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BHOPAL, ITS CONSEQUENCES AND AMERICAN INTERNATIONAL LAW

Preliminary remarks from a European's perspective

BY HANS HENRIK LIDGARD*

In December 1984 approximately 13,000 gallons of poisonous methyl isocyanate gas leaked out in Union Carbide's plant in Bhopal, an old city in the very heart of India. 1,700 humans were killed and some 200,000 people were severely injured. The figures in this worst industrial accident in history are astronomic and the extent of the catastrophe is hard to visualize. It contains a lesson to be learned by the industrialized world and it has also become a study in American legal practices.

1. SOME FACTS[1]

METHYL ISOCYANATE is a chemical substance used in the production of agriculture pesticides. Its production, storage and use is highly dangerous, requiring strict safety controls. The substance has a low boiling point of 39.1 centigrade (102.4 degrees Fahrenheit). Cooling and sensitive alarm systems are vital safety ele-

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* S.J.D., Visiting Professor at McGeorge School of Law, Sacramento during 1984/1985. This article has been prepared with the support of Advokatfirman Vinge, Sweden.

1. This article has primarily collected information from news articles published between December 1984 and August 1985. From contradictions in these articles it is sometimes obvious that all statements are not reliable. The overall picture that emerges is, however, clear and sufficient to discuss the prime legal issues.

ments. The product, furthermore, reacts with water and, in case of contamination, high heat levels are rapidly reached with risks of explosive pressure. Reserve tanks and external alarm systems form part of the security system should an accident occur. The heated gas is toxic and affects the respiratory system. A secondary effect is partial blindness and liver damage. The long-term effects of exposure to the gas are unknown.[2]

UNION CARBIDE is an American entity mainly involved in chemicals on a worldwide basis. Its aggregate turnover is in the range of 9 billion dollars, with a profit of 79 million in 1983. The production of pesticides is only one of many areas where the company is involved. It has pesticide production plants in West Virginia, Hong Kong and Bhopal. The Bhopal plant operates under the name Union Carbide, India Ltd and the American parent corporation holds 50.9% of the shares in the entity and is in control of the board of directors. The Indian Government holds 23% of the shares of the company - a fact which has not been the subject of any major comment. The remaining percentage is held by private families, which is frequently the case when major international groups establish themselves in India or in Pakistan.[3]

THE BHOPAL PLANT was constructed in 1977 based on U.S. experience with the basic design from Union Carbide. The detailed design was performed by an English engineering firm with a branch office in India.[4] The con-

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2. Times 12/7/84, p. 26. News Week 12/17/84, p. 32. Business Week 12/24/84, p. 53.

3. Business Week 12/17/84, p. 32.

4. Business Week 1/28/85, p. 48.

struction work was undertaken locally. At the outset Union Carbide trained Indian technical employees in the operation of the factory. The American company also provided written manuals for the operation and security of the plant. Every third year Union Carbide inspected safety requirements on the spot.

Based on the above description, the conclusion is that the Union Carbide involvement in India is typical for an investment in a developing country and no specific irregularities are apparent.

INVESTIGATIONS OF THE ACCIDENT. The accident occurred on December 3, 1984. Almost immediately three separate investigations of what happened were initiated. Two Indian investigations have been delayed and only partial information has leaked out.[5] The internal Union Carbide investigation has been completed and reported to the press.[6] The report is hampered by the fact that Union Carbide's people only had limited access to the plant in Bhopal and were not allowed to talk to its key personnel. Of importance is Carbide's lab tests in the USA to establish what chemical reaction may have caused the accident.

From the information in the press[7] it appears that a whole set of circumstances have interacted:

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5. W.S.J., (Wall Street Journal) 3/19/85.

