprising that the company did not hold onto the broken bits of wood after the deck was repaired.

The Missing Link: Res Ipsa Loquitur

First year law students who have read this far have likely (hopefully!) realized that Taniguchi's lack of evidence might have been remedied by asserting res ipsa loquitur. This is the doctrine that holds that if the

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20) *Id.* at 3.

21) Declaration of Mamoru Watanabe, dated Dec. 9, 2008, filed with Defendant's Opposition to Plaintiff's Motion for Sanctions, Civil Action No. 08-0008 (D.C.N.M.I., Dec. 18, 2008).

accident is of a type that only occurs as the result of negligence and the accident-causing instrumentality was under the control of the defendant, the burden of proof shifts to the defendant, who must then prove he was not negligent[22]. Whether Taniguchi's accident was of a type where res ipsa loquitur might apply we shall never know: it was never asserted until appeal, by which time it was too late.

Here I must speculate. Although the issue of res ipsa loquitur never featured in the case for but a brief moment when it was rejected in an unpublished memorandum opinion by the Court of Appeals, I suspect that the doctrine was the principal motivation for Taniguchi's lawyer in filing an appeal. On this subject more will follow.

Damages and discoveries during discovery

Had it gone anywhere, one of the other key factual issues in Taniguchi's case would have been the damages he suffered and what they were worth financially. On this element of the cause of action, Taniguchi did proffer evidence. As already explained, without evidence of negligence the issue of damages was probably moot. However, since it was the evidence relating to damages that resulted in the case making it up to the Supreme Court the subject requires some attention.

In his complaint Taniguchi sought a variety of damages. These included punitive damages, another feature of the American legal system that requires some explaining to students in Japan where not only does the law not provide for such damages but the nation's highest court has found them to violate public policy when asked to enforce American court orders providing for them[23]. However it is hard to believe Taniguchi's lawyer demand for punitive damages was anything more than a threat aimed at leveraging a settlement; the law of the CNMI (the Restatement 2d, § 908)

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22) According to the Restatement:

a. It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when: (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to plaintiff.

b. RESTATEMENT (SECOND) OF TORTS, § 328 D(1).

23) *See, e.g., Recognition and Enforcement of Foreign Judgments Regarding Business Activities* on Kyushu University's Transparency of Japanese Law Project, at; http://www.tomeika.jur.kyushu-u.ac.jp/procedure/Overview02_judgments.html.

requires defendant's conduct to have been "outrageous" and reflecting "evil motive" or "reckless indifference to the rights of others." No evidence of Kan Pacific's negligence having been submitted, it goes without saying that there was no evidence of outrageousness, evil or recklessness either[24].

The most substantive of Taniguchi's claims was that as a former professional baseball player, he had endorsement and promotional contracts with three companies in Japan. Under these contracts Taniguchi was supposedly entitled to annual payments totaling one hundred and twenty million yen per year (between $900,000 and $1 million at the exchange rates prevailing in 2008) for endorsements, coaching at baseball camps, playing baseball on corporate teams and other similar activities[25]. Taniguchi alleged that his injuries had prevented him from performing these contracts, resulting in their termination.

Let us consider again what the term "professional baseball player" might mean to readers in the United States. According to one of the submissions by Kan Pacific, the *minimum* salary for players in Major League at the time was $390,000 while the *average* salary was close to three million dollars[26]. Taking this as a (misleading) guide, the approximately one million dollars claimed by Taniguchi seems plausible.

But Taniguchi never played in the American Major League; he was a former Japanese major league player and an undistinguished one at that. According to the Wikipedia page about him, Taniguchi had been a pitching star in high school baseball, a sport which people follow as avidly as NCAA basketball in the United States[27]. This resulted in him being the number one draft pick in 1991 and straight out of high school he entered the most

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24) Defendant submitted a separate motion for summary judgment on the punitive damages claim but the court never ruled upon it, presumably because it was rendered moot by the grant of summary judgment on the negligence claim. Defendant's notice of motion of summary judgment on punitive claims, Civil Action No. 08-0008 (D.C.N.M.I., Dec. 18, 2008).

25) One of these companies, Kyowa Tatemono, had been a sponsor of at least one trip to Saipan to coach local kids. See articles at *supra* note 4.

