

National green tribunal (NGT) in vizag gas leak case: Strict liability *versus* absolute liability: *Aristotle's distributive justice and corrective justice vis-à-vis fairness conception in tort law*

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Abstract

The recent NGT interim order in Vizag Gas Leak case referred to the obsolete law 'strict liability' in Vizag Gas Leak tragedy. Considering its non-suitability, in the year 1986 the Supreme Court of India in Oleum Gas leak case rejected the same and applied the 'absolute liability rule'. Criticism poured in against NGT's interim order for providing escape route to the LG Polymers on the ground of non-negligence. This raised the debate about the shortfalls of the corrective justice conception of Aristotle's Nicomachean Ethics vis-à-vis strict liability in the tort law accident cases which relieves the injurer from liability on the ground of Force Majeure. Considering the views of different jurists and the conception of fairness, the suitability of absolute liability rule to the modern-day tort law was argued to counter the NGT interim order. The article attempted to explore the rightness of the expression 'strict liability' used by NGT.

Keywords: strict liability, absolute liability, corrective justice, distributive justice, national green tribunal (ngt), vizag gas leak tragedy

1. Introduction

National Green Tribunal on May 07, 2020 found LG Polymers *prima facie* liable under the 19th Century English Law principle, i.e., 'strict liability', laid down in *Rylands v. Fletcher*^[1]. The criticism poured in over the application of obsolete law, which was considered as unfit to deal with such massive disasters by the Supreme Court of India in 1986, i.e., in *MC Mehta v. Union of India*^[2]. The inadequacy of the strict liability principle was deliberately expressed in *Oleum Gas Leak Case*^[3], and in subsequent *Bhopal Gas Leak case*^[4], by holding industries to be liable for future undeserved suffering of thousands of innocent citizens, even under no-negligence condition. According to the apex court, the application of strict liability will affect the victim's future interest in their undeserved sufferings caused due to the negligence.

Considering absolute liability principle as social justice friendly, the apex court in plethora of cases firmly applied the same, instead of the strict liability principle. The critics opined the NGT judgment as *ultra vires* to Section 17 of the National Green Tribunal Act, 2010 which mandates NGT to apply the principle of no-fault.

This raised the jurisprudential debate about the Aristotle's forms of justice, discussed by him in *Nicomachean Ethics*, i.e., distributive and corrective justice vis-à-vis the tort law. According to Aristotle, corrective justice which protects the established proportionality is the right approach in accident cases under tort law. Justice Blackburn in *Rylands v. Fletcher*^[5], followed the corrective justice and held that, *the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it*

escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which the natural consequence of its escape.

The development of strict liability in negligence and accidental tort cases developed a dogma in the minds of scholars regarding to the application of Aristotle's forms of justice i.e., distributive and corrective as mentioned in *Nicomachean Ethics*. Especially, the question of method of reparation of loss, caused due to negligent act though done for the welfare of the public attracted the attention of the philosophers who disagreed with the Aristotle's distinction of distributive and corrective justice basing on the premise of the fairness conception and duty to repair a moral wrong. The Aristotle's *Nicomachean Ethics* postulates notion of justice as a virtue and further distinguishes it into universal and particular. The particular justice again has been divided into corrective and distributive justice by applying geometric and arithmetic proportion of application of justice. In detail, the former is the fair distribution of goods by the state to its citizens in a geometric proportion and the later is the corrective principle related to private transactions either voluntary or involuntary wherein the justice is applied in arithmetic proportion to repair a wrong.

While dealing with the negligent cases under the tort law, the question regarding the existence of distinction between both corrective and distributive justice knocked the doors of the modern jurists. The instances of application of both in the negligence and accidental loss cases raised the curtain to the debate whether both kinds of justices can co-exist in one instance basing on the following presumptions i.e., first, negligence liability is fully justified only when it is distributively fair, second, when negligence liability is properly articulated i.e., the norms of due care strike a fair balance between the competing claims of liberty and security. Hence, the basic distinction between both justices proposed by Aristotle i.e., distributive justice, based on the fairness conception and the corrective justice, to deal with a

¹ L.R. 3 H.L. 330, 339-40 (1868)

² M.C.Mehta v. Union of India (Oleum Gas Leak Case), 1987 SCR (1) 819

³ Supra 3

⁴ AIR (1989) (1) SCC 674

⁵ Supra 2

moral wrong to trigger a duty of repair, again became a subject of debate.

