

SECOND M.K. NAMBYAR ENDOWMENT
LECTURE 2014
ON
FROM BHOPAL TO SAHA:
THE ELUSIVE PROMISE OF
EFFECTIVE LEGAL REMEDY[†]

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I would like to express my appreciation to Vice Chancellor Ishwara Bhat and his colleagues, for inviting me to deliver the second Shri M.K. Nambyar Memorial Lecture, and to the donor, Mr. K.K. Venugopal whose generosity has made this event possible. I did not have the privilege of knowing Shri Nambyar, but the accounts of his erudition, his vision and his dedication help us to understand his immense contribution to enabling the judiciary to realize its potential as India's innovative trouble-shooter as well as her steadying gyroscope. He did much to erect the constitutional structure within which India's everyday legality can flourish. I hope you will find it fitting to use this occasion to focus on the everyday – to examine the prospects for making legal institutions more responsive and effective in protecting the lives and well-being of ordinary citizens. Obviously that is a goal with many dimensions, but I want to take this occasion – the thirtieth anniversary of the Bhopal disaster – to focus on an aspect that gets little attention, the protection of citizens from injury due to negligence and indifference.

As a much indulged guest, let me begin by expressing my sincere gratitude for the gracious hospitality of NUJS. It is a great pleasure to be your guest. But I didn't come all this way just to say some nice things and go home. I have been coming to India and thinking and writing about India's

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legal system for a long time – more than half a century, it appears, though that seems hardly possible. This doesn't give me insight superior to those of you who are immersed in it and committed to it in a way I can never be. But my marginality does give me a different, outsider perspective – one that might usefully supplement or even challenge the insights of you insiders. So for what it's worth I am going to take this opportunity to tell you how things look from my perspective. My account may not always be flattering, but I wouldn't be here if I didn't admire and respect so much of what India has accomplished in these sixty some years since Independence – really a short time, just a moment in the arc of a great civilization. But obviously there is much more to be done.

I could be mistaken, but I am an irrepressible optimist. I cannot suppress my conviction that there are prospects for a better future and that those gathered in this room represent a significant component of the capacity to realize them. It is in that spirit that I address you today and I hope that my remarks will be received with the wonderful receptiveness that it has been my good fortune to find here – a receptiveness that need not exclude critical feedback from your side. Basically, I want to use this opportunity to set in motion a conversation that I think is long overdue.

It is a conversation about what happens when people get hurt – by accidents, by negligence, by indifference. How can legal institutions better help to comfort the victims and to make such occurrences less frequent? This is, I submit, a conversation about the constitution – not just in the technical sense of the obligations of government under Art. 21, but in the broader sense of the fellow-feeling, mutual recognition and shared destiny that tie the citizens of India to one another. In talking about the law of torts, we are not only talking about a device for compensating the injured and taxing the injurers, but we are talking about a site for examining, elaborating and dramatizing the responsibilities of human fellowship that constitute the sinew of a democratic society.

I. THE BHOPAL DISASTER

In just a few days it will be 30 years since the terrible gas leak at the Union Carbide plant in Bhopal, which ranks as the world's greatest industrial disaster.¹ Bhopal posed a challenge to the Indian legal system, which, most observers agree, did not acquit itself well (nor, I should add, did the

¹ Coincidentally, the Union Carbide Corporation, then known as Union Carbon and Carbide, was responsible half a century earlier for the greatest industrial disaster in the history of the United States, the death from silicosis of many hundreds of workers in the construction of the Hawk's Nest tunnel in West Virginia. See Marc Galanter, *Bhopals, Past and Present: Changing Responses to Industrial Disaster*, 10 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 3-22 (1990); MARTIN CHERNIAK, *THE HAWK'S NEST INCIDENT : AMERICA'S WORST INDUSTRIAL DISASTER* (1986).

American). Bhopal was the biggest and worst of many injurious events, but mini-Bhopals – building collapses, mass poisonings, fires in hospitals and schools – occur with dismaying frequency. To respond to disaster in a way that *both* assuages the harm *and* reduces the risk of similar events in the future is a goal that grows more challenging as changing technology both increases the scale of potential harm but also provides tools for prevention and remedy.

Since many or most of you may not be chronologically qualified to recall those events, let me briefly summarize. In 1968, the Union Carbide Corporation, an American multi-national with subsidiaries throughout the world, built a chemical plant in Bhopal through its Indian subsidiary, Union Carbide India Ltd. (UCIL).² UCIL had long made pesticides, batteries and other products at fourteen plants in India. The UCIL plant in Bhopal was granted a license to manufacture pesticides in 1975.³ Starting in 1980 the plant produced methyl isocyanate (MIC), an ingredient in insecticides. This was the time of the Green Revolution in agricultural productivity. It turned out that the pesticides produced at the Bhopal plant were less successful than others. In the early 1980s, the profitability of the Bhopal plant was declining and UCC headquarters in Connecticut was considering dismantling the plant and moving it to Indonesia. Maintenance was spotty, and there were several small accidents involving MIC in the months preceding the night of Dec 2, 1984⁴ - when an explosion released a deadly cloud of MIC that killed over 2000 immediately and eventually many times that number and injured many thousands.

It was the most lethal industrial disaster ever and was the focus of horrified attention throughout much of the world, not least in the US because

² To be exact, UCIL was a subsidiary of UCC (which owned 50.9% of the stock), and was managed by another subsidiary of UCC, Union Carbide Eastern, based in Hong Kong.

³ For a recent update, see *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, AMNESTY INTERNATIONAL (2014). For further insight into the events, see S. Muralidhar, *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims' 'Twenty Years' of Courtroom Struggles for Justice – Bhopal Gas Leak Disaster – Legal Issues*, 26 IELRC WORKING PAPER 2004/5 (2004), <<http://www.ielrc.org/content/wo405.pdf>>; JAMIE CASSELS, *THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL* (1993); SHEILA JASANOFF, *LEARNING FROM DISASTER: RISK MANAGEMENT AFTER BHOPAL* (1994); SANJOY HAZARIKA, *BHOPAL: THE LESSONS OF A TRAGEDY* (1988). On the legal maneuvering in the early phase, see Marc Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEXAS INT'L L. J. 273-294 (1985). A vast trove of material on the early years of the Bhopal litigations may be found in the three volumes issued under the auspices of the UPENDRA BAXI & THOMAS PAUL, *MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE*, INDIAN LAW INSTITUTE (1986); UPENDRA BAXI, *INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE* (1986); UPENDRA BAXI & AMITA DHANDA, *VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE* (1990).

