

Chapter 7

The Transnational Traffic in Legal Remedies

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The December 1984 disaster in Bhopal, in which upwards of 3,500 persons were killed and as many as 150,000 seriously injured, invites our reflection on many matters. I shall examine the strikingly different role played by tort law in the risk-management complexes of India and the United States, the two sites of the ensuing legal battle. Flows of capital, goods, people, and information mean that injurious events may be transnational in significant ways. What do the national differences displayed in the aftermath of Bhopal imply for the transnational traffic in legal services and legal remedies?

To place tort law in some perspective, I begin by imagining the introduction of a new productive technology—for example; the production of pesticides—into a new setting—for example, India. This new technology brings with it new risks. At the same time, it effects a reduction of the risks of starvation, malnutrition, and harms associated with older agricultural technologies. Let us assume that the overall quantum of risk in the recipient society is now less than it was before the advent of the new technology. But now there are new risks that impinge on the workers in the pesticide plants, on those who live near the plants, on those who transport' the product, use it in the fields, ingest it, and so forth. At least some of these new risks are more focused, more visible, and more controllable than the old risks that they have replaced. And they are apprehended in a very different way, for they are palpably the result of identifiable human interventions, associated with particular human agencies.

The Various Layers of Control

What kinds of controls are there to protect against these new risks?

There are several overlapping layers':

- A first layer consists of controls intrinsic to the technology itself: preventive design, safety procedures, worker training, and other devices to minimize risk that are built into the technological package itself. Just how these devices will work will vary in different cultures—for example, with workers' literacy, comprehension, obedience, risk averseness, and so on.
- A second layer consists of administrative control by government authorities: determining acceptable risks, requiring preventive practices, and monitoring compliance. Such administrative regulation is typically not included as part of the transfer of technology. To include it would be difficult, since insistence by the transferor would offend the honor of the sovereign recipient and might thwart its policies. Typically there is some administrative counterpart in the recipient country that is assigned some regulatory tasks. These may be more or less appropriate and more or less effective, but again this is ordinarily considered a matter of domestic concern.

These first two layers attempt to address risks before injuries occur; the next two come into play only when injuries have occurred. Because they influence the activity in the first two layers, we can think of them as additional sources of control of the risks from the new technology.

- The third layer consists of institutions for absorbing and spreading losses when the new technology does result in injuries: relief and health institutions that help to reduce losses; welfare institutions like social security and insurance that compensate victims.
- Finally, there is a fourth layer of control made up of private law, which generates and broadcasts standards in the course of vindicating the claims of injured persons. That is, private persons can move courts (or other bodies, like workers' compensation boards) for awards to compensate for damage suffered when the new technology produces actual injuries and damage. This compensation may or may not be conditioned on a finding of fault or wrongdoing. Compensation may be designed to be variable or it may be measured by a fixed schedule.

In the following I; contrast the heavy reliance on the most typical manifestation of the fourth layer—tort litigation—in the American setting and the neglect of tort remedies in India. A brief overview of the working of tort controls and their characteristic strengths and weaknesses is followed by an examination of the collision between the

United States' high accountability-high remedy system and India's low accountability-low remedy system in the Bhopal litigation. Finally, I take up the implication of such imbalances for the transnational traffic in legal remedies.

Characteristics of the Tort System

The United States relies heavily on the fourth layer of private law controls, more so than do other industrialized countries. One comparative survey estimated that "Comparing costs relative to each country's gross domestic output, the U.S. tort system—at 2.5 percent of GNP—ranges between three and eight times the relative cost of tort systems in major European countries as well as in Australia and Japan" (Sturgis 1989:12).²

Our expansive system of private remedy is as much a sign of what we do not have as of what we do have. We do not have a Bismarckian administrative state with intensive and efficient governmental regulation, nor do we have a comprehensive welfare state. The same comparative study noted that "America's social welfare system is considerably smaller than that of any other country studied" (Sturgis 1989:14). Because we have weak administrative controls and a ragged safety-net welfare state, tort looms large as part of our system of compensating injuries.³ In terms of our layers, our heavy reliance on the fourth layer is associated with our comparative under-reliance on the second and third layers. Numerically, the system of private law controls is dominated by routinized administrative remedies like workers' compensation that provide low recoveries without much contest, and which attract little investment of legal talent and little public attention. A minority of injuries are handled by the tort system, which is manned by a dynamic entrepreneurial bar, and which produces higher, uneven, expensive, and sometimes more visible recoveries.⁴

Tort is a curious straddle that combines public standards with passive, reactive public institutions, leaving the initiative to private sector actors (victims and lawyers). The use of private law marks a shift from prospective and preventive control to retrospective and remedial control. Preventive effects depend on potential injurers extracting appropriate signals from what the courts do and modifying their behavior. The enforcement initiative is; shifted away from the productive enterprise (cf. layer 1) and the government (cf. layer 2) as surrogates for potential victims—surrogates who have -many other responsibilities and commitments—to the actual victims and their agents. These victims obviously have strong interests in controlling these risks, but this

interest may be so diffuse that they have little incentive to invest in prevention (Komesar 1990). Their low capability to control these risks directly means that prevention initiatives depend on surrogates, such as lawyers and potential injurers. This diffusion of enforcement initiative is matched by the decentralization of pronouncement of standards. Tort standards are formulated largely by courts responding incrementally to specific cases that are brought before them. Tort standards are "context sensitive,"⁵ incorporating changing popular values and understandings. In the United States this incorporation of popular views is accelerated by the use of civil juries.⁶

