MNCs and Legal Liability for Environmental Hazards
MNCs AND LEGAL LIABILITY FOR ENVIRONMENTAL HAZARDS

The basic insight of ecology is that all living things exist in inter-related systems; nothing exists in isolation. The world system is web like; to plug one strand is to cause all to vibrate; whatever happens to one part has ramification for all the rest. Our actions are not individual, but social; they reverberate throughout the whole eco-system."

-A. Fritsoh.

Nature is regarded as the Mother of Humanity. The existence of pure natural and environmental resources is the prerequisite, if the mankind is to survive on earth. The Stockholm Declaration recognized that man is the part of nature and life depends on it. Truly, the slow and steady degradation of environment began with the onset of industrial revolution under different reasons. But over the last few decades, there has been very reckless use of natural and environmental resources by the industrial organizations including Multinational Corporations (MNCs). Generally, the industrial investment in Third World countries originated outside those countries, and much of this was made by MNCs. A large proportion went into the exploitation of natural resources (e.g. minerals, fuels, timber, fish) by Multinational Corporations (MNCs).

In addition to that, many Multinational Corporations (MNCs) are currently involved in activities that have profoundly negative impacts on the environment in the global competitive world. In recent times, environmental disasters caused by industrial accidents of MNCs are big environmental problems e.g. Bhopal accident in India. Indeed, the MNC has had little sense of

3 P.S.N. Prasad An Overview of March of Environmental and Pollution Control Law-Indian Scenario AIR 1999 p.122.
responsibility to the outside world.\textsuperscript{7} This opinion is true in case of environmental responsibility of MNCs. Under these circumstances, there is an urgent need to make suitable liability principles and strict implementation of the existing relevant liability principles both at national and international level to control and regulate the polluting MNCs for the protection of our natural and environment resources. With this aim, the present chapter deals with the environmental liability principles with regard to the Multinational Corporations (MNCs).

Undoubtedly, MNC is one of the remarkable phenomenons of our times.\textsuperscript{8} They have the dominant position in sophisticated, technology-oriented and high-growth-rate industries.\textsuperscript{9} India’s experience of multinationals is not exactly similar to the experience of some other countries...due to historical and policy reasons.\textsuperscript{10} Generally, environmental regulations and liability rules differ among nations, often strikingly so. The differences are also greatest between the developed and the developing nations, but there are also substantial variations within each of those vague, but convenient groupings.\textsuperscript{11} To impose liability with regard to the environmental pollution caused by mighty Multinational Corporations (MNCs) is a difficult task particularly to the developing countries. However, a comprehensive global approach towards liability prevention can go a long way in establishing healthy trade practices. The state may employ liability rules, under which it merely

\textsuperscript{7} John P.Rive \textit{The Multinational Corporation in the LDC: Is There Room for a Broker?} In S.Prakash Sethi and Richard H.Holton \textit{Management of the Multinationals; Policies, Operations and Research} 1974 at p.38.
\textsuperscript{9} S.Prakash Sethi and Richard H.Holton \textit{Management of the Multinationals; Policies, Operations and Research} 1974 at pp.2-3.
\textsuperscript{10} O.P.Jain \textit{Multinationals in Developing Economics} XXI produ.jour (1980).
\textsuperscript{11} The developed/developing country distinction is an inevitably convenient but potentially misleading simplification. For example, the distinction does not clearly account for the nations of Eastern Europe and the former Soviet Union, the OPEC nations, or the "Asian Tigers." There are also wide differences among the developing nations of Africa, the Americas, and Asia. On the difficulty of distinguishing among developed and developing countries, see generally Gerald G.Geier, Leading Issues in Economic Development 5-15 (1969) (pointing out that definitions of "development" vary with policy goals) cited in Richard B.Stewart \textit{Environmental Regulation and International Competitiveness} 102 YALE L.J. 2051 (1993)
discourages violations by requiring transgressors to pay victims for harms suffered. The international legal activity focused on environmental issues in the past few years manifests a significant shift in the treatment of environmental concerns and also try to establishing the liability principles.

By establishing such principles, not only will the possibility of environmental disasters be reduced, but also liability for observing different standards in different locations will be effectively avoided. Such a scheme will have to go beyond primary environmental concerns because factors such as recycling, health standards, and employees’ rights to know about the hazards associated with particular activities are increasingly being incorporated into national and international standards. However, so long as these standards remain fragmented and scattered, their effectiveness will remain spotty and questionable. The only answer to the quandary lies in the globalization of the issues, concern, and objectives that fall within the sphere of transnational business activity.

Modern business companies are so often interdependent, by reason of financial relationships. The ‘complex corporate structure’ of MNCs is characterized by close interwining coupled with fine distinctions within a network of subsidiaries, affiliates and divisions operating in amaze of ‘interlocking directors, common operating systems, global distribution and marketing systems, design development and technology worldwide, and financial and other controls.’ This ‘complex corporate structure’ of the MNC makes it extremely difficult for victims to ‘pinpoint responsibility for the damage’ or precisely ‘isolate which unit of the enterprise caused the harm.’ Only the MNC in question has ‘the means to know and guard against the hazards likely to be caused by the operation of the said plant.’ As a result, ‘the multinational enterprise which caused the harm is liable for such harm.’ Till the Bhopal incident, the courts in India have been

14 Lewis C.Williams Responsibility of Corporate Control XII Vir.L.Rev.(1925-6) 568.
applying the principle of common law liability for compensating the victims of pollution. The post Bhopal era shows a significant change.\textsuperscript{15}

In treaties and judicial practice the terms responsibility and liability are used in several sense. The most common use of "Responsibility" is to refer to the obligations of States and "Liability" to refer to the consequences which ensue from a breech of those obligations. A second possible term "Liability" refers to obligations in private law, while "Responsibility" distinguishes obligations of States in Private International Law. This sense of "Liability" can be found in liability treaties dealing with oil pollution and nuclear damage, which are concerned with ensuring that private operators or states quo operators are held strictly liable in national law for the damage they cause in other States.\textsuperscript{16} The Bhopal disaster raised complex, legal, moral and ethical questions about liability of parent companies for their subsidiaries, of Transnational Companies (TNCs) engaged in hazardous activities, and of governments caught between attracting industry to invest in business development while simultaneously protecting the environment and citizens.\textsuperscript{17}

Liability has several times been predicted is that of duty arising out of emergency when a special relation between the parties exists. Practically all of these cases have been suits for injuries to employees. The courts seem to hold that where an employee is suddenly so badly injured while in the performance of his duty that he is physically or mentally unable to secure assistance, and such assistance in necessary to save his life, the duty rests upon his employer to render the necessary aid, although the injury may have been due to no fault whatever of the employer. This class of cases, however, seems to be confined to employees engaged in a hazardous occupation.\textsuperscript{18}

\textsuperscript{15} P.Leelakrishnan \textit{Law and Environment} 1992, p.138.
7.1 PRINCIPLES OF ENVIRONMENTAL LIABILITY

Multinational Companies (MNCs) are National Companies for the country of their origin but with extensions overseas.\(^{19}\) The Bhopal case was perceived to be among the most complex litigation caused by Multinational Corporation (MNC) in the late twentieth century,\(^{20}\) the Government of India argued before the American court in the Bhopal case, the concept of multinational enterprise liability. Essentially this involved marrying strict liability for hazardous technology and enterprise liability for MNCs. The Indian lawyers argued that MNCs, ‘by virtue of their global purpose, structure, organization, technology, finances and resources have it within their power to make decisions and take actions that can result in industrial disasters of catastrophic proportion and magnitude. This is particularly true with respect to those activities of the multinationals, which are ultrahazardous or inherently dangerous.’

In India a year after the Bhopal gas leak, a major leakage of oleum gas from a plant owned by Shriram Industries in New Delhi resulted in a large number of persons being affected and at least one death. In this case\(^{21}\) the Supreme Court made a pronouncement of absolute liability and enterprise liability that changed the way in which Indian companies were held liable. In this case, the Supreme Court of India said that:


\(^{20}\) In legal/juristic norms, the Bhopal case is rendered complex by: (a) the enunciation of the principles of hazardous multinational enterprise absolute liability; (b) the parents patriae structuration of sovereign India as plaintiff; (c) the forum proceedings in America; (d) evidentiary complexity; (e) the interwining of appellate jurisdiction in India, culminating in the extraordinary (Article 136) jurisdiction of the Supreme Court and (f) the multinational ability to suborn India's top legal talent. Underlying the juristic complexity is the technological complexity of Bhopal inviting a full understanding of: (a) the nature of the MIC; (b) the state of safety technology; (c) causes of catastrophe; (d) immediate therapy on exposure; (e) the present state of art concerning the manifold toxic impact of MICexposure. Two other orders of complexity are political and bureaucratic. On the latter, see S.Viswanath *Bhopal: The Imagination of Disaster*, 11 Alternatives 147 (1986). The political complexity arises out of: (a) the foreign economic policy of the united states; (b) the military-industrial profile of the UCC; (c) the permeability of the Third World in general and India in particular since 1984 to multinational monopoly capital; (d) the local state polities; (e) the relation of this to activist assertions on behalf of the Bhopal victims; (f) the internal dynamic of the Bhopal-based pro-victim social action groups; (g) the politics of professionals (lawyers, doctors, scientists including the Indian Council of Medical Research).

"We are of the view that an enterprise, which is engaged in and hazardous or inherently dangerous industry, which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity, which it has undertaken." The Supreme Court reasoned that, 'Since the persons harmed on account of the hazardous are inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other element that caused the harm, the enterprise must be held strictly liable for causing such harm as part of the social cost for carrying on the hazardous or inherently dangerous activity. [...] such hazardous or inherently dangerous activity for private profit can be tolerated only on the condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous regardless of whether it is carried on carefully or not."