⁴ Accidents had reportedly taken place in December 1981, as well as January, March and October 1982. An internal security audit conducted in May 1982 identified 61 hazards, included 30 major ones. A local lawyer had served a legal notice on 4-3-1983 highlighting health risks, in reply to which UCIL denied the allegations. See S. Muralidhar, *Supra* note 3.

of the American connection. I cannot hope to summarize the contents of the small library that has been written about the gas leak, its causes and its aftermath. What I would like to do today is to provide a skeletal account of the course of the litigation about the Bhopal disaster and then to examine briefly the encounter of the Indian legal system with several more recent instances of negligent infliction of fatal injury.

In the days following the explosion, amid the confusion in Bhopal, a flock of American plaintiffs lawyers alighted in Bhopal to sign up thousands of clients for anticipated lawsuits in the US; thousands of suits were filed on their return. The Government of India, having equipped itself with statutory authorization as the exclusive representative of the victims,⁵ also decided to pursue the case in the United States.⁶ All the Bhopal cases, the Government's and the private attorneys', filed in Federal Courts in various parts of the United States, were consolidated for pre-trial proceedings in the Southern District of New York.⁷

Union Carbide moved to dismiss the case on grounds of forum non conveniens – that is a rule of jurisdiction, not a constitutional rule, that empowers a court to reject a case on the grounds that it would be more appropriately pursued in an available alternative forum. The parties submitted their arguments on the forum issue. (I must disclose that I was an expert witness for the Government of India on this issue.⁸); Alas, Judge Keenan was more persuaded by the assurances of Union Carbide's experts, Nani Palkhivala⁹ and J.D. Dadachanji¹⁰, eminent advocates who professed outrage at the notion that the Indian system was incapable of timely and effective resolution of the case.

⁵ Under the authority of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (Act 21 of 1985).

⁶ It seems improbable to me that, if the prospective defendant had been an Indian company, the Government's reaction would have taken the form of a civil lawsuit.

⁷ When civil actions involving common questions of fact are pending in different districts, the Judicial Panel on Multidistrict Litigation is empowered to transfer all such actions to any particular district for consolidated pre-trial proceedings (see 28 US Code § 1407). The Judicial Panel in this case transferred the cases to the Federal District Court for the Southern District of New York, before Judge F. Keenan, who was assigned the case by lot. Judge Keenan, whose pre-judicial experience was mostly on the criminal law side, was a relative newcomer to the Bench, having joined the Court in September 1983. In conformity with the Court rules, all subsequent Bhopal-related matters were assigned to Judge Keenan.

⁸ See *Affidavit of Marc S. Galanter*, in, UPENDRA BAXI & THOMAS PAULO, MASS DISASTERS AND MULTINATIONAL LIABILITY 161-221 (1986).

⁹ *Affidavit of N.A. Palkhivala in Support of Defendant's Motion for Dismissal on Forum Non Conveniens Grounds*, in, UPENDRA BAXI & THOMAS PAULO, MASS DISASTERS AND MULTINATIONAL LIABILITY 222-229 (1986). These assurances departed from his earlier assessment. Just 12 months earlier, Nani Palkhivala had told *TIME* Magazine that, "If the suit were filed in India, the judgment would be in the next century". See *The Great Ambulance Chase*, *TIME* MAGAZINE, 24-12-1984.

¹⁰ *Affidavit of J.B. Dadachanji in Support of Defendant's Motion for Dismissal on Forum Non Conveniens Grounds*, in, UPENDRA BAXI & THOMAS PAULO, MASS DISASTERS AND MULTINATIONAL LIABILITY 72-84 (1986).

The Government's suit was dismissed on grounds of forum non conveniens and sent to India.¹¹ Once there, the Government was reluctant to introduce any procedural reforms or establish a special tribunal, fearing that such innovation might provide ground for American courts to decline to enforce the Indian judgement. The case was assigned to the District Court in Bhopal; the only departure from routine was that a judge was assigned to deal with this case exclusively.

After several years of inconclusive grappling, the Bhopal District Court in December 1987 ordered interim relief – a rarity in tort cases – which led to an interlocutory appeal to the High Court of Madhya Pradesh, which upheld it, leading to a further appeal which put the matter before the Supreme Court of India. At that moment, in February 1989, the Government of India concluded a settlement with Union Carbide for 470 million Dollars, which was immediately endorsed by the Supreme Court. The amount was little higher than what UCC had offered earlier, but far short of the 3.1 billion Dollars damages that the Government was claiming. It is not clear to me why the Government settled for so little. One theory is that it was pushed by an acute shortage of foreign exchange.¹²

The Government and many observers, including some in the judiciary, justified the February 1989 settlement of the Bhopal case as beneficial to the victims by comparing it with the results of further litigation that would have lasted “anywhere from 15 to 25 more years.”¹³ 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 unalterable character

¹¹ The case was dismissed with the following conditions: “1. Union Carbide shall consent to submit to the jurisdiction of the courts of India, and shall continue to waive defenses based upon the statute of limitations; 2. Union Carbide shall agree to satisfy any judgment rendered against it by an Indian court, and if applicable, upheld by an appellate court in that country, where such judgment and affirmance comport with the minimal requirements of due process; 3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs.” See *Union Carbide Corp'n. Gas Plant Disaster at Bhopal, India in December 1984, In Re*, 634 F Supp 842 (SDNY 1986). On appeal to the United States Court of Appeals for the Second Circuit, condition (3) above was held to be erroneous, and the provision for discovery was modified in the following form: “we direct that the condition with respect to the discovery of UCC under the Federal Rules of Civil Procedure be deleted without prejudice to the right of the parties to have reciprocal discovery of each other on equal terms under the Federal Rules, subject to such approval as may be required of the Indian court in which the case will be pending.... In the absence of such a court-sanctioned agreement, however, the parties will be limited by the applicable discovery rules of the Indian court in which the claims will be pending.” See *Union Carbide Corp'n. Gas Plant Disaster at Bhopal, India in December 1984, In re*, 809 F 2d 195, CA2 (NY), 1987 (14-1-1987).

