

TORTIOUS LIABILITY FOR ENVIRONMENTAL HARM: A TALE OF JUDICIAL CRAFTSMANSHIP

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Tort is a civil wrong. It is concerned with the liability of persons for torts or breach of their own duties towards others... it relates to the recognition of interests that the civil law recognizes in the absence of contractual relations between the wrongdoer and the injured person¹. While today the Indian courts still follow the English law of torts, this ideological foundation has permitted to some extent innovation and development that are necessary to meet new challenges particularly in the field of environment protection.

The present paper tries to analyze the application of torts' principles in India in the matters related to environmental harms. The principles of torts have been applied by Indian judiciary in various cases of environmental damage violating people's right to clean and healthy environment. It also makes critical study of the judicial response in the development of the principle of absolute liability and wide interpretation of tortious remedy by checking the potential of tort in controlling environmental pollution in India.

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INTRODUCTION

The present legal system in India is formed, for all practical purposes on the basis of the English common law brought into India by the British. From the eighteenth century, the British colonial rulers, who were eager to have a legal system that would maintain law and order and secure property rights, gradually imposed on India a general system of law. The foundation of this Anglo-Indian judicial system was laid by the Judicial Plan of 1772 adopted by Warren Hastings on which later administrations built a superstructure.² In the second half of the nineteenth century the Indian legal system was virtually revolutionized with a spate of over-legislation, which was influenced by a desire to introduce English law and to shape that system from an English lawyer's viewpoint.³ The structure and powers of the court, the roles of judges and lawyers, the adversarial system of trial, the reliance on judicial precedent and the shared funds of concepts and techniques, brought the Indian legal system into the mainstream of the common law systems. It is said that the common law in India, in the widest meaning of the expression, would include not only what in England is known strictly as the common law but also its traditions and some of the principles underlying English statute law. The equitable principles developed in England in order to mitigate the rigours of the common law and even the attitudes and methods pervading the English system of administration of justice⁴.

The early charters, which established the courts in India under the British rule, required the judges to act according to "Justice, Equity and Good Conscience in deciding civil disputes if no source of law was identifiable".⁵ In

¹ A LAKSHMIPATH, M SRIDHAR, THE LAW OF TORTS 7 (ed. Iyer Ramaswamy, Nagpur: Lexis Nexis Butterworths, 2007).

² M. P. JAIN, OUTLINES OF INDIAN LEGAL HISTORY 77 (Nagpur: Lexis Nexis Butterworths 1972).

³ A.C. BANERJEE, ENGLISH LAW IN INDIA 189 (New Delhi: Abhinav Publications 1984).

⁴ M. C. SETALVAD, COMMON LAW IN INDIA 3 (London: Stevens and Sons Ltd. 1960)

⁵ J. D. M. DERRETT, 3 ESSAYS IN CLASSICAL AND MODERN HINDU LAW 129-138 (Leiden: Brill 1976)

the historical development of civil laws in India by English judges and lawyers, the notion of justice, equity and good conscience, as understood and applied by the then Indian courts, was basically in line with the development of English common law. The English-made law used to dominate all major areas of civil laws in India, which mostly took the form of a codified legal order. The law of torts in India, which remained uncoded, followed the English law in almost all aspects in its field. It is notable that common law, originally introduced into India by the British, continues to apply here by virtue of Art. 372 (1)⁶ of the Indian Constitution unless it has been modified or changed by legislation in India. The law was modified and departed from the English law only when the peculiar conditions that prevailed in India required this.

The remedies of modern environmental torts have their roots in these common law principles of nuisance, negligence, strict liability and trespass and other remedies for tort.

POTENCIAL OF TORT IN CONTROLING ENVIRIONEMENT POLLUTION

Majority of environment pollution cases of tort in India fall under four major categories –Nuisance, Negligence, Strict liability and trespass.

