

New developments in construction workers asbestos litigation in Japan

**From Supreme Court ruling
to new Compensation Scheme**

June 19, 2021

Sugio FURUYA

Asian Ban Asbestos Network (A-BAN)

Ban Asbestos Network Japan (BANJAN)

Japan Occupational Safety and Health Resource Center (JOSHRC)



13 years of Construction Workers Asbestos Litigation

No.	Group	District Court	High Court	Supreme Court
1	Kanagawa 1st group	2008-2012	2012-2017	2017-2021
2	Tokyo 1st group	2008-2012	2012-2018	2018-2021
3	Kyoto 1st group	2011-2016	2016-2018	2018-2021
4	Osaka 1st group	2011-2016	2016-2018	2018-2021
5	Kyusyu 1st group	2011-2012	2012-2019	2019-
6	Hokkaido 1st group	2011-2017	2017-	
7	Kanagawa 2nd group	2014-2017	2017-2020	2020-
8	Tokyo 2nd group	2014-2020	2020-	
9	Hokkaido 2nd group	2015-		
10	Osaka 2nd group	2016-		
11	Kyoto 2nd group	2017-		
12	Kyusyu 2nd group	2018-		
13	Hokkaido 3rd group	2020-		
14	Tohoku group	2020-		
15	Saitama 1st group	2020-		
16	Tokyo 3rd group	2020-		
17	Kanagawa 3rd group	2020-		
18	Osaka 3rd group	2021-		
19	Kansai group	2021-		

Total number of the plaintiffs is approximately 1,200 (500 for the first 4 groups)



Kanagawa 1st group
October 22, 2020



Tokyo 1st group
February 25, 2021

Supreme Court Hearings 2020-2021



Kyoto 1st group
March 22, 2021



Osaka 1st group
April 19, 2021

Supreme Court Ruling on May 17, 2021



1947 State Redress Act, Article 1 (1)

- When a public officer who exercises the public authority of the State or of a public entity has, in the course of his/her duties, unlawfully inflicted damage on another person intentionally or negligently, the State or public entity shall assume the responsibility to compensate therefore.

Supreme Court Precedent

- If it is deemed as significantly not rational, deviate from permissible boundaries, in the light of purport, purpose of the law or ordinance prescribing the public authority or nature of the said authority, under the specific conditions, the failure to exercises the public authority by a public officer of the State or of a public entity is, in relation to another person who suffered damage, judged as illegal in the application of the above.

Regulatory Framework for the Case

- The **purpose** of 1972 Occupational Safety and Health Act is to secure safety and health of workers in the workplaces, the act prescribes employer shall take necessary measures for preventing health impairments of workers and the act depute prescribing specific measures to be taken by employer to Ordinance of the Ministry of Labour.
- The **purport** of why OSH Act comprehensively depute prescribing specific measures to Ordinance of the Ministry of Labour are;
that the contents of measures to be taken by employer are wide-ranging specialized and technical matters and
that it is considered as appropriate to depute it to Ordinance of the Ministry of Labour in order to amend the contents as expeditiously as practicable to be adjusted to advances in technology, updates in medical knowledge, etc.

Background Facts confirmed by Courts

- Medical knowledge on asbestosis has been established around on March 31, 1958.
- Relationship between lung cancer/mesothelioma and asbestos exposure and that both disease are late-onset diseases with long latency periods has been established at the latest in 1972.
- In 1973 Ministry of Labour has tightened control limit value in the workplace for asbestos from 33 fibers/cc to 5 fibers/cc based on the above knowledge.
- In 1975 Ministry of Labour amended Enforcement Order/Ordinances for OSH Act to make asbestos the subjects of labeling/posting duties as hazardous materials.
- As about 70% of asbestos was used at construction workplaces at that time, building material manufacturers/employers in construction industry as duty holders of labeling/posting should have been supposed. etc.

