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BALANCING THE SCALES:**Navigating the Thin Line Between Corporate Accountability and Liability in
Environmental Torts**Anushree Kumar¹ & Harshvardhan Yadav²**ABSTRACT**

This paper was born out of the question: Is holding someone liable even after they followed all the rules, for an accident really acceptable in the contemporary world? The current landscape of environmental torts involves strict adherence to the Principle of Absolute Liability in case of industrial accidents in various countries. However, following this approach presents challenges, especially when the status quo would continue leading to injustices and hindering industrial innovation. This paper advocates for a re-evaluation of absolute liability proposing reforms while balancing environmental responsibility by taking case studies of different countries and drawing comparisons. The existing literature largely supports absolute liability. Despite the consensus, the arguments have overlooked the complexities and drawbacks of it. The businesses face significant financial burdens even if they took reasonable precautions.

By applying a fresh theoretical lens, this paper aims to offer a new perspective on the intersection of industrialisation and the international environmental laws emphasising on how industries play a significant role in achieving the sustainable development goals. It analyses the economic impact of absolute liability on industries. Corporate accountability is not the same as liability. We have tried to define this thin line between accountability and liability. Further, it also examines the effectiveness of Corporate Social Responsibility initiatives and whether absolute liability aligns with the modern day ethical standards. Taking into account the international standards and treaties related to environmental laws, the paper explores how various principles under the International Environmental Laws like the Polluter Pays Principle and Negligence-based liability can be applied alternatively to the principle of absolute liability. This will contribute to the ongoing discourse, urging policymakers, stakeholders, and legal scholars to deliberate and form a more adaptable legal framework, navigating towards a future where accountability is not synonymous with liability and environmental responsibility is balanced with industrial innovation. Sustainable industrial

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practices and technologies can help minimise negative impacts, enriching economic growth without compromising the environment. The concept of Green industrialization addresses the existential challenge of climate change and aims to balance growth with environmental conservation.

INTRODUCTION

Environmental torts pose a critical challenge at the international level. Environmental degradation has become a pressing global concern, prompting scrutiny of corporate actions and analysing their implications. While laws exist to address environmental damages, complexities arise in determining the extent of liability. India gave birth to the Absolute Liability Principle under torts which holds any enterprise absolutely liable for the damages caused. This principle is unjust as in any case of an accident also the enterprise will be held liable even though it wasn't their fault. Despite considerable attention to International Environmental Law and Corporate Accountability, there remains a huge gap in understanding the nuanced relationship between the two and their applicability in determining liability and accountability. This study dissects the intricate dynamics of environmental torts, shedding light on the Absolute Liability Principle and their legal implications, political theories, economic implications. By examining case studies and analysing legal precedents, the study aims to find a middle way rather than an extremist law.

KEYWORDS

absolute liability, environment, accountability, international law, negligence

CASE STUDIES

USA

For the purpose of this case study the incident of the Exxon Valdez Oil spill has been considered. It was one of the worst environmental disasters in the USA.

On March 24, 1989, the oil tanker Exxon Valdez stranded in Prince William Sound, Alaska. It spilled 11 millions gallons of oil. The spill affected more than 1300 miles of shoreline, killing 2,50,000 seabirds, 2,800 sea otters, 300 harbour seals, 250 bald eagles, 22 killer whales and billions of salmon.³ In October 1989, Exxon sued the State of Alaska for alleged interference

³ NOAA Damage Assessment, Remediation, and Restoration Program (DARRP), Exxon Valdez Oil Spill, <https://darrp.noaa.gov/oil-spills/exxon-valdez> (last visited 8th Feb 2024).

in spill cleanup. The legal battle resulted in a 5 billion USD⁴ judgement which was subsequently reduced to 507.5 million USD. Exxon argued that the incident was an accident but the plaintiffs believed it to be the company's fault. Finally, Exxon paid the reduced amount in 2009 as compensation.⁵ The US Court did not require the principle of absolute liability to demand compensation. It already has various other environmental laws that hold the enterprises liable such as

- *Environmental Protection Act, 1990*
- *Water Resources Act, 1991*
- *Coal Mining Subsidence Act, 1991*

Canada

The Mount Polley mine disaster was one of the largest environmental disasters Canada has faced till date. On 4th August 2014, the Mount Polley's tailings facility experienced a dam breach and tailings spill.⁶ The investigation report showed a layer of glacial till under the dam.⁷ It released an estimated 25 billion litres of contaminated materials into the water bodies in its vicinity. The company responsible was Imperial Metals. Despite the grave concerns and severe damages no fines or charges were initially assessed. In 2018, the three engineers who worked on the tailings were charged by their professional association by negligence and unprofessional conduct.⁸ Canada did not lay down any liability on the company involved but the individuals who were responsible.

