

2. Law of Property and Obligations

In the field of law of property and obligations, there were many important decisions in 1987. More than 900 cases were reported in different law reports. Many were concerned with the interpretation of articles of the Civil Code and related Acts and decided technical questions which were of interest to civil law experts. Among those, the Tokyo High Court decision in the Tama River Flood case led to severe criticism from both lawyers and lay people. Through the examination of the Tama River Flood case, we will look at a recent trend of judicial decisions concerning river flooding.

A case regarding government responsibility for the collapse of an embankment on the state-controlled Tama River in Tokyo.

Decision by the Seventeenth Civil Division of the Tokyo High Court on August 31, 1987. Cases Nos. (*ne*) 231 and 1481 of 1979 and (*ne*) 2726 of 1981. A *koso* appeal case of claim for compensation. 1247 *Hanrei Jihō* 3; 648 *Hanrei Taimuzu* 66.

[Reference: State Tort Liability Act, Article 2 (1); River Act, Article 16.]

[Facts]

From August 30 to September 1, 1974, Typhoon No. 16 caused floods in the Kanto, Shikoku and Chugoku regions and left 9 persons dead. A cloudburst on August 31 triggered by Typhoon No. 16 caused the Tama River to substantially rise from September 1 through 3. The river water, gushing over an intake dam at Komae, Tokyo, broke the preliminary embankment and the flow of river water destroyed 260 meters of the secondary embankment. The flood washed away 3,000 square meters of residential property including 19 houses standing on the left bank of the river.

The plaintiffs, consisting of 33 flood victims, filed a case against the national government, claiming a compensation for their losses

which amounted to 413.6 million yen and alleging negligence on the part of the government in controlling and maintaining the Tama River. The plaintiffs said that the intake dam was installed too high for a large river and the dam had very few controllable parts such as a floodgate. They also said that the first embankment was weak and the secondary embankment was excessively low in height and dangerous. They also claimed that the Ministry of Construction should have been able to predict a recurrence of a flood, because there had been three similar incidents previously.

The court of first instance, the Tokyo District Court, on January 25, 1979 (913 *Hanrei Jihō* 3), held the State responsible for the collapse of the embankment and awarded 306 million yen or 74 percent of the claim. The Tokyo District Court decision defined the safety level of a river as follows: The river should provide safe-river structures and facilities for releasing runoff water down the river against usually foreseeable floods, and should assure that there will be no harm to residents living beyond the river embankment. The court concluded that the Tama River lacked the safety which a government-controlled river, grade first class, flowing through the nation's metropolitan area should have, and that there was negligence on the part of the government in river control and maintenance which amounted to the defects defined in Article 2 of the State Tort Liability Act.

The State then filed a *koso* appeal from the decision, asserting that (1) the responsibility for control and maintenance of rivers was not the same as for roads, (2) the level of river safety imposed by the decision required absolute safety which was unacceptable to the administration of rivers, and (3) the flood was brought about by unpredictable causes and, therefore, the national government was not responsible.

[Opinions of the Court]

Koso appeal allowed.

The Tokyo High Court, applying the rules of river control and maintenance set by the Supreme Court decision of January 26, 1984 (commonly cited as the Daito Flood case), decided that as a river

needed many renovation projects until absolute safety would be guaranteed, transitional safety was sufficient for a river defined as “an unsatisfactorily renovated river” in the meaning of the Daito Flood court ruling, even if the river embankment had been renovated by the basic working plan for river renovation and construction under the River Act, Article 16. As the flooding resulted from an extraordinary process which the nation had never before experienced, the occurrence of the flood was unpredictable for the government given the past experience with the Tama and other similar rivers. The intake dam, embankment and other structures, then reasonably safe in the light of general safety levels at the time of renovation, still left room for improvement. However, there had been no flooding for 25 years after renovation, and taking into consideration geographic features near the intake dam, the level of control and maintenance of the Tama River, and other related matters, there was no negligence in the control and maintenance of the Tama River for not improving the intake dam and embankment. In conclusion, the Court ruled that the government was not responsible for the plaintiffs’ loss of property in the flood, and the Court ordered a return of the damages of 306 million yen awarded by the district court.

