

## REEVALUATING THE ROLE OF THE TORT LIABILITY SYSTEM IN JAPAN<sup>#</sup>

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### I. INTRODUCTION

Japan, a civil law country, has operated its current tort liability system based on tort provisions under the Civil Code and other special tort provisions for more than 110 years. However, this tort liability system has been condemned for its shortcomings, including how complex tort cases are treated, such as tort litigation arising from a mass accident, product liability, environmental pollution, and so on. In response, Japan has adopted several administrative compensation schemes for certain types of victims,<sup>1</sup> such as those injured by environmental pollution, medical products, vaccinations, blood donation accidents, and asbestos. Yet, as far as environmental pollution cases are concerned, the administrative compensation scheme does not work well. Rather, the tort liability system has been addressing the limitations of the administrative compensation system.

The purpose of this article is to reevaluate the role of the tort liability system in environmental pollution problems in Japan. Before going on to the main subject, Part II overviews the torts and other compensation systems in Japan, paying attention to noticeable differences with the U.S. legal system. Part III explains the historical background and outline of the pollution-related health damage compensation system in Japan. Part IV first addresses why the pollution compensation system went wrong, and then how a series of litigations based on the tort liability system have been trying to restore the failures of the pollution compensation system. Finally, Part V analyzes the role of the tort liability system in environmental pollution problems.

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<sup>#</sup> Due to the complexities of Japanese language translation, the author is singularly responsible for footnotes beginning with an asterisk (\*).

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1. In this article, I use the term “victim” in a broad sense. The State and prefectural governments generally use the term “patient” only for certified victims.

## II. TORTS AND OTHER COMPENSATION SYSTEMS IN JAPAN

### A. Tort Liability System

#### 1. Tort Law in the Civil Code

Japanese tort law is a part of the Civil Code.<sup>2</sup> The Civil Code consists of five parts: Part I - General Provisions, Part II – Real Rights, Part III - Claims, Part IV - Relatives, and Part V - Inheritance. Tort provisions are from Articles 709 to 724 of Part III of the Civil Code.<sup>3</sup> Given its historical background, Japanese tort law is strongly influenced by French and German laws.<sup>4</sup>

There are two basic premises of Japanese tort law: the Fault Liability Principle (i.e., a person without fault is not liable), and the Self-responsibility Principle (i.e., a person is not liable for another person's act). Article 709 provides the general rule of tort liability.<sup>5</sup> Under this provision, the plaintiff/victim bears the burden of proof that (i) a defendant/tortfeasor acted intentionally or negligently; (ii) the defendant infringed any right or legally protected interest of others, in other words, the defendant's act was wrongful; (iii) damage was sustained by the plaintiff; and (iv) there was a causal relationship between the defendant's act and the plaintiff's damage. The defendant is exempt from tort liability if s/he can prove that s/he mentally lacked the capacity to appreciate his/her liability for his/her own act while s/he inflicted the plaintiff's damages (Articles 712 and 713), or that his/her act is justifiable, such as self-defense. When multiple tortfeasors are involved, Article 719 applies.<sup>6</sup>

In complex tort cases, proving a causal relationship is difficult. The

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2. See MINPŌ, arts. 709–724 (Japan), *translated in* <http://www.cas.go.jp/jp/seisaku/hourei/data/CC1.pdf> (unofficial English translation of Parts I, II, and III) (last visited May 9, 2009), *and in* <http://www.cas.go.jp/jp/seisaku/hourei/data/CC4.pdf> (unofficial English translation of Parts IV and V) (last visited May 9, 2009).

3. See *id.*

4. See, e.g., Hisakazu Hirose, Some Thoughts on “Japanese” Contract Law, <http://www.kclc.or.jp/english/sympo/EUDialogue/hirose.htm> (last visited Mar. 10, 2009). However, Article 416 derives from the old case law in England. See *Hadley v. Baxendale*, (1854) 9 Ex. 341, 156 Eng. Rep. 145. Although Article 416 provides the scope of damages caused by a default such as a breach of contract, the Japanese court consistently applies this provision to tort cases. See *Osaka Shōsen Corp. v. Murakane Shōten Corp.*, 5 DAIHAN MINSHŪ 386 (Great Ct. Judicature, May 22, 1926).

5. See MINPŌ, art. 709 (“A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.”).

6. See *id.* art. 719, para. 1 (“If more than one person has inflicted damages on others by their joint tortious acts, each of them shall be jointly and severally liable to compensate for those damages. The same shall apply if it cannot be ascertained which of the joint tortfeasors inflicted the damages.”).

Japanese Supreme Court held that the standard of proof is “not a scientific standard that leaves no doubt, but a case of strong probability that a specific event caused a specific loss by considering all the evidence based on the rules of thumb.”<sup>7</sup> It also held that “strong probability” means that “a reasonable person is convinced of the conclusion to the extent s/he has no doubt.”<sup>8</sup> The standard is important in toxic tort cases involving non-specific diseases, such as asthma, where the causation issue presents a major barrier for plaintiffs. Courts admit epidemiological evidence in these cases.<sup>9</sup>

The primary remedy in torts is monetary damages.<sup>10</sup> The main purpose of tort liability is restitution; that is, to compensate a victim for his/her losses due to the tortfeasor’s act. Therefore, only compensatory damages are available for a plaintiff. It is generally agreed that this tort liability system has a deterrent effect on wrongful acts, and some commentators even say that it functions as a sanction;<sup>11</sup> however, Japanese courts do not permit punitive damages.<sup>12</sup> Nevertheless, it is true that courts generally consider the maliciousness of a tortfeasor’s act as one of the factors for assessing pain and suffering damages.

In case law, the loss claimed by a victim can be compensated if it had a relationship of “adequate causation” with the tortfeasor’s act.<sup>13</sup> This concept was adopted from German Law. The plaintiff has the burden of proof for the amount of damages, both pecuniary and non-pecuniary. Pecuniary damages are divided into both actual loss and anticipated loss. Actual loss includes medical expenses, hospital expenses, expenses for an attendant nurse, funeral expenses, property damages, attorney’s fees, etc. Anticipated loss is calculated based on the victim’s income. While these damages result from the wrongful act that already occurred, the wrongful act may continue and damage may result in the future, especially in pollution cases. However, courts do not allow a plaintiff to demand damages for future damage because the amount of damages cannot be fixed at the end of trial.<sup>14</sup> Non-pecuniary damages are so-called “pain and suffering” damages. In the cases involving many victims, the court allows the plaintiff to demand both pecuniary

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7. *Miura v. Japan*, 29 MINSHŪ 1417, 1419–20 (Sup. Ct., Oct. 24, 1975) (author’s translation).

8. *See id.* at 1420.

9. *See, e.g., Komatsu v. Kinzoku Kōgyō K.K.*, 674 HANJI 25 (Nagoya High Ct., Aug. 9, 1972).

10. *See* MINPŌ, art. 722, para. 1. There are some exceptions. For instance, in a defamation case, the court may order a person who defamed the victim to effect appropriate measures to restore the reputation of the victim in lieu of, or in addition to, damages.

11. *See, e.g., AKIO MORISHIMA, HUHŌKŌIHŌ KŌGI* [TORT LAW LECTURES] 474 (1987) (author’s translation).

12. *See, e.g., Yokozawa v. Japan*, 1044 HANJI 19 (Tokyo D. Ct., Feb. 1, 1982). *See also Northcon I v. Mansei Kōgyō Co.*, 51 MINSHŪ 2573 (Sup. Ct., July 11, 1997) (refusing to enforce the foreign judgment regarding punitive damages).

13. *See Osaka Shōsen Corp. v. Murakane Shōten Corp.*, 5 DAIHAN MINSHŪ 386 (Great Ct. Judicature, May 22, 1926).

14. *See, e.g., Japan v. Ueda*, 35 MINSHŪ 1369 (Sup. Ct., Dec. 16, 1981).

damages and non-pecuniary damages as an inclusive “pain and suffering damage.”<sup>15</sup> Such a calculation method is justified by the difficulty for victims in proving their itemized losses and the difference of each victim’s anticipated loss. When assessing the amount of damages, a court takes into account the victim’s fault.<sup>16</sup> In addition, the victim’s mental vulnerability<sup>17</sup> or pre-existing disease<sup>18</sup> can be considered as contributing factors to his/her damage; however, the eggshell-skull rule applies to his/her pre-existing physical condition.<sup>19</sup> Japan has its own collateral source rule. For instance, the victim’s life insurance is not deductible, while his/her non-life insurance is to be deducted due to double compensation. When a victim dies, his/her bereaved family inherits his/her right to demand compensation for damages. The parents, spouse, children<sup>20</sup> of the dead victim may demand their own non-pecuniary damages.<sup>21</sup>

There is a time limitation for tort litigation. A tort victim must bring his/her case into court within three years from the time when s/he comes to know of his/her damage and the identity of the tortfeasor.<sup>22</sup> The right to demand compensation for damages terminates when twenty years have elapsed from the time of the tort.<sup>23</sup>

## 2. The State Compensation Law

Sovereign immunity is not accepted under the Japanese Constitution. Under Japan’s State Compensation Law,<sup>24</sup> when a public official who is in a position to exercise public power has, in the course of performing his duties, illegally inflicted losses on another person intentionally or negligently, the State or a public entity is liable to compensate such losses.<sup>25</sup> When a defect in construction or maintenance of public property has inflicted losses on another

15. *See, e.g.*, Ono v. Shōwa Denkō K.K., 642 HANJI 96 (Niigata D. Ct., Sept. 29, 1971).

16. *See* MINPŌ, art. 722, para. 2 (Japan), *translated in* <http://www.cas.go.jp/jp/seisaku/hourei/data/CC1.pdf>.

17. *See* Matsuzaki v. Totsuka, 42 MINSHŪ 243 (Sup. Ct., Apr. 21, 1988).

18. *See* Takahashi v. Yasuda Fire & Marine Ins. Co., 46 MINSHŪ 400 (Sup. Ct., June 25, 1992).

19. *See* Fukakusa v. Kinoshita, 50 MINSHŪ 2474 (Sup. Ct., Oct. 29, 1996).

20. \**Cf.* Yamamoto v. Suzuki, 28 MINSHŪ 2040 (Sup. Ct. Dec. 17, 1974) (allowing the victim’s sister-in-law to demand her own non-pecuniary damages, where the victim foster-mothered her sister-in-law).

21. *See* MINPŌ, art. 711; *cf.* Watanabe v. Motohashi, 12 MINSHŪ 1901 (Sup. Ct., Aug. 5, 1958) (allowing the victim’s mother to demand her own non-pecuniary damages, where the victim suffered a severe injury equal to death).

22. *See* MINPŌ, art. 724.

23. *See id.*

24. Kokka baishō hō, Law No. 125 of 1947 (Japan).

25. *See id.* art. 1, para. 1.

person, the State or a public entity is liable to compensate such losses.<sup>26</sup>

### 3. No-fault Liability Provisions in Pollution Control Laws

The court has recognized that fault means that a defendant breached his/her duty to avoid the undesirable result which s/he has foreseen or should have foreseen. In pollution cases, the court generally heightens the standard of due care owed by a defendant company; therefore, it is considered to be negligent whenever pollution occurs.