The court concluded by pronouncing that, 'Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions, which operate vis-à-vis the tortuous principle of strict liability under the rule in *Rylands v Fletcher.*

The case, though limited to Indian companies, sets out a model of liability that can be extremely useful as the international community moves forward in its consideration of how MNCs, especially those engaged with hazardous technology, can be held more accountable. The use of the word “liability” in preference to “responsibility” is pertinent. The question of international responsibility of MNCs is still less developed. However, in certain fields at least there is convention, and treaties which try to saddle the MNCs also with responsibility

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22 1868 (19) C.T.220
towards aliens for the damage to the environment caused by them, provided the
same results in harm to the life or health of those persons.24 Underlying both
absolute liability and enterprise responsibility is that:

1. The enterprise is obliged to take steps to anticipate all risks, and plan and
prevent them from materializing. This corresponds on the one hand to the
principle of due diligence in human rights law and on other also echoes the now
well established principle of strict liability in environmental law.

2. The enterprise internalizes the cost of the personal or environmental harm
due to its activities. This is very much in line with the ‘polluter pays’ and
‘precautionary principles’, now well established in international and domestic law
in almost all jurisdiction.

3. In the context of 1 and 2 above, the victims are not burdened with the
responsibility of pinpointing fault. In a departure from traditional tort law, but
responding to the realities of the increasingly sophisticated nature of technology
and multinational business, it is considered fair to shift the onus of proof on the
tortfeasor, i.e. the enterprise/multinational corporation.

Despite judicial pronouncements on the question, the statutory law in India
clearly reveals the state’s ambivalence on the issue of multinational corporate
liability. The government should also actively promote environmental
efficiency.25 Amongst the amendments to the Factories Act, 1948 was one in
1987 which absolves the designer, manufacturer, importer or seller of plant and
machinery once the user to whom the plant and machinery were handed over,
gave an undertaking that, ‘if properly used’ no harm would ensue. It seems this
 provision was in the nature of an assurance to the high priests of capital and
technology- from absolute liability to absolute prejudgment of liability.

It is important to note that a company may be liable as a consequence of
pollution, even though it has observed a reasonable degree of care while carrying
out its operations. The Supreme Court, in the landmark case of M.C.Mehta v

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Union of India,26 dealing with a question relating to the measure if liability of an enterprise which is engaged in a hazardous or inherently dangerous industry, held that a person who, for his own purpose, brings on to his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that’s person’s willful act, default or negligent or even that he had no knowledge of its existence.

The landmark decision in the case of Rylands v Fletcher27 enunciates the principle of liability that, if a person brings on to his land and collects and keeps there, anything likely to do harm and, such thing escapes and does damage to another, he is liable to compensate for the damage that is caused. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and, if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm. Moreover, it would be of no use to say that the enterprise had taken all reasonable care and that the harm occurred without any negligence of its part. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profile, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident, arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads, regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and, to provide warning against potential hazards.

The decision of the Supreme Court also lays down that the measure of compensation in the kind of cases, referred to in the preceding paragraph must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation that it must pay for

26 1980(1), reported in S.C.C 258.
27 Supra Note 32.
harm, caused on account of the accident in the carrying on of the hazardous or inherently dangerous activity.

7.1.1 PRINCIPLES OF LIABILITY FOR INDUSTRIAL DISASTERS

The MNCs are not doing any favor by investing in developing countries. Instead, they are proved to be environmental hazards for the people working in and living around. In view of the size, huge capital, and the distance from which it operates, an MNC is not amenable to be controlled by a country which awaits investment for generating some sort of employment for its people. This policy of the International Labour Organization (ILO) is clearly discernible the liability principles to avoid the industrial hazards in the following words.

Improving working conditions… is a question not only of reducing or eliminating hazards within the working environment, but also of promoting the well being of the workers. Under the conditions in which these men and women work, considerable organization and effort is needed to combat the effects of the climate and the general environment to provide reasonable living conditions and to ensure satisfactory feeding, sanitation and hygiene arrangement.”

Industrial accidents are ever increasing in developing countries due to mishandling and negligent operations of MNCs take a heavy toll of life and limb in our modern society. Instead of riches and resources MNCs brought miseries and tragedies to the people and the governments in third world countries. They have less or no regard for civil and political rights of individuals by engaging in activity harmful to the health and welfare of the individuals. If we trace the history of the disastrous effect of environmental pollution as far back as 1348, we will find that the ‘Black Death’ wiped out 75 million people in Europe. And when

we come down to recent times the saddest catastrophe is Bhopal disaster in India, worst ever industrial accident in history, is a glaring example.31

   Escape of gas could have occurred in either of two ways. Company might have been negligent in failing to take reasonable precautions to prevent release of the gas. Or the company might have taken all reasonable precautions, but the gas escaped nonetheless; it was an “unavoidable accident”. If negligence can be shown, either by direct evidence or by inference, liability is clear.32 But one who “carries on an abnormally dangerous activity” is liable for the harm inflicted by the activity, “although he has exercised the utmost care to prevent the harm.33 In determining whether an activity is abnormally dangerous, six factors are to be considered.34

   (a) Existence of a high degree of risk of some harm to another;
   (b) Likelihood that the harm will be great;
   (c) Inability to eliminate the risk by the exercise of reasonable care;
   (d) Propriateness of the activity is not a matter of common usage;
   (e) Inappropriateness of the activity to the place where it is carried on; and;
   (f) extent to which the value of the activity to the community is outweighed by its dangerous attributes.

   The restatement standard originated in the English decision in Rylands v. Fletcher35 handed down in 1868. Plaintiff’s coal mine was flooded when defendant’s reservoir burst the court imposed liability without requiring proof of negligence. The court’s formulation most often cited states:

   “The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that

31 Supra Note 15
34 Ibid.
35 L.R.3 H. L.330(1868)
the escape was owing to the plaintiff’s default or perhaps that the escape was the consequence of Vis - Major or the Act of God…”  

*Rylands v. Fletcher* was not widely followed in the United States. In the 1873 decision in *Losee v. Buchanan* a boiler exploded in defendant’s factory, damaging plaintiff’s adjacent property. The court refused to impose liability in the absence of negligence: “We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. [The victim of an accident] receives his compensation… by the general good, in which he shares, and the right which he has to place the same things upon his lands.” At about the same time, American Courts were generally invoking strict liability on behalf of those injured by explosives - a position that antedated *Rylands* and was accepted as valid in *Losee*.  

The Bhopal incident highlighted the importance of and the growing concern over the actual and possible effects of the operation of MNCs on the physical environment of host countries. It raised the issues of liability of MNCs both at national and international level. Among the issues raised were:

(a) the extent to which MNCs should maintain identical standards in home and host countries, regardless of the laxity of local legislation;

(b) the rationale for locating complex and pollution-intensive production facilities in an area with unskilled labour and a population ignorant of the risks posed;

(c) the responsibilities of MNCs and governments in allowing the use of otherwise safe products that become dangerous because of local conditions;

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37 51 N.Y.476 (1873)
38 See, e.g, *Hay v.Cohoes Co.*, 2 N.Y. 15 (1849); *Carman v.Steubenville & Ind. R.R.*, 4 Ohio St. 399 (1854); *Cheatham v.Shearon*, 31 Tenn. (1 Swan) 213 (1851).
39 *Supra Note* 37 at pp 479-480.
(d) the comprehensiveness of local environmental regulation and the ability to apply it effectively.  

A substantial part of the discussion of the incident in the world press focused also on issues such as the role of preventive measures, the consistency of environmental regulation in different countries and regions, the level of training and supervision provided to local personnel with primary responsibility for occupational and environmental health, double standards in treating environmental issues by MNCs, the determination of legal responsibility for damages occurring as a result of MNC foreign operations and the disclosure of relevant information concerning the technology used in the production of hazardous products and processes.

Justice Krishna Iyer has rightly named it as Bhoposhima. “What with MNCs with unlimited exploitative appetites, infranational industrialists with initiative, tactics and money power at various levels wooing political power and whole collar, We have the unconscionable ecocides who seduce politicians, among the vision of governments, lubricate the wheels of bureaucracy and progandise pollution as a necessary evil for the salvation of a Nation”. These are the words in which Krishna Iyer explained the apprehensions of the third world countries. After Bhopal the MNCs have been pressurized mostly by people’s groups to disclose information regarding environmental impact and safety, to install emergency control mechanisms and anti-pollution equipment and risk assessment and avoidance measures. It is said that the industry has positively responded.

According to the Article 13, the parties of the industrial accident shall support appropriate effort to elaborate rules, criteria and procedures in the field of responsibility and liability. Since MNCs can be regarded as subjects of international law in light of existing international positive norms that are directly regulating their behaviour, taking into consideration recent developments that are

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41 Ibid.
42 *Supra Note 24* at p. 550.
changing the concept of the international human rights protection by including non-state actors, responsibility, customary principle that states individual responsibility for violations of the jus cogens norms we can conclude that MNCs have responsibility for breaches of environmental law. However, there is no doubt that the problem of environmental pollution cannot be tackled in isolation without the co-operation of both the developed and developing countries.44

7.1.2 LIABILITY IN CASE OF MERGER OF A COMPANY

The age of mass torts arrived with Bhopal Gas Tragedy unveiling the environmental disasters with toxic invasions, and unfortunately, it continues. The multinationals, which entered the ‘developing world’ as harbingers of profit and again were in fact, brought the death demon, the Union Carbide which authored the tragedy thought it could wash off its hands by selling abandoned Bhopal plant to Dow Chemicals, even as it emanate the poisonous gases and continue to cause enormous damage to the environment. It is not known with great certainly the figure of casualties and injured persons it is not possible to measure up the real damage to the environment which appears as on today as eternal.

In November 1994 Union Carbide sold its interest in Union Carbide India Limited (renamed Eveready Industries India Ltd- or EIIL) to MacLeod Russell (India) Ltd., of Calcutta. As a consequence of that sale, Union Carbide asserted that it retained no interest in or liability for the Bhopal site. However, the Chief Judicial Magistrate for Bhopal has held that Union Carbide Corporation’s transfer of shares was not bona fide because it was done to evade potential liabilities arising out of the ongoing criminal case in Bhopal. As a result $74 million in Union Carbide assets were attached pending appearance of Union Carbide in the criminal case. Union Carbide has never filed an appearance in the criminal case, and asserts that the courts of India lack jurisdiction to make the company appear as a defendant.

