GOVERNING WITHOUT CONTROL: STRUCTURAL MISALIGNMENT IN INDEPENDENT DIRECTOR LIABILITY

Dr. Anuradha Dhadge-Girme Assistant Professor, Department of Law, New Law College, Bharati Vidyapeeth (Deemed to be University), Pune, Maharashtra, India.

Adv. CS Hrucha M. Dhamdhere, LL.M., Department of Law, New Law College, Bharati Vidyapeeth (Deemed to be University), Pune, Maharashtra, India.

ABSTRACT

Independent directorship was incorporated under the Companies Act, 2013 with an intent to strengthen board oversight, accountability and investor confidence. The liability that devolves on independent directors reflects a contrast between formal accountability expectations and the practical constraints of informational dependence and limited supervisory control. This paper examines whether liability can be meaningfully imposed where oversight responsibilities are structurally constrained. The paper adopts a doctrinal methodology grounded in statutory interpretation, judicial analysis and corporate governance theory. It argues that principal difficulty lies not merely in the breadth of liability exposure, but in governance imbalance between accountability obligations, access to information and decision-making authority.

The research advances an Accountability-Access-Control Misalignment Model to explain how liability may become distorted when legal expectations exceed the institutional conditions necessary for their discharge. Unlike conventional accounts that treat independent director liability primarily as a problem of excessive exposure, this model frames it as a problem of institutional design. The paper also argues that although Section 149(12) is meant to limit the scope of independent directors' liability, the recent judicial and regulatory trends may dilute this protection. This can create uncertainty, encourage over-cautious behaviour, and push boards towards compliance-oriented formalism. The core issue, therefore, is not liability per se, but the design of liability within the governance framework. The article contributes to scholarship by reconceptualising independent director liability as a question of governance framework and not merely fault attribution. It proposes reforms through clearer liability thresholds, stronger informational rights, and more functional safe harbour protections to align independent directorship with its intended governance role.

Keywords: Independent Directors, Corporate Governance, Companies Act, 2013, Fiduciary Duties, Information Asymmetry, Liability Design

Introduction

Corporate governance in India is founded upon the premise that effective board oversight requires voices independent of managerial control. The institution of independent directors has emerged as a crucial governance mechanism under the corporate governance framework. The aim with which the mechanism has been designed is to promote accountability, improve monitoring standards and protect the interests of shareholders and other stakeholders. The Companies Act, 2013[1] formally recognised this objective by embedding independent directors into the framework of board governance. This statutory recognition is found in Section 149[2] and the Code for Independent Directors under Schedule IV[3] which postulates the duties and functions of the independent directors. Their statutory inclusion in the board composition is with an aim to introduce objectivity into decision-making, check managerial excesses and strengthen investor confidence.[4]

Independent directorship is rooted in classic corporate governance literature on the separation of ownership and control.[5] It positions the board as a monitoring body to curb managerial discretion. Agency theory reinforced this by treating independent oversight as a tool to reduce agency costs and strengthen accountability.[6] Contemporary principles, including OECD standards[7], continue to stress board independence for effective monitoring and stakeholder confidence. Indian scholarship likewise notes the growing tension between rising expectations of independent directors and uncertainty over their liability. This paper builds on these debates by treating independent directorship not just as board composition, but as institutional design.[8]

Role of independent directors on the corporate boards is significant in present times. Along with exercising independent oversight, identifying governance risks, questioning management

---

[1] *Companies Act, 2013, No. 18 of 2013, India Code (2013)*.
[2] *Companies Act, 2013, No. 18 of 2013, § 149 (India)*.
[3] *Companies Act, 2013*, *No. 18 of 2013,* sch. IV (Code for Independent Directors) (India).
[4] Securities & Exchange Board of India, Report of the Committee on Corporate Governance (Kotak Committee) (Oct. 5, 2017), https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html, (last visited Apr. 10, 2026).
[5] ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).
[6] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).
[7] OECD (2023), *G20/OECD Principles of Corporate Governance 2023*, OECD Publishing, Paris, https://doi.org/10.1787/ed750b30-en, (last visited Apr. 11, 2026).
[8] Institute of Company Secretaries of India, Guidance Note on Independent Directors (GN-8) (Revised ed. 2022), https://www.icsi.edu/media/webmodules/GN8_Guidance_Note_on_Independent_Directors.pdf (last visited Apr. 11, 2026).

decisions where necessary. Courts too have recognised that the role is not formality and it carries expectations of diligence, judgment and responsible supervision.[9] However, the practical functionalities of the institutions reveal a more complex reality. The legal system places substantial fiduciary and oversight expectations upon independent directors but the conditions necessary to fulfil those expectations often remain imperfectly aligned.