The article explains about the Aristotle's forms of justice, the analogy of basic distinction between distributive and corrective justice, and the reasons for application of both justices in negligence and accidental tort cases in the light of moral and economic conceptions of justice. The article also attempts to apply the Aristotle's forms of justice to the NGT ruling in the Vizag Gas Leak tragedy by analyzing the India's stand over the strict liability principle.

2. Aristotle's Forms of Justice

Aristotle's in his fifth book *Nicomachean Ethics* defines universal justice as complete virtue of justice; justice as partial virtue is particular justice. According to him the universal justice is the overcome of different vices and the particular justice is the overcome of a particular vice, namely that of desiring more than what belongs to oneself; outcome of which is inequality. Inside the notion of particular justice, Aristotle makes the seminal distinction between distributive justice and corrective justice basing on the equality proportion applied in both the cases.

The following chart reflects the Aristotle's forms of justice:

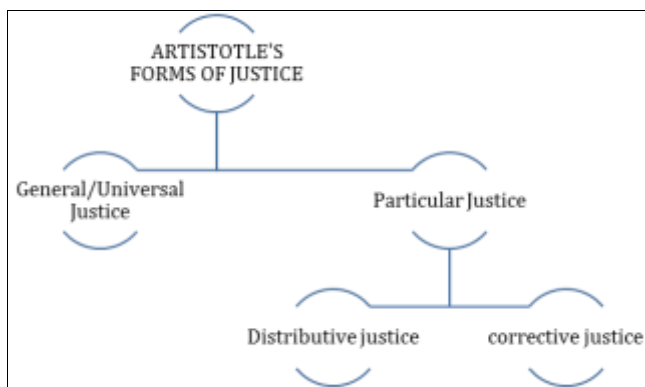


Fig 1

According to him, geometric proportion of equality in distributive justice is between four terms i.e., between the ratio of the merits between two persons should be proportional to the ratio of the distributed goods among them by taking into consideration their prior status. The arithmetic proportion of equality in corrective justice is between two terms i.e., the earner and the loser without taking into consideration their prior status.

Aristotle described a number of important distinctive features of corrective justice as compared to distributive justice i.e., the different nature of equality i.e., geometric proportion and arithmetic proportion, in distributive justice, the prior respective merits of the parties are at the basis of their original rights and whereas in corrective justice, the law considers only the extent of the damage caused it, therefore treats the litigant parties as equal despite of their prior virtues and merits.

The distributive justice establishes the doctrine of proportionality and holds distribution on the basis of established proportion as just. Corrective justice protects the untoward disturbance to the established proportionality.

3. Other scholars on 'aristotle's forms of justice'

Thomas Aquinas, in his major work, the *Summa Theologiae*,

opined that retribution is only the part of corrective justice but not of distributive justice. He argued that the dignity of a person is relevant in both justices. He illustrated that the punishment is more severe for a person who hits a prince than for one who hits an ordinary person reasoning that quantum of damage is high the first case.

But the French philosopher and scientist Johannes Buridanus (Jean Buridan) denied the difference of kind (*species*) between commutative and distributive justice by claiming that the difference resided merely in the matter (*in materia*) and according to him, both are two forms of the same virtue of justice.

A famous jurist of all times, Hugo Grotius while dealing with Aristotle's distinction between two forms of justice (attributive/distributive and expletive/corrective justice) introduced two new terms *aptitude* and *facultas*. The latter term designates a legal right in the strict sense like personal freedom, paternal authority, ownership and obligation and the former term, aptitude, constitutes the potential of obtaining a right. According to him, the *facultas* is the object of the corrective justice, since the latter is aimed at restoring rights to their owners and the distributive justice, by considering the *aptitude* of a person, is the companion of those virtues that benefit the other members of the society, such as generosity, compassion and guiding care. In his opinion, the difference between the two forms of justice is not to be found in the use of different kinds of proportions but in the nature of the objects to which they respectively relate.