6. S.F.C. (San Francisco Chronicle) 3/21/85. W.S.J., 4/26/85.

7. The facts here are cited from a series of Articles in N.Y.T. (New York Times) in January 85. The first article appeared 1/27/85

1. The cooler system, which should keep the substance at O centigrade (32 Fahrenheit), stopped functioning in October 1984 and was not repaired.
2. To avoid continuous alarms (when the cooling system was out of service), the alarm was set at 20 centigrade, rather than the established 11.
3. The external alarm, installed to warn the surroundings, was the same system used for routine signals.
4. A sealed pipe was washed by an unqualified person a few hours before the accident.
5. The leakage was discovered more than two hours before the chemical reaction went out of control, but not attended to due to a tea break.
6. More than 420 gallons of water must have been added to the methyl isocyanate to create the reaction that occurred.
7. A reserve tank, which was installed to receive leaking gas, was already partly used for the storage of methyl isocyanate.

If these facts are correct, they show a remarkable local mismanagement of the Bhopal plant. To some extent this is also confirmed by interviews with employees in the newspaper indicating low morale in an unprofitable unit.

2. THE LEGAL BATTLE

The accident has created a legal trauma which should be discussed.

First of all, local managers and responsible personnel are subject to criminal proceedings under existing Indian Law. Based on the above facts, there is substantial and most likely criminal neglect in the matter. Furthermore, the Bhopal matter appears to have created securities suits and stockholders derivative suits, to be heard by the Federal Court in New York.[8] Of major concern is the public liability trials, where Union Carbide's responsibility towards the individuals will be determined.

Before discussing the legal issues in the liability trials there are reasons to investigate the manner in which the U.S. attorneys acted. Immediately, even before the dead were buried, or the injured people properly attended to, certain U.S. attorneys had established sidewalk offices, offering any victim who signed a power of attorney a sum of some hundred rupies as a compensation.[9] This amount is, of course, trivial when measured by U.S. standards. To what extent these practices occurred is unclear. The fact that it happened at all, - be it U.S. attorneys or their Indian representatives - is embarrassing to the legal profession. Criticism has also come from within and outside the

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8. Business Week 1/28/85, p. 48. The National Law Journal, 4/29/85, p. 13.

9. It even appears that some victims signed up for several law firms N.Y.T. 4/9/85.

USA, charging these U.S. attorneys with "ambulance-chasing."[10] One of the main actors, Mr. Belli from San Francisco, responded to this criticism as follows:

> "I resent that, I've never been an ambulance-chaser. I have always gotten there before the ambulance. To say I am an ambulance chaser isn't fair."[11]

The comment is typical of Mr. Belli, an aggressive, self confident and successful U.S. trial lawyer. One may, however, seriously doubt that Mr. Belli has his overall priorities right.[12]

The outcome of the attorneys activities in Bhopal has been a series of suits filed in State and Federal courts in the USA. The total number of suits was 34 in February and 55 in April, 1985,[13] and it is alleged that the U.S. attorneys are representing more clients than there are inhabitants in Bhopal. They are asking in each case for huge amounts of damages with figures that are normally used as phone-numbers (with area codes).

An interesting aspect of the legal development is the fact that, to the best of my knowledge, no single action has yet been filed in India. Even the Indian

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10. Time 12/24/84. See also Litigation Vol. 11, No. 3, p. 1 (1985).

11. Daily Recorder 2/19/85.

12. According to the American Lawyer March 1985, p. 106, Mr. Belli was finally embarrassed by the criticism and alleged that he had been personally invited to India by victims.

13. News Week 2/4/85, W.S.J. 4/12/85.

Government has filed suit in the USA on behalf of the victims.[14] There seem to be several reasons behind this development:

1. The Indian court system with its present backlog of cases is believed to be unable to handle a matter of this magnitude;
2. The level of damages in the USA would be far higher than the victims could expect in any other country - including India;
3. The contingent fee system is not used and most likely even unethical in India.

