

TORTIOUS LIABILITY FOR ENVIRONMENTAL HARM IN INDIA-A REVIEW

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ABSTRACT:

The paper analyse the application of tort principles in India in the matter related to environmental harm. In various cases the principles of tort have been applied by Indian judicially for environmental damage violating people's right to clean and healthy environment. Various international environmental policy pertaining to environmental now analysing environmental pollution issues have been bringing about a different perspective of applying tortious liability in environmental harm. The paper compares tortious liability and ex anti-safety regulation in providing a comprehensive remedy for environmental damage. It also makes studies in what ways tortious liability provides remedy for causing harm to the environment, what are the limitations in making the injurer liable for that tort committed , in what ways safety regulations can prevent environmental harm and how safety regulations are breached in specific cases. Further the paper studies how a company in Tamilnadu bypassed most of the ex-ante safety regulation policies of a company in Tamilnadu with the influence of the Government and the Court and the difficulty that arose in making the company tortiously liable when it caused environmental harm. The paper suggest the implementation of an effective regulation policies and using the combination of tortious liability and ex-ante safety regulation policy as a tool to control environmental harm.

KEYWORDS: tortious liability, environmental harm, ex-ante safety regulation, Legal policy, tort remedy.

INTRODUCTION:

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 recognition of interest that the law recognises in the absence of contractual relations between the wrongdoer and the injured person. The Indian court still follows the English law of torts. Deterring environmental degradation and compensating the victims of environmental harm are among the most important and difficult problems facing modern industrial societies ¹

There arises a question on the potential of tort law in protecting the environment and providing compensation for the affected victims. Tort liability for harm rest on the risk creators. The tort law is two sided, it talk about compensation on one hand and risk control on the other. Prevention is better than cure, but tort provides cure rather than prevention.

Liability in tort and regulation of safety represent two very different approaches for controlling activities that create risks of harm². The approach of liability is private in nature and works in a manner that is in a sense indirect, for behavior under it is not determined by command of a social authority but rather by the deterrent of payment of money damages should harm occur. Standards, prohibitions, and other forms of safety regulation, in contrast, are public in character and operate in principle in an immediate way to alter behavior; they are requirements imposed on behavior ex-ante-before, or at least independent of, the actual occurrence of harm.³

OBJECTIVES:

- To study the application of tort principles in matters relating to environmental harm.
- To study about tortious liability and ex-ante safety regulation as tools for controlling environmental harm.
- To study the potential of ex-ante safety regulation and tortious liability combined in protecting the environmental.

¹ Peter S. Menell(1991), The Limitation Of Legal Institution In Adressing Environmental Risks, at 93.

² John P. Brown, Toward an Economic Theory of Liability, 2 J. Legal Studies, at 323 (1973).

³ Steven Shavel , Liability For Harm Versus Regulation Of Safety, at 1(1983).

- To study the issues relating to Sterlite Factory and government ineffectiveness in implementing ex-ante safety regulations.

HYPOTHESIS:

The following hypothesis would be examined in the study

- Tortious liability or ex-ante safety regulation itself alone doesn't provide a comprehensive remedy for environmental harm.

MATERIALS AND METHOD

The study was done in the form of a doctrinal research, where the problem/question is systematised, rectified and clarified by sources from authoritative texts. The study took a qualitative research approach. The information, primary and secondary are gathered from journals, articles, research Papers, study articles, survey results and newspapers. They are analysed, interpreted and presented in narrative form.

REVIEW OF LITERATURE:

Anshuman Mazumdar(2007) claims that the right to life and personal liberty as a means like to have pollution free environment. Marshall S.Shapo (1997) points that in such environmental harm tort is the first line of legal protection for persons threatened or injured, by such Hazard. Pamela Corina Tolosa(2008) suggest that ex anti-safety regulation has considered preferable to tort law remedies as it is the chief tool of environmental policy.Madhuri Parik(2013) claims that tort law comes into seen only when something has gone wrong and Mark Latham(2011) in his article points out that governmental regulatory policy does not implicate that tort system or tort remedies unless expressly stated in the law. Jamie Cassels (1991) concludes that the most obvious problem in mass .litigation are simply because of the sheer number of people affected, yet,the problem here is that the law provided itself entirely unable to prevent the disaster and unable to repair all alleviate the human distance and agony once it has occurred. Pamela Corina Tolosa (2008) therefore in her research gives us the opinion about the possibility of combining tort law with ex-ante safety regulation, since it is the alternative most used in environmental pollution cases.

