

Union Carbide and James Hardie: Lessons in Politics and Power

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In terms of industrial disasters, the chemical release at Bhopal and the long-term production and use of asbestos products are two of the largest and most controversial cases. Both events backfired on the companies responsible, namely Union Carbide and James Hardie (which, in Australia, largely controlled the asbestos products market). Yet in the case of Bhopal most victims have not been adequately compensated and, while compensation seems more assured for Australian asbestos victims, it has been a long and bitter battle for justice. How, in a globalised world, can we ensure that corporate negligence backfires and victims receive justice? This paper presents a framework for understanding how global corporations attempt to inhibit outrage and how to counter their tactics.

The world's worst industrial disaster—Bhopal—occurred on 3 December 1984. Thousands of people died on the night and many thousands more in the following days and weeks. Over 150,000 people were severely affected by the release of the chemical methyl isocyanate from a Union Carbide pesticide plant in India. In the 20 years since there have been many improvements in the handling of toxic chemicals and in corporate environmental responsibility, much of which can be attributed to the public interest and outrage provoked by Bhopal. Yet in Bhopal itself some victims have received only between US\$4,000 and \$12,000, while many others have never been compensated. The Union Carbide site is still contaminated by thousands of tonnes of toxic chemicals and those responsible for the disaster have never been brought to justice.

Twenty years after the Bhopal accident, in December 2004, an agreement was signed between the company James Hardie, Australian unions and asbestos support groups. James Hardie was the dominant manufacturer of asbestos-containing products in Australia, which for decades had the highest per capita use of asbestos in the world. Asbestos is the primary cause of a cancer called mesothelioma and is linked to lung cancer and the debilitating lung disease asbestosis. Around 7,500 Australians have already died of mesothelioma and a further 10,500 are expected to die by 2020. Hardie had knowledge of the

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dangers of asbestos from the 1930s but no warnings were placed on asbestos products until the late 1970s, and production of asbestos-containing goods continued until the mid-1980s despite the availability of alternatives. The agreement with Hardie, formalised in December 2005, provides a legally binding agreement with an open-ended funding commitment and no cap on payments to victims.

The point of this paper is not to compare these two industrial disasters but rather to examine them as examples of global injustices that have, to an extent, backfired. There are many observed instances in which actions that are perceived as unjust rebound against the perpetrator, such as violent attacks on peaceful protesters,¹ the 1991 beating of Rodney King by Los Angeles police,² torture³ and censorship.⁴ However, in most cases such injustices do *not* backfire. There are two key criteria for backfire: first, the event sparks outrage due to a perception of injustice; second, information about the event is communicated to a receptive audience.

Both the Union Carbide and James Hardie events clearly meet these two criteria: they generated enormous outrage, a large part of it directed at the companies and their directors. In addition, they both have global dimensions as both are multinational corporations. However, despite the fact that both cases involve similar legal constraints with issues of the responsibility of parent companies, jurisdiction and corporate restructuring, the public reaction has not ensured full justice for the victims in both cases. The Bhopal accident created massive international concern, which has affected chemical and toxic management and legislation internationally, but did not result in the victims being compensated adequately, if at all. In contrast, the indications are that asbestos victims in Australia may receive more satisfactory compensation. An analysis of backfire and the methods used to counter it can shed light on why this is the case.

Perpetrators can inhibit the creation and expression of outrage by five main methods: covering up the evidence; devaluing the victims; reinterpreting the events; utilising official investigations in response to the event; and intimidating and bribing victims, witnesses and supporters.⁵ The suggestion is not that organisations or governments plan their responses to a gross injustice under these headings, or indeed that they plan in detail their response to such events. Rather, the categories are presented as broad and overlapping tools for understanding struggles and responding to unjust events.

In the next five sections, we look in turn at the five methods of inhibiting outrage, in each case giving some general comments and then examples from the Bhopal and Hardie stories. In the conclusion we sum up what can be learned from this approach and how globalisation impacts on backfire.

1. Gene Sharp, *The Politics of Nonviolent Action* (Boston: Porter Sargent, 1973), pp. 657–703.

2. Brian Martin, "The Beating of Rodney King: The Dynamics of Backfire", *Critical Criminology*, Vol. 13 (2005), pp. 307–326.

3. Brian Martin and Steve Wright, "Countershock: Mobilizing Resistance to Electroshock Weapons", *Medicine, Conflict and Survival*, Vol. 19, No. 3 (2003), pp. 205–222.

4. Sue Curry Jansen and Brian Martin, "Making Censorship Backfire", *Counterpoise*, Vol. 7, No. 3 (2003), pp. 5–15; Sue Curry Jansen and Brian Martin, "Exposing and Opposing Censorship: Backfire Dynamics in Freedom-of-speech Struggles", *Pacific Journalism Review*, Vol. 10, No. 1 (2004), pp. 29–45.

5. Brian Martin, *Justice Ignited: The Dynamics of Backfire* (Lanham, MD: Rowman & Littlefield, in press). There are some parallels between our codification and the work of Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity Press, 2001), see esp. ch. 1.

Cover-up

Corporations keep many of their activities out of the public eye for a variety of reasons, including the maintenance of trade secrets and the protection of employees' privacy. Another reason is to hide evidence of corporate malfeasance, including theft, product faults, cartels and dangers to the public. Internal correspondence is normally regarded as confidential; this may also hide criminal behaviour by executives. When "smoking gun" memos are exposed to outsiders, this can open the corporation to legal action, such as when massive numbers of tobacco company documents were leaked to anti-smoking campaigners.⁶ In the case of the CSR blue asbestos mine at Wittenoom in Western Australia, state government documents, which the government itself claimed for many years were lost, showed company negligence and bureaucratic incompetence.⁷ It is appropriate to refer to such instances as cover-up.⁸

A form of de facto cover-up can occur when information is in the public domain but is not salient to relevant groups, for a variety of reasons: the information might be below the threshold for media interest, or there may not be any campaigners or concerned citizens with the knowledge, contacts or resources to make full use of the information. Sometimes, when required to turn over documents, corporations provide vast quantities of files, overwhelming the resources of those who seek to find evidence of wrongdoing.