In the “statement of the Dow Chemical Company regarding the Bhopal Trafedy” Dow declares, “at that [time of the incident], Dow had absolutely no

connection with either the facility or any of the companies linked to the incident. The document also states that at the time of the incident Union Carbide India Limited (UCIL) was a “51% affiliate of Union Carbide Corporation”.45 This suggests that UCIL owned the majority of the plant at the time of the gas leak, which is simply factually inaccurate.

This document outlines six factors that absolve Dow of any responsibility they include, but are not limited to, the $470 million settlement between Union Carbide and the Indian Government (which Dow alleges “Covered all claims relating to the incident”), the Supreme Court of India’s acceptance of this settlement, and an insurance policy to cover 100-residents of Bhopal to used should further health problems arise in survivors.

There are number of interesting aspects of the “key factors” which Dow employed to “ensure there was absolutely no outstanding liability for either the tragedy or for the Bhopal site”. The most obvious of which is that not one factor outlined in Dow’s “exhaustive assessment” includes any interaction whatsoever with actual survivors of the disaster, rather the explanations given for lack of culpability deal with the corporations and governments involved, and even suggest that, in some way, survivors are not justified in demanding any more compensation from any source. The implication is that the incident if fully resolved for all parties involved, even if only explicitly does Dow deny its own role.

One of the “facts” that the document’s logic is based on is the alleged 1987 U.S. Supreme Court ruling that upheld Judge Keenan’s decision. According to Dow this decision was based on the independent legal status of UCIL, which they claim was managed entirely by Indian citizens in India.46 In fact, no such ruling exists, and the only direct contact the U.S. Supreme Court has had with the original case was its refusal to review the U.S. Appeals Court ruling.47 Furthermore, the decision was not based on findings that indicated UCIL was a separate legal entity, rather the courts of India would be a more appropriate form

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45 Settlement of the Dow Chemical Company regarding the Bhopal Tragedy.
46 Ibid.
to conduct the trial. Suggesting as much further absolves Union Carbide, and therefore, Dow, of any legal responsibility whatsoever.

Typically, the argument for Dow’s continued responsibility to the survivors of Bhopal is based on a financial logic—that is that Dow acquired the assets of Union Carbide, thus they should also acquire the history that such assets are founded upon. With regard to ethics and moral liability, this argument is easily supported. Dow’s rejection of liability, however, does not derive out of ethics. It is a legal and financial argument, or perhaps more accurately, it is an argument based on the legality of finances, rather than the morality of finances. As such, demands based on the logic of ethics that operate outside the realm of codified law are not the most appropriate counter arguments to Dow’s stance on the issue. Dow’s official stance on the issue of the company’s responsibility, as outlined on the website is “we respect that, for some people, responsibility for the Bhopal tragedy continues to be an unresolved issue. This doesn’t change the facts that the Government of India, through the settlement agreement, has full authority and responsibility over issues arising from the tragedy and that upon acquiring Union Carbide, Dow inherited no responsibility.”

Through much of the discourse surround the gas leak and its aftermath there is a presupposition that Union Carbide’s accountability automatically became Dow’s accountability. This is certainly not an unreasonable inference, but as Dow contests any connection with the incident and, therefore, any responsibility for it, the idea requires a more in depth explanation.

7.2 PRECAUTIONARY PRINCIPLE

Hazards are a part of life. Pollution control, however, is difficult enough just from the technological standpoint, for pollution cannot be entirely abated without a complete recycling of materials. But it is important for people to press for less harmful alternatives, to exercise their rights to a clean, life-sustaining environment and, when they could be exposed to hazards, to know. What those

hazards are and to have a part in deciding whether to accept them. The principle was adopted by OECD member countries in order to provide common and effective economic guidelines on which to base their pollution control policies. This principle applies to Multinational Corporations (MNCs) also for protection of the environment.

As stated Rio Declaration on Environment and Development in 1992 the precautionary principle says that, “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Some people consider that the principle of “reverse onus” is inherent in the precautionary principle; the principle of reverse onus says that the burden of proof for safety belongs on the proponent of a technology or chemical, not on the general public—in other words, new chemicals and technologies should be considered dangerous until shown otherwise.

The wingspread statement on the Precautionary Principle, which is included when an activity raises of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.”

7.2.1 ELEMENTS OF THE PRECAUTIONARY PRINCIPLE

Precautionary principle is an essential feature of sustainable development. This principle has been accepted as a part of the law of the land as Article 21 of the Constitution of India guarantees protection of life and personal liberty. In Vellore Citizen’s Welfare Forum v. Union of India and others the Court held that the ‘precautionary principle’ and ‘polluter pays principle’ are part

50 Supra Note 5 at p.68
51 Principle 15 of the Rio Declaration, 1992
52 A comprehensive definition of the Precautionary Principle was Spelled out in a January 1998 meeting of scientists, lawyers, policy makers and environmentalists at Wingspread, headquarters of the Johnson Foundation in Racine, Wisconsin.
55 AIR 1996 SC 2715.
of the environmental law of India.\textsuperscript{56} It represents a paradigm shift in decision-making. It allows for five key elements that can prevent irreversible damage to people and nature.\textsuperscript{57}

1. **Anticipatory Action**: There is a duty to take anticipatory action to prevent harm. Government, business, and community groups, as well as the general public, share this responsibility.

2. **Right to Know**: The community has a right to know complete and accurate information on potential human health and environmental impacts associated with the selection of products, services, operations, or plans. The burden to supply this information lies with the proponent, not with the general public.

3. **Alternatives Assessment**: An obligation exists to examine a full range of alternatives and select the alternative with the least potential impact on human health and the environment, including the alternative of doing nothing.

4. **Full Cost Accounting**: When evaluating potential alternatives, there is a duty to consider all the reasonably foreseeable costs, including raw materials, manufacturing, transportation, use, cleanup, eventual disposal, and health costs even if such costs are not reflected in the initial price. Short and long-term benefits and time thresholds should be considered when making decisions.

5. **Participatory Decision Process**: Decisions applying the precautionary principle must be transparent, participatory, and informed by the best available science and other relevant information.

In 1996, the Indian Court laid down the meaning of precautionary principle (PP).\textsuperscript{58} It stated that environmental measures, adopted by the State Government and the statutory authorities, must anticipate, prevent and attack the causes of environmental degradation. Following the definition provided in the Rio

\textsuperscript{56} Madhumita Dhar Sarkar *Contribution of Indian Judiciary Towards the Development of Environmental Jurisprudence* AIR 2005 at p. 303.

\textsuperscript{57} http://environmentalcommons.org/precaution.html

Declaration, the Court stated that where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. The Court again followed the ‘anticipate, prevent and attack’ approach in *M.C. Metha case.* In this case, the precautionary principle was invoked to prevent construction within one kilometer of two lakes located near Delhi and the principle was accepted as a part of the law of the land.

Thereafter, in the *Taj Trapezium Case* the Supreme Court ordered a number of industries in the area surrounding the Taj Mahal to relocate or introduce pollution abatement measures in order to protect the Taj from deterioration and damage. Following the decision of *Vellore Citizen’s Case and Indian Council for Enviro-Legal Action case,* the Supreme Court described the P.P as environmental measures which must ‘anticipate, prevent and attack’ the causes of environmental degradation. In the *Supreme Court described the PP as environmental measures. In S.Jagannath case,* the precautionary approach was relied on to curtail commercial shrimp farming in India’s coastal areas. The commercial user of agriculture lands and salt farms were discharging highly polluting effluents, and causing pollution of water. Normal traditional life and vocational activities of the local population of the coastal areas were being seriously hampered. In *M.C. Mehta (Tanneries) case* this principle was used when the court wanted to relocate 550 pollution tanneries operating in Calcutta.

A recent application of the PP is found in *Suo Motu Proceedings in Re: Delhi Transport Department* where the Supreme Court dealt with air pollution in New Delhi. In the Supreme Court’s view, the ‘Precautionary Principle’ which is a part of a concept of ‘sustainable development’ has to be followed by State governments in controlling pollution. According to Supreme Court the State government is under a constitutional obligation to control pollution and, if

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59 *M.C.Mehta (Badkhal and Surajkund Lakes Matter) v.Union of India and others* (1997) 3 SCC 715: ‘preventive measures have to be taken keeping in view the carrying capacity of the ecosystems operating in the environmental surroundings under consideration.’

60 (1997) 2 SCC 353.


64 (1998) 9 SCC 250
necessary, by anticipating the causes of pollution and curbing the same. The Supreme Court reaffirmed the customary status of the Precautionary Principle in another recent case\textsuperscript{65} and added that principle is entrenched in the Constitution as well as in various environmental laws.\textsuperscript{66}

The Precautionary Principle states that substances or activities which may be detrimental to the environment should be regulated even in the absence of conclusive evidence of harmfulness. But, the precautionary principle does not specify what should trigger action, nor does it specify what action should be taken. It is therefore vague and difficult to craft into workable policies. This vagueness creates difficulties to implement this principle against the mighty and powerful Multinational Corporation (MNCs).

### 7.3 POLLUTER PAYS PRINCIPLE

One of the Core principles of sustainable development is the “Polluter Pays” principle. It has become a popular catchphrase in recent times. ‘If you make a mess, it’s your duty to clean it up’ - this is the main basis of this slogan. It is seen as a way of internalizing pollution-related costs within the context of the economic rationality of the enterprise. There is a close relationship between a country’s environmental policy and its overall socio-economic policy.\textsuperscript{67} At the international level the Kyoto Protocol, which requires the offending parties to bear the cost of reducing their greenhouse gas emissions, is an example of application of the PPP.\textsuperscript{68} This principle has also found a place in the European community Treaty forming part of new articles in respect of Environment which are to be

\textsuperscript{65} A.P. Pollution Control Board v.Prof.M.V.Nayudu (1999) SOL case no 53. The Pollution Control Board of Andhra Pradesh brought the case against an individual. Full report: www.supremecourtonline.com

\textsuperscript{66} The court mentioned Articles 47, 48-A and 51-A (g) of the Constitution, Water Act 1974 and Environment (protection) Act 1986, where both the precautionary and polluter pays principle and special concept of onus of proof are implied. Having said that, the court accepted the observation supplied by Vellore case that in precautionary principle is a part of customary international law. It also accepted the view of ILC report that the consequences of the application of precautionary principle in any potential situation would be influenced by the circumstances of each case.