The government has, after careful evaluation, selected a law firm based in Minneapolis to act on its behalf in a s.c. "parens patriae" action.[15] To enforce the strength of its power, the Indian Parliament has enacted a law giving the Government exclusive rights to represent the interest of the victims. To what extent this law will affect the Powers of Attorney already given remains to be seen.[16] That it is regarded as a serious threat by the U.S. lawyers involved, is demonstrated by the fact that a group of lawyers, through Indian representatives, has appealed the law as unconstitutional.[17] A point clearly in favor of the U.S.

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14. S.F.C. 4/19/85, N.Y.T. 4/9/85, W.S.J. 4/9/85.

15. W.S.J. 3/11/85

16. W.S.J. 4/8/85.

17. W.S.J. 4/8/85, N. Y. T. 4/15/85 in an Editorial Notebook points out that "The personal injury lawyers are once again achieving the impossible: diverting anger from those responsible for the

attorneys is the fact that the Indian government itself does not have entirely clean hands, being the supervising authority over foreign investments and hazardous industry, and even a shareholder of Union Carbide India Ltd.

All of the law suits were consolidated by the Judicial Panel on Multidistrict Litigation[18] to the Federal Court in New York under presiding Judge John Keenan.[19]

It appears that the Indian Government was unsuccessful in its attempt to act as the exclusive representative of all claimants. Jointly with the attorneys involved, Judge Keenan has appointed a liaison committee to act on behalf of all lawyers.[20] This was done in spite of the fact that the Indian Government had requested that the validity of all Powers of Attorney be reconsidered in view of the newly enacted Indian law.[21]

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disaster at Bhopal, India, to themselves. ... Negligence lawyers did not cause the tragedy of Bhopal, but they have created the impression that they alone would profit from it."

18. In re Union Carbide Corp., MDL 626.

19. A battle has started between some familiar lawyers acting for the plaintiffs regarding who should take the lead in the case. It includes names like Lee Bailey, Aron Broder, the "King of Torts" Melvin Belli and David Shrager. To this should be added the representatives of the Indian Government: Robins, Zelle, Larson & Kaplan of Minneapolis. National Law Journal 5/6/85, p.1, W.S.J. 4/29/85, p.26.

20. The committee will, according to the judge's order, "frame and develop the issues" and "prepare expeditiously for trial or settlement negotiations." W.S.J. 4/26/85.

21. The National Law Journal 4/29/85, p. 13, W.S.J. 4/15/85.

For good reasons, Union Carbide has been low-keyed so far. From the record it is clear that the company tried to settle the matter through negotiations with the Indian Government, offering some 100 - 200 million dollars over a 30 to 35 year period.[22] The figures are disclosed off the record by Indian Government officials, who were also cited to say that the Union Carbide attitude had been hostile and that further negotiations were interrupted.[23] Nevertheless, it still appears that negotiations continue. In accordance with a request from Judge Keenan, Union Carbide has also offered to immediately pay out 5 million dollars for interim victim relief.[24]

3. THE LEGAL ISSUES

It is not difficult to identify several fundamental questions which have to be addressed by the parties and the court. However, each question immediately gives rise to a number of secondary questions. It is like peeling an onion. Under each leaf there is another. In the end it seems more than likely that the parties will settle this case, especially as world public opinion would hardly accept a protracted legal battle where so many individual lives are drastically affected. From this point of view the entire proceeding will be a challenge to the U.S. legal system and it is likely that no other system is better equipped to deal with this matter.

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22. Business Week 4/22/85, p. 38.

23. S.F.C. 4/20/85.

24. S.F.C. 4/19/85.

The fundamental issues to be discussed in brief are the following:

1. Does the U.S. court have jurisdiction at all to adjudicate matters over Union Carbide Inc. and Union Carbide India Ltd;
2. Should Indian or U.S. law apply in the case;
3. What type of remedies are available.

The questions will be addressed one by one - even if they are, to a large extent, interrelated.

