

## RECHTSPRECHUNG / CASE LAW

### Japan v. Shimizu

#### Negligence and Abuse of Rights in Early 20<sup>th</sup> Century Japan

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#### I. INTRODUCTION

*Japan v. Shimizu* (信玄公旗掛松事件 *Shingen-kō hata kake matsu jiken*) is one of the most important cases in the history of Japanese private law. It was also one of the most pointless: a battle over a dead tree that led to two fruitless decades of litigation. At the end, nobody was happy: not the landowner who lost money even though he won, nor the government which lost a high-profile case – and certainly not the town, which lost a local legend.

The Imperial Court's decision in the case marks one of the earliest Japanese applications of the originally European theory of “abuse of rights” (権利の濫用 *kenri no ran'yō*). The concept would go on to play an enormous role in Japanese law: a Westlaw search for the term reveals some 12,407 Japanese cases. The doctrine has had a significant impact in a wide variety

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of areas – whether property, tort, or contract law.<sup>1</sup> Simultaneously, the Court defined the scope of private rights using a calculus of negligence that foreshadowed Learned Hand's decision in *United States v. Carroll Towing*<sup>2</sup> some three decades later. In other words, understanding that holding against Japan would require preventative measures for railroads in the future, the Court reached its verdict by considering the costs of safety precautions against the cost of the harms those same measures would prevent (discounted for the probability those harms would occur). This kind of quasi-economic calculus is quite common now – but was quite novel in 1919.

### 1. Historical Context

The Meiji Restoration of 1868 (明治維新 *Meiji ishin*) ushered in a new era of Japanese law. The new Constitution of the Empire of Japan (大日本帝國憲法 *Dai-nihon teikoku kenpō*) was proclaimed in 1889,<sup>3</sup> and a new Civil Code (民法 *Minpō*) was enacted in 1896. This Code set out clear but relatively sparse definitions of what acts constituted a tort.<sup>4</sup> With these reforms Japan made clear its place within modern legal systems like those of Germany and France.<sup>5</sup>

Even the most complex of civil codes contain gaps; holes in the legal fabric where, as jurists like H. L. A. HART would say, a dispute is not clearly resolved by the primary rules.<sup>6</sup> In such cases, judges may look, as

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1 For further reference and discussion of the role of abuse of rights law in contemporary Japanese law, see K. SONO / Y. FUJIOKA, *The Role of Abuse of Right Doctrine in Japan*, *Louisiana Law Review* 35 (1975) 1037.

2 159 F.2d 169 (2d Cir. 1947).

3 The Constitution of the Empire of Japan was either Japan's first or second Constitution, depending on whether historical documents like the 8<sup>th</sup> Century Seventeen-Article Constitution count. For further reference, see S. CALABRESI et. al., *Comparative Constitutional Law* (2<sup>nd</sup> ed. forthcoming). See also generally, C. D. A. EVANS / A. MENTER, *Reinterpreting the Reinterpretation: Collective Self-Defense as Constitutional Fidelity*, *Penn. State Journal of Law & International Affairs* 9 (forthcoming 2021).

4 See generally R. EPP, *The Challenge from Tradition: Attempts to Compile a Civil Code in Japan, 1866–78*, *Monumenta Nipponica* 22 (1967) 15. For a more specific look at the impact on private law and the value of the civil code, see J. M. RAMSEYER, *Water Law in Imperial Japan: Public Goods, Private Claims, and Legal Convergence*, *Journal of Legal Studies* 18 (1989) 51.

5 See, e.g., K. HATOYAMA, *The Civil Code of Japan Compared with the French Civil Code*, *Yale Law Journal* 11 (1902) 354, a historically significant and nearly contemporaneous analysis.

6 H. L. A. HART, *The Concept of Law* (1961) 104.

Ronald DWORKIN argued,<sup>7</sup> to legal principles<sup>8</sup> – consistent rules by which courts have decided similar cases over the long, historical path of the law.<sup>9</sup>

Common law countries establish these legal principles through precedent.<sup>10</sup> For example, in the common law jurisdictions there is a long tradition of claims at equity. Even if an agreement between you and me lacks sufficient consideration to count as a contract, I may still be able to secure judgment against you through the equitable claim of promissory estoppel – if I can demonstrate that I reasonably relied to my detriment on your promise.<sup>11</sup> So too with the equity of redemption<sup>12</sup> and a wide variety of other equitable remedies.

As a relatively new civil law system, early 20<sup>th</sup> century Japanese law lacked any equivalent to the common law's historical system of claims at equity.<sup>13</sup> But Japan still needed a way to fill in the gaps in their legal sys-

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7 R. DWORKIN, *Law's Empire* (1986) 91.