The tort system marries the compensation function with the prevention function. Information about instances in which injurers (and their insurers) are forced to compensate victims cumulate into a kind of knowledge that generates prevention. This process of knowledge generation and preventive action can be analyzed into several distinct steps. First, the compensation may be effectuated either by running the entire course of legal contest or by "voluntary" settlement at an earlier stage in the light of the anticipated outcome of that contest. In fact most injury claims, even serious ones, are settled without trial;

many are granted without formally invoking the system by filing suit. Second, information about such instances of enforced compensation has to be disseminated, so they become known to potential injurers. The fulfillment of this condition entails such institutional arrangements as public courts, public records, and reporting by the trade publications and general media. It is noteworthy that much of this information is lost or suppressed by confidential settlements and by the difficulty of retrieving relevant information. Third, this information has to be gathered into a kind of usable knowledge that is predictive. This is done by published legal doctrine, by specialized publications such as jury-reporting services in the United States and *Current Law* in the United Kingdom, and in the lore of lawyers, insurers, and risk managers. Fourth, potential injurers have to pay attention to it and alter their behavior in light of it.⁷

The linkage of this knowledge to prevention, often condensed into talk about deterrence, is complex and multiple.⁸ Imposition of tort liability may generate both "special effects" and "general effects." Special effects are the effects produced by the impact of litigation (full-blown, attenuated, or threatened) on the parties immediately involved. General effects are effects of the communication to others of information about litigation, including effects of the response to that information.⁹

Special effects are changes in the behavior of the specific actors involved in a particular lawsuit. We can, in theory at least, isolate various

one dollar of benefits to a recipient in various compensation systems.

A very large portion of the money extracted from injurers by the tort process is consumed by the tort process itself. Analyzing data from a number of studies, Rand researchers estimated that the costs of tort litigation consumed roughly half of the \$29 to \$36 billion of private expenditure on that litigation in 1985 (Hensler et al. 1987:

26).¹³ As Table 7.1 suggests, the overhead differs from one field of tort liability to another. Institute for Civil Justice researchers concluded that, in 1985, costs amounted to 48 percent of total expenditures on auto tort litigation, 57 percent of expenditures on tort litigation that did not involve autos, and 63 percent of expenditures on asbestos claims (Hensler et al. 1987:27—28).¹⁴ This relatively expensive system requires justification to offset its inefficiency as a system for compensating specific classes of injuries. One such justification, as noted above, is the generation of preventive effects. Another is its flexibility and adaptiveness: the tort system and its personnel are in place and need not be reformulated and reinstitutionalized for every new task of risk control. Its open texture permits rapid adaptation to new technologies and new encounters. (On the "accumulation of unregulated technologies," see Shrivastava, this volume. Chapter 12, p. 259.)

Tort is more than a technical device for providing compensation and prevention. It has become a major symbolic presence, dramatizing our sense of the high value of human life, a kind of rough and uneven egalitarianism of high expectations, and our sense of the efficacy of money-driven arrangements.¹⁵ At the same time, as manifested in the current campaign for "tort reform," it has come to symbolize extravagant and erratic compensation, a loss of individual self-reliance, and a source of social misallocation.

Mass Injuries in the Good Old Days

The tort system grew up as a way of providing individualized remedies to individual victims. In recent decades tort recovery for individuals has become more ample, and tort has become established as a component of our response to those injuries on a vastly greater scale. How does this system work as a way of handling mass injuries—either single-event disasters like Bhopal or epidemics such as the thousands of Dalkon Shield injuries⁵

We should begin by recalling that a tort system imposing high standards of accountability and awarding sizable remedies is a fairly recent phenomenon in the United States. Lawrence Friedman describes the tort system of the late nineteenth century as a "system of noncompensation" in which few claims were brought and plaintiffs faced an

array of doctrinal, practical, and cultural barriers to recovery (Friedman 1987:355). In the first decade of this century, fewer than one in twelve of those filing tort claims for personal injury "successfully pursued their claims through filing, trial and on to final judgment" (Friedman and Russell 1990:310). Some cases ended in settlement, but the harsh "working system" of "roadblocks and obstacles, with a pot of gold for a few very lucky, very gallant and persistent survivors . . . denied recovery to victims, and allowed industries to avoid internalizing the full costs of their operation by shielding them from what many considered excessive exposure to lawsuits" (Friedman and Russell 1990:310). This system of non-compensation co-existed with a visible body of tort doctrine that appeared to mandate relief to victims (Friedman and Russell 1990:310).

Compensation was uncertain and meager; seeking it was arduous and could provoke retaliation (Gersuny 1981). Of 212 married employees killed in work accidents in Pittsburgh in 1906-1907, over half received \$100 or less from their employers, and only 8 percent received more than \$1,000 (Eastman 1910:121).¹⁶ A 1908 study of work-related fatalities in Manhattan and in Erie County, New York found that 41 percent received no compensation; those settled without suit averaged \$703; those who settled after filing suit averaged \$1,477; the 3 percent whose cases were tried recovered over \$5,000 (Bale 1987:40).¹⁷

