



## THE ROAD TO HARMONY; MEDIATION AND NEGOTIATION IN RESOLVING MASS TORTS

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**ABSTRACT:** *This paper will do a causal comparative study; why mediation and negotiation should be used more often to resolve mass torts. Mass tort personal injury claims frequently raise intricate scientific and legal questions of exposure, causation, injury, liability, and damages that are time-consuming and expensive for both plaintiffs and defendants to litigation and individualized footing. Important time and there sources, of the already- strained judiciary, will be saved. Therefore, the active participation of the mediators become important; every claim resolution in ADR is specific to each case. The difference in settlement from other class action cases is the presence of viable individual claims; Need of the system to change from non zero-sum outcomes into the zero-sum environment.*

**Keywords:** *Mass Torts, Mediation, Class Action, Multidistrict Litigation, Product Liability, Public Interest Litigation,*

### 1. Introduction

This paper will do a causal comparative study of the substantive and procedural methods devised and used for resolving mass torts in USA and India. The research methodology which is used to describe various procedures available for mass tort resolution is descriptive in nature and further it entertains the question as to how mediation and negotiation can remove the hurdles of plaintiffs, defendants, and judiciary. There are various ways through which a mass tort resolution can be achieved, for example, class action and multi-district litigation are methods prevalent in USA, and Representative suit such as Public Interest Litigation, Statutory forums such as Consumer Disputes Redressal Forum or usual litigation are used in India.

This research paper is divided into three parts followed by a conclusion, the first part will deal with the procedural and substantive aspects in the USA, the second part will deal with the Indian Context, the third part will deal with the mediation and it will be followed by the conclusion.

It is also an analysis of the use of mediation procedure for mass tort cases in the USA and it is compared with India. As there are certain institutional and societal principles which are absent in Indian morality and how these differences make the application of mediation procedure difficult in India.

#### 1.1 Mass torts and Role of Mediation

In a mass tort, multitude of people are injured, through same incident or same

product, the reason behind that injury is the negligence on the part of the tortfeasor or the defendant. It is a distinct type of litigation both quantitatively and qualitatively, from traditional tort litigation. It can be defined as an activity or a disaster caused by, the act or abstention from the duty to act of, the defendant, which affected a wide and a large number or part of society. Mass tort cases are different from situations where one or two persons are harmed.

Mankind has faced various types of disaster in its entire existence, and as the history remains so is the fitful memory attached to it. Pre-Industrialization most of these disasters were of natural origins and were recognized as an act of god. With technological and industrial development there has been a fundamental change in the causes of these incidents, which in result has increased the circumstances where there have been manmade hazards, and these hazards are quite capable of doing immense harm to its victims. Many times victims of these disasters are denied access to justice because of vexatious litigation but frequently the reason behind it been ignorance and poverty of the victims and rudimentary legal remedies. But with the industrial development there has been a positive change in the social climate which has increased accountability both private and public. Such cases didn't surface in the past, but at the rate which people are becoming aware, victims of such incidents are coming up but not in satisfactory numbers.

Mass tort personal injury claims frequently raise intricate scientific and legal questions of exposure, causation, injury, liability, and damages that are time-consuming and expensive for both plaintiffs and defendants to litigate on an individualized footing. Mediation and negotiation in mass tort cases are to make civil litigation more economical, efficient, and satisfactory to litigants and the resources of the judiciary.

## 1.2 Various types of mass tort cases

'Negligence' in an act is when an expected reasonable care which is foreseeable is avoided. A tort can be committed by both corporate entities as well as by government bodies. Whenever there is an injury on large scale and multitude of people are incapacitated, a claim of 'mass tort' arise. For instance, a pharmaceutical company created a product on use of which caused a serious illness and it affected a large number of people. For example *Lindsey v. Dow Corning*<sup>1</sup> or Bhopal gas tragedy.

There are not only alternative rules which may be applied but also a number of the different mechanisms by which the claims maybe brought. The potential existence of multiple forums with different jurisdiction and venue is one of the principal impediments to a resolution of mass-tort litigation. The multitude of victims in most mass-tort cases could be aggregated within the available forum by means of expanded rules for consolidation. But in the current system, with its potential for multiplicity, effective aggregation can be achieved only by transfer of cases

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<sup>1</sup> *Lindsey v. Dow Corning Corp.*, No. 94-CV-11558 (N.D. Ala., Oct 7, 1995).

between fora and, in the case of the states, between legal systems<sup>2</sup> or it can be resolved through a representative suit.