[Comment]

Why did the Tokyo High Court overturn the ruling of the Tokyo District Court? The Supreme Court decision in the Daito Flood case on January 26, 1984 (38 *Minshū* 53), had a significant influence on the Tokyo High Court decision. Before examining the ruling of the Supreme Court decision, we will sketch briefly the development of judicial decisions in river flooding cases.

Until the mid-1970’s, most cases concerning Article 2 of the State Tort Liability Act were cases on the defects of road construction and maintenance. Although there were river or sea floodings almost every year in many places of Japan, there were very few litigations concerning river floodings. People at that time considered a river flooding to be a natural calamity, and took for granted the different characteristics of river control and maintenance vis-à-vis road maintenance.

However, since the mid-1970’s, the number of claims for damages

by the victims of river flooding has increased, because of the development of scholarly theory on the nature and extent of state tort liability, and the rise of people's consciousness towards their legal rights. The first important decision on the liability of the State in this period was the Osaka District Court ruling in the Daito Flood case on February 19, 1976 (333 *Hanrei Taimuzu* 136), which denied the differences of maintenance liability between roads and rivers. The Osaka High Court decision in the Daito Flood case on December 20, 1977 (357 *Hanrei Taimuzu* 159), confirmed negligence on the part of the government in maintenance of the river. The Tokyo District Court decision in the Tama River case was one of the leading cases in this area.

During the late 70's and early 80's, there were more than twenty decisions in river flooding cases, most of which were in favor of the victims. However, even in this period there were a few decisions which emphasized the special characteristics of control and maintenance in river and denied government responsibility.

Under these circumstances, the Supreme Court decision in the Daito Flood case (38 *Minshū* 53) had a great impact on the direction of flood cases. In the Daito case, the Supreme Court found no negligence on the part of the government concerning river control and maintenance. The reasoning of the court was as follows: the court recognized the special characteristics of maintenance of rivers not yet renovated or unsatisfactorily renovated which were different from roads, and the court emphasized the existence of many restrictions such as time, financial, technical and social restrictions. The court also said that the completion of flood prevention works required a considerably long period: therefore, a so-called "transitional safety" level was sufficient for rivers not yet renovated or unsatisfactorily renovated. In deciding whether a particular river provided transitional safety, the court recognized the importance of general standards of control and maintenance of rivers of a similar kind. The court defined the meaning of negligence in the maintenance of rivers under renovation and improvement as either unreasonableness in the program of renovation work, or the clear danger of flooding and the necessity of earlier renovation work. All the legal scholars

criticized the reasoning of the Supreme Court decision and argued that the application of the ruling should be limited to the flooding of the river under renovation and improvement, or not yet renovated.

Nonetheless, the Tokyo High Court decision in the Tama River case extended the reasoning of the Supreme Court decision to the river already renovated by the basic working plan for river renovation and construction under the River Act, Article 16. The High Court decision also neglected the fact that the flood occurred at the water flow level which was below the maximum safety level set by the Ministry of Construction. Further the High Court ignored the fact that even a flood investigation committee of the Ministry of Construction published a report which said that the intake dam was badly structured and the secondary embankment was weak. Therefore, the High Court ruling surprised not only the plaintiffs but the public in general as well. Editorial articles of newspapers criticized this decision as being contrary to the people's common sense.

Unfortunately, we notice the stretching of the meaning of the Supreme Court decision in several river flooding cases. For example, in the Gifu District Court decision in the Nagara River Sumata Flood case on May 29, 1984 (1117 *Hanrei Jihō* 13), the judge gave a judgment terribly favorable to the government. Of particular interest is the fact that the judge had previously lost as the government representative in a similar river flooding case before becoming the judge in the Sumata case. We also notice that court rulings in flood cases for damages have generally been in favor of the administrative authorities since the Supreme Court decision.

The plaintiffs appealed to the Supreme Court, and the author sincerely hopes for a change of the court ruling.

(See the second case reported in the section of “1. b. Administrative Law” in the part of Major Judicial Decisions in this issue.)

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