\textsuperscript{67} This is a part of the International Environmental Agreements Compendium, compiled 1995 by the pollution Prevention and Pesticide Management Branch, Ministry of Environment, Lands and Parks, British Columbia, Canada.

\textsuperscript{68} http://hubpages.com/hub/polluter-pays-principle.

(1) The polluter should pay for the administration of the pollution control system; and

(2) The polluter should pay for the consequences of the pollution.

Apart from these two, the polluter should also bear the financial consequences of the pollution.

Polluter pays is also known as Extended Polluter Responsibility (EPR). This is a concept that was probably first described by the Swedish Government in 1975. Many countries have officially adopted the Polluter Pays Principle within their national legislation. The interpretation of the Polluter pays principle differs as to what the polluters should pay and how much. The political practice in most countries that the polluter has to pay the cost of pollution reducing that is required by the authorities through licensing. This practice is sometimes attenuated by subsidy schemes.

The Polluter Pays Principle (PPP), simply put, and means that the person/company/ MNC that is responsible for creating pollution should be made financially responsible for the damage caused to others. It is not a principle of compensation for damage caused by pollution. Nor does it mean that the polluter should merely pay the cost of measures to prevent pollution. It means that the polluter should be charged with the cost of whatever pollution prevention and control measures are determined by the public authorities, whether preventive measures, restoration, or a combination of both. Any pollution generated by a process of a company (include MNCs) must be paid for from within the cost,

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69 Rajeshree Daulagher *The Governing Principles of Environment Protection and Prevention of Mass Extinction* 2001(1) ALT vol. CVIII, at p.16. Article 130 R (2) of the Treaty lays down as under."Environmental considerations are to play a crucial part in all the policies of the community and that action is to be based on the three principles- the need for preventive action, the need to rectify environmental damage at source; and that the polluter should pay.


structure of production. In broad terms, this means that companies must stop producing polluting emissions and effluents or ultimately stop production.

The judiciary in India recognized the Polluter Pays Principle in the judgement delivered by the Supreme Court of India in Indian Council for Environmental Legal Action v. UOI & Ors. In its order dated Feb. 4, 2005, The Supreme Court held that:

“The Polluter Pays Principle means that absolute liability of harm to the environment extends not only to compensate the victims of pollution, but also to the cost of restoring environmental degradation. Remediation of damaged environment is part of the process of sustainable development and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.”

In this case the number of private companies operated as chemical companies were creating hazardous wastes in the soil, polluting the village area situated nearby, and all without the required licenses. The court ruled on the PIL that “once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on”. Consequently, the polluting industries are “ absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas”.

In M.C. Mehta v. UOI, the Supreme Court of India referred to the cases of Enviro-Legal Action and Vellore Citizens and ordered the Calcutta Tanneries to relocate and pay compensation for the loss of ecology/environment of the affected areas and the suffering of the residents. In the Kamalnath’s case the

73 AIR 1996 SC 1446.
74 1996 Indlaw SC 1556
75 AIR 1996 SC 2715.
76 (1997) 1 SCC 388.
court by considering the PPP as the law of the land, ordered that one who pollutes
the environment must pay to reverse the damage caused by his acts. When the
case came up before the Supreme Court again in 2002, exemplary damages were
granted.

Recently the cleanup of the environmental pollution caused by Bhopal disaster77 this principle is applied to the Merger Company i.e. Dow Chemicals. Since Union Carbide and its parent company, Dow Chemicals, refuses to submit to Indian Courts’ jurisdiction in any of the cases and the New York federal court is the only one whose jurisdiction the company recognises, the Indian Government’s intervention in this court would also be consistent with its earlier submission that the company should be liable for cleanup in accordance with the
“Polluter Pays Principle”.

Dow chemical’s management has declined any responsibility for cleanup of the toxic wastes stating among other reasons, that the 1989 compensation settlement covers all liabilities. However, the Supreme Court of India order states that the settlement amount”…. Shall be made to the Union of India as claimant and for the benefit of all victims of the Bhopal gas disaster under the Bhopal Act.78 The toxic wastes, obsolete stockpiles and groundwater contamination were a result of the routine operation of the factory rather than primarily arising out of or connected with the disaster. Therefore, is appears that the liability for clean-up of the toxic wastes and remediation of contaminated groundwater were not necessarily extinguished by the 1989 settlement with the MNC.

The principle was adopted by OECD member countries in order to provide common and effective economic guidelines on which to base their pollution control policies.79 The PPP shifts the burden of pollution-led suffering from the affected to those who are responsible for such damage.80 There are certain statutes passed by the Indian parliament, which directly or indirectly adhere to the polluter pays principle. The Public Liability Insurance Act of 1991 makes it a mandatory

77 The night of 2-3 December 1984 saw the residents of Bhopal caught up in the world’s worst industrial disaster.
78 Bhopal Gas Leak Disaster (Registration and Processing of Claims) scheme, (1985)
79 Supra Note 5 at p.68
80 For example in Bhopal accident, the Dow Chemical refused to take responsibility for cleanup the toxic wastes at the factory.
duty of all the industries, which have a capital value of Rs. Two hundred thousand to get insured under the Act. The premium of such insurance shall be collected in the ‘Environment Relief Fund’ which shall be available with the collector of the district. The collector in case of the industrial accident/disaster shall pay, by way of relief, immediately to the victims of the accident/disaster. This relief will not be a bar to file a case for compensation separately.81

Similarly, the National Environment Tribunal Act, 1995 provides the Tribunal can award compensation on ground of any damage to environment and such an amount shall be remitted to the authority specified under section 7-A(3) of the Public Liability Insurance Act, 1991 for being credited to the Environment Relief Fund. The Act provides that if the owner of the unit/industry fails to pay or deposit such an amount of award within the specified period, it shall be recoverable from the owner as arrears of land.82

7.4 CRIMINAL LIABILITY

Man made pollution has existed as a local problem since man invented fire for cooking and for warming his ill-ventilates caves. Historians report crude oil combustion in Persian shrines as early as 500 B.C In his poems Horace deplored the smoke-blackened temples of Rome in 100 B.C. Man is criminally liable for the pollution in ancient times also. In medieval times man-made pollution became such a menace that British kings. Decreed that fouling of the London air by smoke was an offence which was punishable by the death penalty through hanging.83 For environmental pollution, the most obvious and plausible reason for holding a person criminally liable is based in terms of the consequences that he aimed at or foresaw as substantially or practically certain to follow as a result of his conduct.84

In recent times, the industrial pollution is very high. Among the industries, Multinational Corporations (MNCs) share is also high in environmental pollution. Imposing criminal liability against Multinational Corporation for the

82 Section 23(3) of the National Environment Tribunal Act, 1995.
83 Wilfrid Bach Atmospheric Pollution 1972 at p.3.

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environmental pollution is a difficult task. In this respect, official negligence is also cause of industrial pollution. In the case of licensing of industries which have a bearing on environment with their deleterious impact, when not properly handled also, the failure of licensing control due to official negligence and deliberate omissions and commissions is a serious problem. The well known case of the Bhopal tragedy itself is an illustration.85 If we closely examine the history of that tragedy, it is crystal clear that the governmental authorities which have permission to the Union Carbide factory had neglected relevant factors on which permission was to be sanctioned for its starting and continued functioning. The authorities were not simply lethargic but criminally reckless; in spite of repeated warnings, neither the authorities nor the factory took any timely preventive action.86

Now, it’s high time to put a control over these crimes. There has been a debate as to whether a corporation can be held criminally liable. There are two theories regarding this—‘Normalist’ and ‘Realistic’. Norminalist theory of corporate personality view corporation as nothing more than collectives of individuals. In this an individual first commits the offence; the responsibility of the individual is then imputed to the corporation. According to Realist approach corporations have an existence, which is to some extent independent of the existence of its members. Here, the responsibility of corporation is primarily. The ‘Realist’ theory looks more convincing and practically applicable.

The argument in favor of corporate being criminally liable is that in many cases it is the corporation itself, through its policies of practices, which have done wrong, and prosecution and punishment should be directed at the real wrongdoer. In many cases there is no individual who, alone, has committed a crime. It is the conjunction of the practices of several individual, all acting in compliance with a company’s sloppy or non-existent procedures, that has cased the harm. Alternatively, in many cases companies have complex structure with responsibility buried at many different layers within the corporate hierarchy making it difficult, if not impossible, to determine where the true fault lies.

86 Supra Note 15 at p.185.
The common law jurisdictions have adopted the approach and recognize that corporations may be held criminally liable. However, they do highlight the conceptual difficulty in applying a theory of criminal liability based on a view of fault centered on the psychological processes of humans to what is simply a fictional person. There is an apparent need, now, to adapt the notion of fault to the structure and particulars model operandi of corporations. The existing mechanisms used to attribute criminal liability to corporations are but a partial solution, and should be improved.

In so far as negligence as a fault element is concerned, it might be necessary to provide that criminal negligence refers to significant departure from the standard of conduct of a prudent and diligence corporation. Corporate negligence is establishes by proof of negligence of its employees, agents or officers or, if no one individually is negligent, that the body corporate conduct, viewed as a whole, is negligent. This collective attributable to inadequate management control or supervision, or failure to provide adequate systems for conveying information within the body corporate.

Looking at the widespread ramification of the hazardous or inherently dangerous activities, persons, or the institutions would be hold ‘liable absolutely’, though they have taken all reasonable care while carrying out such activity. The liability to compensate is twofold; one to compensate the victims of pollution for inconvenience and health loss; and the other, to restore the environmental degradation viz., of the soil, underground water and the vegetation cover of that area. Such remediation of damaged to be noted that all this does not absolve a person from criminal liability. This criminal liability principle is also applies to the Multinational Corporations (MNCs).

