

Averting a Bhopal Legal Disaster

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Five months ago a gas leak at a Union Carbide Corp. chemical plant in Bhopal, India, killed an estimated 1,700 Indians and injured as many as 200,000 more. The scale of death and suffering made this a singular human disaster. Now it seems that the outcome of the resulting litigation will be another disaster: Either the victims will receive grossly inadequate (and much delayed) compensation or U.S. firms operating overseas will face uniquely onerous legal liability, further handicapping them in competing with foreign firms. But with leadership from both governments, the interests of all parties can be reconciled.

Most lawsuits are settled, and, probably, so will be this one. Union Carbide Chairman Warren Anderson accepted "moral responsibility" for the tragedy, and the company has already pledged \$7 million to survivors for "immediate interim relief." But no legal settlement is likely before we know where the case would be tried. Why? The possibility of punitive damages.

The recent legal jockeying comes down to the simple question of forum: Will the Bhopal victims persuade some U.S. trial court to accept jurisdiction over their claims? So central is this issue to the outcome of the case that the Indian government, in joining the suit, has also asked that the case be handled in the U.S.

Only in the U.S.

Two factors bring the Bhopal case to U.S. shores. First, Indian courts do not seem to be equipped for a case of this magnitude. U.S. courts have developed procedures, however cumbersome, for handling cases with very large numbers of plaintiffs and complicated legal and scientific issues. In fact, many experts believe that, should the effort to bring litigation in the U.S. fail, no suit will ever be filed in India. Instead, Union Carbide would settle for negligible amounts per victim.

Second, unbounded damages to "punish" defendants, a uniquely U.S. invention, could be awarded. They are not available anywhere else in the world. To punish wrongdoers, other societies rely on criminal prosecution or other governmental sanctions. In recent years, however, U.S. judges have progressively expanded the old English common law concept of punitive damages (originally limited to narrowly circumscribed situations in which ordinary damages were deemed inadequate) so that they can be awarded against any defendant whose behavior suggests a reckless or wanton disregard for safety—

allegations already made against Union Carbide. Punitive awards of between \$1 million and \$5 million are no longer unusual. Recognize that those were awards in favor of individual plaintiffs and one sees why these claims are in the billions.

The magnified liability Union Carbide would face in U.S. courts will undoubtedly lead it to argue that the suits belong in India. U.S. judges retain discretion to dismiss lawsuits that, although falling under their formal jurisdiction, should be brought elsewhere. Is it more convenient, given the witnesses and documents, to have it heard in the U.S. or in India?

There is a nasty element of Russian roulette here. If the plaintiffs prevail on

200,000 injured—some very seriously, some only slightly—we base our estimate on a Rand study of asbestos litigation. The average payment to asbestos victims, a population with similarly varied injuries, was \$64,000. Using the same adjustment for Indian income, we project an average of \$1,100 for each injury, which would total \$220 million. In all, Union Carbide might expect an offer of between \$200 million and \$300 million to receive serious consideration, if punitive damages were not a factor.

The U.S. lawyers representing the victims, sensing the possibility of an astronomical award of punitive damages, will have little incentive to settle for compensatory damages. Since their contingency fees

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the forum issue, they win big. Union Carbide could be pushed to bankruptcy. If the company can persuade U.S. courts to dismiss the suits, the victims would lose most of their bargaining power, and they would be compelled to settle for far less than they could get now.

Furthermore, the outcome of this gamble will not be known for three or four years, at best. The forum issue cannot be definitively decided until appeals are exhausted. In the meantime, the victims will be left waiting.

The vast disparity in the likely outcomes in U.S. and Indian courts is what makes an early compromise unlikely. Union Carbide, with its public image and the prospect of unbounded punitive damages in mind, should be willing to settle for an amount approximating the actual damages inflicted. But it will see little reason to offer more than an appropriate premium for early settlement until the imposition of punitive damages seems probable.

A very rough calculation can be made of the probable compensatory (not punitive) award. Based on a recent Rand Corp. study of wrongful-death awards in Chicago, an American's life is worth about \$500,000. But in setting monetary value on the damage inflicted, U.S. courts will take into account the differences between U.S. and Indian costs and standards of living. Indian per capita gross national product is only about 1.7% of the U.S. figure (\$256 compared with \$15,000). Thus a U.S. court might award only \$8,500 for an Indian's death. Multiplied by 17,000 deaths, this would come to about \$145 million. For the

victims will be relatively modest unless the damages are bolstered by a punitive award, they will go for double or nothing. Actually, it is more likely tenfold or nothing.

The fate of the Bhopal victims should not hinge on such an outrageous gamble. There is only one way to break the present deadlock and ensure prompt and adequate payment to the victims: The question of compensation must be separated from the question of punishment.

The Indian and U.S. governments should establish a special, bilateral tribunal to handle the claims. By agreement among them, Union Carbide and any other responsible parties (there may be more defendants) should be required to provide full and prompt compensation for the victims. A government-to-government agreement is needed to prevent the plaintiffs' U.S. lawyers from challenging the settlement in court. Although congressional action would be preferable, such a claims tribunal could probably be established by executive order, as was the one created by President Carter as part of the Iranian hostage settlement.

Punitive damages should be excluded. This quintessentially American delegation of law-enforcement powers to private litigants is not needed to meet the pressing needs of the victims. The Indian government, like the victims, should be willing to trade off the long-term possibility of a windfall gain for the certainty of immediate payment of satisfactory compensation. (Such practical compromises frequently resolve domestic litigation when the possibility of unbounded damages is balanced

against questionable liability.) If the Indian government thinks that punitive action is needed, it can bring the appropriate criminal prosecution—in India.

Besides being fair to the victims, such an agreement would be in the U.S.'s interest. As a society, it has decided to impose punitive liability on business to protect U.S. citizens. Many Americans, understandably, would like to hold U.S. business to the same levels of liability for its actions overseas. But doing so handicaps U.S. firms as they compete against foreign firms that do not carry similarly expensive liabilities. Whether the U.S. thinks other countries should do so is beside the point. It can't make them assume those liabilities, and the result will be the further loss of overseas markets for U.S. firms.

Sensitive to Accusations

Also, not every country can afford U.S. levels of liability. Even if other developed countries decided to adopt those other wonders of contemporary America—strict liability, punitive damages, contingency fees—it is not clear that the Third World would want to buy them, embedded in exports and investment. Countries like India may reasonably deem them unnecessary luxuries, just as an Indian OSHA might allow much laxer workplace safety than would its U.S. counterpart. It is not the U.S.'s place to impose its rules concerning safety and liability.

We harbor no illusions, though, about the eagerness of either government to pursue this seemingly sensible resolution. The U.S. government will be sensitive to accusations that it is protecting a major U.S. corporation and condoning the exploitation of Third World peoples.

The Indian government, too, will fear charges that it is kowtowing to an "imperialist" nation. Better to leave the matter in the courts and, if the outcome is no recovery for the victims, the "imperialists" can still be blamed.

Nevertheless, both governments have ample reason for concluding that a compensation-based settlement is in the interest of all concerned. If either government summons up the courage to pursue its enlightened self-interest—and the best interests of the victims—the other would be shortsighted to reject the offer.

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