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# Treatment of liability, economic losses and environmental damage of ship source oil pollution

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# Summary

When the *Torrey Canyon* ran aground in 1967, there was no international regime covering liability for oil pollution damage. This changed with the adoption of the 1969 Civil Liability Convention for Oil Pollution (CLC) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention).

While torts are mainly fault based, the Conventions apply strict liability for the shipowner. The CLC/Fund is a two-tiered regime where liability is established through the CLC and if certain criteria are met, the Fund will further compensate victims of oil pollution damage, assuming a state is party to both Conventions. A state may be party only to the CLC but in order to be party to the Fund, it must also be party to the CLC. In 1992 the Conventions were amended, although some states are still party to the 1969/1971 regime. A third tier of compensation is available for contracting States of the 2003 Supplementary Fund Protocol. There was still a gap in the regime of liability for oil pollution damage, as the CLC did not deal with bunker spills from non tankers. This gap was filled by the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers).

In the thesis, the author strives to delve into two problems related to the definition of “pollution damage” in the Conventions; those of “environmental damage” and “pure economic loss”. The legislators of the Conventions have left matters such as standing (*locus standi*) and compensability of pure economic loss to the discretion of national courts. This has led to uncertainty and a lack of harmonization within the regime of oil pollution damage. Although the Fund has developed certain guidelines to deal with the discrepancy of judgments rendered in courts of contracting States, judges have generally been of the position that the guidelines of the Fund are not legally binding.

Uniformity will consequently be difficult to achieve unless the definition in the Conventions is changed.

# Sammanfattning

När Torrey Canyon gick på grund 1967, fanns det ingen internationell regim som täcker ansvar för föroreningskador från olja. Domstolar vid tidpunkten var tvungna att förlita sig på nationell rätt. Detta kom att ändras i och med antagandet av 1969 ansvarighetskonventionen för oljeutsläpp och 1971 års konvention om upprättandet av en internationell fond för ersättning av skada orsakad av förorening genom olja. Konventionerna ålägger strikt ansvar för redaren. Konventionerna är uppbyggda så att ansvaret är ålagt genom ansvarighetskonvention, och om vissa kriterier är uppfyllda, kommer fonden ytterligare kompensera offer för oljeutsläpp, förutsatt att en stat har tillträtt båda konventionerna. Dessa ändrades 1992, även om vissa stater fortfarande är parter i den gamla regimen. En tredje grupp av ersättningen är tillgänglig för stater vilka är part i 2003 års fondprotokoll. Det var fortfarande ett hål i systemet för skadeståndsansvar gällande föroreningskador för oljeutsläpp då ansvarighetskonvention endast behandlar tankfartyg och därför icke bunkerolja från exempelvis lastfartyg. Denna brist avhjälpes genom 2001 års konvention om ansvarighet och ersättning för skada genom förorening orsakad av bunkerolja.

I examensarbetet strävar författaren efter att gräva i två problem relaterade till definitionen av "skada genom förorening" i konventionerna; nämligen "miljöskador" och "ren förmögenhetsskada". Lagstiftarna till konventionerna har lämnat frågor som talerätt och kompensation för ren förmögenhetsskada till nationella domstolar att avgöra. Detta har lett till osäkerhet och brist på harmonisering inom regimen av oljeföroreningskador. Även om fonden har utvecklat vissa riktlinjer för att ta itu med diskrepansen av domar som meddelats i domstolar i avtalsslutande stater, har domare i allmänhet hävdat att riktlinjerna för fonden inte är juridiskt bindande. Enhetlighet kommer följaktligen att bli svårt att uppnå om inte definitionen i konventionerna ändras.

# Abbreviations

CLC	Civil Liability Convention
CMI	Comité Maritime International
CRISTAL	Contract Regarding a Supplement to Tanker Liability of Oil Pollution
HNS	Hazardous and Noxious Substances
IMCO	Inter-Governmental Maritime Consultative Organization
IMO	International Maritime Organization
IOPC	International Oil Pollution Compensation
LLMC	Convention on Limitation of Liability for Maritime Claims
OPA 90	Oil Pollution Act 1990
SDR	Special Drawing Rights
TOVALOP	Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution
UNCLOS	United Nations Convention on the Law of the Sea

# 1. INTRODUCTION

## 1.1 Background

While today, the subject of oil pollution damage is one of the major concerns in shipping, this was not always the case. While there were certain ways of dealing with liability, e.g. torts, there were no conventions relating to the subject and few put much thought into the creation of an international regime regulating liability.

However, with the emergence of the supertanker in the late 50's, an accident of huge proportions was bound to happen.

On 18 March 1967, the *Torrey Canyon* struck Pollard's Rock on Seven Stones reef between the Cornish coastline and the Isle of Scilly. The ship carried 120,000 tonnes of crude oil and contaminated not only large parts of the Cornish coast but thousands of tonnes were carried by winds and currents towards France. At the time, it was the biggest oil spill ever and there was little experience in dealing with oil pollution of this magnitude. As a consequence, the damage done to the environment was massive which raised many issues concerning liability and compensation for pollution damage.<sup>1</sup>

The accident was on the high seas; the ship was registered in Liberia but owned by a company in Bermuda. There were charterers and sub-charterers, damage was done in both the UK and France, two states with completely different limits to liability. Further, there was the issue of who should be able to obtain compensation.

The claims were eventually settled but it was clear that an international convention was required for oil pollution to be dealt with effectively.

Work began immediately to establish a regime relating to liability and compensation for oil pollution damage, resulting in the 1969 Civil Liability Convention for Oil Pollution (CLC), followed by the 1971 Fund Convention.

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<sup>1</sup> Edgar Gold, "Pollution of the Sea and International Law: A Canadian Perspective", in *Journal of Maritime Law and Commerce*, Volume 3 1971-72, p. 21-22.