Governments often aid corporations in cover-up, by passing laws protecting trade secrets and exempting them from freedom of information laws, despite arguments that large corporations, because they have far-reaching social impacts, should be as open as governments.⁹ The World Trade Organisation, through strengthening intellectual property regimes, is aiding this process. As we shall see in the Bhopal case, the government's role in hindering effective compensation is more pronounced, extending beyond cover-up to direct suppression of activists and NGOs.

Corporations are highly resistant to critical investigation into their operations: it is very difficult for scholars to obtain access to observe corporate life first hand.¹⁰ Some of the best available information about corporate problems results from public events, such as the collapse of Enron and disasters such as Bhopal, for it is in such circumstances that both the capacity of corporations to manage may be disrupted and alternative voices may be used in analysis and explanation.¹¹ Although such cases are atypical, they nevertheless reveal much about the role of cover-up.

Bhopal was such a public and large-scale event that it was always going to be difficult to cover up. Nevertheless, Union Carbide Corporation's (UCC) initial

6. Stanton A. Glantz, John Slade, Lisa A. Bero, Peter Hanauer and Deborah E. Barnes, *The Cigarette Papers* (Berkeley: University of California Press, 1996).

7. Ben Hills, *Blue Murder* (Melbourne: Macmillan, 1989), pp. 41–44.

8. For a detailed account of the psychology of cover-up see Cohen, *op. cit.*, ch. 4.

9. The case for corporate openness is a natural outcome of the case for employee rights as given by David W. Ewing, *Freedom inside the Organization: Bringing Civil Liberties to the Workplace* (New York: E.P. Dutton, 1977).

10. Robert Jackall, *Moral Mazes: The World of Corporate Managers* (New York: Oxford University Press, 1988).

11. See Harvey Molotch and Marilyn Lester, "News as Purposive Behaviour: On the Strategic Use of Routine Events, Accidents, and Scandals", in Stanley Cohen and Jock Young (eds.), *The Manufacture of News: Social Problems, Deviance and the Mass Media* (London: Constable, 1973), pp. 118–137.

response was to claim that methyl isocyanate (MIC) was “nothing more than a potent tear gas”.¹² The quick presence of the international media—who can forget the image of a child’s wasted face half buried in the rubble from the accident?—and lawyers arriving from the United States to sign up the victims for compensation claims ensured that cover-up was difficult. Nevertheless, UCC maintained its “monopoly of technoscientific information concerning the toxicity of MIC . . . successfully imped[ing] appropriate therapeutic regimes that could have minimized the overall harm and mayhem”.¹³

There continues to be a cover-up in relation to the number of dead and injured from the gas leak and in relation to the gases released. The UCC/Dow Chemicals Web site (UCC was purchased by Dow in December 2001) claims that about 3,800 people died and some thousands of others were disabled.¹⁴ In contrast, independent sources estimate the death toll on the night to be a minimum of 8,000 with some 20,000 having died in total. Estimates of the number of seriously injured are between 120,000 and 150,000.¹⁵ Further, UCC’s refusal to provide the exact composition of the gases leaked, which continues to this day, hindered the treatment of victims.

The asbestos industry in Australia and across the globe hid medical evidence of the health impacts of asbestos dust from at least the mid-1930s through to the late 1970s. As late as 1976 a pamphlet from James Hardie “denied outright any risk to consumers of asbestos products”.¹⁶ The major strategy of the industry regarding health risks is discussed under the reinterpretation heading, as it involved denying the existence of a medical orthodoxy in relation to the dangers of asbestos. However, there is also no doubt that the industry knew of the dangers and deliberately covered up evidence. In 1949, James Hardie did not reveal, to the affected workers or others, medical evidence from health tests at their Baryulgil asbestos mine in New South Wales. The tests showed two cases of lung disease only five years into mine operation. At the 1984 federal inquiry into mining at Baryulgil, Hardie representatives attempted to deny that worker deaths at Baryulgil mine were asbestos related, citing death certificates of workers that showed other causes of death rather than more reliable autopsy results.¹⁷

In 1979, Hardie failed to provide data on asbestos dust levels to the union and only turned over workers’ medical records after strikes.¹⁸ When Hardie settled

12. Cited in Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years on* (London: Amnesty International Publications, 2004), p. 50. The claim also contradicts UCC officials’ testimony before the US Congress regarding methyl isocyanate; *ibid.*, pp. 52–53.

13. Upendra Baxi, “The ‘Just War’ for Profit and Power: The Bhopal Catastrophe and the Principle of Double Effect”, in Lene Bomann-Larsen and Oddny Wiggen (eds.), *Responsibility in World Business: Managing Harmful Side-effects of Corporate Activity* (Tokyo: United Nations University Press, 2004), pp. 175–201 (p. 180). During the court case in India UCC also continued to deny the toxicity of MIC: see Upendra Baxi and Amita Dhanda, *Valiant Victims and Lethal Litigation: The Bhopal Case* (Bombay: N.M. Tripathi, 1990), pp. xvi–xvii.

14. Union Carbide Corporation, Bhopal Information Center, “Chronology”, available: <<http://www.bhopal.com/chrono.htm>> (accessed September 20, 2006).

15. See Tim Edwards, “How Many Died in Bhopal?”, available: <<http://www.bhopal.net/oldsite/death-toll.html>> (accessed September 20, 2006); Amnesty International, *op. cit.*, pp. 10–17.

16. Jock McCulloch, *Asbestos: Its Human Cost* (Brisbane: University of Queensland Press, 1986), p. 210.

17. *Ibid.*, p. 171.

18. Gideon Haigh, *Asbestos House: The Secret History of James Hardie Industries* (Melbourne: Scribe, 2006), p. 121.

court cases brought by workers suffering asbestos-related disease, it always insisted on confidentiality clauses.