Samuel Pufendorf, a renowned critique of Grotius, equally uses the distinction of Grotius between perfect and imperfect rights in a completely different way. According to Grotius, the attribute/distributive justice is concerned with imperfect rights and the expletive/corrective justice enforces perfect rights. According to Pufendorf, imperfect rights are the objects of universal justice and the perfect rights are the objects of particular justice. According to him, the obligation arising from a crime is that of repairing the damage.

The outstanding philosopher and great critic of Grotius, Giambattista Vico refuted the distinction between distributive and corrective justice by saying that distinction can survive only in theory not in practical life. According to him, distributive justice obtains in public affairs; corrective justice in private affairs.

According to Thomas Hobbes, commutative justice is the justice of a contractor; i.e., a performance of covenant in buying and selling; hiring and letting to hire; lending and borrowing; exchanging, bartering and other acts of contract and distributive justice, the justice of an arbitrator, i.e., the act of defining what is just.

According to Immanuel Kant distributive justice is the decision handed down by a state court in the private law conflict. In his view, considerations of public law, such as the efficiency of the administration of justice, may change the substance of private law.

According to Jean Bodin, a French jurist and political philosopher, the two forms of justice have to be combined in a harmonious way i.e., harmonic justice. By stating example, he says that in case of a repeated offender, the punishment should be more than the loss of the victim.

According to the dissertation *Disputatio Theologica De Justitia Et Jure* written by Philippus Paumfelder, is the one

publicly defended in 1667 at the Catholic University of Salzburg, the five differences between distributive and commutative justice are:

- In distributive justice, the community, or its representative, deals with a private person; in commutative justice, private persons, or those who conduct themselves like private persons, deal with another private person.
- The former orders distributions, the latter transactions.
- Contrary to distributive justice, the basis of commutative justice is a property right or a quasi property right.
- Commutative justice, as such, regards an arithmetic proportion, which constitutes an exact equality between exchanged things; distributive justice considers a geometric proportion that constitutes a proportional equality between things to be distributed and the condition of the recipient persons.
- A duty of restitution arises from the violation of commutative justice, but not from the violation of distributive justice as such.

4. Aristotle's forms of justice and tort law

German Josef Esser, an important modern scholar in his work on the substantive rules of delictual liability related the classical Aristotelian distinction between distributive and commutative justice agreed with the traditional fault principle in relation to the liability of damages caused by non-faulty activities, i.e., accidental losses. According to him, distribution of accidental losses is not the task of commutative justice but that of distributive justice, which applies geometric proportion and takes into account the status of the individual.

According to Jules Coleman, the author of *Risks and Wrongs*, corrective justice has four elements. First, it applies to human agency, not, say, to natural misfortunes. Second, it is concerned with repair or rectification. Third, it is concerned with rectifying some kind of wrongdoing – with 'wrongful losses'. Fourth, it involves correlativity. In cases of accidental loss, when a non-negligent injurer inflicts a loss on a victim, the elements of wrongdoing appear absent by exempting the application of corrective justice. In such circumstances, the possibility of inflicting duty of care upon the non-negligent injurer seems to be impossible for the Aristotelian's judge.

To understand the aforementioned discussion, it is pertinent to understand the strict liability principle laid down in *Rylands v. Fletcher*¹⁶. In this case, according to Mr. Justice Blackburn, *the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which the natural consequence of its escape.*

According to Aristotle, it is unjust to suffer injury at the hands of another and the victim must be compensated. Further, the corrective justice provides that the compensation to the victim be paid by the injurer who gained out of his wrongdoing. If there is no gain out of wrongdoing by the injurer, then he is not liable to compensate the victim.

Here to put it in Aristotelian's terms, if the injurer altered the social proportion of benefits by inflicting injury to the

victim, and gaining out it, then he is liable to compensate. Hence, it can be said that the ruling laid down in the *Ryland v. Fletcher* is supported by the Aristotle's principle of corrective justice, as the ruling supports the idea of protecting the established proportionality.

The critics to the ruling laid down in the *Ryland v. Fletcher*, raised the question, what if the injurer does not gain out of the injury caused to the victim? Whether such situation gives the injurer to create exception to the ruling laid down in *Ryland v. Fletcher*?

