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THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL, Jamie Cassels, Toronto: University of Toronto Press, 1993. Pp. 364. \$19.95

While the press is quick to report environmental accidents, its follow-up of such events is often inadequate. Bold headlines often introduce environmental disasters to the public, but the resolution of these disasters is frequently left unreported or relegated to the back pages. It is often difficult, then, to gauge the causes of and lessons from environmental disasters.

For that reason alone, Jamie Cassels' book, *The Uncertain Promise of Law: Lessons From Bhopal*, is a welcome addition to the literature on environmental disasters. His book is not just a faithful record of a tragic event, but also a careful documentary that reminds us of the gravity of the Bhopal tragedy and attempts to answer the often unasked question: What has the tragedy taught us? Cassels' answer, unfortunately, is sometimes less than satisfying. His analysis of the Bhopal story demonstrates that "the uncertain promise of law" also means the uncertain hope that another Bhopal will not happen again.

Cassels approaches the Bhopal accident in objective, but strong terms. He dissects the political and economic events leading up to the chemical explosion of December 2, 1984. After a discussion of the legal and regulatory impediments to bringing toxic tort actions in common law countries like India and the United States, Cassels presents the legal history of the case, following it from the initial responses by American lawyers and the Indian government to the Indian Supreme Court's final decision upholding the \$450 million settlement between India and Union Carbide. Underlying his analysis are three important questions: (1) Where should causes of action be brought?; (2) How should liability be determined?; and (3) How should victims be compensated? In the background is the main unanswered question both in the book and the Bhopal trial: what happened on December 2, 1984?

While much controversy exists over the actual events of that day, the factual

circumstances of the Bhopal accident matter less than the placing of blame. The Bhopal litigation, as Cassels reports, became largely a corporate and political hot potato as Union Carbide tried to shift liability to its Indian subsidiary. The technical issues of plant design and the economic issues of why a tragedy of such magnitude occurred in the first place were subordinated to the legal concerns of placing blame and finding relief. This transformation is handled nicely in the book as Cassels deftly moves from a pellucid discussion of tort law principles to a chapter entitled "Legalizing a Disaster."

The chapter begins with a disturbing picture of what Cassels calls "ambulance chasing lawyers" who descended on Bhopal to represent the 30,000 plus victims. Among the cast of characters are Melvin Belli and a Washington, D.C., lawyer named John Coale who circumvented India's prohibition on contingency fees by negotiating for "compensation in accordance with United States customs in personal injury cases." In the months after the disaster the lawyers claimed to have over 500,000 claimants comprising 186,000 filed actions against Union Carbide in the United States. Cassel's prognosis of these private causes of action:

While the involvement of U.S. lawyers in the Bhopal case may have 'broken the pattern of legal resignation' in India, it probably also reduced the prospect of a quick, non-traditional solution. . . . More legal energy was spent on attempting to obtain control of the Bhopal cases than in pursuing them. Settlement negotiations were begun by one group and rejected by another. Confusion reigned.

The response by the Indian government simply frustrated the goals of compensating victims and finding fault. In March, 1985, the Indian government passed the Bhopal Gas Leak Disaster Act ("Bhopal Act") making the Indian government "the exclusive representative of the victims in legal proceedings for compensation whether inside or outside of India." The Act was retroactive, applying to actions "already initiated by individual victims, although it preserved their right to retain counsel." More importantly, the Act established a claims scheme for redressing the victims, appointing a claims commissioner in charge of administering the litigation process and "registering, recording, and processing individual claims." Under the aegis of this act, the Indian government in April, 1985, joined the U.S. litigation, which in January had

been consolidated and brought in front of Judge John F. Keenan of the Southern District Court of New York.

