

# **Litigation, Administrative Relief and Political Settlement for Compensating Victims of Pollution: Minamata Mercury Poisoning after 40 years\***

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- 1 The Minamata Story**
- 2 Court Litigation**
- 3 Administrative Relief**
- 4 Political Settlement**
- 5 Some Lessons**

## **1 The Minamata Story**

The first incident of mercury poisoning appeared in Japan in the mid-1950s during a period of growing economic prosperity. In 1954, several people were hospitalized. They were suffering from violent shakings, narrowing field of vision, and loss of control and coordination over their body movements. The number of victims increased rapidly and they were all living in fishing villages in the vicinity of Minamata Bay, Kyushu, the southern most of the four main islands of Japan. The Minamata disease, as it became known, was feared contagious in its initial period of the outbreak and the victims and their families were discriminated against by the rest of community.

It took more than ten years before teams of scientists determined the cause of disease as methylated mercury. The Ministry of Public Health officially recognized the cause and made a public announce-

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ment in 1968. Methylated mercury was a byproduct of the production of acetaldehyde, which was manufactured at the Minamata plant of the Japan Chisso (Nitrogen Manufacturing) Company. For years the Chisso plant had discharged methylated mercury in its effluent directly into the bay. Gradually the chemical had become concentrated in the tissues of fish, other marine organisms, and ultimately in the inhabitants of the Minamata fishing community. Mercury affected the central nervous system when it was taken into the human body through a food chain.

In 1965 a similar outbreak of Minamata disease was reported in Niigata City on the Japan sea side of the main island, where the Showa Denko Corporation operated a plant by employing the same production process and method as Chisso.

Although the cause of disease was not determined until later, fishermen and village people instinctively knew from the beginning that the effluent with sickening color discharged from the Chisso plant was killing fish, and also birds and cats which fed on fish. The people from villages tried repeatedly to negotiate with Chisso to stop the discharge, but Chisso was never responsive. The local residents resorted to such traditional means of dispute settlement as conciliation, mediation, and arbitration. They asked the governor of prefecture to intervene, and appealed to the central government for help. They protested, demonstrated, picketed, staged sit-ins, and even attempted at forcefully breaking into the plant. However, all their efforts produced little result. Chisso, denying any wrongdoing, continued its operation.

## **2 Minamata Victims Sue Chisso for Damages**

The victims finally decided to take the polluters to court. The Niigata group (of 77) sued Showa Denko in 1967 and the Minamata group (of 139) sued Chisso in 1969. The only cause of civil action available to them was one for damages based on a theory of negligence under article 709 of the Civil Code. ("A person who violates intentionally or negligently the rights of another is bound to make compensation for damages arising therefrom.") In a negligence action, the plaintiff must prove the critical elements of liability, namely,

breach of duty of care, foreseeability of harm and causation.

In both cases, the courts found the polluters negligent and awarded the substantial amount of damages to the plaintiffs. In applying the traditional negligence principle to the modern pollution context, the courts demonstrated an innovative approach in deciding the defendants' liability. First, the courts imposed an extensive and high degree of care on the defendants' chemical plants. Second, the courts found that the defendants could have foreseen injuries from their discharges to people living in the surrounding areas. Third, the courts created a presumption of causation in favor of the plaintiffs.

The courts stated the following reasoning as to each issue raised.

(1) Degree of Care. The defendants owed a high degree of care since the production process of the chemical industry generally utilized large quantities of dangerous substances such as raw materials and catalysts. There was an extremely high probability that unpredictably harmful substances would be in the factory's wastewater. When dangerous materials were discharged into the rivers and seas, harm to plants, animals, or people could be easily anticipated. Therefore, when a chemical plant discharged wastewater, it must always use "the best knowledge and technology" to determine whether harmful substances were present and what effect there might be on plants, animals, and humans. In addition to assuring the safety of its wastewater, if by any chance harm became apparent or there arose doubt about its safety, the factory should immediately suspend operations and adopt the necessary maximum preventive measures. Especially with regard to the life and health of area residents, the factory must exercise a high degree of care to prevent harm before it should happen.