¹² *India cannot go back on settlement : Bhardwaj*, THE HINDU, 26-6-2010. (H.R. Bhardwaj was Minister for State for Law at the time of the settlement. He notes the need for foreign exchange at the time).

¹³ *Bhopal Gas Settlement : Govt. Justifies Amount*, HINDUSTAN TIMES, 8-3-1989.

of the India's legal system foreclosed the possibility of obtaining them before passage of so long a period that the present value of these claims was less than the settlement amount. The features of the system that insured protracted delay were treated as given and unchangeable.

Far from resolving matters, the 1989 settlement fragmented the controversy and diverted the fragments into several channels. Activists won a retraction of the Supreme Court's initial acceptance, as part of the settlement, of the quashing of the related criminal cases¹⁴—which eventuated in the conviction of eight senior Indian employees of the subsidiary UCIL, found guilty of criminal negligence on June 7, 2010¹⁵—some twenty-five years after the explosion. Prominently absent was Warren Anderson, Chairman and CEO of Union Carbide at the time of the disaster, who had flown into Bhopal in the days after the gas leak, was briefly detained, but released and allowed to leave India, never returned, and became the symbol of Union Carbide perfidy. He retired in 1985 lived in relative seclusion until his death at the age of 92 on Sep. 29 of this year, 2014.¹⁶ His absence, symbolic of the “escape” of Union Carbide, has engaged and enraged an unappeased following to this day.

In 1999 Carbide was purchased by the Dow Chemical Company. Campaigns to force Dow to engage in clean-ups of the site continue. Sporadic litigation, attempting to find an American forum for claims about the original explosion or the unanticipated costs of the clean up, has been consistently rebuffed by the U.S. courts, most recently in 2014.¹⁷

In the meanwhile the Government of India's distribution of the settlement funds was both stingy and inefficient. An authoritative report observed that “No claim was settled earlier than a waiting period of 7 years. The adjudicatory process involved over 5 visits of two hours each for the claimant. Ultimately the Judge was able to spend no more than 10 minutes on a case.”¹⁸ Twenty years after the explosion, the Government still retained an amount roughly equivalent to the amount it had distributed to the victims. (This was because the exchange value of the rupee had declined from 12 to the Dollar in 1985 to 43 to the Dollar in 2004). In 2004, the Supreme Court ordered the Government to distribute the remaining funds pro rata to the prior recipients.¹⁹ A decade later, just a few weeks before this lecture, victim organizations,

¹⁴ *Union Carbide Corp'n. v. Union of India*, (1991) 4 SCC 584.

¹⁵ *State of M.P. v. Warren Anderson*, Cr. Case No. 8460 of 1996 in the Court of the Chief Judicial Magistrate, Bhopal.

¹⁶ Douglas Martin, *W.M. Anderson, 92, Dies, Led Union Carbide in '80s*, N.Y. TIMES, 31-10-2014.

¹⁷ See for example, *Sahu v. Union Carbide Corp'n.*, Slip Copy, 2014 WL 3765556, SDNY, 30-7-2014.

¹⁸ S. Muralidhar, *supra* note 3, at ¶ 26.

¹⁹ *Union Carbide Corp'n. Ltd. v. Union of India*, (2006) 13 SCC 321; S. Muralidhar, *supra* note 3, at ¶ 24.

dissatisfied with both the compensation and the cleanup, were holding a hunger strike in Delhi.²⁰

These are only the bare bones of the story. To put that story in context, I would emphasize some additional aspects:

- Bhopal occurred some five years before economic “liberalization” and the new openness to foreign investment. It was also just five years after the end of the Emergency, and the recoil against the courts’ weak response to its excesses. That recoil had stimulated a wave of judicial activism and the birth of public interest litigation.²¹ Courts were taking the initiative to address various unaddressed problems. So the defeatism of the bar and the judiciary’s initial response to the disaster is particularly striking. Apart from the attempt to improvise interim relief, we didn’t see any of the innovative energy of PIL here.
- In the last judgement authored before his retirement in December 1986, Chief Justice P.N. Bhagwati attempted to propound a rule of absolute liability for injuries resulting from hazardous activities of large enterprises.²² This was repudiated by later courts that dismissed his observations as “essentially obiter.”²³
- The reach for an American remedy was the reverse side of a deep pessimism about a remedy in India, coupled with an untroubled (and, in the event, unfounded) confidence in the United States’ legal system and anticipation of enormous recoveries. A few weeks after the gas leak, the Chief Justice of India observed “These cases must be pursued in the United States. It is the only hope these

²⁰ See *Bhopal Gas Leak Victims Begin Indefinite Hunger Strike in New Delhi*, DAILY NEWS & ANALYSIS, 12-II-2014.

²¹ After the Emergency of 1975-1977, the higher courts embarked on an activist expansion of rights, which included “public law remedies” for constitutional torts: illegal detention, custodial violence, police atrocities and even culpable inaction in failing to protect citizens. For an authoritative account, see S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2nd Edn., 2003). Under the writ petition procedure, courts, typically proceeding on the basis of a report of judicial enquiry or other official reports, allowed compensation against the State and sometimes against offending officials, preserving rights to pursue “private law remedies”. Noting cases like *Rudul Sah v. State of Bihar*, (1983) 4 SCC 141 and *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746.

²² *M.C. Mehta v. Union of India*, (1987) 1 SCC 395.

