

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 5

2021

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Strict Liability in Realm of Environment Violations

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ABSTRACT

This paper observes some of the characteristic features of environmental violations and the ways which the courts and tribunals handle such cases having the applicability of the principle of strict liability. This article dialogues on how the liability (Strict and Absolute) and compensation regime for pollution has been implemented in India, and whether a combination of the international laws and domestic regulations could provide an adequate mechanism for holding violators liable for environment mishaps. Researcher also reflects over the present observed environment cases, the regime for ensuring adequate compensation to injured parties as well as to re-instate the recovery of lost ecological structure and biodiversity levels. The article also ponders over the possibility behind slow and weak implementation of legal orders and argues that the main aspect to consider is the inexperience and lack of sincerity of implementing agencies to follow up with judicial members, judges and their perception of environmental offense and its perilous effect. In this article, the circle of tortious liability in concern with strict and absolute liability will be discussed, through the topic of importance instances of recent Vizag Gas leak case and its questionable judgment which displays the room of interpretation for environment concerns and the capacity of courts and tribunal to deal with such cases which are more than likely to happen more frequently in near future. The article concludes by considering further suggestions for more effective enforcement of liability in environmental crime concerning whether strict or absolute liability principle in the courts which one is more reliable.

I. ENVIRONMENT AND LIABILITY

There are many reports touching scientific, economic and social perspective highlighting that there is a chance to rectify our relationship with our planet especially now when the global movements and discussion like Fridays for future, various campaigns by the United Nations Environment Programme (UNEP), Indian Climate collaborative (ICC) are making the governments, companies and people all around to think towards nature and its mitigating risks

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in future. How environment impacts each and every person though located at different corners can be explained by the recent phenomenon that how a pandemic emerges. Over the past century, two new animal-borne viruses have emerged from nature every year — and these numbers are set to increase over the next decade. The leading driver of zoonotic diseases— which jump from animals to humans — is deforestation. When people cut down forests to make room for roads, farms or cattle, they are also creating new edges of the forest, and increasing their exposure to animals with diseases that can infect them — a process known as “virus spillover.”² This is just one example on how reckless human activities have impact on entire population on earth.

The scientific community overwhelmingly approves that the society is in crisis and we’ve only got little time to drastically cut our carbon emissions, or humanity will suffer devastating consequences. Further, a number of economic policies currently provide incentives to degrade nature – such as direct and indirect subsidies to use fossil fuels, as well as those related to fisheries and agriculture.³ What is now clear is that the social and economic results of corrupting environment are disastrous, and protecting human wellbeing, abundance and security is naturally connected to defending natural wellbeing.

Courts by establishing liabilities on whom to held responsible plays an important role. Number of claims has increased on existing national and international laws that ensure right to clean and healthy environment as basic fundamental right. Courts acts as frontline shield in case of Indian legal system to deal with environment cases. Public interest litigation has utilized such laws to constrain oil organizations to keep petroleum products in the ground, expect organizations to take responsibility for contamination and propel governments to order environment related strategies. However the litigation Process in tribunals and courts has not changed with the demanding pace of alarming environment crises which in itself is a global phenomenon. The situation exists primarily because the present problem requires highly systematic, methodological, scientific and sophisticated approach of the operations of various actors in economy to make it commanding enough to bring change in the ways of production, consumption, transportation, marketing, and disposal along with mitigating factors to address situation of crisis.

² Kiley Prince, Study: Could the Amazon become ground zero for the world’s next pandemic?, Conservation International, (last access on 12th April 2021), <https://www.conservation.org/blog/study-could-the-amazon-become-ground-zero-for-the-worlds-next-pandemic>

³ Environmentally Harmful Subsidies, OECD, 13, (2005), (Last access on 3rd April 2021), <https://www.cbd.int/financial/fiscalenviron/g-subsidyreform-inc-oecd2005.pdf>

II. IS THE PRINCIPLE OF STRICT LIABILITY THE ANSWER?

The doctrine of strict liability is a liability without fault on the part of defendant. The said doctrine is considered of the most suitable importance in cases related to environmental pollution and is applicable in case of injuries caused to both person and property. However the doctrine of strict liability cannot be applied if there is no escape of the noxious substance or article from the land of the defendant. In many case where the aftermath of carrying out such dangerous activities, toxic substance cause harm via air, water, land or other which have indirect degradation effect. So the person usually finds it difficult to establish an effective legal action.

The present research has emphasised in equating the strict liability doctrine with other related terms especially the doctrine of absolute liability with a view to determining the core of the doctrine in present condition of India's present situation dealing with environment cases and the doom of victims of environmental pollution and public which is or would be in clutches of ill effects in near future caused by pollution.