8 R. DWORKIN, *The Philosophy of Law* (1977) 25.

9 R. DWORKIN, *Taking Rights Seriously* (1977) 85.

10 *See generally* R. DWORKIN, *A Matter of Principle* (1985).

11 *See, e.g., Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683 (1965). The idea of promissory estoppel is that, even if two (or more) parties are not in privity (that is to say, they do not have a contractual relationship) because of some technical requirement (like documentation or consideration), a wronged party may still be able to secure some remedy if the wrong party reasonably relied to its detriment on a promise made by the other party. In *Hoffman*, for example, plaintiff made several financial decisions (selling his bakery, relocating towns, purchasing real estate) on the assurance by defendant that plaintiff would be able to purchase a franchised grocery store. When defendant unexpectedly increased the price before closing, negotiations fell through. Plaintiff sued, invoking the equitable claim of promissory estoppel. Relying on Section 90 of the Restatement of Contracts, First, the Wisconsin Supreme Court held that defendant was liable because defendant had made a promise to plaintiff on which plaintiff reasonably relied to his detriment.

12 *See, e.g.,* D. P. WADDILOVE, *Why the Equity of Redemption?*, in: Briggs / Zuijderuijn (eds.), *Land and Credit: Mortgages in the Medieval and Early Modern European Countryside* (2018) 117. The equity of redemption is another equitable claim, like promissory estoppel, but of distinct origin and different character. Redemption permits a party to redeem a mortgage up until the moment of repossession. Suppose, for example, that A loans USDX to B secured by B's home O. B defaults on the loan. A moves in court to repossess O. Even if B clearly defaulted, and even if the loan contract clearly states that repossession of O is permitted in event of default, B can still show up in court up until the very last moment, pay USDX (plus reasonable fees) to A, and prevent foreclosure on O. Redemption has ancient origins and has long been a part of common law jurisprudence. *See* R. W. TURNER, *The Equity of Redemption* (1931).

13 Indeed, Japanese law lacked a second-order legal system entirely. *See* H. SMITH, *Equity as Second-Order Law: The Problem of Opportunism*, (Harv. Pub. L. Work-

tem, because Japanese persons, no less than Western persons, argued with one another, suffered their share of business disputes – and ultimately looked toward society’s neutral courts to secure their rights.<sup>14</sup> Abuse of rights claims helped to satisfy this need.

## 2. Doctrinal Framing

Two prominent legal decisions helped set the stage for *Japan v. Shimizu*. In *Tonomura v. Ōsaka Alkali Co.* (大阪アルカリ事件 *Ōsaka arukari jiken*),<sup>15</sup> the plaintiff sued for damages caused by air pollution.<sup>16</sup> The defendant argued that it should not be held liable because the firm used the best pollution-mitigation equipment available.<sup>17</sup> The Imperial Court ultimately agreed with the defendant, ruling that it was not negligent because it had exercised reasonable care.<sup>18</sup> However, the decisions in *Ōsaka Alkali* contained significant discussion over the proper scope of negligence. The Ōsaka Court of Appeals, for example, found in favor of the plaintiffs, adopting something that more closely resembled strict liability.<sup>19</sup> The Imperial Court ultimately rejected this argument, but the back-and-forth revealed a search within Japanese law for a theory that balanced the interest in compensation of harmed parties with the right to operate an enterprise.<sup>20</sup>

In *Mori v. Tsumashika*,<sup>21</sup> a creditor secured a court decree permitting the removal of a debtor’s house from his land. While lawfully removing the house, the creditor recklessly destroyed it. The debtor sued for damages. The Court found in favor of the debtor, applying the reasonable care principle in *Ōsaka Alkali* – this time in reverse. In other words, a lawfully granted right had to be exercised within its proper scope, and the creditor exceeded that scope when he recklessly destroyed the debtor’s house. Significant as this case was, the Court rooted its decision in tort law precedents, and did not use the phrase “abuse of rights.”

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ing Paper No. 15-13, 14 October 2015). See also H. SMITH, *Equity as Meta-Law*, *Yale Law Journal* 130 (2021) 1050.

14 Some have claimed that Japanese are less likely to sue one another than persons of other countries. Even if this is true, the reasons may be more structural than social. See, e.g., J. M. RAMSEYER, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, *Yale Law Journal* 94 (1985) 604.

15 Imperial Court, 22 December 1916, 22 *Minroku* 2474 (1916).

16 *Id.* at 2474.

17 *Id.* at 2475.

18 *Id.* at 2479.