The present research seeks to examine this tension. The sources of information that the independent directors can rely on for their informed decisions is none other than the very management they are expected to oversee. Their participation in board processes may confer formal responsibility, but often without corresponding operational control. This creates a deeper conceptual problem: whether liability can be meaningfully imposed where control and access to information remain structurally constrained. The recent regulatory and judicial developments further increased this concern.

Section 149(12) was introduced to ensure that liability of independent directors would arise only in limited circumstances involving knowledge, consent, connivance or failure to act diligently. [10] But the practical boundaries of this safeguard have not always remained free from uncertainty. This has generated apprehension that the accountability architecture governing independent directors may impose responsibility but without adequate authority or institutional support.

Existing scholarship has largely focused on excessive liability and protection concerns, while the relationship between liability design and institutional conditions has received comparatively limited attention.[11] The inconsistency in the liability design and the corresponding institutional conditions of oversight has somewhat remained an unexplored aspect. This paper conceptualises the problem through an ***Accountability-Access-Control Misalignment Model (AACM)***[12]. It advances three related propositions a) Calibrated Fault Thresholds where liability is aligned with demonstrable knowledge, diligence, and culpability; b) Informational Autonomy Architecture where there is independent access to information

[9] *Official Liquidator v. P.A. Tendolkar*, A.I.R. 1973 S.C. 1104.
[10] Companies Act, 2013, §149(12).
[11] Umakanth Varottil, *Evolution and Effectiveness of Independent Directors in Indian Corporate Governance*, 6 Hastings Bus. L.J. 281 (2010), https://repository.uclawsf.edu/hastings_business_law_journal/vol6/iss2/1, (last visited Apr. 13, 2026).; Afra Afsharipour, *Corporate Governance Convergence: Lessons from the Indian Experience*, 29 Nw. J. Int'l L. & Bus. 335 (2009). https://scholarlycommons.law.northwestern.edu/njilb/vol29/iss2/12, (last visited Apr. 14, 2026).
[12] The Accountability-Access-Control Misalignment Model is proposed by the authors as a conceptual framework for analysing independent director liability.

enabling meaningful oversight; c) Functional Safe Harbour Design for good-faith protections that operate effectively beyond formal law. This framework serves as the analytical lens through which the doctrinal and governance concerns explored in this paper are examined.

Independent Directorship and the Accountability-Access-Control Misalignment

One of the key assumptions in the corporate governance discussion particularly about independent directors is that stronger accountability may produce stronger governance.[13] In contemporary discourse that assumption needs to be critically evaluated. If we are to implement accountability norms, they must be supported by the institutional conditions within which duties are performed. Legal obligations need to be accompanied by institutional conditions that make accountability workable. In their absence, accountability may cease to function as a governance-enhancing mechanism and may instead become structurally distorted.

This distortion may be understood through what may be described as 'governing without control'. Independent directors are entrusted with supervisory responsibilities. They are not involved in day-to-day management and ordinarily do not possess the same access to operational realities as executive directors. Their role is intentionally designed to preserve independence from management, but that very separation can also create practical limitations in detecting risk, evaluating internal conduct or independently verifying disclosures placed before the board.

This study advances the proposition that 'informational dependence' is not merely a practical difficulty but a structural boundary on fault attribution. The effective discharge of independent director's function depends upon the quality, completeness and timeliness of information available to them. In practice, independent directors must rely on the documentation provided by the management, the internal reporting structures and board materials. This information is available only through executive channels creating dependency that affects the way in which independent directors can always meaningfully prevent or identify governance failures.[14]

[13] Arora A (2024), "Do independent directors enhance better corporate governance in companies in India?". *Public Administration and Policy*, Vol. 27 No. 2 pp. 154-166, doi: https://doi.org/10.1108/PAP-05-2023-0057 (last visited Apr. 14, 2026).