CONTENT:-**ENVIRONMENTAL TORT IN INDIA:**

India has seen a plethora of legislations covering various aspects of the environment to ensure its conservation. However, due to loopholes in the laws or perhaps, the slack of the authorities imposing the laws, these legislations have merely remained a compendium of powerless phrases that have lost their power during the course of time⁴. The SC has interpreted the right to life and personal liberty as under Article 21 to mean a right to have pollution free environment⁵. However, Indian Environmental Law has seen considerable development in the last two decades, with the constitutional courts laying down the basic principles on which the environmental justice system stands. The law of torts in India, which remained uncodified, 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.⁶

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.

LEGAL THEORIES OF LIABILITY:**NUISANCE:**

It means anything which annoys, hurts or that which is offensive. Nuisance may be public or private in nature. Hence acts interfering with the comfort, health or safety are covered under nuisance. The interference may be due to smell, noise, fumes, gas, heat, smoke, germs, vibrations etc. In the private nuisance the basis of an action under nuisance is unreasonable and unnecessary inconvenience caused by the use of defendant's land. The tort law of nuisance as a remedy with reference to environmental damage suffers from several limitations. First reasonableness of defendant's conduct is a question mark or otherwise

⁴ Anshuman Mozumdar*, Kartikey Mahajan and Krithika Ashok, ENVIRONMENTAL TORTS: A STEP TOWARDSTHE LEGAL REVAMPING POLICY RELATED TO ENVIRONMENTAL PROTECTION, at 1(2007)

⁵ E.G. Rural Litigation Entitlement Kendra, Dheradun v. State of Uttar Pradesh, AIR SC 2187, M.C.Mehta vs., Union of India, AIR SC 1037, (1998).

⁶ Dr. Madhuri Parikh, TORTIOUS LIBILITY FOR ENVIRIONMENTAL HARM: A TALE OF JUDICIAL CRAFTMANSHIP, at 77 (2013).

unreasonableness on the defendant's conduct is very difficult to prove and mostly weighed against the gravity of the harm to the plaintiff.

In pollution related cases it is very difficult for the plaintiff to establish casual link between the pollutant and the injury as the subject required more of technical evidences. Again material harm attributable to the unreasonable conduct of the defendant is very difficult to prove especially in the pollution related cases.

NEGLIGENCE:

Negligence is another specific tort on which a common law action to prevent environmental pollution can be instituted. When there is a duty to take care and the same is not taken, which results in some harm to another person, it is amounted to negligence. In the action of negligence the result is some kind of a loss, inconvenience or annoyance to another.

The plaintiff must show

- the defendant was under a duty to take reasonable care to avoid the damage complained
- breach of the duty
- the consequential damage which must have been factually caused by breach of duty and must be reasonably foreseeable as a consequence of the breach.

The problem with cases of negligence is, the difficulty in establishing casual connection between the negligent act of one and injury to other. It is also very difficult and problematic to prove if the effect of the injury remains latent for a long period.

TRESPASS:

It means an intentional invasion of the interests of the plaintiff over property in his exclusive possession. Invasion may be direct or through some tangible object. Two things are necessary to prove for constituting the tort of trespass.

- intentional interference
- such interference must be direct rather than consequential.

In the environment related problems tort of trespass constitute a deliberate placement of waste in such circumstances as it will be carried to the land of plaintiff by natural forces. It may be gases or even invisible fumes. In environment related cases the tort of trespass is very rarely invoked due to the fact.

- difficult to identify the source
- high cost of litigation

- unwillingness on the part of the people to resort to such remedy
- all this make it less popular amongst the people.

STRICT LIABILITY:

The rule of strict liability as enunciated in *Rylands vs. Fletcher* is another form of private law action in respect of environmental hazards. The rule provides that:

*“the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape”.*⁷

In India the rule of strict liability has been applied in limited situations relating to the escape of water causing damage to landed property and chattels, fire etc. In the modern industrial society with highly developed scientific and technological knowledge, where hazardous and inherently dangerous industrial activities are necessary due to their social utility, the Supreme Court found it necessary to lay down the old rule of strict liability and evolved a new principle of Absolute Liability. It is to be noted that despite the explicit and repeated endorsement of the rule of strict liability in environmental statutes in the case of industrial accidents, the Supreme Court continues to refer back to the principle of absolute liability enunciated in the *Oleum gas leak case*. For example, the Supreme Court in *Sterlite Industries v. Union of India* (Civil Appeal Nos. 2776-2783 of 2013, Decided on 2 April 2013) referred to the *Oleum gas leak case* and applied it while issuing an order against the *Sterlite Industries* to pay 100 Crores as compensation for the damages caused.