26) Defendant's Reply Memorandum (on Motions Directed at Plaintiff's Contract Claims) at 3, Civil Action No. 08-0008 (D.C.N.M.I., Dec. 11, 2008), (referencing Major League Baseball Players' Association Website).

27) http://ja.wikipedia.org/wiki/%E8%B0%B7%E5%8F%A3%E5%8A%9F%E4%B8%80. Some of the information about Taniguchi's career was also available on his personal blog which was reviewed by the author several times but has since been taken down.

famous of Japan's professional baseball teams, the Yomiuri Giants. However within two years of joining he was sidelined by a shoulder injury and was never able to recover his former glory. By his own admission he appeared in less than 10 games in Japan during his entire career, never finished out a game or earned a "save" or won a game[28]. In 1999 — at a time when Japanese players like Hideki Irabu and Ichiro Suzuki were achieving fame in U.S. Major League Baseball — Taniguchi also tried to make in America but was unsuccessful, returning to Japan after a couple of years playing in farm teams[29]. He returned to Japan and retired from baseball in 2002. As characterized by the defendant, he was "simply not a very good professional baseball player[30]," and "a winless, retired journeyman pitcher[31]."

Professional baseball is generally not as lucrative a career in Japan as it is in the United States. When deposed, Taniguchi stated that he had earned at most about ¥1 million per month playing pro baseball in Japan and during his brief tenure in the U.S. minor league[32]. Furthermore, he also admitted to having never been paid to endorse any product while he was a professional, and to earning only ¥350,000 per month working for Kyowa Tatemono after his retirement[33].

Taniguchi's claims to have suffered economic damages of approximately a million dollars a year due to the cancellation of his contracts, despite having had an undistinguished and not particularly lucrative professional career were thus suspect. The three contracts that were cancelled were

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28) Taniguchi Dep. 31: 2-18, 24-25; 78: 19-24, Oct. 20, 2008 (attached as Exhibit B to Defendant's Notice of Motion and Motion for Dismissal, Or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims), Civil Action No. 08-0008 (D.C.N.M.I., Nov. 20, 2008)).

29) Despite having alleged in his complaint that he had played for the Mets, and appeared at events in Saipan wearing a Mets jersey the assertion was not true and during depositions Taniguchi admitted that the jersey was a replica, id. at 38: 23-25.

30) Defendant's Reply Memorandum (on Motions Directed at Plaintiff's Contract Claims) at 2, Civil Action No. 08-0008 (D.C.N.M.I., Dec. 11, 2008)

31) Defendant's Notice of Motion and Motion for Dismissal, Or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims) at 5, Civil Action No. 08-0008 (D.C.N.M.I., Nov. 20, 2008)

32) Taniguchi Dep. 36-45.

33) Taniguchi Dep. 40-42, 60: 18.

thus the only plausible evidence of his otherwise extravagant damage claims. This is doubtless why Kan Pacific's counsel felt it was worth having them translated professionally.

Taniguchi may have been surprised to learn that by bringing suit he would subject himself to the U.S. discovery system: that he would have to disclose pay stubs, medical records, tax records, answer written interrogatories and be subject to rigorous, adversarial questioning during depositions before anything happened in a courtroom. The discovery system is another feature of the American system that puzzles many Japanese students that are unfamiliar with it and terrifies corporate legal departments that are. The Japanese system of evidence gathering is quite different, with judges taking a more active role in asking questions and marshaling the evidence. With no jury this can be part of an ongoing trial process. While there are various tools for obtaining evidence from opponents and third parties, they are not nearly as extensive or coercive as those available to American lawyers and judges, the latter being vested with broad contempt powers that Japanese judges lack to encourage cooperation[34].

Taniguchi was probably not familiar with the systems of proof in either Japan or the United States but I suspect that he was surprised by the extent of the information Kan Pacific demanded he provide. The facts that there was a language barrier between Taniguchi and his counsel and that some of the things requested by Kan Pacific were inapplicable in the Japanese context (many Japanese people do not have to file tax returns, for example, a standard item in many discovery requests) may explain why he seemed unresponsive to the defendant's discovery requests.