If anything, victims of mass disasters received smaller recoveries on average than workers injured individually.¹⁸ Three years after the 1911 fire in the Triangle Shirtwaist Company, in which 145 young women were killed due to a locked fire escape, the twenty-three civil cases against the building owner were settled for the sum of \$75 each (*New York Times* 1914).¹⁹ The early 1930s Hawk's Nest disaster, in which over seven hundred tunnel workers died of silicosis and which has been labeled America's worst industrial disaster, led to the bringing of a total of 538 suits, thirty-four of them for wrongful death. The total amount of settlements was \$200,000, "only two thirds of which actually accrued to [the victims]" (Cherniack 1986:73).²⁰ If every claimant shared in the recovery, the average recovery would have been about \$390, reduced by the lawyers' one-third or one-half. When those who did not recover are eliminated, the shares are correspondingly higher. And it should be noted that those who filed were only a minority of those who contracted silicosis or other maladies.²¹

Victims of "consumer" disasters—theater fires, capsized excursion steamers, and so forth—fared no better. When the "Absolutely Fire-proof" Iroquois Theater burned in Chicago in 1903, killing 602 pa-

trons, "a few dozen of the civil suits were settled for payment of \$750 per death" before the company was discharged in bankruptcy (Speiser 1980:134). There was no recovery for the 1,031 fatalities of the excursion steamer *General Slocum*, which burned in the East River on June 14, 1904 (Werstein 1965:148). Even the \$15 to \$18 million in claims generated by the 1912 sinking of the *Titanic*, in which 1,500 lost their lives, led in 1916 to settlements with the American claimants for \$664,000. The largest settlement for death was \$50,000, with the recovery for the death of immigrants set at \$1,000 (*New York Times* 1916). In the 1942 Coconut Grove nightclub fire in Boston, in which 492 were killed, each claimant eventually received about \$160 (after legal expenses) from the bankrupt defendant (Keyes 1984:160). The legal treatment of mass disasters before World War II is a story of hapless victims encountering ineffectual and sometimes predatory lawyers, unflinching antagonists, unresponsive law, callous lawmakers, and a largely indifferent public.

The Transition to a High Accountability-High Remedy System

Half a century later there is a new legal world with a legal doctrine more favorable to claimants, a more skilled and sophisticated (and less exploitative) plaintiffs' bar, and judges and juries that award more ample recoveries. These legal institutions are set in a far richer and more educated society, with higher expectations of institutional performance. Lawyers, scholars, and journalists generate much richer information about that performance. National media connect regions, classes, and races; the softening of social divisions has extended the bounds of empathy.

This new legal world reflects changes in the incidence of risk and expectations of remedy. Lawrence Friedman reminds us that in nineteenth-century America "a person could not expect to pass through life without sudden catastrophe" (Friedman 1985:50). "In life there was no general expectation of justice or fairness; no general expectation that somebody or some agency would provide compensation for material loss. In the legal system, too, the situation was basically the same: no general expectation of justice, no norms that promised justice in every circumstance, no rules that generally promised compensation" (Friedman 1985:51). But technology has "made the world over," bringing "dramatic . . . far reaching reductions in the uncertainties of life" (Friedman 1985:51, 52) and raising public expectations of life and of law.

Legal institutions in the United States have been reshaped to sup-

port a high accountability-high remedy system that corresponds with these values and expectations.²² Changing expectations have been accompanied by increasing investment in each of our four layers: there is more safety technology, more government control, more welfare and insurance, and more control by the tort system. (This does not imply a claim that the present mix is optimum.)

Cases involving what we might call "consumer" disasters—crashes of commercial airliners or hotel fires—routinely lead to substantial compensation. A study of recovery for 2,113 victims of air crashes on major U.S. airlines from 1970 to 1984 found that the average compensation was \$363,608—but even this was only about half of the full economic loss of the survivors (King and Smith 1988:viii). In the 1977 Beverly Hills Supper Club fire in Southgate, Kentucky, some 260 claimants (including survivors of the 165 fatalities) settled for a total of \$34 million. In the 1980 MGM Grand Hotel fire in Las Vegas, in which 84 persons were killed, a \$155 million settlement fund was established for the 1,357 plaintiffs (Lewin 1984). The total settlement of thirty-nine claims arising from the 1980 fire at Stouffer's Inn in Harrison, New York, in which there were twenty-five deaths, was \$48.6 million. All but one of the claimants settled for seven-figure amounts (Flaharty 1984). One hundred claims (involving 85 deaths) arising from the 1981 fire at the Las Vegas Hilton Hotel were settled for \$22.8 million. (Tarr 1985).

With industrial disasters the record is more mixed, but the movement is in the same direction. Consider the 1972 Buffalo Creek disaster in West Virginia, less than a hundred miles southwest of the Hawk's Nest tunnel. Over 125 persons were killed, communities were demolished, and thousands had their lives disrupted when a Pittston Corporation mine dam collapsed, flooding the valley below (Erikson 1976). A suit on behalf of 600 victims was brought as an intense, and ultimately profitable, pro bono effort by a major Washington law firm.²³ It involved a massive deployment of legal resources, intensive investigation, the development of innovative theories of recovery, strenuous and effective legal maneuvers—and ultimately a settlement of \$13.5 million (Stern 1977).²⁴ The result was an unusual instance of a major legal campaign for a group of victims operating under unified direction. In spite of the high levels of skill and coordination, this campaign focused exclusively on compensation; it did not address the victims' problems of reestablishing community, nor did it address what Robert Rabin calls one of the "central features of the case, the total absence of an administrative enforcement system that could have prevented the tragedy" (Rabin 1978:286). Early on, plaintiffs' counsel announced his intention to press for a remedy that would control

future corporate conduct, but no trace of this appeared in the settlement agreement (Stern 1977:86-87).²⁵ Other claimants settled on their own, apparently for a total of more than \$14 million. Another large group of cases on behalf of affected children, managed by another major Washington firm, was settled for \$4.88 million in early 1978 (*Wall Street Journal* 1978).