COMMON LAW REMEDY UNDER TORTS- NOT SO POPULAR

The common law remedies against the environmental pollution are available under the law of torts. A plaintiff in the tort action may sue for damages or seek an injunction or both. In our country most of the time the damages awarded have less money value, depreciation in the value of damages awarded at the end of litigation due to high rate of inflation, prolonged litigation - all this make the relief a little successful to plaintiff. Secondly the relief does not deterrent the polluter. Thirdly it is not an effective remedy for the abatement of pollution. Compare to damages the injunctive reliefs are more effective in abating pollution. Yet, In India common law remedy is used in very few cases for the purpose

⁷ *Rylands vs. Fletcher*, [1868] UKHL 1, (1868) LR 3 HL 330

of protecting the environment. The remedy is not so popular because like any other civil action, litigation is very expensive and lengthy affair. Secondly very few people perceive that environmental issues may be brought to Court under the law of torts. Thirdly the burden of proof - as the subject of environmental pollution is of highly technical in nature a common man may not be in a position to understand the technical aspects of the same and this puts him in a psychologically disadvantageous position.⁸

The tort liability system can work as an adequate tool for addressing environmental pollution cases :

- a) once there are present victims who have adequate information concerning the harm;
- b) once victims' damage prices exceed the prices related to the claim;
- c) once the injurers' identity is know, or will be simply discovered;
- d) once the injurer has enough assets to afford expected harm costs.

Tort law are an adequate different for addressing environmental pollution issues in things wherever all the higher than mentioned conditions occur together.

EX-ANTE SAFETY REGULATION:

A accepted argument is sometimes invoked to like ex ante safety regulation to tort law for handling environmental problems, a minimum of in matters touching broad and indeterminate groups of victims : that's, plainly, that tort law takes its half solely ex post, specifically once the damage has already been done, whereas safety regulations focuses on avoiding environmental damage over any plan of compensation. Therefore, ex ante safety regulation is taken into account preferred to tort law remedies because the chief tool of environmental policy⁹. Under the regulatory approach possible incapacity to pay for harm done would be a matter of irrelevance, for parties would be made to take steps to reduce risk as a precondition for engaging in their activities.

It can be summarised that (i) to the extent private parties posses information about risky activities which is superior to a regulatory authority's, the desirability of allowing the parties to decide how to reduce risk will be enhanced, and thus, so will be the appeal of the tortious liability approach over the regulatory ; that (i) the problem of inability to pay for the full magnitude of harm done reduces the deterrent inherent in tortious liability and is

⁸ Remedies For The Enforcement Of Environmental Rights, sodhganga, at 121.

⁹ Pamela Carina Tolosa, Advantages and Restrictions of Tort Law to Deal with Environmental Damages, at 113, (2008).

therefore an argument in favor of ex-ante safety regulation ; that (i) the likelihood that suit would not be brought is for similar reasons a factor that works in favor of ex-ante safety regulation; that (iv) consideration of administrative costs may favor liability because under it and not under ex-ante safety regulation , such costs are borne only if harm actually occurs;but this argument was qualified in several ways.¹⁰

APPLICATION OF TORTIOUS LIABILITY WITH EX-ANTE SAFETY REGULATION:

It is observed that the determinants favoring tortious liability and those favoring ex-ante safety regulation ought both generally to have enough importance to make desirable some degree of use of each means of controlling risk. Consideration of the four determinants is therefore to be regarded as determining the best balance between tortious liability and safety regulation , not which approach ought to be employed to the exclusion of the other.If, then, some measure of jointness of use of liability and regulation is likely to be advantageous, what can be said about the two questions that are immediately raised concerning the relationship between satisfaction of regulation and tortious liability.That is, should a party's adherence to ex-ante safety regulation relieve him of liability? And on the other hand, should a party's failure to satisfy regulatory requirements result necessarily in his liability?