According to Aristotle's theory of corrective justice, the injury must have been caused due to the act of negligence by the wrong doer. But if the act is caused or act of god (*Force Majeure*), then Aristotle's corrective justice do not come into play because of the absence of wrongful conduct by the injurer. Further, under corrective justice, injurer if gains out of the wrong committed due to his act of negligence, then only he is responsible for compensating the victim. In case of *force majeure*, no negligence on part of the injurer and injurer do not gain out of the loss caused to the victim.

Now the question is, whether the strict liability rule is compatible to the twenty first century industrial revolution & development? Whether creating exceptions on the basis of no-negligence & no-gain out of wrong committed leaves the scope for the enterprises to escape the liability? Whether application of distributive justice which requires the society to establish the proportionality before distributing the proportion is more justifiable than the application of the strict liability by keeping in mind the today's enterprise activity involving hazardous or dangerous substances.

The demand for diversion from the Aristotle's conception of justice rose automatically, by bringing the fairness conception into the tort accident law. The need for application of fairness conception to the tort law of accidents to deal with the fair distribution of the burdens and benefits of mutually beneficial but harmful activities arose. The principle of fairness, which is a principle of distributive justice, asserts that the burdens and benefits of risky activities are fairly apportioned when those who reap the benefits of those activities also bear their burdens.

4. Absolute Liability Principle: A Judicial Creation in India

In India, the debate about the application of strict liability started with the case *M.C.Mehta and Anr v. UOI*¹⁷. This case established the jurisprudence of absolute liability, a deviation from the strict liability laid down in *Ryland v. Fletcher*¹⁸, creating a considerable shift in the field of tort and criminal law. This case is famously known as the Oleum gas leakage case, as it deals with the aftermath of the oleum gas leakage from Shriram Food and Fertilizers Ltd., complex in Delhi.

Analysing the rule laid down in *Ryland v. Fletcher* as obsolete, Bhagawati J., in this case attempted to look for an alternative to the strict liability rule by keeping the increased industrial capacity in dealing with hazardous or inherently dangerous industry. According to the court, the strict liability does not hold *force majeure*, and such exception provides scope for the industries to shrug their shoulders from the serious injuries which flows into future generations

⁶ Supra 2

⁷ Supra 3

⁸ Supra 2

of the victims caused due to the escape of the dangerous substance from the injurer's premises.

Considering Bhopal Gas leak tragedy, which occurred just before the Oleum Gas Leak tragedy, the apex court derived absolute liability rule, which do not provide any exception unlike strict liability. Under the absolute liability, injurer is liable to provide compensation, even though the injury is due to the act of god, purely under the condition of non-negligent conduct of the injurer, and where injurer is not benefitted due to the cause of the injury. This deviation from the strict liability is supported by the arguments such as high industrial growth, and the advent of science and technology etc.

After this case, the apex court applied the absolute liability rule in *Bhopal Gas Leak Disaster case* ^[9]. It is one of the big tragedies for which the generations are suffering with different post-incident medical problems even today. About 2660 people died instantaneously and lacs of people were seriously injured. The Union Carbide Company pleaded for the application of the strict liability rule and following the absolute liability principle laid down in *M.C.Mehta v. Union of India* ^[10]. The court in this case reaffirmed the absolute liability principle which fixes liability upon the injurer even if there is no negligence on his part.

Subsequently in *Indian Council for Environmental Legal Action v. UOI* ^[11], the apex court applied the Polluter Pays Principle while dealing with the discharge of azo dye and untreated toxic sludge by the five chemical industries producing H Acid in Rajasthan. The toxic substance was discharged into the open compound, which further crept into the bowels of the earth, polluting the underground water, leaving surrounding agricultural fields infertile and also affecting the health of the villagers surrounding those industries.

In *Vellore Citizens Welfare Forum v. UOI* ^[12], the apex court while deciding the Public Interest Litigation filed against the tanneries and similar industries in Tamil Nadu for discharging untreated effluents. The discharge of untreated effluents affected the drinking water and health of the residents in its surroundings. The court applied the Polluter Pay Principle and reiterated the relevance of absolute liability principle in the context of changing dimensions of the industrial activity.