Buffalo Creek is not a typical industrial disaster story. On February 3, 1971, a year before the dam burst at Buffalo Creek, an explosion at the Thiokol Corporation plant in Camden County, Georgia killed twenty-nine workers and injured more than fifty while they were making incendiary flares for the U.S. government. Some sixty-five lawsuits were filed. The victims, like those in Buffalo Creek, were settled workers with ties in the locality. But again we have a pattern of relatively marginal claimants—here, rural black women—matched against organizations that are powerful, resourceful, and centrally located (Scardino 1986:9). Both Thiokol and the government were held liable in a 1977 ruling,²⁶ but tort recovery from Thiokol was preempted by Georgia's workers compensation law. Protracted resistance by the government led to an extended series of appeals, including a rehearing before a bench of twenty-four judges of the United States Court of Appeals²⁷ and a reference to the Georgia Supreme Court.²⁸ By 1986, some forty-four suits had been settled. The victims had sued for \$717 million in compensation, but it was estimated that the settlements would total less than \$20 million.²⁹ The litigation was still winding down in late 1989. Its sixteen-year span would not be out of place in India. Still, this is not Hawk's Nest; we have rigorous accountability and substantial damages.

In recent decades the processing of mass disaster recovery through the tort system has become more efficient. In the single-event "disaster," courts have fashioned devices for aggregating multiple claims and processing them more expeditiously. The 1986 arson fire that killed ninety-seven and seriously injured over one hundred more at the San Juan Dupont Plaza Hotel gave rise to 275 suits filed by some 2,337 plaintiffs against more than 250 defendants. By mid-1991 settlements of \$220.9 million had disposed of the victims' claims; the amount and division of plaintiffs' lawyers' fees had been litigated; and the court was turning to the resolution of insurance coverage issues (Blum 1991). A complex mediation by federal and state court judges resolved all claims arising from the 1987 collapse of the L'Ambiance Plaza in Bridgeport, Connecticut in eighteen months (Verhovek 1988). The \$41 million settlement involved "92 lawyers representing 16 injured workers, the estates and families of 28 ... killed [workers] and 40 contractors, subcontractors and other defendants" (Ravo

1988). On the other hand, as Tom Durkin and William Felstiner show in the next chapter, the courts and lawyers have struggled in vain to find a mode of expeditious resolution of the vast epidemic of asbestos cases.³⁰

As asbestos—or Thiokol—reminds us, even in a strong, high accountability system, compensation of victims through lawsuits involves tremendous transaction costs—uncertainty, delay, lawyers' fees. Typically claimants have to grant tremendous discounts from announced entitlements to overcome them. And the relief comes late—not when it would do most good in terms of rebuilding shattered lives.

We know that as a compensation device, tort is extremely costly and uneven in performance. Barriers of information and initiative mean that many or most potential cases are never brought (Abel 1987). How good is tort in controlling risk? Frankly we do not know. Indeed, current attacks on the tort system vacillate between accusing it of overdetering and of being ineffectual. The complex undertaking of assessing these claims remains to be done. In the meantime we can surmise that had the United States pursued the more traveled path of industrial nations by developing comprehensive administrative and welfare measures to deal with the injurious effects of industry, there would have been little for it to offer *ex post* in the Bhopal case. But by fostering a market in potent retrospective private remedies (which in turn become powerful symbols), American society created a resource that could be put to unanticipated transnational uses.

The Collision with India

Having taken this detour through the tort system, let us return to our example of a new productive technology arriving in India accompanied by its complement of new risks. Safety technologies are attenuated by a less educated and skilled workforce. Administrative controls are weak, for example, factory inspectors in Madhya Pradesh are few and lack resources to monitor sophisticated production facilities. India's welfare state provisions were sparse. Not only were all these layers weak, but the private law layer was weak as well. India has a low accountability-low remedy tort system. At the risk of distortion by condensation, let me briefly set out some of the principal components of that system at the time of the Bhopal accident.³¹

- India had an undeveloped tort law. Few tort cases were brought. There had been little doctrinal development. Tort is little used and has remained largely outside the consciousness of Indian lawyers and public.

- Delays of Bleak House proportions are routine. In a survey I conducted of reported tort cases in the ten years 1975—1984, these cases took an average of twelve years and nine months from filing to decision. They did not involve matters of great complexity, either logistical or technological: in the twenty-two negligence cases, the most common fact situation was a railroad crossing accident (7); next was a downed electrical line (3). There was not a single product liability case among the fifty-six cases located in my survey, nor any case involving any industrial process or chemical mishap. Nor did these cases involve massive amounts of evidence, large numbers of experts, or large numbers of parties.
 - The sources of the amazing longevity are several. First, there are relatively few courts—about one-tenth as many on a per capita basis as in the United States (Galanter 1985b:attachment C). Staggering backlogs have been building for a generation. Lawyers' and judges' work habits of dealing with cases piecemeal and lavish provision for multiple interlocutory appeals (originally designed for colonial supervision of unreliable locals) equip the determined adversary with abundant opportunity to prolong litigation almost indefinitely.
 - Upon invoking the courts, claimants must pay substantial fees, proportional to the size of their claim, which are charged whether they are successful or not. These fees divert disputes (and legal experience) away from money damages tort cases into other channels (e.g., criminal law, injunctive relief).
 - Where tort cases are brought, recovery is far from assured. Of the 56 cases, 48 had been resolved. Some twenty-three of these failed to recover anything. The average recovery of the plaintiffs who won was only Rs 15,159. The median recovery was Rs 7,895.³²
 - High *ad valorem* court fees, protracted delay, and meager recoveries discourage claimants. Neither contingency fees nor legal aid are present to overcome financial barriers to access. Rules shifting costs to losing parties raise the risks of pioneering litigation.
 - India has a numerous and well-established legal profession. Lawyers in India are courtroom advocates; their role does not include investigation and fact-development; specialization is rudimentary; barring some recent exceptions, there are no firms or other forms of enduring professional collaboration that would allow a division of labor and pooling of resources to support the development of expertise in tort law. One may visualize Indian lawyers as stuck in a hyper-individualized bazaar economy in which virtually all lawyers offer the same narrow range of services.
- The setting in which Indian lawyers work is devoid of institutional

