

Appendix F: Assessing Responsibility: The Legal/Regulatory System

M.J. Peterson
Revised March 3, 2008

Appendix Contents:

Topic 1: Litigation

- 1.1) [Note on Indian Supreme Court Decisions regarding Bhopal Gas Disaster](#), MJ Peterson

Topic 2: On Policy Changes Inspired by Bhopal Disaster

- 2.1) [Western European Policy on Information about Chemical Plant Hazards, 1982](#)
[excerpt from Josee van Eijndhoven, "Disaster prevention in Europe" in Sheila Jasenoff ed, *Learning from Disaster: Risk Management after Bhopal*(Philadelphia: University of Pennsylvania Press, 1994) pp. 113-132]
- 2.2) [United States Policy on Information about Chemical Plant Hazards, 1987-](#)
[excerpt from Susan G. Hadden, "Citizen Participation in Environmental Policy Making" in Sheila Jasenoff ed, *Learning from Disaster: Risk Management after Bhopal* (Philadelphia: University of Pennsylvania Press, 1994), pp. 91-112.]

References used in this section:

Josee van Eijndhoven, "Disaster prevention in Europe" in Sheila Jasenoff ed, *Learning from Disaster: Risk Management after Bhopal* (Philadelphia: University of Pennsylvania Press, 1994) pp. 113-132

This case was created by the International Dimensions of Ethics Education in Science and Engineering (IDEESE) Project at the University of Massachusetts Amherst with support from the National Science Foundation under grant number 0734887. Any opinions, findings, conclusions or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the National Science Foundation. More information about the IDEESE and copies of its modules can be found at <http://www.umass.edu/sts/ethics>.

This case should be cited as: M.J. Peterson. 2008. "Bhopal Plant Disaster." International Dimensions of Ethics Education in Science and Engineering. Available www.umass.edu/sts/ethics.



© 2008 IDEESE Project

Susan G. Hadden, "Citizen Participation in Environmental Policy Making" in Sheila Jasenoff ed, *Learning from Disaster: Risk Management after Bhopal* (Philadelphia: University of Pennsylvania Press, 1994), pp. 91-112.

Sanjoy Hazarika, *Bhopal: The Lessons of a Tragedy* (New Delhi: Penguin Books India Pvt Ltd, 1987)

Indian Law Institute, *Mass Disasters and International Liability: The Bhopal Case*, Bombay: N.M. Tripathi Private Ltd. 1986

Additional readings:

Links to Supreme Court of India decisions:

Decision of February 1989 by Supreme Court Panel accepting the Settlement:
<http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=8035>

Decision of May 1989 providing additional rationale for accepting the settlement:
<http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=7916>

Decision of December 1989 rejecting challenges to the Bhopal Gas Disaster Relief Act of 1985 establishing the Government of India as sole legal representative of the victims (upholding the challenges would have allowed private lawsuits suspended in 1985-86 to proceed and victim advocates hoped to do this to overturn the settlement):
<http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=7699>

Decision of 1991 by full Supreme Court upholding 1989 decisions against appeals. This decision added the three elements to the 1989 settlement:
<http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=12603>

Update on US Court Proceedings:

US Federal District Court ruling on *Bano v. Union Carbide Corp.* Ruling summarized briefly in *New York Law Journal* Oct 14, 2005.

Comments on legal proceedings:

Mark A. Chinen, "Jurisdiction: foreign plaintiffs, forum non conveniens, and litigation against multinational corporations." *Harvard International Law Journal* 28/1: 202-209 (winter 1987).

Monroe Leigh. "Federal jurisdiction - forum non conveniens - review of conditions of dismissal imposed by trial court - no need to require consent to enforceability of foreign judgment - equal access of parties to evidence under applicable discovery rules." *American Journal of International Law* 81/2: 415-417 (April 1987).