Nonetheless, the following are some of the key facts that emerged from discovery, the deposition of Taniguchi by Kan Pacific's counsel in particular. I think they reveal how useful the discovery process is in bringing much of the truth of many cases to light before a court wastes too much of its time (let alone a jury's time).

First, Taniguchi was unable to proffer any evidence of every having received an income anywhere near a million dollars a year at any time in his

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34) See, Craig Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation,* in: 3 ASIA PAC. L. & POL. J. 1 (2002).

career, or of even having received any payments under the contracts that were supposedly cancelled. Second, as a result of his injury a doctor in Japan had advised him not to play baseball wearing cleats for a while — hardly the crippling injury he was alleging or grounds for cancelling contracts[35]. Third, few months before his accident, Taniguchi had been earning a modest salary managing a bar operated by Kyowa Tatemono[36]. Fourth, Hisato Endo, the former president of Kyowa Tatemono and the man who had signed some of the contracts had been present at the time Taniguchi had the accident[37], and was the person who suggested he contact a lawyer[38].

However, by far the most significant piece of information to come out of the discovery process is Taniguchi's own admission that the contracts had been backdated: signed after the accident[39]. Taniguchi asserted that the written contracts merely reflected the terms of oral agreements that had been concluded before the accident but also admitted that the notice of termination he received from one of the companies (another piece of evidence) had been executed before the written contracts were signed[40]. Later in the deposition Taniguchi claimed that he never expected to actually get paid under the contracts, and that all he was really seeking from Kan Pacific was a "peaceful apology[41]." The picture that emerges is of a poorly-considered lawsuit brought with the expectation that the mere prospect of an injured "professional baseball player" appearing before a jury would quickly lead to a Kan Pacific and its insurance carrier offering a generous settlement long before the case was ready to go to trial.

Knowing the facts described in the preceding few paragraphs, most readers will likely agree with Taniguchi losing his case on summary judgment, even if the reason for defendant's motion being granted was

35) Additional layers of inquiry that were never pursued (and are completely hypothetical at this point) include: whether Taniguchi's injuries would have been grounds for cancellation of the contracts under Japanese law, and whether such cancellation might have been an "abuse of rights" on the part of the counterparties.

36) Taniguchi Dep. 60: 18.

37) Taniguchi Dep. 20: 20-22

38) *Id.* 21: 9-12.

39) Taniguchi Dep. 68-69.

40) *Id.*, at 73-74.

41) *Id.*, at 91, 97-98

technically Taniguchi's failure to proffer any evidence of negligence rather than bogus contracts[42]. In fact, merely booting Taniguchi out of court seems almost kind. It is also easy to understand why Judge Munson might have been inclined to agree with Kan Pacific's claim that Taniguchi should have to pay for the costs of translating the contracts he had sought to use as grounds for claiming damages. Nonetheless, the judge still rejected some of the items in the defendant's bill of costs (the cost of Kan Pacific's counsel to fly to Japan to consult with a Japanese lawyer about the contracts) and only ordered Taniguchi to pay my fee (which was about $5,500) and court reporter fees ($2,215)[43].

So why the appeal?

Having not only lost at summary judgment but had his client admit to the spurious provenance of a critical piece of evidence, one might wonder why Taniguchi's counsel bothered filing an appeal with the Court of Appeals for the 9th Circuit, the federal appellate circuit in which the CNMI is located. Moreover, it being a near certainty that he took the case on a contingency fee basis, there would have been little incentive for him to launch an appeal just on the issue of costs. It also would have been uneconomic for Taniguchi to pay for such an appeal given the amount of costs involved.

As to the real reasons for making the appeal, I can only speculate. I suspect, however, that the doctrine of res ipsa loquitur was a key driver. If Taniguchi's counsel realized too late in the initial proceedings (or after they were finished) that asserting the doctrine might have remedied the lack of evidence on the plaintiff's side and possibly enabled Taniguchi's claim to survive the motion for summary judgment, he might well have felt a professional obligation to try to raise the argument on appeals. This, again, is only speculation.

Unfortunately the American system is very unforgiving of appeals on factual matters. Unlike courts in countries like Japan where appellate courts can conduct de novo findings of fact and may even rewrite a lower

42) Kan Pacific's motion for summary judgment also included an alternate "motion *in limine*" to prevent the contracts from being introduced at trial as evidence of damages, a prudent back-up in case the judge ruled against the summary judgment motion.