support for specialized knowledge: there are no specialist organizations, no specialized technical publishing, no continuing legal education; nor is there a vigorous scholarly community.

- Indian civil procedure does not include provisions for wide-ranging discovery that would permit factual investigation in complex problems of technology or corporate management. There are no special procedures for handling complex litigation involving massive amounts of evidence or large numbers of parties. Bar and bench, though they contain many brilliant and talented individuals, have a very limited fund of experience, skills, and organizational capacity to address massive cases involving complex questions of fact,

The cumulative effect of these factors, together with cultural and political predispositions, is that there has been little connection between tort law and disasters in India. Such a negative is hard to document. I can only say that I have never heard of an instance of an industrial explosion, mine cave-in, building collapse, food adulteration, or other mass injury leading to tort claims. Surveys of all the tort cases reported by India's leading series of law reports since 1975 did not reveal a single case that arose from such an incident.³³ What typically happens in disasters is that the government announces that it is making *ex gratia* payments of specified amount to the victims. For example, when four people were trampled to death in a March 1989 stampede at the New Delhi railway station, the railway announced an *ex gratia* payment of Rs 5,000 [approximately \$320 at then current exchange rates] to the kin of the deceased and of Rs 1,000 to the injured. A departmental inquiry was ordered and a criminal case was registered on the basis of the negligent announcement that was thought to have triggered the stampede (*Hindu-1989*). Attributions of responsibility, if pursued at all, would be done by a governmental investigation or perhaps a criminal prosecution or a commission of inquiry. In each case, the inquiry into responsibility is dissociated from the administration of compensation.

We need not take the present level of controls as representing a calculated choice and conclude that Indians have consented to that level of protection. As in most societies, including our own, there is a pretense that government affords more protection than it does in fact. Lackadaisical administration, failures of implementation, and the expense of remedies attenuate even the most ample substantive standards. What was so striking in the Bhopal case was that the Government of India took the unusual step of dropping the ordinary pretense and conceding—at least momentarily—that its private law

controls were inadequate, a move that earned it the severe reproach of the Indian legal establishment.

In Bhopal, India's low accountability-low remedy system collided with the high accountability-high remedy system of the United States. Because the Bhopal event was transnational, it was not contained within either the Indian or the U.S. system. Had Bhopal been a purely Indian event, there would most likely have been a modest *ex gratia* payment by the company and/or the government and that would have been the end of the matter. If it had been an American event, it is likely that there would have been very substantial payments to the victims, possibly on a scale that would have significantly diminished the company, and the proceedings would have generated strong preventive effects on safety practices (storage, warnings, etc.). Indeed, as documented by numerous other contributors to this volume, the specter of Bhopal did generate a whole range of preventive activity in the United States—as far as one can tell—with far more reduction of risk than in India.

The contrast between the two systems drove a series of attempts at arbitrage. The great ambulance chase by American lawyers in Bhopal can be read as testimony to the gap. So can the Government of India's insertion of itself as representative of the victims to pursue their claims in the United States. But these attempts to connect the victims with the most promising forum should be placed in the context of increasing transnational flows of legal services. The arrival of the plaintiffs' lawyers in Bhopal was only the most visible spurt of a sustained flow of American lawyers servicing transnational transactions. Union Carbide's international operations, including its Indian ones, were already served by transnational lawyers. What is unusual is that the Bhopal victims managed to get connected as well. Jet planes, instantaneous transmission of news, and an open society allowing unimpeded flow of news and people made it possible for the gap to be bridged. The possibility of U.S. jurisdiction and massive recoveries induced entrepreneurial personal injury lawyers and the Indian government to use these resources to bridge the gap.

These efforts were abrogated by Judge John Keenan's decision to grant Union Carbide's motion to dismiss the case from the United States courts.³⁴ Having overestimated the capacity of the Indian system, Judge Keenan hedged by attempting to devise his own linkage, lending some of the strength of the U.S. system to the victims while relieving his own court from the onerous burden of this mega-case. In granting Union Carbide's motion to dismiss on grounds of *forum non conveniens*,⁹³ Judge Keenan was persuaded that the Indian courts and lawyers were capable of improvising procedures adequate to

dealing with this case of a kind and scale unknown to them. In the event, no such innovative response was forthcoming.³⁶ Indeed, the two notable innovations, both from the public interest sector and each intended to help the plaintiffs' cause, both arguably redounded to the detriment of the claimants. The first of these was a ruling by the Supreme Court of India in a case involving a gas leak that occurred in New Delhi just weeks before the hearing scheduled in Judge Keenan's court on the forum issue (see also Rosencranz et al., this volume, Chapter 3). The Supreme Court of India's aggressive response, later crystalized into a doctrine of expanded liability for dangerous industrial processes, was urged by Carbide as a warrant of the innovative capacity of the Indian courts and apparently contributed to Judge Keenan's decision. (That this centerpiece of Indian Judicial activism ended up being used by Union Carbide, but not by the plaintiffs, suggests that even favorable substantive doctrine does not make a decisive difference in a setting in which procedural and institutional tools are lacking.) A second innovation by a dedicated intervenor who persuaded the District Judge hearing the case to award interim relief provided the occasion for appeal to the Supreme Court of India, which imposed a settlement in February 1989.³⁷ The settlement for \$470 million, by far the largest recovery in any Indian litigation, was far short of the \$3.1 billion that the Government had sought.