Mass torts can be classified within three categories:-

1. Single event occurrences
2. Serial injuries, by a product to multitude of victims over a period of time.
3. Toxic damages over persons or property<sup>3</sup>.

#### 1.2.1 Single Event Injury

As the name suggests a single event injury is when a single event results in injury for a multitude of people. In single event injury, usually, proof of causation i.e. actual or proximate cause of the injury is not an issue, and the question of contributory negligence is raised rarely. These cases are easy to consolidate, as every person derives their claims from the same set of facts, and the evidence to support such claim is also limited to one geographic area<sup>4</sup>. Since there is a very narrow scope of defense available to the defendants, single-event injury proceedings often become tied up in the procedural manipulation and a very wide section of these cases end through settlements.

One of the most famous single incident disasters was the 1988 Union Carbide gas leak in Bhopal, India. This incident resulted in more 10,000 deaths and 200,000 injuries<sup>5</sup>.<sup>5</sup> Another example would be Northwest Airline jet crash in 1987 which resulted in the deaths of 156 passengers<sup>6</sup>.

In single event disaster, the case becomes tied up when there are several defendants. In the case of fire at the MGM Grand Hotel, 84 persons were dead and more than 1000 injured in 1980<sup>7</sup>. In this case, the hotel was not the only defendant, 100 other companies related to wiring and constructions were also included and they were made liable under the principle of contributory negligence.

#### 1.2.2 Multiple events of injuries by same product

Serial injuries caused by a single product can be on the multidistrict level. These kinds of injuries are not limited to one geographical area. For example, multiple events of injury caused by products of pharmaceutical company. The approach of Courts while dealing with these types of cases is different from single event cases. They deal with different sets of question such as what is the actual and proximate cause of the injury, whether the injury is caused due to or over-use or misuse of the product or not, and injuries which do not surface until usage of several years.<sup>8</sup> These kinds of cases pose a problem to the judiciary as every case needs to be dealt with

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<sup>2</sup> Courtland H. Peterson; Joachim Zekoll, "Mass Torts", *The American Journal of Comparative Law*, Vol. 42, no. 3, 1994, 79.

<sup>3</sup> John G. Fleming, "Mass Torts", *The American Journal of Comparative Law*, Vol. 42, no. 3, 1994, pp. 507- 529.

<sup>4</sup> *Sala v. National R.R. Passenger Corp.*, 120 F.R.D. 494 (E.D. Pa. 1988).

<sup>5</sup> *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 205 (2d Cir.), cert. denied, 484 U.S. 871 (1987).

<sup>6</sup> *In re Air Crash at Detroit Metro, Airport*, 791 F. Supp. 1204, 1238 (E.D. Mich. 1992).

<sup>7</sup> *In re MGM Grand Hotel Fire Litigation*, 570 F. Supp. 913, 924 (D. Nev. 1983).

<sup>8</sup> *In re Agent Orange Product Liability Litigation*, 506 F. Supp. At 783.

singularly; all of these cases cannot be clubbed together and given uniform resolution. Every individual claimant needs individualized treatment.

Asbestos<sup>9</sup> and pharmaceutical products raise a unique problem, where in the source culpable for the alleged injury must be found out. Other manufacturers produce similar products, and it is, thus necessary to know whose product was responsible for the supposed injury. Asbestos litigation has stretched for decades, and still involves more than 100,000 claimants. This undying litigation has not only strained the resources, both physical and financial, of the court system, but also of the participants<sup>10</sup>

### 1.2.2 Toxic Damage

Typically, the injury caused by toxic elements involves improper disposal of the toxic discharge which later on contaminates air, water, or food. They are also termed as environment torts. Problems and importance related with toxic damages are both equally high with causation. Plaintiff faces a lot of hurdles in getting their claim under this kind of mass tort. There is a need to prove that injury is caused due to toxins which have an identifiable source, under such cases plaintiffs are left with no real defendants.<sup>11</sup> As in the case of *Indian Council for Enviro-Legal Action v. Union of India*<sup>12</sup>.

