



### Mediation and Negotiation in resolving Mass Torts

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**ABSTRACT:** ‘Mass Torts’ can be best explained as Tort i.e., ‘civil wrong’, being inflicted upon a large number of people or sector of society where they get affected simultaneously. It involves a sizable number of people or litigants, we may say, and that is the reason these cases must be resolved through mediation and negotiation. Mediation not only reduces the pendency of cases but also leads to peace and harmony in society. By agreeing to mediation, we would be relieving the citizens of a huge set of problems.

The present paper tries to analyze and emphasize on the strict need of Mediation and Negotiation in resolving cases of Mass Torts.

Keywords - Benefits of mediation, Current situations, Mass number of litigants, Reducing pendency of cases.

. . . both were happy with the result, and both rose in public estimation. . . I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing out private compromises of hundreds of cases. I lost nothing

thereby—not even money; certainly not my soul.

Mahatma Gandhi.

#### I. INTRODUCTION

The word ‘tort’ has been derived from Latin word ‘tortum’, which means ‘to twist’. Thus, “tort” means “a conduct which is not straight or harmful, but, on the other hand, twisted, crooked or unlawful. ” It is equivalent to the English term ‘wrong’. The law of Torts consists of various ‘torts’ or wrongful acts whereby the wrongdoer violates some legal right vested in another person. The term “Mass torts” signifies a single tort i.e., civil wrong that results in causing injury to several number of victims by the virtue of an single event or act. And therefore gives birth to numerous number of plaintiffs against only one single defendant (or may be several) who behaved in a negligent manner. Most of the ‘Mass torts’ cases consists of many plaintiffs suing one defendant based on harms arised from a single event which caused damage simultaneously to a number of people. It is not necessary that the defendant was working negligently, he may be working with due care and diligence and still he can be held liable by the virtue of “Vicarious liability”. Generally, a person is liable for his own wrongful acts and one does not incur any liability for the acts done by others. In certain cases, however, “vicarious liability”, that is the liability of one person for the act done by another person, may arise. The common examples of such a liability are :

- Liability of a principle for the tort of his



agent;

- Liability of partners of each other's tort;
- Liability of the master for the tort of his servant.

#### CAPACITY TO SUE [1]

Generally, every person has a capacity to sue, liability to be sued in tort. There are some variations in this rule in case of certain persons and their position has, therefore, been specifically discussed.

**Act of State :** An act done by a sovereign power in relation to another State or subjects of another State is an Act of State and cannot be questioned by municipal courts.

**Corporations :** A corporation being an artificial person cannot be itself liable but its agents and servants can be sued for the wrongful and negligent acts.

**Minor:** A minor has a right to sue like an adult with the only procedural difference that he cannot himself sue but has to bring an action through his next friend.

**Independent and Joint Tortfeasors:** When two or more persons commit one tort against the same plaintiff, they may be either independent tortfeasors or joint tortfeasors.

#### Position in India

India being the hub of leading corporations and pharmaceutical industries have seen in its history a number of such incidents where a single firm, working negligently, had caused harmed to numerous number of people through an single act. May it be the State functionary or a Private corporation, the receiving end of harm is with the poor and the downtrodden section of society. From the 'Bhopal Gas Tragedy Case' of the

year 1984 to the recent Railway accidents Cases, the one thing that has been common is deprivation of life of the people, mentally or physically. A large number of people die and if by chance, left alive, they're mentally tortured and harassed for the claims of their damages by long trials and complicated processes of the court.

The only way out of this bane, is by developing such facilities for quick relief and settlement of the compensation cases and this is possible only through 'Mediation'. Mediation and Negotiation are a boon to society through which a large number of cases can be easily and quickly settled and people can be compensated without any difficult hardships they face while knocking the doors the courts.

India is in absolute need of developing the scope of Mediation and Negotiation for the settlement cases of Mass torts in order to provide relief to the people of the country from the complicated court processes. There is a common saying, "Justice delayed is Justice denied", it means that, that justice is of no use which came at a point where the one seeking it has lost all the hope and faith in the judicial system. In some of most common cases in India, it was observed that the compensation seeker, mostly the poor and downtrodden classes, are either denied Justice, or they are provided with such a small amount of relief and that too after such a long time.

Mediation is a voluntary, cooperative process in which an impartial and neutral mediator facilitates disputing parties in reaching a settlement. A mediator does not



impose a solution but creates a conducive environment in which disputing parties can resolve all their disputes. It is tried and tested alternative method of dispute resolution. It has proved to be great success in all the major cities of the country with its rapidly widening scope. Mediation is structured process where a neutral person uses specialized communication and negotiation techniques, a settlement process whereby disputing parties arrive at a mutually acceptable agreement.