The current regimes regulating oil pollution are the CLC 1992 (although the 1969 Convention is still in force in a number of states), the Fund Convention 1992 (along with the 2003 Supplementary Fund Protocol) and the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers).

While these conventions provide the foundation for oil pollution liability, there are still some issues that have remained unresolved. This thesis will provide, *inter alia*, a background to liability for oil pollution damage, through national legislation and the CLC/Fund regime. The focus will be on two specific problems with the current regime: the issue of compensability of pure economic losses and; the issue of what constitutes and relates to “environmental damage”.

The terms responsibility and liability will be used interchangeably throughout the paper but what it means is the act or omission that leads to a legal consequence. However, it should be mentioned that “duty” does not necessarily connote legal consequence. Likewise, the terms recoverable and compensable in relation to pure economic loss will be used interchangeably.

## **1.2 Purpose of thesis**

The purpose of the thesis is to give the reader an overview of ship-source oil pollution liability and compensation before moving on to address two problems where there is quite a bit of uncertainty; environmental damage and compensation for pure economic loss.

As a definition of environmental damage is lacking in the CLC/Fund regime the author will attempt to give an analysis as to what kind of damage is compensable and who has the right to make a claim.

The chapter on pure economic loss attempts to give the reader a grasp of the concept itself and look at when these losses are compensable under national legislation and the relevant Conventions. The role of the IOPC Fund in determining compensability will also be explored.

### **1.3 Delimitations**

The discussion is confined to consideration of ship-source pollution from oil, both cargo and fuel but will not deal with chemicals, referred to as “hazardous and noxious substances” (HNS). Further, industry based agreements such as TOVALOP and CRISTAL will not be dealt with. The United States Oil Pollution Act 90 (OPA 90) will be mentioned in terms of comparison with the CLC/Fund but will not be analyzed further. Although the paper will look into the CLC/Fund regime, there will not be enough space to give a very detailed analysis.

### **1.4 Methodology**

The methodology used by the author is the traditional legal method and the sources used are mainly literature, case law, conventions and national legislation. Some chapters are more descriptive providing the necessary background to the problems on which the author has decided to focus. In the more “problematic” chapters a more analytical approach has been taken by using case law and scholarly writings.

### **1.5 Disposition**

The first part of the thesis is designated to giving a background of liability for ship-source oil pollution damage. The second part deals with the two problems this author chosen to focus on: environmental damage and pure economic loss.

The concept of pure economic loss will be dealt with at first in a general way, giving background to the problem and a small comparative analysis and then move into pure economic loss in relation to ship-source oil pollution and the Fund’s position.

## 2. LEGAL FRAMEWORK

In Article 235 (3) UNCLOS it is stated that:

With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

The provision shows the importance of compensation for oil pollution damage. It makes clear that compensation must be prompt and adequate and forms along with the well established principle of making the “polluter pay” a foundation for liability and compensation for pollution damage.

There are different systems in establishing liability. While it is, of course, easier where states are parties to conventions such as the CLC, this is not always the case and then alternative methods of establishing liability are required.

### 2.1 Law of Torts

While the UK is now party to the CLC, there have been accidents causing pollution damage that predate the convention. The alternative was then to found liability on some type of tort, as oil pollution damage is essentially a tort, the relevant torts being: negligence, nuisance and trespass. This would be the situation today if there was no convention or if the oil spill occurred in a common law state which is not party to the convention.

Perhaps the most commonly used tort in cases of pollution is that of negligence. Negligence is “the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff.”<sup>2</sup>

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<sup>2</sup> W.V.H Rogers, *Winfield and Jolowicz on Tort* (18th edition, London: Sweet & Maxell, 2010), p. 150.

It was further stated by Lord Wright in *Lochgelly Iron and Coal Co. v. Mcmullan*<sup>3</sup> that-

negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing<sup>4</sup>

Regarding trespass, it can be said that “any direct interference with land in the possession of another is trespass and is actionable *per se*.”<sup>5</sup> In *Fowler v. Lanning* it was held that-

trespass to the person did not lie if the injury to the plaintiff was caused unintentionally and without negligence on the defendant's part, and this applied whether the injury was caused on the highway or in any other place.<sup>6</sup>

Nuisance can be categorized into private and public nuisance.

In the case of *Attorney General v. PYA Quarries Ltd (No.1)*<sup>7</sup> it was held that-

...any nuisance which materially affected the reasonable comfort and convenience of life of a class of Her Majesty's subjects was a public nuisance.<sup>8</sup>

Private nuisance is referred to as “unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with it.”<sup>9</sup>

A somewhat recent case relating to pollution and nuisance is that of the *Cambridge Water*.<sup>10</sup> The defendant ran a tanning business; certain chemicals used in the process entered the water supply, contaminating a borehole recently purchased by the plaintiff in 1976.

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<sup>3</sup> [1934] A.C. 1.

<sup>4</sup> *Ibid*, p.25.

<sup>5</sup> Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin’s Tort Law* (7th edition, Oxford: Oxford University Press, 2013), p. 401.

<sup>6</sup> [1959] 1 Q.B. 426.

<sup>7</sup> [1957] 2 Q.B. 169.

<sup>8</sup> *Ibid*, p. 170.

<sup>9</sup> Rogers, *supra* n. 2, p. 712.

<sup>10</sup> [1994] 2 A.C. 264.

At that time a small amount of contamination was not considered to be significant but in 1980 Directive 80/778/EEC was issued with stricter guidelines regarding water supplies. Consequently the well became worthless and the plaintiff claimed for compensation.

In the House of Lords, this was rejected due to the injury being unforeseeable.<sup>11</sup>

### **2.1.1 Esso Petroleum & Wagon Mound (No. 2)**

Before the CLC came into force, two cases relating to oil pollution damage were decided in the House of Lords.

In the case of *Southport Corporation v. Esso Petroleum*<sup>12</sup> the defendant's steamship *Inverpool* stranded due to a defect in the steering gear and proceeded to jettison 400 tons of oil. The oil polluted the plaintiff's foreshore causing damage to property, consequently the plaintiff claimed for damages due to negligence and/or nuisance and/or trespass.