Devaluing Victims

Employers have a range of techniques to devalue, demonise, discredit, or vilify victims of corporate activities. They can label victims as misguided, as ignorant, as complainers, as self-seeking, as vindictive, as pawns in the hands of anti-corporate manipulators, or even as criminals. The CEO of CSR in the late 1980s referred to asbestos claimants as “malingerers”.¹⁹ Companies can claim that victims are complicit in their own misfortune by choosing to work in or live near a potentially dangerous plant. They can ignore victims and their concerns as unimportant.

Devaluation also occurs based on pre-existing prejudices, such as racism or blaming the poor for their poverty, which can be augmented by active discrediting. If victims are perceived as degraded in some sense, then it does not seem so unfair when bad things happen to them. Devaluation is made easier by many people’s belief that the world is just, so that if bad things happen to someone, they are assumed to have done something to deserve it.²⁰

The lack of concern for the people of Bhopal was evident from the planning and construction phase of the development. UCC insisted it be situated next to a residential area, despite the fact that this contravened local planning regulations. Discovery documents obtained from UCC in 2002 showed that they cut costs in plant design and used technology unproven and inadequate at the time, neither of which occurred at a plant in the United States constructed at about the same time.²¹ A 1982 safety audit indicating the poor condition of safety systems was suppressed by UCC, even from Union Carbide India Limited (UCIL).²² Once the plant was operational, maintenance was poor to say the least and; on the night of the accident, none of the six safety mechanisms to prevent a methyl isocyanate leak functioned.²³

During the first court case in the United States, UCC was more explicit about its judgement of the value of the lives of Bhopal’s residents. In arguing for the case to be dismissed (which it was), it stated that there is a:

practical impossibility for American courts and juries, imbued with US cultural values, living standards and expectations, to determine living standards for people living in the slums or “hutments” surrounding the UCIL, Bhopal, India, [which] by itself confirms that the Indian forum is overwhelmingly the most appropriate. Such abject poverty and the

19. Hills, *op. cit.*, p. 183.

20. Melvin J. Lerner, *The Belief in a Just World: A Fundamental Delusion* (New York: Plenum, 1980).

21. Baxi, *op. cit.*, pp. 186–189. See also “Updates: Bhopal Disaster”, *World Watch*, Vol. 16, No. 3 (2003), p. 9; H. Rajan Sharma, “Slow Motion in Bhopal”, *The Nation*, Vol. 278, No. 25 (28 June 2004), p. 2; Kim Fortun, *Advocacy after Bhopal: Environmentalism, Disaster, New Global Order* (Chicago: University of Chicago Press, 2001), pp. 116–117.

22. Baxi, *op. cit.*, p. 189.

23. International Campaign for Justice in Bhopal, available: <<http://bhopal.net>> (accessed September 20, 2006).

vastly different values, standards and expectations which accompany it are commonplace in India and the third world.²⁴

A US newspaper took up this line of argument, calculating that:

An American life is worth approximately five hundred thousand dollars. Taking into account the fact that India's gross national product is 1.7 percent of that of the United States, the court should compensate for the decease of each Indian victim proportionately, that is to say with eight thousand five hundred dollars.²⁵

Unfortunately for the victims, the Indian government appears not to have valued the lives of its citizens much more dearly. In 1985, the Indian government, through an act of parliament, granted itself exclusive rights to represent the victims of Bhopal in India and overseas. While some lawyers applauded the decision as reducing complexity and costs, many of the victims saw the act as disempowering and indeed devaluing, as it suggested they were not able to act in their own best interests.²⁶ Devaluation was implicit in the Indian government's calculations for the settlement reached with UCC in 1989. First, the calculation assumed only 200,000 claims; in fact 600,000 had already been initiated, of which around 500,000 were upheld. Of the 200,000, allowance was made for only 3,000 deaths and 50,000 serious injuries, again a significant shortfall. Second, the settlement allowed for payouts for deaths was around US\$14,500 per death and \$3,125 per serious injury. As Cassels points out, while these amounts were more than provided for in Indian workers' compensation legislation, they are less than an average factory worker's annual wage.²⁷

The scheme for assessing illness was also devaluing: it was based on an abstract medical categorisation of illness that hierarchically ranked body parts and denied the existence of systemic illness or long-term effects.²⁸ The system also ignored the socio-economic situation of victims; for example, if a victim was classified as 30 per cent incapacitated the resultant payout did not take into account that a person engaged in a manual occupation normally had little chance of alternative employment.

James Hardie adopted the devaluation tactic at the inquiry into the Baryulgil asbestos mine. It claimed that miners were warned about asbestos on numerous occasions and it was their fault (or stupidity) if they did not heed warnings.²⁹ Hardie was unable to substantiate its claims regarding warnings, which were in direct conflict to the miners' claims that they were never warned. To lend weight to their claim, Hardie then suggested that miners' memories couldn't be

24. Cited in Amnesty International, *op. cit.*, p. 51.

25. "Averting a Bhopal Legal Disaster", *Wall Street Journal* (16 May 1985), cited in Dominique Lapierre and Javier Moro, *Five Past Midnight in Bhopal* (trans. K. Spink) (New York: Warner Books, 2002), p. 380.

26. On the case for the act, see James Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto: University of Toronto Press, 1993), p. 118.

27. *Ibid.*, p. 230.

28. Baxi and Dhandra, *op. cit.*, p. iii; Fortun, *op. cit.*, p. 146.

29. McCulloch, *op. cit.*, pp. 184–186.

trusted.³⁰ Given that almost all the miners were Aborigines, this claim may have attempted to build on racist attitudes prevalent among white Australians.

Reinterpreting the Events

Although the meaning of events sometimes may seem obvious, there is always the possibility of creating different meanings. One way is through lying and deception, as when a manager announces that an investigation has found that no mismanagement occurred, when actually no investigation occurred. Some such lying and deception, when information is hidden, can be classified as cover-up. However, when false understandings of public events are fostered, it is better to call this reinterpretation.