On regulatory changes:

Sheila Jasanoff, ed. *Learning from Disaster: Risk Management after Bhopal*. Philadelphia: University of Pennsylvania Press, 1994. [wide-ranging collection addressing various aspects of regulatory changes]

G. Joseph, M. Kasniak, and L. Long, "Lessons after Bhopal: CSB as a Catalyst for change," *Journal of Loss Prevention in the Process Industries* 18/4-6:357-348 (2005). [discusses experiences of the US Chemical Safety Board]

Ronald J. Willey, Daniel A Crowl, and Wil Lepkowski, "The Bhopal Tragedy: Its influence on process and community safety as practiced in the United States," *Journal of Loss Prevention in the Process Industries* 18/4-6, pp 365-374 (July-Nov. 2005). [a more general summary of effects on US regulatory practice]

Indian Supreme Court Decisions on the Bhopal Disaster

John P. Ake and MJ Peterson
ver.2, 10 Mar. 2008

With the 1986 US federal court ruling that all lawsuits claiming compensation for harm suffered in the Bhopal disaster should be handled by Indian courts, the Indian Supreme Court took the lead in handling the litigation. It could start from the fact that the Indian Parliament had adopted special legislation in the Bhopal Gas Leak Relief Act of 1985 naming the Government of India as sole legal representative of all victims. This step had been taken to consolidate all claims, regardless of whether they were to be pursued in US or Indian courts, and greatly simplified the tort law proceedings in India. Though prepared to hear the case, the Supreme Court urged the Government and Union Carbide to resume the negotiations broken off before the US decision in 1986 and come to a general settlement. A settlement was reached but was sufficiently controversial that the case remained in litigation for an additional two years. This was possible because under Indian law, cases before the Supreme Court are typically heard by a panel rather than the full 26-member court. Those who lose their case in the panel may appeal to the full court for a ruling setting aside the panel's judgment.

This note summarizes the various decisions and provides links to their official text on the Supreme Court of India's website.

- 1.) Supreme Court Decision (by the initial panel), February 14, 1989. The panel formally endorsed the settlement it had urged the Indian government to accept, payment of \$470 million from Union Carbide as final settlement of all past, present, and future claims arising from Bhopal. The panel also exercised its extraordinary jurisdiction to terminate all the collateral criminal, civil, and contempt of court proceedings then pending in lower Indian courts. Union Carbide, which had been required to maintain money in escrow in anticipation of settlement, paid the money to the Government within 10 days.

URL: <http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=8035>

This decision was extremely unpopular; victim advocates had long maintained that a minimum acceptable settlement would involve payment of \$3 billion in compensation. Prime Minister V.P. Singh, head of a government having only minority support in Parliament and soon voted out, protested, set the Carbide money aside, began paying compensation to victims from the Indian treasury, and asked the Court to rescind the settlement.

- 2.) Supreme Court Decision, May 1989. In response to the Prime Minister's actions, the Supreme Court of India issued an additional opinion explaining the rationale for the settlement. It emphasized that compensation levels involved were substantially higher than those ordinarily payable under Indian law.

URL: <http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=7916>

Victim advocates then attempted to reopen the possibility of pursuing lawsuits by challenging the government's position as sole legal representative.

- 3.) Supreme Court Decision, December 1989. The Supreme Court upheld the validity of the "Bhopal Gas Leak Disaster Act of 1985," thereby closing off this possibility.

URL: <http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=7699>

Union Carbide on various points, and victims and advocates on others, then invoked the last legal resort and appealed to the full Supreme Court.

- 4.) Supreme Court Decision, October 1991. The full Supreme Court dismissed all petitions seeking review of the settlement, upheld the civil settlement of \$470 million in its entirety, but set aside the portion of the 1989 decision that quashed criminal prosecutions pending in Indian Courts at the time of settlement. The Supreme Court further:
- a.) Required the Government of India to purchase, out of the settlement fund, a group medical insurance policy to cover 100,000 persons who may later develop symptoms;
 - b.) Required Government of India to make up any shortfall, however unlikely, in the settlement fund from public funds;
 - c.) Specified certain aspects of the mode of administering the settlement fund; and
 - d.) Took up the repeated offers of UCC and UCIL to fund a hospital in Bhopal by instructing them to fund construction and eight years of operating costs of a specialist hospital in Bhopal to be built on land donated by the state government. They agreed to fund the hospital; UCC provided the money from proceeds of sale of its 50.9% stake in UCIL to a third company in addition to the \$470 million settlement payment.