[14] *Independent Directors: Steering the Governance Wheel*, Nishith Desai Assocs. (Aug. 14, 2023), https://www.nishithdesai.com/fileadmin/user_upload/Html/Hotline/Yes_Governance_Matters_Aug1423_M.htm (last visited Apr. 15, 2026).; Pawan Yadav, *Importance of Independent Directors in Corporate Governance: Ensuring Accountability and Transparency*, 1 All. J. Corp. & Com. L. 1 (Dec. 2023) https://www.journalsalliancepub.com/index.php/ajccl/article/view/215, (last visited Apr. 15, 2026).

This informational dependence has an impact on the fiduciary responsibility of the independent directors. Duties of care, diligence and independent judgment presuppose a realistic ability to exercise informed oversight. When informational access itself is constrained, the performance of those duties becomes more complex than conventional liability models often acknowledge.

In ***Official Liquidator v. P.A. Tendolkar***[15], the Supreme Court opined that directors cannot remain passive spectators to the affairs of a company. They are expected to exercise reasonable vigilance in the discharge of their duties. The court insisted that directorship carries a positive duty of supervision, not merely formal participation in board processes. The judgment asserts that the directors must not shut their eyes to irregularities that reasonable diligence could have detected. This principle remains significant even in contemporary governance discourse.

The standard of vigilance articulated in *P.A. Tendolkar* also invites a harder question in the context of independent directors. Diligence cannot be assessed in abstraction from the informational conditions within which it is exercised. Where board oversight depends substantially on information filtered through management, the expectation of vigilance acquires structural limits. The legitimacy of a diligence standard is not the only problem. It is whether liability doctrines sufficiently account for the mediated nature of knowledge available to independent directors. The case thus demonstrates the importance of oversight and at the same time also highlights the tension that emerges when supervisory expectations are imposed despite this structural defect.

The governance concerns reflected in ***Tata Consultancy Services Ltd. v. Cyrus Investments Pvt. Ltd.***[16] show that formal board independence does not always translate into substantive autonomy in decision-making. Although the case did not directly address liability of independent directors, it exposed how managerial and promoter influence may constrain the practical effectiveness of independent oversight. It shows that legal responsibility may exist even where this asymmetry constrains effective oversight. The case clarifies that the challenge is not merely one of formal authority, but it is whether independent directors possess the institutional capacity necessary to discharge the responsibilities imposed upon them.

The Accountability-Access-Control Misalignment Model (AACM Model) developed in this paper may be understood through three interrelated elements namely liability, information

[15] *Official Liquidator v. P.A. Tendolkar*, A.I.R. 1973 S.C. 1104.
[16] *Tata Consultancy Services Ltd. v. Cyrus Investments Pvt. Ltd.*, (2021) 9 S.C.C. 449.

access and control. Among these elements, liability expectations have progressively intensified but informational autonomy and effective supervisory leverage have remained comparatively underdeveloped. This gap forms the conceptual lens through which the doctrinal analysis in this article proceeds.

If independent directors are expected to function as guardians of corporate governance, the framework governing them must provide practical conditions that make accountability functional. Without rectifying this disconnect, independent directorship may evolve into a model where formal independence is preserved, while effective oversight remains constrained. Further it may result in defensive conduct, risk-aversion and compliance-oriented participation rather than engaged oversight. Such outcomes would undermine the very rationale for independent directors as agents of informed and independent supervision.

The challenge, therefore, is not whether independent directors should be accountable, but whether the current framework conceives accountability in a manner consistent with the institutional realities of their role. It is this question that informs the doctrinal analysis that follows.