Reinterpretation can also occur through genuinely different perspectives on the meaning of events, as in attributions of blame: a manager might blame a worker for an accident whereas others might blame poor policies or inadequate supervision.³¹ There are numerous methods of reinterpretation; in other circumstances some of these might be called spin doctoring or symbolic politics.

The words "accident" and "disaster" can have different connotations depending on the circumstances. Sometimes they are associated with blame but at other times they imply just bad luck. Managers may use the words to suggest that an event just happened, out of anyone's control, so there is little or no responsibility attached to it, in a situation in which others attribute responsibility for the event. For UCC, Bhopal was neither an accident nor a disaster, but merely a gas leak.³²

UCC's first attempt to reinterpret Bhopal was to distance itself from its 50.9% owned subsidiary that operated the Bhopal factory: UCIL. This was ultimately a legal as well as political tactic and was linked to UCC's public position of accepting moral but not legal responsibility for the disaster. (The legal issues are discussed in more detail in the next section.) UCC's second attempt to reinterpret Bhopal was in March 1985 when it first articulated its "sabotage theory", which claimed that "a 'disgruntled' worker attached a water hose directly to a storage tank filled with MIC" thus causing the leak.³³ UCC/Dow stands by this story to this day: its Web site states that "The gas leak could only have been caused by deliberate sabotage . . . Process safety systems had been put in place that would have kept the water from entering the tank by accident."³⁴ The sabotage explanation also relies on an analysis of psychological factors, which quickly reverts to the devaluation technique asserting that plant workers tend to "omit facts or distort evidence".³⁵ This explanation does not, of course, address why a worker

30. *Ibid.*, p. 150.

31. On this theme see Cohen, *op. cit.*, pp. 101–116.

32. Union Carbide Corporation, Bhopal Information Center, available: <<http://www.bhopal.com/>>.

33. Fortun, *op. cit.*, p. 102; Lapierre and Moro, *op. cit.*, pp. 381–382.

34. Union Carbide Corporation, "Statement of Union Carbide Corporation Regarding the Bhopal Tragedy", available: <<http://www.bhopal.com/ucs.htm>> (accessed September 20, 2006).

35. This is from a study by Ashok S. Kalelkar from the firm Arthur D. Little, which claims to be an independent investigation but includes a footnote that Kalelkar/Little were part of the UCC study. Arthur D. Little was later engaged to advise UCC in the (non-existent) environmental clean-up. Ashok S. Kalelkar, "Investigation of Large-magnitude Incidents: Bhopal as a Case Study", Presented at the Institution of Chemical Engineers Conference on Preventing Major Chemical Accidents,

could have such unauthorised access; why safety systems failed or were not maintained; why the plant's emergency response services were not able to respond effectively to the leak; or indeed why the so-called disgruntled worker (whom UCC did not name but was identifiable from their report) was never charged.³⁶ Warren Anderson, CEO of UCC at the time of the disaster, actually contradicted the sabotage claim in his testimony before the US Congress in March 1986.³⁷

By 1986, UCC had developed a third way of reinterpreting Bhopal that built on accepting moral but not legal responsibility. UCC now claimed it was focused on the needs of the victims and accused the Indian government, by its supposed emphasis on litigating rather than the health and welfare of its citizens, of inhibiting UCC's efforts. The Indian government, it claimed, simply refused UCC offers of "major humanitarian assistance—with no strings attached . . ." ³⁸ without mentioning that UCC refused to pay interim relief proposed by the Bhopal District Court in 1987, challenging the order in the High Court of Madhya Pradesh and in the Indian Supreme Court. This line was most fully articulated in a statement written by the former CEO, Warren Anderson, in 1990.³⁹ The statement consistently refers to Bhopal as a "disaster" or "terrible tragedy", repeats the standard claim that UCIL was a "wholly Indian operation" and lists UCC's "frustrated" humanitarian efforts. Anderson then claims that UCC's attempts to settle the matter were not prevented by the money offered but rather by the politics and bureaucracy of the Indian government: "it's easy to get lost in the morass of lawyers, politicians and media managers and to forget that a tragedy like Bhopal is primarily about victims and their needs".

In the case of James Hardie, its main defence for not warning consumers or workers of the dangers of asbestos dust is the claim that for many years there was no medical orthodoxy on the dangers and therefore they were not compelled to act. In fact, there was a general medical consensus on the dangers in relation to asbestosis and to lung cancer by the late 1950s and by 1964 the causal relationship between asbestos and mesothelioma was generally medically accepted.⁴⁰ Indeed, the existence of scientific doubt about the dangers of asbestos was largely the product of asbestos industry influence and funding.⁴¹ For example, in 1974 a Hardie employee, Dr S.F. McCullagh, published an article in the *Medical Journal of Australia* stating that asbestos should not be considered harmful and that it has "saved more lives than it has claimed".⁴²

London, May 1988, available: <<http://www.bhopal.com/pdfs/casestdy.pdf>> (accessed September 20, 2006), p. 10.

36. Fortun, *op. cit.*, p. 102, Lapierre and Moro, *op. cit.*, p. 382.

37. Cited in Students for Bhopal, "What Happened", available: <<http://www.studentsforbhopal.org/whatHappened.htm>> (accessed September 20, 2006).

38. Jackson Browning, Vice President of UCC, cited in Fortun, *op. cit.*, p. 98.

39. The statement is reprinted in Fortun, *op. cit.*, pp. 98–101.

40. On the development and disbursement of medical evidence see, for example: David Gee and Morris Greenberg, "Asbestos: From 'Magic' to Malevolent Mineral", in P. Harremoës, D. Gee, M. MacGarvin, A. Stirling, J. Keys, B. Wynne and S. Guedes Vaz (eds.) pp. 52–63, *The Precautionary Principle in the 20th Century: Late Lessons from Early Warnings* (London: Earthscan, 2002); McCulloch, *op. cit.*, pp. 36–69; National Industrial Chemicals Notification Assessment Scheme, *Chrysotile Asbestos Priority Existing Chemical No. 9: Full Public Report* (Commonwealth of Australia, 1999), pp. 57–72.