In 1972, a strict liability scheme was introduced into the Air Pollution Control Law<sup>27</sup> and the Water Pollution Control Law.<sup>28</sup> Under these provisions, whenever any air pollutant or water pollutant injured human life or health, the person who released such pollutant shall be liable to compensate any damages resulting in consequence. A plaintiff is not required to prove that a defendant acted intentionally or negligently.

### 4. Injunction

In some cases, monetary damages are not enough for a person who is infringed or likely to be infringed of his/her right or legally protected interest. There is no explicit provision in the Civil Code to allow a tort victim to seek injunctive relief; however, the court may issue an injunction if the degree of infringement exceeds the maximum permissible limit (*junin-gendo*). When the court applies these standards, it considers several factors, such as the nature and content of the injury, the content and degree of the public need brought about by the infringement, the complementary relationship of benefits and burdens for victims, and the content of measures for preventing injury.<sup>29</sup> The legal grounds for injunction are real rights or personal rights (*jinkaku-ken*).<sup>30</sup> Personal rights are derived from Articles 11 and 13 of the Constitution.<sup>31</sup>

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26. *See id.* art. 2, para. 1.

27. *See* Taiki osen bōshi hō, Law No. 97 of 1968, art. 25 (Japan).

28. *See* Suishitsu odaku bōshi hō, Law No. 138 of 1970, art. 19 (Japan).

29. *See* Maki v. Japan, 49 MINSHŪ 2599 (Sup. Ct., July, 7, 1995).

30. For a description of personal rights, see Ueda v. Japan, 35 MINSHŪ 1881 (Osaka High Ct., Nov. 27, 1975), *translated in* JULIAN GRESSER ET AL., ENVIRONMENTAL LAW IN JAPAN 188 (1981) (“Personal rights are a composite of fundamental interests which relate to the physical as well as the mental well-being of individuals. No one can be permitted to infringe on such personal rights, and everyone has the power to act against any infringement of such rights.”).

31. *See* KENPŌ, arts. 11, 13 (Japan), *translated in* [http://www.kantei.go.jp/foreign/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html) (last visited May 9, 2009).

## **B. Dispute Resolution System for Complex Tort Cases**

### 1. Civil Justice System

Japan has a unitary justice system which is divided into three tiers: the Supreme Court, the High Courts, and courts of first instances (district courts, family courts, and summary courts).<sup>32</sup> A jury system for civil cases has never been adopted in Japan.<sup>33</sup>

There is no class action system in Japan. Instead, the Code of Civil Procedure<sup>34</sup> allows three measures for multiple parties and/or claims.<sup>35</sup> First, multiple claims may be consolidated if they are through the same kind of court proceeding.<sup>36</sup> Second, multiple parties may sue or be sued as joint litigants, if their rights or obligations are common, they are based on the same factual or legal cause, or they are of the same kind and based on the same kind of causes in fact or by law.<sup>37</sup> Third, a group with a common interest may appoint more than one person to be a plaintiff or defendant from the group to conduct litigation.<sup>38</sup> Moreover, non-parties who have a common interest with the parties in pending litigation cases may appoint the existing plaintiff or defendant to be their appointed party.<sup>39</sup>

Litigation, in general, has been criticized because it is time-consuming, let alone in complex tort lawsuits. The Study Council for the Acceleration of Court Proceeding<sup>40</sup> examined all civil litigation cases, including tort litigation

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32. See CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 111–112 (2003) (noting that the Supreme Court of Japan is composed of 15 Justices. It renders decisions from either the Grand Bench of all Justices or three petty benches of five Justices. The Grand Bench adjudicates constitutional issues).

33. See *id.* at 113. Japan adopted a lay judge system for certain criminal cases under the Lay Judge Act. See Saiban'in no sankasuru keiji saiban ni kansuru hōritsu, Law No. 63 of 2004 (Japan). Before World War II, Japan had a jury system for certain criminal cases pursuant to the Jury Act. See Baishin hō, Law No. 50 of 1923 (Japan). However, the Jury Act has been suspended by the Act Concerning the Suspension of the Jury Act. See Baishin hō no teishi ni kansuru hōritsu, Law No. 88 of 1943 (Japan).

34. MINSOHŌ, Law No. 109 of 1996 (Japan), translated in <http://www.cas.go.jp/jp/seisaku/hourei/data/ccp.pdf> (last visited May 9, 2009).

35. See *id.* arts. 30, 38, 136. In addition, Japan introduced a new system for consumer group action by the Law for the Partial Amendment to the Consumer Contract Act. See Shōhisha keiyakuhō no ichibu wo kaiseisuru hōritsu, Law No. 56 of 2006 (Japan). In this capacity, a consumer group certified by the Prime Minister may demand an injunction against a business operator for its unconscionable contract. See *id.*

36. See MINSOHŌ, art. 136.

37. See *id.* art. 38.

38. See *id.* art. 30, para. 1.

39. See *id.* art. 30, para. 3.

40. It was established under the Trial Facilitation Law. See Saiban no jinsokuka ni kansuru hōritsu, Law No. 107 of 2003 (Japan).

cases in the first instance, which terminated from April 1 to December 31, 2004. According to its report, the average duration of court deliberation is 20.8 months for pollution lawsuits demanding damages and 32.9 months for pollution lawsuits demanding injunction, compared to 8.2 months overall for the civil cases generally.<sup>41</sup>

Finally, there are monetary difficulties for victims in filing lawsuits in complex tort cases. In such cases, transaction costs may exceed the victim's compensation amount, even though plaintiffs' attorneys work on pro bono basis. In addition, it should be noted that a contingent fee system is generally not available in Japan.<sup>42</sup>

## 2. Environmental Dispute Coordination System

In 1970, the Environmental Disputes Settlement Law was enacted in order to settle environmental disputes quickly and justly. The law established the Environmental Dispute Coordination Commission at the national level and pollution examination organizations in each prefecture. The Environmental Dispute Coordination Commission conducts conciliation, mediation, and arbitration in relation to serious pollution cases incurring severe injuries, nationwide pollution cases, and inter-prefectural pollution cases. It also conducts the cause-effect adjudication and the damages-responsibility adjudication. The main benefit of using the environmental dispute coordination system is that it is made available at a lower cost than litigation proceedings.<sup>43</sup>

## C. Other Compensation Systems

### 1. Liability Insurance Systems

A tort victim cannot receive any monetary relief if the tortfeasor has no financial resources. Nevertheless, a third-party liability insurance system has been

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41. See SAIKŌSAIB ANSHO JIMUSŌKYOKU [GEN. SECRETARIAT OF THE SUPREME COURT], SAIBAN NO JINSOKUKA NI KAKARU KENSHŌ NI KANSURU HŌKOKUSHO [REPORT ON THE EXAMINATION OF THE ACCELERATION OF COURT PROCEEDING] 19, 23 (2005) (author's translation), *available at* [http://www.courts.go.jp/about/old\\_siryō/saiban/jinsoku/kentou/11/hokokusyo.html](http://www.courts.go.jp/about/old_siryō/saiban/jinsoku/kentou/11/hokokusyo.html) (last visited May 6, 2009).

42. See GOODMAN, *supra* note 32, at 241. Some law firms adopt a contingency fee system for certain types of cases, such as borrower lawsuits against consumer finance companies over excessive interest charges.

43. The application fee is smaller than the filing fee for litigation. Moreover, the Commission and prefectural organizations cover the substantial part of their proceeding cost.

introduced for certain types of accidents, such as automobile accidents or workers' accidents. For instance, the automobile third-party insurance is compulsory for all automobile owners.<sup>44</sup> It covers damages for personal injury, up to 30 million yen; therefore, automobile accidents incurring property damage or personal damage beyond the cap are still governed by the tort liability system.

## 2. Administrative Compensation Systems

The difficulties in complex tort cases make it difficult for victims to use the justice system. Japan has adopted several administrative compensation systems for certain types of victims. Such systems include the Pollution-Related Health Damage Compensation System (1969), the Relief System for Injury to Health with Vaccination (1970), the Relief System for Sufferers from Adverse Drug Reactions (1979), the Relief System for Sufferers from Infections Arising from Biological Products (2004), the Relief System for Injury to Health Caused by Blood Donation (2006), and the Asbestos-related Health Damage Relief Program (2006).

### **III. THE POLLUTION-RELATED HEALTH DAMAGE COMPENSATION SYSTEM**

#### **A. Brief History of Environmental Pollution in Japan**

In the early Twentieth Century, the Japanese government strongly encouraged industrial development. People in rural areas were affected by the copper refining industry, resulting in significant damage to local residents and their agricultural resources. People in urban areas suffered from air pollution caused by factories.

After the end of World War II, the government made economic reconstruction the first priority. It redeveloped old industrial areas and started to construct petrochemical complexes in several coastal zones. By 1955, Japan reached its pre-war economic level and entered an era of high economic growth (1955-1973).

In the 1960s, serious environmental pollutants were growing concerns in Japan: cadmium poisoning from mining pollution (*Itai-itai* disease) in Toyama Prefecture, mercury poisoning from industrial wastewater (Minamata disease) in Kumamoto and Niigata Prefectures, and asthma and bronchitis from industrial air pollution (Yokkaichi asthma).<sup>45</sup> These major pollution cases went to trial in early

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44. See *Jidōsha songai baishō hoshō hō* [Law Regarding Insurance for Automobiles], Law No. 97 of 1955 (Japan).

45. Around the same time, Japan suffered food pollution cases, such as the Morinaga



1970. Furthermore, people in urban areas, such as Tokyo and Osaka, also had serious respiratory problems due to air pollution caused by industrial plants or automobiles. The demands increased for an administrative compensation system which would give fair and prompt relief to pollution victims.

## **B. Two Key Lawsuits Leading to the Pollution-Related Health Damage Compensation System**

### **1. Yokkaichi Air Pollution Lawsuit**

Yokkaichi is an industrial city located in Mie Prefecture, in western Japan. In 1955, a cabinet meeting approved transfer of an abandoned old naval site in Yokkaichi City to private companies. Showa Sekiyu Co. Ltd. and Mitsubishi Group then developed the Yokkaichi First Complex on the site. Soon after the complex went into full-scale operation in 1959, residents living in the vicinity of the complex began to suffer respiratory problems. The number of asthma patients rapidly increased after the Yokkaichi Second Complex started operation. In 1963, the government dispatched a research group to Yokkaichi. The team investigated the source and effect of air pollution in Yokkaichi and submitted its report to the National Diet of Japan in 1964.

Beginning in May 1965, Yokkaichi City started to offer a healthcare program in order to provide prompt relief for officially certified patients of air pollution-related diseases. It was the first of its kind in Japan. The number of patients increased so rapidly that the city could not afford the entire cost. Subsequently, the Law Concerning Special Measures for the Relief of Pollution-Related Health Damage<sup>46</sup> was promulgated in 1969 for the purpose of setting up a fund for both air pollution victims and water pollution victims. It was against the “polluter-pays principle”<sup>47</sup>—its funding was split between industry and government—and certified patients received compensation for medical care only. Since February, 1970, 464 certified patients have been covered under the fund.<sup>48</sup>

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Arsenic Dry Milk Poisoning Case and the Kanemi Oil Poisoning Case, as well as drug-induced diseases, such as the Clioquinol SMON Case and the Thalidomide Case. *See generally* INDUSTRIAL POLLUTION IN JAPAN (Jun Ui ed., 1992).