²³ *Union Carbide Corp. v. Union of India*, (1991) 4 SCC 584; *Charan Lal Sahu v. Union of India*, (1990) 1 SCC 613.

unfortunate people have.”²⁴ The export of the legal action to the United States provoked hardly a murmur of dissent at the time. Later, lawyers attacked the Government for its lack of confidence in the Indian legal system, eventually eliciting an apology by the Government for its insult to bar and bench.

- Bhopal provided a vivid reminder of the Indian legal community’s lack of interest in tort litigation. There are many brilliant and highly skilled judges and advocates – but relatively little experience or imagination when it comes to tort.
- To this day public discourse reveals an emphatic focus on criminal liability – i.e., on punishment of the bad guys rather than the compensation and rehabilitation of the victims and the deterrence of future damaging behavior.
- To an outsider the virtual absence of any visible investment of reform energy in the legal control of accidents – in spite of the high accident rate²⁵ – is striking. And not just to outsiders - just two months before this lecture, a bench of the Supreme Court, upholding a liability judgement of the National Consumer Disputes Redressal Commission (in a case involving a 1992 incident where customers were allowed to ride a boat filled over standard capacity, without any provision of life-guards or life-jackets), requested that the Law Commission propose a comprehensive law of tort liability for government agencies.²⁶

All of which brings us to the question of why there is so little resort to tort remedies in India? Tort claims in the courts are inhibited by steep up-front ad valorem filing fees, by long delays and by modest (and frequently difficult-to-collect) awards. Cases arising from car, bus and truck accidents are in the Motor Accident Tribunals; medical malpractice claims are in the consumer tribunals.²⁷ But for the great bulk of non-auto injuries, the most

²⁴ James Stewart, *Why Suits for Damages Such as Bhopal Claims are Very Rare in India*, WALL ST. JOURNAL., 23-1-1985, at 1, Col. 1.

²⁵ According to the National Crime Records Bureau’s report, there were 3, 94, 982 accidental deaths in 2012 alone. See, Ministry of Home Affairs, *Accidental Deaths & Suicides in India: 2012*, NATIONAL CRIME RECORDS BUREAU (2012), <<http://ncrb.gov.in/CD-ADSI-2012/ADSI2012.pdf>>.

²⁶ *Vadodara Municipal Corpn. v. Purshottam V. Murjani*, Civil Appeal No. 3594-3611 of 2010, decided on 10-9-2014 (SC). The judgment was delivered 21 years after the event, which took place in August 1993.

²⁷ For example, see *Kunal Saha v. Sukumar Mukherjee*, OP No. 240 of 1999 in the National Consumer Disputes Redressal Commission, which will be discussed later in this paper. In

prevalent form of relief, if any, is through ex gratia payment—that is, a payment which the giver, either the tortfeasor or more frequently a government body, characterizes as given without legal obligation.²⁸ A report of a building collapse, a railway accident, a chemical spill is typically accompanied by an announcement by some government body that it is giving an ex gratia payment of 2 lakhs or 5 lakhs to families of the deceased, less to the injured. Some of these are one-off; other ex gratia payments are regularized, with terms specified in advance and announced on government websites.²⁹

There is sometimes – we don't know how often – slippage between the announcement and the actual delivery of aid. Such ex gratia payments are welcome indications of concern and willingness to help. But concern can take many forms. These payments, in many cases at least, are paternalistic, unpredictable, not closely related to need, involve no ascertainment or admission of fault, and do not have a discernable connection with prevention.³⁰ Indeed they may insulate potential tortfeasors by reducing the occurrence of demands on them. Recovery from injurers is so rare that legal liability is typically not treated as a factor of prevention. My sense is that there are an increasing number of schemes of ex gratia payment, perhaps a growth of expectation of such payment in many types of injury. If there is concern with determining responsibility for the injury, it is quite separate from the delivery of compensation. But it would seem possible to enhance governmental responsiveness to victims' need by enabling the responding agency to move against the tortfeasor by way of subrogation or assignment.³¹

principle, product liability claims by consumers should be there as well – and they frequently are. It seems that at least some consumer tribunals have also decided cases in which commercial users of products are suing their suppliers. See Shilpi Verma, *Product Liability in India – Award of Damages*, PRODUCT LIABILITY BLOG (11-2-2008), <<http://productliabilityindia.blogspot.com/2008/02/product-liability-in-india-award-of.html>>

²⁸ But there are exceptions. Robert Moog, *The View from Inside India's Consumer Forums: Empowering the Few 1-20* (2014) (unpublished manuscript). In this paper, Robert Moog analysed a sample of 100 cases in each of 14 districts (in 7 States). In one of his districts 17% of the sampled cases were tort claims, 14 of them “actions against the electricity supplier seeking damages from fallen power lines or short circuits that resulted in crop losses, animal deaths, or injuries or death to humans.” This pattern was distinctive; in none of the other 13 districts was there a significant presence of tort claims.

²⁹ See, e.g., the Government of Delhi website.

³⁰ These observations are focused on instances like building collapses, fires and mass poisonings where private negligence is combined with regulatory failure. Some “natural disasters” for which no one is directly responsible may be more appropriate for ex gratia treatment, but there is often an element of responsibility in terms of adequacy of advance planning and response.

³¹ See *Economic Transport Organisation v. Charan Spg. Mills (P) Ltd.*, (2010) 4 SCC 114, para 23.