## 2. Mass Torts in USA

The judicial system of U.S.A. has faced a lot of challenges while resolving mass tort cases. Various procedures are being used by the courts in U.S.A. to resolve the huge amount of mass tort cases, following are some methods employed by the courts:-

1. Consolidation for pre-trial purposes.
2. Coordination of federal and state cases
3. And the use of alternative dispute resolution for individual or a global settlement<sup>13</sup>

The fundamental problem with mass tort litigation is accommodating it into the procedural facilities and the resources of the legal system. The asbestos<sup>14</sup> claim was in the hundreds of thousands, and in the Agent Orange<sup>15</sup> dioxin defoliation case, this number crossed two million. These are just a few of the examples. There is a massive number of mass tort cases, each case involving a massive number of claims, which are clogging the American courts. If all of these cases are resolved using the traditional concept of individual dispute resolution, every individual will be required to establish their case, considering the huge amount of claimants, this process will be need to be repeated again and again whenever there is new claimant, and this will put pressure

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<sup>9</sup> *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997); *Georginev. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 408, 473 (5th Cir. 1986).

<sup>10</sup> Supra note 1.

<sup>11</sup> Courtland H. Peterson; Joachim Zekoll, Mass Torts, *The American Journal of Comparative Law*, Vol. 42, no. 3, 1994, pp. – 79-146.

<sup>12</sup> *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212.

<sup>13</sup> Supra 1.

<sup>14</sup> Supra 9.

<sup>15</sup> Supra 8.

on the resources of the judiciary.

Judicial Innovativeness of the American courts was being challenged with the rise in mass torts, essentially because of the limitless scope of mass tort litigation, taking example of Asbestos or Dow corning.<sup>16</sup> There are two main methods used to resolve mass tort cases i.e. Consolidation and Class action, and the provisions are provided in the Federal Rules of Civil Procedure, which for the most part are replicated in the states system.

There are various reasons which amount to rise in mass torts litigation in U.S as tort law is more developed in the developed nations, therefore, the punitive damages are awarded creating a deterrent for future negligence. Varieties of legal services are available to the public from the legal fraternity. Starting from lawyer fighting for their claim on a contingency fee because of the hope of getting a huge claim. Mass tort lawyers are always in wait for a product which has caused common injury to masses, or for a negligent act which injures a huge number of people as they can collect all the plaintiffs and create a mass tort case out of it. There are various ways through which mass tort litigation can be pursued, it includes consolidation, class actions, bankruptcy, and informal aggregation.

### 2.1 Consolidation

In multidistrict litigation the panel is authorized, for the purpose of pre-trial proceedings, to consolidate all civil actions which are pending before different federal courts.<sup>17</sup> Consolidation of claims under the same court has very little significance.

It is easier to consolidate cases where there is single event disaster rather than a multiple event disaster.<sup>18</sup> The reason behind consolidation of cases is that it provides a cushion of convenience to the parties and witnesses. As consolidation of cases doesn't strain the resources, in other words, it lifts of the financial burden as the parties share all pre-trial costs. For example, all the parties can share the burden of extensive discovery which is permitted in American procedure.

After evaluating their chances of winning, consolidated claims generally ends in a comprehensive settlement. Transferee courts also steer the multiparty litigation towards a settlement as they can deny individual claims for trial to the originating courts. This kind of proceeding has been used in both single event and product liability cases.

### 2.2 Class Action

Class action suits are the most favored and complex mechanism for mass tort resolution.<sup>19</sup> In the early 1980s, there was resistance over the use of class action in mass tort claims, largely out of concern that the interest of an individual litigant would be submerged within the large-scale proceedings.<sup>20</sup> Though by the end of

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<sup>16</sup> Supra 3.

<sup>17</sup> Supra 3.

<sup>18</sup> Supra 4.

<sup>19</sup> Manuel L. Real, "What Evil Have we Wrought: Class Action, Mass Torts, and Settlement", *Loy. L. A. L. Rev.*, no.31, 1998, pp. 437-450.