46. Kogai ni kakaru kenkō higai no kyusai ni kansuru tokubetsu sochi hō, Law No. 90 of 1969 (Japan).

47. *See* Vito De Lucia, Polluter Pays Principle, *The Encyclopedia of Earth*, [http://www.eoearth.org/article/Polluter\\_pays\\_principle](http://www.eoearth.org/article/Polluter_pays_principle) (last visited Mar. 13, 2009). The Council of Organization for Economic Co-operation and Development (OECD) adopted the polluter-pays principle as a general principle in 1972. It is the principle according to which the polluter should bear the cost of measures to reduce pollution according to the extent of either the damage done to society or exceeding of an acceptable level of pollution. *See id.*

48. *See* YOKKAICHI-SHI NO KANKYŌ HOZEN [ENVIRONMENTAL CONSERVATION IN YOKKAICHI CITY] 114 (2008) (author’s translation), *available at*

On September 1, 1967, nine asthma patients in Yokkaichi filed lawsuits in the Yokkaichi Branch of the Tsu District Court. Plaintiffs sought damages from six oil chemical plants (Ishihara Sangyo Co., Chubu Electric Power Co., Showa Yokkaichi Oil, Mitsubishi Petrochemical Co., Mitsubishi Kasei Corp., and Mitsubishi Monsanto Co.) in the Yokkaichi First Complex. In order to increase the probability of success and to prevent prolongation of litigation, the plaintiffs' lawyers decided to sue only private companies and not to pursue an injunction claim. The main issue was whether respiratory problems suffered by plaintiffs were caused by sulfur dioxide (SO<sub>2</sub>) emitted by defendants.

On July 24, 1972, the Yokkaichi Branch of Tsu District Court rendered a decision in favor of the plaintiffs.<sup>49</sup> The court admitted the plaintiffs' epidemiologic approach to proving a causal relationship between air pollution and the high prevalence of asthma. It held all defendants liable jointly and severally for compensatory damages totaling 86 million yen sustained by the plaintiffs. The defendants did not appeal. One hundred and forty patients negotiated and concluded a compensation agreement with the defendants.

In addition, the Yokkaichi ruling has been highly praised in at least two respects. First, the court adopted the concept of total emission control. It concluded that defendants should not have emitted more than 0.1 parts-per-million (ppm) of sulfur oxide (SO<sub>x</sub>), based on studies on air pollution or occupational disease cases caused by SO<sub>x</sub> smoke, epidemiological data, and Japan Public Health Association's report. In 1974, the Air Pollution Control Law was amended again. It adopted total emission regulation for SO<sub>2</sub>, wherein if industrial facilities are concentrated in an area and it is recognized that it is difficult to attain the air quality standard<sup>50</sup> solely with the K value regulation, the prefectural governor in the area is required to formulate a total emission reduction plan and to set the total emission control standard based on this plan.<sup>51</sup> From 1974 to 1976, 24 areas

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<http://www.city.yokkaichi.mie.jp/kankyo/H20/p06.pdf>. (last visited May 9, 2009); From May 1965 to January 1970, 786 victims applied, and 732 were certified. *See id.*

49. *See Shiono v. Shōwa Yokkaichi Sekiyu*, 672 HANJI 30 (Tsu D. Ct., Yokkaichi Branch, July 24, 1972).

50. In 1967, the Diet enacted the Basic Law for Environmental Pollution Control. *See* Apec Virtual Center for Environmental Technology Exchange, Enactment of the Basic Law for Environmental Pollution Control, [http://www.epcc.pref.osaka.jp/apec/eng/history/page/sogo\\_01.html](http://www.epcc.pref.osaka.jp/apec/eng/history/page/sogo_01.html) (last visited Mar. 13, 2009). The Basic Law for Environmental Pollution Control defined environmental quality standards to be "standards for the environment recommended for protection of human health and preservation of the living environment." *See id.*; *see also* Kōgai taisaku kihon hō [Basic Law for Environmental Pollution Control], Law No. 132 of 1967 (Japan). Currently, there are ten environmental quality standards for air pollutants: sulfur dioxide (SO<sub>2</sub>), carbon monoxide (CO), suspended particulate matter (SPM), nitrogen dioxide (NO<sub>2</sub>), photochemical oxidants, benzene, trichloroethylene, tetrachloroethylene, dichloromethane, and dioxins. *See* Ministry of the Env't: Gov't of Japan, Environmental Quality Standards in Japan – Air Quality, <http://www.env.go.jp/en/air/aq/aq.html> (last visited Mar. 23, 2009).

51. *See* Taiki osen bōshi hō [Air Pollution Control Law], Law No. 97 of 1968, art. 5-

became subject to total emission control. Second, it advocated the importance of environmental impact assessment. It emphasized that a company should comprehensively research the environmental impact of its operations, and it also should site its facility so as not to harm nearby residents. In response to severe industrial pollution all over the country, the idea of environmental impact assessment gradually became common. In June 1972, a cabinet meeting decided that each ministry would conduct environmental impact assessment for public works.<sup>52</sup> The Yokkaichi decision bolstered this trend. A basic plan of economic society, approved by a cabinet meeting in February 1973, required industrial developers and urban developers to conduct sufficient environmental impact assessments. In the same year, an environmental impact assessment process was incorporated into several laws.<sup>53</sup>

## 2. The First Kumamoto Minamata Disease Lawsuit

Minamata disease is a neurological disorder caused by methylmercury poisoning. The victims, mostly subsistence fishermen, consumed a lot of fish contaminated by methylmercury compounds discharged into seas and rivers from Chisso Co. The first patient with Minamata disease was officially discovered at Minamata City in Kumamoto Prefecture on May 1, 1956. At the end of the year, the toll of victims reached 52, 17 of whom died. The ensuing investigation revealed that there were victims as early as 1942. This fact is not surprising because Chisso had discharged effluents containing methylmercury into Minamata Bay, which is a part of the Shiranui Sea, since 1932.

A group of Minamata disease victims organized the Minamata Strange Disease Victims' Mutual Aid Society (later renamed as the Minamata Patients' and Families' Mutual Aid Society) to seek compensation from Chisso on August 1, 1957. Suffering from disease, dire poverty, and social pressures, the Society accepted the solatium agreement with Chisso on December 30, 1959.<sup>54</sup> Under the

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2, para. 1 (Japan). Since 1984, the emission of NO<sub>2</sub> is also regulated by the total emission control standards. See KANKYŌSHŌ [MINISTRY OF THE ENV'T], CHISSOSANKA-BUTSU NI KAKARU SŌRYŌ KISEI SEIDO NO DŌNYŪ NI TSUITE [MEMORANDUM ON INTRODUCTION OF TOTAL EMISSION CONTROL OF NITROGEN OXIDE] (NOV. 12, 1981) (author's translation), available at <http://www.env.go.jp/hourei/syousai.php?id=4000113> (last visited May 6, 2009).

52. See TADASHI OTSUKA, KANKYŌHŌ [ENVIRONMENTAL LAW] 221 (2d ed. 2006) (author's translation).

53. See Setonaikai kankyō hozon tokubetsu sochi hō [Temporary Measures Law for Environmental Conservation of the Seto Inland Sea], Law No. 110 of 1973 (Japan); Kōwan hō [Harbor Law], Law No. 218 of 1950 (Japan); Kōyō suimen umetate hō [Public Water Body Reclamation Law], Law No. 57 of 1921 (Japan).

54. It provided 300,000 yen for death, annual payments of 100,000 yen for adults, 30,000 yen for minors, and 20,000 yen for funeral expenses (which were extremely small

agreement, only certified patients were eligible to receive the payments from Chisso. As Chisso refused to accept the opinion of doctors in private hospitals, the Ministry of Health and Welfare (MHL, currently the Ministry of Health, Labor and Welfare) established the Screening Council for Minamata Disease Patients. After the Law Concerning Special Measures for the Relief of Pollution-Related Health Damage was enacted on December 15, 1969, Kumamoto and Kagoshima Prefectures established pollution-related health damage certification councils, respectively.

After the official recognition, on September 26, 1968, that Minamata disease was a pollution-related disease, the Mutual Aid Society restarted negotiations with Chisso. In order to establish the Minamata Disease Compensation Processing Committee, the MHL requested victims to sign a pledge form granting the MHL discretionary power concerning the appointment of committee members. This caused the Mutual Aid Society to split off on April 5, 1969. The majority (the Entrustment Group) accepted the offer and entrusted everything regarding the negotiation to the MHL. Some victims (the Litigation Group) rejected the offer and decided to bring a lawsuit against Chisso. Some victims (the Direct Negotiation Group) also rejected the offer and decided to negotiate directly with Chisso.

On June 14, 1969, 138 victims from 30 families brought cases for damages against Chisso to the Kumamoto District Court (the First Minamata Disease Lawsuit). There were several important issues: (1) causation, (2) the defendant's negligence, (3) the validity of the solatium agreement of December 1959, (4) statute of limitations, and (5) damages.

On March 20, 1973, the court decided in favor of the plaintiffs.<sup>55</sup> The amounts of individual damages were 16 million yen, 17 million yen, or 18 million yen depending on the severity of the injury. Although such amounts were not sufficient to redress victims' medical conditions and grievances, they were the largest awards in history. Chisso did not appeal.

After the decision, three victims groups began negotiation for a new compensation agreement with Chisso from a position of strength. The new agreement was finally reached on July 9, 1973.<sup>56</sup> Chisso agreed to pay all

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amounts, even in 1959). Chisso also took advantage of the Mutual Aid Society by including exemption clauses in the agreement. *See* GRESSER ET AL., *supra* note 30, at 103–105. It was later revealed that Chisso already knew that their factory effluents were the cause of Minamata disease by their own investigation at the time of signing the agreement. In the First Minamata Disease Lawsuit, the Kumamoto District Court held that the solatium agreement was invalid because it offended public order and morals. *See* Watanabe v. Chisso K.K., 696 HANJI 15 (Kumamoto D. Ct., Mar. 20, 1973), *partially translated in* GRESSER ET AL., *supra* note 30, at 86, 94–95, 101–102; *see generally* MINPŌ, art. 90 (Japan).

55. *See* Watanabe, 696 HANJI 15, *partially translated in* GRESSER ET AL., *supra* note 30, at 86, 101–102.