In the first instance it was held by Devlin J. that-

...plaintiffs had established a good cause of action in nuisance (or in nuisance analogous to trespass) in that their property was sufficiently proximate to the navigable highway to be affected by the misuse of it, but that being proximate to the highway they took the risk of damage being done to their property by users of the highway acting with due care, and that the onus was on plaintiffs to prove negligence (and not on defendants to prove inevitable accident); that the stranding occurred owing to a defect in the ship's steering gear, such defect being caused by an unexplained fracture of the stern frame; that the only negligence alleged by plaintiffs was the negligence of the master, and that, the master having satisfied the Court that he was not personally negligent, the action failed.<sup>13</sup>

This decision was reversed in the Court of Appeal where it was held that-

...in the circumstances of the stranding the doctrine of *res ipsa loquitur* applied and the onus was on defendants to show that the

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<sup>11</sup> *Ibid*, p. 301.

<sup>12</sup> [1955] 2 Lloyd's Rep. 655.

<sup>13</sup> [1953] 2 Lloyd's Rep. 414.

fracture of the stern frame occurred without negligence on their part (or at any rate to provide a reasonable explanation consistent with negligence or no negligence), and that having failed to do so they were liable to plaintiffs in negligence<sup>14</sup>

It was further held by Denning L.J. that there were grounds for an action in public nuisance:

Applying the old cases to modern instances, it is, in my opinion, a public nuisance to discharge oil into the sea in such circumstances that it is likely to be carried on to the shores and beaches of our land to the prejudice and discomfort of Her Majesty's subjects. It is an offence punishable by the common law. Furthermore, if any person should suffer greater damage or inconvenience from the oil than the generality of the public, he can have an action to recover damages on that account, provided, of course, that he can discover the offender who discharged the oil.<sup>15</sup>

The decision of the Court of Appeal rested largely on the decision in *The Merchant Prince*<sup>16</sup>, where counsel for the appellants contended that the onus was upon the defendants in the action to prove inevitable accident<sup>17</sup>, citing a passage in *The Merchant Prince*:

The burden rests on the defendants to shew inevitable accident. To sustain that the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided.<sup>18</sup>

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<sup>14</sup> [1954] 1 Lloyd's Rep. 446.

<sup>15</sup> *Ibid.*, p. 456.

<sup>16</sup> [1892] p. 179.

<sup>17</sup> *Supra* n. 12, p. 665.

<sup>18</sup> [1892] p. 179, p. 189.

In the House of Lords the issue was that of negligence and not nuisance or trespass as the discharge of oil was necessary for the safety of the crew and this afforded a sufficient answer to the claim based upon nuisance or trespass.<sup>19</sup>

Lord Morton of Henryton held in regards to the pleadings that-

As against the master, it was alleged that he had been negligent, that his negligence was the cause of the discharge of oil from the tanker, that such discharge had resulted in "a trespass and/or nuisance" and had caused damage to the respondents. It was sought to make the appellants liable only on the ground of vicarious responsibility for the acts and defaults of the master.

All the attacks upon the master's conduct were fought out before Devlin, J., and they all failed. The victory of the master destroyed the only ground upon which the respondents by their statement of claim had sought to cast liability upon the appellants. Counsel for the respondents then sought to make a case of which no hint appeared in the pleadings.<sup>20</sup>

His Lordship further added that-

The respondents, however, as I have already pointed out, had pleaded negligence of the master, and trespass and nuisance and damage resulting from such negligence; as against the appellants, they chose to rely only upon the responsibility of the owners for the master's negligence.

In this state of the pleadings it seems to me to follow that the Court of Appeal, having affirmed the judgment of Devlin, J., in favour of the master and having thereby acquitted the master of any negligence, should also have affirmed his judgment in favour of the present appellants.<sup>21</sup>

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<sup>19</sup> *Supra* n. 12, p. 661.

<sup>20</sup> *Ibid*, p. 665.

<sup>21</sup> *Ibid*.

This was the reasoning behind the House of Lords reversing the judgment made in the Court of Appeal. However, it would appear that if the plaintiff had in the pleadings alleged that not only the master but also the owners of the ship were negligent the outcome may very well have been different and the rule in *The Merchant Prince* would have applied.

In addition Lord Tucker held regarding the relationship between negligence and trespass that:

[I]t is in my view well settled that in actions between users of the highway, and between the occupier of premises adjoining the highway which have been damaged by a person lawfully using the highway, the person who has suffered damage cannot recover in trespass in the absence of negligence on the part of the person who has caused the damage.<sup>22</sup>

The other major case relating to oil which predates the CLC is that of *The Wagon Mound (No. 2)*.<sup>23</sup>

While bunkering in Sydney Harbour, a large quantity of furnace oil was spilled from the vessel *Wagon Mound*. The oil on the water became ignited, causing damage to the vessels *Corrimal* and *Audrey D*. In the Supreme Court of New South Wales it was held that the appellant (the owners of *Wagon Mound*) was liable in nuisance but not in negligence. The judgment was appealed; the appellant on behalf of the decisions regarding nuisance and the respondent on behalf of the decision regarding negligence.

Regarding foreseeability as a prerequisite for liability relating to nuisance it was held by Walsh J. in the S.C. of N.S.W. that:

...I do not find in the case law on nuisance, up until the time of The *Wagon Mound* decision, any authority for the view that liability depends on foreseeability. It was necessary that the damages should not be 'too remote', but that requirement was not equated in these cases, with unforeseeable consequences.<sup>24</sup>

This was the essential question that had to be determined by the Lord Justices in the Privy Council. In the judgment, Lord Reid held:

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<sup>22</sup> *Ibid*, p. 667.

<sup>23</sup> [1966] 1 Lloyd's Rep. 657.

