

STATE OF DENIAL

Accepting liability is rarely easy – especially if you’re sure you’ve already dealt with the issue or it wasn’t all your fault anyway. But what if the issue is a humanitarian disaster? **Neil Hodge** finds that sorry really is the hardest word when big businesses and governments are called to account.

The term “corporate social responsibility” has become solidly entrenched in the business lexicon over the past few years. Companies now place ethical conduct at the heart of their business strategies – at least on paper if not in practice. Some western governments also claim to be taking an increasingly ethical stance, making third-world development projects and debt relief a key tenet of their foreign policies.

Although big businesses and governments may well be striving to be more ethical in the future, they are reluctant to admit that any of their past behaviour was unethical, negligent or even criminal. Companies have often settled lawsuits on the strict grounds that they accept no liability for any harm caused, while governments have chosen either to ignore calls to hold them to account or to flex their muscles and bury the scandal.

Recently, the UK government has been pilloried for its handling of the Chagos islanders’ case for compensation. In 1961 the UK government handed over the island of Diego Garcia to the US to use as a military base, forcing 2,000 people to leave their homeland as a result. It took more than a decade for the evictees to receive compensation. Even then, it came to less than £3,000 each. In 2000 the High Court ruled their expulsion illegal. In 2003 the government invoked a royal prerogative to





Rajendra Kumar, 43, a terminally ill Bhopali in the hospital that was set up under the terms of Union Carbide's compensation settlement. He was living less than a quarter of a mile away from the plant at the time of the gas leak.

overturn the court's decision, bypass Parliament and ban the islanders from ever going home, ostensibly because a study had found that the island was sinking.

"Governments are not above the law and crown bodies have been subject to it – take all the negligence claims against the National Health Service, for example," says Roger Bickerstaffe, a partner at law firm Bird & Bird. "But holding ministers and individual departments to account is hard."

At the end of last year the High Court agreed to a judicial review of the royal prerogative. The islanders say they will appeal to the European Court of Human Rights if this doesn't go in their favour. Even if they win, it will be a hollow victory: the government might accept its wrongdoing, but no one expects that the islanders will be allowed to return.

One of the most controversial cases of corporate versus state responsibility concerns the development of Agent Orange. Made specifically for the US army to use during the Vietnam war, Agent Orange (its name derives from the colour of identifying bands painted on the drums containing the chemical) was a 50:50 mix of two herbicides that had been developed and widely used in the US in the Forties. Seven companies – the Dow Chemical Company, Monsanto, the Diamond Shamrock

Corporation, Hercules, Uniroyal, T-H Agricultural & Nutrition Company and the Thompson Chemicals Corporation – were commissioned by the US government under the Defense Production Act 1950 to develop a defoliant that would reveal the enemy's jungle positions and destroy their crops.

Today in Vietnam there are 150,000 children with birth defects that are claimed to be the result of their parents' exposure to the dioxin contaminants of Agent Orange. Dioxin is highly toxic to animals and has been proven to cause chloracne, a serious skin disorder in humans. Its links with other diseases – cancer, for example – are not proven.

The Vietnamese government estimates that three million people were exposed to these chemicals during the war and that at least 800,000 suffer serious health problems today as a result. Arnold Schecter, professor of environmental sciences of the University of Texas School of Public Health, sampled the soil at a former US base in Vietnam in 2003 and found that it contained dioxin levels that were 180 million times above the safe maximum set by the US Environmental Protection Agency.

When the former US president, Bill Clinton, visited Hanoi four years ago, the Vietnamese premier, Tran Duc Long, appealed to America "to acknowledge its responsibility to



It's estimated that US forces sprayed 42 million litres of Agent Orange on Vietnam. The codename for this operation was Hades, which was later changed to the more PR-friendly Ranch Hand.

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detoxify former military bases and provide assistance to Agent Orange victims". Three decades after the war, no such acknowledgment has been made. Instead, Washington has offered funding for scientific conferences and further research.

But the legacy of Agent Orange is not confined to Vietnam. US war veterans campaigned in the late Seventies and early Eighties for compensation for health problems that they suspected were caused or exacerbated through their contact with defoliants and other chemicals. Barred from suing the US army for injuries suffered while in military service, they turned their attentions towards the manufacturers. The day before their class action was due to go to trial in May 1984, federal judge Jack Weinstein facilitated an out-of-court settlement worth \$180m between the seven companies and the 2.4 million veterans on condition that no future claims could be brought.

The settlement held until November 2001, when a higher court reviewed the case of two claimants who'd argued that their situations were unique and that they'd been inadequately represented in 1984. This case is now proceeding in the trial court with Weinstein presiding. Furthermore, in February 2004 the newly formed Vietnamese Association of Victims of Agent Orange filed a separate class action in Weinstein's court against Monsanto and 36 other firms.

Monsanto has said in a statement that "there were seven manufacturers that were required to make Agent Orange at the specific request of the US government for military use. Production ended more than 30 years ago. The government of

Vietnam resolved its claims as part of the treaties that ended the war and normalised relations with the US."

According to Dow, "the US and Vietnamese governments are responsible for military acts in Vietnam and the use of Agent Orange as a defoliant. The manufacturers feel that in 1984 they took part in a good-faith settlement aimed at healing and bringing closure to this issue. Any future issues involving Agent Orange should be the responsibility of the respective governments as a matter of political and social policy."