19 J. M. RAMSEYER, *Odd Markets in Japanese History: Law and Economic Growth* (1996) 49–50.

20 *Id.* at 53.

21 Imperial Court, 22 January 1917, 23 *Minroku* 14 (1917).

Together, the two cases helped establish the principle that a person could be held liable even for exercising a legally granted right, if that exercise went beyond the right's proper scope. This principle set the stage for the challenge in *Shimizu*.

## II. FACTS

The first railway in Japan opened on 12 September 1872, providing service between Shimbashi (新橋) and Yokohama (横浜).<sup>22</sup> The railways were a project of pride for the new Meiji government,<sup>23</sup> determined to rapidly modernize Japan.<sup>24</sup> Soon, railway construction exploded across the country, mirroring similar booms in the United States and Western Europe.<sup>25</sup>

In the late 19<sup>th</sup> century, Hinoharu (Village) (日野春), a small town near Kōfu (甲府), asked the Ministry of Railways to build a railway station near the town. In 1896, the Ministry responded with an informal construction plan. Things got more serious in 1902, when the Ministry made an official offer to begin construction on what would later become Japan's celebrated Chūō Line (中央本線 *Chūō honsen*). These plans alarmed local resident Rinmo SHIMIZU (清水倫茂), who lived in nearby Kabutomura (Village) (兜村).

### 1. *Not in My Backyard*

Mr. SHIMIZU (1864–1936) was the president of Kai Bank. The Hinoharu branch of the bank was located inside his family home, so he spent nearly all of his time in the village. He became involved in local politics, winning election as a member of the Village Council in 1893, and then deputy mayor in 1895. In 1903, he was elected to the Kitakoma District Council (北巨摩郡議会 *Kitakoma gun-gikai*). Just before he filed his lawsuit, he became Mayor of Kabutomura.

Mr. SHIMIZU was alarmed by the railway's construction plans because of their proximity to his property. Most of all, he feared that the railway would

22 See generally E. AOKI et al., *A History of Japanese Railways: 1872–1999* (2000).

23 See S. ERICSON, *The Sound of the Whistle: Railroads and the State in Meiji Japan* (1996) 25 (“In discussing government policy and state-business relations [...] one can easily lose sight of the larger meaning and significance of the railroad for Meiji Japan. Simply put, railroads had the power to change society.”).

24 The push for rapid modernization was more than an economic imperative; it was very much a part of the foundational ideology of the Meiji Restoration. For recent work tracing this line of thought in Meiji philosophy, see C. D. A. EVANS / H. ISHIKAWA, *A New Translation of Yoshida Shoin's Taisaku Ichido*, *Journal of Japanese Philosophy* 8 (forthcoming 2021).

25 See, e.g., C. MINER, *A Most Magnificent Machine: America Adopts the Railroad, 1825–1862* (2010).

cause damage to a very special tree that grew on his land. This tree was special because, according to local legend, the 16<sup>th</sup>-century warlord TAKEDA Shingen (武田信玄) had once rested his banner against the tree's trunk.

One of the most talented and charismatic feudal lords during the chaotic 16<sup>th</sup> century, Shingen was an innovative battle tactician and strategist.<sup>26</sup> Over the course of a tumultuous three-decade military career, Shingen became one of the most powerful military lords in Japan.

Shingen's famous war banner, taken from SUN Tzu's classic *The Art of War*, read in Japanese "Fu-Rin-Ka-Zan" (風林火山). Each syllable was an abbreviation: Wind, Forest, Fire and Mountain. The banner paraphrases Sun Tzu: "as swift as wind, as gentle as forest, as fierce as fire, as unshakable as mountain".<sup>27</sup>

One of the most famous political slogans in Japanese history, Fu-Rin-Ka-Zan was said to reflect both Shingen's battle tactics and his broader political reforms.<sup>28</sup> Few figures in Japanese history are as popular as Shingen<sup>29</sup> – and few banners as famous as Fu-Rin-Ka-Zan.

## 2. Demands and Correspondence

On 6 May 1902, Mr. SHIMIZU sent a letter to the head of the Hachioji Field Office of the Ministry of Railways asking Japan either to change the proposed construction route or to offer him appropriate compensation for the (expected) damage. Kennosuke MATSUSHITA, the local Section Head of Railway Administration, forwarded Mr. SHIMIZU's letter to Deputy Mayor Hamakichi OBI. He attached a note, which read:

26 See generally S. TURNBULL, *Kawanakajima 1553–64: Samurai Power Struggle* (2013).

27 This simplification is now famous but not precisely correct – Shingen's historical banner was probably more complete than the four-character "Fu-Rin-Ka-Zan" that is popular today. Shingen's actual flag probably contained a more complete quotation from *The Art of War*. The simplified "Fu-Rin-Ka-Zan" slogan was popularized by the celebrated author Yasushi INOUE, who wrote a best-selling 1953 book with that same title. See Y. INOUE, *The Samurai Banner of Furin Kazan* (Yoko Riley, tr.) (2005).