56. *See* MAKOTO SHIMIZU ET AL., MINAMATABYŌ SAIBAN ZENSHI [COMPLETE HISTORY

certified patients under the pollution-related health damage compensation system a lump sum payment equivalent to the damages awarded by the Kumamoto District Court decision (16 million yen, 17 million yen, or 18 million yen) and pensions from 20,000 yen to 60,000 yen per month depending on the severity of the injury. Chisso also agreed to establish the medical fund of 300 million yen.<sup>57</sup>

### **C. The Enactment of the Pollution-Related Health Damage Compensation Law**

In October 1973, the Pollution-Related Health Damage Compensation Law<sup>58</sup> superseded the Law concerning Special Measures for the Relief of Pollution-related Health Damage. This law designates two types of areas: Class I areas are where severe air pollution occurs and many people suffer from respiratory disease (non-specific disease), and Class II areas are where many people suffer from mercury poisoning, cadmium poisoning, and arsenic poisoning (specific disease) causally related to industrial or mining waste. Under this law, the compensation system is administered by each prefectural government. Administrative costs are split between the State and the prefectural government. Because certification is a highly technical task, prefectural governors establish municipal health damage certification councils as consultative bodies. Regarding Class I areas, the governor certifies a person within his/her jurisdiction as a pollution patient if s/he suffers from respiratory disease and has lived or worked for a certain period in that area. Regarding Class II areas, the person suffering from specific poisoning needs to establish causation between his/her symptoms and the pollutant in order to be certified as a pollution patient. The certified pollution patient is eligible to receive medical care, medical expenses and allowance, and a disability pension, while his/her family is eligible to receive a pension for rearing children with disabilities; and if the certified patient dies, the bereaved family is eligible to receive funeral expenses, a lump-sum benefit for survivors, and a survivors' pension. The funding complies with the polluter-pays principle, because the law was intended to provide prompt and "just" compensation for pollution victims. Regarding the fund for non-specific disease in Class I areas, 80 percent is raised from industrial levies, and 20 percent is raised from automobile tonnage tax. Regarding the fund for specific poisoning in Class II areas, responsible companies are required to pay in full.

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OF MINAMATA DISEASE LAWSUITS] 120–23 (1998) (author's translation).

57. See MINAMATA CITY, MINAMATA DISEASE: ITS HISTORY AND LESSONS (2000), available at <http://www7.ocn.ne.jp/~mimuseum/nenpyou.html> (last visited May 6, 2009). As of April 2000, the endowment principal was seven billion yen. See *id.*

58. Kōgai kenkō higai no hoshō tō ni kansuru hōritsu, Law No. 111 of 1973 (Japan).

#### IV. TORT LITIGATION AS RESTORATION TOOL FOR THE POLLUTION COMPENSATION SYSTEM

##### A. The Failure of the Pollution-Related Health Damage Compensation System

###### 1. Dysfunction of the Minamata Disease Certification Procedure

The success of an administrative compensation system hinges on fair and prompt certification procedure. After Chisso was found to be legally responsible for Minamata disease in the Kumamoto District Court (the First Minamata Disease Lawsuit) in March 1973, however, the number of applications for certification soared and the certification procedures were delayed.<sup>59</sup>

59. See Minamatabyō Sentā Sōshisha [Minamata Disease Ctr. Soshisha], Minamatabyō Nintei Shinsa Kanren Tōkei Shiryō: Kumamotoken [Statistical Data Concerning Minamata Disease Certifications: Kumamoto Prefecture] (author's translation), <http://www.soshisha.org/kanja/toukei.htm> (last visited Mar. 20, 2009). For instance, records for applications in Kumamoto Prefecture reflect the following:

Number of Minamata Disease Patients Certified by Kumamoto Prefecture

| Year        | Certified | Rejected | Pending | Year | Certified | Rejected | Pending |
|-------------|-----------|----------|---------|------|-----------|----------|---------|
| Before 1969 | 44        | 0        | 0       | 1989 | 6         | 722      | 2191    |
| 1970        | 72        | 2        | 28      | 1990 | 3         | 505      | 1884    |
| 1971        | 58        | 1        | 136     | 1991 | 6         | 463      | 1710    |
| 1972        | 154       | 10       | 411     | 1992 | 1         | 350      | 1577    |
| 1973        | 298       | 40       | 1968    | 1993 | 1         | 404      | 1310    |
| 1974        | 73        | 22       | 2628    | 1994 | 1         | 623      | 800     |
| 1975        | 128       | 24       | 2949    | 1995 | 1         | 520      | 485     |
| 1976        | 104       | 84       | 3360    | 1996 | 0         | 331      | 218     |
| 1977        | 180       | 98       | 4171    | 1997 | 0         | 173      | 55      |
| 1978        | 143       | 296      | 4695    | 1998 | 0         | 39       | 30      |
| 1979        | 117       | 601      | 4666    | 1999 | 1         | 18       | 39      |
| 1980        | 51        | 800      | 4416    | 2000 | 0         | 11       | 35      |
| 1981        | 61        | 733      | 4036    | 2001 | 0         | 11       | 41      |
| 1982        | 65        | 353      | 3950    | 2002 | 0         | 15       | 22      |
| 1983        | 64        | 303      | 4130    | 2003 | 0         | 24       | 17      |
| 1984        | 41        | 392      | 4221    | 2004 | 0         | 3        | 239     |
| 1985        | 33        | 517      | 4213    | 2005 | 0         | 0        | 3468    |

Due to the burden of compensation, Chisso suffered financial crisis and sought financial support from Kumamoto Prefecture and the State. In 1977, the Environmental Agency (currently the Ministry of the Environment) published “The Criteria for Judging Post-Natal Minamata Disease” (the 1977 Criteria),<sup>60</sup> which replaced the criteria described in “The Certification Under the Law Concerning Special Measures for the Relief of Pollution-Related Health Damage” published in 1971 (the 1971 Criteria).<sup>61</sup> Typically, mercury poisoning causes Hunter-Russell Syndrome, which was a combination of ataxia, concentric construction of the visual field, and speech impediment. Under the 1971 Criteria, if a victim has one of these symptoms, s/he can be certified as a Minamata disease patient. However, the 1977 Criteria required a victim to have a plurality of symptoms to be certified. Victims argue that the 1977 Criteria were adopted to cap the number of certified patients considering Chisso’s financial ability. Since 1978, the number of those rejected has exceeded the number of those certified. Similarly, the Kumamoto Prefecture began to support Chisso to prevent it from going bankrupt beginning 1978, as did the State starting in 2000.

## 2. Removal of the Class I Designation

The first oil crisis hit Japan in October 1973. Japan set back efforts for environmental protection to help its stagnant economy recover.<sup>62</sup> Beginning in 1976, the Japan Federation of Economic Organizations officially began to ask the government to review the pollution-related health damage compensation system.<sup>63</sup> In 1983, the Environmental Agency consulted the Central Council for Environmental Pollution Control to review the system.<sup>64</sup> In 1986, the council recommended removal of the Class I designation, based on its conclusion that air

|      |    |      |      |      |   |   |      |
|------|----|------|------|------|---|---|------|
| 1986 | 41 | 725  | 3926 | 2006 | 0 | 0 | 3315 |
| 1987 | 18 | 1408 | 3144 | 2007 | 1 | 0 | 3717 |
| 1988 | 7  | 768  | 2719 | 2008 | 0 | 0 | 3730 |

*See id.*

60. *See* MAKOTO SHIMIZU ET AL., MINAMATABYŌ SAIBAN ZENSHI [COMPLETE HISTORY OF MINAMATA DISEASE LAWSUITS] 89–90 (3d ed. 2000) (author’s translation).

61. *See id.* at 87–88.

62. *See* Kankyōshō [Ministry of the Env’t], Nisankachisso ni kakaru Kankyō Kijun ni tsuite [Environmental Quality Standard for Nitrogen Dioxide] (July 11, 1998) (author’s translation), <http://www.env.go.jp/hourei/syousai.php?id=4000012> (last visited May 9, 2009). In July 1978, the Environmental Agency relaxed the air quality standard for NO<sub>2</sub>. Under the new standard, the daily average for hourly values was set within the 0.04-0.06 ppm zone or below that zone. *See id.* It was more than twice as lax as before.

63. *See* KEN’ICHI MIYAMOTO, NIHON NO KŌGAI [POLLUTION IN JAPAN] 197–198 (1996) (author’s translation).

64. *See id.* at 198.

pollution had not been the primary cause for asthma in recent years.<sup>65</sup> Following the recommendation, the Pollution-Related Health Damage Compensation Law was amended on September 18, 1987.<sup>66</sup> At that time, 41 areas were designated as Class I areas. The amendment led to the removal of the entire Class I designation. While then-certified pollution patients up to that time continued to receive compensation, no more victims were certified as Class I patients from the date of its implementation, March 1, 1988.<sup>67</sup>

## **B. Minamata Disease Litigations**

### **1. Seeking Judicial Recognition as a Minamata Disease Patient**

On January 20, 1973, 141 uncertified victims from 38 families brought cases demanding damages against Chisso to the Kumamoto District Court (the Second Minamata Disease Lawsuit). One of the issues in this litigation was to

65. See TSUMORU USHIYAMA, GENDAI NO KŌGAI HŌ [MODERN POLLUTION LAW] 223 (2d ed. 1991) (author's translation).

66. The title was also changed to the Law on Compensation for Pollution-Related Health Damage. See Kōgai kenkō higai hoshō hō, Law No. 97 of 1987 (Japan).

67. The number of certified pollution patients in former Class I areas has been decreasing:

Changes in Certified Pollution Patients in Former Class I Areas

| Year+ | Patients | Year | Patients | Year | Patients |
|-------|----------|------|----------|------|----------|
| 1976  | 53414    | 1987 | 105027   | 1998 | 65015    |
| 1977  | 63654    | 1988 | 107207   | 1999 | 62054    |
| 1978  | 72789    | 1989 | 101258   | 2000 | 59415    |
| 1979  | 77493    | 1990 | 95462    | 2001 | 57138    |
| 1980  | 79936    | 1991 | 90591    | 2002 | 54819    |
| 1981  | 83211    | 1992 | 86052    | 2003 | 53024    |
| 1982  | 86575    | 1993 | 81451    | 2004 | 50904    |
| 1983  | 89053    | 1994 | 77642    | 2005 | 48945    |
| 1984  | 92350    | 1995 | 74195    | 2006 | 47193    |
| 1985  | 95391    | 1996 | 70414    | 2007 | 45739    |
| 1986  | 98694    | 1997 | 67602    |      |          |

See KANKYŌSHŌ [MINISTRY OF THE ENV'T], KANKYŌ TŌKEISHYŪ [ENVIRONMENTAL STATISTICS] (2008) (author's translation), available at <http://www.env.go.jp/doc/toukei/index.html> (last visited May 6, 2009) (data gathered in March).



clarify the criteria of Minamata disease. Most of the plaintiffs became certified during the trial and voluntarily withdrew their cases. On March 28, 1979, the court held that 10 out of 12 uncertified victims were Minamata disease patients.<sup>68</sup> Both defendant and plaintiffs appealed to the Fukuoka High Court. On August 16, 1985, the court again held in favor of the plaintiffs-appellants, declaring that the combination of symptoms was too narrow as criteria for Minamata disease.<sup>69</sup> However, the Environmental Agency did not revoke the 1977 Criteria.

## 2. Pursuing Administrative Responsibilities for Minamata Disease

On May 21, 1980, uncertified victims filed lawsuits for demanding damages against Chisso, the State, and Kumamoto Prefecture to the Kumamoto District Court (the Third Minamata Disease Lawsuit). This was the first lawsuit pursuing the State and prefectural governments' responsibilities regarding Minamata disease. This lawsuit was split into two before the trial. On March 30, 1987, the court held in favor of the first group of victims that the State and Kumamoto Prefecture were liable,<sup>70</sup> and on March 25, 1993, the court also held in favor of the second group of victims that the State and Kumamoto Prefecture were liable.<sup>71</sup>

Many victims had made their living by fishing. After Chisso polluted Minamata Bay, some of them moved to other places. Victims who lived in Osaka, Tokyo, Kyoto, and Fukuoka filed lawsuits for compensation against Chisso (and its subsidiaries), the State, and Kumamoto Prefecture. These plaintiffs commonly claimed that the State and Kumamoto Prefecture failed to exercise their authority to prevent the spread of Minamata disease, and challenged the reasonableness of the 1977 Criteria. On September 28, 1990, the Tokyo District Court recommended settlement to the parties of the Tokyo Lawsuit. Later, the Kyoto District Court, the Osaka District Court and the Fukuoka High Court recommended settlement for each pending lawsuit. However, the State and Kumamoto Prefecture declined their offer, respectively.