Canada also follows the absolute liability principle but not under torts. It is a provision under the criminal law. The Supreme Court of Canada defined absolute liability in *R v. City of Sault Ste-Marie*⁹, as an offence where the accused cannot raise the point that he was free of fault and the defence of due diligence and mens rea. Section 7 of the Canadian Charter of Rights and Freedoms¹⁰ holds absolute liability as unconstitutional. Canada never used the principle of absolute liability under torts or environmental law. Its application under criminal law is only highly criticised.

⁴ George Erb, Exxon Valdez Case Still Twisting Through Courts, Puget Sound Bus. J., Nov. 3, 2000.

⁵ News and Information, "Exxon Qualified Settlement Fund, archived from original on August 26, 2013, retrieved March 21, 2013.

⁶ CBC News, Mount Polley Mine Tailings Spill: Imperial Metals Could Face \$1M Fine, CBC News (Aug. 6, 2014), retrieved Aug. 8, 2014.

⁷ Globe & Mail, Mount Polley Spill Taints Alaska-B.C. Mine Relations.

⁸ CP, "Three Engineers to Face Disciplinary Hearings in Mount Polley Dam Collapse," Vancouver Sun (September 26, 2018), Retrieved September 27, 2018.

⁹ *R v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299 (Can.).

¹⁰ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, § 7.

CRITIQUE OF ABSOLUTE LIABILITY PRINCIPLE

1. Liability for non-culpability

Economic liberalism and rugged individualism suggested that strict liability was a moral principle, and that it was unjust to hold an individual liable for causing harm that could not have been avoided by exercising reasonable care.¹¹

2. Reduces incentive for Due Diligence

Absolute Liability reduces the incentive for industries to show due diligence in preventing accidents, if there is no threat of liability and they would be held absolutely liable even without any fault, this would lead to a lack of motivation for organisations and industries. The Preventive Theory of Punishment¹² posits that punishment should deter future such incidents. But absolute liability punishes an enterprise even in cases deemed as accidents, which does not deter future such incidents as the enterprise never had control over the incident.

3. Lack of Deterrent Effect

Critics argue that absolute liability is not an effective deterrent. If the party held liable had no control on preventing harm and the damage was an 'accident', imposing liability might not lead to improvement in practices or behaviour. According to the Deterrent Theory of Punishment¹³ Punishing the violators of the law also discourages other people from committing similar offences. In the case of absolute liability, enterprises do not have control on external factors which may cause harm, so it does not have the deterring effect expected.

4. Inflexibility

Absolute liability may be too strict and inflexible. It does not consider the circumstances leading up to the event. This lack of flexibility can be seen as unfair in situations where the harm was unforeseeable or where the responsible party took reasonable precautions.

5. Burden on Small Businesses

¹¹ Sweet and Maxwell, Clerk and Lindsell On Torts, 20th South Asian Edition, (2018).

¹² Johannes Andenaes, General Preventive Effects of Punishment, 114 U. Pa. L. Rev. 949 (1965).

¹³ Anthony Ellis, A Deterrence Theory of Punishment, 53 Phil. Q. 337 (2003).

Absolute liability could disproportionately burden small businesses that have limited resources¹⁴. It will be financially crippling for them, hampering their potential and further discouraging entrepreneurship. Imposing liability on industries, particularly in emerging economies, may hinder growth and discourage investment due to the high potential for legal consequences, even in the absence of negligence. It ultimately leads to a concentration of market power in larger, more financially robust corporations.

6. Fairness and Justice Concerns

Absolute liability might be unfair in cases where the harm was caused by factors outside the party's control. Absolute liability may not adequately consider factors like force majeure or natural disasters when assigning responsibility. The lack of consideration for fault or intent may lead to unjust outcomes.