Tort law deals with remedy for invasion of private rights. It talks about compensating a person for violation of his private right. A question arises about potential of tort law in controlling pollution as it focuses on remedy for violation of private right. According to Stephan Shavell “tort law should be assessed in terms of the contribution it can make to the control of environmental and other risks. The reason is that compensation can be

⁶ Art.372 (1) of the Constitution of India states: “Notwithstanding the repeal of this Constitution of the enactments referred to in Article 395 but subject to the other pro-visions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.”

achieved independently of tort law by other (and he implies, equally good and better) means.⁷ Compensation goals can be pursued independently of tort law, as can risk control goals, but in tort law these two goals are harnessed together. Tort liability for harm rests on risk-creators. It is in the link between compensation and risk-control that the distinctiveness of tort law resides. Tort law is two sided, “looking both to harm and to the compensation of harm.”⁸ Because of its bilateral structure the tort law is best suited in the environmental law context. It is responsibility based mechanism for repairing harm. It’s potential as a risk control is limited by its focus on harm. Actually the close study of the characteristics of tort law reveals its true potential in protecting the environment.

- a) Tort law comes onto the scene when something has gone wrong. So in cases of environment, the tort law will play role when there is environmental damage.
- b) It is much more concerned with cure rather than prevention.
- c) It is concerned primarily with reparation and not punishment.
- d) Tort law focuses on bad outcomes affecting persons (both human beings and corporations) and property. The term ‘property’ does not refer to the things, but to things that are subject to legal regime. The earth’s atmosphere for instance, is not subject to any legal property regime and so is not within the scope of tort law. In this way, tort law can be seen exclusively concerned with persons because only persons can have property.
- e) The rights protected from interference by tort law are property rights⁹ and dignitary rights such as reputation and personal

⁷ STEPHAN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENTAL LAW* 279 (Harvard University Press, 1987); *See also*, Richard B. Steward, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual Track System*, GEO L.J. 88 (2000) 2183-83.

⁸ PETER CANE, *THE ANATOMY OF TORT LAW* 427-467 (Oxford: Hart Publishing 1997).

⁹ Rights in land, chattels, intellectual property, such as trade mark, patent etc.

freedoms. The archetypal harms recognized by tort law are injury to the human body and mind, damage to tangible property and financial loss. More marginal are tangible harms to the person such as grief, fear and insult. Significantly for present purposes aesthetic harms resulting from bio-diversity damage, for instance, are not as such recognized by tort law.

- f) It is said that tort law focuses on harms not risks. It is not absolutely true. For instance, an important component of negligence calculus is the probability of the harm. The core-idea of foreseeability is also related to risk.
- g) In cases where an injunction may be awarded to prevent harm occurring in future, an injunction will be issued only if the court is satisfied that harm is imminent or very likely and not merely on the basis that the defendant is involved in a risky activity. Here it differs from precautionary principle, which considers risk involved in the activity and proposes prevention rather than cure. So the precautionary principle is increasingly finding favour as an approach to environment protection.
- h) Tort liability is predominantly fault based liability and in tort fault typically means negligence. The pre-condition of foreseeability of harm is pre-condition of liability under the principle of *Rylands v. Fletcher*¹⁰. The polluter pays principle is usually assumed to dictate strict liability.
- i) Private law remedies in tort may require payment to individuals for environmental damage if that environmental harm constitutes harm to certain individual interests. There is absence of any liability to the environment, and absence of any doctrine

¹⁰ *Rylands v. Fletcher*, LR3HC 330 (1968).

compensating the environment for the harm caused to it. It is yet to be developed.

- j) In some of the cases it is difficult to prove any causal links between the emission of a pollutants and increased incidence of disease. In some of the cases the victims are passive victims in such cases it is difficult to prove the causes of harm. It is simply impossible in many cases to distinguish the pollution effects and the general background of disease, that is between the individually tortiously injured as distinct from individuals with same disease brought about by background factors. In addition multiple sources of pollution together with non environmental factors can combine to create complex links to the extent that it may not even be meaningful to ask what causes an ailment. As well as creating difficulties for individual claimants, any deterrent effects of tort will be lessened by the reduced likelihood of a successful claim.

In evaluating the potential of tort law in matters related to environment protection as a compensation and risk control mechanism, we need to attend not only to the rules and principles according to which tort liability is imposed, but also to the institutional structure through which these rules and regulations are given practical effects. In other words, we need to assess tort law in action i.e. the interpretation of the tortious liability rules by the judiciary in cases related to environment protection.