## 3. Political Solution

On September 28, 1995, the three ruling parties (the Liberal Democratic Party, the Japan Socialist Party, and the New Party Sakigake) proposed the final plan regarding the issues of the uncertified victims. The proposal was later called

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68. See *Morieda v. Chisso*, 927 HANJI 15 (Kumamoto D. Ct., Mar. 28, 1979).

69. See *Takemoto v. Chisso*, 1163 HANJI 11 (Fukuoka High Ct., Aug. 16, 1985).

70. See *Honda v. Japan*, 1235 HANJI 3 (Kumamoto D. Ct., Mar. 30, 1987).

71. See *Tanoue v. Japan*, 1455 HANJI 3 (Kumamoto D. Ct., Mar. 25, 1993).

the Comprehensive Minamata Disease Medical Care Project. The contents of proposal were as follows:

- The State and Kumamoto Prefecture must officially apologize to victims.
- The victims must voluntarily withdraw their cases.
- Uncertified victims must withdraw their applications for certification.
- Uncertified victims will not be certified under this plan.
- Each uncertified victim suffering paralysis of the limbs will receive a lump sum payment of 2.6 million yen.
- Other uncertified victims will receive acupuncture and moxibustion treatment.
- Victims groups will receive additional cash benefit.

All parties, except the Kansai Group in Osaka, accepted this proposal, and the Cabinet approved this proposal on December 15. The Prime Minister expressed his regret, but did not admit administrative responsibility for Minamata disease. All the pending lawsuits, except the Kansai Lawsuit, were settled in May 1996.

From January to July 1996, 11,152 victims received medical notebooks and 1,222 victims received health notebooks under the Project.<sup>72</sup> A medical notebook holder receives a recuperation allowance for medical treatment expenses and surgical operation recuperation expenses for acupuncture and moxibustion. A health notebook holder receives surgical operation recuperation expenses associated with acupuncture and moxibustion.

#### 4. The Supreme Court Decision on the Kansai Lawsuit and Its Impact

On October 15, 2004, the Second Petty Bench of the Supreme Court delivered its decision.<sup>73</sup> It was the first Supreme Court decision on the issue of the State and the Kumamoto Prefecture's responsibilities regarding Minamata disease.<sup>74</sup> The Opinion of the Court stated that the State and the Kumamoto

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72. The Ministry of the Environment extended this Project on April 7, 2005. It is because, as later explained, the applications for certification increased drastically after the Supreme Court found the 1977 Criteria was inappropriate. See KANKYŌSHŌ [MINISTRY OF THE ENV'T], KONGO NO MINAMATABYŌ TAISAKU NITSUITE [FUTURE MEASURES AGAINST MINAMATA DISEASE] (Apr. 7, 2005) (author's translation), available at <http://www.env.go.jp/chemi/minamata/taisaku050407.pdf> (last visited May 9, 2009).

73. See *Araki v. Japan*, 1876 HANJI 3 (Sup. Ct., Oct. 15, 2004).

74. This is the second case where the Supreme Court held the State liable for not exercising its regulatory authority. See *id.* The first was the coal miners' pneumoconiosis (black lung disease) case in the Chikuho region of Fukuoka Prefecture, Kyushu. See

Prefecture were liable for failing to exercise their regulatory authority. It also affirmed the decision of the Osaka High Court, which held that the 1977 Criteria was inadequate.

On the night of the same day of the Supreme Court's decision, the Minister of the Environment officially apologized for not preventing the spread of Minamata disease and for taking a long time to handle it.<sup>75</sup> However, on October 18, 2004, the Ministry reaffirmed that the 1977 Criteria was adequate. Therefore, both the 1977 Criteria and the judicial criteria stand.

From the date of the Supreme Court decision until March 2008, 5,992 victims applied for certification under the Pollution-Related Health Damage Compensation System,<sup>76</sup> and 16,226 victims received health notebooks under the Comprehensive Minamata Disease Medical Care Project.<sup>77</sup> Despite the flood of applications, the Kumamoto Screening Committee for Minamata Disease Patients was closed from November 2004 until March 2007. No one wanted to be a member of the committee because s/he did not know which criteria should be adopted. After resuming, the Committee used the 1977 Criteria. The Kagoshima Screening Committee for Minamata Disease Patients has been closed since September 2004.

In May 2006, the ruling parties (the Liberal Democratic Party and the New Komeito Party) established the Project Team on Minamata Disease. In October 2007, the project team released its final report, which recommends a new relief measure. Under the proposed measure, the victims who suffer from sensory disorder and have not received a lump sum payment under the Comprehensive Minamata Disease Medical Care Project should receive a lump sum payment of 1.5 million yen and 10,000 yen per month as medical allowance. Chisso has not accepted the proposal.

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Yamamoto v. Japan, 58 MINSHŪ 1032 (Sup. Ct., Apr. 27, 2004).

75. From time to time, the national government expressed their regret for the Minamata disease; however, it never admitted their administrative responsibility until they lost their case in the Supreme Court. On the other hand, the mayor of the Minamata City officially apologized for its administrative responsibility for Minamata disease on May 1, 1994. See Kumamoto-ken [Kumamoto Prefecture Web Site], Minamatabyō Mondai ni Kansuru Keika Nenpyō [Minamata Disease Problem-Related Progress Chronology] (author's translation), available at <http://www.pref.kumamoto.jp/site/548/list863-1355.html> (last visited May 6, 2009).

76. The problem is that if a person applies for certification, s/he has to return his/her notebook under the Comprehensive Minamata Disease Medical Care Project.

77. See KANKYŌSHŌ [MINISTRY OF THE ENV'T], 2008 KANKYŌ JUNKANGATA SHAKAI HAKUSHŌ [2008 WHITE PAPER ON ENVIRONMENT AND RECYCLING-BASED SOCIETY] 293 (2008) (author's translation).

### 5. New Wave of Minamata Litigations

#### a. The No More Minamata Lawsuit

On October 3, 2005, Minamata Shiranui Victim Group brought cases against the State, Kumamoto Prefecture, and Chisso to the Kumamoto District Court. This action was called the “No More Minamata Lawsuit” and the plaintiffs seek to be judicially recognized as Minamata disease patients and demand compensation. The number of plaintiffs has reached 1,707 (as of April 2009), and these cases are pending.

#### b. The Third Niigata Minamata Disease Lawsuit

The residents in the basin of the Agano River in Niigata Prefecture also suffered from mercury poisoning caused by Showa Denko K.K. in the mid-1960s. Victims won their first lawsuits against Showa Denko,<sup>78</sup> and accepted the political solution during the Second Lawsuits against the State and Showa Denko.

On April 26, 2007, seventeen uncertified victims brought cases against the State, Niigata Prefecture, and Showa Denko to the Niigata District Court. The first oral argument was held on May 8, 2008, and the case is pending.<sup>79</sup>

#### c. The Second Generation Lawsuit

On October 11, 2007, nine uncertified victims of the Minamata disease Victims Mutual Aid Society brought cases against the State, Kumamoto prefecture, and Chisso to the Kumamoto District Court. It is called the “Second Generation Lawsuit” because all of the plaintiffs were born in a methyl-mercury-polluted area around 1956, the year in which Minamata disease was officially recognized, and were probably exposed to that substance in their mother’s wombs or in their childhood. They seek to be judicially recognized as Minamata disease patients and demand compensation for damage. The cases are pending.

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78. See *Ono v. Shōwa Denkō K.K.*, 642 HANJI 96 (Niigata D. Ct., Sept. 29, 1971), partially translated in GRESSER ET AL., *supra* note 30, at 66–83.

79. See generally Niigata Nippo Online [Niigata Daily Report Online], Shasetsu: Niigata Minamatabyō: Soshō de shika Sukuena no ka [Editorial: Niigata Minamata disease: Cannot Be Relieved Only by Litigation?] (Feb. 3, 2009) (author’s translation) (on file with author). Niigata Minamata Disease Agano Patient Society, one of the Minamata Disease victims groups in Niigata, announced that they were preparing to bring the fourth lawsuit against the State and Showa Denko K.K. in June 2009. See *id.*

### **C. Air Pollution Litigations**

#### **I. Wave of Air Pollution Litigations**

Responding to the Class I designation removal, pollution victims groups around the country began to prepare for new litigation. The purposes of such litigation were not only to seek plaintiffs' own remedies, but also to encourage restoring the Pollution-Related Health Damage Compensation System.

##### a. The Nishiyodogawa Air Pollution Lawsuit

###### i. Background

Nishiyodogawa Ward is an industrial town located in Osaka City. It has small businesses and housing adjacent to each other, as well as several highways operated by the State or the Hanshin Expressway Public Corporation. Osaka City became one of the first designated Class I areas under the Pollution-Related Health Damage Compensation Law, and it has the largest number of certified patients in Japan.

In April 1978, air pollution victims filed lawsuits against ten private companies (Godo Steel Ltd., Furukawa Co., Nakayama Steel Product Co., Kansai Electric Power Co., Asahi Glass Co., Kansai Coke and Chemical Co., Sumitomo Metal Industries Ltd., Kobe Steel Ltd., Osaka Gas Co., and Nippon Glass Co.), the State, and the HEPC in the Osaka District Court. One hundred twenty-seven plaintiffs sought an injunction to stop the emission of air pollutants (NO<sub>2</sub>, SO<sub>2</sub>, and SPM) that exceeded air quality standards and damages totaling 3.8 billion yen.

In 1984, a second group of victims filed lawsuits against the above companies, the State, and the HEPC; a third group of victims filed lawsuits in 1985; and a fourth group of victims filed lawsuits in 1992. The total number of certified patient plaintiffs in the second to fourth lawsuits was 432, and the sum of their compensation claim was 8.6 billion yen.

###### ii. The First Lawsuit

On March 29, 1991, the Osaka District Court found all defendant companies liable for damages totaling 350 million yen for 67 certified patients.<sup>80</sup> However, it denied the liability of the State and the HEPC. It also dismissed the

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80. \*See Nakajima v. Japan, 1383 HANJI 22 (Osaka D. Ct., Mar. 29, 1991).

plaintiffs' claim for an injunction.<sup>81</sup> Both the plaintiffs and the companies appealed to the Osaka High Court.

On March 2, 1995, the certified patients and companies<sup>82</sup> reached a settlement. The settlement agreement included the companies making a lump-sum payment of 3.9 billion yen, of which 1.5 billion yen would be used for environmental protection, improvement of the plaintiffs' living environment, and revitalization of the Nishiyodogawa area,<sup>83</sup> and the companies confirming their continuing efforts in pollution-prevention measures. Lawsuits against the State and the HEPC remain pending.