URL: <http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=12603>

- 5.) Supreme Court Decision, December 1986: Although it was not part of the Bhopal litigation, the Indian Supreme Court's December 1986 ruling in *M.C. Mehta and Anr. v. Union of India and Ors.* ("the Sriram Case") is also relevant. In that case, the Supreme Court ruled that a corporation engaged in "a hazardous and inherently dangerous" business is "absolutely liable" for all damage caused by accidents during its operations. This case arose from a leak from an Indian company's chemical plant that caused a few injuries in New Delhi about a year after the Bhopal leak. It was widely viewed as having been decided with the pending Bhopal litigation in mind, though was not directly cited in the rulings endorsing the settlement. It is often mentioned by advocates of discouraging operations – or at least carelessness – by imposing heavy compensatory and punitive damages on multinational corporations operating in developing countries.

URL: <http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=8858>

Update: Further US Litigation related to the Bhopal Disaster

The Indian Supreme Court's 1991 decision did not end the legal wrangling. Continued dissatisfaction with the results left emotions raw. The portion of the 1991 decision reinstating criminal charges against Warren Anderson and 8 UCIL executives and supervisors, and ongoing controversies about cleanup of the plant site suggested further avenues for suit in the USA.

The first effort, a set of cases consolidated into *Janki Bai Sahu v. Union Carbide Corporation and Warren Anderson*, sought to reopen the case under the US Alien Tort Claims Act, which permits civil suits regarding harm done abroad by US nationals or by foreigners to US nationals. The same judge who ruled that the cases should be tried in India heard this case and in the course of ruling on preliminary motions maintained the view that the Indian Supreme Court's ruling disposes of the matter.

See:

- 1.) *Sahu v. Union Carbide Corp.*, 04 Civ. 8825 (JFK) , United States District Court for the Southern District of New York, 418 F. Supp. 2d 407; 2005 U.S. Dist. LEXIS 31202, December 1, 2005, Decided , December 1, 2005, Filed

Result -Plaintiffs, class members, filed a class action complaint against defendants, a corporation and its former chief executive officer (CEO), and alleged environmental pollution in and around the corporation's former plant in Bhopal, India. The class sought recovery for injuries they alleged were sustained by the pollution. All claims except corporate veil piercing are dismissed.

- 2.) *Sahu v. Union Carbide Corp.*, Docket No. 05-6944-cv , United States Court of Appeals for the Second Circuit, 475 F.3d 465; 2007 U.S. App. LEXIS 923; 37 ELR 20018, November 15, 2006, Argued , January 17, 2007, Decided

Result -Carbide's motion to have plaintiff's case for corporate veil piercing dismissed is granted.

More recently, the victims' lawyers have sought to reopen the issue by focusing on post-leak contamination, an issue they claim is not covered by the Indian Supreme Court rulings. The main case here is *Jagarnath Sahu et al. v. Union Carbide Corporation and Warren Anderson et al.*, a class action suit filed in March 2007, seeking financial compensation for costs of cleaning up six individual properties allegedly polluted by contaminants from the Bhopal plant as well as the remediation of property in 16 colonies adjoining the plant. Suit has been stayed pending resolution of appeal in *Janki Bai Sahu* case. This is the legal side of the international activists' campaign against Dow Chemical Company, the current owner of Union Carbide.