JUDICIAL SKILL IN SHAPING TORTIOUS LIABILITY IN ENVIRONMENT PROTECTION

The Indian judiciary has played a remarkable role in implementing principles of tort law in environmental issues. The credit goes to the Supreme Court in interpreting the same old principles of tort with wider meaning to encompass the new challenges of the environmental damage.

Wherever and whenever necessary, the Supreme Court has evolved new principles of tort and given a new shape to tortious liability in environment protection.

Evolving New Principles of Tortious Liability

The Bhopal Catastrophe has been proved eye-opening for the environmentalist, social workers and government institutions as well as general public. It brought new awareness in India. The government and the judiciary started thinking about new ways and means of preventing similar tragedies in future. Compensation to the victims of Bhopal disaster raised an enigma in Indian torts law. There was paucity of litigation in the field of torts. The proverbial delay, exorbitant court fee, complicated procedure and recording evidence, lack of public awareness, the technical approach of the bench and the bar and absence of specialization among lawyers are stated to be reasons for such a condition.¹¹ It is also argued that the alleged paucity is myth and not reality, as thousands of cases are settled out of court through negotiations and compromises and unreported decisions of subordinate courts.¹² It is not disputed that Indian courts do not award punitive damages in civil cases to deter the wrongful conduct.¹³ But it does not mean that tort law has not played any effective role in the environment protection. The judicial pronouncements clearly show the recent trends in the Indian torts law as an instrument of protection against environmental hazards.

The judicial vigil is seen in the interpretation of principles of tort law in the age of science and technology. Absolute liability for harm caused by industry engaged in hazardous and inherently dangerous activities is a newly formulated doctrine free from exceptions to the strict liability in England.¹⁴

¹¹ B. M. GANDHI, *LAW OF TORTS* 63-69 (Eastern Book Company 1987).

¹² J. B. Dadachandji, J.B.'s affidavit before US District Court in the Bhopal litigation: *Inconvenient Forum and Convenient Catastrophe: the Bhopal Case*, Indian Law Institute, 81-82 (1986).

¹³ Stephan L. Cummings, *International Mass Tort Litigation: Forum Non Conveniens and the Adequate Affirmative Forum in Light of the Bhopal Disaster*, 109 (16) GA. J. OF INT'L & COMP. L., 136-142.

¹⁴ P.LEELAKRISHNAN, *ENVIRONMENTAL LAW IN INDIA* 126 (Butterworths 1999).

The judicial activism and craftsmanship is clearly seen in its new-fangled approach in providing tort remedies in public interest litigation. In *M.C.Mehta v. Union of India*¹⁵ the court entertained the public interest litigation where the damage was caused by an industry dealing with hazardous substance like oleum gas. The Supreme Court could have avoided a decision on the the affected parties' application by asking parties to approach the subordinate court by filing suits for compensation. Instead, the Court proceeded to formulate the general principle of liability of industries engaged in hazardous and inherently dangerous activity. Not only this, Chief Justice Bhagawati declared that the court has to evolve a new principle and lay down new norms, which would adequately deal with the new problems which arise in a highly industrialized economy.¹⁶ The Court evolved the principle of absolute liability and did not accept the exceptions of the doctrine of strict liability for hazardous industries. The Court did not stop here; it proceeded a step further and held that the measure of compensation must be co-related to the magnitude and capacity of the enterprise.

The Chief, Justice Bhagawati said: "The large and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on the hazardous or inherently dangerous activity by enterprise."¹⁷ This is found necessary because of its deterrent effect on the behaviour of the industry. The Indian Supreme Court was developing indigenous jurisprudence free from the influence of English law. Here the scope of the owner conferred on the Court under Article 32 was so widely interpreted as to include formulation of new remedies and new strategies for enforcing the right to life and awarding compensation in an appropriate case.¹⁸ The court gives clear message in the case that one who pollutes ought to pay just and legitimate

¹⁵ AIR 1987 SC 1086.

¹⁶ *Id.*

¹⁷ *Id.* at 1089.