43) Judgment and Award of Costs, Civil No. 08-0008 (D.C.N.M.I., Dec. 22, 2008).

court's findings of facts in order to correct them, American courts only entertain appeals on matters of law or procedure[44]. Some appeals may result in a remand for further fact-finding or even a new trial, but the appellate courts will themselves not typically get into matter of facts. Furthermore, even with respect to matters of law, they are generally very reluctant to entertain arguments that have not been raised in the court below.

Taniguchi's lawyer would thus have been at a quandary: he could not appeal the District Court's failure to apply res ipsa loquitur because the issue had not been raised in the proceedings there. He could not ask the appellate court itself to apply the doctrine because it was a new argument and one that related to the evidence proffered at trial (or the lack thereof). He could not ask for a new trial based on a new evidentiary theory because Taniguchi had already had his day in court. So what Taniguchi's counsel may have been attempting (and again, I should be clear that I am speculating) was to use a legitimate point of law as grounds for appeal and attach to it a request for the application of res ipsa loquitur in the hope that the appellate court would remand to the trial court for further proceedings. Perhaps then Kan Pacific would settle for something — anything — just to make the case go away.

The Ninth Circuit interprets "interpret"

Unfortunately for Taniguchi, the 9th Circuit wasn't biting. It rejected

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44) "In Japan the function of the District Court is NOT to establish the record. Rather, it is the function of the District Court to begin the trial process. What this means is that the first level appeal is not what the American lawyer would typically consider an appeal. Rather, it is a continuation of the trial. The appeal court may take additional and new evidence and indeed the parties may raise new issues not considered by the court below. The function of the first level appeal court is not to supervise the trial court and correct any errors that the court may have made. The function of the appeals court is the same function as the trial court — to see that the party who should win does win. The first level of appeal court is not even a 'court of errors' in the sense that it corrects errors made by the initial court. Appeal is a chance for a second bite at the apple." CARL F. GOODMAN, JUSTICE AND CIVIL PROCEDURE IN JAPAN (2004) 429. Goodman also notes that since many proceedings at the District Court level are conducted *pro se,* the courts would expect many appeals to involve new issues of both fact and law, particularly since parties losing *pro se* might consider it wise to hire a lawyer for the appeal. *Id.* at 435.

the res ipsa loquitur claim. In a brief, unpublished memorandum opinion the court of appeals held:

> Taniguchi contends that the district court did not consider the doctrine of res ipsa loquitur when ruling on the summary judgment motion and that he was entitled to have a res ipsa loquitur charge given to the jury. However, Taniguchi did not advance this theory in the district court. We generally will not review an issue initially raised on appeal. . . . Neither will we re-frame the cause of action and essentially review a different cause of action than that decided by the district court[45].

With the issue of res ipsa loquitur conclusively dispatched, the case essentially took on a life of its own, one that had little to do with the interests of either of the actual parties.

Unlike factual matters, the legal authority of a district court judge to award costs was subject to de novo review on appeal. In other words the appellate court was not bound by the trial court's conclusions of law.

The award of costs itself was reviewed to consider whether the lower court judge abused his discretion[46]. Taniguchi appealed the award of costs on two legal grounds. The first was a fairly strained argument that taxing Taniguchi for costs (both my fee and other costs) was mistaken because they had already been covered by Kan Pacific's liability insurance. The Court of Appeals spent little time on this argument, which was poorly supported by prior case law, contrary to the provisions of the FRCP that authorized taxing and reflected reasoning that "punishes a prevailing a party for being insured."

The second grounds applied only to the taxing of my fee. It was probably the only grounds cited in Taniguchi's appeal that involved a reasonable dispute about the law. The statute under which the award of taxes was made (28 U.S.C. § 1920(6)) authorizes federal judge or clerk of court to tax a party for costs of: "Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." (emphasis added). The language says nothing about translation. Thus, whether the district court judge abused his discretion by awarding costs of a type that

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45) Taniguchi v. Kan Pacific Saipan, Ltd., No. 09-15212, (9th Cir. Mar. 8, 2011).
46) Taniguchi v. Kan Pacific Saipan, Ltd., 633 F.3d 1220 (9th Cir. 2011).

were not specified in the statute — by interpreting "interpreter" so as to include translators — was a question on which reasonable minds could disagree.