This link is to the docket on the case, which indicates its preliminary status:

http://dockets.justia.com/docket/court-nysdce/case_no-1:2007cv02156/case_id-302312/

Western European Policy on Information about Chemical Plant Hazards, 1982-

from Josee van Eijndhoven, "Disaster prevention in Europe" in Sheila Jasenoff ed, *Learning from Disaster: Risk Management after Bhopal* (Philadelphia: University of Pennsylvania Press, 1994) pp. 113-132

[note: references to "Europe" mean Western European countries]

Risk regulation has developed somewhat differently in Europe than in either the United States or India. Two important explanatory variables are differences in regulatory strategy and differences in the incidents that shaped public attention to hazards. With respect to strategy, most European countries, unlike the United States, require that a license be granted for a chemical plant to start operating. ... A licensing system tends to shift the burden of proof on safety to an early point in time, namely to a moment before operations have started. Debate on the acceptability of a plant's effects on its employees or its environment become part of the process of starting up the plant. A licensing system also shifts the responsibility for the safety of the plant in the sense that the authorities, in granting a license, accept that the plant can be safely operated.

The second difference between Europe and the United States is related to the accidents that have influenced policy. I argue in this chapter that the actual shape of disasters and the perception of their cause and relevance are very important in determining the reaction to them. The major accidents, most notably Bhopal, that helped shape risk management in other parts of the world were not nearly so important in Europe. ... The 1976 Seveso accident stands out as most important from the standpoint of risk regulation in Europe. [At Seveso in northern Italy gasses, including Dioxin, that escaped from a chemical plant contaminated fields, killed animals and injured people for two weeks before local authorities understood the full extent of hazard and ordered a temporary evacuation of the area around the plant.] ...

More generally, the 1970s were a period in which a number of European governments became sensitized to chemical hazards, partly because of disasters but partly also because of a climate that favored a certain amount of industrial regulation, especially with respect to safety at work. The starting point for regulation in many cases was the political debate after an accident in a given country, but accidents in other countries helped to keep the issue on the European agenda. ... On the whole, the safety legislation enacted in Europe in this period consisted mainly of provisions in various nation states and not at the level of the European Community (EC). ...

...Council Directive 82/501/EEC [generally known as the "Seveso Directive"] ... was the first community law requiring environmental information to be provided and exchanged across national frontiers, both among governments and between governments and the public.[1]

The principal aims of the Directive were described in an EC brochure. The first is "to reduce the likelihood of a major accident by requiring industry to incorporate preventive measures into the design of a plant or a manufacturing process from the beginning." The second is "to ensure that if an accident occurs, it does not escalate into a disaster." The Directive requires chemical-plant managers to install control and safety measures and prepare emergency plans. Thus described, the aims of the Directive focus on risk management.

These objectives have been operationalized by information obligations. Industrialists are required to provide to the "competent authority" (that is, to designated national control bodies) [information] that they have identified major accident hazards, adopted appropriate safety measures, and provided the people

working on the site with information, training, and equipment to ensure their safety. As noted above, in many member countries these requirements were already in place, or partly in place, through legislation on health and safety at work or via licensing procedures. ...

... The more innovative part of the Directive, however, is the obligation to provide information to other parties, most notably the public at risk. Under Article 8, member states are required to ensure that people likely to be affected by a major accident are informed, in an appropriate manner, of the safety measures and correct behavior to adopt in the event of an accident.[2] ...

[The 1986 EC study of implementation of Seveso Directive information provision requirements] showed that the guidelines were indeed practicable, as evidenced by their almost complete implementation in the United Kingdom.[3] But it also became clear that countries diverged in their views of the adequacy of existing routes of information provision. Some adopted information policies that can only be characterized as passive. In the Federal Republic of Germany and the Netherlands, for instance, the types of information that should be available about possible impacts of industrial activity were already extensively regulated. In the course of implementing the Seveso Directive, these information requirements were further extended. However, the available information was only indirectly brought to public attention. When a license was filed, people were informed of this fact, which meant they could inform themselves using the available material if they so chose. In the Netherlands people could in principle freely look through the files of a plant, but in practice this material was not easily accessible: it was highly technical in character and often filled many file cabinets. Some measures were adopted to facilitate public access to licenses and their contents [after the rise of citizen environmental activism in the 1970s]. ... Nevertheless, all the information generated during licensing was restricted to people who actively seek it. [In addition,] licensing in most countries is heavily geared toward regulating an activity as it starts and much less toward keeping hazard information up to date. Licensing information also is not adequate to inform people about the most effective precautionary or protective measures to adopt in the event of an accident. ...

