



International Environmental  
Law Research Centre

# Existing Rules on Liability and Identified Gaps

*Presentation*

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## 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.

## **Liability and environmental damage: The Indian Experience**

The Union Carbide Gas Disaster was the first experience of a major industrial disaster in India. In its aftermath, the vastness of the death and suffering placed the focus predominantly on questions of compensation to the victims and survivors of the disaster. This was resolved by a settlement in 1989 which is widely regarded as inexplicably low in its quantum (475 million US\$ for an indeterminate number of victims, and claims totalling over 5,00,000, with over 2800 having died in the night and day of the disaster, and over 20,000 having died over the years due to causes arising out of the lethal gas leak), and which, in its original statement closed all the criminal proceedings which had been initiated against the corporation and its managers. This was later revised, the criminal cases re-opened, and the trials are currently underway. Warren Anderson, its CEO at the time of the disaster, and the UCC, remain absconders, refusing to present themselves to be tried.

It was not till 1999, when Greenpeace conducted tests in and around the Bhopal plant, that the environmental damage, which continued to affect the population around the plant, acquired a centrality. The toxicity seeping out of the plant, and into the soil, has contaminated the water sources around the plant. Also, there is a reckless disregard, which is in evidence in the absence of a clean-up programme on the site of the factory and its storage depots. In the meantime, Dow Chemicals has taken over Union Carbide, but is denying any responsibility for cleaning up the premises. The Union Carbide – Bhopal Gas Disaster is, so far, a saga of impunity.

Environmental law has, in the meantime, developed essentially in the PIL jurisdiction. Public Interest Litigation (PIL) allows any bona fide person to take a matter of public interest to the higher judiciary, even where the person who is espousing the cause is not personally or directly affected by the interest that is being agitated in the court. It is a dilution of the principle of locus standi – a significant departure from traditional rules of procedure – which has given the judiciary enormous scope for intervening in environmental matters.

Indian courts have been categorical in their adoption of the values of sustainable development and of the precautionary principle.

The kinds of environmental issues that have been brought to the court include –

- Riverine pollution – by tanneries, industrial effluents, untreated sewage, for instance.
- Soil and groundwater damage, e.g., in the Bicchri industrial pollution case
- Indiscriminate mining
- Protection of forests
- Fencing in of parks and sanctuaries
- The preservation of monuments of archaeological and historical significance, and their protection from vandalism, and industrial pollutants.
- Automobile pollution

Indian courts have moulded remedies that were intended to have the effect of

- amelioration
- reparation
- redress
- penalty

The judicial prescription has included

- the remedial measures that clean-up technology may offer
- application of the polluter pays principle
- the imposition of a pollution fine
- revision of environmental standards applicable in Indian conditions, for instance where automobiles were ordered to conform to Euro standards, or in the conversion of commercial vehicles to CNG, a less polluting fuel.

Where the source of pollution has been certain, as in the Bicchri Case (1996) where the polluting industries were clearly identified, the court has ordered that the owners go deep pocket in paying for environmental clean-up, and for compensating those who had suffered losses as a result of the toxicity let loose on the soil and water in that area of Rajasthan. Where a multiplicity of establishments has been found to be polluting a resource, the response has ranged from closing down the enterprise, to getting them to set up ETPs or CETPs, and levying a penal fine on the enterprise.

When Oleum Gas leaked from a factory in Delhi in December 1985, the Supreme Court advanced into law the principles of

- ‘absolute liability’ (where act of god and sabotage constitute the only exceptions), and
- enterprise liability by which the paying capacity of the enterprise would determine the sum of compensation to be paid

This was intended to serve the cause of deterrence and, consequently, enhance safety. In an interim arrangement, the Managing Director of the enterprise was required to give an undertaking that he would be personally liable in the event that another episode led to further damage.

In 1991, the Public Liability Insurance Act was enacted particularly to provide for a scheme of insurance where an activity involving hazardous substances or processes is carried on. This would be drawn upon to pay interim compensation to victims of an 'accident'. In 1992, by an amendment which placed a ceiling on the amounts that an insurance company would have to pay, a provision was made for the setting up of an Environment Relief Fund. The National Environment Tribunal Act enacted in 1995 has a schedule which, following the Bhopal Claims Act 1985, details the expected losses and the heads of damages following an 'accident' involving hazardous substances or processes.

There is a category of offences termed 'absolute offences' which the court recognizes. 'Absolute offences', the Supreme Court has said, 'are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty'. Breach of the prescriptions under the Factories Act 1948 would, then, constitute an absolute offence.

There is a significant departure from criminal law in cases of absolute offences. In criminal law, the issue to be decided is confined to questions of guilt of persons charged with an offence. In contrast, in the Factories Act 1948, for instance, the occupier or manager of a factory is answerable in the first instance for breach of any provision of the law; but where they claim due diligence or absence of knowledge, consent or connivance in relation to a breach of the law and ask to be discharged, that can be done only when 'any other person whom he charges as the actual offender (is) brought before the court at the time appointed for hearing the charge'. The occupier or manager has to prove too due diligence, and that 'the said other person committed the offence in question without his knowledge, consent or connivance'. And that other person shall be convicted of the offence. This rests on the logic of accountability, and on an understanding that there is, or has to be, a person(s) responsible for the conduct of the plant at all times; and that what happens within the plant is within the near exclusive knowledge of those in authority in the plant.

In 1987, following on the Bhopal Gas Disaster, the term 'occupier' was re-defined to mean, inter alia, 'in the case of a company, any one of the directors shall be deemed to be the occupier'. This was in recognition of the systemic nature of matters of safety, and was intended to foster a greater priority for safety than had been demonstrated so far.