Mediation comes with numerous benefits such as., being quick and responsive, economical in nature with no or very little amount of costs included, provides harmonious settlement and also keeps it confidential and informal, parties too have a say in their disputes. Mediation is far more satisfactory way of resolving disputes as compared to litigation. There is no loss of time and no requirement of financial investment at all.

## II. Legislative Acts dealing with Compensation of victims

The Public Liability Insurance Act, 1991

The Public Liability Insurance Act, 1991 aims at providing for public liability insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance for matters connected therewith or incidental thereto. Every owner, i.e. a person who has control over handling of any hazardous substance, one or more insurance policies providing for contracts of insurance whereby he is insured against liability to give relief in case of death or injury to a person, or damage to any property, arising from an accident

occurring while handling any hazardous substance. In respect of already established units, insurance policies or policies have to be taken as soon as possible, but within a maximum period of one year from the commencement of the Act. Such liability shall be on the principle of “no fault” liability. “Hazardous substance” means any substance or preparation which, by reason of its chemical or physio-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment.

Railways Act, 1989

With effect from 1.8.1994 under Section 124-A of the Railways Act, 1989 the railway administration has also become liable to pay compensation for loss of life or injury to bonafide rail passengers, who become victims of untoward incidents such as terrorist acts, violent attack, robbery, dacoity, rioting, shoot-out or arson by any persons in or on any train carrying passengers, waiting hall, cloak room, reservation or booking office, platform, any place within the precincts of a railway station or the accidental falling of any passenger from a train carrying passengers. Section 124-A of the Railways Act, 1989 reads as under:- “When in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or the dependent of a passenger who has been killed to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding



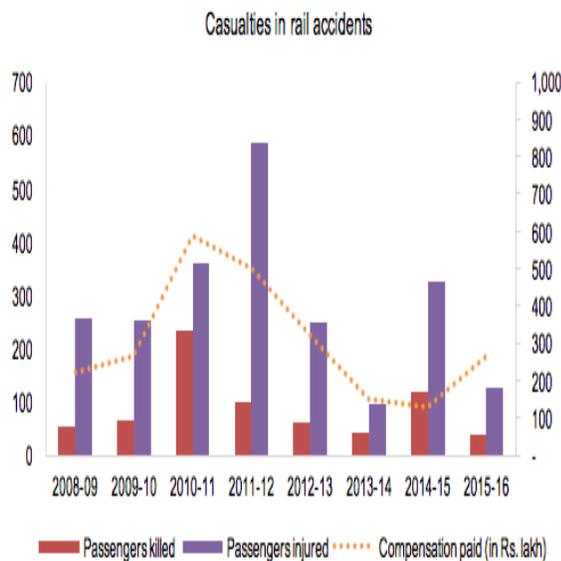
anything contained in any other law, be liable to pay compensation to such extent as may be prescribed, and to that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident.

Provided that no compensation shall be payable under this Section by the railway administration if the passenger dies or suffers injury due to:- (a) suicide or attempted suicide by him; (b) self-inflicted injury; (c) his own criminal act; (d) any act committed by him in a state of intoxication or insanity; (e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident. Explanation: For the purpose of this section, “passengers” includes (i) a railway servant on duty; and (ii) a person who has purchased a valid ticket for traveling, by a train carrying passengers, on any date or a valid platform ticket and becomes a victim of an untoward incident.

**III. Cases relating to Mass torts in India**

**THE BHOPAL GAS LEAK DIASTER CASE [2] :** On the night of 2/3 Dec, 1984, a mass disaster, the worst in the recent times, was caused by the leakage of Methyl Isocyanate (MIC) toxic gases from a plant set up by the Union Carbide India Ltd. (UCIL) for the manufacture of pesticides, etc. in Bhopal. UCIL is a subsidiary of Union Carbide Corporation (UCC), a multinational company, registered in U.S.A. The disaster resulted in the death of at least 3,000 persons and serious injuries to a very large number of others (estimated to be over 6 lac), permanently affecting their eyes, respiratory system, and causing scores of other complications, including damage to the fetuses of pregnant women.

The peculiar problem regarding the claim of compensation was involved because of such a large number of victims, most of those belonging to the lower economic strata. On behalf of the victims, a large number of cases were filed in Bhopal, and also in U.S.A against UCC. There was an effort for out of court settlement between the Government of India and the UCC but that failed. The Government of India then proclaimed an Ordinance, and thereafter passed the “The



Note: Compensation paid during a year relates to the cases settled and not to accidents/casualties during that year.



Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985”.Section 3 of the Act confers an exclusive right on the Central Government to represent, and act in place of every person who has made a claim, or is entitled to make, a claim arising out of, or connected with, the Bhopal gas leak disaster. Empowered by Section 9 of the Act, the Government of India also framed “The Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985”.

Settlement: After long drawn litigation for over 4 years, there was a settlement between Union of India and Union Carbide Corporation and in terms thereof, the Supreme Court in Union Carbide Corporation v. Union of India, 1990, passed an Order on February, 1989 directing the payment of a sum of 470 million U.S. Dollars or its equivalent nearly Rs. 750 crore as compensation was provided.

In spite of the anxiety of the Supreme Court for providing expeditious relief to the gas victims, there is much to be desired regarding medical care, rehabilitation and compensation. The progress regarding compensation claims is so slow, that it may take 15 years for all the cases to be heard. According to a report 74% of the Bhopal Gas claims heard so far, have been rejected, and moreover, sufficient number of claims court have yet to be set up to deal with claims. The fact that the victims of Bhopal tragedy have not been able to get any substantial relief, rehabilitation, proper medical facilities and compensation for over 8 years after the accident shows that the administrative

and legal in India has failed miserably in catering to enormous problems. Even after so many years after the disaster and also settlement, the state of affairs is extremely unsatisfactory.

M.C.MEHTA V. UNION OF INDIA, 1987 [3]: The Supreme Court was dealing with claims arising out from the leakage of oleum gas on 4<sup>th</sup> and 6<sup>th</sup> December, 1985, it was alleged that one advocate practicing in Tis Hazari Court had died and several others were affected by the same. The action was brought through a writ petition under Article 32 of the Constitution by way of public interest litigation. The Supreme Court thus evolved a new rule creating absolute liability for the harm caused by dangerous substances as was hitherto not there. The following statement of Bhagwati, C.J., which laid down the new principle may be noted: “We are of the view that an enterprise which is engaged in an hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results on account of hazardous or inherently dangerous activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which engaged must be conducted with the highest standards of safety and if any harm results on the account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred



without any negligence on its part.” The court held that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in the escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher*.

**Prabir Kumar Das vs Unknown on 26 November, 2012**

The Indian Railways have decided to pay compensation to all the victims of the train accident that took place in August 2012 at an un-manned level crossing near Sambalpur. In pursuant to an High Court order passed in November 2012, the Railways have decided to pay damage to the next of kin of the deceased and to the injured in the accident. In a letter to the Human Rights activist and lawyer Prabir Kumar Das, a divisional engineer of East Coast Railways has informed that an amount of Rs. 77,44,569 has been sanctioned as compensation. All the victims were farm labourers and were socially and economically disabled. While 13 of the 14 deceased were women, their family members independently could not fight with the Railways to seek damage and therefore a PIL was filed in the High Court by Das.

Compensation : Deciding the case, the High Court had directed the Railways to pay compensation at the rate of Rs. 5 lakh to

each of the families of the deceased.

The Railways were also asked to compensate other injured persons by paying damage ranging between Rs. 5,000 and Rs. 25,000 as per the gravity of the injuries from the date of filing of the PIL with six per cent interest per annum.

#### IV. Mediation

Mediation is the process by which the participants together with the assistance of neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and aim to reach a consensual agreement that will accommodate their needs. It is a confidential, voluntary and participatory process. The parties to the disputes have an opportunity to ventilate their grievances and feelings through the process of mediation and thereafter tailor the solution to their unique circumstances and demands.

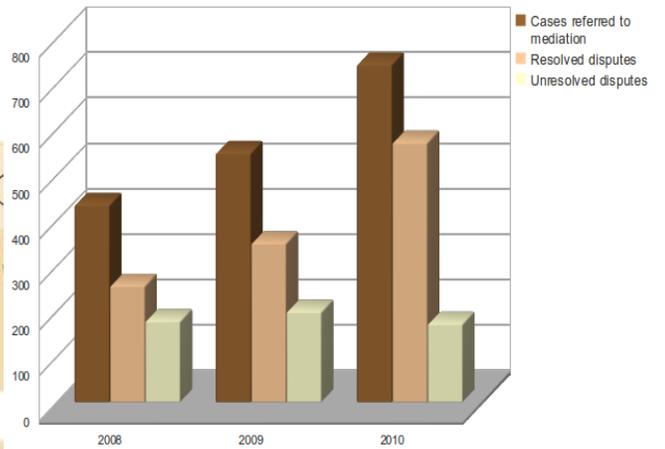
The mediator does not impose any solution but creates a favorable environment to enable the parties to resolve their disputes themselves amicably.