28 See generally S. HALL / K. NAGAHARA / K. YAMAMURA, *Japan Before Tokugawa: Political Consolidation and Economic Growth, 1500–1650* (2014).

29 See, e.g., D. FLANAGAN, *Kofu: The Mountain Fortress of Warlord Takeda Shingen*, *Japan Times*, 5 November 2016, <https://www.japantimes.co.jp/life/2016/11/05/travel/kofu-mountain-fortress-warlord-takeda-shingen/> ("[The film *Kagemusha*] captures the enduring aura of the real Takeda, a warlord who still holds considerable sway over Japan's historical imagination. [...] Innumerable books, films and television programs have been made about him, including the 1988 NHK *taiga* period drama *Takeda Shingen*.").

“Mr. SHIMIZU Rinmo, a resident of your village, has sent us the attached letter. Our plan for the railway track is designed to skirt around Mr. SHIMIZU’s old pine tree, which will avoid this problem. Consequently, the project will not harm Mr. SHIMIZU or the tree. Therefore, no modifications or compensation is required – nor will we make any changes to our plan.”

Mr. MATSUSHITA would normally have sent this letter to the Mayor of Kabutomura. However, in this case that would have been counterproductive – since Mr. SHIMIZU was himself the mayor of Kabutomura at the time.

Despite Mr. MATSUSHITA’s assurance, Mr. SHIMIZU remained concerned. He wrote again to the Ministry on 5 September, but his concerns were again dismissed. The Ministry began construction at Hinoharu on schedule. The completed line, now running between Nirasaki (韮崎市) and Fujimi (富士見市), opened in 1904.

Mr. SHIMIZU continued to contact the Ministry of Railways for many years, seeking compensation for harms to his land and property. In November of 1911, he sent a letter to Mr. Kei HARA,<sup>30</sup> then Minister of Railways, demanding compensation once again – but his claim was again rejected. In 1914, Mr. SHIMIZU’s Pine Tree died.<sup>31</sup>

On 15 April 1915, Mr. SHIMIZU sent a final letter demanding compensation to Juichi HAMADA, then Minister of Railways. In his note, Mr. SHIMIZU demanded Yen 2,000 for compensation and Yen 1,000 for pain and suffering.<sup>32</sup> Mr. SHIMIZU was notified that his claim was rejected on 20 June 1915.

Having exhausted his other options, Mr. Shimizu hired attorney Kaichiro FUJIMAKI. Mr. FUJIMAKI was born in Kitakoma, Yamanashi. He studied law at Meiji Law School, a private law school that later became Meiji University (明治大学 *Meiji Daigaku*). At that time, Meiji Law School taught a curriculum that was heavily influenced by the French civil law tradition, including claims like abuse of rights. After law school, Mr. FUJIMAKI served

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30 Kei HARA (原 敬) (1856–1921), served as Prime Minister from 1918 to his assassination in 1921. See T. NAJITA: Hara Kei in the Politics of Compromise 1905–1915 (1967).

31 *Japan v. Shimizu*, Imperial Court of Japan, 3 March 1919, 25 Civil Court Minroku 356, 360.

32 There are no readily available online calculators for inflation that stretch back to Japan’s early 20<sup>th</sup> century. However, the Bank of Japan does publish this information in physical reports. Using these tables, and adjusting for inflation, this sum is roughly Yen 2.236 million for damages and Yen 1.118 million for pain and suffering. Or – as of 10 August 2020 – about USD 32,000. For a link to these online tables, see Bank of Japan, <https://www.boj.or.jp/announcements/education/oshiete/history/j12.htm/>.

as a judge, and then opened a law firm in 1908. He became President of the Kōfu Bar Association in 1914.<sup>33</sup>

Mr. FUJIMAKI filed an action on Mr. SHIMIZU's behalf on 6 January 1917 (6<sup>th</sup> Year of Taishō) in Kofu District Court. The lawsuit sought compensation for damages to the Shingen Pine Tree as well as for pain and suffering.<sup>34</sup>