European legislation, in contrast to that in the United States, interprets the public's relation to information as a *need* to know rather than a *right* to know. The former implies a right of access only to that information which is needed for a specific purpose, such as self-protection. The latter suggests an open-ended right of access to all information. The right-to-know principle has generally been interpreted as more far-reaching than the need-to-know.

Indeed, during the second revision of the EC Directive, the point was made that information resulting from a right-to-know approach could well be insufficient for purposes of public safety. The insufficiency might arise not only from the fact that too little information was given, although that could and did happen in many cases, but also from the fact that too much information might be given in the wrong way. Unfiltered risk information is often too technical, not sufficiently geared toward the needs and capabilities of lay people, and too cumbersome and difficult to acquire. That is why the Dutch licensing authorities [where licensing requires a public hearing on the application] are obliged to provide a popular version of the licensing requirements in addition to the technical version. More importantly, the EC has explicitly stated that providing information on a right-to-know basis is insufficient, because people do not receive the information that they need to act upon. The Seveso Directive provides not only that people must receive all necessary emergency response information but also that they must be informed in such a way that they can understand the risks they run. If people only get highly technical information, the latter objective is not fulfilled. In the Netherlands, the need-to-know principle has been translated into an obligation to provide information with various amounts of detail to varying groups of people. In risk-communication campaigns,

simple information is provided door to door. The opportunities for acquiring additional information are indicated, and meetings are organized for those who wish to be further informed. For the really committed, the original licensing material and risk analyses are provided.

These attitudes and practices stand in sharp contrast with the presumptions underlying [the US Emergency Planning and Community Right-to-Know Act].[4] ... U.S. law provides only for the disclosure of information, not for its transmission in usable form to the public at risk. In the U.S. framework, the task of interpreting information and mobilizing citizen action accordingly falls to organized public interest activists, such as [local] and national environmental groups. In the EC countries, where the state [that is, government and government agencies] plays a more actively protective role towards its citizens, not merely the provision of information but also its screening and repackaging are seen as appropriately the obligation of the state.

Notes:

1. Council Directive of 24 June 1982 on the Major Accident Hazards of Certain Industrial Activities, 82/501/EEC, *Official Journal of the European Communities* L230, 5 August 1982.
2. Article 8 provides that
 1. Member States shall ensure that person liable to be affected by a major accident originating in a notified industrial activity within the meaning of Article 5 [which defined the types of industrial processes covered by the Directive] are informed in an appropriate manner of the safety measures and of the correct behavior to adopt in the event of an accident.
 2. The Member States concerned shall at the same time make available to the other Member States concerned, as a basic for all necessary consultation within the framework of their bilateral relations, the same information as that which is disseminated to their own nationals.
3. Commission of the European Communities, *Chemical Risk Control in the European Community* (Brussels: Commission of the European Communities, 1987).
4. [added by MJ Peterson] Adopted as Title III of the Superfund Amendments and Reauthorization Act of 1987, it was known as "SARA Title III" or "Title III" until 1991. In that year the US Environmental Protection Agency began using "Emergency Planning and Community Right to Know Act" or "EPCRA" in its documents, reports and publications.

United States Policy on Information about Chemical Plant Hazards, 1987-

from Susan G. Hadden, "Citizen Participation in Environmental Policy Making" in Sheila Jasenoff ed, *Learning from Disaster: Risk Management after Bhopal* (Philadelphia: University of Pennsylvania Press, 1994), pp. 91-112.

The complex interplay between public access to information and participatory institutions is illustrated in the law passed as part of the United States response to the Bhopal accident. One part of the law, which has proved relatively ineffective, established new institutions intended to bring diverse interests together to develop community emergency-response plant. A different part of the law made available startling new information about environmental risks and has led to significant participatory activity. If the new institutions under the former part could be expanded to allow consideration of new the information provided under the latter, a very effective model for citizen participation might evolve.