<sup>20</sup> John C. Coffee, Jr., "Class Wars: The Dilemma of the Mass Tort Class Action", *Columbia Law Review*, Vol 95,

the 1980s, there has been a shift in the favour of class certification, the issue whether appropriation of the class representation is there, is the foremost and the most critical issue in class action practice.<sup>21</sup>

Judges have an important role to play as they decide whether a case can be certified as class or not. Efficiency in the proceedings and safeguarding the interest of the members against any conflict which has arisen or may arise between the 'class' or between the 'class' and its attorneys need to be taken care of. A class action suit is based on four pillars. The facts in question and laws applied should be common, there should be several members, and suitable representation of the matter should be there. Court while dealing with the question of law and facts has to insure that they are common to the whole class and it pre-dominates any question which affects only individual members. This method should only be employed when other methods available for the resolution of the dispute are inefficient and will not be fair for the adjudication of the controversy.

Under class action suits there is a class representative for both plaintiffs and defendants who litigate on behalf of their respective class members. Class Action automatically includes all those absent members who share that common interest. Final decision taken under these class action suits are binding on all the parties 'party to the suit. A shift can be noticed from the traditional model of individual litigation. In many of these class action mass tort cases, class members have already initiated a lawsuit prior to class certification, they have their own legal representation. Most of the mass tort class action suit is a combination of individual claims and claims on behalf of those who are either absent or cannot afford to initiate a lawsuit. This amalgamation raises to another conflict of interests problems.

Across a period, federal judges found that the class action procedure was a "superior" method of handling mass tort litigation and thus began relying on Rule 23, few of the cases are *Bendectin*<sup>22</sup>, *Agent Orange*<sup>23</sup>, *asbestos*<sup>24</sup>, *gypsum*<sup>25</sup>, *human rights*<sup>26</sup>, *breast implants*<sup>27</sup>, and *DES*<sup>28</sup>. In many cases, judges have applied Rule 23 liberally to reflect the due process requirements of *Hansberry v. Lee*<sup>29</sup>, and *Mulane v. Central Hanover Bank & Trust Co.*<sup>30</sup> Courts in all of the above mentioned cases faced similar kind of impediment, i.e. neutralizing the problems arising from inconsistent results of multiple jurisdiction. Further, these decision were awarding multiple punitive damages for the single act of tortious nature but in the end there was inefficiency, as

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No. 6, 1995, pp. 1343-1465.

<sup>21</sup> Ibid.

<sup>22</sup> *Daubert v. Merrell Dow Pharms., Inc.*, (509 U.S. 579, 1993); *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239 (S.D. Ohio 1984).

<sup>23</sup> *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir. 1987).

<sup>24</sup> *Supra* 9.

<sup>25</sup> *In re Gypsum Antitrust Cases*, 565 F.2d 1123 (9th Cir. 1977).

<sup>26</sup> *Hilaov. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

<sup>27</sup> *In re Dow Corning Corp.*, 211 B.R. 545 (Bankr. E.D. Mich. 1997); *In re Breast Implant Cases*, 942 F. Supp. 958 (E. & S.D.N.Y. 1996).

<sup>28</sup> *Payton v. Abbott Labs.*, 83 F.R.D. 382 (D. Mass. 1979).

<sup>29</sup> 311 U.S. 32 (1940).

<sup>30</sup> 339 U.S. 306 (1950).

the victims with small claims were not able to recover anything. Class action suit still has some gaps which need to be filled, as all the questions under the area are not being covered under this method.

### 2.3 Bankruptcy

The defendants under mass tort litigation can invoke the provisions of federal bankruptcy under chapter 11 of the Bankruptcy Code and most of it leads to difficult situation for plaintiffs where they are the bottom of the list when it comes to their claim. Johns Manville, the principal defendant in the asbestos case after the court announced the award of \$ 1,00,000 to each affected worker, he outwitted the court by taking shelter behind bankruptcy laws. Though, the case was terminated at negotiation settlement, by creating a trust fund out of the assets of the company. This gave us a model or scheme of compensation fund which is useful, however, it has been criticized for its widespread manipulation to stall victims' claims.

All of the bankruptcy cases are handled by the federal courts by the rules which are enshrined in the U.S. Bankruptcy Code. There are two alternative objectives of Chapter 11. First, in a circumstance where complete liquidation of assets of the debtor is required to pay off the claims<sup>31</sup>. Second, rehabilitation of the debtor through reorganization, especially in the cases of corporate defendants.<sup>32</sup> Chapter 11 bankruptcies are initiated voluntarily when defendant feel vulnerable by the huge volume of potential claims, it is frequently done in mass tort litigation.