7. Chilling Effect on Innovation

Companies would be reluctant to engage in activities with potential risks even if those risks can be managed with or mitigated through advancements in technology or practices. Innovation often involves taking risks, especially in emerging and cutting-edge technologies. The threat of absolute liability may discourage companies from pursuing projects that carry inherent risks, even if the potential benefits could be significant. This could stifle the development of breakthrough technologies that might otherwise contribute to societal progress.

8. **Unintended Consequences:** Absolute liability might lead to unintended consequences, such as the withdrawal of certain products or services from the market. In some cases, the removal of potentially beneficial innovations due to legal concerns may deprive society of valuable advancements.

¹⁴ Parisaboina, S. (2021) *A critical analysis of absolute liability and its role in environment law*, *International Journal of Law Management & Humanities*. Available at: <https://ijlmh.com/paper/a-critical-analysis-of-absolute-liability-and-its-role-in-environment-law/> (Accessed: 10 February 2024).

ECONOMIC IMPLICATIONS OF ABSOLUTE LIABILITY

Absolute liability is an external macro factor determining the business environment. It affects all industries since it is a policy decision.¹⁵

Absolute Liability would increase customer loyalty

Suppose that due to the introduction of the absolute liability principle, firms install safety equipment. This will result in public trust. When consumers perceive that a firm operates with a high level of responsibility and prioritises safety, it can lead to increased trust in the company. The installation of safety equipment can serve as a signal of quality and reliability to consumers. In signalling theory¹⁶ given by Michael Spence, sellers provide buyers with signals to help them evaluate the quality of their product. In this case, firms would invest in costly signals, such as safety equipment to convey information about the quality of their product, leading eventually to an increase in demand. In competitive markets, firms that invest in safety equipment may differentiate themselves from their competitors. This can attract consumers who prioritise safety in their purchasing decisions, creating a competitive advantage for the firm in the market.

Absolute Liability would hamper Innovation

Peter Drucker in his book 'Innovation and Entrepreneurship', explained how classical economics believes that economies tend towards equilibrium, they optimise which results in incremental growth over a long period of time. However, the nature of the entrepreneur is to disorganise and upset the current setting by introducing new ideas. According to Drucker, whatever changes the wealth producing potential of already existing resources is what is called innovation. There may also be observed a shift from the welfare state to the entrepreneurial society.¹⁷

It is the innovation and entrepreneurship that differentiate firms from each other. However, the absolute liability principle hampers innovation as it would make companies more risk averse, as they may fear the catastrophic financial consequences of any accident, even though it was not their fault. This can also be a significant deterrent to risk-taking and entrepreneurship.

¹⁵ Prof. Dr. Peter Schmidt, Economics as a Business Environment, SoSe (2015).

¹⁶ Brian L. Connelly et al., Signalling Theory: A Review and Assessment, 37 J. Mgmt. 39 (2011)

¹⁷ Peter Drucker, Innovation and Entrepreneurship (1985).

ALIGNMENT OF ABSOLUTE LIABILITY PRINCIPLE WITH ENVIRONMENTAL ETHICS

Environmental ethics is a discipline in philosophy which studies the moral relationship of human beings to, and also the value and moral status of, the environment and its non-human contents.¹⁸ The study of environmental ethics can be done by adopting two approaches - the traditional approach or the multicultural approach.¹⁹

The traditional approach elucidates anthropocentrism²⁰ which places human interests at the centre of moral consideration. It views nature as existing primarily for serving human interests and prioritises human needs over any other species. It also emphasises on the responsible stewardship and sustainability of resources. Within this approach, decisions about environmental issues are often made on cost-benefit analysis. The Absolute Liability Principle aligns with the traditional approach's emphasis on responsible stewardship and sustainability of resources. By holding individuals or enterprises absolutely liable, the principle emphasises greater caution. From an anthropocentric perspective, the principle can be seen as deterring environmentally harmful behaviour and ensuring that the victims affected receive compensation. It reinforces the idea that environment protection ultimately serves man's good life.