The Bhopal Act was one factor that facilitated Judge Keenan's decision on May 12, 1986 to return the Bhopal trials to India. He dismissed the action from the U.S. on the grounds that India would be the more convenient forum. In reaching this decision, Judge Keenan pointed to the innovativeness and efficacy of Indian law as evidenced by the Bhopal Act and to "Union Carbide's evidence of India's control over (the) Bhopal operation; to the fact that it was licensed and regulated by Indian law, subject to Indian environmental and safety laws and monitored by Indian agencies." Ironically, these factors suggest, according to Cassels, that Judge Keenan may have already decided the case on the merits. Keenan's reasoning reflected "a normative position that the [parent] company should not be held responsible. . . . His emphasis of the degree of Indian control over the operation reflects and reinforces a presumption of multinational non-responsibility." In fact, Cassels points out that Judge Keenan adopted a strange assumption of risk argument: "As [Keenan] said, 'India no doubt valued its need for a pesticide plant against the risks inherent in such development.' This may be true, but the exclusive focus on Indian sovereignty tends to reinforce the notion that developed countries have no responsibility in the developing world."

Cassels suggests that Judge Keenan's opinion offers several lessons to developed countries and multinationals:

The conclusion drawn by the lawyer is that legal responsibility can be avoided by emphasizing local government regulation and delegating to the subsidiary 'as much autonomy as possible concerning operating matters.' The advice to multinationals, then, is to maintain strategic control from afar, but to leave operations in the hands of local managers and safety in the hands of the host country.

In the last third of the book, Cassels follows the Bhopal litigation back to India where the battle is played out between Union Carbide and the District Court in Bhopal. Union Carbide, in an effort to escape liability, attempted to take advantage of the innovativeness of the Indian legal system. First, using the provisions of India's Fatal Accident Act of 1855, Union Carbide demanded

that all the claimants provide the full details of the nature and quantum of injury, which served to further delay the litigation. Moreover, Union Carbide tried further distancing itself from its subsidiary, 49.1% of which was owned by Indian public institutions. Finally, Union Carbide alleged that both the governments of India and Madhya Pradesh, of which Bhopal is the capital,

had knowledge of the toxic properties of MIC but failed to take adequate precautions. They argued that, notwithstanding the knowledge of the risks, the state government had allowed the growth of slum areas in close proximity to the plant and that it was the responsibility of the government to design adequate warning systems, evacuating procedures, and other emergency and medical facilities in case of an accident.

Union Carbide argued that it should be absolved of any liability because of the state's involvement in maintaining the subsidiary. Furthermore, Union Carbide argued that under a negligence theory the Indian government still had to demonstrate that the accident was a result of Union Carbide's fault rather than the acts of a saboteur.

The Indian government won a major victory, however, on the issue of interim compensation. On December 17, 1987, Judge Mahadeo Wamanrao Deo of the District Court of Bhopal, responding to pressures from a judge hearing the numerous interim petitions for relief from a Bhopal victim, ordered Union Carbide to pay \$270 million into a fund to be administered by the claims commissioner, the disbursement of \$15,385 to the next of kin of each victim and \$7,690 to the permanently disabled.

The order of interim compensation marks the watershed in the Bhopal story. On appeal, Judge S.K. Seth concluded that the award of interim compensation was consistent with "a provision of English law that permits a court, in a situation where one party will eventually be held responsible to pay damages, to award interim damages." Most crucial to the decision was the finding that the Bhopal victims had a prima facie case against Union Carbide.

Judge Seth's decision, though appealed to the Supreme Court, was the catalyst for eventual settlement between the Indian government and Union Carbide. On February 14, 1989, the Chief Justice, Rajinder S. Pathak, ordered

a final settlement between Union Carbide and the Indian government of \$470 million dollars in exchange for a waiver of all future criminal or civil liability by Union Carbide. According to Cassels, victims and social activists were astounded. The final amount was a trifle compared to the government's claim of \$3.3 billion and much smaller than previous offers Union Carbide was rumored to have made.