In fact, reasonable minds did disagree. While the issue was one of first impression for the Ninth Circuit, other appellate courts had arrived at different conclusions. In a 2008 opinion the Seventh Circuit court of appeals determined that "interpretation" and "translation" had distinct meanings — the former referring to translation of the spoken word the latter to the written — and declined to interpret the two as synonymous[47]. By contrast, a 2005 Sixth Circuit opinion found that courts have the authority to interpret (judicially) the items listed in 28 U.S.C. § 1920(6) and that based on the dictionary definition of the term "interpret" (languages), taxing of translator fees was permissible[48]. "In essence, the Sixth Circuit concluded that "translation" services and "interpretation" services are interchangeable[49]."

In Taniguchi v. Kan Pacific, the Ninth Circuit agreed with the Sixth Circuit, finding that its interpretation was "more compatible with Rule 54 of the Federal Rules of Civil Procedure, which includes a decided preference for awarding costs to the prevailing party[50]." On this basis it upheld the district court's order that Taniguchi should be taxed for my fee.

Why appeal to the Supreme Court?

Having failed at both the District Court and the Court of Appeals and, more importantly, having lost any hope of further proceedings leading to any sort of compensation for Taniguchi's injuries, why did Taniguchi bother making a further appeal to the Supreme Court just on the issue of being taxed on my fee? In fact, some might wonder if there was even a real case or controversy for the court to consider; Kan Pacific had already been reimbursed from its insurance provides and it is hard to imagine the company deciding to invest energy and legal fees in enforcing an order for a few thousand dollars in costs against a party in another country.

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47) Extra Equipamentos Exportação Ltda. v. Case Corp., 541 F.3d 719, 727-28 (7th Cir. 2008). As an aside it is amusing to note that the Seventh Circuit nonetheless appears to have found it difficult to define "interpret" without actually using the word "translate."

48) BDT Products, Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 419 (6th Cir. 2005).

49) Taniguchi v. Kan Pacific Saipan, Ltd., 633 F.3d 1218, 1221 (9th Cir. 2011).

50) *Id.*

Furthermore, given the amount at issue it is inconceivable that either party would have wanted to spend legal fees on an appeal to the Supreme Court.

The answer is that by the time the Supreme Court heard the case, both Taniguchi and Kan Pacific had effectively ceased to be parties in any meaningful sense beyond their names being on the case captions. Forces larger than a Japanese baseball player and a Saipan company took the case to the nation's top court.

Here I must digress briefly. Although I have taught a number of courses with titles that include the phrase "American law", one of the first things I have to explain to students is that there actually is no such thing. The law of the United States consists of state (and territorial) law and federal law. Having likely heard of at least a few of the court's famous constitutional decisions, most law students anywhere can probably instinctively appreciate that the Supreme Court of the United States has the final say on what the Constitution means. However, it may need to be explained that the Court also has the final say in interpreting the entire corpus of federal law below the Constitution as well.

Furthermore, students also need to be told that even though the Constitution and federal law are supposed to be "uniform" in the manner of national law, both may be subject to subtle geographic differences. Unless the Supreme Court has decided on the matter, what the words of a particular federal law mean are a matter of how they have been interpreted by the different appellate circuits in different appellate circuits in the federal court system, interpretations which may differ as was the case with 28 U.S.C. § 1920(6).

Taniguchi v. Kan Pacific thus represented an opportunity for the Supreme Court to resolve a jurisdictional split on a very minor point of federal law. However, the Supreme Court cannot just reach down sua sponte into a pool of lower court cases and cherry pick the ones it finds convenient to advance the cause of legal uniformity. The Constitution requires that there be a "case or controversy" which means it must wait until parties to an actual dispute bring an appeal.

As already noted, there was probably no reason for Taniguchi to launch an appeal and even if he had, Kan Pacific probably would have had little incentive to participate in a response. Apparently, however, major law firms with large litigation departments and Supreme Court appellate practices monitor appellate court dockets for cases like *Taniguchi v. Kan*

Pacific which the Supreme Court might accept in order to resolve a jurisdictional split. Such firms then contact the parties (or their local counsel) and offer to take the case pro bono. Taniguchi and Kan Pacific were represented by the mega-firms Jones Day and Mayer Brown LLP, respectively.