<sup>24</sup> [1963] 1 Lloyd's Rep. 402, p. 433.

Comparing nuisance with negligence, the main argument for the respondents was that in negligence foreseeability is an essential element in determining liability, and therefore it is logical that foreseeability should also be an essential element in determining the amount of damages; but negligence is not an essential element in determining liability for nuisance, and therefore it is illogical to bring in foreseeability when determining the amount of damages. It is quite true that negligence is not an essential element in nuisance. Nuisance is a term used to cover a wide variety of tortious acts or omissions and in many negligence in the narrow sense is not essential.<sup>25</sup>

And although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability.<sup>26</sup>

The present case is one of creating a danger to persons or property in navigable waters (equivalent to a highway) and there it is admitted that fault is essential-in this case the negligent discharge of the oil.<sup>27</sup>

Lord Reid then referred to a passage from a different case where Lord Denning had held:

But how are we to determine whether a state of affairs in or near a highway is a danger? This depends I think on whether injury may reasonably be foreseen. If you take all the cases in the books you will find that if the state of affairs is such that injury may reasonably be anticipated to persons using the highway it is a public nuisance<sup>28</sup>

From this, it is clear that foreseeability is required to determine liability in cases of nuisance. What the Lord Judges then had to establish was whether the fire was reasonably foreseeable or not.

It was held that-

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<sup>25</sup> [1966] 1 Lloyd's Rep. 657, p. 664.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, p. 665.

<sup>28</sup> *Ibid.*

In the present case the evidence shows that the discharge of so much oil on to the water must have taken a considerable time, and a vigilant ship's engineer would have noticed the discharge at an early stage. The findings show that he ought to have known that it is possible to ignite this kind of oil on water, and that the ship's engineer probably ought to have known that this had, in fact, happened before.<sup>29</sup>

If it is clear that the reasonable man would have realized or foreseen and prevented the risk then it must follow that the appellant is liable in damages.<sup>30</sup>

Therefore, the judgment in favour of the respondent was upheld.

While torts offer a way to claim for damages it is not very “victim friendly”. It is for the plaintiff/victim to show negligence on part of the polluter imposing on the victim the burden of proof. This can be an issue; especially, proving foreseeability may be difficult. However, the doctrine of *res ipsa loquitur* presents a better view for victims if it is applicable, and accepted by the Court.

## 2.2 Legislation

Legislators have several options to deal with liability for oil pollution damage. Gauci highlights two of them, namely presumption of fault and strict liability<sup>31</sup> but there is also e.g. fault based liability based on intention or negligence and absolute liability in which there is no exception to liability (see *The Empress Car*<sup>32</sup>).

Presumption of fault means that the burden of proof lies on the polluter to prove that there was no negligence on his part. Presumption of fault can be seen in e.g. the Hamburg Rules article 5.1.<sup>33</sup>

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<sup>29</sup> *Ibid*, p. 667.

<sup>30</sup> *Ibid*.

<sup>31</sup> Gotthard Gauci, *Oil Pollution at Sea: Civil Liability and Compensation for Damage* (Chichester: Wiley, 1997), p. 16.

<sup>32</sup> [1999] 2 A.C. 22.

<sup>33</sup> “The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.” It should be noted that presumptions of fault can be

### 2.2.1 Strict Liability

The concept of strict liability has existed for some time.

In the classic case of *Rylands v. Fletcher*<sup>34</sup> it was established that-

A person who, for his own purposes, brought on his land and collected and kept there anything likely to do mischief if it escaped, had to keep it in at his peril; and if he did not do so, he was prima facie answerable for all the damage which was the natural consequence of its escape.<sup>35</sup>

The Defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the Plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the Defendants, according to the principles and authorities to which I have adverted, were certainly responsible.<sup>36</sup>

It could very well be imagined that this rule could be applicable for e.g. oil tankers carrying oil but there are several difficulties in applying this rule to oil pollution as Gauci points out, such as:

Firstly, an oil spill from a tanker occurs on the sea, not on land, and the sea is considered to be a public highway; secondly, the use of a tanker to carry oil cannot be considered to be non-natural; moreover, very frequently, the cargo of oil and the carrying ship belong to different individuals or corporations.<sup>37</sup>

Even though the rule in *Rylands v. Fletcher* cannot be directly applied in ship source oil pollution cases, the strict liability principle can be applied and is in fact applied through convention law, as carriage of oil by sea is considered to be a dangerous or hazardous operation, which was the rationale used by the House of Lords in *Rylands v. Fletcher*.

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rebuttable or non rebuttable. Those that are rebuttable are for all practical purposes similar to strict liability, see *Winfield and Jolowicz on tort*, p.36-46.

<sup>34</sup> (1868) L.R. 3 H.L. 330.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid*, p. 342.

<sup>37</sup> Gauci, *supra* n. 31, p. 13.

It is evident that strict liability has been the legislators' preference when dealing with oil pollution liability. While there was some debate about the basis of liability at the Diplomatic Legal Conference on Marine Pollution Damage held in 1969, where some proposed a fault based regime, they eventually settled on strict liability of the shipowner subject to some exceptions.<sup>38</sup>

Strict liability has further been adopted in the 1971 Fund Convention; the 1992 protocols (CLC and Fund), the 1996 HNS Convention, the 2001 Bunkers Convention, the United States Oil Pollution Act (OPA) 1990. This certainly supports the idea that strict liability is the best way to go in order to make the polluter pay.

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<sup>38</sup> Colin De La Rue and Charles B. Anderson, *Shipping and the Environment: Law and Practice* (2nd edition, London: Informa, 2009), p. 14.

# 3. THE LIABILITY REGIME OF THE CONVENTIONS

There are three conventions relating to liability and compensation for oil pollution damage. This chapter will explain briefly how the different conventions function without going into too much detail.

## 3.1 CLC

As explained in the introduction, the background for the CLC is based mainly on the *Torrey Canyon* disaster where it was evident that national legislation was not enough to deal with spills of this magnitude.