41. Geoffrey Tweedle and Jock McCulloch, "Chrysophiles versus Chrysophobes: The White Asbestos Controversy", *Isis*, Vol. 94, No. 2 (2004), pp. 239–260.

Hardie has also liberally reinterpreted its compliance with existing government standards on asbestos. At the Baryulgil mine, the word of the workers was not enough to convince the government on this; it was "The Hardie Papers" supplied by a former mine manager to the Aboriginal Legal Service, supporting the miners' stories, that ultimately gave them legitimacy.

Use of Official Channels

Official channels include internal grievance procedures, courts, formal inquiries and investigations by agencies such as ombudsmen, audit departments and anti-corruption commissions. Official channels serve to dampen outrage because they give the appearance of providing justice. Pronouncements by experts, especially those seen as independent, have a similar effect.

If official channels lived up to their promise and actually provided swift, independent, fair outcomes that were easily understood and readily implemented, then there would be less cause for complaint. But, in many cases, official channels give only an illusion of justice. For example, in the most comprehensive study of whistleblowers' experiences with official agencies, whistleblowers reported being helped in less than 1 in 10 times, and in many cases reported being worse off.⁴³ Those familiar with the legal system often say that courts do not dispense justice.⁴⁴ From the point of view of those with less power, the main problems with official channels are that they require defendants to prove both causality and harm and, as such, are slow, highly complex, dependent on experts (such as lawyers and scientists) and tilted in favour of those with more money, status and staying power. A worker who goes to court for wrongful dismissal may not obtain a result for months or years, must deal with the complexities of the law, rely on lawyers and make significant expenditures while unemployed. When dealing with the claims of former Wittenoom blue asbestos miners who had contracted mesothelioma, CSR utilised the time taken by courts to settle the claims for them, as many simply died before their cases could be heard. In the case of mass disasters the complexity of the event is compounded by the nature of the judicial system to make findings of any kind difficult.⁴⁵

In contrast, the corporate employer often has unlimited funds and time, with no individual risking anything from the outcome of the case. As the process continues and time passes, the potential for outrage over an event often declines, the complexities of the case cause observers to lose interest, and the image of the court promises justice. For these reasons, perpetrators of injustice often set up inquiries or refer matters to official bodies as a way to reduce outrage from their actions.

In both the incidents studied here the so-called "corporate veil" must also be understood as a key part of official channels that reduce company "exposure". It is, if you like, an institutionalisation of corporate advance "planning for 'maximum deniability'".⁴⁶ The corporate veil derives from legislation and

42. Cited in McCulloch, *op. cit.*, p. 21.

43. William De Maria, *Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia* (Adelaide: Wakefield Press, 1999).

44. Thane Rosenbaum, *The Myth of Moral Justice* (New York: HarperCollins, 2004).

45. Baxi and Dhanda, *op. cit.*, p. v.

46. Cohen, *op. cit.*, p. 79.

court precedent that grants the shareholders in a company limited liability for the actions of that company and gives companies themselves the status of a ("special") person in general and specifically in relation to their holding in other companies.⁴⁷ Courts have interpreted this to mean that companies also have limited liability in relation to their holdings in other companies and subsidiaries, even where they are majority shareholders and effectively manage the day-to-day operations. In both cases, too, corporate veil protection was augmented through the fact that national court jurisdiction on foreign operations has limits; this is an example of the way in which the increasing globalisation of enterprises is testing the capacity of governments, courts and citizens to ensure accountability for actions.

Both governmental and legal channels have dismally failed the people of Bhopal. The Indian government, after legislating to represent all victims in its 1985 Bhopal Gas Leak Disaster Act, decided to pursue the case in the United States. The US case was dismissed in May 1986 on the basis of *forum non conveniens*, that is the existence of a more convenient and equally adequate jurisdiction for the trial, namely India. As James Cassels argues, the "*forum non conveniens* doctrine shields [US] multinationals from liability for injuries abroad".⁴⁸ At the same time, the US government has been happy to utilise foreign policy instruments to pursue the interests of its companies abroad. The case indicates some of the added complexities of legal channels in a globalised era: on the one hand, a sovereign state argued that its own legal system could not manage the case and, on the other, a multinational corporation argued it had little control over a subsidiary.⁴⁹ In the Indian court, UCC argued that "there is no concept known to law as 'multinational corporation' or as 'monolithic multinational'", saying it was actually a purely domestic corporation that owns shares in other companies around the world.⁵⁰ The corporate veil certainly made the Indian government's case more difficult: much time at these and subsequent hearings was spent arguing about the relationship between UCC and UCIL.

From the United States, the case moved to the Indian courts in September 1986. UCC successfully continued its strategy of pursuing complex litigation in order to achieve a settlement on its own terms.⁵¹ The Indian government originally asked for \$3.3 billion. However, after three years of legal proceedings, and with the assistance of the court, a settlement was reached in which UCC and UCIL agreed to pay the Indian government only \$470 million, one seventh as much. The victims were not consulted during the proceedings or prior to the agreement being finalised: they were "caught in the middle of the crossfire between the multinational and the Indian state".⁵² The settlement also included broad civil and criminal immunity for UCC and UCIL, effectively ending their legal liability for

47. For a useful discussion of the attributes of a corporation and recent attempts to reform corporate law in particular liability aspects, see Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002), pp. 1–5.

48. Cassels, *op. cit.*, p. 144.

49. *Ibid.*, pp. 134–135.