¹⁸ *Id.* at 1091.

damages for the harm one causes the society. It opened a new path for later growth of the law and accepted the polluter pays principle as part of environmental regime. The principle requires an industry to internalize environmental cost within the project cost and annual budget and warrants fixing absolute liability on harming industry. The judiciary woke up with a new awareness and laid down legal norms in clear terms. This was accompanied by invoking the technique of issuing directions under Art.32 of the constitution of India.

In *Consumer Education and Research Center (CERC) v. Union of India*¹⁹ the court designed the remedies following the Mehta dictum.²⁰ The Court's attitude shows certainty of the court that direction can be issued under Article 32 not only to the State but also to a company or a person acting in purported exercise of powers under a stature of license issued under a statute for compensation to be given for violation of fundamental rights.

In this case, the doctrine of absolute liability has not been referred but a different species of liability was formulated in respect of hazardous industries, like those producing asbestos. The compensation payable for occupational diseases during employment extends not only to those workers who had visible symptoms of the diseases while in employment, but also to those who developed the symptoms after retirement.

In *Indian Council for Enviro-Legal Action v. Union of India*²¹ the Supreme Court supported Mehta case and pointed out the rationale for fixing the absolute liability on the hazardous industry. In this case the polluter pays principle was applied. The Court directed the government to take all steps and to levy the costs on the respondents if they fail to carry out remedial actions.

¹⁹ AIR 1995 SC 922.

²⁰ Not mentioned the case but followed.

²¹ AIR 1996 SC 1466.

Socio-economic transformation is a challenge to a developing country. As Chief Justice Bhagwati has rightly observed, law has to grow in order to satisfy the needs of fast changing society and keep abreast with the developments taking place in the country.²² It is absolutely true. The Indian judiciary has evolved the new doctrines of tortious liability through the effective tool of public interest litigation.

Some of the Public Interest Litigation cases involved flagrant human rights violations that rendered immensely inadequate traditional remedies, such as the issuance of prerogative writs by the Courts. Without any hesitation the Indian Judiciary has forged unorthodox remedies. Where the peculiarities of case prompted urgent action, the Court gave immediate and significant interim relief with a long deferral of final decision as to factual issues and legal liability.

In cases of personal injuries²³ and unlawful confinement²⁴, the court has refused to limit the victim to the usual civil process. Petitions are allowed directly to the Supreme Court under Article 32 and damages are awarded to compensate the victim and deter the wrongdoer. In cases of gross violations of fundamental rights, the damages are awarded by the court. It is a new approach. The court has not dealt with only violation of individual's right but has taken serious note of the environmental harm along with violation of human rights. In such cases the court has also imposed the cost of repairing the environmental damage on the polluters.²⁵ Perhaps more importantly, the courts have shown a willingness to experiment with remedial strategies that require continuous supervision and that appear significantly to shift the line between adjudication and administration. Just as the court will appoint socio-legal commissions to gather facts, so will it create agencies to suggest

²² *Supra* note 544, 546.

²³ *M.C.Mehta v. Union of India*, AIR 1987 SC 1086.

²⁴ *Rudal Shah v. State of Bihar*, AIR 1983 SC 1086.

²⁵ *Vellore Citizen Welfare Forum v. Union of India*, AIR 1996 SC 2715; *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 SC 1466.

appropriate remedies and to monitor compliance. The final orders in PIL matters are often detailed, specific and intrusive.²⁶

In *Bandhua Mukti Morcha v. Union of India*²⁷ the Court had endorsed the true scope and ambit of Article 32 of the Constitution and has held: “it may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for the enforcement of the fundamental rights but it also lays a constitutional obligation on the Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce fundamental rights”²⁸.

In *M.C Mehta v. Kamal Nath and Ors.*,²⁹ the Supreme Court held, “Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution, has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner...The considerations for which “fine” can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded.”³⁰

²⁶ Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, AM. J. of COMP. L., 37, 506 (1989).

²⁷ (1984) 3 SCC 161.

²⁸ *Id.*

²⁹ AIR 2002 SC 1515.