Government Responsibility of Survey, etc

- In light of the above points, around 1973, the Ministry of Labour was able to recognize that construction workers might be exposed to asbestos with a concentration exceeding 5 fibers/cc and **should have conducted survey** such as asbestos dust concentration measurement at the construction workplaces. If the ministry did so they could recognize the bellow.
- Although labeling/posting duties was introduced in 1975, the contents the ministry was instructing were far from appropriate/adequate (for example “inhaling large amount of dusts may damage your health”).
- At the time of 1975 respiratory protective equipment against asbestos was needed for all indoor construction workers but majority of them had not worn, and there was no barrier for introducing such duty.

Government Responsibility on Workers -1

- By October 1, 1975, when duties of labeling/posting for asbestos were introduced, Ministry of Labour also should have exercised its regulatory authority under OSH Act and **should have instructed/supervised** (duty holders) to indicate that inhaling asbestos dust generated from asbestos containing construction materials increased risks developing serious asbestos-related diseases like asbestosis, lung cancer, mesothelioma, etc and that worker engaging works generating asbestos dust such as cutting construction material or working around such works must wear proper dust prevention mask on the **labeling** on asbestos containing construction materials and on the **posting** at the workplaces handling asbestos containing construction materials.

Government Responsibility on Workers -2

- By October 1, 1975, when duties of labeling/posting for asbestos were introduced,
Ministry of Labour also should have exercised its ministerial ordinance enactment authority under OSH Act and **should have obliged** employer to have worker engaging the above mentioned work at indoor construction workplaces use **respiratory protective equipment**.
- It should say **significantly irrational**, in relation to worker who engaged in indoor construction work and was exposed to asbestos, in the light of purport, purpose of OSH Act and nature of the authority and should be **said to be illegal** in the application of Article 1 (1) of State Redress Act that the minister had not exercised the above mentioned authorities under OSH Act after October 1, 1975.

Government Responsibility on Workers -3

- On April 1, 1995 Ministry of Labour has amended an ordinance for OSH Act to **oblige** employer to have worker engaging works generating asbestos dust such as cutting construction material use **respiratory protective equipment**.
- However workers working **around** such works were not subject to the obligation and the contents of **instruction/supervision** by the ministry on **labeling/posting** had remained inappropriate/inadequate as before.
- The state where non-exercise of regulatory authorities by the ministry was illegal in the application of Article 1 (1) of State Redress Act had continued from October 1, 1975 to September 30, 2004 and has been **resolved after** October 1, 2004 when manufacture, import, transfer, provide or use of construction material containing asbestos at 0.1% or more in its weight was **prohibited** under OSH Act.

Government Responsibility on Self-employed -1

- Article 57 of OSH Act prescribes that a person that transfers or provides a certain hazardous substance including asbestos must **label** the container or the package of the substance with name of the substance, its effect on human body, precautions concerning storage or handling it, etc.
- It is understood as the purport of this article is to prevent person handling that substance from having health problem. The risk of health problem doesn't depend on whether the person is an employee defined under OSH Act or not.
- Considering this is **regulation focusing on the danger of substance** and workers are not only ones who are at risk from handling the substance, the purport of this article is to **protect person handling the substance and not employee too**.
- Also it's hard to understand OSH Act is naturally excludes those who are not employees because the Act also aims to facilitate the creation of comfortable workplace environments.

Government Responsibility on Self-employed -2

- An Ordinance for OSH Act prescribes that employer shall, at the workplace where a certain special control substance including asbestos is manufactured or handled, **post** name of the substance, its effect on human body, precautions concerning storage or handling it, etc at a visible location in the workplace.
- It is understood as this is to oblige the posting considering such workplaces are dangerous to the human body. The risk of health problem doesn't depend on whether the person is an employee defined under OSH Act or not.
- Considering this is **regulation focusing on the dangers of workplace** and workers are not only ones who are at risk at the workplace, the purport of this is to **protect person handling the substance and not employee too**.
- Also it's hard to understand OSH Act is naturally excludes those who are not employees.