The rule of absolute liability, in general can be defined as the rule of strict liability less the exemptions. Having many exceptions to the doctrine of strict liability, defendants were able to dodge their liability or were compensating very little as compare to the damage done. In many cases against industrial projects, large oil spill hazards, government approved mining, rampant deforestation in the name of development and promotion of tourism face certain inherit problems of establishing the action of negligence and liability for such activities. Here the plaintiff has to prove the connection between negligent act and plaintiff's injury and that the same was foreseeable by defendant. Secondly the scientific angle stating that a certain activity is causing or is likely to cause harm to public health, biodiversity or climate change at large is the real annoyance due to lack of reliable data and comparative researches.

Need to modify or come up with more stringent rule was felt by judiciary. Justice Bhagwati also stated that the rule of strict liability was evolved in 19th century, the time when nature industrial developments was at primary stage, in today's modern industrial society where hazardous or inherently dangerous industries are necessary to carry out development programme, thus this old rule cannot be held relevant in present day context. Also one cannot feel inhibited by this rule which was evolved in the context of totally different social and economic structure. Law has to grow in order to satisfy the needs of the fast changing society. We have to evolve new principles and lay down new norms which would adequately deal with

new problems which arise in highly industrial economy.⁴ As a result the rule of Absolute liability was laid down by the Honourable Supreme Court of India in the said case which is popularly known as Oleum Gas leakage Shriram food and fertilizer case.

The decision of Supreme Court in Bhopal gas leak⁵ also established strong base for the doctrine of Absolute liability. Paragraph 15 of the case clearly states that in determining the compensation payable to Bhopal gas victims, absolute liability principle was adopted as the Court in estimating the value of compensation had adopted a higher basis. Justice Bhagwati while presiding over the case which gave the base of absolute liability declared: We no longer need the crutches of a foreign legal order... We in India, cannot hold our hands back and I venture to evolve new principle of liability which English courts have not done.⁶

The present situation in our country especially after the global pandemic is that the market is more inclined towards economic development including foreign investment, new production industries and exploration of untapped natural resources. With the rise in the new Multinational corporations (MNCs) raises a point of appreciation as well as distress. In such condition of our countries it is obvious that the government is already slipping from the standards to be observed while permitting exodus amount of industrial, transformational, infrastructural projects.

Owing to the procedures involved in establishing liability in such cases, it becomes essential in the present research to travel around Absolute liability and enforcement proceedings' as an instrument to obtain environmental justice and security; and fundamental rights, actuality considered as 'absolute rights' may venture a stricter or even an absolute liability on environmental which are evidently embodied in various environmental legislatures, rules and notifications in India.

III. EXISTENT REALITY OF ENVIRONMENT AND IMPLEMENTATION OF LIABILITY

In 2006, the Global Risks Report sounded the alarm on pandemics and other health-related risks. That year, the report warned that a "lethal flu, its spread facilitated by global travel patterns and uncontained by insufficient warning mechanisms, would present an acute threat. In 2020, the risk of a global pandemic became reality.⁷ As governments, organizations and social orders review the harm incurred throughout the most recent year, fortifying key premonition is currently more significant than any other time.

⁴ M.C. Mehta v. Union of India, 1987 SCC 395

⁵ Union Carbide Corporation v. Union Of India 1990 AIR 273, 1989 SCC (2) 540

⁶ S.C Shastri, Environmental Law, 525, (Sixth Edition. 2018)

⁷ World economic forum, The Global Risks Report 2021, 16th Edition, 5 ,(2021), http://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2021.pdf

If environmental concerns and its effects are not addressed and groups, industries involved are not confronted and made liable, environmental degradation will interconnect with other aspects including major health issues, economy and even sustenance of species will bring about intense magnitudes. There has been a number of cases where the judiciary while implementing liability, mentioned that to deal with cases having hazardous impact have almost doubled, and at this stage absolute liability is the most suitable answer. However it is unclear how much of this suggestion is being utilized and with what outcomes.

Recently the National Green Tribunal had made Strict Liability applicable in the Vizag gas leak catastrophe. The topic of discussion here is the application of Strict Liability is met with serious apprehensions in legal parlance. Argument on the floor is that if the accident met the requirements of Absolute Liability, why the tribunal invoked an out-dated statute. Strict responsibility has quite a few gaps, such as the one surrounding monetary reimbursement. While Strict Liability calls for compensatory damages, Absolute Liability mandates exemplary damages which mean monetary reparation much more than the damage done. Thus, Absolute Liability acts as a discussion. In the said case as already the tribunal has taken leniency by avoiding the absolute liability an initial fee, NGT awarded Rs.50 Crore rupees but the defendant M/s LG Polymers failed to deposit the same and approach SC seeking exemption.⁸ This clearly is a mirror depicting the loopholes in mentality of companies to uphold the law and the courts itself stepping down from much required stringent measures keeping close eye in implementation part of the guidelines.