³⁰ *Id.*

CONCLUSION

Thus the judiciary has resorted to fundamental rights, directive principle of state policy and the fundamental duties of citizens in the constitution for the development of environmental jurisprudence. The new interpretation of these provisions has developed a judge made law in the field of environmental law in India. The expansive interpretation of Article 21 is the remarkable development in the human rights to clean and wholesome environment in India. The Article 21 has been used by judiciary to implement the principles of sustainable development, protecting the right to clean air, water and environment; right to livelihood etc. the analysis of the case laws shows that the judiciary has widened the scope of article 21 and implemented an international law in a domestic law. Article 48 A and 51 A (g) have been interpreted to substantiate this development .

The liberal interpretation of Article 32 and 226 have further added to the development of remedies for environmental tort in India. A new method of awarding compensation for constitutional tort has been developed by Indian Judiciary in environmental cases. The dynamic interpretation of Article 21 by the judiciary has served twin purpose of protecting the rights of the citizens to clean and wholesome environment and awarding damages for the violation of their private rights.

The judicial craftsmanship is clearly seen in the use of private law remedies for the public wrong in environmental cases. The High Courts have also shown dynamic approach in interpreting the principles of tortious liability to protect the environment. The judgments in *Ram Raj Singh v. Babula*³¹, *Ramlal v. Mustafabad Oil and Cotton Ginning Factory*³², *Krishna Gopal v. State of M.P.*³³, *Dhanna Lal v. Chittar Singh*³⁴, *Lakshmipathy v. State*³⁵, *Ved*

³¹ AIR 1982 ALL 285.

³² AIR 1968 P&H 399.

³³ 1986 Cr. C.J. 396 (M.P.).

³⁴ AIR 1959 MP 240.

³⁵ AIR 1992 Kant 57.

*Kaur Chandel(Smt) v. State of H.P.*³⁶, *Bijayanand Patra v. Distt. Magistrate, Cuttack*³⁷, clearly establishes that the conduct of a person (on his Property) becomes a private nuisance when the consequences of his acts no longer remained confined to his own property, but spill over in a substantial manner to the property belonging to another person.

Thus the judiciary has innovated new methods to enforce tortious liability to protect the environment. The Supreme Court and the High Courts have laid down and are in the process of broadly laying down the legal framework for environmental protection. A public law realm, based on the Constitution of India, has brought about great inroads into the civil and criminal laws of the country within the last three decade or so. These new developments in India by the extraordinary exercise of judicial power have to be perceived as just one of the many ways to meet the social and political needs of the country. The new approach of the Judiciary in developing the concept of constitutional tort has proved really helpful in protecting the environment and the rights of people to clean and healthy environment.

The Supreme Court's role is noteworthy in developing tortious liability in environmental cases in India, still we feel that there is a great paucity of tort litigation in India, which makes the ideological credibility of Indian tort law a debatable issue. Several reasons could be given for the scanty litigation in India in this field:

- (1) The institutional character of the legal system fails to encourage the pursuit of remedies of a civil nature for reducing inter-personal tensions in the community;
- (2) The very technical approach adopted by judges and lawyers without taking into account the growing needs of Indian society;

³⁶ AIR 1999 HP 59.

³⁷ AIR1999 Ori 70.

- (3) The tendency, noticed in most eastern societies in general, to prefer the process of mediation to that of the judicial process;
- (4) The prohibitive cost of a lawsuit, the time, labour and money expended at every stage of litigation;
- (5) The delays attendant on litigation;
- (6) The unsatisfactory condition of the substantive law on certain topics, for example the liability of the State for torts of its servants;
- (7) The anomalies created in the minds of litigants by the coexistence of several statutory provisions;
- (8) The low level of legal awareness among the general public;
- (9) The difficulty of gaining access to law, since a large portion of the tort law remains uncodified;
- (10) The bureaucratic attitude of government officers dissuading legitimate claims of citizens even though they are legally enforceable.

In the light of such hurdles, which obstruct the natural growth of tort law in India, the recent development in combining tort law with the constitutional right to personal liberty and its remedy through compensation is a good step. The present state of the law of torts in India is characterized by rapid recent developments within the public law domain that have also perceptibly created a new legal framework for environmental protection in India.