Government Responsibility on Self-employed -3

- It should say **significantly irrational**, in relation to those who engaged in indoor construction works and was exposed to asbestos and who are not employees defined under OSH Act too, in the light of purport, purpose of OSH Act and nature of the authority and should be **said to be illegal** in the application of Article 1 (1) of State Redress Act.

that the minister had not exercised the above mentioned authorities under OSH Act after October 1, 1975.

- In this case person who is not an employee defined under OSH Act means self-employed worker or small business owner.

Responsibility of Building Material Manufacturers

- It is reasonable to understand that certain former asbestos containing construction material manufacturers are, by applying the analogy of the later part of Paragraph 1, Article 719 of the Civil Code, **jointly responsible** for a certain part of the damages of plaintiffs.
- Some cases have been confirmed but many have been remanded to the High Court. Several discussion points has not been confirmed yet for the responsibilities of former asbestos containing construction material manufacturers.
- Paragraph 1, Article 719, the Civil Code
If more than one person has inflicted damage on another person by a joint tort, each of them is jointly and severally liable to compensate for the damage. The same applies if it cannot be ascertained which of the joint tort-feasors inflicted the damage.

Other Discussion Points

Supreme Court denied responsibilities of Government and former asbestos containing construction material manufacturers on **outdoor construction** workers.

The bellow Government responsibilities acknowledged by High Courts have been confirmed because Supreme Court didn't accepted appeals by the Government;

- Government responsibility on **protection of asbestos spraying worker** for the period between October 1, 1972 and September 30, 1975 and
- Government responsibility on introduction of a **ban on asbestos** for the period between the end of 1991.

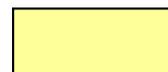
Supreme Court didn't make own decisions on **standardized compensation amount** and **liable fraction** of Government responsibility (different judgments have been confirmed).

High Court Judgments and Supreme Court Decisions

	Kanagawa 1st	Tokyo 1st	Osaka 1st	Kyoto 1st
Gov responsibility on indoor construction worker	Won But limited	Won	Won	Won
Gov responsibility on self-employed worker	Lost	Won	Won	Won
Gov responsibility on outdoor construction worker	Lost	Lost	Won	Lost
Gov responsibility on spraying worker	-	-	Won	-
Gov responsibility on ban on asbestos	Lost	Lost	Lost	Won
Responsibility of former asbestos containing construction material manufacturers	Partially Won	Lost	Won	Won
Standardized compensation amount				
Grade 2 asbestosis with complication	¥13M	¥13M	-	¥15M
Grade 3 asbestosis with complication	¥18M	¥18M	-	-
Meso, lung cancer, diffuse pleural thickening	¥22M	¥22M	¥23M	¥24M
Death due to the above	¥25M	¥25M	¥26M	¥27M
LIABLE fraction of Gov responsibility	1/3	1/3	1/2	1/3



High Court judge was confirmed.



Reviewed by the Supreme Court.

Demand/proposal by the Plaintiffs

Establishment of new “Asbestos Damage Compensation Fund for Construction Workers” by the Government and former asbestos containing construction material manufacturers – both should contribute half of the fund respectively.

Standardized compensation amount (consolation money);

1. Grade 2 asbestosis without complication	16 M JPY
2. Grade 2 asbestosis with complication	18 M JPY
3. Grade 3 asbestosis without complication	22 M JPY
4. Grade 3 asbestosis with complication	24 M JPY
5. Grade 4 asbestosis	27 M JPY
6. Lung cancer or mesothelioma	27 M JPY
7. Diffuse pleural thickening	24 M JPY
8. Benign asbestos pleural effusion	24 M JPY
9. Death due to 1-8	30 M JPY

Rapid Developments after Supreme Court Ruling

- **Supreme Court** ruling was made on May 17, 2021.
- **Project Team of Ruling Parties** proposed early resolution by (1) apology by the Government, (2) settlements with all plaintiffs by unified standards and (3) establishment of new payment scheme for (current and future) possible plaintiffs.
- **Prime Minister**, Suga accepted the proposal and met representatives of plaintiffs to officially apologize on May 18.
- **Minister of Labour**, as a representative of Government, also met representatives of plaintiffs, officially apologized and signed “Basic Agreement” with them on May 18.
- **Bill** for establishing new “asbestos compensation payment scheme for construction workers with asbestos-related diseases” was submitted to Parliament on June 2, 2021.
- **New Act** was enacted on June 8, promulgated on June 18 and **New Payment Scheme** will start to work within 1 year.