Gershon Smoger, principal partner at US law firm Smoger and Associates, thinks that neither the government nor the military should be held to account for the use of Agent Orange. "The US government relied on testimony from the chemical producers that the herbicides would cause no health risk. As a purchaser, it wasn't the US government's responsibility to check whether that was true," he says.

Smoger points out that the companies had "a duty to ensure that the products they were manufacturing wouldn't endanger the lives of employees producing them or the local populations where they were being sprayed. That clearly didn't happen. As a result, the manufacturers are fully liable for any claims arising from their use and production."

Apart from its involvement in the production of Agent Orange, Dow's name is also irrevocably linked with the Bhopal disaster through the company's 2001 acquisition of Union Carbide – the company at the heart of the catastrophe. Shortly after midnight on December 3, 1984, around 43 tonnes of toxic

gases, including methyl isocyanate, phosgene (mustard gas), hydrogen cyanide and carbon monoxide, escaped from the Union Carbide plant after water entered a storage tank and caused a violent reaction. The safety systems that could have prevented the leak either failed completely or hadn't been activated. Union Carbide paid the Indian government \$470m in 1989 to cover all liabilities arising as a result of the leak in exchange for a guarantee of immunity from prosecutions against the company or its executives.

But it has since become clear that the Indian government agreed a settlement that underestimated the number of people affected by the gas at the time of the leak, as well as the number of children who would later be affected. The state government of Madhya Pradesh, of which Bhopal is the capital, also made a serious miscalculation. The authority decided that the wind might have blown the gas across 36 of the city's 56 wards, so all citizens living within those boundaries were automatically deemed eligible for compensation and medical treatment. The other 20 wards – comprising around 334,000 people in December 1984 – were declared safe. Doctors and campaigners claim that tens of thousands of victims have been denied free treatment purely because their homes at the time of the leak were outside those perimeters.

Two decades on, 572,000 people – most living in poverty – are still waiting for their claims to be settled. Around \$327m of the compensation money has been lying in the Reserve Bank of India, the country's central bank, for 15 years owing to bureaucratic bungling and legal wrangles over who should receive the money. The plant is also still yet to be decontaminated.

For a decade the victims fought in the courts for the funds against the state's ruling party and the hospital trust set up through the Union Carbide deal to treat those deemed gas-affected. It was only last August when the Indian Supreme Court decided in their favour. The welfare commission for Bhopal gas victims, set up by the government to deal with their claims, hopes to distribute the remaining funds by the end of this month. The amount of money disbursed so far has averaged only \$2 a month per victim since the disaster.



Protestors hold a midnight vigil on the 20th anniversary of the Bhopal disaster. Most victims refuse to blame the government for their long wait to receive compensation.

Strangely, the victims have not been demanding to know what has happened to the interest accrued on the amount over the past 15 years. Officials in Bhopal refuse to comment on the matter. At the 20th-anniversary protests at the end of 2004, demonstrators refused to blame the central or state governments for the small settlement or the mishandling of funds. The survivors firmly believe that Dow is solely responsible for their rehabilitation and compensation.

On January 6, Anil Kumar Gupta, the chief judicial magistrate of Bhopal, accepted an application from a campaigners' organisation called the Bhopal Group for Information and Action to summon Dow to appear in his court. According to Srinivasan Muralidhar, a Delhi-based lawyer acting on behalf of many of the victims, "under Indian law, by acquiring Union Carbide's plants, products, people, patents and profits, Dow also acquired its liabilities".

Dow has indeed paid out on Union Carbide's US asbestos liabilities, an \$800m blow that sent its share price reeling after the 2001 takeover. But it has always refused to accept that it has inherited Union Carbide's Bhopal liabilities, or even that any remain. In 2003 Dow's chief executive, William Stavropoulos, told investors at its AGM that there were no criminal charges outstanding against Union Carbide in India – a statement he was later forced to retract (he claimed he "mis-spoke").

Despite such notorious cases, Martyn Day, senior partner at law firm Leigh, Day & Co, says that in general there's a growing sense of social responsibility among businesses. "The media's focus on ethical issues and peoples' rights has become much stronger and companies and governments are taking this seriously," he says, pointing out that the UK government accepted moral responsibility and paid out £200m in compensation to British prisoners of war held by the Japanese during the World War II. "In legal terms, the case against the government was not so strong, yet it felt duty-bound to compensate, and more instances of that kind of thinking are taking place."

But Gershon Smoger sees signs in the US that the government – which he believes is virtually untouchable in terms of litigation – is trying to protect businesses from having to "pay for their moral dilemmas". Two planned laws may curb civil litigation against companies. The Lawsuit Abuse Reduction Act 2004, currently before Congress, would impose sanctions on attorneys for "frivolous pleadings" and also apply the Civil Justice Reform Act 1990, which has proved successful in federal courts, to state courts in order to accelerate the pre-trial process and weed out time-wasting cases. And the Class Action Fairness Act 2004 sets forth provisions governing the transferral of interstate class actions to federal district courts.

According to Smoger, these bills could make it harder for people to sue large companies. If class actions are shunted into the federal court system, which prioritises criminal cases and is overloaded anyway, claimants will be waiting even longer to get their case to trial, he says. "This could be a serious setback for them, because the threat of litigation is usually the only means that people have to hold large corporations to account." **FM**

Neil Hodge is a freelance business journalist.