3.1. Jurisdiction to Adjudicate

Union Carbide Inc. is an American enterprise and U.S. courts clearly have jurisdiction to adjudicate matters with respect to the company based on the fact that it is incorporated and doing business in America.[25] However, the matter in India is not primarily related to Union Carbide Inc., but to Union Carbide, India Ltd. which is a separate entity with distinct legal features and different shareholders and a limited capital to cover its responsibilities.

Under the Civil Law system there is a clear tendency against "piercing the corporate veil" in ordinary civil actions. In products liability cases the solution is more doubtful. The European Court in Luxembourg has in

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25. Restatement, Second, Conflict of Laws Paragraph 41 (1971).

an antitrust case reached out for the entity available in the jurisdiction and imputed the activities of the foreign entity in the activities of the locally established company. Thereby the court could assess joint liability for fines.[26] It is, however, a rare and far reaching case and the law remains as muddied as ever.

Uncertainty, also appears to be the governing tendency in the U.S. A suit would normally require that the Indian corporation has performed acts in the U.S. that qualify under the long arm statutes and fulfills the constitutional requirements.[27] Lacking such a basis of jurisdiction over the foreign subsidiary, the relations between the parent company and its affiliate must be carefully evaluated. If the relations are close, the courts may attribute the activities of one company to the other, as was done by the European Court in the Commercial Solvents case. Factors which may strongly influence the outcome are substantial ownership, control over the decision making process, interlocking directors, close multinational control and supervision and exclusive relations between the two entities. If the end result is that the affiliate has no independent existence and merely acts as a representative of the parent then the acts of the affiliate may be regarded as the acts of the parent.[28] Without proof of the

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26. Cases 6 and 7/73. Istituto Chemioterapico Italiano S.P.A. & Commercial Solvents Corp. v. E.C. Commission. Court of Justice of the European Communities. 20 Rec 223 (1974) 1. C.M.L.R. 309.

27. The classical case is International Shoe Co v. Washington 326 U.S. 310,316 (1945) holding that "due process requires only that...a defendant...have certain minimum contacts with (the forum) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."

close contact, jurisdiction over one does not provide jurisdiction over the other.[29]

A major concern when determining the jurisdictional issues is the fact that a substantial part of the company was owned by Indian shareholders and that the company was largely managed locally. Due to Indian legal requirements, the company had to be staffed with Indian citizens, which clearly affected the American company's opportunity to be in charge of the daily operations.[30] It may then appear unfair that Union Carbide should be excluded from the daily control and yet carry full responsibility in a U.S. trial.

The Indian government in its complaint to the Federal Court sets forth a legal theory it calls "the multinational enterprise liability" which radically overlooks the hurdles just discussed.[31] It is said to be an expansion of the American concept of products liability,[32] which means that Union Carbide Inc. should be held accountable for all damages from the gas leak because the company is a monolithic multinational corporation. Since it is an American entity, U.S. courts

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28. Delagi v. Volkswagenwerke A.G. 29 N.Y. 2d 426 (1972).

29. See Scoles, E.F. and Hay, P., Conflict of Laws (1982) p. 337.

30. National Review 2/22/85, p. 17.

31. For an analysis of the Indian complaint and the activities during the initial hearing, see Schwartz, Victor E., India Sues Union Carbide with Unique Complaint. Legal Times, 5/6/85, p. 25. See also S.F.C. 4/9/85, N.Y.T. 4/9/85, W.S.J. 4/9/85.