The procedure to prove corporation (MNCs also) criminally liable is, prime facie, rather complex. If intention, knowledge or recklessness is an essential ingredient of the offence, these fault elements must be attributed to the body corporate if it expressly, tacitly of impliedly authorized or permitted the commission of the offence. First, the corporation’s fault will be established (vicarious liability) if the body Corporation’s board of directors intentionally,
knowingly or recklessly carried out the wrongful conduct, or expressly or by necessary implication authorized or permitted the commission of the offence. Second, the corporation’s fault may be established by evidence that a high managerial agent of the company intentionally, knowingly or recklessly engaged in the relevant conduct or expressly, tacitly or impliedly authorized or permitted the commission of the offence.

In this second case, however the corporation will not be liable if it proves that it exercised due diligence to prevent the conduct. Third, the corporation’s fault may be established by proof that a corporate culture existed within the body corporate that encouraged, tolerated or led to non-compliance with the relevant provision. Fourth, the corporation’s fault may be established by proving that it failed to create and maintain a corporate culture that required compliance with the relevant provision.

7.5 TORTIOUS LIABILITY

Tort law in India is underdeveloped and is founded on English law as applied in India prior to independence. The development of security legislation, under the welfare state has led to the feeling that, broadly speaking, tort liability should be based upon some proof of fault. A number of cases have recently been filed by affected communities which have sought to use national law to tackle cases of personal injury or environmental damage claims against MNCs. The liability of the corporate institution in India in tort is not entirely clear.

The earlier concept that liability can be based only on fault conformed to the metaphysical idea that all legal relations must be traceable to an act of will of the party. Generally, tort cases hold many obstacles for plaintiffs. Cases are generally slow and expensive. Toxic tort cases often have very high standards for proving certain legal elements such as causation and liability, which make it

89 P.T. Muchlinski The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors (1987) 50 MLR 564.
90 Dennis Lloyd Liability for Radiation Injuries, Current Legal problems 1959, Vol.12, at p.37

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difficult for plaintiffs to meet evidentiary burdens. While tort cases are
reasonable good at assessing personal injury and property damage, tort cases are
‘clumsy and inflexible’ in assessing, evaluating, and quantifying environmental
goods and processes outside the market. For cross-border torts, questions arise
about the appropriate forum for the case and the applicable law. The application of
the doctrine of forum non convenience, like in the Bhopal case, can often
determine whether a case will succeed or fail.

Even of cases are allowed, awards can be small if a Court decides it is
proper to use the more limited law of the state in which the tort occurred. Courts
may also choose to apply the doctrine of limited liability which allows
corporation to hide behind the corporate veil, effectively prohibiting the
enforcement of any damages awarded. MNCs are also problematic for torts
because they defy assumptions about ‘the mapping of legal persons to territorial
jurisdiction,’ the basis of traditional tort law.

The increasing proliferation of tort cases against MNCs is a symptom of
the failure of other regulatory systems or, in fact, the lack of them-despite Bhopal-
which have left victims/plaintiffs with no option but to turn to tort law for redress.
Affected workers and communities have formed alliances with NGOs and public
interest lawyers to attack a perceived ‘governance deficit’ in the regulation of
MNCs. The big question, however, is whether the judiciary should and can make
up this deficit, especially within the framework of tort?

Victims of the Bhopal gas leak attempted and failed to access justice
through the tort system in both the USA and in India. In theory, the tort system is
a powerful tool to obtain justice, compensation and remediation and to act as a
deterrent in cases of environmental damage. The Bhopal case revealed some of
the weaknesses of using tort law. Existing civil liability regimes are reasonably
good at awarding compensation for personal injury and damage to property, are
somewhat sclerotic and inflexible in making awards for environmental goods and
processes outside the market. Since tort law is geared to the protection of

94 Peter Wetterstein Harm to the Environment: The Right to Compensation and the Assessment of Damages., 1997 p.36.
persons and property, it is particularly ill equipped to provide compensation where the damaged natural resources are unowned. For these reasons, and for others, there is good reason to be cautious about the prospects of using tort law as a substitute for environmental regulation. The important aspect of the judgement in *M.C.Mehta v Union* of India\(^{95}\) that makes the most radical and the least defensible departure from current notions of tortious liability is its holding that the quantum of compensation must be commensurate with the capacity of the enterprise.\(^{96}\)

Similarly, it may be difficult to identify a single location as the *locus actus*. In choosing between the *locus actus* and the *locus damni*, few countries provide clear statutory guidance, leaving the decision to the courts. There are at least three arguments in favour of adopting the *lex loci actus*.

First, the tortfeasor should be subject to a known and local legal framework rather than foreign legal rules that may be both unknown and unforeseen.

Second. The *lex loci actus* plays a role in deterring similar action in the future and must be crafted so as to meet the ends of justice.

Third, in the context of Transnational Companies (TNCs), the argument is advanced that the law of the parent company should apply simply due to the structure of the enterprise: a single policy decision taken at the headquarters of the parent company could result in environmental damage in a number of countries in which subsidiaries are located.\(^{97}\) It can be argued that the law of the parent company jurisdiction regulates the “mind” of the entire transnational enterprise (MNC). Furthermore, with a claim for vicarious liability, most of the important evidence, and witnesses will be located in the country where the foreign company has been operating, and this would provide a further reason for holding that the courts of that country are the appropriate forum.\(^{98}\)

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95 AIR 1987 SC PP. 1099, 1100
97 Union Carbide, for instance had subsidiaries operating in thirty-eight different countries at the time of the Bhopal gas leak.
In most cases involving MNCs, the MNC will strenuously seek to apply the local law of the host state, while the plaintiffs will tend to seek to apply the law of the capital-exporting state. Experience also shows that counsel for the parent company will seek to emphasise the primary of the *locus damni*, and assert that the *locus actus* is identical. The Albaforth ⁹⁹ suggests that the locus of the tort is the natural forum. Where the tortious act is deemed to have taken place in the same jurisdiction as the injury, a single *locus delicti* can be identified. For this reason, foreign plaintiffs are almost certain to find themselves subject to the laws of the state in which the injury occurred, even if that law is applied by a court of the “parent” state. From the perspective of using tort to secure environmental regulation, this result presents real difficulties. The applicable law in the state of the parent company is much more likely to benefit the plaintiffs than the law of the subsidiary.

With Bhopal Gas Tragedy, the age of mass torts began. One of the issues that were raised in the Bhopal case, for instance, was the relative paucity of tort jurisprudence in India, including in particular a real shortage of case law dealing with complex environmental or toxic torts. ¹⁰⁰ The Indian Government and similar developing countries shocked to know the direct and serious impact of MNCs in era of Globalization. The craving for foreign investments and transfer of technology from west with politically motivated vested interest has resulted in savage death to thousands of unknown masses. The Indian Jurisprudential principle of Absolute Liability was naturally not liked by the MNCs. Under the mass torts, there are certain striking features on the grounds of which a MNC should be held liable. They are as follows –

1. MNC’s by virtue of their global purpose structure, organization, technology, finance and resources have it within their power to make decision and take actions

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¹⁰⁰ See Affidavit of Marc S.Galanter, December 5th 1985, reprinted in *Mass Disasters and Multinational Liability: The Bhopal case* 161 (Upendra Baxi & Thomas Paul eds. 1986). It should be noted , however that the Indian Courts were engaged in a large number of environmental cases in the years following the *Bhopal Gas Leak* and in *M.C.Mehta v.Union of India*, A.I.R. 1987 S.C., 1086 developed a new standard of environmental liability-the rule of absolute' immunity that is even stricter than the strict liability standard under *Ryland v. Fletcher*, L.R. 3 HL 330 (1868). The impact of the Indian decision on tort standards is discussed in Michael Anderson & A.Ahmed, *Assessing Environmental Damage under Indian Law* 5 REV. EUR. COMMUNITY & INT’L ENVTL.L.207 (1996)
that can result in industrial disasters of catastrophic proportion and magnitude. This is particularly true with respect to those activities of the MNC which are ultra hazardous or inherently dangerous.

2. Key management personnel of multi-nationals exercise a closely-held power which is neither restricted by national boundaries nor effectively controlled by international law.

3. A MNC has a primarily, absolute and non-delegable duty to the persons and country in which it has in any manners caused to be undertaken any ultra hazardous or inherently dangerous activity. This includes a duty to provide that all ultra hazardous or inherently dangerous activities be conducted with the highest standards of safety and to provide all necessary information and warnings regarding the activity involved. Thus the activity of the defendant causing harm to a large number of persons in Mass Torts and a MNC is held liable on the grounds of its ultrahazardous activities & the disobedience regarding safety measures and the necessary information.\textsuperscript{101}

7.6 STATE LIABILITY

The term ‘state responsibility’ traditionally relates to injuries resulting from violation of obligations under international law. It is essential for states to accept an obligation within their territory and jurisdiction, first, to take all possible measures to prevent pollution or deterioration of the human environment, secondly, to restore the state of the environment where it has been damaged by pollution, and thirdly, to co-operate with one another in the prevention and mitigation of pollution damage.\textsuperscript{102} Such responsibility can be either direct (for acts of the state itself) or indirect and imputed (for acts of its citizens or those under its control). In the year 1257, just 753 years ago, Queen Eleanor, wife of king Henry III, removed from Nottingham to Tutbury Castle on account of the “unendurable smoke from sea cole.” The first record of any legislation about

\textsuperscript{101} http://www.legalserviceindia.com/article/print.asp?id-184.
\textsuperscript{102} John B.Yates \textit{Unilateral and Multilateral Approaches to Environmental problems} XXI Uni, Toron.L.J.(1971) 189.