To summarize, if the response to Bhopal did anything to link tort compensation with deterrence, prevention or the promotion of public safety, it is difficult for me to discern.³²

II. UPHAAR – THE BREAKTHROUGH ALMOST

On Friday the 13th of June, 1997, a fire broke out in the Uphaar cinema in a prosperous area of New Delhi. Exits in the balcony were blocked and unusable as a result of the installation years before of additional unauthorized seats. Fifty-nine theatre-goers died and over 100 were injured. A group of families formed an association and launched a coordinated campaign of litigation against the cinema owners, the Electricity Board that housed a defective generator in the basement of the theatre, indifferent regulators and ill-equipped responders. In November, 1997, the Association, represented by a volunteer lawyer, filed suit in the Delhi High Court (using the writ petition procedure), asking Rs. 22.1 crores compensation and Rs. 100 crore punitive damages (to be used to set up a trauma center). In April, 2003 the court ordered compensation of Rs. 21 Crores to the families of the deceased, and Rs. 1.04 crores to the 104 injured theatergoers. Fifty-five percent of these damages were assessed against the theatre owners and forty-five percent shared by three government units (the Electricity Board, the Municipal Corporation and the Police licensing bureau). In addition, Rs. 2.5 crore (the estimated earnings of the owners from the theatre's unauthorized seats) was awarded to establish an accident trauma service.³³

Five months after the fire, criminal charges were brought against the theatre's owners, multimillionaire brothers Sushil and Gopal Ansal, and 14 others. Trial in the Sessions court commenced sixteen months later in March 1999. Eight years and seven months later, in November 2007, the Sessions Court convicted all of the 12 surviving accused and sentenced the Ansals to two years imprisonment.³⁴ Thirteen months later the Delhi High Court upheld the brothers' convictions but reduced their sentences to one year.³⁵ The Court also upheld the convictions of four of the other accused. The victims' association and the Central Bureau of Investigation (CBI) appealed to the Supreme Court to enhance the sentences of the Ansals. In March 2014, sixteen years

³² See Usha Ramanathan, *Legislation of a Complicit State*, THE STATESMAN, 12-12-2014; Vijay Nagaraj & Nithya Raman, *Are We Prepared for Another Bhopal?*, SEMINAR 244 – ELUSIVE JUSTICE: A SYMPOSIUM ON THE BHOPAL GAS DISASTER AFTER TWENTY YEARS (December 2004) for an account of the post-Bhopal legislation. Ramanathan concludes: "As for corporate manslaughter, which has entered the realm of the probable with the Bhopal gas disaster, the law and the law maker continue to maintain an unbroken silence."

³³ *Assn. of Victims of Uphaar Tragedy v. Union of India*, (2003) 68 DRJ 128 : (2003) 104 DLT 234 (DB). See also Sayantan Chakravarty, *Uphaar Case : Pay a Price*, INDIA TODAY, 5-5-2003, at 44.

³⁴ SC No. 13 of 2007.

³⁵ *Sushil Ansal v. State*, 2008 Indlaw Del 2319.

and four months after the fire, a two judge bench of the Supreme Court upheld the convictions.³⁶

The *Upbaar* civil case looked like the perfect candidate for a breakthrough on the tort liability front. It had rich malefactors, sympathetic victims, public-spirited claimants, apparently incontrovertible fault, and no evidentiary problems.³⁷ It seemed to open a path to tort relief in disasters. Of course it is very much the exception that proves the rule. The event was big news, the plaintiffs were affluent and well-organised and represented by a dedicated lawyer who did not charge for his services. The defendants included governmental as well as private parties; the wrongdoing included violations of statutory duties as well as negligence; the civil proceedings were paralleled by criminal prosecutions for egregious safety violations. The writ petition procedure was pressed into service; the case could suffice without a trial because “the judges felt that a conclusion could be reached on the basis of official reports without going into disputed questions of fact requiring massive volumes of evidence.”³⁸

The discretionary attention of the higher courts is a scarce resource. Public outrage, astute lawyering³⁹ or judicial sympathy can capture such attention for an occasional tort case, but as the late Professor S.P. Sathe concluded “[a]wards of compensation under the writ jurisdiction can be nothing more than tokenism.”⁴⁰

The *Upbaar* civil case failed to be an exemplary shining token. On October 13, 2011, fourteen years and four months after the fire, a two judge bench of the Supreme Court eviscerated the plaintiffs’ 2003 victory in the High Court.⁴¹ The damages were reduced to a fraction of the High Court’s award – for example, payments to the relatives of deceased victims were cut 90% from 2.5 crores to 25 lakhs. The various government agencies which had been found liable were let off (apart from the Delhi Vidyut [Electricity] Board). Once again, the hope for an exemplary legal response to a mass tort proved unfounded.⁴²

³⁶ *Sushil Ansal v. State*, (2014) 6 SCC 173.

³⁷ Samar Halarnkar & Sayantan Chakravarty, *Tickets to Hell*, INDIA TODAY, 30-6-1997, at 30.

³⁸ Rajeev Dhavan, *The Upbaar Case*, THE HINDU, 2-5-2003.

³⁹ Marc Galanter & Nick Robinson, *India’s Grand Advocates: A Legal Elite Flourishing in the Era of Globalization*, 5 HLS PROGRAM ON THE LEGAL PROFESSION RESEARCH PAPER NO. 1240 2013, (1-11-2013), <<http://ssrn.com/abstract=2348699> or <http://dx.doi.org/10.2139/ssrn.2348699>>.

⁴⁰ S.P. SATHE, *supra* note 21, at 144.

⁴¹ *MCD v. Upbaar Tragedy Victims Assn.*, (2011) 14 SCC 481.

⁴² Raveendran, J. held that in case of constitutional torts (sought through a writ petition in the Constitutional Courts), mere inaction or inefficiency by public authorities in performance of statutory duties will not lead to monetary liability, absent proof of malice, conscious abuse or direct negligence. Radhakrishnan, J. further observed that constitutional power to grant compensation is exercised mostly when there is a serious violation of fundamental rights and seldom when there is a mere violation of a statute. *Id.*

In March 2014 a two judge bench of the Supreme Court took up the appeal of the Uphaar criminal case. While it upheld convictions of the Ansals, the judges disagreed about the appropriate penalty. One judge [T.S. Thakur J.] would have restored the original two year sentence of the Ansals; the other [Gyan Sudha Misra J.] would have instead imposed an enormous fine of Rs. 100 crores, earmarked for a trauma center to be “built in the memory of the Uphaar victims.”⁴³ As of this writing the brothers remain free on bail pending convening of a three judge bench to resolve the penalty question. The openness of Judge Misra to a fine (to be utilized on a project related to the demands of the civil case plaintiffs) of a magnitude far greater than the damages that the Supreme Court bench in the tort case had been willing to countenance stands in striking contrast to the reluctance of that bench (in the civil case) to envision damages at a deterrence-generating level.