To earlier misgivings about the inadequacy and callousness of the relief efforts was added new disquiet with the amount of the settlement and the termination of the case without either a definitive finding of fault or establishment of norms of corporate conduct. In the end, both the Government of India and the Supreme Court declared themselves defeated by intractable gridlock and delay. The Government justified the settlement on the ground that "Eminent lawyers have argued that this case, which has already been four years in various courts in the pretrial stage, would in the most optimistic circumstances need anywhere from 15 to 25 more years for an ultimate decision" (*Hindustan Times* 1989). This was not a claim that the settlement represented the victims' true entitlements; rather it was an assertion that whatever the magnitude of those entitlements, the character of India's legal system made it inevitable that they could not be obtained before passage of so long a period that the discounted present value of the claims was less than the amount to be delivered under the settlement. The features of the system that prevented a timely and adequate adjudication were treated, by the Government itself, as given and unalterable.³⁸

While the merits of the settlement continued to be hotly debated, the money, which was paid over immediately, was not distributed to

the victims because the government had not assembled machinery for distribution nor devised a policy for distributing it.³⁹ Unable to devise a system for identifying the actual victims, the government made uniform (and miniscule) interim payments to residents of some thirty-six wards in the city of Bhopal. The first determinations of individual compensation took place in mid-1992, eight and a half years after the event and over three years after the settlement. By June 1993 only 5 percent of the claims had been adjudicated; of these, all death cases, 70 percent were rejected (N.K. Singh 1993). Typical awards in death cases were about Rs. 100,000 (equivalent to \$3,200 at the 1993 exchange rate) (N.K. Singh 1993; S. Hazarika 1993).

To some observers, including myself, the course of events reinforced earlier apprehensions that Indian courts and lawyers were unlikely to bring the matter to a satisfactory conclusion and confirmed the conviction that the matter would have had a more satisfactory outcome had it remained in the courts of the United States. In the end, the heroic interventions of a few "public interest" actors were too isolated to overcome the endemic inertia and mismanagement.

Transnational Remedies in a World of Unequal Remedial Capacities

We have seen that tort is a very expensive and unwieldy system of controlling the risks of new technologies. The compensation it delivers is often inadequate—especially for the most seriously injured⁴⁰—and too late. The transaction costs are very high. And in mass disasters there are severe administrative problems. But these defects must be looked at in the context of comparison with other institutional alternatives.⁴¹ Tort does offer some advantages that are particularly telling where the other layers of controls are weak, as in most developing countries. Tort can be "self-enforcing" through mobilizing a class of bounty-hunting lawyers. And it can operate without the extensive *ex ante* investment that it takes to put into place safety regulations or administrative controls or welfare state provisions.

Disputes involving complex technology typically involve large organizations. As societies industrialize, an increasing portion of serious disputes are between entities of different sizes—typically between individuals and large organizations—rather than between comparable entities. Legal systems will differ in their ability to handle disputes arising from complex technology and large organizations and to offset the advantages of organizations in legal combat with individuals.

It is likely that in the foreseeable future, legal systems will differ greatly in their capacities, their goals, and their priorities. Like en-

gineering, banking, insurance, and other specialized information services, legal services will not be evenly dispersed, but will be concentrated at central locations. Expectably, agents and brokers will appear to make available elsewhere the services produced at these central nodes. So far most of these transnational innovations are extensions of the "corporate hemisphere" of the legal profession that services large organizations.⁴² We can see only the glimmerings of transnational activity among lawyers who occupy the hemisphere of the legal profession that services individuals.⁴³ One can imagine devices for linkage that are more sophisticated and more enduring than the ad hoc exertions of the American plaintiffs' lawyers and the Government of India. Such devices might include multinational law firms, networks of lawyers like corresponding banks, international placement and matchmaking services, or trade union insistence on favorable choice of forum provisions in technology-transfer agreements.

The growing transnational traffic in legal services is predominantly, though not exclusively, a matter of the spread of American lawyers and their highly rationalized, client-oriented lawyering style.⁴⁴ J. Gillers Wetter suggests that we are living in the midst of a "singular movement," comparable to the reception of Roman law in Europe, "the adoption and absorption throughout the world of a less clearly defined legal heritage in which many characteristic elements can be traced back to the common law, with an American flavor" (Wetter 1980:217; Wiegand 1991). The appeal of U.S. lawyers is connected to the strength of the U.S. remedy system.⁴⁵ The strength of U.S. legal technologies suggests the possibility of a second wave of transnationalization of law, in which the capacity for local legal systems to investigate and remedy harms to individuals from technological risks is upgraded or linked to stronger forums.⁴⁶

Notes

1. I have omitted here those arrangements in the recipient country (like the placement of housing or the adequacy of roads) which, though not designed with an eye to exposure to the risks in question, may increase or decrease such exposure.