### III. CASE TIMELINE AND PROCEDURAL POSTURE

1. 31 January 1918 (7<sup>th</sup> Year of Taishō). The Kōfu District Court ruled in favor of plaintiff SHIMIZU. Defendant Japan moved to appeal.<sup>35</sup>
2. 14 June 1918 (7<sup>th</sup> Year of Taishō). On appeal by defendant-appellant Japan, the Tōkyō Court of Appeals ruled in favor of plaintiff-appellee SHIMIZU, remanding the case to Kōfu District Court for further review and determination of damages.
3. 14 June 1918 (7<sup>th</sup> Year of Taishō). Defendant-appellant Japan moved for reconsideration on the grounds that defendant-appellant was unrepresented at the Court of Appeals (the Ministry had not sent counsel to the hearing and the case was consequently heard *in absentia*).
4. 26 July 1918 (7<sup>th</sup> Year of Taishō). The Tōkyō Court of Appeals rejected defendant-appellant Japan's motion for reconsideration, affirming its prior decision and re-confirming judgment for plaintiff-appellee SHIMIZU. Defendant-appellant Japan appealed to the Imperial Court of Judicature.<sup>36</sup>
5. 3 March 1919 (8<sup>th</sup> Year of Taishō). On appeal by defendant-appellant Japan, the Imperial Court affirmed the judgment of the Court of Appeals and ruled in favor of plaintiff-appellee SHIMIZU. The case was again remanded to Kōfu District Court to determine damages.

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33 See NAGASAKA TOWN LOCAL MUSEUM, *The Book of Hatakake-Matsu Pine Tree* (2013).

34 *Id.*

35 Under Japan's rules of civil procedure at the time, consideration and appellate review was mandatory. Of course, as in today's American federal courts system, mandatory review certainly did not mean that cases were regularly reversed; indeed, the opposite was true.

36 Unlike the current American federal court system, the appellate jurisdiction of Japan's Imperial Court was mandatory at this time. Though the Imperial Court was required to hear all cases properly appealed, many cases were summarily affirmed with little controversy. Indeed, for many years the Imperial Court Secretariat is rumored to have kept a stamp that simply stated "affirmed for reasons provided by the court below."

6. 15 February 1921 (10<sup>th</sup> Year of Taishō). The Kōfu District Court ordered defendant Japan to pay Yen 499<sup>37</sup> (including Yen 50 for pain and suffering<sup>38</sup>).
7. 11 April 1922 (11<sup>th</sup> Year of Taishō). On appeal by defendant-appellant Japan, the Tōkyō Court of Appeals reduced damages and ordered defendant-appellant to pay Yen 72 sen 60<sup>39</sup> (including Yen 50 for pain and suffering).
8. 25 December 1924 (13<sup>th</sup> Year of Taishō). The Tōkyō Court of Appeals rejected a motion for reconsideration by plaintiff-appellant SHIMIZU regarding the reduction in damages and the imposition of court costs.
9. 28 September 1925 (14<sup>th</sup> Year of Taishō). Kōfu District Court set court costs at Yen 241 sen 71 ri 2 mō 5<sup>40</sup> and ordered plaintiff SHIMIZU to pay 90% of this cost.

#### IV. TRANSLATION

*Japan v. Shimizu,*  
*Imp. Ct., 3 March 1919, 25 Minroku 356*

*Summary of the Decision (Court Reporter)*

Even when exercising a legal right, one must do so within a legally approved zone of reasonable action. If, in exercising one's rights, one intentionally or negligently exceeds that zone of reasonableness; and if, because of one's inappropriate actions one infringes the rights of another person, then one commits a tort to the extent of the excess.

- If, when exercising one's rights, one's conduct imposes upon another person a burden that, according to general social understanding, exceeds the

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37 Approximately Yen 269,000 in today's money – or about USD 25,000.

38 This is roughly USD 2,500, adjusting for inflation and then converting currencies.

39 Adjusting for inflation, approximately Yen 40,000 or around USD 380. Based on the records of these later trials, the principal difference between the Kōfu District Court and the Court of Appeals lay in how they valued the Pine Tree. The Court of Appeals valued the tree solely for its timber, discounting the tree's history. In this, apparently, they might have had the better approach – though there is no evidence of fraud on Mr. SHIMIZU's part (indeed, the legend of the Pine Tree was widely believed by local residents), the Pine Tree at the heart of this case was apparently just 160 years old at the time of its death. If this is correct, the tree could not have had much to do with Lord Shingen, who, of course, passed away hundreds of years earlier.

40 Adjusting for inflation, approximately Yen 130,000 or around USD 1,200. Note that because of this award of court costs, Mr. SHIMIZU actually lost money, despite winning his case.