Positives of Bankruptcy	Negatives of Bankruptcy
<ul style="list-style-type: none"> <li>• Management of mass tort cases</li> <li>• All the claims which arise against the debtor are consolidated in one forum.</li> <li>• Automatic stay on all other proceedings against the debtor. Without any risk of violating anti-injunction act</li> <li>• Federal in nature, easy consolidation.</li> </ul>	<ul style="list-style-type: none"> <li>• It can be used in bad faith, for example, for obtaining a stay of litigation pending against the defendant rather than for legitimate rehabilitative purposes.</li> <li>• One of the tasks of the bankruptcy code is to estimate the number of claims which are against the debtor, including contingent and unliquidated claims, acting as a hindrance in the closing of the case.</li> <li>• The automatic stay of other proceedings will include other defendants or not?</li> <li>• What about later claims when the funds are exhausted?</li> </ul>

<sup>31</sup> 11 U.S.C. §§ 701 et seq.

<sup>32</sup> 11 U.S.C. §§ 1101 etseq

### 3. Mass Torts in India

Tort law in India is not well equipped to deal with the industrial and technological development which are ongoing in the country. As it is still developing, overtime Indian Courts have referred to the case laws decided in other common law jurisdictions. The tort law in India is still in its blooming stage. There are certain parameters which it has to establish which will protect the people of India from becoming victim to any industrial or mass incident. Section 1A of the Fatal Accidents Act, 1855 provides for the compensation to the family members in case of death and the amount of damage would be in accordance with the loss suffered. It has been a practice of the Indian Courts to compensate a victim by calculating the intensity of compromise which will the family of the deceased will face.<sup>33</sup> This has been the view point of the Supreme Court<sup>34</sup> i.e. to compensate proportionally in terms of economic capacity of the victim and in case the enterprise's settlement fund is exhausted, the UOI should help to make up for the deficiency.

Various statutes has been enacted to make up for the deficiency, and through these statutes, various institutions has been created to render superficial remedy to the victims. Public Liability Insurance Act, 1991, Civil Liability of Nuclear Damage Act, 2010, Consume Disputes Redressal Commission through Consumer Protection Act, 1986 and Public Interest Litigation, National Green Tribunal are amongst them. Codification of laws does bring certainty of law in a legal system but at the same time it makes it rigid and prevents it from further growth or development. Tort law is unique in itself, as it deals with the interest of the individuals by regulating their behavior.

With the technological and industrial development, there has been negligence on part of government operated enterprises and corporate entities, majorly because of the absence of an effective legal procedure, and since there exist no pre-existent culture of accountability between the employer and employee because of the large population and easy access to mass cheap labor. The proportion in which the development has happened is not proportional to the accountability these enterprises should have towards the victims of their negligence, the victims of the accidents are generally from the poor, uneducated and unaware strata of our country. They suffer the most in the name of development. Any development which is being done by disabling a section of our society, will not amount to development. Till present mass number of victims of Bhopal Gas Tragedy have not been included in the list of the claimants. Generations of families have been affected from one single incident, which could have been avoided if there was proper adherence to safety regulations. The Public Liability Insurance Act, 1991 provide immediate insurance to the person when there has been an accident while handling hazardous substance and similar circumstances. This does help the weaker section of our society from delayed relief and compensation. As per the act it is the duty of the owner of the hazardous factory to take insurance policies in order to provide immediate relief to its own employee.

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<sup>33</sup> *Bijoy Kumar Dugarv. BidyaDharDutta*, (2006) 3 SCC 242.

<sup>34</sup> *M.C. Mehta v. Union of India*, 1987 1 SCR 819, *Union Carbide Corpnv. Union Of India*, (1991) 4 SCC 584.



### 3.1 Consumer Disputes (Product Liability)

For justice to prevail, the victims are required to come forward and fight for their right. There is an equal important role of court as the approach taken by them towards the issue while deciding the matter in question will affect the trust and confidence of the victims. Victims to any incident will only surface when they believe in the system which delivers justice. The current system doesn't encourage the victims to come forward because of various reasons such as high cost of litigation, compensation granted in the end is not satisfactory, delay in justice, and even when there is a decision in the end many of the times it is without any deterrent for future negligence.