Why would big firms take such cases for free? More speculation again, but having worked for two mega-firms myself (in non-litigation roles), I would assume that it provides a useful and stimulating opportunity for training junior litigation associates, allows a firm to burnish its Supreme Court litigation credentials and is the sort of pro bono activity that firms try to devote a portion of their resources to handling. Litigating before the Supreme Court is a unique practice, so there are presumably clients who are willing to pay top dollar for a firm with expertise. The fact that many of the cases that can potentially go to the court involve parties like Taniguchi and Kan Pacific who have no ability to pay, or interest in paying for such appeals means that some firms may feel it is worth taking such cases for marketing purposes, to train associates or as a public service[51].

The Supreme Court Proceedings

Oral arguments in the case were held on February 21, 2012 and the court issued its opinion three months later, on May 21. Recordings and transcripts of the former can be accessed through the Supreme Court website and the text of the latter is available online and in paper format, and readers interested in how interpretation and translation intersect with the U.S. court proceedings are recommended to refer to both.

As made clear at the outset, the purpose of this article is not to analyze the Supreme Court's earth-shattering conclusion that "translator" does not mean "interpreter" for purposes 28 U.S.C. § 1920(6). The term "inter-

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51) Kan Pacific's counsel, Mayer Brown LLP is able to advertise on its website that: "Mayer Brown's more than 45 appellate lawyers have argued over 220 cases before the United States Supreme Court, representing either parties or amici in approximately 15 cases each Term for the past several years, and arguing an average of four per term." http://www.mayerbrown.com/experience/supreme-court-appellate/. Similarly, the recruiting section of the website of the Jones Day appellate practice group declares that it "offers lawyers unsurpassed opportunities to develop their careers, working on the most important and challenging cases, including Supreme Court . . ." http://www.jonesdayappellate.com/iarecruiting/Recruiting.aspx.

preter" not being defined in the applicable statute, the majority opinion devotes several pages discussing various dictionary definitions of "interpret" and "interpreter" before arriving at its conclusion (the dissent by Justices Beyer, Ginsburg and Sotomayer also offer various differing dictionary definitions in support of their view that the taxing order should stand)[52].

Central to the majority opinion, however, was the Court Interpreter's Act (CIA), which provides for "a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States[53]." The provisions of 28 U.S.C. § 1920 allowing the taxing of a losing party for various costs predates the CIA, but paragraph (6) — the provision including interpreters costs as one of the numerous taxable costs — was added at the adoption of the CIA. Since the CIA was intended to ensure that persons brought into federal court by the U.S. government, whether as defendants in criminal proceedings or otherwise, would be able to follow what was going on in the courtroom, a basic requirement of justice. The dissent focused on court practices in awarding costs before the adoption of the CIA, and was concerned more with broader notions of broader access to justice. However the conservative, limited interpretation prevailed and Taniguchi won; it was almost certainly a largely meaningless victory to him.

Intervenors: present, hidden and missing

As is often the case in Supreme Court litigation, non-parties submitted amicus curiae briefs. This is another aspect of the American system that may need to be explained to students in other countries: while a great deal of American law, constitutional law in particular, is made through litigation between individual parties, the litigation system provides a mechanism for interested parties to participate by expressing their views in cases where the decision will have an impact far beyond just the parties involved. Such a process does not really exist in Japan, for example.

Two amicus briefs were submitted in *Taniguchi v. Kan Pacific,* both in

52) One of the interesting things that was revealed in the course of oral arguments was Justice Scalia's contempt for Webster's Third New International Dictionary (1976), which characterizes as "not a very good dictionary" that "defines "imply" to mean "infer" . . . and "infer" to mean "imply." Transcript of Oral Argument at 13, Taniguchi v. Kan Pacific Saipan, Ltd. 132 S.Ct. 1997 (2012).