32. N.Y.T. 4/9/85.

should have jurisdiction both over Union Carbide Inc. and Union Carbide India Ltd.[33]

Even if there exists a number of factors that connect the case with the United States and which may create a basis of jurisdiction, it is also settled law that a plaintiff may not choose a forum that is seriously inconvenient for the defendant and burdensome for courts that have a minimal interest in the case.[34] This legal theory, which must be considered as a part of the jurisdictional issues, may well serve as a basis for not trying the Bhopal case in the United States.[35]

It is interesting to note that Union Carbide Inc. has so far not accepted liability. On the other hand, it has been very careful in addressing the issues. In a statement to the stockholders (1/25/85) the Chairman, Mr. Warren Anderson, said: "While we do not believe the Corporation is at fault, we nevertheless recognize that it is in the best interest of the Corporation and all of the people in India affected by this incident to work toward a speedy and equitable settlement of the claim arising from it." According to the Wall Street

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33. In its simplicity the statement has a rhetorical sound that will get the attention because it attacks multinations which scores with the general public. The idea is also much in line with the Code established by the Organization for Economic Cooperation and Development and United Nations draft code on Multinational Corporations. Through the Bhopal case these codes have a fair change of being recognized as international law on the subject. See the Columbia Law Alumni OBSERVER, March 85, p.6.

34. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

35. Schwartz, supra note 31, at p. 28. L.A. Daily Journal 2/8/85, p.3.

Journal[36] Mr. Anderson said that Union Carbide Inc. is "prepared to accept that it, rather than its Indian subsidiary that operated the plant, is responsible for the Bhopal disaster should an acceptable settlement be reached with Indian officials. Clearly the language is conditioned. In the end it will be interesting to see if Union Carbide Inc. will invoke the forum non conveniens rule in U.S. law.[37]

3.2 Choice of Law

The court seized with the Bhopal matter has to select the applicable law with respect to both procedural and substantive issues. If a U.S. court gets jurisdiction, the parties will have to live with American procedural rules as these follow lex fori. Of major importance is that the unique American discovery system with its possibilities for "fishing expeditions" will come into play. For Union Carbide the effect will be an increased obligation to disclose information and documentation asked for the by plaintiffs. (Another important feature for a civil law lawyer is that the matter will most likely be dealt with by a jury).

The prime question is, however, what law should be applied to the substantive issues. It will make all the difference if it is Indian Law and Indian standards of compensation or if it is the -- from a European standpoint -- "exorbitant" American standards that shall govern.

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36. W.S.J. 3/19/85.

37. N.Y.T. 4/9/85.

From a traditional perspective, the choice of law shall not be affected by where the case is heard. In tort cases, the lex loci delicti principle is the basis and, at least in France, Spain, Italy and the Scandinavian countries,[38] it appears that there exists almost no exceptions. Germany appears to adhere to the lex loci principle, but at the same time makes exceptions for lex fori when German interests are at stake.[39]

The old rule is based on a wish to use one clearly defined connecting factor in tort cases and thereby give local and foreign law the same dignity and avoid possibilities for unwanted forum shopping. The end result of a strict adherence to the lex loci delicti rule is generally believed to create stability, predictability of results and international order in a fairly simple and straightforward system.

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38. Cronsioe v. Cronsioe. Nytt Juridiskt Arkiv 1969 p. 163. Wife passenger hurt in automobile accident in Holland when Dutch truck was overtaken. Swedish insurance for international transports applicable. Question: Should higher Swedish standards of compensation govern the computation of damages. The Swedish Supreme Court established that according to Swedish conflict rules, liability in tort matters shall be decided in accordance with the substantive rules in the country where the accident occurred. It was recognized that certain connecting factors pointed at the application of Swedish Law. These factors were, however, not individually or collectively of such a character that the basic rule should be abandoned. From dicta it is clear that the Supreme Court might have reached a different conclusion if the overtaken car had also been Swedish.

39. For a comparison see Morse, C.G.J. Choice of Law in Tort: A Comparative Study. American Journal of Comparative Law, Vol. 32 (1984) p. 51.

It is, however, clear that the lex loci delicti rule is under debate in Europe and that the future trend may will be towards an increased flexibility. Several countries have already opened up possibilities for the plaintiff to select either the law of the country where the accident happened or where it had its effect. Probably inspired by the U.S. Restatement, Second, Conflicts of Laws, Sec. 145(1), certain counties (Austria, Holland and Switzerland) have started to accept that the lex loci delicti rule may be displaced when the parties have a stronger connection with the law of another state.