(2) Foreseeability. The defendants contended that foreseeability was limited to the foreseeability of the production of the specific causal agent, and that they did not violate any duty since they could not possibly have foreseen this specific outcome. However, the courts found that if one were to proceed along the defendants' contention, the degree of danger could only be proven after the environment was polluted and destroyed and lives and health of people harmed. Until that point, the discharge of dangerous wastewater would have to

be tolerated. The inevitable consequence would be that the encroachment on the lives and health of residents would not be stopped, and this would be tantamount to allowing the residents to be human experiments. The courts found it clearly unjust.

(3) Causation. The courts analyzed the causation in three parts: (a) the characteristic symptoms of the disorder and its causal (etiological) agent; (b) the pathway of pollution; and (c) the discharge of the causal agent by the wrongdoer. With regard to (a) and (b), the courts held that causation might be proved by an accumulation of circumstantial evidence if the plaintiffs' explanation was consistent with the relevant scientific findings (of clinicians, pathologists, epidemiologists and other medical specialists). When the above level of proof was obtained, and the search for the source of pollution led to the very doorstep of the factory, it should be factually presumed that the factory was the source, and legal causation should be fully established.

In these cases of mercury poisoning, the courts in essence imposed strict liability on the polluters, while still using such terms of negligence under the article 709 as breach of care, probability and foreseeability of harm. The courts also created a presumption of causation in favor of the plaintiffs. Once the plaintiffs demonstrated the causal agent and the pathway implicating defendants, the burden of proof then shifted to the defendants to prove that the causal agent could not be discharged from its plant.

Other victims of air and water pollution in other parts of Japan also sued and won in all of the major litigation. The courts provided a public forum where victims could confront and expose the polluters' wrongdoing. The victims were morally outraged and their assertion of civil rights in a very basic sense was finally vindicated by the courts. The courts' holdings on those issues were adopted into and formed the foundation of a national administrative compensation system established in 1973.

### **3 Administrative Compensation System Established**

The Diet in 1970 enacted a dozen environmental protection meas-

ures. The Law for the Compensation of Pollution-Related Health Injury was enacted in 1973, and established a national administrative compensation system. The law was supported by all major actors, namely, pollution victims, business and industry, politicians and bureaucrats. Pollution victim organizations supported it because the administrative compensation system could offer victims much needed monetary relief promptly and fairly. Business and industry people supported it because the system could provide them with some predictability and control as to the costs of compensation. They could not predict nor control the magnitude and extent of tort liability that the courts might impose on them in potential law suits against them. Politicians and bureaucrats could take credit for doing something for the victims and retain control over the national pollution crises.

The law established the administrative system to provide scheduled compensation payments for certified victims of air and water pollution. Polluted areas were designated around major industrial cities and sites. In the case of air pollution, eventually, the 41 areas were designated by using the level of SO<sub>x</sub> concentration as an index. Seven areas of water and soil pollution caused by mercury, cadmium and arsenic were also designated. In these areas, usually a specific source of toxic pollution had been identified. People living in designated areas who developed certain prescribed symptoms were certified by doctors. Upon certification they became eligible for receiving compensation for medical expenses, lost earnings and other incidentals. A special Health Damage Certification Council of medical, legal, and other experts was set up for the purpose of reviewing certification.

The costs of compensation were imposed upon polluters. In the case of air pollution, a graduated emission charge was levied on stationary sources (factories with smoke stacks) and a tonnage tax on automobiles, respectively contributing 80% and 20% of the amount paid into the central fund each year. The emission charge was collected and pooled at the national level. Thereafter, the fund was distributed to provincial governments for payment to the victims. In the case of water-related pollution traceable to a specific substance and source, identified polluters (like Chisso in Minamata) were re-

quired to pay directly to certified victims at the local level.

In 1988, after 15 years of its operation, there were 108,489 certified victims of air pollution and 1,898 certified victims of toxic pollution who were receiving compensation under the system.