According to Cassels' analysis of the judgement,

The Court felt that this figure would provide reasonable compensation based on the estimated number of deaths (2,660) and injuries (30-40,000) accepted in the High Court...[T]he Court recognized that the opportunity to address important social, technological, and legal issues had been lost. But, it concluded, 'in the present case, the compulsions of the need for immediate relief to tens of thousands of suffering victims could not, in our opinion, wait till these questions, vital though they be, are resolved...The tremendous suffering of thousands of persons compelled us to move into the direction of immediate relief which, we thought, should not be subordinated to the uncertain promises of law.

Cassels' description of the steps leading up to settlement suggests that the Bhopal crisis was resolved as a result of its own weight. A tragedy of such proportions could not have ended without Union Carbide compensating the victims even if the company did not accept blame. Furthermore, settlement could not have been reached without the innovative legal thinking of the Indian judges involved in the case. From that perspective, the Bhopal trial demonstrates the promises of law despite the uncertainties of litigation. The "uncertain promise" that the Indian Supreme Court and Cassels refer to is not the availability of compensation but the promise that Bhopal does not repeat itself and that those compensated are compensated justly. The rule of law cannot promise either of these objectives.

As Cassels points out in his "Afterword," as of January 10, 1993, "not one of the victims of the gas leak has received final (as opposed to interim) compensation." Furthermore,

hazard management practices (in India), both public and private, remain depressingly ineffective. A National Security Council survey of the previous year documented a reported 27 deaths and 256 injuries as a result of chemical leaks. Many other such incidents go unreported. An ILO report identified 6,000 hazardous installations that had to be covered by a mere 903 inspectors. Industrial fatalities in India continue to occur at four times the rate documented for North America and the United Kingdom.

In response to these failures, Cassels offers several substantive remedies for the current legal regime on transnational toxic hazards. His focus on litigation, however, distracts him from the potential regulatory solutions to transnational toxic torts. Cassels' solutions to the tragedy of Bhopal are largely changes in the litigation process; he strongly supports increasing the responsibility of multi-national corporations to host countries. Specifically, he suggests that courts adopt the presumption of multi-national liability unless a corporation can show "that it was prevented by the host country from exercising control over the subsidiary, that the hazardous practices were mandated by the policies of the host country, or that its liability or responsibility has been expressly waived or limited in agreement negotiated with the . . . host country."

Undoubtedly, increasing multi-national responsibility is an important policy goal, but Cassels' analysis ignores some of the economic incentives that may keep multi-nationals from bearing liability even with heightened judicial scrutiny. A developing country desperate for industry may sacrifice some of its population for the prospects of industrial expansion. In fact, even with heightened judicial scrutiny for multi-nationals, placement of industrial facilities like the one in Bhopal is still subject to the economic pressures of environmental racism: the highest risks are placed in impoverished areas having the most to gain from industry. Cassels hints at this problem in the early portions of his book, but he fails to address it in his discussion of solutions. Cassels' remedy, while possibly alleviating the litigation difficulties arising from another Bhopal, probably will not resolve the underlying causes of such a tragedy.

While Cassels does mention some regulatory solutions, such as environmental legislation passed by India, he does not consider command and control solutions such as direct regulation of the international manufacture

and sale of toxic substances by an international regulatory body. Cassels notes that the EPA recently banned Temick, the chemical that was being produced by Union Carbide in Bhopal, yet he fails to suggest that more vigilant regulation of chemicals buttressed by international enforcement may be the most effective way to prevent future Bhopals.

In the end, Cassels' insights into the unpredictability of litigation make him somewhat skeptical of regulatory solutions. His detailed documentary of the Bhopal litigation and subsequent responses, however, may lead many readers to conclude that what he calls the "uncertain promise of law" is really only the "uncertain promise of politics."

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## **Bhopal and the Age of Globalization**

By [Gary Cohen](#)

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Fifteen years ago, on December 3, 1984, Union Carbide Corporation's pesticide factory accidentally leaked poisonous gases into the city of Bhopal, India. In one night of chemical terror over three thousand residents were killed and hundreds of thousands of others were injured, many of them permanently. Bhopal has been called the "Hiroshima of the Chemical Industry", the worst commercial industrial disaster in history.