Multicultural environmental ethics²¹ challenge anthropocentrism by emphasising the intrinsic value of non-human entities, like individual organisms (biocentrism)²² or entire ecosystems (ecocentrism).²³ It draws traditional knowledge and cultural practices that prioritise harmony with nature. The multicultural approach also highlights issues of environmental justice, recognising that marginalised communities are disproportionately affected by environmental degradation. Aligning the multicultural approach with absolute liability principle involves considering how these concepts complement each other's emphasis on intrinsic value of nature. Absolute liability aligns with this perspective by recognising that environmental harm carries inherent significance and that those responsible should be absolutely liable regardless of human-centric considerations. Multicultural approach prioritises environmental justice,

¹⁸ Brennan, A. and Lo, N.Y.S. (2021) *Environmental ethics*, *Stanford Encyclopedia of Philosophy*. Available at: <https://plato.stanford.edu/entries/ethics-environmental/> (Accessed: 09 February 2024).

¹⁹ Eugene C. Hargrove, A Traditional and Multicultural Approach to Environmental Ethics at Primary and Secondary School Levels, 30 *Envtl. Ethics* 263 (2008).

²⁰ Helen Kopnina et al., Anthropocentrism: More Than Just a Misunderstood Problem, 31 *J. Agric. & Envntl. Ethics* 109 (2018).

²¹ J. Baird Callicott, Multicultural Environmental Ethics, 130 *Daedalus* 77 (2001).

²² Nicholas Agar, Biocentrism and the Concept of Life, 108 *Ethics* 147 (1997).

²³ Katherine V. Kortenkamp & Colleen F. Moore, Ecocentrism and Anthropocentrism: Moral Reasoning About Ecological Commons Dilemmas, 21 *J. Envntl. Psychol.* 261 (2001).

absolute liability reinforces this emphasis by ensuring that responsible parties are held liable for the harm that is caused regardless of the socio-economic status or political power of affected communities. Absolute liability can also align with indigenous environmental ethics under the multicultural approach as it acknowledges the importance of respecting the traditional territories of indigenous people and holding those liable who cause harm to these sacred spaces.

SUGGESTIONS

Alternatives to Absolute Liability

In international environmental law, Absolute Liability is a principle holding individuals or entities absolutely liable for environmental damage, regardless of fault. Alternatives to Absolute Liability encompass:

1. ***Polluter Pays Principle***²⁴ This principle emphasises that the party responsible for pollution should bear the costs of measures to prevent, control, and mitigate pollution. It focuses on assigning financial responsibility rather than liability. It internalises environmental costs, discourages harmful activities and promotes sustainable practices by holding polluters financially accountable. This principle ensures fairness by preventing the burden of environmental degradation from falling disproportionately on affected communities. Implemented through regulatory mechanisms and liability laws, it ensures environmental justice.
2. ***Negligence Based Liability***²⁵: Under this framework, liability is determined based on whether the defendant failed to exercise reasonable care²⁶ in preventing environmental damage. It is a legal concept based on holding individuals or entities legally responsible for the harm caused by them. It applies in situations where one party breaches their duty of care²⁷ owed to another party, resulting in foreseeable harm²⁸ or damages. The duty of care establishes an obligation to act reasonably and avoid causing harm to others. To establish negligence, it must be shown that the defendant

²⁴ *Halsbury's laws of England: 5th edition vol 46: Environmental law* (2019). S.I.: LexisNexis.

²⁵ Stephen G. Gilles, Rule-Based Negligence and the Regulation of Activity Levels, 21 J. Legal Stud. 319 (1992).

²⁶ David W. Barnes & Rosemary McCool, Reasonable Care in Tort Law: The Duty to Take Corrective Precautions, 36 Ariz. L. Rev. 357 (1994).

²⁷ Christian Witting, Duty of Care: An Analytical Approach, 25 Oxford J. Legal Stud. 33 (2005).

²⁸ Thomas R. Shultz et al., Judgments of Causation, Responsibility, and Punishment in Cases of Harm-Doing, 13 Can. J. Behavioural Sci./Rev. Can. des Sci. du Comportement 238 (1981).

breached²⁹ the duty of care. It is also of utmost importance to establish that he acted in a manner that a reasonably prudent person would not have under any given circumstance.

3. Additionally, the *No-Fault Liability Principle*³⁰ is another alternative to absolute liability, focusing on compensating victims without establishing fault. No-fault liability in this context does not mean the same as absolute liability but the exact contradiction of it. In this system, compensation is provided to victims regardless of whose fault it is often through insurance or government-funded schemes. No-fault liability prioritises timely compensation for victims and streamlines the claims process. This approach provides financial support quickly, reduces litigation costs, and ensures that victims receive compensation regardless of disputes over fault. However, it is often criticised as it also limits the ability to hold negligent parties liable.