The administrative system was designed primarily for the purposes of (1) compensating pollution-related health damages and (2) making polluters pay for the costs. However, the system may also serve the following functions: (3) identifying harm caused by pollution; (4) legitimating compensation to victims; (5) providing polluters an incentive to reduce emission; (6) accounting the costs of pollution; and (7) generating information vital for environmental policy making. The functions listed (3) through (7) may not have been intended, but are interesting and significant to explore.

The system identifies and defines the extent and nature of harm of pollution. It makes people in designated areas aware of a possible link between pollution and their illness by prescribing typical symptoms caused by harmful substances. It provides an incentive for victims to come forward to be identified.

The system legitimates payments to victims by admitting officially that pollution exists and victims are entitled to receive compensation. The victims of pollution often suffered discrimination and were accused of using their personal misfortune for obtaining public assistance. The system publicly admits that pollution related health damages does exist in many parts of Japan, and that victims are indeed entitled to receive compensation for their sufferings. Once certified and legitimated, victims become a symbolic existence whose force cannot be ignored politically.

The system provides polluters with an incentive not to pollute or to reduce the amount of pollutants. In the case of air pollution, the system charges the emission sources according to the amount of SOx discharged. In addition to the direct regulations setting certain emission standards, there is an economic incentive for polluters to pollute less by adopting anti-pollution measures, if those measures cost less than emission charges imposed. The air quality in designated areas improved sufficiently that the law was amended in 1987 and all area designations as to air pollution were removed. The marked

reduction of SOx was largely brought about by industrial policy to import low sulfur oil. However, the emission charges under the system may, theoretically at least, have some effect.

The system accounts the costs of pollution in terms of health damages every year. The system reports numbers of applications for certification, by area, of certified victims, of the amount of compensation paid to them, and of the amount of charges imposed upon polluters. These numbers are not otherwise accounted and produced for the public to see.

The system generates general information relating to pollution and public health otherwise not available. A large scale public health survey may produce similar data, but it is costly and may be difficult to obtain funds to do the survey every year in a systematic way. This information is vital for making the public aware of pollution as well as making a long and medium range environmental policy.

The system worked well for providing compensation for victims of air pollution. Their typical symptoms were defined and the fund necessary to pay victims was generated by charging numerous emission sources. However, the system experienced many difficulties with compensating the Minamata victims. First, the number of applications for certification greatly increased once Chisso's liability was clearly established by the court decisions. Soon, the backlog of applications to be processed reached several thousands toward the end of 1970's. Second, the medical standards for certification became progressively uncertain as many applications involved not acute mercury poisoning, but milder, cumulative effects of poisoning indistinguishable from ordinary ailments. The doctors on the certification board could not agree on what typical symptoms were. The courts, reviewing several cases of appeals from persons whose applications for certification had been denied, held the board's standards too strict. The Environment Agency also proposed more flexible guidelines for certification. However, these judicial and administrative attempts could not resolve the certification problem. Third, Chisso, the sole party responsible for continuously paying compensation to the certified victims had been on the brinks of bankruptcy many times. Each time, the prefectural government rescued Chisso by issuing public

bonds, a large portion of which the central government purchased, and by making the capital generated therefrom available in the form of low interests loans to Chisso. Nobody could afford to see Chisso go bankrupt.

As of 1995, there were 2,950 certified victims of mercury poisoning (Chisso-related 2,260 and Showa Denko 690). Upon certification, a victim received on average a lump sum payment of US\$180,000 (@100 yen = 1 US dollar), and annual payments \$20,000. Chisso paid \$27,500 per certified victim, a total of \$31 million. Showa Denko paid \$16,500 per certified victim, a total of \$7 million. From 1973 to 1994, both companies paid a total of \$1,288 million to certified victims.

Meanwhile, litigation involving other issues, civil as well as criminal, continued after the initial action against Chisso for damages. A criminal charge was brought against a plant manager of Chisso for criminal negligence in discharging the waste water, and he was convicted.