In the last fifteen years since the chemical accident, there have been few positive changes in Bhopal. Union Carbide's pesticide factory remains abandoned and contaminated, leaking toxic chemicals into the nearby slum. Despite an extradition order pending since March, 1992, the Indian government, which issued the extradition order, has made no moves to bring former Union Carbide CEO Warren Anderson to trial. Instead, the government is courting chemical companies to expand their manufacturing capacity in India, as well as allowing them to introduce genetically engineered crops to replace traditional farming practices.

For Union Carbide and the Indian government, the Bhopal incident was a public relations fiasco that is finally fading from the public's memory. With the recent merger of Union Carbide and Dow Chemical, even the name of Union Carbide will soon disappear.

For the survivors of the Bhopal disaster, the toxic nightmare has continued unabated: At least sixteen thousand people have died so far from injuries related to their toxic chemical exposure fifteen years ago. 550,000 people have injury claims before the compensation courts set up in Bhopal. Of the claims processed so far, 90% of the claimants have received only \$400 for their personal injuries, which is barely enough to cover medications for five years. Unfortunately, the courts do not understand the long term health impacts related to peoples' toxic exposure. People are suffering from significant immune system collapse, which is contributing to many other illnesses not covered by the courts.

The bright sign in this otherwise bleak landscape is that people have continued to struggle for their lives and for justice. There have been more than one hundred protests in Delhi and Bhopal. An international medical commission visited Bhopal in 1994 to help facilitate streamlined compensation and health assistance to those affected. The survivors themselves set up a model health clinic in 1997 to attend to the wounded, and have shared their stories with citizen groups around the world. People in Bhopal have not given up.

The significance of the Union Carbide disaster extends well beyond Bhopal. It takes its place beside so much other needless destruction that has occurred during the last hundred years. During the first half of the century, mass destruction was carried out in the name of nationalist ideologies that made certain people enemies of the state, and therefore expendable. In the latter days of the twentieth century, the global corporation has emerged as a major agent of destruction, with an ideology that condones the sacrifice of people and the environment at the altar of free trade and next quarter's profit margin.

Through a narrow economic logic that has become a religious catechism, social, environmental and public health goals are considered "external" to the corporation's drive to realize a profit. Additionally, human rights and spiritual values, the fundamental threads that connect us to what is sacred in nature

and to each other, have become not only irrelevant, but are considered "quaint", blocking the inevitable march of globalization. Those who resist this industrial and technological juggernaut - workers, communities, indigenous peoples, traditional farmers - have become expendable.

Renowned philosopher Hannah Arendt, in attempting to understand the Nazi era, has written that evil was not only committed by fundamentalist zealots, but by people who were simply doing their jobs. In this way, thousands of petty officials could fulfill their small, seemingly innocuous jobs, connected together in a vast machinery of brutality and injustice that sent millions of people to their deaths.

The Nazis' efficient technological and corporate structure was an effective mechanism both in removing individual responsibility and in dehumanizing the people who were the victims of this system. Jews in transport trains to the death camps were called "pieces". On their one-way journey to Auschwitz, train officials processed 15,000 pieces from Hungary, 10,000 pieces from Greece, a million pieces from Poland, etc. Arendt called this phenomena the "banality of evil."

While there is a critical difference between the Nazis' philosophy of genocide and the economic calculus of global chemical corporations, a similar dehumanization and banality also finds expression. In its 1989 annual report, Union Carbide told its shareholders that the Bhopal gas leak had cost them 43 cents per share. The horrible suffering of over half million people was thereby reduced to 43 cents per share. On the day that Union Carbide settled with the Indian government on behalf of the Bhopal victims, its stock rose two dollars. Yet people in Bhopal remained sick and dying, their cases lost in a hopeless bureaucracy that will likely outlive them.