Work began right away by both IMCO<sup>39</sup> and the CMI to come up with an international convention covering liability and compensation for oil pollution damage. The result was the 1969 Civil Liability Convention for Oil Pollution (CLC). The CLC represents one of the major conventions of the IMO, having been ratified by almost all of the world's maritime states (with some exceptions, the most notable one being the U.S).

Along with the CLC, the 1971 Fund convention was adopted.<sup>40</sup> The CLC was later amended in 1992 which is the version most states are party to. The basis for the convention is a strict liability regime where liability is "channeled" to the shipowner. There was some discussion as to who should be liable; the shipowner or the cargo owner but eventually, the view that the shipowner should be liable as the "polluter" prevailed.

The 1969 CLC is applicable to any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo.<sup>41</sup> The 1969 CLC also applies exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimise such damage.<sup>42</sup> Oil means any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and

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<sup>39</sup> Now called the International Maritime Organization (IMO).

<sup>40</sup> *Infra* chapter 3.2.

<sup>41</sup> CLC 1969, article 1(1).

<sup>42</sup> *Ibid*, article 2.

whale oil, whether carried on board a ship as cargo or in the bunkers of such a ship.<sup>43</sup> Shipowners may be jointly liable as stated in article 4

When oil has escaped or has been discharged from two or more ships, and pollution damage results therefrom, the owners of all the ships concerned, unless exonerated under Article III, shall be jointly and severally liable for all such damage which is not reasonably separable.

This leads to an interesting possibility pointed out by Wu as follows:

This article assumes that, in a pollution incident involving two CLC ships, if one of them is insolvent, the other must pay the whole admissible damages. It is clear that, despite the involvement of two tankers, it will be considered as one incident.<sup>44</sup>

Article 3 provides that liability is put solely on the shipowner and paragraph 4 of the same article states that-

No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.

What this means is that liability is channeled to the owner with the purpose of giving the servants of the owner immunity from claimants.

Article 7(8) offers the claimants the possibility to bring claims directly against the insurer or other person providing financial security for the owner's liability for pollution damage.

A key feature of the CLC is laid out in article 7(1) where it states that-

The owner of a ship registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund in the sums fixed by applying the limits of liability prescribed

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<sup>43</sup> *Ibid*, Article 1(5).

<sup>44</sup> Chao Wu, *Pollution from the Carriage of Oil by Sea: Liability and Compensation* (London: Kluwer Law International, 1996), p. 55.

in Article V, paragraph 1 to cover his liability for pollution damage under this Convention.

While the idea of compulsory insurance was debated in the proceedings to the CLC<sup>45</sup> it was eventually a part of the convention. If it had not, the possibility for victims to get compensated would surely have looked bleaker as there would likely be many smaller companies perhaps only owning a single ship not capable of compensating victims.

Limitation of liability was set at 2,000 francs for each ton of the ship's tonnage with a ceiling at 210 million francs.<sup>46</sup> However, the shipowner is not entitled to limit his liability in case the incident occurred as a result of the actual fault or privity of the owner.<sup>47</sup>

While the 1969 Convention certainly solved a lot of the problems encountered by claimants in the case of the *Torrey Canyon*, there were still some issues surrounding oil pollution, not to mention the fact that it easily gets outdated with regard to currency, size of claims and therefore there was a need to update the convention.

In 1978 the *Amoco Cadiz* carrying 220,000 tons of crude oil, suffered a failure of her hydraulic steering gear and consequently ran aground on Portsall Rocks, off the coast of Brittany, with the consequence that her entire cargo escaped. Approximately 200 miles of coastline was polluted, this in a very important fishing and tourist region of France.

The CLC was applicable, however the Fund Convention was not.<sup>48</sup> As such, the shipowner was able to limit his liability to an amount which was about 15 per cent of the sums claimed.<sup>49</sup>

The claimants then filed actions against Amoco Transport Co. and others in the Amoco Group (including Amoco International Oil Co. subsidiaries to Standard Oil Co. Of Indiana, responsible for operation of Amoco's tanker fleet) in which they claimed that the *Amoco Cadiz* casualty was caused by

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<sup>45</sup> *Ibid*, p. 66.

<sup>46</sup> CLC 1969, article 5(1).

<sup>47</sup> *Ibid*, Article 5(2).

<sup>48</sup> *Infra*, discussion on the Fund Convention.

<sup>49</sup> De La Rue & Anderson, *supra* n. 38, p. 27.

the negligence of the Amoco parties in the course of constructing, maintaining and operating the tanker in a federal district court in the United States. The Court applied the law of the forum (US law).

Eventually, after a long process it was held that-

AIOC negligently performed its duty to ensure that Amoco Cadiz in general and its steering gear in particular were seaworthy, adequately maintained and in proper repair.<sup>50</sup>

Standard therefore is liable for its own negligence and the negligence of AIOC and Transport with respect to the design, operation, maintenance, repair and crew training of Amoco Cadiz. Standard therefore is liable to the French claimants for damages resulting from the grounding of Amoco Cadiz.<sup>51</sup>

The right to limit liability was denied to Standard Oil Co. of Indiana and Amoco International Oil Co. since they were not shipowners.<sup>52</sup>

Additionally AIOC failed to make *Amoco Cadiz* seaworthy prior to the last voyage and, for that reason among other things, it could not limit its liability.<sup>53</sup>

Two years after the *Amoco Cadiz*, the Malagasy tanker *Tanio* broke amidships and as a result about 13500 tons of cargo oil was spilled, causing pollution damage to the coast of Brittany. However, at this time the Fund Convention was in force. The total amount claimed was about FFr 527 million (US\$ 56 million) while the final amount of claims agreed by the IOPC Fund was approximately FFr 350 million (US\$ 37.3 million). The total amount payable under the Fund Convention was about FFr 245 million (US\$ 26.1).<sup>54</sup>

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<sup>50</sup> [1984] 2 Lloyd's Rep. 304, p. 337.