Liability Framework under the Companies Act, 2013: Statutory Design and Doctrinal Gaps

The Companies Act, 2013 sought to achieve two-fold objectives through the independent director concept. First was to ensure significant accountability in corporate governance. The other objective was to prevent any indiscriminate imposition of liability on those who are not involved in day-to-day management. Section 149(12) embodies this rationale and hence occupies a central place in the statutory framework governing independent directors. Certainly, the provision highlights the importance of holding independent directors answerable for failures in oversight. But it simultaneously acknowledges practical limitations inherent in their role. Therefore, the law also seeks to protect independent directors from any automatic or vicarious liability. It is this balance, however, that has generated considerable interpretive difficulty.

Section 149(12) limits the liability of an independent director to acts of omission or commission by a company that occurred with his or her knowledge, attributable through board processes, and with consent or connivance, or where the director had not acted diligently. There is a credible concern that Section 149(12), rather than operating as an ***ex-ante limitation on liability***, may increasingly function as an ***ex-post defence*** once exposure has already arisen.[17] The language of the provision makes it clear that there is no blanket liability. It imposes conditional responsibility when there is demonstrable involvement or culpable inaction. In case of executive directors, the managerial authority justifies broader exposure. But for independent directors the liability is exceptional since they act in the capacity of monitors and advisors only.

In support of this, Section 166[18], codifies the directors' duties which *inter alia*, include acting in good faith, exercising due and reasonable care, and acting in the best interests of the company and its stakeholders. For independent directors, these duties are to be applied along with the ones listed in Schedule IV. It is a specialised code of professional conduct and emphasises independent judgment, objective scrutiny and oversight of management. Collectively, these provisions create expectation of vigilance without equating independent directors with executive management.

Another important provision which differentiates between the liability of independent directors from those of the executive directors is the definition of the term "officer in default" under Section 2(60)[19]. The explanation under this provision indicates about officers who are ordinarily responsible for statutory defaults. Therefore, by inference it indicates that liability is not meant to attach indiscriminately across the board.

This legislative thought is further supplemented by Section 463[20] which empowers courts to relieve officers, including directors, from liability where they have acted honestly and reasonably and ought fairly to be excused. This serves as an additional statutory safeguard that narrows down the liability norms for the independent directors and reflects a broader legislative concern with fairness in enforcement.

From the securities market and investor perspective, the regulatory framework under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, particularly Regulation 25, elaborates duties of independent directors in listed entities.[21] They increase the

---

[17] *Companies Act, 2013*, No. 18 of 2013, § 149(12), India Code (2013); Ministry of Corporate Affairs, General Circular No. 5/2020 (Mar. 2, 2020); *Pooja Ravinder Devidasani v. State of Maharashtra*, (2014) 16 S.C.C. 1; *Sunil Bharti Mittal v. Central Bureau of Investigation*, (2015) 4 S.C.C. 609.
[18] Companies Act, 2013, No. 18 of 2013, § 166 (India).
[19] Companies Act, 2013, No. 18 of 2013, § 2(60) (India).
[20] Companies Act, 2013, No. 18 of 2013, § 463 (India).
[21] SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, reg. 25 (India).

responsibilities of independent directors in areas such as monitoring management, overseeing risks, and participating actively in board processes. However, these duties do not make independent directors equivalent to executive management or persons involved in the company's day-to-day operations. Their role remains one of supervision and oversight, not management or control. The framework nowhere suggests that independent directors are expected to prevent every instance of corporate wrongdoing or act as guarantors against misconduct. The law expects them to exercise reasonable care, diligence and independent judgment within the limits of their role.

From various legislative, committee and regulatory materials underlying Section 149(12) it can be inferred there is an apprehension that qualified professionals would be reluctant to accept independent directorships if they are exposed to unqualified liability.[22] The provision was intended precisely to avoid such a consequence. It was introduced not as an indulgence, but as recognition that board independence would be compromised if the role carried disproportionate legal risk. Ministry of Corporate Affairs has issued circulars cautioning against routine prosecution of independent and non-executive directors.[23] This emphasises that liability of an independent director must be founded upon specific involvement and not the designation in isolation. Despite this carefully calibrated structure, doctrinal developments have not been much in conformity to this legislative premise. There is a gap between the narrow statutory basis of liability and the enforcement practice.