### iii. The Second to Fourth Lawsuits

On July 5, 1995, the court found the State and the HEPC liable for damages totaling 66 million yen for 18 certified patients.<sup>84</sup> This was the first case that recognized the relationship between vehicle emissions (NO<sub>2</sub> and SPM) and plaintiffs' health problems and that found the State and public corporations responsible for road-related air pollution. However, the claim for an injunction was dismissed.<sup>85</sup> The State and the HEPC appealed to the Osaka High Court.

Following a recommendation of settlement made by the court on July 29, 1998, plaintiffs-appellees, the State, and the HEPC reached a settlement on May 17, 1999. The settlement involved the State and the HEPC improving their roadside environment, and the settlement involved the plaintiffs, the State (the Kinki Region Construction Bureau of the Ministry of Construction), and the HEPC establishing a coordinating conference on the roadside environment in Nishiyodogawa area.<sup>86</sup>

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81. *See id.*

82. Nippon Glass was immune from reorganization proceedings.

83. In 1998, the pollution victims in the Nishiyodogawa area established the Center for the Redevelopment of Pollution-Damaged Areas in Japan (the Aozora Foundation) funded by part of the settlement money. This was an unprecedented experiment in Japan. Its main activities are the research for redevelopment of pollution-debilitated areas and the promotion of model business in Nishiyodogawa area, the efforts handing down experiences and lessons of pollution to posterity and offering such information at home and abroad, and the promotion of environmental education and environmental health activities. *See generally* Aozora Zaidan [Aozora Foundation], Welcome to the Aozora Foundation Home Page: A Blue Sky for Our Children: Bringing Dragonflies Back to the City, <http://www.aozora.or.jp/newenglish/eindex.htm> (last visited Mar. 22, 2009).

84. *See* Hamada v. Japan, 1538 HANJI 17 (Osaka D. Ct., July 5, 1995).

85. *See id.*

86. The meeting is held annually to exchange opinions on the road environment and road structure in Nishiyodogawa. The twelfth meeting was held on June 24, 2008. *See* Osaka Kokudō Jimusho [Osaka Nat'l Highway Bureau], Nishiyodogawa Chiku Dōro Endō Kankyō ni kansuru Renrakukai Dai 12 Kai ga Kaisai saremashita [12th Coordinating Conference on the Roadside Environment was held in Nishiyodogawa area] (author's

## b. The Kawasaki Air Pollution Lawsuits

### i. Background

Kawasaki City of Kanagawa Prefecture is located in the Keihin industrial area. Kawasaki Ward and Saiwai Ward in the city have been especially heavily industrialized since early times. As in other industrial areas, residents developed problems from smoke and soot from industrial plants and exhaust fumes from automobiles.

In November 1969, Kawasaki City decided to start its own healthcare program for victims of air pollution-related diseases and to establish a patient certification system. From February 1970, certified patients in both wards were covered under the fund established by the Law concerning Special Measures for the Relief of Pollution-related Health Damage.

In March 1982, 128 certified patients and their bereaved families filed lawsuits against 13 private companies (Nippon Kokan (JFE), Tokyo Electric Power Co., Tonen, Tonen Chemical, Kygnus Sekiyu, Nippon Sekiyu, Ukishima Petrochemical, Showa Denko K.K., General Sekiyu K.K., Mitsubishi Sekiyu Co. Ltd., Showa Sekiyu Co. Ltd., TOA Oil Co. Ltd., and East Japan Railway Co.), the State, and the Metropolitan Expressway Public Corporation in the Kawasaki Branch of the Yokohama District Court. Plaintiffs sought an injunction to stop the emission of air pollutants that exceeded air quality standards and damages totaling 2.6 billion yen.

In September 1983, a second group of victims filed lawsuits against the above companies, the State, and the MEPC; a third group of victims filed lawsuits in March 1985; and a fourth group of victims filed lawsuits in December 1988. The total number of plaintiffs was 321.

### ii. The First Lawsuit

On January 25, 1994, the Kawasaki Branch of the Yokohama District Court found all defendant companies liable for damages totaling 463 million yen for 106 plaintiffs, including 90 certified patients.<sup>87</sup> However, it denied the liability of the State and the MEPC.<sup>88</sup> It also dismissed the claim for injunction.<sup>89</sup> Both the plaintiffs and the companies appealed to the Tokyo High Court.

On December 25, 1996, the plaintiffs and companies reached a 3.1-billion-yen settlement.

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translation), [http://www.kkr.mlit.go.jp/osaka/gyomu/road\\_dat/nisiyodo/index.html](http://www.kkr.mlit.go.jp/osaka/gyomu/road_dat/nisiyodo/index.html) (last visited Mar. 22, 2009).

87. *See Ohmura v. Nippon Kokan*, 1481 HANJI 19 (Yokohama D. Ct., Kawasaki Branch, Jan. 25, 1994).

88. *See id.*

89. *See id.*

### iii. The Second to Fourth Lawsuits

On August 5, 1998, the Kawasaki Branch of the Yokohama District Court recognized the relationship between vehicle emissions (NO<sub>2</sub> and SPM) and plaintiffs' health problems, and it held the State and the MEPC liable for damages totaling 149 million yen for 48 plaintiffs.<sup>90</sup> However, it dismissed the claim for injunction.<sup>91</sup> The State and the MEPC appealed to the Tokyo High Court.

On May 20, 1999, plaintiffs-appellees, the State, and the MEPC reached a settlement. The settlement included: the State and the MEPC making sincere efforts toward achievement of environmental quality standards in Kawasaki Ward and Saiwai Ward; the State and the MEPC improving the road environment and road structure in both wards, including research on structural and technical problems and impact on other highways when metropolitan expressways adopt road pricing for transportation demand management; and the plaintiffs, the State (the Kanto Region Construction Bureau of the Ministry of Construction), and the MEPC establishing a coordinating conference on the roadside environment in the southern area of Kawasaki City.<sup>92</sup>

### c. The Amagasaki Air Pollution Lawsuit

Amagasaki is an industrial city located in Hyogo Prefecture. It is a major part of the Hanshin industrial region, which is one of the biggest industrial regions in Japan.

In November 1970, Amagasaki City established its own healthcare program by ordinance. Starting in December, certified patients in Amagasaki were covered under the fund established by the Law concerning Special Measures for Relief of Pollution-Related Health Damage.

In December 1988, 379 certified pollution patients and their bereaved families in Amagasaki City filed lawsuits against nine companies (Kansai Electric Power Co., Asahi Glass Co., Kansai Coke and Chemical Co., Sumitomo Metal Industries Ltd., Kubota Corp., Godo Steel Ltd., Furukawa Co., Nakayama Steel Products Co., and Kobe Steel Ltd.), the State, and Hanshin Expressway Public Corporation in the Kobe District Court. They sought damages and an injunction

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90. *See* Miyata v. Japan, 1658 HANJI 3 (Yokohama D. Ct., Kawasaki Branch, Aug. 5, 1998).

91. *See id.*

92. The meeting is held annually to exchange opinions on the road environment and road structure in Kawasaki Ward and Saiwai Ward. The twelfth meeting was held on August 28, 2008. *See* KAWASAKI-SHI NANBU CHIKU DÖRO ENDÖ KANKYÖ NI KANSURU RENRAKUKAI DAI 12 KAI KAISAI NITSUITE [12TH COORDINATING CONFERENCE ON THE ROADSIDE ENVIRONMENT IN SOUTHERN AREA OF KAWASAKI CITY] (author's translation), available at <http://www.shutoko.jp/company/press/h20/prl2sv00000078oj-att/prl2sv00000078pw.pdf> (last visited May 6, 2009).



to stop air pollutants that exceeded those air quality standards from entering their living place. A second group of victims filed lawsuits in December 1995.

Following a recommendation by the Kobe District Court, the plaintiffs settled with the companies on February 17, 1999. The companies agreed to pay 2.42 billion yen in damages, of which the plaintiffs used 920 million yen to protect the environment in Amagasaki.<sup>93</sup>

On January 31, 2000, the Kobe District Court found the State and the HEPC liable for roadside air pollution.<sup>94</sup> It ordered the State and the HEPC not only to pay to the plaintiffs 210 million yen, but also to limit the amount of SPM being emitted on Route 43 and Osaka Nishinomiya Line.<sup>95</sup> The State and the HEPC appealed to the Osaka High Court, and so did the plaintiffs.

Following a recommendation by the Osaka High Court, the parties reached a settlement on December 8, 2000. The settlement included the following:

- (i) the Environmental Agency, the Ministry of Construction, and the HEPC take roadside environment measures;
- (ii) the Environmental Agency makes efforts (a) to achieve a new long-term goal of diesel-powered vehicles by 2005, (b) to achieve reduction in the sulfur content (50 ppm) of light fuel oil by the end of 2004, (c) to conduct endurance tests of diesel particulate filter (DPF) and to consider support measures for promoting DPF, such as a subsidy system, and (d) to consider ways of promoting the further sale and use of low-emission vehicles by auto manufacturers and business users. Based on its environmental health surveillance system, introducing an additional survey and analysis using PM2.5 as a pollution indicator is considered;
- (iii) the Ministry of Construction and the HEPC (a) experiment with the environmental road pricing for certain roads, (b) inform everyone, especially truck businesses, of the Automobile NOx Control Law,<sup>96</sup> (c) strengthen regulations for specialized

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93. With part of the settlement money, a patient group established “The Amagasaki Center for People, Town, and Dragonfly” on September 19, 1999, where patients restore their health and revitalize the town. *See generally* Amagasaki Hito Machi Akatonbo Sentā no Ichinen [A Year of Amagasaki Center for People, Town, and Dragonfly] (author’s translation), <http://www1.jca.apc.org/kougai/sokai/sokai32/akatombo.html> (last visited Mar. 22, 2009). With part of the settlement money, the patient group also opened an information center called “Amaken” on March 23, 2001. *See* Amaken, Setsuritsu no Keii [Establishment Progress], <http://www.amaken.jp/about.htm> (last visited Mar. 22, 2009).

94. *See* The Amagasaki Lawsuit, 1726 HANJI 20 (Kobe D. Ct., Jan. 31, 2000) (plaintiffs’ names were withheld).

95. *See id.*

96. Jidōsha NOx hō, Law No.70 of 1992 (Japan).

vehicles, and (d) research traffic volume necessary to consider the availability of traffic control of large vehicles, and request the National Police Agency to consider this issue. The air pollution monitoring system will also be enhanced; and (iv) the parties establish a coordinating conference for improving the roadside environment in the southern area of Amagasaki City. The conference consists of plaintiffs, the State (Kinki Region Construction Bureau of Ministry of Construction), and the HEPC. The conference is held annually to exchange opinions on the road environment and road structure in the southern area of Amagasaki City.

On October 15, 2002, former plaintiffs in the Amagasaki lawsuit filed a claim with the Environmental Dispute Coordination Commission over the State's failure to abide by the settlement. It was the first case of pollution victims requesting the Commission to conduct a conciliation process based on a breach of settlement. On May 13, 2003, the HEPC joined the conciliation process.

On June 26, 2003, the parties accepted the conciliation plan offered by the Commission. The Commission found that air pollution in Amagasaki had not improved and required the State and the HEPC to implement specific measures as follows: (i) comprehensive research for reducing the traffic of large vehicles (ii) environmental road pricing, (iii) request for the NPA to study the feasibility of traffic control of large vehicles, (iv) facilitation of the conference, and (v) promotion of cooperation of other relevant authorities. The Commission recommended the parties make efforts to achieve a better roadside environment by mutual understanding and cooperation.