- level of harm a person can be required to bear, then that conduct exceeds the zone of reasonableness and constitutes a tort.
- Steam locomotives are indispensable for transportation. Because operating a steam train requires burning coal, a train operator who holds the right to run a train correspondingly holds a right to emit some soot. Persons living along the tracks must accept this situation as part of the cost of living in a community. As a general matter, then, even if nearby residents are harmed by the soot emitted through operating a steam locomotive, their rights have not been unlawfully infringed and the train operator has not committed a tort.
  - Because of the location of the disputed pine tree, it suffered more severe soot damage than other trees along the tracks. There were steps that the Ministry could have taken to mitigate this harm, but the Ministry chose not to do so. Instead, it let the smoke and soot kill the tree. This is beyond what, by general social understanding, we can reasonably expect citizens to be forced to bear. Accordingly, the action of the Ministry does not constitute a reasonable exercise of its rights.

#### *Order*

The appeal in this case is denied. [Judgement of the Tōkyō Court of Appeals in favor of Mr. SHIMIZU is affirmed.] The Defendant-Appellant<sup>41</sup> shall bear costs of the appeal.

#### *Text of the Decision*

*[Defendant-Appellant makes two arguments.]*

*First*, the defendant-appellant characterizes the decision of the Court of Appeals as concluding that the defendant-appellant's negligence caused the death of the pine tree in this case: "Soot from coal has often damaged trees. Those involved in the railroad freight business would know that soot emitted from a steam locomotive would harm trees. Moreover, even if the Ministry did not know this, if it did not take reasonable measures to prevent soot damage, it unreasonably violated its duty of care... Given this failure to anticipate the harm caused to others, the exercise of rights in this case constituted negligence." Further, "because Ministry employees did not take reasonable measures to prevent the harm caused by soot and consequently caused the death of the pine tree, the behavior of the Ministry was negligent and illegal."

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41 We consistently use the term "defendant-appellant" for the Ministry of Railways. This term is not found in the original text; nor would it have been common, even in American federal courts, at the time this case was litigated. We nevertheless have chosen to use it because it helps clarify the case's procedural posture.

Again, “in order to prevent harm from smoke to trees, the Ministry needed to take reasonable preventative measures, but it did not do so. This failure killed the pine tree [...] This is negligent and illegal conduct.”

The defendant-appellant argues that, in order to find the defendant-appellant negligent, the Court of Appeals first needed to verify that reasonable measures were available to prevent the death of the pine tree, and that the defendant-appellant carelessly failed to take those measures. The defendant-appellant argues that the Court of Appeals made no such findings, instead simply declaring that “the Ministry did not take reasonable [preventative] measures.” Therefore, the defendant-appellant argues that the Court of Appeals decision was in error. Either the Court failed to give a reason for its verdict, or, if the Court did give a reason, the analysis provided was inadequate to sustain plaintiff-appellee’s claim.

The defendant-appellant argues that the Court of Appeals failed to explain what steps would have constituted “reasonable [preventative] measures.” No railroad track is totally removed from persons, livestock, crops and trees. It is unreasonable to expect steam-locomotive operators to eliminate all harm caused by smoke. The defendant-appellant argues that, by imposing such a mandate, the Court of Appeals’ decision represents unrealistic armchair speculation. The general understanding in current society is that one cannot realistically expect those in the freight business who operate steam locomotives on tracks to prevent all such harm. The defendant-appellant therefore argues that, since a party cannot be held negligent for failing to install non-existent measures, the decision of the Court of Appeals must be reversed.

*[We respond as follows.]*

According to the facts in record ... the Pine Tree allegedly damaged by the defendant-appellant was located south of Hinoharu Station. Both parties clearly agree on the tree’s location and that the tree was located within one *kan*<sup>42</sup> from the rail line. The parties also agree about the form and physical characteristics of the tree.

Expert witness Tohei DOI prepared a report used by the Court of Appeals.<sup>43</sup> According to that report: “The Pine Tree was located close to the

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42 This older unit of measurement would be roughly equivalent to two yards (approx. 183 cm).

43 Readers more familiar with the common-law approach to appellate litigation might find it confusing that the Court of Appeals heard separately from new expert witnesses. In the American system, Courts of Appeal consider (in principle) only errors of law – seeking out new evidence not in record and then presenting that evidence in Court could violate the parties’ right to trial by jury (because, of course, there are

station and to the place where steam trains switch from one track to another. Because the locomotives often stop and stay at this junction and switching yard, the Pine Tree suffered significantly more damage from soot and smoke – even when compared to other trees located close to the rail tracks.”