Furthermore, unacceptable results can be altered through the instruments offered by the classical conflicts law -- primarily renvoi and the public policy notions. However, the first concept is controversial and the public policy notion as an escape route should be used restrictively and with care.

Even if the lex loci delicti principle is under debate in several European countries, it appears quite likely that the Bhopal question would have been determined in accordance with Indian rules if the matter had been referred to a court in any of the European Civil Law countries.

If there is a certain tendency away from a rigid application of the lex loci principle in continental Europe, this is but a tardy follow-up of what has been a fact in Common Law countries for a good number of years.[40]

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40. U.S.A.: Babcock v. Jackson (1963) 12 N.Y.2d 473. U.K.: Chaplin v. Boyes (1970) 3 W.L.R. 322. Canada: Abbotsmith v. Governors of the University of Toronto (1964) 45 D.L.R. (2nd) 672. With respect to Indian Private International Law it has been said that "in some areas rules are so few and

Based on the fact that common law judges were simply not ready to blindly accept the substantive results that could be obtained if foreign law were to apply, they preferred to emphasize governmental interests of lex fori. Rather than giving local and foreign law the same dignity, it can be said that in those U.S. states which apply the method of interest analysis, the local rule should prevail. This is so unless the forum has no legitimate interest in implementing its own rule while there is such an interest for the foreign state. Having this in mind that the requirement for jurisdiction is normally a legitimate interest in the matter, it appears that if the seized court in the USA accepts jurisdiction, it is more than likely that the court will apply U.S. law even in a case where connecting factors strongly point in another direction.

The advantages of the U.S. interest analysis, allegedly emphasizing the better rule and increased flexibility, is probably not the final word. The end result appears to be the application of lex fori in every possible situation. It also encourages forum shopping to an extent which is at least debatable. The system has also been exposed to severe criticism.[41] Fritz Juenger's conclusion is that "For all the gallons of ink and tons of print lavished on the subject, current American conflicts law remains a rhubarb."[42] To a

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scanty that no generalization is possible, in some areas the statutory rules and rules laid down by the courts are at a variance and no symbiosis can be made, and a large part of private international law is based (rather, mutated duplication of) on English Law." Divan, P., Indian and English Private International Law. p. IX (Bombay 1977).

41. Juenger, F., A Critique of Interest Analysis. The American Journal of Comparative Law, Vol. 32 (1984), p. 1.

certain extent it appears that this rhubarb is back to square one in accordance with Savigny's old thesis that emphasis is to be given to the fundamental principles of public policy in the country of the forum.

Contrary to what a civil lawyer could have suspected, it appears that if the Bhopal case is heard in America it is likely that U.S. law will apply including U.S. standards of compensation.

3.3 Economic Compensation - Damages

In its complaint the Indian Government is requesting compensatory damages and punitive damages in amounts which the Government is currently unable to allege due to the enormity of the disaster.[43] The individual complaints, which were filed before the Government suit, have asked for multi-billion figures in punitive damages.

Of all issues preventing international legal cooperation, the U.S. system of damages is one of the major obstacles. It has clearly prevented closer cooperation in the field of recognition and enforcement of foreign judgments[44] and it has even caused retaliatory legisla-

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42. Id. at 50.

43. W.S.J. 4/9/85.

44. Among others, the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of April 26, 1966 and the Convention on the Reciprocal Recognition and Enforcement of judgments in Civil and Commercial matters of October 26, 1976 have both collapsed due to foreign problems with the American system of punitive damages.

tion in certain foreign countries.[45]

Compensatory damages are less of a problem as they are intended to cover the loss suffered by the individual. In countries with a developed social welfare system, the basic safety net offered by the society covers the main loss. Compensation over and above this basis will be calculated according to given criteria and the amount is frequently established as a life long pension. Compensatory damages have a similar goal in the U.S. However, three different factors make the U.S. system appear different: the defendant has to pay for the entire loss without reduction on account of monies that the victim will receive from collateral sources. Furthermore, the established criteria are higher with respect to pain and suffering. Finally, amounts are quite often calculated as one time payments. These factors jointly make the amounts sound hilarious to a foreigner. To a large extent the American jury system may account for the specific features. The difference is, however, only apparent. The underlying principles are very similar.