<sup>51</sup> *Ibid*, p. 338.

<sup>52</sup> *Ibid*, p. 339.

<sup>53</sup> *Ibid*, p. 338.

<sup>54</sup> Reinhard Ganten, "The Tanio Spill: A Case History Illustrating the Work of the International Oil Pollution Compensation Fund." <<http://ioscproceedings.org/doi/pdf/10.7901/2169-3358-1985-1-135>> accessed 22 May 2013.

At this point it was clear that the limit in the CLC was set too low. In the 1984 Protocols the limit was therefore increased from 133 to 420 SDRs per ton. The Protocols however failed to enter into force.

In 1990 the OPA 1990 came into force, this meant that the US were not likely to ratify the CLC and in 1991 another major disaster struck when the Cypriot tanker *Haven* caught fire while anchored outside of Genoa.

The tanker broke which led to oil escaping, polluting the coastline of both Italy and France.

The compensation claimed was well over the limit of the CLC and the Fund Convention.

To deal with the “flaws” of the 1969 CLC and 1971 Fund Convention, an IMO Diplomatic Conference was convened in London in 1992 leading to the 1992 CLC and the 1992 Fund Convention.

The limits set out in the 1969 Convention were changed to as follows:

The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount calculated as follows: a) 3 million units of account for a ship not exceeding 5,000 units of tonnage; b) for a ship with a tonnage in excess thereof, for each additional unit of tonnage, 420 units of account in addition to the amount mentioned in subparagraph (a); provided, however, that this aggregate amount shall not in any event exceed 59.7 million units of account.<sup>55</sup>

In 2003 the limits were further raised to the following amounts:

(a) for a ship not exceeding 5,000 units of tonnage, 4,510,000 SDR; (b) for a ship between 5000 and 140,000 units of tonnage 4,510,000 SDR plus 631 SDR for each additional unit of tonnage; and (c) for a ship of 140,000 units of tonnage and above, 89,770,000 SDR.<sup>56</sup>

With the conclusion of UNCLOS in 1982, every state had the right to establish an exclusive economic zone of not more than 200 nautical miles from the baseline.<sup>57</sup>

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<sup>55</sup> CLC 1992, article 5(1).

<sup>56</sup> IMO Resolution LEG.1(82).

<sup>57</sup> United Nations Convention on the Law of the Sea, article 57.

The geographical scope was changed and the 1992 Convention applies-

a) to pollution damage caused: i) in the territory, including the territorial sea, of a Contracting State, and ii) in the exclusive economic zone of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;b) to preventive measures, wherever taken, to prevent or minimise such damage.<sup>58</sup>

The definition of “ship” in the 1969 Convention was a cause for concern as it only covered “laden” tankers, meaning tankers on ballast voyage were not covered. Consequently the definition was changed to cover-

any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.<sup>59</sup>

The definition in the 1992 Convention covers pollution caused by “unladen” tankers on ballast voyages.

The “channeling” provision in the 1969 Convention as seen in the case of the *Amoco Cadiz* proved to be ineffective and changes were made in the 1992 Convention. In the 1992 Protocols all claims must be channeled against the owner.<sup>60</sup>

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<sup>58</sup> CLC 1992, article 2.

<sup>59</sup> *Ibid*, article 1(1).

<sup>60</sup> CLC 1992, article 3.

...the owner of a ship at the time of an incident, or, where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident.

...No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5. of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against: a) the servants or agents of the owner or the members of the crew; b) the pilot or any other person who, without being a member of the crew, performs services for

Under the old regime the limits of liability could be broken if the incident occurred was the shipowner's actual fault or privity.<sup>61</sup> This proved to be relatively easy to break as seen by a number of English cases such as *The Lady Gwendolen*<sup>62</sup>. In determining the presence or absence of actual fault or privity it was held by Winn L.J. that-

First: an owner who seeks to limit his liability must establish that, although for the immediate cause of the occurrence he is responsible on the basis of respondeat superior, in no respect which might possibly have causatively contributed was he himself at fault. An established causative link is an essential element of any actionable breach of duty: therefore, "actual fault" in this context does not invariably connote actionable breach of duty.

Second: an owner is not himself without actual fault if he owed any duty to the party damaged or injured which (a) was not discharged; (b) to secure the proper discharge of which he should himself have done but failed to do something which in the given circumstances lay within his personal sphere of performance.<sup>63</sup>

The rule of "actual fault or privity" was at this point the norm in convention law as exemplified by the 1957 Limitation Convention.<sup>64</sup> However, in the 1976 LLMC "conduct barring limitation" was worded as follows:

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission,

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the ship; c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship; d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority; e) any person taking preventive measures; f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e); unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."

<sup>61</sup> CLC 1969, article 5.2.

<sup>62</sup> [1965] 1 Lloyd's Rep. 335.

<sup>63</sup> *Ibid*, p. 348.

<sup>64</sup> International Convention relating to the Limitation of Liability of Owners of Sea-Going Ships, article 1 (1) "The owner of a sea-going ship may limit his liability in accordance with Article 3 of this Convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner:"

committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.<sup>65</sup>

The test was the same in the 1984 Protocols and later in the 1992 CLC where it reads:

The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.<sup>66</sup>

As mentioned above, limitation prior to the 1992 CLC was relatively easy to break. This did not sit well with the insurance industry, because if liability was unlimited, premiums would have to be sky-high and that the “*quid pro quo* for raised limits was a watertight provision making limits virtually unbreakable.”<sup>67</sup>

Under the new test, the claimant does not only have to carry the burden of proof for the merits of the case, but also have to prove that the shipowner is not entitled to limit his liability. This gives the shipowner a much stronger case as the threshold for actual fault under the old regime is without intent.

### **3.2 The Fund Convention**

While the CLC provides the first tier of compensation, the second tier of compensation is provided by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (The Fund Convention). There is also a third tier available in the Supplementary Fund Protocol of 2003. The Fund Convention was adopted in 1971 and came into force in 1978.