III. THE SAHA SAGA

In 1986, Parliament passed a Consumer Protection Act that established a nationwide three level system of consumer tribunals to provide remedies for deficiencies in purchases of “goods and services.”⁴⁴ In 1995, the Supreme Court held that medical services were included under the Act.⁴⁵ Thus medical malpractice claimants did not need to invest the court fees and brave the endemic delays of the ordinary courts. Medical claims became a significant part of the caseload of the Consumer Tribunals. From 2008 to mid-2012, the National Consumer Disputes Redressal Commission—the tribunal having original jurisdiction of the largest cases – published 154 judgments in the medical malpractice area, some 8% of the total of all its judgments for that period. The claimants prevailed in about 45% of these cases. The cases took a long time – an average of 11.7 years from filing to final judgement (and the time elapsed crept up steadily from 10.5 years in 2008 to 12.2 years in the first half of 2012). What I found particularly striking was the small size of the judgments. Putting aside for the moment one case that we will come to shortly, the median of the 31 judgments for which I had figures was Rs. 3.5 lakhs; the average judgment was Rs. 5.3 lakhs. The disconnect between the size of the judgments and the time expended is glaring. Should we expect the threat of a judgment of Rs. 5 lakhs some eleven years in the future to generate much of a deterrent signal? Of course, deterrence is generated by the cost, hassle and reputational effects of litigation, not just by the award. But can we believe that these are sufficient to send a signal strong enough to induce more careful behavior?

⁴³ *Sushil Ansal v. State*, (2014) 6 SCC 173, 331. Judge Misra left the court on 27-4-2014 when she reached the compulsory retirement age of 65.

⁴⁴ Consumer Protection Act, 1986 (Act 68 of 1986).

⁴⁵ *Indian Medical Assn. v. V.P. Shantha*, (1995) 6 SCC 651.

Less than a year after the Uphaar fire, an Indian-American couple were visiting their family in Kolkata. He was a medical doctor and she was a 36 year old child psychologist, just embarking on her professional career. Suffering from a rare but treatable skin ailment, she was hospitalized at the AMRI Hospital where she was treated by eminent practitioners. The treatment, which included administration of large doses of an off-label drug (Depomedrol) made her worse and within weeks she was dead. Her husband, Dr. Kunal Saha, complained to the West Bengal Medical Council about professional misconduct. The Council exonerated the doctors. Dr. Saha, along with relatives, brought criminal charges in the West Bengal Courts which resulted in the conviction under S. 304A of the Indian Penal Code, soon overturned by the Calcutta High Court. The decision of the High Court with respect to criminal liability was upheld by the Supreme Court.⁴⁶ Dr. Saha also filed a claim with the National Consumer Disputes Redressal Commission (NCDRC)⁴⁷ against three of the AMRI doctors for medical negligence, asking for 77 crore. In 2006 his case was rejected by the Commission. Saha represented himself in all these proceedings – an undertaking costly in many ways—he made some 50 round trips between the US and India, went through bankruptcy in the United States, and failed to obtain tenure in his academic post in Cincinnati.⁴⁸

In 2009 the Supreme Court reversed the decision of the NCDRC, held the doctors liable, and remanded the case to the Commission to determine the amount of compensation.⁴⁹ In October 2011 the Commission awarded Dr. Saha 1.5 Crores.⁵⁰ On appeal to the Supreme Court on the question of the compensation amount, the Court directed the doctors and the Hospital to pay a total of 6.08 Crores along with 6% interest per annum, which nearly doubled the amount.⁵¹

What does it tell us that the breakthrough came not in a mass injury case but in a classic one-on-one (we might say) claim of a single high status plaintiff suing several individual doctors and a hospital? The elevated damages were based on the victim's expectation of a long career at a high American income. In that respect, the configuration in *Saha* is a curious reversal of Bhopal, where we had an American perpetrator and Indian victims; now we have Indian perpetrators and an American (that is, Indian-American) victim. The Bhopal settlement dramatized the low monetary equivalent of Indian lives; *Saha* displays the high monetary equivalent of an Indian life transmuted into

⁴⁶ *Malay Kumar Ganguly v. Sukumar Mukherjee*, (2009) 9 SCC 221.

⁴⁷ *Kunal Saha v. Sukumar Mukherjee*, Consumer Case No. 240 of 1999.

⁴⁸ Saha filed a claim in the United States against his employer, the Ohio State University, due to the denial of his tenure. It was dismissed both by the trial court and the Court of Appeals. *Saha v. Ohio State University*, 2011 Ohio 3824.

⁴⁹ *Malay Kumar Ganguly v. Sukumar Mukherjee*, (2009) 9 SCC 221.

⁵⁰ *Kunal Saha v. Sukumar Mukherjee*, Consumer Case No. 240 of 1999, decided on 21-10-2011 (NC).

⁵¹ *Balram Prasad v. Kunal Saha*, (2014) 1 SCC 384.

an American one. Can this ample evaluation of life be transferred back to India?

The amount of damages raises tricky questions of valuation in a society of vast inequality. Would expansive tort damages based on monetary loss reinforce inequality?⁵² How could damages be arranged to avoid aggravating existing inequalities? Would it be better to rely on a schedule of payments? Would delivery of such payments by courts as deserved compensation be better than distribution by governments as *ex gratia* patronage?

IV. DELAY

So long as there is no effective reduction in delay the presence of enlarged substantive rights and the award of more substantial damages promises to have little effect. The tort problem is in good measure a procedure problem.