Additionally, Ihachiro MIURA,<sup>44</sup> another expert witness, wrote: “The Pine Tree stood at the closest place to the rail track and its branches leaned toward the track. It was so old a tree that the branches covered the train’s smokestacks. Compared with other trees standing around the rail tracks, the Pine Tree was exposed to more smoke and more soot. Because of this, in the end, the tree died prematurely.”

The Court of Appeals decision was based on these facts. The Court of Appeals judged that the pine tree died from smoke and fumes because it was located within one *kan* of the rail track. Since its branches leaned toward the track and were continually exposed to smoke and fumes, the pine tree was particularly and severely affected.

These facts distinguished the pine tree from other trees located along the tracks in valleys or next to paddies and fields. Those trees were not exposed to the massive amounts of smoke and soot that this pine tree was exposed to, and hence do not require the same preventative steps. [Because the risk was specific to this one pine tree, the defendant-appellant’s position that it was unreasonable to require proper mitigation is incorrect.] It is not difficult to imagine that defendant-appellant could have built a wall blocking off the soot and smoke, or laid the track at this particular section further away from the tree. When the court below referred to reasonable measures, these measures were what it had in mind.

The court below correctly concluded that the defendant-appellant negligently violated its duty of care in failing to install reasonable measures to mitigate the harm from smoke. Correspondingly, it is not reasonable now for defendant-appellant to contest that decision by claiming that a requirement to protect this specific pine tree would entail a promise to protect the hundreds of other trees along the tracks.

*Second*,<sup>45</sup> the defendant-appellant argues that the Court of Appeals’ decision wrongly interpreted the law and incorrectly applied it. The court held

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no juries at the Appellate level). Japan’s civil law system works differently. Because there were (then) no juries at *any* level, there is no particular difficulty with the Appellate Court considering new evidence – and indeed appellate courts would actively investigate the crucial facts of the case. In this context, it is not at all surprising that the Court of Appeals heard from two new experts; nor that the Imperial Court’s opinion should start by reaffirming these factual determinations.

<sup>44</sup> Professor MIURA served on the Faculty of Agriculture at the University of Tōkyō.

that the defendant-appellant caused the death of the pine tree through its illegal action: "Like others in the railroad freight business, the Ministry has the right to operate steam locomotives. That does not mean that the Ministry may, in the course of that operation, randomly violate the rights of others without reason. It may not, either intentionally or negligently, infringe those rights by failing to take necessary measures to protect against harm from smoke. Should it infringe the rights of others through that smoke, its actions fall outside the zone of activity recognized by law. Instead, they constitute an abuse of rights and are illegal."

As the Court of Appeals recognized, the defendant-appellant has the right to operate steam locomotives on a set of tracks as part of its freight business. Defendant-appellant argues that its actions fall within the exercise of those rights, provided that it exercises its rights appropriately, that it uses standard modes of operation, and that it insures that its exercise of rights does not exceed their scope. If it does this and a pine tree next to the tracks nonetheless dies, defendant-appellant argues that it would be an incorrect interpretation of the law to hold (as the Court of Appeals did) that its actions constituted an abuse of rights and were illegal. According to defendant-appellant, whether an action is illegal turns instead on the ordinary sense of society – it is wrong simply to declare that there is objective damage and a cause of the damage, and that therefore the causative action is illegal.

All steam locomotives generate non-trivial smoke and soot hazards. But defendant-appellant argues that it did not use substandard coal, nor did it use any unusually polluting equipment. Instead, it operated the steam locomotives according to the substantively and customarily accepted modern modes of operation. This is not illegal. To require operators to use protections against smoke that are realistically non-existent is a mistaken interpretation of the law, argues the defendant-appellant. Accordingly, concludes the defendant-appellant, the court below imposed on it an unreasonable responsibility. [*Citations, including those to German (§ 906) and Swiss (§ 684) civil codes, omitted.*]

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45 The original text clearly uses the terms "first" and "second" to number two separate arguments made by defendant-appellant. Unfortunately, the original briefs and records of the oral arguments are lost, so we are left piecing together what we think these arguments must have been from the Court's opinion. Although there are perhaps some differences in the framing and emphasis on the standard of care in this second argument, frankly, the difference between the first and second arguments advanced by the plaintiff seems a bit obscure. We nevertheless translate the numbering and break the arguments up as they were in the original case, as that seemed important to the Court (perhaps for reasons now lost to history).