In ***Pooja Ravinder Devidasani v. State of Maharashtra***[24], the Supreme Court opined that liability cannot be imposed upon a director merely by virtue of office. The Court insisted on specific allegations demonstrating a role in the commission of the alleged offence and rejected prosecution based solely on designation. This principle is especially significant for independent directors, whose role is functionally distinct from management. The judgment affirms that legal

---

[22] Ministry of Corporate Affairs, *Report of the Companies Law Committee* ¶ 1.16-1.17 (2016), https://www.icsi.edu/media/webmodules/linksofweeks/21_Report_Companies_Bill.pdf, (last visited Apr. 16, 2026); Ministry of Corporate Affairs, General Circular No. 5/2020, *supra* note 16; Institute of Company Secretaries of India, Guidance Note on Independent Directors *supra* note 8.

[23] *Circular Issued Against the Unnecessary Prosecution of Non-Executive and Independent Directors of Indian Companies*, Majmudar & Partners (Mar. 6, 2020), https://www.majmudarindia.com/circular-issued-against-the-unnecessary-prosecution-of-non-executive-independent-directors-of-indian-companies/, (last visited Apr. 17, 2026); *MCA Circular on Proceedings Against Independent Directors and Non-Executive Directors*, Argus Partners (Mar. 4, 2020), https://www.argus-p.com/updates/updates/mca-circular-on-proceedings-against-independent-directors-and-non-executive-directors/, (last visited Apr. 17, 2026).

[24] *Pooja Ravinder Devidasani v. State of Maharashtra*, (2014) 16 S.C.C. 1.

responsibility must rest on demonstrated involvement, not merely presumptive association.

A similar caution was observed in ***Sunil Bharti Mittal v. CBI***[25], where the Supreme Court rejected casual attribution of criminal liability in the absence of a clear legal basis. While the case arose in a different context, its reasoning has broader relevance. The Court's insistence that liability cannot be imposed through loose notions of control or status is instructive in evaluating exposure of independent directors. It reinforces the principle that accountability must be linked to conduct, not merely corporate position.

This reasoning also finds backing in the decisions given in ***S.M.S. Pharmaceuticals v Neeta Bhalla***[26] and ***National Small Industries Corporation Ltd v Harmeet Singh Paintal***[27]. In both the cases, the Court emphasised the need for specific averments before criminal liability may be invoked against directors. Although these cases pertain to cheque dishonour, they reflect a judicial preference for proved criminal default over liability that comes through the office held. If the standards of interpretation are stretched, they can shift liability away from a fault-based approach towards something closer to presumed negligence.

This does not necessarily arise from overt judicial departure from legislative intent, but rather from a gradual interpretive drift in which accountability expectations have expanded while institutional constraints remain largely unaddressed. Where duties continue to grow, while informational dependence and limited control remain unchanged, safe harbour protections may become formally present but functionally weakened. That possibility raises a deeper question about the architecture itself. Is Section 149(12) operating as an effective limitation on liability, or merely as a qualified defence invoked after exposure has already arisen? A safeguard which exists only in theory cannot fully address liability design distortion.

Thus, the doctrinal challenge is not simply one of excessive liability but of coherence. The law seeks to preserve independent oversight while shielding those who perform it in good faith. Where this equilibrium is disturbed, the problem is not merely unfairness to individual directors, but a weakening of the institutional logic of independent directorship itself. These doctrinal tensions also raise broader questions regarding the governance effects of liability

[25] *Sunil Bharti Mittal v. Central Bureau of Investigation*, (2015) 4 S.C.C. 609.
[26] *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*, (2005) 8 S.C.C. 89 (India).
[27] *National Small Industries Corp. Ltd. v. Harmeet Singh Paintal*, (2010) 3 S.C.C. 330 (India).

design. That is the central concern which the next section attempts to address.