The problem of delay is not a new one. Over the past century there have been numerous schemes to attack delay. Most recently, in October 2009, the then Union Minister for Law and Justice launched a “National consultation for strengthening the judiciary toward Reducing Pendency and Delays.”⁵³ In June, 2010 the Minister announced a “National Litigation Policy to reduce the cases pending in various courts in India under the National Legal Mission to reduce average pendency time from 15 years to 3 years”⁵⁴. The National Judicial Data Grid (repository of judicial data) project and the National Mission for Justice Delivery and Legal Reforms (for improvement in infrastructure) have been in operation. A “National Court Management Systems (NCMS): Policy & Action Plan” was released by the Chief Justice of India on September 27, 2012. The Plan specified that:

*“A comprehensive implementation plan for NCMS [National Court Management Systems] shall be prepared within 2 months of establishment for consideration of Hon’ble the Chief Justice of India. The implementation plan shall entail not only how National Court Management Systems will be established but how it will be institutionalized and sustained. It will identify all resource requirements for the same.”*⁵⁵

Easier said than done. This plan to create an implementation plan seems to have run aground. In April, 2013, four years after the first sightings of this

⁵² Richard Abel, *A Critique of Torts*, 37 UCLA L. REV. 785.

⁵³ Held on 24th and 25th October, 2009, at Vigyan Bhawan, New Delhi.

⁵⁴ See Ministry of Law and Justice, Press Information Bureau (GOI) Release (23-6-2010).

⁵⁵ Supreme Court of India, National Court Management System: Policy & Action Plan II (27-9-2012), <<http://supremecourtindia.nic.in/ncms27092012.pdf>>.

initiative, Mohan Parasaran, the Solicitor General of India, told a legal reporter “[t]he committee [to monitor the National Litigation Policy] met only on a few occasions and gave some recommendations. Thereafter there has not been any meeting of minds.”⁵⁶ A tardy response to a Right to Information application revealed that the “said policy has not yet been approved by the Government.”⁵⁷ In November 2014, Sadananda Gowda, the Union Minister for Law and Justice announced once again that a National Litigation Policy would be formulated to avoid “unnecessary litigation”.⁵⁸

As far as I can tell there is no indication in government reports, professional sources, or press accounts of the formulation or implementation of this policy or of any effect on the duration of civil litigation or the volume of cases pending in the civil courts. In the five years since this “policy” was brought forward, there is no evidence of a decrease in delay of civil cases or of any institutional changes designed to accomplish such a decrease.

What can we learn from this about the prospects for reform of civil justice? Such reform, it strikes me, needs at least two things. One is a plausible program; the second is a constituency that is willing to invest political resources in its realization. In the case of civil justice reform – and in particular the development of effective tort law –neither of these is in evidence.

⁵⁶ This was during an interview by V. Venkatesan, a legal reporter for the prominent news magazine *Frontline*: (V. Venkateswan): The National Legal Mission aims to reduce the average pendency time from 15 years to three years. How far has this been achieved?

(Mohan Parasaran): To be frank, that has not been achieved. There has been an increase in the rate of disposal and awareness.

(V. Venkateswan): The Government appointed an empowered committee to monitor the implementation of the policy, and you are also an ex-officio member of it. What was been your experience with this committee?

(Mohan Parasaran): The Committee met only on a few occasions and gave some recommendations. Thereafter there has not been any meeting of minds.

In the course of the interview, the Solicitor General conceded that the litigation policy had not yet been approved by the Government. He commented that “Even though the same has not been approved, it was widely publicized in 2010 when it was launched, and it has been at the back of the Government’s mind.” *A People’s Court*, *FRONTLINE*, Vol. 30 (8), 3-5-2013.

⁵⁷ In November 2013, nine months after a retired government employee filed an application under the Right to Information Act to find out what had become of the National Litigation Policy, the Central Information Commission ordered the Law Ministry to respond. *Kantilal Bafna v. Ministry of Law & Justice, Dept. of Legal Affairs*, Central Information Commission Case No. CIC/SS/A/2013/000361, decided on 6-11-2013. The then Union Law Minister, Dr. Ashwani Kumar, had earlier stated in the Lok Sabha that the policy had not been approved by the Government yet (in response to unstarred question no. 4064; answered on 21-3-2013).

⁵⁸ Ministry of Law & Justice, Enactment of National Judicial Appointments Commission Bill on Top Priority, says Union Law Minister, PRESS INFORMATION BUREAU, (19-11-2014). The Minister also stated that the Government would prioritise setting up of alternate dispute resolution mechanisms, e-courts, repeal of redundant laws, and appointment of more Judges. This policy has not been approved by the Cabinet.

V. THE FUTURE: A SECOND COMING OF TORT LAW?

I have argued elsewhere that there is no foundation (as measured by per capita court use) for the widespread belief that India is a highly litigious place.⁵⁹ The courts in India are congested and slow not because there are so many cases but because there are comparatively few courts⁶⁰ and because of deeply ingrained wasteful patterns of indulging delay.⁶¹ In the area of personal injury, there is an evident unfulfilled demand for remedies; when there is access to a usable procedure, even a flawed one, (as in the Motor Accident Claims Tribunals, in the Consumer Tribunals for medical malpractice, and in the High Courts' writ jurisdiction for constitutional torts), there is readiness to make claims about injuries.⁶² And in at least some instances where there is persistent demand for remedies; courts have been responsive and inventive in devising them. Because the district courts have not been a viable forum, most of the action is elsewhere – in tribunals, in the writ jurisdiction, and in the realm of *ex gratia* payments, with some spillover into the criminal process. But low rates of filing claims, long delays and meagre awards limit the preventive effects of this litigation. On the whole those who create or ignore dangerous conditions are allowed to buy their way out of responsibility for negligence at bargain rates. Where claimants brave the obstacles to bring claims, judges often seem so fearful of bestowing windfalls that they keep the level of awards too low to project strong deterrent signals.⁶³

Accidental injuries in India seem to be caught in a vicious cycle in which low damage awards and low probabilities of having to pay them allow the persistence of dangerous conditions and activities, leading to more uncompensated or undercompensated injuries. One may imagine a future in which

⁵⁹ Marc Galanter, "To the Listed Field...": *The Myth of Litigious India*, 1 JINDAL GLOBAL L. REV. 65FF (2009).