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smoke was in 1273 when the English parliament passed a law prohibiting the burning of sea coal in England.\textsuperscript{103}

The question arises at two levels: that of domestic law and that of international law. At the domestic level, different regimes of liability coexist which can be applied to compensation for this type of damage. Not all are equally well suited. However, it is necessary to be able to compare and analyze them in order to endeavor to improve existing techniques.\textsuperscript{104} At the international level, the work of the OECD Transfrontier Pollution Group and the UNEP Working group of Experts on Environmental Law has shown that differences between states concerning the very concept of responsibility and liability for environmental damage are still sharp. Some favor a very strict notion of international liability, under which the state under whose jurisdiction a polluting activity is undertaken will be liable for all damage attributable to Transfrontier pollution, with in principle, no grounds for exoneration admitted. The other states, generally do not share this approach. For them the international liability for this type of damage falls within the classical framework of responsibility for an illegal act. In other words, according to this majority view, there will be no obligation to provide from failure to fulfill a pre-existing obligation.\textsuperscript{105}

Environmental damage can have many faces. Catastrophes like the release of toxic gas in Bhopal (central India), the dioxin cloud in Seveso, Italy, or the fire at a tank farm in Hemel Hempstead near London clearly illustrate the enormous risk potential of Industrial plants. In Bhopal case, Quentin- Baxter arguing that states remain “primary accountable” for things that happen within their own territory, that they may choose whether to allow the imports of dangerous industries and that they can condition such import on the “exporting” state’s retaining liability.\textsuperscript{106}

Tirupur Dying industries affecting on environment i.e the ground water and surface water, soil have also affected. So the agriculture lands have become

\textsuperscript{103} William A.Christy, \textit{Industrial Air Pollution 3 Industrial Wastes} (1958) 107.
\textsuperscript{105} \textit{Ibid} at p. 249.
\textsuperscript{106} Rebertso \textit{Action to the Bhopal symposium 20 TEX.INT’L.L.J} 269 (1985)
barrned. State has accountability to protect the Noyyal River to protect the environment in and around Coimbatore and Tirupur District.

But what do all these cases have in common? What links them is that the pollutants were dispersed via an environmental medium, i.e. water, land and/or air in such cases. It is not just the medium itself that is polluted-flora and fauna, people and property also tend to suffer serious “collateral damage”. Seen from this perspective, therefore, even the consequences of explosions or fires may be considered environmental damage. Contamination through environmental damage can happen suddenly or as part of a gradual process. If damage is confined to an industrial site, one talks of a first-party loss; in adjacent properties are damaged, it is referred to as a third party loss. Historical pollution is the contamination of soil or groundwater that remains undetected for many years.107

Traditionally, international responsibility was founded on fault imputable to the acting state. As a general rule, the state is not liable for the action of private parties unless such fault can be attributed to the state. Today, there is a growing trend towards holding states responsible for the transboundary environmental consequences of acts occurring within their jurisdiction. It is also significant to note that while the Government of India (GOI) was allowing industries employing hazardous substances, technology and process to operate, no attempt was made to develop an appropriate regulatory framework to govern safety and risk of such industries. Further, little or no attention was paid to enhancing capacities of bodies responsible for industrial safety to actually monitor hazardous industries. The lack of legislative frameworks and corresponding institutional preparedness not withstanding, it seems that what the state really lacked ‘were the will and the intent to come down strongly on union carbide. The state liability with regard to the environmental disaster of the Industries (MNCs) is as follows in the Bhopal accident.

1. After the accident at it’s U.C.I.L plant at Bhopal, India in 1984, when the U.C.C chairman/C.E.O came over to Bhopal from U.S.A to visit the accident

site, local policies arrested him on the charges of manslaughter. However, the Government of India got him released.

2. In 1985, Government of India enacted “Bhopal Claims Act” took-away the right of appeal of all the Gas tragedy victims & declared itself as the sole representative of all victims. This said act itself is violative of victim’s fundamental & human rights. The victims didn’t choose Government of India as it’s representative under will, agreement trust or pleasure.

3. The paradox of this “Bhopal Claims Act” is that, Government of India which is also a party to the crime, tragedy, itself is the appellant. The appellant (petitioner), defendant are government of India, Prosecution by Government of India & Judged by Government of India.

4. In 1989, When an appeal about interim compensation to be paid by the U.C.I.L to all the victims was being heard in the Apex Court, the Supreme Court of India without giving a chance to the victims to make their point, without consulting them, without making a proper assessment of damages. losses, gave an arbitrary figure as verdict & dropped all civil, criminal proceedings against U.C.C.&U.C.I.L

5. In the same year 1989, the Government of India without consulting the victims of disaster, without making proper assessment of damages/ losses, negotiated a settlement with the U.C.C and in turn gave full legal immunity to U.C.C & U.C.I.L from civil & criminal proceedings

6. Even the Government of India didn’t present the case of victim’s-gas tragedy victims, properly before the U.S. Courts, where the U.C.C is based.

All these crimes, the Government of India failed to distribute compensation in time to victims. It has failed even to provide safe drinking water to the residents near the accident site, It has failed to provide comprehensive medical care to the victims, till date. It has even failed to get the accident site cleared off toxic wastes either by the culprit management or by itself, that too after 25 years. The very presence of these toxic wastes since 25 years is further contaminating, polluting the environment and taking toll of more victims. Home state is also liable for the
environmental pollution caused by the MNCs because restrictions have been placed on the operations of the foreign affiliates by the parent country as a means of implementing foreign policy.  

7.7 CIVIL LIABILITY

In the modern globalized world the Civil Liability of corporate sector has an conflicting issue with regard to the environmental aspects. In the industrial accident the companies generally escaping from the payment of compensation to the victims and also continuing a long term process. The civil liability of employers for industrial accidents of MNCs has two objectives in view. Designed primarily to provide compensation for the damage or injury sustained by the employee, it also acts as a deterrent the damage paid by the employer act as a spur in encouraging him to take precautions against the recurrence of such accidents.

The obligations imposed on the exporter/notifier/by the Regulation have the potential to form the basis of a civil action for damages for breach of statutory duty. There are four reasons why it is likely that the courts will hold that civil liability arises. First, the obligations are imposed on private citizens rather than government bodies. Secondly, the Regulation itself provides no mechanism for bringing civil actions in cases of breach. Thirdly, Article 3(5) requires the exporter to make arrangements for ‘insurance against damage to third parties’. Fourthly, the Regulation is based on the Basel Convention, Article 12 of which provides: “The parties shall co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes”. This is clear evidence of an

110 The House of Lords held in Garden Cottage Foods Ltd. v. Milk Marketing Board (1984) AC 130 That directly applicable provisions of the Treaty of Rome, in that case Article 86, might give rise to such an action.
111 This is one of the reasons why the Court of Appeal in Bourfoin SA v. Ministry of Agriculture, Fisheries and Food (1986) QB 716 held that no civil action lay in relation to a breach of Article 30 by a government department.
intention that civil liabilities should attach as a result of the Convention’s provisions.\footnote{112}

The various methods available for resolving problems raised in the field of civil liability of Industries like MNCs by the development of modern techniques and processes. They have been provoked by the following facts.\footnote{113}

a) From the beginning of the nineteenth century industrial and technical developments have created new hazards while simultaneously providing new means of preventing them.

b) The characteristic common to all these new hazards is that the slightest inadvertence may result in very serious injury, injury which may even be caused through no personal fault, and without the defence of inevitable accident.

c) These dangers, inherent in all applied techniques, occur constantly and everywhere in certain fields accidents are everyday events.

d) In increasing measure the negligent parties are enterprises (corporations) while the victims are for the most part employees, that is a class dependent on wages with no financial reserves in the event of an accident.

Besides civil liability claims, there are also claims by authorities under public law. Moreover, there has recently been an increased tendency for the state to see itself as nature’s advocate. For example, as of May 2007 in the European Community, operators that cause purely ecological damage will be financially liable for the costs of remedying this damage. In addition to public law claims, the state (as the owner of property and waters) can also make civil law claims.\footnote{114}

In recent years it has thus fallen mainly to the national law of civil liability to address grievances against MNC activities. Affected workers and communities have brought a number of high-profile cases involving the oil, mining, and

\footnote{112} Supra Note 98 at pp.67-68
chemical industries in all corners of the globe. As Newell notes, the considerable growth in such suits in recent years is a symptom of the failure of other regulatory, systems, leaving plaintiffs with little scope for effective redress other than tort law. Affected workers and communities have forged alliances with international non-governmental organizations (NGOs) and public interest lawyers to redress what is often perceived as a “governance deficit” in the regulation of MNCs. It is often hoped that through such suits local communities will not only press their own claims for environmental justice, but may also shape the public perception of MNCs and the environment at a global level. Some of the cases that have captured public attention in recent years include;

- In 1984 a leak of methyl isocyanate gas from a pesticide plant owned by union carbide in Bhopal, India, resulted in the loss of over 3,500 lives and the exposure of an estimated 521,000 individuals to the gas that can result in chronic effects, including depression of immune response. Plaintiffs failed in their attempt to sue in the U.S., and following much-delayed litigation in India the case was settled for $470 million.\(^{115}\)

- In 1990, Coast Rican Banana Plantation workers won the right to sue Dow Chemical in Texas Courts for injury and sterility resulting from exposure to Dow-manufactured chemicals in Costa Rica.\(^ {116}\)

- From 1982 to 1994, the village of Bukit Merah in Malaysia was exposed to radioactive tailings from the activities of the Asian Rare Earth Corporation – a Japanese/Malaysian joint venture owned in part by Mitsubishi. Although exposed residents were denied redress under Malaysian tort law.\(^{117}\)

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• In 1993 a group of Ecuadorian indigenous people from the Orient region of the Ecuadorian Amazon brought an action in the U.S. against Texaco for deforestation and environmental degradation.118

• In 1994 individuals living near the Ok Tedi River in Papua New Guinea brought a suit against Broken Hill Proprietary, an Australian company, for damages following the collapse of a tailings dam from a copper mine.119

• In 1998 a suit was brought against the Canadian mining company Cambior following a leak of 3.2 billion litres of cyanide-polluted water at the Omai mine in Guyana.120

• Ken Wiwa and others from the Ogoni region in Nigeria brought suit in New York for the alleged collusion of Royal Dutch/shell with he Nigerian Government in imprisonment, torture, and killing of environmental activities opposed to shell’s oil exploration activities.121

• In 1997 and 2000, South African workers exposed to mercury secured out of court settlements after suing the parent company in the UK.122

• After a long legal battle, over 4,000 south Africans won right in July 2000 to sue Cape Industries in the UK for asbestosis and mesothelioma resulting from exposure to asbestos in south Africa.123


The violations of rules and regulations can be dealt simply with the limping legal position of civil liability is to give licence for committing grave crimes humanity and the whole environment as it had actually happened in Bhopal. In recent years, considerable changes have taken place relating to the extent of employer’s liability. These changes are marked on the one hand by legislation on the subject and on the other by a new trend in the jurisprudence of the courts attaching greater weight to the liability of the employer.