*[We respond as follows.]*

Rights must be exercised within a zone of appropriate activity. Suppose that in the exercise of a right, a person intentionally or negligently exceeds that zone of appropriate activity. Suppose further that through the use of inappropriate means, this person infringes the rights of another. In such a situation, the decisions of this court hold that the person commits a tort to the extent of the infringement. *[citation omitted]*

What is this zone of appropriate activity? People who live lives of social cooperation cannot avoid the fact that one person's actions may cause harm to another. Such harm does not necessarily constitute the infringement of a right, for it may be that the harm is that which one must accept, given the needs of cooperative living. Sometimes, however, one person's actions will cause injury that goes beyond the level that, by general social understanding, an injured person should be required to accept. When that happens, the person who caused the injury has exceeded the zone of appropriate activity and committed a tort.

The operation of steam locomotives inevitably transmits noise and vibrations to nearby areas. Simply by burning coal – a necessary part of their operation – trains send soot and smoke to the same nearby areas. So long as defendant-appellant operates these trains carefully, the burning of coal is itself unavoidable and therefore accompanies the proper exercise of defendant-appellant's rights. Given that steam locomotives are indispensable to public transport, residents near the tracks must accept these phenomena as part of the cost of living cooperatively. So long as defendant-appellant exercises its rights within the zone of appropriate activity, even if defendant-appellant damages nearby residents, defendant-appellant does not illegally infringe on their rights and does not commit a tort.

If in the course of its travel a train harms nearby plants and trees by emitting ordinary levels of smoke and soot, the damaged party may not legally demand recovery for damages. Suppose, however, that in the process of operating the train a party exceeds the zone for the appropriate exercise of its rights, employs unreasonable methods, and damages another party. The first party has then illegally infringed the rights of the second party and must accordingly pay damages.

The Court of Appeals found that the pine tree was located close to the station, that it was located less than *one kan* from the railroad tracks, and that its branches leaned toward the tracks. Because of this location, the tree was constantly exposed to massive amounts of smoke and soot, and consequently died. In addition, the Court of Appeals further found (as we explained earlier) that measures to prevent this damage were in fact available.

Plaintiff-appellee's pine tree was different from the many other trees located along the rail tracks and not vulnerable to the same level of harm from soot and smoke. In other words, it suffered severely because its location subjected it to vastly greater harm from soot and smoke. Although there were ways to prevent the damage, defendant-appellant failed to incorporate them, let the smoke damage occur, and killed the tree. Thus, defendant-appellant operated its steam locomotives beyond the zone generally accepted by social understanding, and did not employ the appropriate means of exercising its rights.

The Court of Appeals concluded that in harming the pine tree through its smoke, defendant-appellant acted in ways that exceeded the zone for the exercise of its rights. It acted negligently and committed a tort. We reject defendant-appellant's claims that plaintiff-appellee's pine tree was no differently situated from any of the many other trees along the tracks.

For the reasons explained above, applying Sections 452 and 77 of the Code of Civil Procedure, we reject the appeal of defendant-appellant and decide as given in the order.

#### SUMMARY

*The article presents an English-language translation of Japan v. Shimizu (信玄公旗掛松事件 Shingen-kō hata kake matsu jiken), a critical case in the history of Japanese private law. While resolving a torts dispute about a historically important tree, the Japanese Imperial Court set a powerful precedent for the consideration of equitable claims. These "abuse-of-rights" (権利の濫用 kenri no ran'yō) claims now play a major role within Japan's system of tort, contract, and property law. In this article, the authors outline the history and discuss the doctrinal significance of Shimizu, reconstructing the case's factual background and procedural posture. By making this case available, the authors hope to shine light on this important branch of Japanese law.*

#### ZUSAMMENFASSUNG

*Der Beitrag präsentiert eine englische Übersetzung der Entscheidung Japan vs. Shimizu (信玄公旗掛松事件 Shingen-kō hata kake matsu jiken), bei der es sich um eine zentrale Gerichtsentscheidung in der Geschichte des japanischen Zivilrechts handelt. Mit seiner Entscheidung in einer deliktsrechtlichen Auseinandersetzung um einen historisch bedeutenden Baum hat der japanische Reichgerichtshof einen rechtsgestaltenden Präzedenzfall für die Berücksichtigung des Grundsatzes von Treu und Glauben geschaffen. Klagen, die sich auf eine „missbräuchliche Rechtsausübung“ (権利の濫用 kenri no ran'yō) stützen, spie-*

*len seither eine große Rolle im Bereich des Delikts-, Vertrags- und Eigentumsrechts in Japan. Die Autoren geben einen Überblick über den Hintergrund des Falles und diskutieren die rechtsdogmatische Bedeutung der Entscheidung, wofür sie die historischen Fakten und den Verfahrensablauf rekonstruieren. Sie hoffen, auf diese Weise einen wichtigen Bereich des japanischen Rechts zugänglich zu machen.*

*(Die Redaktion)*