From Accountability to Symbolic Governance: Regulatory Signalling and Over-Deterrence

The contemporary liability framework applicable to independent directors reflects a broader shift in corporate governance discourse. It has moved from viewing independent directorship as a facilitative oversight institution to treating it increasingly as an instrument of demonstrable accountability. In this evolution, liability does not merely function as a legal consequence for breach but also serves a signalling function. Strong liability norms communicate to markets, investors and regulators that governance failures will attract consequences and that boards are expected to act as effective monitors. This also reinforces confidence in governance standards and aims at ensuring that the presence of independent directors is not reduced to a formal statutory requirement. The governance project tends to being performative rather than substantive if symbolic accountability overshadows the functional conditions necessary for deep oversight.[28] These interventions were clearly meant to strengthen governance. But they also show a familiar regulatory reflex. When governance fails, the response is often to tighten compliance requirements and load more responsibilities onto independent directors, without asking whether they have the leverage to deliver on those expectations. It is that accountability may come to be measured mainly through visible liability and compliance signals, instead of through reforms that make independent oversight work in practice.

This concern often been observed across instances of serious corporate distress, such as the IL&FS crisis.[29] What matters here is not only the collapse itself, but also the regulatory and institutional response that followed. This crisis put board performance under a sharper scrutiny and stressed that independent directors should have spotted, questioned, or pushed back against managerial misconduct. That scrutiny is justifiable, but it also heightened anxiety about liability. In the aftermath, many observers felt that independent directors might be judged not just on proven involvement in wrongdoing, but also on what they are assumed to have known or been able to prevent. That shift materially affects how the role is understood and whether it

---

[28] Danielle Hanna Rached, *The Concept(s) of Accountability: Form in Search of Substance*, 29 Leiden J. Int'l L. 317 (2016), https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/concepts-of-accountability-form-in-search-of-substance/8E481D883DC5B5E9752C3CCA9BE39884, (last visited Apr. 19, 2026).

[29] Anjali Arora, *Corporate Governance Failure at IL&FS: The Role of Internal and External Mechanisms*, 1 Asian J. Mgmt. & Com. 43 (2020), DOI: https://doi.org/10.22271/27084515.2020.v1.i1a.63, (last visited Apr. 19, 2026).

appears feasible to discharge in practice.

It is in this context that concerns about liability without supervisory parity acquire prominence. Liability should discipline negligence, not generate a level of risk aversion that weakens the institution itself. An excessively expansive liability environment may produce precisely that effect. Where exposure appears uncertain or disproportionate, independent directors may begin to prioritise self-protection over substantive oversight. Decision-making may become shaped less by commercial judgment and more by defensive considerations. The result is not necessarily stronger governance, but a cautious governance.

This dynamic is often described as 'defensive directorship'. Instead of encouraging active, and questioning oversight, the fear of liability can push independent directors towards self-protective behaviour.[30] These could include strictly following processes, recording dissent[31], and maintaining extensive paperwork to reduce personal exposure. Procedural care and proper documentation are part of good governance, but the difficulty arises when they become the focus. In that situation, board oversight can shift from exercising independent judgment in the company's interests to ensuring that one's actions will stand up to scrutiny later.

Where liability pressures are significant, governance may be measured increasingly through demonstrable compliance rather than through the quality of oversight itself. Meetings are attended, disclosures reviewed, formal objections recorded, committees constituted, but whether such processes translate into robust challenge or genuine monitoring becomes less certain. The concern here is not that independent directors universally function in this manner. Many independent directors continue to add substantial value to board deliberations. The real problem is systemic one where a liability architecture that disproportionately incentivises caution may gradually prefer formalism over substantive engagement.

In public commentary, resignations by experienced professionals and a growing hesitation among capable individuals to accept independent directorships are often traced to uncertainty about personal exposure.[32] If the liability regime pushes qualified people, especially those who

---

[30] Organisation for Economic Co-operation and Development (OECD), *G20/OECD Principles of Corporate Governance* ch. V.A-D (OECD Publishing 2023), https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/09/g20-oecd-principles-of-corporate-governance-2023_60836fcb/ed750b30-en.pdf, (last visited Apr. 21, 2026).

[31] Companies Act, 2013, No. 18 of 2013, sch. IV (India); SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, reg. 25 (India).

[32] Kala Vijayraghavan & Lijee Philip, *Independent Directors Depart as Companies Run into Rough Weather*,

can bring genuine independent judgment, the overall quality of oversight is likely to decline.