5. NGT and vizag gas leak case

NGT constituted a five-member joint monitoring committee to conduct the inquiry. According to the Committee, *prima facie* the following are the reasons for the styrene gas/vapour leakage from the affected tank:

1. *Insufficient Teritiary Butyl Catechol (TBC, used as inhibitor to avoid polymerization at lower temperatures) concentration in styrene tank due to unavailability of TBC in the plant.*
2. *There is no monitoring system for dissolved oxygen in the vapour space which might have fallen down below 6%.*
3. *The tank has no provision of monitoring temperatures at top layers of the storage.*
4. *Refrigeration system was not being operated for 24 hours.*

⁹ (1989) (1) SCC 674

¹⁰ Supra 3

¹¹ AIR 1996 SC 1446

¹² (1996) 5 SCC 647

5. *Gross human failure and negligence of the Person in-Charge of the plant and maintenance personnel of the storage tanks.*

After probe, the NGT imposed a 50-crore interim compensation and the order is as follows: "...Leakage of hazardous gas at such a scale adversely affecting public health and environment, clearly attracts the principle of 'strict liability' against the enterprise engaged in a hazardous or inherently dangerous industry. Such an entity is liable to restore the damage caused under the Environmental law, apart from other statutory liability'.

The use of the expression 'strict liability' by the NGT in the LG Polymers gas leak case raised the doubt of diluting of the principle of liability by providing possible exceptions to the company to evade the compensation payment.

The order was criticized as *ultra vires* to the National Green Tribunal Act of 2010 which incorporates the absolute liability principle under Section 17 which reads as follows:

Sec.17: Liability to pay relief or compensation in certain cases:

1. *Where death of, or injury to, any person (other than a workman) or damage to any property or environment has resulted from an accident or the adverse impact of an activity or operation or process, under any enactment specified in Schedule I, the person responsible shall be liable to pay such relief or compensation for such death, injury or damage, under all or any of the heads specified in Schedule II, as may be determined by the Tribunal.*
2. *If the death, injury or damage caused by an accident or the adverse impact of an activity or operation or process under any enactment specified in Schedule I cannot be attributed to any single activity or operation or process but is the combined or resultant effect of several such activities, operations and processes, the Tribunal may, apportion the liability for relief compensation amongst those responsible for such activities, operations and processes on an equitable basis.*
3. *The Tribunal shall, in case of an accident, apply the principle of no fault.*

Section 17 of the NGT Act, 2010 provides for absolute liability or non-fault liability. Deviation in case of Vizag Gas leak case by NGT attracted heated debate about the intention of the Tribunal to provide scope for the LG Polymers to provide the exception.

6. Analysis of NGT Verdict in Vizag Gas Leak Case

As explained earlier, under the strict liability principle, injurer is responsible for the damage caused to the victim, when there is a clear evidence of negligence; and whereas in case of absolute liability, no-negligence rule imposes duty upon the injurer to compensate the victim irrespective zero benefit gained by him out of the accident or zero negligence on part of him in causing the accident.

According to the Supreme Court in *M.C.Mehta and Anr v. UOI* ^[13], the strict liability is creating exceptions to the injurer to escape the liability where there is no negligence on his part in the loss caused due to the escape of the

¹³ Supra 3

hazardous substance from his premises. The court in *M.C.Mehta and Anr v. UOI* ^[14] opted the absolute liability only to close the door for the industries or enterprises to escape the responsibility of compensating the victims in the name of the act of god. This approach is adopted by the apex court to provide justice for the victims from the big industries on the premise that distributive justice involving fairness conception is more to social welfare concept, compared to the corrective justice.

The Hon'ble Supreme Court of India in *M.C.Mehta and Anr v. UOI* ^[15] & *Bhopal Gas Leak Disaster case* ^[16] opted to apply the absolute liability only to implement the social welfare concept, by making corporations absolutely liable to compensate for such harm irrespective of the fact that the enterprise had taken all reasonable care and that the harm occurred without any negligence on its part. The objective of opting absolute liability principle is to inject respect for human rights and social conscience in corporate structure.

The important point to discuss is whether apex court ruling in *M.C.Mehta and Anr v. UOI* ^[17] refrained the application of the strict liability in India? The reading of the *M.C.Mehta and Anr v. UOI* ^[18] verdict do not reflect that application of strict liability is prohibited. In the verdict, Justice Bhagawati mentioned that strict liability provides scope for the enterprises to escape from the liability by proving the no-negligence. India being the developing country with large number of populations belonging to the below poverty line, the application of strict liability will harm their welfare.