Prime Minister, Suga.



Minister of Labour, Tamura.



New Payment Scheme for Construction Workers -1

Payment amount;

1. Grade 2 asbestosis without complication	5.5 M JPY
2. Grade 2 asbestosis with complication	7 M JPY
3. Grade 3 asbestosis without complication	8 M JPY
4. Grade 3 asbestosis with complication	9.5 M JPY
5. Grade 4 asbestosis	11.5 M JPY
6. Lung cancer	11.5 M JPY
7. Mmesothelioma	11.5 M JPY
8. Diffuse pleural thickening	11.5 M JPY
9. Benign asbestos pleural effusion	11.5 M JPY
10. Death due to 1-3	12 M JPY
11. Death due to 4-9	13 M JPY

If the victim had been smoker 10% of the amount will be reduced and if asbestos exposure period was relatively short the amount will be reduced up to 10% too.

New Payment Scheme for Construction Workers -2

- **Eligible person:** an employee, self-employed worker or small business owner who had been exposed to asbestos in engaging construction works during the bellow period and suffered from asbestos-related disease OR bereaved family if that person has been died.
 - Asbestos spraying work for the period between October 1, 1972 and September 30, 1975 and/or
 - Indoor construction work for the period between October 1, 1975 and September 30, 2004.
- **Recognition:** Ministry of Labour set up Recognition Examination Committee (not judiciary procedure).
- **Contributor:** Government (only)
- It is expected there will be approx. 10,000 possible eligible persons and, in addition, will have 20,000 or more in the future.

Points to Note and Way Forward

- Almost of plaintiffs and expected receivers of new payment scheme is receiving or have received benefits from Workers Compensation Scheme or Asbestos Health Damage Relief Act (as **official minimum compensation/relief**).
- What plaintiffs claimed at the courts and payment from new scheme is **additional compensation payment** to such benefits as standardized **consolation money**.
- New payment scheme should be expanded to cover outdoor construction workers etc.
- Former asbestos containing construction material **manufacturers** should contribute to new payment scheme and then its benefit will be doubled. Asbestos litigation against them continues and will increase.
- **Fundamental reconstruction of Asbestos Health Damage Relief Act** will be most important next challenge to close the gap with Workers Compensation Scheme.

June 18, 2021

あやまれ! つくなえ! なくせ! アスベスト被害 2021年6月16日
建設アスベスト訴訟の全面解決をめざす全国総決起集会
屋外工・違法期間外を含めすべての被害者の救済を!
建材企業は責任を認め、裁判の和解と補償基金に成せよ!

Struggle continues



Article

Experience of Japan in Achieving a Total Ban on Asbestos

<https://www.mdpi.com/1660-4601/14/10/1261>

Sugio Furuya ^{1,*} and Ken Takahashi ²

¹ Japan Occupational Safety and Health Resource Center, Tokyo 1360071, Japan

² Asbestos Diseases Research Institute, University of Sydney, Sydney 2139, Australia;
ken.takahashi@sydney.edu.au

* Correspondence: 2009aban@gmail.com; Tel.: +81-3-3636-3882

Received: 25 September 2017; Accepted: 18 October 2017; Published: 20 October 2017

Past Measures Are Now Being Judicially Examined

After the “Kubota Shock”, the relevant ministries committed to verifying the ministerial measures taken in the past and reported back during the above-discussed meetings. The overarching theme of these self-reports was that the past actions of each ministry were generally appropriate. Today, however, some of these past measures are being contested in court. ...

A lesson can be drawn for the governments of all countries currently using asbestos: whether or not a ban is planned, the government should thoroughly review and consider their current actions against asbestos in view of the historical and current developments in Japan.