With the high industrial growth in India, we are also observing an upsurge in industrial catastrophes. India has 280 contaminated sites and 168 probable contaminated sites and over 1000 of hazardous units.⁹ There are several laws dealing with industrial regulations, safety measures for industrial accidents dealing with penalties for its violation however not every case reaches the court and not every victim is compensated because in such environment crisis direct victim may get recognition but there are an exodus amount of indirect victims of such hazards who either fails to establish liability or don't even understand the cause of any health crisis due to a specific hazard which in itself is terrifying.

Tribunals and courts despite giving guidelines in consideration to Paris agreement and highlighting the consequence and liability fails to have strong hold on companies and even legislative bodies. Furthermore, it is observed that there is a lack of access to environmental

⁸ National Green Tribunal, Principal Bench, O.A No. 73 of 2020, Vizag Gas Leak case Vishakhapatnam.

⁹ Central Pollution Control Board, Status of Contaminated Sites in India, https://cpcb.nic.in/uploads/hwmd/Brief_Contaminated_sites_in_india.pdf

information, environmental education, awareness and public participation in environmental decision-making which leads to the tragic loop of hindrance in access to environmental justice and enforcement of fundamental rights to a clean environment enshrined in our constitution. The situation is partially responsible for non-observance of the recommendation of important international conventions and treaties.

Mr. Chandra Bhushan, who is chief executive officer (CEO) and President of the International Forum for Environment, Sustainability and Technology a body working on environmental and sustainability issues, explained that methane emissions from coal mines is not as large as methane plumes from oil and gas wells while defending the proposal of Indian government to open 52 new coal mines of million tonnes of capacity each, which could increase the country's methane emissions alone by 45 million tonnes in 20 years.¹⁰ Such stands at this point where the globe is at tipping point and climate change is declared as international emergency can be considered as aftermath of court's decision to give free-pass as in Vizag case where tolerance observed is a classic example which gives muscle to those who intend to take environment laws nonchalantly.

IV. GLOBAL STAND ON TUSSLE BETWEEN STRICT AND ABSOLUTE LIABILITY

Over the years, most countries have embraced the doctrine of strict liability but as with the advent of high industrial growth, more egocentric economy, shrinking of natural resources as people multiply and related fatalities felt the need to have stronger laws to deal with the same. Absolute liability provides durable base solution in many cases however the part to determine the cause of the action and involvement in international treaties and obligations to the same plays an important role.

There are many cases especially related to oil spills and gaseous toxins pollution, recent instance of forest fires which are caused by the wilful act of the claimant or the act of a third party in such scenario strict liability cannot be applicable as the defendants will not be held liable in law. In the case of *Perry v Kendricks Transport*¹¹ where the court held that the defendant was not liable as the escape was caused by the deliberate action of a third party under the rule in *Rylands v Fletcher* since the act which caused a petrol tank explosion were the acts of a stranger over whom the defendants had no control. Hence, the defence of 'Act of a stranger'.

¹⁰ Global energy monitor, <https://globalenergymonitor.org/projects/global-coal-mine-tracker/tracker-map/>, (Last visited date 17th April 2021)

¹¹ *Perry v Kendricks Transport*, England and Wales Court of Appeal (Civil Division), (1955)

It is witnessed in the Pulp Mills case decided by International Court of Justice securing liability for international harm on principles of negligence (prevention and due diligence)¹² was deficient of a specific insight. The fact that the construction of Mills and the said activity which gave rise to the cause of action was foreseeable which should attract Absolute liability irrespective of the factor of 'Due diligence.'

The most conflicting occurrence at this point remains that the loss to environment *per se*, which does not result in any direct loss to the subject (Person or property) of individuals or the State, is still not considered a fit case for compensation. Such narrow interpretation is not something to be held on when we are at the brink of facing existence crisis which have already set up its root by medium of climate change, warmer oceans, deteriorating health, etc. The desire to adopt uniform international rules and procedures for determining issues of liability and reliable compensation in environment pollution cases still appears far-reaching.

V. WHERE ARE WE NOW AND WHERE DO WE NEED TO GET TO?

Principle of Absolute liability is much sustainable as compared to strict liability on the ground that only the enterprise conducting any hazardous activity itself can guard and warn authorities against any potential threats. The concept of absolute liability needs to be understood keeping in mind law of torts and its interaction with environment legislations in India. It is submitted that the legal obstacles faced by victims of pollution in India in proving cases of environmental pollution against companies or even government authorities are linked with the nature of the prevailing standards of liability engaged by the courts. At present, though the fact that in case of serious harm to biodiversity, life and limb due to environmental hazard absolute liability should be implemented without the duty to prove negligence on the part of victims but courts still operate under the veil of strict liability.