The concept of Mediation is ancient and deep rooted in our country. In olden days disputes used to resolve at the community level. Panches used to be called Panch Permishwar. Now we have grown into a country of 125 crore people and with liberalization and globalization, there is tremendous growth. All this has led to

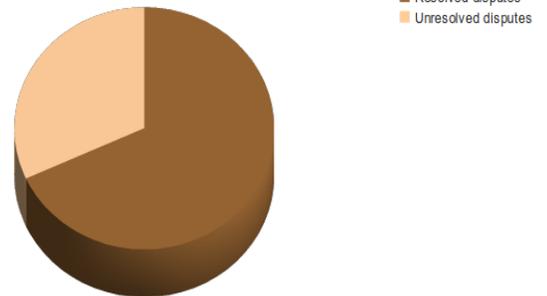
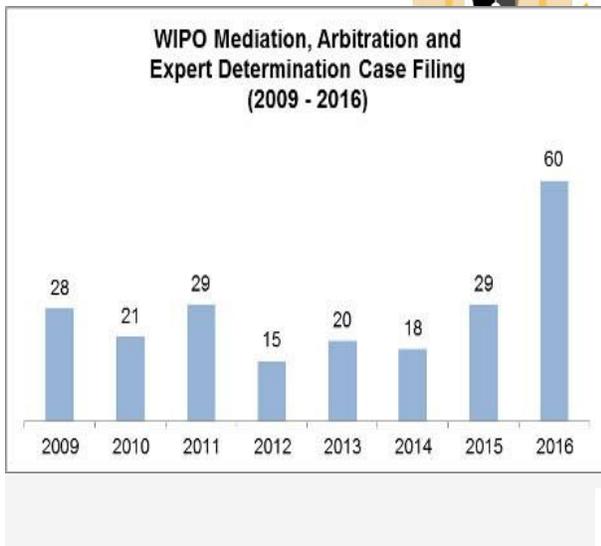


explosion of litigation in our country. Though our judicial system is one of the best in world and highly respected but there is a lot of criticism on account of long delays in the resolution of disputes in the court of law. The litigant is vary of approaching the court for a decision of his dispute. Hence we've turned to ADR mechanism.

Mediation is a simple process as compared to litigation which is more complicated, time consuming and money consuming. Mediation is an informal process, without any strict or binding rules of procedure. It enable disputing parties to interact even on a one-to-one basis and is completely voluntary. It is an inexpensive and speedy mode of dispute resolution. Harmonious and quick settlement is guaranteed to parties with no hidden or extra costs. Even the plaintiff is entitled to refund of full court fees as per section 16 of the Court Fees Act, 1870, if the dispute is settled through the process of mediation.



Resolved and unresolved disputes throught mediation for a three years period





The above figures represent the trends of cases referred to mediation and resolved and unresolved disputes over the years.

**Impact of Mediation :** There is no doubt that mediation has had a significant impact on dispute resolution all over the world. In Bangladesh, mediation has been extremely successful in delivering justice to the poorer sections of the society. In America, mediation is the norm of dispute and litigation is the exception. In England, the courts do not award costs if a litigant unreasonably rejects mediation as an alternative dispute resolution mechanism. In India, mediation has shown significant results in dispute settlement in Bengaluru and Chennai, both of which have a very vibrant mediation centers running successfully for a long time. The district courts of Delhi are presently running three mediation centers in different parts of the city and have resolved more than 12,000 cases so far.

Effective mediation requires a comprehensive participation of the claimant, one has to believe in the process and be familiar with the facts and the issues. It's good to show empathy, build rapport, reinforce neutrality, and do so equally with the parties. One should not be fazed or at least don't show.

Lawyers also play an important role in the process of mediation. It has become increasingly important as society views mediation as an effective ADR mechanism to litigation. The lawyer is the well known champion of the client, advising on the law and procedure, articulating the clients' views to others, and above all, pursuing the clients' best interests at all times. The participation of

lawyer is required in mediation in certain ways; Client preparation and participation, Interests and positions, Reality test, Opening statement is important, Use private session effectively and Be part of the problem and part of the solution.

#### V. Challenges faced by Mass Torts

The courts are inundated with large number of cases which turn out to be difficult to manage and are much likely to resolve.