After the conciliation process, the meeting became open to the public. The thirtieth meeting was held on December 17, 2008.

#### d. The Southern Nagoya Air Pollution Lawsuit

Residents in the southern Nagoya area suffered from air pollution caused by soot and smoke from factories and vehicle emissions from Routes 1 and 23.

In March 1989, certified patients and their bereaved families filed lawsuits against ten companies (Chubu Electric Power Co., Nippon Steel Corp., Toray Industries, Inc., Aichi Steel Corp., Daido Steel Co., Ltd., Mitsui Chemicals, Inc., Toho Gas Co., Ltd., Toagosei Co., Ltd., Nichiha Corp., and Chubu Steel Plate) and the State in the Nagoya District Court. They sought damages and an injunction against emitting air pollutants that exceeded air quality standards. In October 1990, a second group of patients filed lawsuits, and a third group of patients filed lawsuits in December 1997.

On November 27, 2000, the Nagoya District Court recognized the relationship between SO<sub>x</sub> and the plaintiff's respiratory diseases, and found all

defendant companies liable for damages totaling 290 million yen.<sup>97</sup> The court recognized the relationship between SPM and plaintiff's respiratory disease, and ordered the State not only to pay 18 million yen, but also to limit the amount of SPM emitted on Route 23.<sup>98</sup>

On August 6, 2001, the parties reached a comprehensive settlement. This air pollution case was the first in which plaintiffs settled with both the companies and the State at the same time. Unprecedentedly, three uncertified patients were subject to this agreement. The State and the companies did not recognize causation between air pollution and health damage. However, the terms of settlement included the following:

- (i) The State takes measures to promptly achieve environmental quality standards. More precisely, it considers reducing the traffic lanes of Route 23 in southern Nagoya in order to reduce NOx and SPM in the area. Under the Automobile NOx/PM Control Law, Aichi Prefecture supports reduction of the total amount of NOx in the area, planting roadside trees, and conducting health effect surveys of local residents, and disclosing the results;
- (ii) The parties (plaintiffs, the Ministry of the Environment, and Chubu Region Construction Bureau of the Ministry of Construction) establish a conference on improvement of the roadside environment in the southern Nagoya area in order to exchange opinions on the measures above;<sup>99</sup> and
- (iii) The defendant companies pay 1.5 billion yen. They will disclose information on the amount of emission of pollutants.

#### e. The Tokyo Air Pollution Lawsuit

Tokyo is the one of the largest cities in the world. Its average daily traffic is five times heavier than the national average. Nineteen out of 23 wards in Tokyo are formerly Class I areas under the Pollution-Related Health Damage Compensation Law.<sup>100</sup> Since 1972, the Tokyo metropolitan government has had

97. \*See The Southern Nagoya Lawsuit, 1746 HANJI 3 (Nagoya D. Ct., Nov. 27, 2000) (plaintiffs' names were withheld).

98. \*See *id.*

99. It was the first time the Ministry of the Environment joined this kind of conference. The ninth meeting was held on June 25, 2008. See Kokudokōtsūshō Chūbu Chihō Seibikyoku [Chubu Reg'l Bureau, Ministry of Land, Infrastructure, and Transp.], Heisei 20 Nen (2008 Nen) Rokugatsu Happyō Bun [2008 June Announcement] (author's translation), <http://www.cbr.mlit.go.jp/kisya/2008/06.htm> (last visited Mar. 22, 2009).

100. As of March 2007, there were 18,475 certified patients in Tokyo. \*See Tōkyō-to Hukushi Hokenkyoku [Tokyo Metropolis Bureau of Soc. Welfare & Pub. Health], Kankyō

its own healthcare subsidy program for respiratory disease patients under 18 years old.<sup>101</sup> According to the Ministry of Health, Labor, and Welfare, Tokyo had approximately 197,000 asthma victims in 2004.<sup>102</sup>

On May 31, 1996, air pollution victims in Tokyo filed lawsuits against the State, Tokyo metropolitan government, Metropolitan Expressway Public Corporation, and seven companies that manufacture and sell diesel vehicles (Toyota, Isuzu, Mazda, Mitsubishi, Nissan, Nissan Diesel, and Toyota subsidiary Hino Motors) in the Tokyo District Court. Plaintiffs sought injunction relief and damages. This was the first case of suing automakers for air pollution. Five more victims groups filed lawsuits by 2006. The total number of plaintiffs has reached 633.

On October 29, 2002, the Tokyo District Court found a causal relationship between air pollution and the plaintiffs' illnesses, and ordered all of the defendants, excluding automakers, to pay a combined 79 million yen as compensatory damages.<sup>103</sup> Plaintiffs, the State, and the MEPC appealed.

On June 22, 2007, the Tokyo High Court proposed a settlement plan between the plaintiffs and all defendants including seven automakers. Five

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Eisei: Taiki Osen Iryōhi Josei Jōrei [Environment Public Health: Ordinance on Healthcare Subsidy for Health Problems Related to Air Pollution] (author's translation), [http://www.fukushihoken.metro.tokyo.jp/kankyo/kankyo\\_eisei/taiki/iryōhi/t\\_kitei/jyōrei/](http://www.fukushihoken.metro.tokyo.jp/kankyo/kankyo_eisei/taiki/iryōhi/t_kitei/jyōrei/) (last visited Mar. 22, 2009).

101. *See id.* As of March 31, 2008, there were 43,505 certified patients in Tokyo. *See* Tōkyō-to Hukushi Hokenkyoku [Tokyo Metropolis Bureau of Soc. Welfare & Pub. Health], Kankyō Eisei: Taiki Osen Iryōhi Josei Nintei Kanjasū [Environment Public Health: Number of Patients Certified for Healthcare Subsidies Related to Air Pollution] (author's translation), [http://www.fukushihoken.metro.tokyo.jp/kankyo/kankyo\\_eisei/taiki/iryōhi/kanjasuu](http://www.fukushihoken.metro.tokyo.jp/kankyo/kankyo_eisei/taiki/iryōhi/kanjasuu) (last visited Mar. 22, 2009).

Changes in Certified Patients Under Tokyo Healthcare Subsidy

| Year | Patients | Year | Patients | Year | Patients |
|------|----------|------|----------|------|----------|
| 1997 | 46016    | 2001 | 51058    | 2005 | 44758    |
| 1998 | 49093    | 2002 | 49602    | 2006 | 43505    |
| 1999 | 51038    | 2003 | 47994    |      |          |
| 2000 | 51122    | 2004 | 46640    |      |          |

*Id.*

102. *See* KŌSEIR ŌDŌSHŌ [Ministry of Health, Labor & Welfare], Kokumin Seikatsu Kiso Chōsa [National Livelihood Survey] (2004) (author's translation), [http://www.dbtk.mhlw.go.jp/toukei/data/030/2004/toukeihyou/0005453/t0117897/H3421\\_012.html](http://www.dbtk.mhlw.go.jp/toukei/data/030/2004/toukeihyou/0005453/t0117897/H3421_012.html).

103. *See* The Tokyo Air Pollution Lawsuit, 1885 HANJI 23 (Tokyo D. Ct., Oct. 29, 2002) (plaintiffs' names were withheld).

hundred and twenty-seven plaintiffs and defendants accepted the proposal on July 3, 2007. The settlement included the following:

- (i) Tokyo metropolitan government establishes a healthcare subsidy program for air pollution victims and will review the program after five years. Automakers contribute 3.3 billion yen, the State contributes 6 billion yen, and the MEPC contributes 500 million yen.
- (ii) In order to achieve the air quality standard for NO<sub>2</sub> promptly and to ensure the air quality standard for SPM, the Ministry of Land, Infrastructure, Transport and Tourism, the Ministry of Environment, the MEPC, and the Tokyo metropolitan government, take measures for improving the road environment, for control vehicle emissions, for monitoring PM2.5, and so on.
- (iii) Automakers pay 1.2 billion yen as settlement money.
- (iv) The parties establish a conference for improving the road traffic environment in the Tokyo area. The plaintiffs and Tokyo metropolitan government establish a coordinating conference on the Tokyo healthcare subsidy program.

Starting August 1, 2008, the Tokyo metropolitan government will implement a healthcare program by which certified asthma patients over 18 years old will be covered if they have lived in Tokyo for at least one year.

## **V. ROLE OF THE TORT LIABILITY SYSTEM IN ENVIRONMENTAL POLLUTION PROBLEMS**

### **A. Role of the Tort Liability System in Relieving Minamata Disease Victims**

#### **1. Driving Force for Administrative Compensation System**

For the purpose of relieving Minamata disease victims, tort litigation played a critical role in establishing and operating an administrative compensation system. In the creation of the Pollution-Related Health Damage Compensation System, Minamata disease victims groups could take advantage of the overall victory in the First Minamata Disease Lawsuit. The amount of a lump sum award for any patient is equivalent to the compensatory damages awarded in the First Minamata Disease Lawsuit. Chisso never took the victims' request seriously until the court held it liable. After the Supreme Court questioned the propriety of the 1977 Criteria, though never revoked, a flood of applications and new lawsuits have certainly captured the interests of public and ruling parties.

## 2. Social Reintegration of Minamata Disease Victims

Victims have been continuing to press for apologies from the Chisso Co., Minamata City, Kumamoto Prefecture, and the State. In the beginning, the Minamata disease was deemed as a contagious disease or genetic disease and the victims were ostracized in their community. After the cause of the disease was discovered, the victims were still despised. Minamata City was heavily dependent on Chisso economically and victims claiming their legitimate rights were regarded as blackmailers. Moreover, the certified patients were sometimes blamed as “fake patients” for money.<sup>104</sup> Therefore, some victims were forced to leave Minamata due to such discrimination, and to lead secretive lives in unfamiliar places. After the Supreme Court decision, applications for certification increased rapidly and exceeded six thousand as of April 2008.<sup>105</sup> Many victims are first time applicants.<sup>106</sup> Several studies found that various factors had prevented Minamata disease victims from coming out, including discrimination against them in job hunting or marriage.<sup>107</sup> In this context, it was significant for Minamata disease

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104. On August 7, 1975, two members of Kumamoto Prefectural Assembly called the Minamata disease victims fake patients. A total of 342 Minamata disease victims and patients brought defamation lawsuits against them and Kumamoto Prefecture, and the Kumamoto District Court ruled in favor of the plaintiffs. *See* Moritama v. Sugimura, 964 HANJI 108 (Kumamoto D. Ct., Mar. 24, 1980). *See also* Ogata v. Japan, 43 KEISHŪ 188 (Sup. Ct., Mar. 10, 1989); Ogata v. Japan, 18 KEISAI GEPPŌ 242 (Fukuoka High Ct., Apr. 18, 1986); Japan v. Ogata, 43 KEISHU 231 (Kumamoto D. Ct., Mar. 18, 1980).