The victims sued the certification board to contest its determination denying them certification. The courts found the board's certification standards too strict and inflexible, and ordered some of the plaintiffs to be certified. The victims also sued the governments (national and local) for their failure to take necessary and prompt action. Major issues involved in this group of litigation are (a) whether the government should have banned fishing and sale of fish caught in the Minamata bay under the food safety act (The central government said no in response to the inquiry from the local government because there was no clear evidence that all fish and shell fish in the bay were contaminated); and (b) whether the government should have ordered Chisso to stop its operation because it violated the water quality preservation act. (The defendant contended that there was no violation because the area was not designated for preservation under the act).

The decisions of six district courts in ruling on these issues were evenly divided, three holding the government liable and three not liable. Both parties appealed to appellate courts. Toward the end of the 1980s, a total of 2,300 plaintiffs were in those suits pending be-



fore the 11 district and appellate courts.

Meanwhile, the central government in 1992 in cooperation with the local governments initiated a health care plan for uncertified victims. By the end of 1995, about 4,600 people were receiving on average \$2,900 for medical care annually.

By the mid 1990s it became apparent that the certification process for Minamata victims had broken down. Chisso had been in a chronically precarious financial situation. Litigation was in at an impasse. The only option remaining seemed to be a political resolution of the problem.

#### **4 A Political Settlement**

In April of 1994, the ruling political party, a coalition of Liberal Democrats, Socialists and one other faction, decided to make a national political settlement with the Minamata victims. The major political issue was the treatment of and remedies to be accorded to those who were claiming some effects of mercury poisoning, but still uncertified and uncared for. The government proposal contained the following features: (1) the polluters shall make a lump sum payment to those who meet certain requirements; (2) the national government and the Kumamoto prefectural government shall make a statement expressing sincere regret for their handling of the Minamata problem; (3) the parties who sign this agreement shall terminate all pending law suits; and (4) the central and prefectural governments shall continue the comprehensive health care plan, and shall provide financial measures to assist Chisso and to develop the affected areas, and reopen the application process for the health care payment.

In May, accepting and acting on the government proposal, the National Coordinating Conference of the Minamata Victims-Plaintiffs and the Plaintiffs' Lawyers (the Conference), and Chisso Corporation (Chisso) entered an agreement for the purpose of achieving the "final and comprehensive solution of all problems" concerning the Minamata disease.

The following text of the agreement recaptured in its preamble the events leading to the final settlement:

(1) On March 20, 1973, Kumamoto District Court rendered the

judgment for the plaintiffs, holding Chisso liable for damages. Following the court decision, a compensation agreement was signed by patient groups and Chisso, thereby providing compensation to the certified patients. Since the conclusion of the compensation agreement, however, the number of applications for certification had markedly increased, and so correspondingly did the number of rejected applications. Several rejected patients-applicants filed suits, contesting the determination of the certification board as well as its procedure and standards.

(2) The Fukuoka Appellate Court, on August 16, 1985, held that four of five plaintiffs deserved to be certified. The court found that those losses of skin feeling and sensation of the hands and feet, though the same might be caused by the neck bone deformation, were quite distinctive symptoms of mercury poisoning. It was reasonable to presume, the court held, that the symptom was in fact that of the Minamata disease, unless it should be proved otherwise, and that even a diagnosis of such symptom alone, when accompanied with those epidemiological conditions and cumulative symptoms observable among the family members of a particular patient, should warrant the finding of Minamata disease with high probability.

(3) Since 1980, a series of suits was brought against the central government and Kumamoto prefectural government under the government torts claims act. The plaintiffs alleged that the governments were liable for the occurrence and the spread of Minamata disease. During September to October of 1990, several courts where those suits were pending recommended the parties to settle. The plaintiffs, the Kumamoto prefectural government, and Chisso participated in settlement negotiations, but the central government refused to join in. On January 7, 1993, the Fukuoka Appellate Court drafted and proposed the terms of settlement. However, the settlement was not finally reached since Chisso did not accept the proposal. Meanwhile, several district courts found for uncertified patients, ordering Chisso to compensate them.