In *Charan Lal Sahu v. UOI* ^[19], the apex court held that the absolute liability rule do not provide any exception and the enterprise cannot escape the liability by showing the due care and no-negligence plea. According to the apex court, permission granted for enterprise to operate and carry out trade in hazardous or dangerous activity in India is conditional, that the enterprise is liable for any accident caused due to the escape of the hazardous substance. The court reasoned that enterprise alone is have the resource to discover and guard the hazards and has the capability of warning against potential hazards.

While dealing with the suits filed against Union Carbide Corporation in the Bhopal Gas Leak case before the United States District Court of New York by the legal representatives of the deceased and the affected persons including the Union of India's suit, Judge Keevan on 12th May 1986 while dismissing the suits on the ground of forum inconvenience held that '*Indian Judiciary must have the opportunity to stand tall before the world and to pass judgment on behalf of its own people*'.

According to Justice Bhagawati, absolute liability in tort law of accidents is fairer compared to the strict liability. The fairness conception and justice in contemporary tort theory, when considered to be a matter of distributive justice, is a fair distribution of the burdens and benefits of accident caused beyond his control. The fairness conception under the distributive justice is wider compared to the corrective justice, as the former one establishes the proportionality ratio of distribution of goods and the later protects the established proportionality against any inner disturbances.

This means absolute liability involves both distributive justice and corrective justice because, it imposes distributive liability fairly in both negligent losses as well as the nonnegligent losses. In absolute liability, victims claim to reparation rest at bottom on a conception of distributive justice as well as corrective justice. The absolute liability bridges the connection between corrective justice and social contract conceptions with an expanded application of fairness conception.

7. Conclusion

The choice of strict liability in negligence and accidental tort law necessitated the revisit of basics of fundamental distinction between the distributive justice and corrective justice. Though the modern scholars argued about the degree of harm with a liability based upon distributive considerations, but the consequence of the above choice lead to a great diversity in the understanding of the notions of distributive and corrective justice. The modern scholars argue that Aristotle is silent upon the question, how the principle of arithmetic proportion of corrective justice can be maintained in the case where the injured person's loss exceeds the wrongdoer's gain? Some scholars opined that, since the function of corrective justice is merely to restore the original position of the parties, this form of justice is secondary in importance to distributive justice that determines the original position. This leads to a conclusion that the function of corrective justice is to preserve a given distribution of wealth.

But Ernest Weinrib, opined that corrective justice's mode of justification can operate against the background of a distribution without incorporating into its justificatory structure the justification of the distribution, otherwise, corrective justice becomes a species of distributive justice, which runs counter the Aristotle's postulate of their being two separate forms of justice. Izhak Englard opined that the original distribution of entitlements could only be determined by the remedial potential of the legal systems.

Hence, many scholars have answered the query regarding the practical possibility of application of two forms of justice simultaneously in a given situation affirmatively. John Finnis affirmed, "The distinction between distributive and commutative justice is no more than an analytical convenience, an aid to orderly consideration of problems". According to Lord Steyn in *McFarlane v. Tayside Health Board* ^[20], "*the truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven*".

After analyzing the above arguments of great scholars, it is evident that Aristotle established different institutions of justice basing on the notion of justice. The base of above distinction lies in loss and gain principle, right – duty relationship, public – private law concept, imperfect and perfect relationship etc., The ultimate goal is to provide a better justice which maximizes the wealth of the society and the correction of moral wrong which endangers the egalitarian distribution. The application of strict liability in negligent and accident tort cases till serves the purpose of justice both from the point of view of loss and gain theory and fairness conception is considered acceptable in few judicial decisions.

Keeping the wider approach of the distributive justice and

¹⁴ Ibid.,

¹⁵ Supra 3

¹⁶ (1989) (1) SCC 674

¹⁷ Supra 3

¹⁸ Supra 3

¹⁹ AIR 1990 SC 1480

²⁰ [2000] 2 AC 59

the limitations of the corrective justice in mind, the NGT may review the interim order by altering the expression 'strict liability' with the absolute liability. The future implications of the discharge of toxic substance upon the surrounding residents yet and providing possible exceptions to the injurer is against the fairness conception and social welfare.

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