It is totally different with punitive damages. In the USA this is where the victim and his legal representative are looking for the real "pay-off." The damages are not calculated in any way to compensate the victim for pain and suffering, but rather to punish the wrongdoer and deter him from further activities which may create a similar harm.[46] These reasons for a special

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45. United Kingdom has enacted the protection of Trading Interest Act 1980, which gives effect to British public policy of resisting the application of among other things foreign judgments for multiple damages - whether the act also applies to punitive damages is unclear.

compensation are not accepted elsewhere. Corrections of this type are established through the ordinary criminal system and public intervention. It is not the individual - or his legal representative - who should cash in on the amounts involved.

India follows to a large extent traditional English standards. The principles of Rylands v. Fletcher, with its strict liability in cases regarding anything likely to do mischief if it escapes, are recognized in India.[47] This theory also covers gas leaks causing damages.[48]

Union Carbide would - if Indian law were to govern - have to pay compensatory damages in an amount which equals the calculated loss and pain suffered in each specific instance. That would most likely alter the computation of damages compared to U.S.A. class action. Furthermore, Indian living conditions and expected life income shall govern the calculation, which would reduce the amounts to fragments of what will be awarded if U.S. law were to apply. The equivalent of punitive damages, referred to as Exemplary Damages, may

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46. Or as stated in the government complaint: The punitive damages should be sufficient to "deter Union Carbide and any other multinational corporation from the willful, malicious and wanton disregard of the right and safety of the citizens of those countries in which they do business." By December 24 the total individual claim for punitive damages exceeded 20 billion dollars. Business Week 12/24/84, p. 55. The figure must have increased substantially since then.

47. Rylands v. Fletcher (1866) L.R. 1 EX. 265, 279 affirmed in H.L. (1868) L.R. 3 H.L. 330.

48. See Clerc & Lindsell on Torts. The Common Law Library No 3 (London 1982) p. 1228 - 1232.

be awarded in India in certain circumstances when the object of the court is to deter the the wrongdoer as well as to warn the public.[49]

CONCLUDING REFLECTIONS

Bhopal is distant and time will, like in any other major disaster, make it gradually fade away to leave room for new accidents on the world stage. Bhopal should, however, be different as it was not the result of events outside control of man. Whatever one may think of the American legal system, in this case, profit oriented liability lawyers will keep the heat on and continue the debate.

Industry should now be focusing on how to protect workers, community and environment from similar occurrences.[50] Much is already done through internal control and risk management and the increased awareness indicates that more can be expected.[51] There are economic incentives. The financial effects of another catastrophe are sufficient to shake any major company to its very basis. The possibilities of protecting hazardous industry through insurances have greatly

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49. Minattur, J., The Indian Legal System (New York 1978) p. 599.

50. Although the Union Carbide pesticide plant in the USA has been the subject of substantial evaluation after the Bhopal accident, it wass reported in the press on August 12, 1985, that a toxic gas leak took place due to a broken valve. Some 200 people were hospitalized, but no severe injury was reported. S.F.C. 8/12/85.

51. See readers Speak Out on Chemical Plant Safety by Shalley Wilkinsson in Chemical Business, June 1985 p. 17-20.

diminished and it is today almost impossible to obtain full insurance coverage on the international market regardless of price. A remedy is to undertake any measure to eliminate, to the extent possible, the risk of other accidents.