These alternatives provide nuanced approaches to addressing global environmental harm, considering varying perspectives and balancing accountability with fairness.

Proposed Reforms

1. ***Tiered system:*** A proposed structure linking liability to the severity of environmental harm will be presented which shall ensure proportional consequences for responsible parties in accordance to the proposed models.
2. ***International Cooperation Mechanisms:*** It enhances collaboration among the differing legislative policies pre-existing in the realm of law across the world. Each aspect of liability will be incorporated on the basis of adoption and applicability.
3. ***Periodic Review and Adjustment:*** It establishes mechanisms for regular assessments and ensures that legal frameworks stay relevant and effective in addressing the evolving challenges of environmental protection. The identification of future inconsistencies and restructuring will be aided.
4. ***Reforms aim to refine Absolute Liability application:***Reforms shall seek the aim to change the pre-existing system of absolute liability into the pursuit of changeable liability discussed ahead.

²⁹ John Tingle, Establishing Breach of the Duty of Care in the Tort of Negligence, 11 Brit. J. Nursing 1128 (2002).

³⁰ Ezra Ripley Thayer, Liability Without Fault, 29 Harv. L. Rev. 801 (1916).

Proposed Model

Absolute Liability will be completely removed. Rather there will be two different principles under the international Environmental Law that will be under application. These two principles include:

1. Polluter Pays Principle
2. Negligence based liability

In the case of an accident, the Polluter Pays Principle under the International Environmental Law will be fulfilled. To consider a real life simulation of the factories involved in the strategizing of the findings; the study considers Factory A . Suppose in Factory A an accident occurred, leading to any form of environmental damage, but if this was purely a mishap and accidental then the factory would not be held absolutely liable. Rather the Polluter Pays Principle will be applied. Since the source of the disaster is Factory A, Factory A should compensate for the damages caused. However, they shall not be held liable. In this manner, they are not blamed for the incident but still take responsibility. Black's Law Dictionary defined accountability as "When one party must report its activities and take responsibility for them." The rationale behind this is that; the factories and firms should compensate monetarily, but shouldn't take the blame for the accident if it wasn't their fault. Being held legally liable also implies that blame for the incident is attributed to the factory even when the factory took all precautions. In case, an individual or group in Factory A was responsible for the disaster, the principle of Negligence Based Liability will be followed and any negligence shown by the former party mentioned , they will assume liability. The Principle of Strict Liability also continues to exist and is applied.

The aspect of liability is a consideration of legal authority over the institutions, meanwhile differentiating it into the concept of accountability is better for actual functioning.

The concept of environmental accountability under this proposed law can be defined as - "Environmental accountability is the legal and ethical responsibility of businesses to acknowledge, mitigate and show transparency about their environmental impacts. It includes compliance with all environmental laws, proactive efforts to prevent pollution, and providing restitution for damages caused to the communities and the environment."

The following model could overcome most drawbacks of the Principle of Absolute Liability. Critics would argue that without liability there will be a diminished deterrent effect on corporations to prevent environmental harm, but this model would give them the incentive to ensure all safety measures as they would not be blamed for any accident caused , considering it was not under their control.

CONCLUSION

International environmental law plays a significant role in addressing global ecological challenges. It provides a framework for global cooperation, sets standards for responsible behaviour, and holds nations accountable, hence contributing significantly to the collective efforts to combat environmental challenges. With effective implementation of alternatives suggested in the paper such as Polluter Pays Principle, Civil liability and Graduated Liability ; international environmental law can be strengthened and better equipped to address the complexities and interconnected challenges facing the global environment. Under the proposed model, Absolute Liability will be replaced by two principles under the International Environmental Law - the Polluter Pays Principle and Negligence Based Liability. In the event of an accident, the impact will be analysed and if deemed accidental, the Polluter Pays Principle will be applied for awarding compensation, negligence based liability will be used otherwise. However, there are few limitations to the study. The economic analysis undertaken and the model proposed are made keeping a hypothetical economy and state in mind. The practical application of the model is yet to be analysed. This study being the first step will bring out a number of further studies. These include: To analyse the practicality in different countries, To deliberate how to overcome the limitations of this model, To determine the sustainability etc. This study is the preliminary ascend to policy reformation, philosophy of environmentalism while concluding with the principles of application and practicality.