50. Baxi and Dhanda, *op. cit.*, pp. xiv, 61–62. See also Upendra Baxi, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (Bombay: N.M. Tripathi, 1986); Upendra Baxi and Thomas Paul, *Mass Disasters and Multinational Liability: The Bhopal Case* (Bombay: N.M. Tripathi, 1986).

51. Baxi and Dhanda, *op. cit.*, pp. xxxv–xxxvii.

52. *Ibid.*, p. 162.

Bhopal.⁵³ Why the government settled for such a paltry sum has been the subject of much debate. Commentators point to the pending federal elections in India and the fact that, during this period, the Indian government opened the economy to international investment and was trying to attract new funds, and feared that a large settlement might deter potential investors.

The 1985 Bhopal Gas Leak Disaster Act, which gave the government the exclusive right to act for the victims, also set up an administrative framework for the filing, processing and categorisation of claims. The problems with the medical categorisation and the small payouts planned for were outlined above. In reality, payouts have been smaller than envisaged and there have been delays at every stage of the process. One claimant who lodged a claim in 1988 had not, in 2004, received notification regarding hearing of the claim.⁵⁴ With the benefits of interest and appreciation of the dollar against the rupee, in mid-2004 \$327.5 million from the settlement was still being held by the Reserve Bank of India. In July 2004, the Supreme Court of India ordered that the remaining funds be distributed to victims but did not set a timeframe for the distribution.⁵⁵ Supreme Court orders to include claimants who were under 18 at the time of the disaster have had equally little impact.

Concurrent with the civil proceedings, criminal actions against Warren Anderson, UCC and UCIL proceeded. Although the 1989 settlement gave criminal immunity, criminal proceedings were reinstated through the appeals process in 1991. UCC/Dow always refused to attend the criminal proceedings. Indeed, the UCC/Dow Merger Agreement simply denies UCC's criminal liability in the Bhopal case.⁵⁶ An arrest warrant was issued for Mr Anderson for culpable homicide and in 1992 he was declared a fugitive for failing to appear. However, the Indian government never lodged an extradition appeal with the United States, despite the existence of a treaty between the two countries. Indeed, in 2002 it tried unsuccessfully to have the charges against Mr Anderson reduced to "hurt by negligence".⁵⁷ The US government, for its part, has always claimed that it did not know the whereabouts of Mr Anderson. However, Greenpeace easily "found" him in 2002 living in the Hamptons resort district of Long Island, New York.⁵⁸

UCC/Dow claims that the sale of UCIL to Everready Industries in 1994 ended its liability for the site, although its lease from the Madhya Pradesh government specified that the land must be returned in "usable and habitable condition".⁵⁹ Groups of victims continue to pursue legal avenues, both in India and the United States, for environmental remediation of the Bhopal site. The merger with Dow has made their case more difficult. Only one thing is clear: the proceedings will take a lot more time.

Now consider asbestos use in Australia: its relatively uncontrolled use continuing for so long is testament to the close relationship between government

53. Amnesty International, *op. cit.*, p. 59.

54. *Ibid.*, p. 66.

55. *Ibid.*

56. *Ibid.*, p. 55.

57. World Socialist Web site, "Indian Court Refuses to Reduce Homicide Charges over Bhopal Disaster", available: <<http://www.wsws.org/articles/2002/sep2002/bhop-s12.shtml>> (accessed September 20, 2006).

58. "Bhopal Gas Disaster Fugitive 'Found'", *BBC News World Edition* (30 August 2002).

59. See International Campaign for Justice in Bhopal, *op. cit.*

and industry. In New South Wales, the Mines Inspectorate relied on James Hardie for knowledge regarding monitoring and controlling asbestos fibre in the workplace; Hardie had representatives on the committee that reviewed dust standards.⁶⁰ In the state of Victoria, new regulations for asbestos exposure were developed in 1956 but not enacted until 1978.⁶¹ Even where regulations did exist, they were rarely enforced. At both the Baryulgil and Wittenoom mines, management were forewarned of inspectors' visits and the mines were cleaned up before the inspectors' arrival.⁶²

When asbestos victims first considered legal action against CSR and James Hardie (and later other distributors and users of asbestos products) the hurdles were stacked up against them. First, the statute of limitations on industrial injuries in most Australian states was around six years. Given the decades-long latency period of most asbestos-related diseases, this excluded most victims from compensation. Western Australia was one of the first states to change this law but only in 1983, after the conservative state government was voted out of office. Second, victims had to prove that the company could reasonably have foreseen the injury at the time in which it occurred.⁶³ As outlined above, asbestos company executives used two main tactics—cover-up and reinterpretation—that made proving this very difficult for many years.

Finally, utilising the corporate veil, James Hardie commenced restructuring in 1995 to separate its asbestos liabilities from its other assets. Via a number of steps, the asbestos liabilities were separated into two companies (Amaca and Amaba) in 2001 and, at the same time, Hardie established the Medical Research and Compensation Foundation (MRCF), which acquired Amaca and Amaba, thus assuming Hardie's asbestos-related liabilities. MCRF was allocated \$293 million, which Hardie claimed would cover all its Australian asbestos-related liabilities, though this was at least a \$1.5 billion shortfall.⁶⁴ In October 2001, the New South Wales Supreme Court granted James Hardie approval to establish a new Netherlands-based parent company and for transfer of \$1.9 billion from Australia to it. Next, in March 2003, Hardie separated the Australian company (JHIL) from the parent company (JHNV). Although this last step was performed without informing the authorities, the approval for the restructure is remarkable when one considers that: (a) many UK and US companies with significant asbestos liabilities had attempted similar restructures already in the 1970s and 1980s (albeit mostly unsuccessfully);⁶⁵ and (b) the Netherlands is one of the few countries with which Australia does not have a treaty regarding enforcement of

60. McCulloch, *op. cit.*, p. 143.

61. George Wragg, *The Asbestos Time Bomb* (Sydney: Catalyst Press, 1995), p. 27.

62. McCulloch, *op. cit.*, pp. 95–96, 149–150.

63. *Ibid.*, p. 183.