53) 28 U. S. C. §§ 1827.

support of Taniguchi. The first was from a group called "Interpreting and Translation Professors." The gist of it was that translation and interpreting were very different professional activities and that translators should not be treated the same as interpreters by laws referring only to the latter[54]. The second was from the National Association of Judiciary Interpreters and Translators[55]. They started with a similar proposition, that translators and interpreters were two very different professions[56], but then focused more on the significance of the formal certification process for court interpreters. They went on to argue that while interpreting costs would be naturally limited to the scope of the oral proceedings, translation costs were limited only by the volume of documents involved, which could be massive, leading to further litigation over the scope of translation costs to be subject to taxed[57].

While amicus briefs can be quite influential, with counsel for amicus parties sometimes even being allocated time in oral arguments, apparently there are also people who try to participate but never get in the door. In *Taniguchi v. Kan Pacific* a gentleman in Taiwan (which he referred to by its colonial era title of "Formosa" and as sovereign territory of Japan under temporary military occupation) sent several documents purporting to be motions to intervene to an impressive mailing list of lawyers involved in the case, as well as recipients within the federal court system and the Japanese government[58].

His arguments were mostly in Kan Pacific's favor (I think) and were interesting though hard to summarize. They essentially dealt not so much with the distinction between interpreting and translation, but on whether the court treating the two differently would result in an impediment to the ability of Japanese people to access to justice in the CNMI. His argument was based on a combination of the Treaty of Friendship and Commerce between the 1953 Friendship Commerce and the Navigation Treaty between

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54) Amicus Brief for Interpreting and Translation Professors. They were represented by another large firm, Akin, Gump, Strauss, Hauer, and Feld LLP.

55) I was once a member of this organization; thanks for nothing!

56) And they are!

57) Amicus Brief of NAJIT.

58) All documents on file with author. I had to send this person an e-mail requesting that he stop naming me in his filings after he circulated an "urgent *jus tertii* motion on behalf of the Emperor of Japan, the Foreign Minister of Japan, and Colin Jones."

the United States and Japan (Article IV of which accords national treatment to Japanese citizens in American courts)[59] and the rather novel argument that Japanese was a "Native American Language," the use of which could not be restricted in any Public Proceeding under 25 USC § 2904[60]. Since these issues were irrelevant to the basic question before the court — whether "translate" and "interpret" were synonymous — it is hard to imagine the arguments having gone anywhere even if they had been briefed formaly.

What was interesting about the *amicus* process was the absence of any business interests who might have been affected by a ruling, particularly one in Kan Pacific's favor. One of the issues that was discussed in both the briefs and at oral argument was the huge potential costs involved if losing parties could be taxed with documentary translation costs in complex cross-border litigation. Yet nobody from the business world who might have to pay such costs seemed to care enough to participate.

Facts that never came out

The average person would probably consider Taniguchi's admission that his putative contracts were signed after the accident to be decisive; the type of revelations from a witness that causes a hush to call over the courtroom in a TV drama. Yet it is a fact that did not even bear mention in the published opinions at any level of the proceedings. At risk of repetition, whether facts such as this were "decisive" was irrelevant because the proceedings never got that far.

Knowing that Taniguchi signed the contracts after the accident doubtless makes Taniguchi a much less sympathetic plaintiff. Yet his assertion that he never expected to receive any money from the litigation is almost as

59) Treaty of Friendship, Commerce and Navigation, U.S.-Japan, art. IV, Apr. 2, 1953, 4 U.S.T. 2063.

60) His logic being that 25 USC § 2902 defines "American Indian" as including Pacific Islanders such as the people of the NMI. Since Japanese was the "official" language of the Pacific Islands while they were Japanese colonies (and is, I would add still an official language of Angaur, one of the states in the Republic of Palau), Japanese was thus a Pacific Islander language. I have to say I am enchanted by this argument, though question whether the language of Japanese colonial masters really meets the definition of "historical, traditional languages" in 25 USC § 2904(6) (by that logic, Spanish might also qualify, the NMI having been part of the Spanish Empire for much longer than they were Japanese).

interesting as the post-dating of his contracts, though perhaps not as decisive.

Taniguchi's endorsement and promotional contracts were signed with Kyowa Tatemono and two related companies. The companies appear to have been involved in real estate and restaurants, though Kyowa Tatemono reportedly went bankrupt in 2009. Why would such a company need a professional baseball player as a spokesperson or pay one so much even if it did (particularly if it was just a few years from declaring bankruptcy)? I do not have an answer, but in the Japanese context there were further grounds for suspecting the arrangement because in Japan real estate firms and restaurant and bar operators sometimes have unsavory associations, being one of the front businesses commonly used (or, in the case of bars and restaurants, extorted) by organized crime groups[61]. I should be clear that I am not asserting that Kyowa Tatemono was such a company.