2. Cf. Adyah 1987 on contrast with England.

3. Pfennigstorff and Gifford (1991:129) attribute the less frequent resort to tort remedies in other industrialized democracies to the presence of public entitlement systems or to public and private insurance; these "alternative compensation sources do much of the work that is accomplished under the tort system in the United States." On the scantier coverage and lesser coordination of American social security schemes, see Grana 1983; Kaim-Caudle 1973.

4. On the shape and costs of the tort system, see Hensler et al. 1987.

5. Cf. Schuck 1991:27.

6. Juries are a significant component of the civil remedy system in the United States and to a lesser extent in parts of Australia and Canada. See Galanter 1990b.

7. For a discussion of the problems of extracting and applying this knowledge, see Galanter 1990b.

8. In a review of the sizable literature on deterrence, Gibbs 1986 observes that, since deterrence research has proceeded without controls for other general effects, "all previous reported tests of the deterrence doctrine . . . were really tests of an implicit theory of general preventive effects; and that will remain the case as long as nondeterrent mechanisms are left uncontrolled." The literature on the effects of tort law displays the same conflation of deterrence with other preventive effects that Gibbs finds in the criminal law literature.

9. This notion of "general effects" takes off from the very helpful discussion of general preventive effects of punishment by Gibbs (1975:ch. 3), as usefully elaborated by Feeley (1976:517ff). It is simply a generalization from the illuminating and now familiar (if not entirely serviceable, as Gibbs points out) distinction between special deterrence and general deterrence introduced by Andeneas 1966.

10. Some of the labels used here for the various effects are inspired by those carefully discussed by Gibbs 1975. A fuller taxonomy of the effects of litigation can be found in Galanter (1983:124ff).

11. Other studies provide suggestive but contrasting hypotheses about the conditions under which such enculturation takes place and its relation to the coercive aspects of law. Cf. Muir 1967 with Dolbeare and Hammond 1971.

12. See, for example, the studies by Wiley 1981 and Givelber, Bowers, and Blich 1984.

13. This estimate was for all cases resolved after filing in courts of general jurisdiction, but did not include claims resolved without filing. Nor did it include the cost of the governmental institutions, which another team of Rand researchers estimates as \$320 million for 1982 (Kakalik and Robyn 1982:62).

14. None of these studies compare costs at different points in time, but there is some reason to think that there is variation from time to time as fields become more routine or more problematic.

15. Thinking that other people are entitled to compensation (by the wrongdoer or some impersonal organ of society) when they suffer is an attenuated expression of human solidarity. It is not a willingness to sacrifice for others, to succor them, to share their burdens—but it is not indifference or dismissal either. It stands in contrast to societies in which the suffering of others may be seen, if it is seen at all, as in the nature of things.

16. In addition, in thirteen instances suit was still pending and in ten others there was recovery of an unknown amount.

17. In Michigan in 1910, the average recovery for death on the job was \$388 for industrial workers and \$1,158 for miners (Bale 1987:44).

18. A striking exception was the 1909 Cherry Mine fire, in which some 270 miners were killed. Although the St. Paul Mining Company originally proposed to pay \$100 for each death, outside intervention led to average payments of over \$1,400, remarked at the time as extremely generous. The heirs of unmarried victims received \$800; widows were given \$1,800 (State of Illinois 1910).

19. The owner of the Triangle Shirtwaist Company, a known insurance claim "repeater," collected \$64,925 in insurance—some \$445 for each dead worker (Stein 1962:176).

20. This report of the amount withheld by the lawyers is at variance with the other accounts that reported contingency fees of 50 percent (Cherniack 1986:66; U.S. House of Representatives 1936:4, 69).

21. The House Subcommittee Resolution referred to 476 dead and an additional 1,500 "now suffering from silicosis" (U.S. House of Representatives 1936:1). Cherniack reports that about 2,500 worked in the tunnel, including about 1,200 who were heavily exposed (Cherniack 1986:29, 98).

22. Although it is evident that something has changed, it is less clear just how to characterize this shift. Friedman views it as a shift in popular culture, but compare Sanders, who suggests that it is not a general change in views but an increase in variance, so that there are now sizable (but not necessarily majority) portions of the population that hold views more favorable to high accountability and high recovery (Sanders 1987:610). In any case, it is necessary to explain why the impulse to general protection in America has taken the form of strong tort law rather than the kind of comprehensive welfare state that is found in other industrial societies.

23. Although Arnold & Porter's involvement was "pro bono" in the sense that the firm would probably not have taken the case absent the "doing good" aspects, the financial arrangement was actually a standard contingency fee set at the modest level of 25 percent.

24. Some observers were troubled by the chanciness of the whole proceeding. Robert Rabin points out that the outcome was very much affected by a series of contingencies—the identity of the judge, untested theories, bargaining in "an Alice-in-Wonderland atmosphere in which the lawyers traded monetary claims made out of whole cloth" in "negotiations [that] took no account of precedent or of individual claims—normal guidelines were suspended" (Rabin 1978:294,295).

25. The settlement abandoned the demand for public attribution of blame. The expertise of Arnold & Porter was dismantled and no further representation of flood victims was undertaken, although plaintiffs' counsel insisted on placing the entire results of his investigation in the record, so the loss of knowledge was limited. The Arnold & Porter representation covered only a minority of the survivors—650 out of more than 2,000.

26. *Artez v. United States*, 503 F. Supp. 260 (S.D. Ga., 1977), damages awarded 456 F. Supp. 397 (S.D. Ga., 1978), aff'd 604 F.2d 417 (5th Cir. 1979).