64. On both the level of underfunding of the MCRF and Hardie misleading the public regarding the capacity of the MCRF to meet asbestos liabilities, see D.F. Jackson QC, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (September 2004), available: <<http://www.cabinet.nsw.gov.au/publicationstco-branches2/>> (accessed September 20, 2006), pp. 7–30. See also Haigh, *op. cit.*

65. A fact acknowledged in the Jackson Report, *op. cit.*, p. 19. US companies had also transferred asbestos production to developing countries with less stringent or no safety and environmental standards: Raymond J. Michalowski and Ronald C. Kramer, "The Space between Laws: The Problem of Corporate Crime in a Transnational Context", *Social Problems*, Vol. 34, No. 1 (1987), pp. 34–53.

legal decisions, so the restructure effectively cut any legal link for Australian creditors, including asbestos victims.⁶⁶

During 2004, whilst the New South Wales government Special Commission of Inquiry into James Hardie Industries was running, Hardie continued to publicly deny legal liability for asbestos victims. Indeed, denial of liability was its primary public strategy until the middle of the year when along with denials it agreed to provide funds for a compensation programme.⁶⁷ Further, in 2004 Hardie directors took the corporate veil argument to a new height when they suggested they might be liable to shareholders if they were too generous with compensation to asbestos victims!⁶⁸

So why in December 2004, given their relative legal immunity, did Hardie sign an agreement with unions and asbestos groups agreeing to, amongst other things, an open-ended funding commitment for victims? Certainly not because of the pressure of government, though the NSW state government did take a belated interest in the issue after it felt this would assist its popularity to do so. It was, rather, the unceasing public pressure of asbestos groups and unions during 2004 that made the difference. The campaign was extended to include a boycott of Hardie products which, by late in the year, was receiving international support. In other words, it took a tremendous and sustained level of public pressure to succeed over the legal and financial power of governments and the corporation, a level that the victims of Bhopal have sadly never been able to mobilise in their support.

Intimidation and Bribery

Intimidation and bribery are two potent means for discouraging action by people who feel concern about something. Once dissuaded from taking action, it is not uncommon for people to reduce the gap between their thoughts and actions by feeling less concern. Few corporations operating in the West are able to directly exert physical force against workers or members of the public, but nevertheless they have some potent means for intimidation. Managers have many ways to adversely affect workers: threats, petty harassment, reprimands, referral to psychiatrists, demotions, dismissals, and blacklisting. Whistleblowers are often subject to these techniques; often other workers join in a scapegoating operation. Ostracism is common, because co-workers do not want to be targeted themselves.

It is harder for managers to attack members of the public, but techniques exist. A common one is legal action such as for defamation or damage to business.⁶⁹ When governments overtly support corporations, the government's tools can be used to suppress protests and the activities of organisations via, for example, arrests and confiscations.

66. On the difficulties of pursuing action against Hardie, see Peter Prince, Jerome Davidson and Susan Dudley, "In the Shadow of the Corporate Veil: James Hardie and Asbestos Compensation", Parliament of Australia, Parliamentary Library, Research Note No. 12 (10 August 2004), available: <<http://www.aph.gov.au/library/pubs/rn/2004-05/05rn12.htm>> (accessed September 20, 2006).

67. Amisha Patel and Robina Xavier, "Legitimacy Challenged: James Hardie Industries and the Asbestos Case", *Australian Journal of Communication*, Vol. 32, No. 1 (2005), pp. 53–69.

68. Bruce Cowley, "Can Directors be Personally Liable for Being too Generous in Compensating Victims?", *Keeping Good Companies*, Vol. 57, No. 1 (2005), pp. 36–37.

69. George W. Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Philadelphia: Temple University Press, 1996).

Bribery can take many forms. In the case of workers, direct payments for cooperation do occur, but more common is the expectation of continued employment or promotion. Community groups that support the corporation or mute their criticisms may be rewarded by grants. Some people keep quiet because of the prospect of future employment.

In Bhopal, the Indian government has actively assisted in the repression and intimidation of activists working for victims. In 1985, police raided a medical clinic for victims, confiscated medical records and arrested six volunteer doctors.⁷⁰ At least 10 criminal cases have been lodged against 7,100 activists, including charges for violating the Official Secrets Act. In 1991, police attacked activists from a local victims' organisation, ironically while they were trying to submit a plea to the governor asking for protection from police brutality.⁷¹

UCC appeared to use inducements in organising witnesses for its sabotage theory. A primary witness, Mr Rajan, only remembered the relevant details one year after the event and afterwards UCIL relocated him to Bombay.⁷² A 12-year-old tea boy was retrieved from Nepal to describe the tense atmosphere amongst the workers that evening "thus 'verifying' that all workers on-site were involved in a conspiratorial cover-up".⁷³

The Asbestos Diseases Society of Australia has documented a number of instances of intimidation in its battle for justice for victims:

The society's offices were burgled and papers stolen, the phones tapped, a victim's house trashed while his widow was attending his funeral. An asbestos industry "spy" infiltrated the office, and the society, its supporters and the Vojakovics [founders of the society] were routinely threatened with violence.⁷⁴

One can only speculate whether and how corporations are connected to such events.

Conclusion

The Australian government estimates that more people die from workplace-related injuries each year than on the roads.⁷⁵ Yet in Australia corporate actions leading to death or injury to workers or members of the public result in few repercussions for the corporation: little publicity, relatively low financial costs, and few criminal prosecutions. In developing countries the repercussions are even slighter. Corporations have various methods of containing the reaction to damaging activities. But occasionally there are incidents that cut through the

70. World Socialist Web site, *op. cit.*

71. Fortun, *op. cit.*, p. 42.

72. *Ibid.*, p. 102.

73. *Ibid.*

74. Victoria Laurie, "The Club that Refuses to Die", *The Weekend Australian Magazine* (5–6 February 2005), pp. 18–20 (p. 20).