Displeased consumer against a product has two options when it comes to product liability, either he or she can approach to the district court or forum established under Consumer Protection Act, 1986. The purpose of this act is to safeguard the consumer interest and where there are disputes it is to provide speedy and simple redressal. Subject to pecuniary and territorial jurisdiction, consumer disputes are resolved through quasi-judicial judiciary machinery present at district, state and centre. These councils are forbidden to exercise their jurisdiction in any case which involves the complex question of law and fact.<sup>35</sup> Since this leaves the council with the power to deal with petty cases and disqualifies them to deal with any class action suits. Since representative suit can be brought by Order 1, Rule 8 of the Civil Procedure Code, 1908 read with Section 2(1)(b) of Consumer Protection Act, for product liability arising out of consumer products.<sup>36</sup> The rationale behind tort law is that damages should be passed onto the manufacturer in such way that it ensures against such complaints in future. Punitive damages should be awarded. Manufacturers have a legal responsibility, information, and means to deal with any dangerous products in a better way than consumers. Hence, it is the responsibility of the manufacturer to keep reasonable duty of care.

### 3.2 Public Interest Litigation (PIL)

It is another form of representative suit, where question of public interest is raised in relation to the legal rights or liabilities of a class of community or general public. It is a product of constitutional obligation which was created and carved out by the judicial creativity and craftsmanship, and is aimed at widening the concept of access to justice. The *locus standi* is not questioned when there is a clear public interest, it is relaxed<sup>37</sup>. It is essential as it works as a legal aid to the masses who constitutes the lower section of our society.<sup>38</sup> Through this medium the court entertain a wide spectrum of cases, which includes environment degradation and mass accidents by MNCs and cases of other civil characters.

Many of the cases which fall under PIL are of mass tort nature but these civil liabilities are camouflaged with Public Interest Litigation. Bhopal Gas Tragedy stands

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<sup>35</sup> *Pannalav. Bank of India* (1992) 1 CPR 34 NC., *Niwaz Spinning Mills Ltd. V. Canbank Mutual Fund* (2002) 2 CPJ 128 (NC).

<sup>36</sup> National Consumer Disputes Redressal Commission, New Delhi, Consumer Case No. 97 of 2016

<sup>37</sup> *Janata Dal V. H.S. Chowdhary*, AIR 1993 SC 892, at 909. PIL is for the promotion of public interest not for the protection of certain accused person

<sup>38</sup> *Labourers Working on Salal Hydro Project v. State of Jammu and Kashmir*, AIR 1984 SC 177.

as an example of the failure, on the part of the judiciary to render justice to the victims from mass scale industrial accidents. This incident took a lot of lives, left a generation of people diseased and debilitated and the average amount awarded to per family of the dead was \$2,200.<sup>39</sup> For claims the government enacted an act known as Processing of claims, it was for the speedy, effective, equitable disposal of claims and for the best advantage of the claimants. Considering the amount awarded to the victims, and as many of them are still suffering it cannot be said that it achieved its purpose. Though, this disaster attracted the concern of the government which prompted various legislation<sup>40</sup> and the development of tort law took another turn.

‘Absolute liability’ of the owner of the hazardous enterprise was first recognised in the case of ‘oleum gas leak’, though the measure of compensation given under the mentioned case was to be decided according to the magnitude and capacity of enterprise.<sup>41</sup> This judgment established a legal principle which is a part of our legal jurisprudence but it was not able to provide claim to the victims of the accident. As the task was left on the shoulders of Delhi Legal Aid and Advice Board to take up cases and file for relief on behalf of the victims.<sup>42</sup> While recognising the principle the court stated that they are ready to learn from all the sources but would create their own jurisprudence.

In recent statutes such as Civil Liability of Nuclear Damage Act, 2010 the legislature has made it mandatory for the nuclear plants to set up a civil liability fund before operating the plant. This fund will operate whenever there is any victim of a nuclear incident. Minimum amount which should be there in the fund is Rs 500 Crore.<sup>43</sup>

#### **4. Mediation and Negotiation in Mass Torts**

Mediation is a versatile form of alternative dispute resolution, parties have full autonomy over it. They decide the time and place of mediation, they negotiate for their own settlement. Since they are private, only parties and their respective representatives attend the sessions. Confidentiality in the whole procedure give it another dimension, parties can express their underlying interest to the mediator, which can help in achieving a peaceful negotiated settlement.