In *Official Liquidator v P.A. Tendolkar*, the Supreme Court stressed that directors cannot be passive or ignore misconduct. But in today's setting it leads to a practical question. How far can we push this vigilance standard when independent directors often depend on information filtered through management? If courts apply diligence standards without taking these limits into account, liability can quietly expand even when directors had little real control. The issue is not the idea of diligence itself. It is the risk that diligence becomes a backdoor route to hindsight-based liability that does not match the realities of independent directorship.

This leads to a larger normative question: Can excessive liability weaken governance rather than strengthen it? Governance institutions do not become effective merely because liability is severe. They become effective when accountability is matched by authority, access and workable standards of responsibility. Where liability exceeds those supporting conditions, it may distort incentives, weaken board participation and transform independent directorship into a cautious, compliance-driven office.

Therefore, the difficulty lies in attuning accountability in a manner that preserves the functional value of the institution. A regime that relies too heavily on liability as proof of governance seriousness risks mistaking symbolic assurance for effective oversight. If independent directors are to remain crucial actors in corporate governance, liability must operate as part of a broader framework of functional accountability, not as a substitute for it. Otherwise, the institution risks being judged by the optics of responsibility while being deprived of the conditions necessary to exercise it meaningfully. The foregoing concerns point towards the need to regulate liability from the perspective of functional accountability.

Reimagining Functional Accountability: Reforming the Liability Architecture

The liability of independent directors and the challenges around it do not require a complete dilution of accountability but for a more coherent framework. The responsibility given to the

---

The Economic Times (Apr. 27, 2025), https://economictimes.indiatimes.com/news/company/corporate-trends/independent-directors-depart-as-companies-run-into-rough-weather/articleshow/120652565.cms?from=mdr, (last visited Apr. 22, 2026) ; Aakanksha Singhal & Swati Patil Lahiri, *Resignation Surge: Why Independent Directors Are Exiting Indian Startups*, Lawrbit (June 10, 2025, updated June 18, 2025), https://www.lawrbit.com/article/resignation-surge-independent-directors-exit-startups/#:~:text=Independent%20directors%20(IDs)%20play%20a%20critical%20role,ahead%20of%20major%20funding%20rounds%20or%20audits, (last visited Apr. 22, 2026).

independent directors must correspond to the authority, information, and institutional support available to them. If liability continues to be imposed within a framework where independent directors are expected to exercise oversight without adequate means to do so, the effectiveness of the mechanism will suffer. Therefore, changes must be made to make the standards of governance workable.

Calibrated Fault Thresholds: A first aspect requiring reconsideration is the threshold for liability itself. Section 149(12) of the Companies Act, 2013 was introduced with a clear legislative objective namely independent directors should not be exposed to the same degree of liability as executive management unless wrongful conduct occurred with their knowledge, consent or connivance, or where they failed to act diligently. This notion recognises the distinct role occupied by independent directors. Yet, uncertainty remains over the content of "knowledge" and "due diligence," and that uncertainty often expands exposure rather than cabins it.

There is a strong case for a more exacting interpretation of these standards. Knowledge ought not to be presumed merely from board membership or participation in meetings. It should require demonstrable awareness, or at least circumstances from which conscious disregard can reasonably be inferred. Equally, the diligence expected from independent directors must be assessed considering their role as non-executive monitors rather than day-to-day managers. A standard that expects them to know everything cuts against the very idea of differentiated liability in Section 149(12).

Section 463 although used less often, it gives courts the power to excuse officers (including directors) from liability where they have acted honestly and reasonably. In practice, it can work as an important safety valve against hindsight-based liability. This is particularly suited where an independent director acted in good faith but could not realistically have prevented the misconduct in question. When applied together with Section 149(12), Section 463 can help bring greater consistency and fairness to the liability framework.

Informational Autonomy Architecture: Many of the difficulties associated with independent directorship arise not from absence of duty, but from absence of tools necessary to discharge that duty effectively. If independent directors are expected to exercise informed judgment, they cannot remain structurally dependent on management-filtered information. Accountability without informational autonomy is difficult to sustain.