105. *See* Sankei Shimbun, Minamatabyō Nintei Shinsei 6000 Nin Koe [Number of Minamata Disease Applications for Certification Exceeds Six Thousand] (Apr. 22, 2008) (author’s translation) (on file with author). The breakdown as of April 22, 2008 is: 3720 in Kumamoto Prefecture, 2292 in Kagoshima Prefecture, and 30 in Niigata Prefecture. *See id.*

106. *See* KYŪSAISAKU [MINISTRY OF THE ENV’T], ARATANA KYŪSAISAKU NO TAME NO JITTAI CHŌSA: ANKĒTO CHŌSA [SURVEY FOR NEW RELIEF MEASURES: QUESTIONNAIRE SURVEY] 1, 5 (2007) [hereinafter QUESTIONNAIRE SURVEY] (author’s translation), *available at* [http://www.env.go.jp/chemi/minamata/survey\\_remedy-h19/ir\\_questionnaire.pdf](http://www.env.go.jp/chemi/minamata/survey_remedy-h19/ir_questionnaire.pdf) (last visited May 6, 2009); KANKYŌSHŌ [MINISTRY OF THE ENV’T], ARATANA KYŪSAISAKU NO TAME NO JITTAI CHŌSA: SAMPURU CHŌSA ISHITŌ NI YORU MENSETSU [SURVEY FOR NEW RELIEF MEASURES: SAMPLE SURVEY INTERVIEW BY MEDIAL PROFESSIONALS] 1, 3 (2007) [hereinafter INTERVIEW SURVEY] (author’s translation), *available at* [http://www.env.go.jp/chemi/minamata/survey\\_remedy-h19/ir\\_sample.pdf](http://www.env.go.jp/chemi/minamata/survey_remedy-h19/ir_sample.pdf) (last visited May 6, 2009). From April to May 2007, the Environmental Agency conducted the survey on Minamata disease victims. *See generally* INTERVIEW SURVEY at 1; QUESTIONNAIRE SURVEY at 1. The survey consisted of the interview survey and the questionnaire survey. *See generally* INTERVIEW SURVEY at 1; QUESTIONNAIRE SURVEY at 1. In the interview survey, out of 119 responding applicants for certification under the Pollution-Related Health Damage Compensation System, 76.5 percent were first time applicants. *See* INTERVIEW SURVEY at 3. In the questionnaire survey, out of 2,862 responding applicants, 76.6 percent were first time applicants. *See* QUESTIONNAIRE SURVEY at 5.

107. *See* NIHON BENGOSHI RENGŌKAI [JAPAN FED’N OF BAR ASS’NS], MINAMATABYŌ HIGAI JITTAI CHŌSA [SURVEY ON DAMAGE RELATED TO MINAMATA DISEASE] 12 (2008)

victims that the highest court in Japan made the offending company, national government, and prefectural government legally accountable for their sufferings under the tort liability system.

## **B. Role of the Tort Liability System in Fighting Against Air Pollution**

### 1. Common Goals in Air Pollution Litigations

The above five complex air pollution lawsuits had common goals.<sup>108</sup> Pursuing tort liability of offending companies, the State, and local governments is the first step for air pollution victims toward constructive negotiation with them. Victims groups brought their cases into court not only to seek remedy for their individual damage but also to correct failures of environmental policy. Their primary goal is the latter: they tried to force the relevant authorities to restore the Class I designation under the Pollution-Related Health Damage Compensation System and to improve air quality—more specifically, vehicle emissions control.

### 2. Regulation by Litigation

#### a. Medical Care for Air Pollution Victims

According to the Ministry of Health, Labor, and Welfare, Japan has over one million asthma patients as of October 2005.<sup>109</sup> Based on the data, the removal

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(author's translation), available at [http://www.nichibenren.or.jp/ja/committee/list/data/minamata\\_houkokusyo\\_000.pdf](http://www.nichibenren.or.jp/ja/committee/list/data/minamata_houkokusyo_000.pdf) (last visited May 6, 2009); SHIRANUI KAI KENKYŪ PUROJEKUTO [SHIRANUI SEA RESEARCH PROJECT], MINAMATABYŌ NINTEI SHINSEISHA SEIKATSU JITAI CHŌSA CHŪKAN HŌKOKUSHO [INTERIM REPORT OF SURVEY ON THE CURRENT LIVING CONDITION OF MINAMATA DISEASE APPLICANTS FOR CERTIFICATION] 4 (2005) (author's translation), available at <http://www.env.go.jp/council/26minamata/y260-06/mat03.pdf> (last visited May 6, 2009).

108. There were other significant air pollution lawsuits. For instance, the Route 43 Air Pollution Lawsuit became the first case where the Supreme Court recognized the liability of road administrators for road-related pollution. See *The Route 43 Lawsuit*, 49 MINSHŪ 1870 (Sup. Ct., July 7, 1995).

109. See *Kōseir ōdōshō* [Ministry of Health, Labor & Welfare], Heisei 17 Nen Kanja Chōsa Hōkoku [2005 Patient Survey Report] (May 23, 2008) (author's translation), <http://www-bm.mhlw.go.jp/toukei/saikin/hw/kanja/05syoubu/suihyo31.html> (last visited May 9, 2009). After removing the Class I designation, the asthma patient population increased.

of the Class I designation was apparently premature. The Class I designation has not been restored after five lawsuits; however, the Tokyo lawsuit successfully created a new medical care program. Pollution victims see the program as a test of whether it can be expanded nationwide. The problem is that ex-defendant contributions to the program are limited to five years, and it is unclear whether it will survive or not.

#### b. Vehicle Emissions Control

Just a short while before the first Tokyo lawsuit was brought to court, in 1996, the Environmental Agency asked the Central Environment Council to study

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Changes in Asthma Patients (in thousands)

| Year+ | Estimated<br>Total Patients++ | Total<br>Patients+++<br>(A + B) | Inpatients<br>(A) | Outpatients<br>(B) |
|-------|-------------------------------|---------------------------------|-------------------|--------------------|
| 1979  | -                             | 102.7                           | 13.2              | 89.5               |
| 1980  | -                             | 106.6                           | 14.3              | 92.3               |
| 1981  | -                             | 88.9                            | 12.9              | 76.0               |
| 1982  | -                             | 99.2                            | 16.2              | 83.0               |
| 1983  | -                             | 120.8                           | 18.7              | 102.0              |
| 1984  | -                             | 138.6                           | 20.4              | 118.1              |
| 1987  | 764                           | 150.7                           | 20.1              | 130.5              |
| 1990  | 850                           | 157.1                           | 19.7              | 137.4              |
| 1993  | 1066                          | 175.1                           | 17.5              | 157.6              |
| 1996  | 1146                          | 171.7                           | 16.8              | 154.9              |
| 1999  | 1096                          | 167.4                           | 14.9              | 152.5              |
| 2002  | 1069                          | 152.8                           | 11.6              | 141.2              |
| 2005  | 1092                          | 155.8                           | 8.7               | 147.1              |

+ The data was gathered in October.

++ Estimated total patients means the total number of patients who receive continuous medical treatment. It includes patients who did not receive medical treatment on the day of the survey.

Estimated total patients = Inpatients + New outpatients + Old outpatients \* Average interval for medical treatment \* Adjustment factor (6/7)

Before 1987, an adjustment factor is not available.

+++ Total Patients means the total number of patients who receive medical treatment on the day of the survey.

*See id.*



future measures to reduce vehicle emissions.<sup>110</sup> Since that year, the council has released its recommendations almost every year, and following the recommendations, the State has gradually enhanced diesel vehicle emissions control.<sup>111</sup> Tokyo metropolitan government took measures to control diesel vehicles from August 1999, and has regulated them by its environmental ordinance<sup>112</sup> since October 2003.

In 2000, the courts granted an injunction for SPM in both the Amagasaki lawsuit and the southern Nagoya lawsuit. In June 2001, the Automobile NOx Control Law was amended to the Automobile NOx/PM Control Law.<sup>113</sup> It regulates permitted levels of emissions for diesel vehicles in designated areas in Tokyo, Osaka, Chiba, Kanagawa, Hyogo, Aichi, and Mie.

Despite these measures, there are still certain nonattainment areas for NOx and SPM.<sup>114</sup>

## VI. CONCLUSION

In this article, I focused on the environmental pollution field to reevaluate the role of the tort liability system. I considered two examples: Minamata disease (mercury poisoning) cases and air pollution cases. In both cases, due to uneven distribution of resources, litigation based on the tort liability system was the last resort for victims. Once victims successfully prevailed in their cases, they negotiated on even ground with responsible companies and, more fundamentally, national and local governments. It became possible for victims not only to achieve new legislative or political solutions for their damages, but also to change national and local environmental policies for the public.

This tendency holds true with the relationship between the asbestos-related health damage relief system and asbestos litigations. In February 2006, the

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110. On January 29, 2008, the Central Environment Council released its ninth report. See CHŪO KANKYŌ SHINGIKAI [CENT. ENVTL. COUNCIL], DAI KYŪ TŌSHIN, KONGO NO JIDŌSHA HAISHUTSU GASU TEIGEN TAISAKU NO ARIKATA NI TSUITE [REPORT NO. 9, FUTURE MEASURES TO REDUCE VEHICLE EMISSIONS] (2008), *available at* <http://www.env.go.jp/council/toshin/t07-h1909/houkoku.pdf> (last visited May 9, 2009) (refer to note before page 1).

111. *See generally id.*

112. *See* Tomin no kenkō to anzen wo kakuhosuru kankyō ni kansuru jōrei dai 215 gō [Ordinance No. 215 on the Environment to Secure the Health and Safety of Citizens of Tokyo] (Dec. 22, 2000) (author's translation), *available at* [http://www.reiki.metro.tokyo.jp/reiki\\_honbun/g1011328001.html](http://www.reiki.metro.tokyo.jp/reiki_honbun/g1011328001.html) (last visited May 9, 2009).

113. *See* Jidōsha NOx/PM hō, Law No.73 of 2001 (Japan).

114. *See* KANKYŌSHŌ [MINISTRY OF THE ENV'T], 2007 TAIKI OSEN JŌKYŌ NITSUITE [THE STATE OF AIR POLLUTION 2007] 1, 5 (2008) (author's translation), *available at* [http://www.env.go.jp/air/osen/jokyo\\_h19/full.pdf](http://www.env.go.jp/air/osen/jokyo_h19/full.pdf) (last visited May 6, 2009).

Asbestos-Related Health Damage Relief Law<sup>115</sup> was promulgated to establish a relief fund for asbestos victims who contracted mesothelioma or lung cancer caused by asbestos and their bereaved family, who are not subject to workers' compensation. The certified patient is eligible to receive medical expenses and an allowance; and if the patient dies, their bereaved family is eligible to receive funeral expenses and a lump sum benefit for survivors. The fund is raised from contributions from the State, local government, and all business enterprises. However, many asbestos victims have chosen to go to court based on the tort liability system. In addition to the lawsuits against the asbestos-related industry, ten asbestos lawsuits against the State are pending as of October 1, 2008. The purpose of such lawsuits is not only to demand compensation based on the State Compensation Law but also to force the government to set up a more comprehensive administrative compensation system.

The tort liability system has both merits and deficits, as does the administrative compensation system. It is nevertheless true in Japan that, given these phenomena, the tort liability system serves an increasingly important role even in the areas covered by administrative compensation systems.



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115. Ishiwata ni yoru kenkō higai no kyūsai ni kansuru hō, Law No. 4 of 2006 (Japan).