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# Existing Rules on Liability and Identified Gaps

*Presentation*

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Dr Usha Ramanathan

**International Environmental Law Research Centre**
India Office
283 Supreme Enclave
Mayur Vidar, Phase 1
New Delhi, India
E-mail: delhi@ielrc.org

## Existing rules on liability and identified gaps

*There are three areas of law that aspire to relevance in the context of accountability and answerability of corporations. There is*

- statute law,
- juristic activism on the bench, and
- tort law

Statute law is most often prospective and always so where penalty and punishment are a part. Juristic activism allows for a certain creativity and exercise of legal imagination, and can assist the recognition of wrongs that had not been budgeted for before. This has proved potent in Public Interest Litigation in India, for instance where errant corporations damaging the environment have been brought to account. But dealing with reluctant corporations under this jurisdiction is not without its complement of problems, especially where the corporation may just walk out of the jurisdiction of the court, or vanish into the yaws of another corporation. The fear that activism may not stand the scrutiny of a foreign court which may test the 'due process' of the trying court may add to the unavailability of activism as a path to establishing liability. Tort law is the one area of law which works on the principle that every wrong has a remedy. But this is often poorly developed and precedents that may reckon with the wrongs of a large, or transnational, corporation are not easy to find.

Increased awareness of potential risk and harm, and experience with mass disaster has shown up the inadequacies, even absences, in the law's possibilities. The immediate need of victims of disaster has tended to dislodge concerns about safety and liability. The language of no-fault and the device of insurance have assisted the relegation of liability, in particular, to the background. The impaired resistance of victim populations pitted against the staying power of the corporation has also been cause for cases not to come to judgment. The difficulties in predicting with precision the impact of emerging technologies, and the inadequate avenue of information for a victim of such technology, lend a further dimension to the issue of liability.

The difficulties experienced, and as may be anticipated, in bringing foreign corporations to trial and judgment, and anxieties about implementing an award of a court, have stunted the development of liability law, especially in its relation to transnationals. Importance of discovery procedures, requiring providing of information about a product which has caused injury or harm for instance, cannot be discounted; yet they fall between the cracks in the law.

The development of a statutory regime which

- sets out systems of accountability,
- makes choices and arrangements between fault and no fault,
- prescribes penalties, and responsibilities, upon the happening of an event – traumatic or non-traumatic- and
- recognises a universality in the matter of misconduct, negligence or criminality of a corporation

is a necessary concomitant of the deployment of certain technologies, and their movement across borders, with the potential of affecting host populations. The shifting relationship between industrial and trade secrecy and the right to information too requires to be played out in a statute.

It may be instructive to see

- The extent to which the 'compensatory' element is reduced to 'compensation'
- The infusion of the no-fault principle into compensation law
- The movement of liability for compensation from fault, to strict liability, to the 'absolute liability' principle that has been mooted by the Indian courts
- The potential for penalty structures that travel beyond the 'fine' and 'imprisonment' prescriptions that is so well known to law, to other forms, including outlawing goods produced by an offending corporation, tacit hypothecation by which the assets of the enterprise would stand 'hypothecated' to the decision in a case, dismantling an offending corporation, restraining the corporation's activities until remedial measures are taken – an element that is already entrenched in environmental law – are definite options
- Any expansion of causation that may be developing, or may need to be developed, especially in the context of indefinite gestation and aggravated harm
- The notion of 'victimage' especially where 'mass disaster' occurs.
- The especial character of a 'mass disaster'
- The disappearance and reappearance of corporations, and its impact on liability, compensation, access to relevant information and deterrence
- The nature of corporate criminality, and the 'punishing' of an offending corporation and of errant corporate actors

The general inability of national laws to hold a transnational corporation (TNC) to account where it decides to evade the law, and in the absence of international law that can enforce answerability of the TNCs, stands demonstrated.

An international system of laws based on an understanding of what has transpired in this domain, and anticipating the conduct of corporations in the matter of risk, hazard, damage, loss, cost, negligence, fault and criminality has emerged as an imperative.