There is today an increased call for "Right to Know" Legislation by people living in the environment of hazardous industry as well as better planning with respect to the location of industry. Bhopal has by no means created these needs. They were there long before. The disaster has merely invigorated the discussion and the requests for results.

Companies operating in different countries must apply, to the extent legal, similar safety standards irrespective of where the work is carried out. The concept of responsibility for the parent corporation or the technology supplier, as presently discussed in the USA, is a way of achieving such goals. Irrespective of how companies decide to structure themselves legally, they should carry responsibility for the technology supplied. Should it be established that different norms govern the operations in different countries in an inexplicable and arbitrary way, it could well be considered a sign of negligence.

Much can be achieved in the industrialized world. The difficult question is how to spread the awareness and the safety precautions to developing countries. From a humanitarian point, different requirements cannot be tolerated. From industry's point of view, it is essential that the lack of safety requirements will not have undue competitive advantages for the less controlled industry. A major disadvantage with the "American solution" is that it only affects multinational corpo-

rations and that it does not reach a soley local company. Industry can to a large extent accept increased burdens as long as they are shared equally by all competitors. Problems appear when some companies can escape the costs.

If increased safety precautions are required by transnational corporations, they must also be given adequate means to control their operations in developing countries. Such a solution may sometimes be in conflict with local policies on self reliance and autonomy, employment of local labor and education of local management. To a certain extent it should be possible to harmonize the different objectives. Largely, however, it is a question of priorities for the host country. The Bhopal accident may indicate that safety precautions should override other policies, at least as far as dangerous industrial activities are concerned.

A special reflection emanating from the Bhopal accident relates to the treatment of the victims. No one wants a multi-year legal battle, only prompt compensation to the victims. The legal activities in the USA leave room for doubt that a rapid solution can be expected.[53] This is so in spite of the fact that Union

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53. An alternative way, used in some European countries (Germany, Sweden and Finland) is a compulsory liability insurance. So far it is only applicable to product liability in the pharmaceutical sector. Industry pays premiums based on turnover. Victims are promptly compensated based on strict liability. No reasons can be seen why this method could not be extended to cover other inherently dangerous activities as well. One aspect of the system is that it does not provide lawyers with much work.

Carbide has made certain concessions and declared itself willing to accept liability on conditions.

The major hurdle appears to be the substantial amounts involved if punitive damages should be awarded. The question is, however, whether this specific problem should be allowed to delay a solution. It has been suggested that the humanitarian aspect could be dealt with through compensatory damages. Based on Union Carbide's general attitude and the fact that the company is covered by liability insurance, it should be possible to reach a satisfactory compromise as to the standards of compensation. An intergovernmental tribunal could be used as a vehicle for a smooth distribution of the compensation.[54]

The question of punitive damages should then be expelled from U.S. courts and handled where it belongs - in the Indian court system based on findings in local investigations. The contribution by the American legal society should be limited to enforce, if necessary, decisions made by the competent Indian court. Unfortunately, however, the presented suggestion is mainly theoretical. It must be seriously doubted that Union Carbide would accept that any issues remain open after a settlement on the compensatory damages.

With its liberal attitude towards new developments in jurisdictional and conflicts matters, as well as proven generosity in calculating and awarding damages, the U.S. legal system is well equipped to give the Bhopal

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54. W.S.J. 8/6/85.

question the right attention. Yet, some American practices may, from a European perspective, work in a detrimental direction:

- the system with contingency fees,
- the fact that the loser is not forced to cover the legal costs of the winner,
- the fact that the individual (and his legal representative) may obtain punitive damages in order to deter and "fine" the wrongdoer,
- the discovery system with "finishing expeditions" allowed during the pretrial activities.

All of these factors jointly appear to create a very litigious environment. As long as the system is limited to the U.S. territory, it is mainly of American concern. Often, however, decisions have international implications. The negative attitude in most European countries towards recognition and enforcement of U.S. judgments is one way of demonstrating a hostile attitude towards these U.S. practices.