The discussion surrounding the Convention was that it would be unfair for the shipowner to be exclusively responsible for the economic consequences of pollution damage considering the nature of the goods. The pollution damage would not have taken place if the ship was carrying e.g. rice and

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<sup>65</sup> Convention on limitation of liability for maritime claims 1976, article 4.

<sup>66</sup> CLC 1992, article 5(2)

<sup>67</sup> Proshanto K. Mukherjee, “Essentials of the Regimes of Limitation of Liability in Maritime Law” in *The Admiral*, Volume 4 (Ghana Shipper’s Council), 2009, p. 53.

therefore, putting the entire blame on the shipowner would not be just. Although there was no precedent on assigning liability on a “non-performing” party, it was felt that there was nothing stopping the legislators from assigning the cargo owners some responsibility for providing supplementary compensation through a suitable mechanism.<sup>68</sup>

The purpose of the Fund is to pay for compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of the Liability Convention.<sup>69</sup>

There are three different scenarios in which this can occur.

The first scenario is if there is no liability incurred under the CLC, e.g. if the shipowner managed to successfully plead any of the defenses set out in the CLC. The second circumstance in which the Fund pays is if the liable owner is unable to meet the obligations incurred in the CLC and any financial security that may be provided under that Convention does not cover or is insufficient to satisfy the claims for compensation for the damage, e.g. if the owner is insolvent.

The last and most common scenario is when the damage exceeds the owner’s liability limit under the CLC.<sup>70</sup>

The Fund does not incur liability in much the same way that owners are exonerated from liability in the CLC<sup>71</sup> and further-

If the Fund proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the Fund may be exonerated wholly or partially from its obligation to pay compensation to such person provided, however, that there shall be no such exoneration with regard to such preventive measures which are compensated under paragraph 1. The Fund shall in any event be exonerated to the extent

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<sup>68</sup> *Ibid.*

<sup>69</sup> The Fund Convention 1971, article 4.

<sup>70</sup> *Ibid*, article 4.

<sup>71</sup> CLC 1969, article 3.

that the shipowner may have been exonerated under Article III, paragraph 3, of the Liability Convention.<sup>72</sup>

The Fund acquires by subrogation, the rights the person so compensated may enjoy under the Liability Convention against the owner or his guarantor.<sup>73</sup>

Contributions to the Fund shall be made in respect of each Contracting State by any person has received in one calendar year more than 150,000 tons of crude oil and fuel oil after sea transport in ports or terminal installations of a state party immediately after carriage by sea.<sup>74</sup> The Fund shall in each Contracting State be recognized as a legal person capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State.<sup>75</sup> This means that the Fund can be sued and therefore be liable for compensation in the same way as any other entity is liable under CLC.

The changes in the 1992 Fund Convention reflect the changes made in the 1992 CLC and the Fund functions mainly in the same way as the 1971 Convention. The compensation were raised and the aggregate amount of compensation payable by the Fund shall in respect of any one incident be limited, so that the total sum of that amount and the amount of compensation actually paid under the 1992 CLC shall not exceed 135 million SDR. The Fund is liable for the excess of the aggregated compensation after the shipowner has paid up to his limit according to the CLC. However, the maximum amount can be increased to 200 million SDR with respect to any incident occurring during any period when there are three Parties to this Convention in respect of which the combined relevant quantity of contributing oil received by persons in the territories of such

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<sup>72</sup> The Fund Convention 1971, article 4(3).

<sup>73</sup> *Ibid*, article 9(1).

<sup>74</sup> *Ibid*, article 10.

<sup>75</sup> *Ibid*, article 2(2).

Parties, during the preceding calendar year, equalled or exceeded 600 million tons.<sup>76</sup>

In 2000, the limits were further raised to 203 million SDR and in the special case of article 6.3(c) the limit is 300,740,000 SDR.<sup>77</sup>

As mentioned before, a third tier of compensation was added in 2003 with the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992. Like the Fund, the Supplementary Fund shall in each Contracting State be recognized as a legal person capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State.<sup>78</sup> The Protocol functions in the same way as the Fund but the limit to compensation is set at 750 million SDR.<sup>79</sup>

### **3.3 Bunkers**

While the CLC and the Fund offer victims of oil pollution damage ways to get compensation, they only cover damage caused by ships carrying oil as cargo. There is no mention of pollution damage caused by ships other than tankers. With the size of dry bulk carriers and container ships nowadays, they can carry a very large amount of oil in their bunkers (even more than some tankers carry as cargo). Not only can ships carry large amounts of bunker oil but as these oils are in general highly viscous and persistent, hence even small amounts can cause a lot of damage to the environment.<sup>80</sup> As such, there was a “gap” in the international regimes regarding oil pollution and claimants had to seek compensation through national law. This gap was filled by the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (hereafter referred to as “Bunkers”) which entered into force in 2008.

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<sup>76</sup> The Fund Convention 1992, article 6(3c).

<sup>77</sup> IMO Resolution LEG.2(82).

<sup>78</sup> Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, article 2(2).

<sup>79</sup> *Ibid*, article 4(2).

<sup>80</sup> De La Rue & Anderson, *supra* n. 38, p. 255.

Bunkers is largely based on the CLC and consequently shares many of the features of the CLC. However, there are some significant differences. A ship is defined as “any seagoing vessel and seaborne craft, of any type whatsoever”<sup>81</sup> while bunker oil means “any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil.”<sup>82</sup> While the CLC covers oil pollution damage caused by tankers, whether it is carried as cargo or bunker oil, Bunkers covers oil pollution damage caused by all other ships carrying oil in their bunkers.

For pollution damage as defined in the CLC, Bunkers is not applicable, even if compensation is not payable under that regime.