Thus, civil liability has an important but inevitably limited role to play in environmental management. That its profile is much higher in the transnational context is simply testimony to the lack of other accountability mechanisms. The global legal community has not yet evolved legal techniques that are effective in regulating MNCs, in part because MNCs defy our most fundamental assumptions about the mapping of legal persons to territorial jurisdiction. In such circumstances, it is not surprising that many observers have been attracted to the idea of holding MNCs accountable to global norms based on international human rights standards. The proposal has stimulated much debate and legal analysis.

7.8 STRICT/ABSOLUTE LIABILITY

In general sense the expression ‘strict liability’ may mean a liability which is stringent i.e., something more than an ordinary liability. Legally, it signifies a ‘tortious liability and is regarded as a binding, precise, rigid and hard measure


than the ordinary liability. It is imposed upon the wrong-doer for such tort which is committed by him while doing some ‘special act’ i.e., an act not done by common people in ordinary circumstances.\textsuperscript{128} The Bhopal disaster was followed by the \textit{Oleum gas leakage case}.\textsuperscript{129} Where the Supreme Court of India formulated a new doctrine of absolute liability free from strict liability rule in England. In this case the court proceeded to formulate the general principle of liability of industries engaged in hazardous and inherently dangerous activity where Chief Justice Bhagwati declared in unambiguous term.

“We have to evolve new principles and lay down new norms, which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the clutches of a foreign legal order.”\textsuperscript{130}

Strict liability is important in law of torts, corporations law, and criminal law. In formulating this principle, the professed intention of the court was to free Indian Jurisprudence from colonial legal influence.\textsuperscript{131} The court made it clear that an enterprise is liable to compensate all those persons who are affected by the accident and such liability is not subject to any of the exceptions recognized under the rule in \textit{Rylands v. Fletcher}.\textsuperscript{132}

In tort law, strict liability is the imposition of liability on a party without a finding of fault such as negligence or tortuous intent. The plaintiff needs to prove only that the tort happened and that the defendant was responsible. Strict liability is imposed for legal infractions that are malum prohibit rather than malum in se, therefore, neither good faith nor the fact that the defendant took all possible precautions are valid defenses. Strict liability often applies to those engaged in hazardous or inherently dangerous ventures. The doctrine of strict liability was

\begin{itemize}
\item \textsuperscript{129} M.C.Mehta v.Union of India, AIR 1987 SC 1086.
\item \textsuperscript{130} \textit{Ibid} at 1089.
\item \textsuperscript{131} \textit{Supra Note} 96 at p.155.
\item \textsuperscript{132} 1868 (19) LT 220; The Exceptions recognized to the rule of strict liability are (1) Act of God and (2) Act of default of the plaintiff.
\end{itemize}
propounded in a 19th century English case, *Rylands vs Fletcher*.133 Accounting to the doctrine, people who engage in particularly hazardous activities should bear the burden of the risk of damage that their activities generate.

Traditionally, the principle of strict liability allowed for the growth of hazardous industries including the Multinational Corporations (MNCs) while ensuring that such enterprises would bear the burden of the damage they caused when a hazardous substance escaped. This is evidenced by the landmark decision of the Indian Supreme Court in *M.C.Mehta v. Union of India*.134 In this case, the petitioner *M.C.Mehta*, an environment lawyer, sought the court’s directions to close and relocate the caustic chlorine and sulphuric acid plants of the company Shriram, which were located in a thickly populated part of Delhi. Shortly after Mehta filed the petition, on December 4, 1985, Oleum leaked from shriram’s sulphuric acid plant, causing widespread panic in the surrounding community. The ongoing Bhopal litigation influenced the court’s decision if this case considerably.135 Laying down a principle of strict and absolute liability to compensate accident victims of ‘hazardous and inherently dangerous activity’, Chief Justice Bhagwati declared in unambiguous language:

“ We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order”.

In the past all actions for environmental torts against companies and industries were governed by the principle of strict liability. This is essentially a principle of common law as enunciated in *Rylands v Fletcher*136 by English courts. However,

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133 *Ibid*

134 *Supra Note* 21.

135 In *Bhopal case* the U.S Court rejecting the plea and holding that the Indian courts are the most appropriate forum. Justice Keenan of the U.S. District Court Observed that “…… The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgement on behalf of its own people would be to revive a history of subservience and subjugation from which Indiqa has emerged. India had its people can and must vindicate their claims before the independent and legitimate judiciary…. *Union of India v. Union Carbide Corporation*, (1986) 2 Comp LJ 169 (US) at 195.

136 *Supra Note* 22.
MC Mehta v. Union of India\textsuperscript{137}, the Indian Supreme Court sought to deviate from this principle. The court stated “an enterprise which is engaged in a hazardous or inherently dangerous activity that poses a potential threat to the health and safety of persons & owes an \textit{absolute and non-delegable duty} to the community to ensure that no harm results to anyone. The principle of absolute liability is operative without any exceptions. It does not admit of the defence of reasonable and due care, unlike strict liability. Thus, when an enterprise is engaged in hazardous activity and harm result, it is absolutely liable, effectively tightening up the law.\textsuperscript{138}

The court reiterated this principle in \textit{Indian Council of Enviro-Legal Action v.Union of India}.\textsuperscript{139} The issues were two-fold in the case:

1) Should the corporation be held responsible to meet the cost of the remedial action to remove and store the sludge in safe and proper manner?

2) Should they be made liable for the loss and suffering caused to the village where the industrial complex was located?

To answer this, the court re-emphasized the Mehta principle of absolute liability. It stated that the industry alone has the resources to discover and guard against hazards and dangers caused by its actions. Justifying the stringent level of liability laid down, the court also observed that persons affected do not have this ability. It is also difficult for the victim to establish the absence of reasonable care or foreseeability of the industry.\textsuperscript{140} For these reasons, the onus ought to lie on the industry. In fact, the Court imposed on the respondents liability not only for environmental hazards, but also the cost of all measures including remedial measures recovered from them.\textsuperscript{141}

\begin{itemize}
  \item \textsuperscript{137} AIR 1987 SC 1086.
  \item \textsuperscript{138} Dilip Ukey, \textit{Changing Paramaters of Tortuous Liability Doctrine- an overview}, 9(3) CULR 302 (1996) AT 305.
  \item \textsuperscript{139} AIR 1996 SC 1466.
  \item \textsuperscript{140} \url{http://india.smetoolkit.org/india/en/content/en/36040/what-is-the-doctrine-of-absolute-liability-as-has-developed-in-India}.
  \item \textsuperscript{141} P. Leelakrishnan \textit{Environmental Law in India} 1999 p. 136.
\end{itemize}
The judgement of the Supreme Court of India in *M.C. Metha v. Union* of India, established the following four basic principles of law.

i) These enterprises which are engaged in hazardous activities are subject to ‘absolute liability’ and not only ‘strict liability’ When the dangerous thing escape and cause harm to plaintiff, the defendant is absolutely liable.

ii) The rule of absolute liability does not allow any of these exceptions of defence which have been recognized under the rule in *Rylands v. Fletcher*.

iii) The enterprise conducting operation of hazardous activities must discover and guard against dangerous issue warning to the people in surroundings against hazards or dangers.

iv) The principle of ‘no fault liability’ has been emphasized by the court. That is, the defendant cannot be exempted from liability on the ground that he had taken reasonable are to avert the accident.

For the application of principle of Absolute Liability and Multinational Enterprise liability, certain characteristics are to be there for classifying an enterprise as “Hazardous Multinational” They are rightly explained by Upendra Baxi and Amita Dhanda.

1) The global structure, organization, technology, finances and resources of Multinationals enables them to take catastrophic decisions that is decisions and actions which lead to mass disasters.

2) The power of multinationals, especially over their ‘key management personal’ is neither ‘restricted by national boundaries’ nor effectively controlled by international law’.

3) This is because of the complex corporate structure of multinationals with ‘networks of subsidiaries and decisions which make it ‘exceedingly difficult

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142 *Supra Note* 137.
144 Upendra Baxi and Amita Dhanda *Valiant Victims and Lethal Litigation The Bhopal Case* 1990 at p. viii-ix
or even impossible to pinpoint responsibility for the damage caused by the enterprise’.

4) The monolithic multinational, operates through:

- A neatly designed network of interlocking directors.
- A common operating system.
- Global distribution and marketing systems.
- Design development and technology worldwide.
- Financial and other controls
- Highly sophisticated and technologically capable machines and working staff.
- Victims of such daily actions are unable to identify which unit of the enterprise caused the harm.

The significance lies in the court’s formulation of the principle of the measure of liability of an industrial enterprise engaged in hazardous or inherently dangerous activity in case of an accident. It was examined whether the rule in *Rylands v. Fletcher* with all its exception would be applicable in such cases. Answering the question in the negative the court evolved a new principle of liability.

It was felt that there was no law to provide for immediate, just and reasonable relief to the victims of industrial accident. The victims remained un-redressed for quite a long period of time. For providing immediate relief to the victims, in January 1991, parliament of India enacted the Public Liability Insurance Act (PLIA) 1991, giving statutory recognition to no fault liability.

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145 (1868) LR 3 HL 330.
146 *M.C.Mehta v. Union of India*, (1987) 1 SCC 395 SCC (L&S) 137; AIR 1987 SC 1086 at 1098. "This rule, evolved in the 19th Century at a time all these developments of science and technology have not taken place, cannot afford any guidance in evolving any standards of liability consistent with the constitutional norms and the needs of the present day economy and social structure."
Under this Act, victims of a hazardous industrial accident are entitled to compensation at prescribed levels, without providing any proof of negligence. The maximum compensation under the Act, however, is limited to a measly Rs.25,000 although the right of a victim to claim larger damages under any other law is expressly reserved. To ensure prompt payment of compensation to victims, the Act requires all hazardous enterprises to obtain sufficient insurance cover and provides for an independent machinery administered by the District Collector for the filing for and adjudication of claims. The rules framed under the PLIA limit the liability of an insurer to Rs.5 Crore for every accident.