(4) The central government initiated a comprehensive medical care measure which provided 4,600 persons with medical care. In June, 1994, a new cabinet was formed under Prime Minister

Murayama, the head of the Socialist Party, and a solution for Minamata disease was placed on a high priority list of his government's political agenda. The government agreed on a framework for a political solution of the Minamata disease problems. Prime Minister Murayama, speaking for the government, issued the following official statement on December 15, 1995. "I express a deeply felt condolence for those who died in the midst of sufferings and frustration and when I consider those who have been put under indescribable sufferings for many years and must have felt irreparably hurt, I am filled with the sincere feeling of regret."

In the context described above, the Conference and Chisso entered the agreement to settle the Minamata disease problems, stating that "taking into consideration, to the utmost degree, the early resolution is urgently needed."

The agreement sets forth the following terms of settlement.

(1) Chisso gravely accepts the following: that Chisso's legal responsibility for causing Minamata disease by its own discharge of methyl mercury was adjudged by the court on March 20, 1973; that Chisso's legal responsibility for four uncertified plaintiffs was affirmed by the appellate court judgment on August 16, 1985; and that a series of other district court decisions, while appealed, held Chisso liable for uncertified-patient plaintiffs. Chisso shall make apology to the plaintiffs, the residents of the affected areas and to society in general for the fact that it has taken such a long time to reach the resolution today since the beginning of the Minamata problem.

(2) Among those who were possibly exposed to the above-natural level of methyl mercury in the past and were suffering from the loss of sensation in their hands and feet, the administrative compensation act has set those certified apart from the others whose certification was denied. The diagnosis of Minamata disease has been made on the basis of exposure to methyl mercury and of a combination of symptoms of mercury poisoning. This agreement intends to provide some relief for those whose certification was denied. However, since the medical determination of the Minamata disease is dependent on a matter of degree of probability, the fact that their applications were denied does not mean that they are entirely without the

effects of methyl mercury. Therefore, the agreement provides relief for those who are suffering from the loss of sensation in their hands and feet, and who consent to the termination of their litigation.

(3) The National Conference and Chisso actively shall work with the residents of the area for reviving and redeveloping the community, by participating and coordinating in the efforts of repairing and reconstructing the community's bonds.

Under the agreement, Chisso is required to make a lump sum payment to (1) those who are currently registered and receiving health care under the comprehensive health care measure, and (2) those who are determined to be eligible in the reopened application process for the comprehensive health care measure by the prefectural governor in consultation with the review board. The amount of lump sum payment to a person eligible is \$26,000 per person plus a \$3,000 medical care payment per year for those who applied between January and August, 1996. The number of renewed applications was over 9,300, of which 5,885 were determined eligible (roughly 60%). In March of 1997, when the review of all applications was completed, the final number of persons eligible for receiving a lump sum payment and the continuing medical payment reached 10,350 (including about 4,400 who were determined eligible before the reopening of the application).

It is estimated that those who have been determined eligible would continue to receive medical care payment, on average, for 10 to 14 years. The total amount of medical care payments per person at the end of these years may be around \$29,000 to \$40,000. With the lump sum payment, the total amount one person would receive may become comparable to the average damage award (\$58,000) by the courts in six cases where the plaintiffs sued the governments as well as the polluting companies.

Aside from an individual lump payment, a total of \$50 million is allocated to six victims organizations involved in litigation. The eligible person if he is a member of one of those organizations may receive an additional amount determined by each organization in addition to his or her lump sum payment. This portion of payments comes from Chisso. The medical care costs are to be borne by the

central and local governments as a part of the costs of the public health insurance system.

The national conference and its members agree, upon receiving the lump sum payments, to settle all disputes and pending litigation, and to refrain in the future from litigation for damages, attempting negotiations, and activities for demanding official certification under the administrative compensation system.

The group of people in Niigata who sued Showa Denko also reached a settlement with similar terms to the groups of Minamata. Showa Denko agreed to contribute \$2,500,000 for the reconstruction of the community ties in addition to a lump sum payment to eligible persons.