⁶⁰ The number of Judges per 100,000 capita in India is 1, compared to 10.4 in the United States and 6.6 in England & Wales. Civil law countries like Germany and France have 27.1 and 10.7 Judges respectively. *Id.*

⁶¹ A long series of accounts highlighting patterns of delay in the courts include Panchkouree Khan, *The Revelations of an Orderly: Being an Attempt to Expose the Abuses of Administration by the Relation of Everyday Occurrences in the Mofussil Courts* (Kesslinger Publishing, 2010) (1849), the *Civil Justice Committee Report, 1925* [1925] known as the Rankin Committee Report, especially 26-42, and *77th Report on Delays and Arrears in Trial Courts*, LAW COMMISSION OF INDIA (1978).

⁶² Of demand for tort remedies, a recent study of consumer forums by Robert Moog provides mixed indications. He notes the low rate of use of these of these forums. On the other hand, the consumer forum in one of the districts in his study has a robust tort docket. See note 27 above. On product liability litigation in the Consumer Courts, see Shilpi Verma, *Product Liability in India – Award of Damages*, PRODUCT LIABILITY BLOG (11-2-2008), <<http://product-liabilityindia.blogspot.com/2008/02/product-liability-in-india-award-of.html>>.

⁶³ Cf. the comparable problem in China where there is rising resort to tort recovery, but compensation is far less than actual losses, Wei Zhang, *The Evolution of the Law of Torts in China: The Growth of a Liability System* (15-8-2014), <<http://ssrn.com/abstract=2514951> or <http://dx.doi.org/10.2139/ssrn.2514951>>.

rising expectations will transform this to a virtuous cycle in which significant awards will provide incentive for more claims and this enhanced litigation risk will inspire preventive measures. The challenge is to develop patterns of more timely, more generous, and more effective awards. Is there a way to get there from here?⁶⁴

What sort of reform am I thinking of? Perhaps overall reform is too much to bite off—not only difficult to bring about, but frankly it is not clear what will work. We shouldn't be afraid to admit that we don't have a ready-made solution waiting to be implemented if only other people would cooperate. My guess would be that good substantive tort law is necessary but not sufficient. If cases take 15 years and produce paltry recoveries, even the best designed reforms of substantive tort law are unlikely to have substantial effect on safety practices. What is also needed is procedural reform – not just new procedural rules, but new practices. But how do we know what will work?

I would propose an experimental approach that is both more modest and more adventurous than a comprehensive all-India program of reform. Imagine that there were some designated demonstration districts— or better yet, one or more states—that, would experiment with possible solutions, like an agricultural program testing new seeds and techniques, investing in better-trained personnel, and monitoring the results of the new policies. Such initiatives might include continuous trials, limited appeals, monitoring the enforcement of judgments, contingency fees⁶⁵ or conditional fees (with or without supervised ceilings), joinder of similar cases into “class actions,” and measures to eliminate toleration of delay. We do not know which (if any) of these could make a consequential difference. One may imagine different experiments in different localities. One aspect of this open experimentation would be to enlist the knowhow, energy and imagination of lower court judges, an untapped resource in most reform schemes.⁶⁶ I could imagine an important role for law student interns to assist courts and in implementing and monitoring such programs.

⁶⁴ A Supreme Court bench recently called for the Law Commission to prepare a comprehensive law of tort for government agencies in *Vadodara Municipal Corpn. v. Purshottam V. Murjani*, Civil Appeal No. 3594-3611 of 2010, decided on 10-9-2014 (SC). I am arguing that while across-the-board statutory reforms are desirable, they might better be delayed to a later point in the reform process when experimentation has generated some shared understanding of which reform proposals work and which don't.

⁶⁵ In spite of the prohibition of such provisions, fee arrangements of this type are not unknown at present. I believe it would be greatly advantageous if they were open, recognised, and subject to regulation.

⁶⁶ On the problems of pursuing remedies in the lower tiers of the judicial and administrative system and the possibilities for making the lower courts effective, see Jayanth Krishnan et al., *Grappling at the Grassroots: Access to Justice in India's Lower Tier*, 27 HARV. HUM. RTS. J. 151 (2014).

The presence of such “demonstration districts” should not discourage courts elsewhere from pushing the tort envelope. Judges throughout the system should be encouraged to regard developments in these districts as possible models and to see how those developments might be applied even without the statutory frame that covers the experimental districts.

Enhanced tort recovery may contribute to reducing the rate of injuries, but optimum results require that it be combined with a mix of other preventive measures—reliable inspection, licensing, requirements of improved physical facilities and better education. But setting of behavioral standards and monetary recovery are areas where the courts play a primary role. And what courts do can stimulate some of these other developments.

To sum up, my argument is this. First, the present situation in India is one of too little deterrence of tortious conduct. Second, enhanced recovery of damages from violators of safety standards could have a useful deterrent effect as well as providing deserved help to the injured. Third, to produce such effects, recovery needs to be both substantial and quick. Fourth, to make recovery substantial and quick requires thoroughgoing reform of judicial and professional practices. Fifth, exactly what those reforms should be is not presently known. Sixth, a period of experimentation and pilot projects could advance our understanding. Seventh, there is ample talent to devise such projects. And of course, reforms in this area might provide useful lessons for more general reform.

Identifying rules and practices that could generate optimal deterrence of harmful practices is only half the battle. The other (and more challenging) half is institutionalizing such rules and practices in a setting where potential defendants are accustomed to avoiding accountability and lawyers are accustomed to the existing inefficient system of civil litigation. Institutionalizing a new tort regime is particularly challenging because the immediate beneficiaries of a better tort regime are a diffuse constituency for whose members exposure to the risk of tortious injury is not a salient concern before something bad happens. Hence the “the interests of potential victims in safety and prevention are poorly represented in the political process,”⁶⁷ whereas potential tort-feasors are more likely to be aware of the stakes and more capable of political action in relation to those interests. Given this distribution of incentives to action, tort may be an issue in which initiatives by judges (not just higher court judges but also judges in the trial courts), supported by researchers, NGOs and bar groups, are of vital importance.

⁶⁷ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* 174 (1994).