Another important question is that whether there exists a sanctioning administration for polluting emissions. Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits? In general practice. Provisional to the type of activities undertaken by a company, multiple permits may need to be obtained.

To rationalize the environmental permit/consent system, and avoid repetitive and/or conflicting conditions, the CPCB has relinquished the requirement of having separate CTEs (Consent to establish) for industrial units which require an Environmental Clearance (EC). In such cases, the EC will be considered equivalent to a CTE and no separate CTE will need to be obtained.

¹² Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. (Apr. 20)

This decision though aimed to avoid repetitive procedures in many cases have led to the occurrence where companies all together avoid the step to obtain require permit or only obtain CTE in those cases where pollution control board exclusively have advised to obtain both.¹³ The key environmental permits, referred to in consideration with various legislations, must be obtained from the State Pollution Control Board (SPCB). In certain cases, entities or companies usually having larger risk factor requires consent or environmental clearance (EC) from one or more authorities. However in reality the observations of such standards are extremely questionable. As a solution to this efforts should be made to improve watchfulness upon various statutory bodies and local agencies involved in complaint redressal.

For any environment legislation to be effective, deterrence is the key. India has many reliable environmental laws which can only be operative if we bring the deterrent fact in in related policies which could only be practiced within the ambit of the new doctrine i.e. Absolute liability and not strict liability which still leaves the room for escape. The main problem that arises while dealing with such cases involving doctrine of Strict or Absolute liability is that there are abundant comprehensive environmental legislations but they all are inclined towards civil liability rather than criminal. Even though there are few which give rise to criminal proceedings in industrial hazards like huge oil spills, toxic gas exposure etc. but they aren't used often. The basis of criminal liability for environmental damage is the cause of nuisance to the public, which is also regarded under Section 268 of the Indian Penal Code. Section 269 of the Code also provides criminal liability for a negligent act that threatens the spread of infection or disease. Section 278 provides punishment for making atmosphere noxious health. There are still couple of sections dealing with pollution and environment degradation. Since the punishment provided in those offences are too measly and none of these criminal statutes clearly provide for absolute liability. Therefore there is dire need to have the effective implementation of absolute liability to curb the problem of current massive environment problems.

When forest land is diverted for development projects (e.g. mining, infrastructure), project proponents or users are required by law to pay compensation for the loss of environmental services. These funds have accumulated over two decades and today account for more than INR 66,000 crore. Per the Compensatory Afforestation Fund Act 2016, the money is to be allocated to states in proportion to their deposits.¹⁴ This clearly shows that the fact that the

¹³ Practical Law - Thomson Reuters, [https://uk.practicallaw.thomsonreuters.com/0-503-2029?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/0-503-2029?transitionType=Default&contextData=(sc.Default)&firstPage=true) (Last visited 13th April 2021)

¹⁴ Indian Climate Collaborative, https://indiaclimatecollaborative.org/wp-content/uploads/2019/01/2019-01-23_Sustainable-Land-Use-Perspectives-Forum-Pre-read.pdf, (Last visited 3rd April 2021)

industrial development cannot be done without the existence of hazardous and innately dangerous industries, it is extremely necessary to held responsibility in the bag of of such companies for the protection of the public and environment at large from any type of mishaps.

In another prominent case the court reiterated that this rule is ‘absolute and non-delegable’ and the enterprise cannot escape liability by showing that it has taken reasonable care and there was no negligence on its part. The Supreme Court justified the rule on the economic basis by stating that if an enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident (including indemnification of all those who suffer harm in the accident) arising on the account of such hazardous inherently dangerous activity as an appropriate item of its overheads; and – The enterprise alone has the resource to discover and guard against hazards or dangers and to provide a warning against potential hazards or dangers and to provide warning against potential hazards.¹⁵

For the purpose of providing justifiable remedy under law and broadly development of Indian environmental Jurisprudence and to ensemble our own requirements we need the principle of absolute liability which will be just to both the polluter and the sufferer. Absolute liability is in proper pace with the prevalent situation of our country, where the trend of globalization, establishment of new production industries and large investments where the nature of industries is or would be more hazardous.

VI. CONCLUSION

It is observed that considering the defence of companies responsible and even statutory authorities under the strict liability in India or at international level with regard to environmental pollution cases, it would be more reliable to conclude that the rule of strict liability as known in Rylands is not necessarily operative today since the defence would automatically curb the need to establishment accountability and legal actions against polluters.

After extensive research and case study researcher believes that though the courts and tribunals acknowledge the principle of absolute liability, but it is not in accordance with the necessary level which is extremely important considering the current situations in our country. Fixing accountability is not enough, absolute liability is therefore essential for proper functioning of environmental justice system by implementing stricter norms and unconditional accountability which mere strict liability wasn't able to nor is able to award.

¹⁵ Charan Lal Sahu v. Union of India (AIR 1990 SC 1480)