It is worth mentioning, however, that Hisato Endo — the president of Kyowa Tatemono, Taniguchi's employer and the man who signed two of the three contracts, had been arrested in Saipan in August 2007 — between the accident and the filing of the lawsuit — for allegedly threatening to throw someone off of Banzai Cliff if they did not repay money[62]. Bloggers have attributed his arrest as a compounding factor that led both to Kyowa Tatemono going bankrupt and his subsequent divorce from his celebrity wife, Fumie Hosokawa[63]. It thus seems at least possible that Taniguchi's involvement in his own case was not completely voluntary from the beginning. This too, is speculation, of course.

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61) *See, e.g.,* Andrew Rankin, 21st-Century Yakuza: Recent Trends in Organized Crime in Japan~*Part 1,* 10 THE ASIA-PACIFIC JOURNAL, Issue 7, No 2 (Feb. 13, 2012), at: http://www.japanfocus.org/-Andrew-Rankin/3688#sthash.cC0lVno1.dpuf

62) Ferdie de la Torre, *Endo pleads not guilty to Banzai Cliff beating,* SAIPAN TRIBUNE (Sept. 5, 2007), http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=72044. The victim of this extortion was arrested in Saipan the following year for rape. Ferdie de la Torre, *Businessman accused of rape freed on bail,* SAIPAN TRIBUNE (Mar. 15, 2008): http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=78013.

63) *See, e.g.,* http://redeve-blog.com/?p=528, http://trendnews08.com/2612.html. Hosokawa was Endo's second wife, and they reportedly had a wedding ceremony in April 2007 in Saipan at a time when his first marriage had not yet been dissolved, leading to rumors that he was guilty of bigamy. Their marriage was reportedly registered in Japan after his divorce from his first wife was finalized. Id.

Coda

In trying to tell the "real" story of Taniguchi v. Kan Pacific it has been necessary for me to speculate about a number of points. It is thus only fair for me to tell readers about one bit of speculation that turned out to have been misguided.

I had long assumed that whether he won or lost at the Supreme Court, whether Taniguchi actually paid the costs for which he was taxed would always be a non-issue. Given the amounts involved it seemed unlikely that Kan Pacific would never try to enforce the judgment in Japan.

In addition to my translation fee, Taniguchi was also taxed for $2,215 in court reporter fees. These are costs that are clearly enumerated as eligible for taxing under 28 U.S.C. § 1920 so there was never any dispute about him having to pay them. Thus, even though the Supreme Court ruling freed Taniguchi from reimbursing Kan Pacific for my fee, he was still on the hook for the remaining amounts.

He paid.

In the fall of 2012 a news article appeared in the Saipan Tribune that the District Court had issued an order for him to pay or suffer contempt sanctions[64]. A friend in the Guam Bar Association to whom I forwarded the article responded that Taniguchi had paid.

Here again I must speculate as to why. It is entirely possible that Taniguchi did so because he felt an obligation to obey the law. But I am more inclined to attribute it to a more prosaic reason, one that has to do with another feature of the American legal system which requires some explanation to my Japanese students, a feature they find quite surprising: the power of the American judiciary. Japanese judges are not vested with any of the inherent powers of their counterparts in the United States or other common law countries. They cannot generally hold parties in contempt or throw them in jail for non-compliance. As a result, the enforceability of Japanese court orders within Japan can often be an issue let alone in other countries. Things are different in U.S. courts, even in a backwater like Saipan.

Why would Taniguchi pay rather than let the contempt sanction stand?

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64) Ferdie de la Torre, Ex-baseball player ordered to pay $2K or face arrest, SAIPAN TRIBUNE (Oct. 31, 2012): http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=123055.

I imagine that someone advised him that if allowed to continue, the contempt process would result in a warrant being issued for his arrest and once that went into law enforcement databases he would probably find it difficult to ever travel to the United States again. Perhaps Taniguchi thought that a couple of thousand dollars was a small price to pay for preserving that privilege.