Through mediation, parties can save substantially, form their legal fees and other litigation-related expenses. The pressure and tension through which both the plaintiff and the defendant go through are substantially reduced. While the interest for ADR has grown, behavioral scientists have sought to develop a theoretical base for the analysis of negotiation and dispute resolution. This resulted in emergence of an analytical framework for determining how and why certain conflicts are resolved through negotiation or some other consensual method, and how disputes can be

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<sup>39</sup> Muhammad Ali Khan, The Law of Torts and the Case for its Codification available at <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=da4a712e-da28-445a-8190-9b8367243539&txtsearch=Subject:%20Consumer>. (last accessed 18 October 2017).

<sup>40</sup> *The Environment Protection Act, 1986, The Public Liability Insurance Act, 1991, The National Environment Tribunal Act, 1995, and The Civil Liability of Nuclear Damage Act, 2010*

<sup>41</sup> *M.C. Mehta v. Union of India*, 1987 SCR (1) 819.

<sup>42</sup> *Ibid.*

<sup>43</sup> *M.C. Mehta and Anr.v. Union of India*, 1987 1 SCR 819.

managed so as to increase the likelihood of settlement.<sup>44</sup>

#### 4.1 Role of the Mediator

Mediator plays an important role in the mediation. It can be of any type of mediation, but the skill of mediator will make a substantial difference to the result of the mediation. A strong management role was played by the mediators in L'ambiance mediation. Judge Zampano and Judge Meadow were strong, activist mediators. It is pertinent to note that strong role played by the mediators in L'ambiance mediation lead to a settlement, they decided which entities should be brought into the mediation process. Mediation in mass tort is to be looked from a different perspective, in L'ambiance mediation, mediators worked out the details of the process and the settlements amount and made sure that informal stay on the ongoing suits was respected by the state courts.<sup>45</sup>

The strategy applied in the mediation procedure makes a lot of difference in achieving the settlement of the dispute. Mediator plays a key role in any mediation. In case of mass tort, this responsibility significantly increases as both parties have a lot of members and there are chances that it will increase as the mediation progress, and there might be claimants even after the mediation process is over.

In L'ambiance plaza mediation, mediators didn't play the role of traditional mediators by letting the parties to negotiate their own settlement, on the other hand, they kept away the parties from interacting. Virtually, all negotiations were between the mediation panel and the individual parties. This pattern was strictly adhered by every person who was a party in that mediation, neither any plaintiff knew what the other plaintiff would receive nor any defendant knew how much other defendant had paid, it was all revealed at the end of the process when the agreements were announced and became a matter of public record.

In such a large mediation cooperation of parties is an issue, as parties who are not sued yet for the damages will not be cordial. In L'ambiance mediation, mediators were judges which affected the mediation process in the positive way, they requested potential defendants to attend the mediation proceedings and they obliged. In this case the request was coming from judges though they didn't have any power to settle the dispute, still, they were persuasive. They were able to make parties aware of the pros and cons of the litigation and mediation.

In the USA there is a major cost of continuing litigation, both financial and emotional. It is the mediator's responsibility that parties understand the profound emotional and economic stress they will go through litigation.

'Morality' according to Plato in its standard form refers to the protocol which is accepted by any person who meets certain intellectual and volitional conditions, almost always including the condition of being rational.<sup>46</sup> 'Morality' as a principle

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<sup>44</sup> *Lucy v. Katz*, "The L'Ambiance Plaza Mediation: A Case Study in Judicial Settlement of Mass Torts", Ohio St. J. on Disp. Resol No.5,1990 ,pp. 277-336.

<sup>45</sup> Ibid

<sup>46</sup> 'The Definition of morality, available at <https://plato.stanford.edu/entries/morality-definition/>, (last accessed

plays an important role in mediation. Moral imperative that arose from the terrible nature of the tragedy, and to set it right by getting quick relief to the victims or their families is the primary target which every mechanism is trying to achieve. This positive attitude towards a disaster in mediation overpowers the negativity related to litigation.

