Whose Law Should Apply for Foreign Torts?

By DOUGLAS J. Besharov

TRADE REFORM and tort reform are both important issues now before Congress. Both involve a complex interaction between our product liability laws and patterns of international trade and business and American consumers.

In 1986, the Asahi Glass Co., Ltd., based in Bhopal, India, in December 1984 had been found to have been involved in a large-scale poisoning over which the company was tried in the United States. The plaintiffs, who had sought to have the case heard in Union Carbide Corp., has sought a trial in Indian courts.

American substantive law is only a secondary reason for wanting the case heard here. The real attraction is the American procedural rules that would be applied.

Beyond much more liberal discovery, the plaintiffs would have enjoyed more damage cases over rules concerning damages. As non-economic awards for "pain and suffering" and "loss of consortium" are "consequential damages" but are two forms of damages, the more general substantive damages are considered unenforceable in a mass tort case. Beyond compensation, the US law is more generous concerning procedural issues and also unavoidable in mass tort cases.

Contingent fee rules are likewise procedural. Contingent fee arrangement provide an important public service by allowing plaintiffs' lawyers to recover the costs of litigation and permit the major suits on behalf of thousands of plaintiffs. Although illegal almost everywhere outside the civilized world if a foreign case is handled here, the lawyers are permitted to work on a contingent fee basis.

Bay Area Chamber of Commerce. If the case is heard in India and that nation's ordinary practices are followed, the "liberal" law will likely lead to a total award against Union Carbide would be less than $1 billion.

An award from an American court, however, would be many times larger. Using data on comparable cases involved by the Ram, and an Institute of Civil Justice, Peter Reuter, senior economist at the Bay Area Chamber of Commerce, I calculate that compensatory damages could be as much as $15 billion. For comparable cases over which a figure is limited only by the net worth of the company, would have been a larger award.

It was the specter of punitive damages that likely led Union Carbide to offer a settlement of $550 million, close to the likely compensatory award from an American court but many times higher than what might be expected from an Indian court. And, for the plaintiffs, it was also the opportunity for punitive damages that likely led them to reject the offer.

Although the Bhopal victims' attitudes may be to accept jurisdiction over their claims is well known, it is merely the prototypical example of the largest of the class of cases. Numerous aircraft and drug companies, for example, have sought to have the cases heard here.

Mr. Besharov is a resident scholar at the Carnegie Mellon Institute and an adjunct professor of law at both Georgetown and American Universities.


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