I argue in this chapter that the lessons learned from Bhopal or any other disastrous event depend very strongly on the existing institutions and political context. Societies, like people, only learn when they are ready....

[During debates about responses to the Bhopal disaster] the Senate Environmental and Public Works Committee adopted a suggestion by Senator Frank Lautenberg of New Jersey that provisions of his Bhopal-inspired bill be incorporated into [the Superfund Amendments and Reauthorization Act]. Thus two different environmental issues, hazardous waste disposal and emergency response to toxic chemicals, became closely tied.

This linkage further complicated an already complex issue. Drawing on experiences in their own states or listening to demands from constituents, members of Congress developed four policy responses to Bhopal: emergency planning and response, emergency notification, right to know, and an emissions inventory. Requirements intended to address each of the four concerns were thrown into the statutory pot as the bill moved through its many committees... Given the complexity of Title III, it should come as no surprise that its multiple purposes were fulfilled with varying degrees of success. ... The statute's absolute distinction between local emergency planning and the federal toxic release inventory (TRI) made it difficult for citizens to obtain all the information about a facility in one place.

Finally, the different actors implementing the law often had very different ideas of the true purpose of the right to know. Emergency-response professionals, who tended to dominate state and local Title III activities, saw the right to know more as an aid to their planning activities than as of direct relevance to citizens. Industry, too, focused on safety and, in response to TRI data, on reducing emissions, believing that the data were generally too technical for citizens. Many public interest groups, in contrast, saw in "right to know" an opportunity to change the power structure in the community, with data providing a hitherto unavailable basis for demonstrating how powerful industries were compromising the health and safety of ordinary citizens. These different perspectives underpinned the inconsistent orientations of the law itself, since each group had the ear of one or more Congressional staff during the long battle over SARA.

Section 313 of Title III requires manufacturing facilities to report their emissions of about 350 hazardous chemicals. ... The data are entered, by law, into an electronic database, so that citizens and regulators can identify emissions problems by region, company, facility, or chemical. Publicized by the media and environmental groups, the data have stimulated considerable participation by citizens at every level of government.

However, in almost every case, already-organized environmental groups were needed as intermediaries to make the data usable. The services they performed included knowing what facts were available and how to acquire them; knowing how to use computerized data systems; knowing how to analyze the data and where to find relevant supplemental information; and mobilizing citizens or politicians to achieve desired results.

Without the aid of intermediary groups, even the electronic database created under Title III (called the Toxic Release Inventory, or TRI) is not entirely adequate to the task of providing access to data, because it is difficult to locate and not "user-friendly." Once citizens do acquire data through the TRI, they must interpret it, determine whether risks are a cause for concern, and, if they are, persuade manufacturers to reduce their emissions. Title III does not grant citizens access to the supplementary information needed to interpret the data, although EPA and many private groups are providing such assistance. In short, access to data is but the first step in a complex process of analysis, risk assessment, and mobilizing political participation. Title III concerns only the first step – a necessary one, to be sure, and one that was previously extremely difficult. A wide variety of public interest groups were poised to assist citizens in taking one or more of the later steps.... As public interest groups continued to acquire data, transform it into comprehensible form, and publicize it, four types of policy outcomes became feasible: new laws, emissions reductions, legal actions, and improved enforcement of other environmental laws.

With less than six years' experience in implementing SARA Title III, we can already abstract some important lessons. While information remains an essential component of political power, information alone does not empower the recipients. The nexus between data and action is not obvious to most people; of those who can see a relationship, many do not find an issue sufficiently salient or the cost of acting low enough to merit participation. Various supporting mechanisms are needed, including institutions through which people can act if they wish. Institutions themselves gain strength when people need, use, and act through them, even altering them to suit their purposes. Thus Local Emergency Preparedness Committees (LEPCs) provided an unusual opportunity for a wide range of interests to work together, but their focus on emergency response limited their utility to communities where a spill had recently occurred. Recently, people in some localities have begun to talk about extending the purview of the LEPC to environmental issues other than hazardous materials, a development that would surely increase their vitality and salience.

<end>