Other examples of this corporate philosophy abound. The DuPont Corporation continued producing chlorofluorocarbons throughout the 1980s even though research in the mid-1970s showed these chemicals destroyed the ozone layer and would lead to millions of skin cancers. Today, malignant melanoma is one of the fastest growing cancers worldwide. As long as DuPont could evade liability for these health consequences, it made sense to continue producing these chemicals. The Johns Manville Corporation continued producing asbestos even when research showed that asbestos was killing its workers. Dow Chemical has continued to market a pesticide called Dursban, even

though it is recognized to be a neuro-toxin that especially effects small children. According to the U.S. Center for Disease Control (CDC), Dursban is present in the blood of every U.S. citizen.

Recently, this corporate logic has become enshrined in the economic underpinning of the General Agreement on Trade and Tariff (GATT) and a new international agency called the World Trade Organization (WTO). Under this new regime, global corporations are free to export dangerous products and technologies to 110 nations, as they shop around for the cheapest labor costs and weakest environmental and public health protections. When individual nations try to impose strict environmental laws to defend their citizens, the exporting nation can appeal to the WTO to strike down those environmental laws as an unfair restriction of trade.

The globalization of the toxics economy and the establishment of the WTO as the global arbiter on trade and environment issues has made the violence against the Earth and her inhabitants an inevitable conclusion. What is most frightening about Bhopal is that it is not unusual in the Age of Globalization. It is the way that people are routinely treated by global corporations and the international agencies in their service. Cancer-causing pesticides banned in the U.S. and Europe are freely sold to farmers in Asian, African and Latin American countries. Native American tribes are offered bribes by the U.S. government to accept nuclear waste on their sacred lands. Asbestos, long banned in the U.S. because of its devastating impacts on workers, is sold by Canadian companies to "developing" countries. Medical waste incinerators, discredited in the United States, are being financed by World Bank grants to more than 20 countries trying to grapple with their burgeoning waste streams. This kind of corporate violence is repeated in every corner of the Earth.

We have all become "pieces" on the global corporate chessboard. Companies routinely calculate the profits lost from discontinuing a dangerous product measured against a possible accident or litigation costs if these measures are not taken. Union Carbide made such a calculation when it decided to cut back on safety personnel and their training period at its Bhopal factory before the accident occurred. Dow Corning made a similar calculation when it continued to sell silicone breast implants after studies showed they were causing adverse health impacts in women.

The chemical trespass into our lives is so profound that it is not possible for a

women to give birth to a child, anywhere on the Earth, without toxic chemicals in his/her body. It is not possible to breast feed a child, anywhere on the Earth, without passing dioxin and other dangerous toxins onto the child. Are we going to accomodate ourselves to the wholesale poisoning of the next generation of children so that the chemical industry can continue to reap huge profits?

Now the same companies that spread their dangerous products and waste throughout the world have embarked on the next major biochemical experiment - genetic engineering. Under the guise of feeding the world's poor, Monsanto, DuPont, Novartis and Zeneca have taken out patents on hundreds of plants to gain control over the world's food supply. These companies are rapidly selling off their chemical divisions to avoid liability and raise cash while putting all their corporate eggs in the biotech basket. In the process, they are mixing genes from different species in wholly new ways and releasing them into our food and the environment with little understanding of the consequences.

Bhopal is not only a symbol of the technological failures and corporate abuses of the twentieth century, but a powerful warning sign for the next century. Are we willing to continue to enjoy the commodities of the global market at the expense of species extinction, poisoned children and ecological destruction of epic proportions? Are we willing to sacrifice all that is sacred, including our own genetic heritage and the genetic diversity of the planet, so that a few powerful corporations can become wealthier than most of the world's nations? Bhopal calls us to mourn for the dead, but it also challenges us to fight for the living, both in Bhopal and around the globe. Bhopal calls us to resist the further destruction of the earth and to join with our neighbors to defend our children and our communities. Without that level of spiritual and political resistance, Bhopal will remain a symbol of our collective ecological nightmare.

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