## 5 Some Lessons

The magnitude and full extent of harm caused by mercury pollution in Minamata has yet to be determined. It has been reported that about 20,000 people living along the nearby coast have been affected. About 17,000 applied for official certification, and of those about 4,000 were certified. About 1,200 have died from mercury poisoning. The compounding effects of 40 years of litigation, the administrative compensation system, and the final political settlement have been very divisive within the community. People are divided between those who sued and those who did not; those who applied for certification and those who did not, those certified and those not certified. The victims were at one time fragmented into 20 different factions.

Some people fear that the political settlement may create a false impression on the part of the general public that the Minamata story is over. The steel net which sealed the mouth of bay to prevent fish to go out was finally removed in 1997. Fish caught in the bay were tested for mercury and declared safe. Commerical fishing is now possible in and around the bay, but few fishermen still remain in the area. A large portion of the bay (about 138 acres) was land-filled and a layer of concrete covered the heavily contaminated sediments in the bottom of the bay. A memorial museum was built on the site. Other use of the acquired space remains undecided. The Chisso plant

is there still operating; the sole purpose of its existence seems to be continuing to pay compensation to the certified victims of mercury poisoning.

Three different institutional approaches have been used over 40 years. The victims resorted to the court for the vindication of their rights after all traditional means of dispute settlement failed. The courts provided the victims with a forum to confront the polluters and to gain public attention. Through litigation, the local incident of mercury poisoning far away from Tokyo finally drew the attention of politicians and bureaucrats in the central government.

The courts created a presumption of causation in favor of the plaintiffs and imposed a very high degree of care on the polluting companies. The courts awarded damages to the plaintiffs in all major pollution cases in the early part of 1970s, and laid a foundation for the administrative compensation system.

The administrative compensation system served its function sufficiently in terms of providing payment to victims of air pollution. In the case of air pollution, scientific and medical standards for designating the heavily polluted areas and certifying victims were relatively clear and never in dispute. Also, a sufficient fund was created at the national level by charging numerous emission sources. The amount needed to pay certified victims each year was assessed and charged to those sources. The collection of charges was effectively made through relevant industrial associations, and the fund remained solvent all through the years of its operation. In contrast, in the case of compensating the victims of mercury poisoning, the certification process broke down under the large volume of applications and because of medical uncertainty as to certification standards. Ever since the courts found it liable for damages, Chisso has been on the verge of bankruptcy several times. Chisso has been kept afloat by infusions of public money in the form of low interest loans. If Chisso were to go under, about 2,000 certified victims currently receiving compensation directly from the company would be left uncompensated.

The political settlement came only after 40 years. It certainly extended remedies to a large number of uncertified victims. It incor-

porated a comprehensive health care plan which was designed to improve public health care in the affected community. The measure has provided such treatments as acupuncture and hot spring bathing to those who were not eligible for medical care payments. The political settlement also emphasized the need of healing the divided community and made some attempts to promote cooperation among the once adverse parties.

In mass torts cases, litigation leads often to a political settlement. Judges may actively be involved in formulating the terms of settlement. Possible advantages and disadvantages of setting up compensation systems of funds have been debated. Unless a society decides to adopt a comprehensive national health and welfare system, it takes all three different approaches to resolve a mass tragedy like Minamata. In hindsight, we can ask several questions yet to be answered. Why was not Chisso ordered to stop the discharge when mercury was found in the wastewater? Why was not commercial fishing in the Minamata bay prohibited? Why did Chisso continue its operation even after an internal experiment on cats established its wastewater caused the disease? Why were only damages and not injunctions sought in all those suits? Why did regulatory agencies remain unconcerned and did not initiate actions in the critical stages? What is the most effective and efficient combination and sequence of litigation, regulatory relief and political intervention? Why has it taken forty years to reach the settlement? To find answers to these questions is certainly a step toward preventing the tragedy from happening again. The Minamata story urges all of us to do so.