27. *Artez v. United States*, 635 F.2d 485 (1981).

28. *United States v. Artez*, 248 Ga. 19, 280 S.E.2d 345 (1981).

29. This account is from Scardino 1986.

30. Courts inundated by asbestos cases adopted innovative case-management plans, such as the Ohio Asbestos Litigation Plan (Orlando 1988). Other courts devised novel procedures for handling massive insurance indemnification litigation. In 1985 thirty-four asbestos producers and sixteen insurers established the "Wellington Facility" to use "alternative dispute resolution techniques" to resolve claims. The Facility collapsed in 1988 (Mitchell and Barrett 1988), leading to a reported surge of asbestos trials (Carter 1988). In the Manville proceedings, a solution was eventually negotiated among contending groups—management, stockholders, various classes of creditors, insurers, injury victims, future claimants, and so forth—placing more than half

of the company's stock in a trust for the asbestos injury claimants. The Manville Personal Injury Settlement Trust, an entirely new kind of creature, was established to pay some \$2.5 billion to claimants over a twenty-six-year period (Alternatives to the High Cost of Litigation 1988). The Manville Trust subsequently developed its own financial difficulties (Schachner 1993).

31. This summary is borrowed from Galanter 1990a. A fuller discussion of these features may be found in Galanter 1985 a, b.

32. The exchange value of the rupee was approximately twelve to the U.S. dollar in late 1984, seventeen to the U.S. dollar in 1989, and twenty-five to the dollar in mid-1991. On damages and their determination in India, see Galanter 1985a: 276. A more recent survey by Mary Versailles (1991) of cases reported in the *All-India Reporter* analyzed recoveries for death of an adult male in a motor vehicle accident case. The average recovery in cases decided in 1985 was Rs 74,084 and the median was Rs 56,640. Taking inflation into account, the size of recoveries remained constant from 1976 to 1986.

33. I rely here on surveys of cases reported in the *All-India Reporter* conducted by my students, Gary Wilson, J.D. (1986) University of Wisconsin, and Mary Versailles, J.D., University of Wisconsin (1991).

34. *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India* in December 1984, 634 F. Supp. 842 (S.D. N.Y., 1986).

35. That is, on the ground that the American court was not the most convenient forum and that an adequate alternative forum existed in which the case could be heard.

36. Earlier talk about special courts, limitation of interlocutory appeals, and so forth was never implemented.

37. On the settlement and its aftermath, see Barr 1989. The Supreme Court's definitive response to questions engendered by the settlement is found in *Union Carbide Corporation v. Union of India* (A.I.R. 1991 S.C. 248).

38. In the decision of the Supreme Court of India dismissing objections to the settlement, this same unalterability argument was endorsed by the Chief Justice of India:

If the litigation was to go on merits in the Bhopal Court it would have perhaps taken at least 8 to 10 years; an appeal to the High Court and a further appeal to this Court would have taken in all around another spell of 10 years with steps for expedition taken. We can, therefore, fairly assume that litigation in India would have taken around 20 years to reach finality. (*Union Carbide v. Union of India*, A.I.R. 1992 S.C. 248).

39. In the meanwhile, the Government of India has reduced by more than half its commitment to funding a seven-year rehabilitation program (*India Today* 1989).

40. Where many pursue legal remedies together, the most seriously injured may be less well served than the larger number of less seriously injured. Cf. the observation that: "Other things being equal, plaintiffs are likely to receive a higher recovery in an individual action than in a class action" (Coffee 1987). A study of civil actions in Cook County, Illinois found that each additional co-plaintiff added to civil actions reduced the original plaintiff's compensation by 27 percent (Chin and Peterson 1985).

41. Cf. Komisar 1990.

42. In their analysis of the structure of the Chicago bar, Heinz and Lau-

mann (1982:48) described the fundamental structural division in the practice of law between those lawyers (typically organized into larger offices) who represent corporations and other organizations and those lawyers (typically in smaller practices) who represent individuals.

43. For a fascinating account of the transfer of expertise from German to Japanese thalidomide claimants, see Ino et al. 1975.

44. The unplanned export of U.S. legal institutions that is "quietly emerging through the international market for U.S. legal services" (Garth 1985:6.) is an ironic variation on the vision of legal influence that animated the law and development movement of the 1960s, which sought to replicate legal institutions, rules, and training to produce local approximations of advanced legal institutions (which, as critics pointed out, turned out to be remarkably similar to our own). See Trubek and Galanter 1974; Gardner 1980.

45. "When breakdowns in the system do occur, the international actors prefer to fight with the best available technology, and for a variety of reasons that tends to mean "metalitigation" in the United States. In no other country do the parties have such power—stemming especially from liberal discovery—to escalate a dispute into a tremendously costly lawsuit. . . . Despite recent discussion of the efficiency of settlements, it can be suggested that the deterrent impact of large-scale litigation helps to bolster the peaceful regime of international legality and access to the U.S. arsenal of weapons helps to maintain that stability" (Garth 1985:10).

46. India is a society with a lot of lawyers, a vast pool of scientific and technical expertise, and well-established judicial institutions; it contains the resources needed to develop a stronger system of remedies. Such a development would entail a massive rearrangement of existing components of the legal system. But there are many countries that probably do not have the potential to have legal systems that contain procedures and expertise to handle gigantic, complex lawsuits. Consider that half of the sovereign nations in the world have populations of less than five million; there are sixty countries with less than two million.

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