This points to the need for a stronger information rights architecture. Independent directors should have statutory recognition of direct access rights to internal records, compliance reports, and key risk-related information beyond what management elects to disclose. While some of this may be implicit in present governance norms, the framework remains underdeveloped. Thus, a clear and express provision could be a rectification measure in the right direction.

There is also merit in institutionalising independent advisory support available to boards and their independent members. Access to external legal, financial, or technical advice, which is devoid of management mediation, would strengthen substantive oversight and reduce informational vulnerability. This may also include an express right of independent directors to obtain external legal, financial or technical advice at the company's cost where reasonably necessary for discharge of oversight functions. In complex sectors particularly, independence is not secured merely through appointment criteria. It is sustained through access to informed and independent inputs.

The Indian framework already recognises that accountability requires capacity-building, reflected in the Independent Directors Databank[33] and proficiency architecture; the gap lies in extending this recognition into liability design itself.

Documentation safeguards are equally important. A stronger culture of recording dissent, reservations, and requests for additional scrutiny can serve a dual purpose. It strengthens deliberative governance and, at the same time, provides objective evidence of diligence where liability questions arise later. Such safeguards do not encourage defensive conduct; rather, they reinforce responsible board processes.

Functional Safe Harbour Design: Strengthening safe harbour protections is important so that they function in practice as well as on paper. Safe harbours are not exemptions from accountability; they are mechanisms to prevent liability from becoming indiscriminate. Their value lies in preserving principled distinctions between culpable inaction and reasonable oversight failures.

This principle does find recognition in the Indian legal context but still lacks the practical

---

[33] *About Us*, Independent Directors Databank, https://www.independentdirectorsdatabank.in/aboutus, (last visited Apr. 25, 2026); Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019.

application. Clear and explicit articulation possibly through legislative clarification, regulatory guidance or judicial consistency would significantly reduce ambiguity. A brief comparative glance at the United Kingdom is appropriate in this regard.[34] While the institutional context differs, greater emphasis is laid on good-faith judgment and reasonableness in evaluating director conduct offers a useful reference point.

Ultimately, reform must move beyond treating independent directors as symbolic guarantors of governance. The emphasis should be on functional independence where responsibility is matched by access, authority and realistic standards of review. Corporate governance is not strengthened by imposing expansive liability on structurally constrained actors. It is strengthened when oversight institutions are designed to function effectively.

The question, therefore, is not whether independent directors should be accountable or not. The question is whether accountability can be made consistent with the realities of board governance. Reimagining the liability architecture along these lines would not weaken the institution of independent directorship, rather it would be more credible. In the long run, it is a stronger foundation for corporate governance than symbolic independence backed by uncertain liability.

Conclusion

Independent directorship was introduced in India to provide credible oversight beyond managerial control. This article argues that the core problem is not simply "too much liability", but the way liability is designed. When directors are held accountable without adequate access to information or real supervisory leverage, the result is not just unfair exposure; it creates a structural mismatch in the governance framework.

Using the Accountability-Access-Control Misalignment Model (AACM Model), this paper shows that independent directors' liability cannot be judged without looking at the conditions in which they are expected to supervise. The real question is not whether they should be accountable, but whether the standards of accountability reflect how the role works through management-provided information, limited control and a non-executive mandate. From this perspective, the key challenge in India is not to expand liability, but to close the gap between

[34] *Companies Act 2006*, c. 46, §§ 174-177 (U.K.).

responsibility and capacity.

The article has further suggested that this governance-design imbalance has broader consequences. A liability regime that generates uncertainty or over-deterrence may weaken the very institution it seeks to strengthen by encouraging defensive conduct, discouraging capable professionals and privileging formal compliance over substantive oversight. In that sense, the future of independent directorship depends not on making liability harsher or lighter in abstract terms, but on making it functionally coherent.

The main contribution of the article is that independent director liability should be seen as a governance design issue, not just a question of blame. If independent directors are to play a meaningful role, reforms must match responsibility with real access to information, some degree of authority, and clear, workable standards. Without this reset, independent directorship may look strong on paper but remain weak in practice. With it, the institution can better deliver the oversight it was meant to provide.