75. Kim Haines, Thomas John and Malcolm Park, "Workplace Death and Serious Injury: A Snapshot of Legislative Developments in Australia and Overseas", Parliament of Australia, Parliamentary Library, Research Brief No. 7 (2004–5), available: <<http://www.aph.gov.au/library/pubs/rb/2004-05/05rb07.htm>> (accessed September 20, 2006).

usual control processes and lead to massive outrage, as shown in our study of the Bhopal accident at Union Carbide's plant in India and disease and death from asbestos produced by James Hardie in Australia.

We have shown how the five key methods for inhibiting outrage from injustice—cover-up, devaluation of victims, reinterpretation of events, use of official channels to give the appearance of justice, and intimidation and bribery—operated and how globalisation made possible new variants of these tactics. This study of the special features of backfire events with global dimensions has implications for the study of globalisation.⁷⁶

Some aspects of cover-up are more difficult in a globalised environment: there may be receptive audiences, such as action groups, in different parts of the world. The rise of the Internet means that control over the mass media in a single country may be insufficient to prevent publicity. Cover-up also becomes more difficult when action groups in different parts of the world share information and tactics, as in the campaign against the Multilateral Agreement on Investment.⁷⁷ On the other hand, the increasing intensity of communication can cause information overload. Although it is easier to communicate, it may be harder to find people who care, because there are so many competing issues.

Devaluation of victims can occur through pre-existing views, such as racial prejudice, through routine efforts to vilify certain types of people, such as workers, and through discrediting of specific victims. This can have contradictory consequences in a global picture. From the point of view of citizens and media in rich countries, the Indian victims of Bhopal do not have the same salience as if the accident had happened in UCC's home country, the United States. On the other hand, the fact that most victims were from low castes and lived in slums has had little significance in the United States, whereas within India it served to reduce the sense of outrage. When an issue becomes recognised internationally, then, it is likely that local and national assumptions about the worthiness of victims lose some effect, whereas cross-national assumptions become more important.

Reinterpretation of events is an ongoing process, involving a host of techniques from lying to framing. Techniques that work well in one country may not in another. Therefore, the challenge for corporations in selling their viewpoint becomes more complex as the diversity of the potential audience becomes greater: in essence, they can be caught out more easily.

Official channels may give the appearance of justice but in many cases provide little or no substance and the globalisation of corporations has further complicated the chances of legal success. This is because globalisation has not fundamentally erased borders, but rather entrenched, established and redrawn them.⁷⁸ The rules developed and enforced by the World Trade Organisation, in the name of protecting intellectual property or of ensuring a level playing field between corporations, may make it harder for governments, where they are concerned, to

76. Jan Aart Scholte treats globalisation as the delinking of human lives from territorial geography in "The Globalization of World Politics", in J. Baylis and S. Smith (eds.), *The Globalization of World Politics* (Oxford: Oxford University Press, 2001), p. 15.

77. David Wood, "The International Campaign against the Multilateral Agreement on Investment: A Test Case for the Future of Globalisation?", *Ethics, Place and Environment*, Vol. 3, No. 1 (2000), pp. 25–45.

78. Paul Gready, "Conceptualising Globalisation and Human Rights: Boomerangs and Borders", *International Journal of Human Rights*, Vol. 8, No. 3 (2004), pp. 345–354 (p. 350).

protect environmental, social or health standards. Large corporations have increased their capacity to use regulations and laws to their advantage: processes remain incredibly slow, so opponents are worn down while outrage dwindles; jurisdictional issues and rules remain complex and procedural, so attention is drawn away from the central injustices and placed on technicalities; expenses have, if anything, increased, so opponents may give up or settle for less than they deserve; and executives seldom risk their liberty, though some experience feelings of guilt and suffer career setbacks.

Union Carbide and James Hardie were able to manipulate national laws and jurisdictional issues to their advantage, so it might seem that one solution is to create better international law to cover transgressions by multinational corporations. But a backfire analysis suggests a different conclusion: it can be unwise to devote lots of effort to obtaining justice through official channels as they stand. Depending on the circumstances, it may be better to use a campaigning approach, aiming to apply pressure through using publicity and direct action such as protests and boycotts.

Intimidation and bribery are powerful tools for deterring action by people concerned about a situation. They usually are more effective when applied locally, because workers and local residents are typically more vulnerable to, or dependent on, a corporation. For a corporation to threaten or sue a support group in a foreign country could be counterproductive, because its threat would be more easily resisted and publicised as unscrupulous behaviour. Similarly, it is more difficult to buy off foreign activists, because they usually have their own sources of support. Therefore, as a generalisation it can be said that global corporations will usually find it harder to use intimidation and bribery against foreign critics. On the other hand, as corporations become larger and have more influence with governments, their capacity for intimidation and bribery becomes larger. Nevertheless, they risk more by using such techniques, because they can easily be perceived as bullies. The most effective way to resist intimidation is to refuse to acquiesce and to expose the attempt.

Opponents of corporate injustices should expect to encounter each of the five methods of inhibition and to be prepared with countermeasures: exposing the injustice; validating the victims; interpreting the events as unjust; avoiding or discrediting official channels; and resisting and exposing intimidation and bribery. Perhaps the most controversial recommendation in this list is avoiding and discrediting official channels. Many people believe that laws, courts and government regulations are about dispensing justice. We do not argue that these channels should always be avoided, only that far more scepticism about them is warranted. The experiences of Bhopal and James Hardie show that in developed and developing countries alike, official channels may give only an illusion of justice.

The fundamental point is that industrial disasters can, and occasionally do, backfire against owners and managers, because workers and citizens pin the blame on corporate policies and practices. This potential for backfire is the reason why owners and managers take such strenuous efforts to minimise public outrage. The precise tactics used in struggles over the implications of corporate disaster are somewhat different in a globalised world, because both corporate operations and civil society organisations that span many countries have somewhat different resources available, but the main types of methods used are much the same as found in localised disasters.