Charting out strategy is important for every mass mediation as this will build the faith, trust, and confidence of the parties in the mediation. This can be achieved if the mediator is thoroughly knowledgeable about the case, educating himself along the development in the proceedings.

#### 4.2 Bellwether Settlement – Stryker litigation

In Stryker litigation, resolution was achieved by using bellwether settlement. It is one amongst the biggest medical device manufacturer in the world. They introduced two artificial hip implants in 2012. The device was coated with strong metal alloys. In later stages, it was discovered by the company that the alloys they used could corrode, so acting with this new knowledge they called the device back and conducted tests and also paid for the revision surgery to replace the device in case the patient was uninsured. Thousands of its customers sued. The settlement was conducted in phases, in first phase parties were mediated and in second stage they reached a global settlement.<sup>47</sup> One of the important factors behind the successful mediation was that the artificial hip implants were tagged, it became easy to know all the claimants, second important factor would be that Stryker performed their moral duty towards their customers, which usually lack in the conduct of enterprises.

### 5. Conclusion

There have been various cases on mass torts, and with the rate of development, they are bound to increase. In case of developing countries, such as India, awareness regarding the rights and duties of both the injurer and the injured. The jurisprudence on this subject is more developed in USA as being a capitalist state. In India, courts have to balance the economical and social responsibilities. As leaving an enterprise under debt after punitive damages will also create employment problem for the people employed because of the industry.

Generally, there are three criteria to measure dispute resolution process: Efficacy; cheap and time saving, fair and just, and constant. Mediation is one of the dispute resolution processes which match up with all the criteria. Role of the mediator is the key in mediation. The skill level of the mediator will make a difference in the outcome of the mediation process. Trust and confidence of the parties is the base for the negotiation during the mediation process.

In the USA, mediation can be a solution for the heavy flow of mass tort claims, the role played by the mediators in la'ambiance mediation and bellwether settlement pave the path for it. Again, the role played by the mediators play a vital role in the

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on 18 October 2017).

<sup>47</sup> Barry Meier, "Stryker Settles Suits by Hip Implant Patients for \$1 Billion", *N.Y. TIMES*, Nov. 4, 2014, at B9

mediation proceedings. Mediation in mass tort cases can bring zero sum outcome because for the plaintiffs it will be time saving and cheap, for the defendants it will save them from negative press and potential fall in price of their stock, and for judiciary it will save their resources which otherwise would have been used to manage successive jury trials for thousands of plaintiffs spanning a period of years. Mass tort cases have economic and managerial problems, they need to be dealt with techniques studied from other disciplines than law. There is a need to incorporate a system of the zero-sum environment. Judicial mediation, integrative bargaining and creative solutions can be imposed within an adversarial framework.

In India, the mechanism to deal with mass tort cases is different than the USA. There are inherent differences between the two nations. Economical and procedural errors make it difficult for the victims to get relief. There has been an attempt by Indian courts and legislature to develop a jurisprudence which differentiates the level of negligence and in same way differentiate the claim for it. For example, Civil Liability of Nuclear Damage Act makes it a statutory requirement to for operators to create a fund in case of damages, in other cases compensation is given on the basis of the analysis of the harm done to the earning capacity of the victim. Lack of quality mediators is another problem which India is facing. There aren't many qualified mediators available. To deal with this problem, lawyers and judges should be trained and should emphasis on the use of ADR.

There have been suggestions by our formal Justice V R Krishna Iyer that there is a need for a substantive law of torts which creates strict liability and provide for standardizing compensation for mass application. Our legislature didn't create a specific substantive law but created various acts for specific acts of liability. It was also suggested to create a new division with adequate numbers of judges well versed with courses on environment law in the High Court. Though, this was not taken into consideration. Mediation as dispute resolution mechanism is currently being used in India. Mediators are not trained to resolve such disputes. Hence, there is a need to improve the skills of the mediators in order to increase the chances of achieving resolution through mediation.

With the technological and scientific inventions, there will more products, medicines for new diseases, and construction of new plants, to keep a balance between the development to f the society and damage to environment or human lives, courts need to set a bar really high in case of negligence so that it acts as a deterrent to the future. Mediation can play a vital role as it will be efficient the only improvement which is required is skill development training of the mediators and mediators who are creative enough to devise new strategies to deal with every new difficult problem.