Theory suggests that the answer to both these questions ought to be in the negative. In respect to the first, if satisfaction of regulatory requirements were to render parties immune from tortious liability , then no one would do more than to satisfy the requirements.But there will generally be parties who ought to do more to reduce risk than what is called for by safety regulation because they bear lower than usual costs of taking care or present a higher than usual potential for doing harm, or because there are aspects of their behavior which affect risk but are not covered by ex-ante safety regulation (due to limitations of knowledge on the part of the regulatory authority). And since some among these parties would be induced by tortious liability to take more care to reduce risk (for some would be able to pay for harm done and would be sued with sufficiently high likelihood) , it becomes desirable to employ tortious liability as an additional means of controlling risk at the same time, if failure to satisfy ex-ante safety regulation were necessarily to result in a party's liability for negligence, then some parties would be inappropriately led to satisfy ex-ante safety regulation who would not otherwise have done so. This is because some parties for whom the regulatory

¹⁰ Steven SHAVELL, "Liability for Harm versus Regulation of Safety",at 10 (1984)J. Legal Stud.360.

requirements would not be desirable-those facing higher than usual costs of care or posing less than the usual potential for harm-will not have been forced to satisfy the requirements due to flaws in or probabilistic methods of regulatory enforcement. Yet these parties might still be induced by threat of tort liability to obey the requirements. But allowing recognition in tort liability law of the parties' special circumstances will lead, desirably, to their not adhering to the regulatory requirements after all.

THOOTHUKUDI STERLITE ISSUE:

Sterlite Industries (India) is a subsidiary of London based Vedanta resources. Founded in 1975 by Anil Agarwal, its primary operation in India is production of non-ferrous metals like Copper, Aluminium and Zinc. From the day of establishment of the industry it's been known that the industry has not followed most of the ex-ante safety regulations imposed by various environmental boards and committees. In 1998 the National Environmental Engineering Research Institute (NEERI) submits a reports on Sterlite concluding that Sterlite had failed to develop a greenbelt, it was producing products it was not authorized to, it had contaminated the groundwater with arsenic, lead, selenium, arsenic, aluminium and copper, tampered with the online air monitors installed at TNPCB, had caused toxic gas leaks, had not maintained the shaft height as mentioned, it had located itself 14 Kms from GoM without consent. However a week later after the Madras High Court Order For the closure of the factory it asked NEERI to do an another survey. It submitted its report after 45 days and curiosity Sterlite has cleared all of the above charges. By influencing the Government and the courts it had bypassed all of the safety regulations. In 2013 the HC ordered for closure of the factory citing the violations of pollution control. The Supreme Court overturned the decision of the HC And simply fines the company 100 crore by holding the company absolutely liable for causing environmental harm, at the same time ordering for its reopening. This is the second time after Oleum gas leak case the court had held a company liable under absolute liability for environmental harm. This is because there are many difficulties in making a company liable under tortious liabilities.

SUGGESTION

Difficulty faced by victims to fight the case is a major challenge making the company liable under tort. Time, money and burden of proof continue to pose challenges for victims especially when the victims belong to socially and economically backward classes. Even when the victims manage to fight the legal battle, it is very difficult to get the remedies.

These are the limitations in using the ex-post liability (ie.tortious liability) for environmental harm. Therefore it is necessary to implement the ex-ante safety regulation policies more effectively. It is the responsibility of the Government and the Courts to effectively implement the ex-ante safety regulation policies and at the same time combining both tortious liability and ex-ante safety regulation policies as an effective tool for controlling environmental harm.

CONCLUSION:

Tort law has traditionally provided a blunt instrument for remedying harms to the environment. Indeed, the lack of a neat fit between certain harms to environmental interests and a remedy through the common law tort system has been a significant catalyst for the increase in environmental statutes and regulations over the past several decades¹¹. Nevertheless, general tort law theories have been successfully applied to remedy numerous types of harm to the environment. This occurs in areas where the harm is to a well-defined area or specific person or class of persons, is readily supported by general and specific causation, and closely fits the traditional elements of a tort cause of action. When the on top of enumerated conditions don't occur along, or when one amongst them is weak, the chance of combining tort law with alternative tools, or solely using them, ought to be evaluated. during this method, it's fascinating to investigate the chance of mixing tort law with ex ante safety regulation, since it's the choice most utilized in environmental pollution cases. in addition, it's necessary to work out whether or not there are cases within which the exclusive use of ex ante safety regulation wouldn't be a superior resolution.

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¹¹ Anshuman Mozumdar*, Kartikey Mahajan and Krithika Ashok, Environmental Torts: A Step Towards The Legal Revamping Policy Related To Environmental Protection, at 495-496, (2008)

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