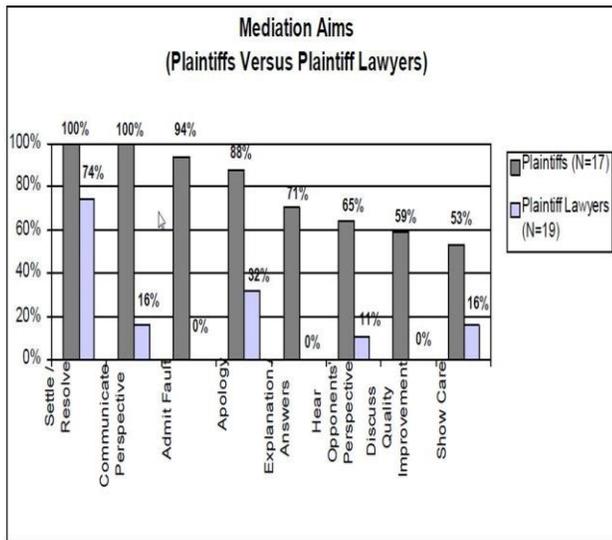
The claims gravitate towards different jurisdictions that claimants believe more suitable. As a result there is disparity among the judicial system and can't deliver proper justice.

In case of legitimate case being tied with dubious claims, the problem intensifies. Settlement burden on defendant is increased with the joining of additional claimants.

Plaintiffs try to look for as much money as possible, resulting in difficult for the actual claimants to get the desired relief.

The graph below shows the difference between the Plaintiffs and Plaintiffs lawyers.

All the above factors jointly make the settlement of Mass Torts in the judicial system challenging. These turn out to be overwhelming for the judicial system and thus, makes it necessary to discover new arenas of the dispute management system, specifically in mass torts cases.



and factual complexity of the cases and must address the conflicts of interest or problems related to future plaintiffs. Most importantly, these proposed rules ignore the peculiar risk that comes with the mass tort litigation. In an effort to lessen the grievances and the financial expenditure of the people, the focus on rationalizing what courts are already practicing, but have not achieved the desired goals

Mediation and negotiation is found to be the best alternative method for the settlement of mass torts in India. Keeping in mind the financial conditions and literacy levels of the most of the population, mediation is the only way. As mostly the claimants are not so educated or economically strong, this would be boon for the people i.e., Mediation and Negotiation for dispute resolution and also it would open new horizons of the judicial system. An impartial justice delivery system would be assured by this. India is still a developing country and for this to be efficient, an all round contribution is required by the side of People, Administration and the Judiciary.

**VI. Alternative methods for dispute settlement**

As a legal scholar, I would recommend more stringency in current rules i.e., consolidation, alterations in current rules i.e., class actions, and new compensation mechanisms i.e., claims resolution tribunals, setting up of special courts etc.

Most of these recommendations aim at procedure rather than substantive doctrine and incur more capabilities in judges to achieve global standards of mass tort litigation. It must not deal with the legal

**VII. CONCLUSION**

To show the advantages and essence of mediation at present it is considered that the approach of courts sending parties for mandatory mediation may inspire confidence as India is high context society where cultural norms and customs play a vital role in bringing



a solution to any dispute and thus only once the parties are sent for such mediation they realize its efficacy and uniqueness.

Finally it would be apt to say that Mediation can only be achieved if we understand that this fast paced process of ADR is not an independent procedure but procedure that is connected with the judicial system and that compliments and does not supplant the justice system as a whole. In achieving this level of understanding the litigants must put their faith in court annexed mediation which is a vital element in development and evolution of Mediation as Dispute Resolution system preferred than other systems. Mediation and Negotiation is emerging out as an alternative dispute resolution mechanism in India, particularly it is a boon in the field of Mass Torts. It has come as a reaction to the complicated and tiring process of litigation, keeping in view the variation in the Indian population i.e., diversity, literacy level, financial aspects etc. People would be highly benefited by this mechanism and it would be easy for more claimants to file for relief for the damages caused to them. As compared to strict nature of the litigation, mediation is a more lenient, informal, inexpensive and a speedy mode of resolution. Disputes are settled through a mediator, a neutral person and even the decision of the mediator is just a suggestion to the parties. A party not satisfied from the decision can at any time knock the doors of court and seek justice.

India has seen a whole lot of cases of Mass torts i.e., from the Bhopal Gas tragedy of the year 1984 to the recent Railways Accidents where the most of the suffering parties are the poor and indigent class, for whom, it is a bane to step in the complicated process of litigation. Even the Constitution of India states that “Welfare of the People” is its paramount interest.

Once there is a case of Mass Torts, the Courts are flooded with litigants. This not only decreases the quality of justice but adds up to the already tons of pending cases. Mediation and Negotiation once adopted will be great relief to the judicial system.

So in the light of these circumstances, it is deliberately recommended to adopt Mediation and Negotiation as a normal code of conduct for the increasing Mass Torts cases in India.

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