Compensation for industrial disasters under the Public Liability Insurance Act is only an interim payment and the other litigation is time-consuming, with evidence of liability and amount of compensation difficult to determine. With only a few cases reported under the Act, it has not been found to be of any help to ensure timely payment of adequate compensation to the victims of accidents involving hazardous industries. Poor enforcement of the Act by the authorities has meant that its laudable objectives are out of sync with reality.

The National Environment Tribunal Act (NETA), 1995, extended the application of absolute liability without limitation to all cases where death or injury to a person (Other than a workman) or damage to any property or the environment resulted from an accident involving a hazardous substance. The “owner”, who is defined as a person who owns or has control over the handling of any hazardous substance at the time of the accident, is liable to compensate the victims on a no-fault basis. Application for compensation may be made to the tribunal established under the Act. The Act is not in force as the government has not yet notified it, allegedly under pressure from business houses dealing with hazardous substances.

The law was enacted in pursuance of decisions taken at the United Nations Conference on Environment and Development (In which India participated) held in Rio de Janeiro in June 1992. The statement of objectives of the Bill stated that it was considered expedient to implement the decisions of the aforesaid conference so far as they related to the protection of the environment and the

148 Supra Note 92 at p.58
payment of compensation for damage to persons, property and the environment while handling hazardous substances.

### 7.9 PARENT COMPANY LIABILITY

Generally, most nations in which MNCs are headquartered (with the possible exception of Japan) do not have an overall policy which address the question of MNC expansion abroad. In its true sense, although MNC subsidiary corporations are legally separate but in fact MNC parents tend to view them as parts of the single global system whose overall success, rather than that of any individual component, is considered critical. It is important to note that a basic principle of corporation law in most countries is the doctrine of “limited liability”, which generally means that shareholders of a corporation are under no obligation to the corporation or its creditors. Direct liability of the parent company for the obligations of its subsidiary is admitted only in special circumstances—i.e., the case of complete integration of a subsidiary into a group. Accordingly, member states of the OECD have not recognized a general responsibility of parent companies for environmental or other damages caused by their subsidiaries. Subsidiaries are often created for the purpose of limiting the liability of the parent corporation.

The justification for making the parent liable would be that “The main effect of affording limited liability to parent corporations is to subsidize inefficient investment……” when the subsidiary is not in a position to adequately compensate for any accidental release, a rule limiting the liability of the parent corporation will result in the externalization of the costs of cleaning up the environment. Some of these costs may fall upon the involuntary creditors. Nothing is more fundamental than the fact that, to grow an enterprise, a parent

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149 Surpa Note 108 atp. 362.
150 For the sake of convenience, “parent” will refer to a corporation which exercises ultimate managerial authority over a wholly or partially owned subsidiary corporation incorporated in another country. “Subsidiary” will refer to a controlled, foreign-incorporated entity.
155 Ibid at pp.991-92.
corporation often provides fiscal and managerial support to its subsidiary. Arguably, it is one of parent corporation’s fiduciary obligations. Indeed, to facilitate coordination, consistency and the sharing of key skills and institutional know-how, many corporate parents have, at one time or another:

- Appointed a common slate of officers and directors to operate one or more subsidiaries and strategically place (that is, loan) employees to help jump start or expand a fledgling subsidiary;
- Signed environmental permits, hazardous waste manifests or property transfer documents on behalf of a subsidiary;
- Selected off-site hazardous waste treatment, storage and disposal facilities or undertaken remedial obligations of a subsidiary, following either a corporate master purchase agreement or a uniform corporate sourcing policy intended to enhance corporate social responsibility objectives;
- Provided loans, letter of credits, support agreements or corporate guarantees to support environmental permit requirements or underwrite a subsidiary’s access to capital of business opportunities with major customers or suppliers;
- Transferred contaminated assets into parent corporation-created special purpose entities (SPEs) to facilitate the subsidiary’s consummation of a business transaction;
- Allowed a subsidiary to use real and personal property on favorable (that is noncommercial) terms, either through inter-company transfers, assignments, leases or sub-leases; and
- Extended insurance coverage to a subsidiary by allowing the subsidiary to become an additional insured on policies that blanket the property and causality risk of the consolidated enterprise.

To understand why seemingly salutary and progressive corporate practices should even give rise to concerns about potential environmental risk at the parent company level, the recent case law on environmental “owner/operator liability”
jurisprudence as well some state statutes governing the transfer of industrial facilities offer insight. The leading case remains the U.S. Supreme Court’s 1998 decision in *U.S. v. Best Foods*¹⁵⁶ in which the court held that a parent corporation could be derivatively liable under the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9701 et seq. (CERCLA, or the Superfund) as an owner through veil piercing or directly liable as an operator, for the environmental harm caused by its subsidiary, if it sufficiently controls a polluting subsidiary.

Plaintiffs frequently sue the parent corporation as well as the subsidiary for claims arising out of the actions of the subsidiary. Bringing suit against the parent can be especially important when the assets of the subsidiary are insufficient for complete recovery.¹⁵⁷ In *Smith, Stone and Knight Ltd v. Birmingham Corporation*¹⁵⁸ the parent company succeeded in a claim for loss of business when a local authority compulsorily acquired premises occupied by its subsidiary company. Atkinson J found that the subsidiary in conducting business on the premises had acted as the parent’s agent. This finding was justified by the fact that the parent had treated the subsidiary’s profit as its own; had appointed the directors conducting the business of the subsidiary; had directed all that was done within the subsidiary; and had maintained effectual and constant control over the subsidiary. Again in *DHN Estates v. Tower Hamlets LBC (‘DHN’)*¹⁵⁹ one of the reasons given by the Court of Appeal in allowing the loss suffered by the parent to be included when assessing compensation due to the landowner subsidiary, was its finding that the companies formed a ‘single economic unit’.

In addition to the traditional parent functions, in this age of environmentalism and globalization, corporate performance and stock value are often judged by more than quarterly earnings or compliance with applicable laws. They are also judged on the tenets of “corporate citizenship.”¹⁶⁰ Prior to

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¹⁵⁶ 524 U.S. 51
¹⁵⁷ Supra Note 153
¹⁵⁸ [1939] 4 All ER 116
¹⁶⁰ See, for example, the initiatives established by the Organization for Economic Cooperation and Development’s Corporate Social Responsibility Guidelines, the United Nations Environment Programme’s Financial Services and Insurance Initiatives, the U.N’s Secretary
undertaking any corporate parent-support activities or implementing a corporate –
level EMS, it is important for senior management to work closely with both
corporate counsel and the corporate EHS manager to assess whether any of the
contemplated activities should be (mis) construed, later, as evidence of the
corporate parent’s direct operational involvement in the subsidiary’s
environmental affairs.

The transformation of accepted corporate governance practices into a
sources of potentially significant risk for the corporate parent is best seen in the
arena of environmental litigation (whether for noncompliance with environmental
laws or recovery of cleanup costs), especially as environmental regulators use
increasingly creative enforcement strategies to target industry, requires even
greater vigilance in respecting good governance up and down the corporate chain.
Likewise, once enforcement proceedings for noncompliance or environmental
cost-recovery (whether governmental or third-party) commence, it is too late to
insulate a well-meaning aren’t from the liabilities of a subsidiary if, for example,
the parents signature on a permit or corporate guarantee amounts to a statement on
a public document (assessable through the Freedom of Information Act) that the
parent’s assets are available to cover for the subsidiary’s liability.161

A parent will be liable in tort without regard to the fact that it is a parent, if
it violates a duty owned by it independently of any duty owed by the subsidiary. If
it directs a tort to be committed, or if the subsidiary’s servant on whose acts the
claim is based is also the parent servant.162 It is likely that Union Carbide has
superior knowledge of the risk involved in the production process used at Bhopal
and in a newly industrializing country, such as India, the victims cannot be
expected to have personal injury and life insurance.163 Various alternative bases
have been discussed on which the UCC (America) could be held liable. The

162 “Liability of a Corporation for Acts of a subsidiary of Affiliate” 1958; Vol.71, Number 6 at
pp.123-4 (Harvard Law Review) Concerning the limited liability of the parent company, it
has also been observed in particular reference to Bhopal that insistence on limited liability
would undermine the compensation of the victims who are involuntary creditors of the
company. It would treat the shareholder corporation as a privileged entity, thereby
reducing the deterrent effect of legal control in this field Sumitra Sripada The
163 Supra Note 89 at pp. 581-582.
analogies of principal and agent, employer and employee as between the UCC and UCIL so as to make the UCC vicariously liable have been rejected. The model of employer and independent contractor though could be applied, it was held would be unhelpful as the employer is not vicariously liable for the conduct of the independent contractor.  

The theory of multinational enterprise liability, which views the multinational enterprise as a single entity, suggests that multinational structure alone is sufficient to impose liability on the parent corporation for the non-contractual liabilities of its subsidiaries, and that alleged harm caused by any unit of the entity will be attributed to the entity as a whole.

The multinational enterprise which caused the harm is liable for such harm. The international legal activity focused on environmental issues in the past few years manifests a significant shift in the treatment of environmental concerns and also try to establishing the liability principles. The Polluter Pays Principle, Precautionary Principle, Strict/Absolute Liability, Parent Company Liability, Civil Liability, Criminal Liability are some of the principles to regulate the environmental harm and impose liability who caused the harm. Implemented these Principles to make suitable liability principles and strict implementation of the existing relevant liability principles both the national and international level to control and regulate the polluting MNCs for the protection of our natural and environment resource has been discussed in this chapter. In India Supreme Court has implemented these principles in various cases regarding environmental issues.

The hypothesis that there are several loopholes in imposing liability for environmental hazards caused by MNCs proved to be correct.


165 Supra Note 152.