This can lead to interesting and problematic scenarios as pointed out by Wu in that:

If a laden tanker spills oil (bunker or cargo) in a country that is not party to any of the CLCs, but is party to the Bunkers Convention, neither the CLC nor the Bunkers Convention shall apply.<sup>83</sup>

If an unladen tanker spills bunker oil in a country that is a party to both CLC 69 and Bunkers Convention, neither CLC69 nor the Bunkers Convention shall apply.<sup>84</sup>

In the 1992 CLC, unladen tankers are also covered and therefore the second situation would not occur if a state is party to both the 1992 CLC and Bunkers.

A major difference between Bunkers and the CLC is the definition of “shipowner”. While all liability is channeled to the registered owner in the CLC, Bunkers offer a much wider definition of shipowner:

“Shipowner” means the owner, including the registered owner, bareboat charterer, manager and operator of the ship.<sup>85</sup>

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<sup>81</sup> Bunkers 2001, article 1(1).

<sup>82</sup> *Ibid*, article 1(5).

<sup>83</sup> Chao Wu, “Liability and Compensation for Bunker Pollution” in *Journal of Maritime Law and Commerce*, Volume 33, 2002, p. 557.

<sup>84</sup> *Ibid*.

There is no channeling provision in Bunkers; consequently it is possible for claimants to pursue persons other than shipowners independently of the Convention. If more than one person is liable, their liability shall be joint and several.<sup>86</sup>

The CLC/Fund is a two-tier regime and for some states three-tiered, Bunkers however is single-tiered and there is no fund bearing part of the compensation. Whilst this could make adequate compensation an issue, the fact that claimants have a wider array of “shipowners” should be enough for compensation to suffice without a fund. Another issue with the lack of a fund dedicated to bunker pollution is that bunker spill claims must compete with other claims subject to limitation under the relevant global limitation.<sup>87</sup>

Another major difference between CLC and Bunkers is that shipowners have the right to limit their liability under the liability scheme of CLC.

Bunkers offer no right to limit liability based on a provision in the Convention, instead it is stated that:

Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.<sup>88</sup>

As there is no unified limit of liability, some issues might arise.

There is a possibility that a state with no limitation in the national law joins the Bunkers Convention meaning that liability will be unlimited<sup>89</sup>, as put by former Director of the IOPC Funds Måns Jacobsson “the limitation amount will differ, dependent on the State in which the pollution occurs; if that State

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<sup>85</sup> Bunkers 2001, article 1(3).

<sup>86</sup> *Ibid*, article 3(2).

<sup>87</sup> Wu, *supra* n. 83, p. 564.

<sup>88</sup> Bunkers 2001, article 6.

<sup>89</sup> *Ibid*.

does not provide in its national law for limitation of liability for maritime claims, the liability under the Bunker Convention will be unlimited.”<sup>90</sup>

It is not entirely clear whether pollution from bunker oil is covered in the LLMC as it is not mentioned in either article 2 which sets out when there is a right to limit liability or article 3 which lists claims where the right to limitation does not apply. An option for solving this problem is the approach taken by the UK set out in the Merchant Shipping Act 1995 where liability for ships other than tankers is set out in section 154.<sup>91</sup> The applicable provision for limitation of liability for bunker oil spills is section 168 where it is stated that-

For the purposes of section 185 any liability incurred under section 154 shall be deemed to be a liability to damages in respect of such damage to property as is mentioned in paragraph 1(a) of Article 2 of the Convention in Part I of Schedule 7.<sup>92</sup>

As pollution from bunker oil is considered to be damage to property, it is a claim for which limitation is available in the LLMC thus solving the problem.

In the 1976 LLMC the limits are:

b) in respect of any other claims, (i) 167,000 Units of Account for a ship with a tonnage not exceeding 500 tons, (ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i): - for each ton from 501 to 30,000 tons, 167 Units of Account: - for each ton from 30,001 to 70,000 tons, 125 Units of

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<sup>90</sup> Måns Jacobsson, “International Convention on Liability for Bunker Oil Pollution Damage”, World Maritime University, 4 July 2008.

<sup>91</sup> Merchant Shipping Act 1995, s. 154. (1) Where, as a result of any occurrence, any oil is discharged or escapes from a ship other than a ship to which section 153 applies, then (except as otherwise provided by this Chapter) the owner of the ship shall be liable—  
(a) for any damage caused outside the ship in the territory of the United Kingdom by contamination resulting from the discharge or escape; and  
(b) for the cost of any measures reasonably taken after the discharge or escape for the purpose of preventing or minimising any damage so caused in the territory of the United Kingdom by contamination resulting from the discharge or escape; and  
(c) for any damage so caused in the territory of the United Kingdom by any measures so taken.

<sup>92</sup> *Ibid*, s. 168.

Account; and - for each ton in excess of 70,000 tons, 83 Units of Account.<sup>93</sup>

In the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 the limits are raised to:

(i) 1 million Units of Account for at ship with a tonnage not exceeding 2,000 tons, (ii) for at ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i): - for each ton from 2,001 to 30,000 tons, 400 Units of Account; - for each ton from 30,001 to 70,000 tons, 300 Units of Account; and - for each ton in excess of 70,000 tons, 200 Units of Account.<sup>94</sup>

As with the CLC, insurance is compulsory.

The registered owner of a ship having a gross tonnage greater than 1000 registered in a State Party shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the liability of the registered owner for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.<sup>95</sup>

What is noteworthy in this provision is that insurance is only compulsory for the registered owner but not for any other person that is defined as shipowner in article 3(1). Whilst Bunkers helps fill a gap in the international regime of oil pollution, there are some issues, such as the lack of uniformity.

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<sup>93</sup> Convention on limitation of liability for maritime claims 1976, Article 6.1.b.

<sup>94</sup> Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976, Article 3.1.

<sup>95</sup> Bunkers 2001, Article 7(1).

### 3.4 Pollution damage and preventive measures

In order to make a successful claim for oil pollution damage, obviously the damage suffered must be within the convention's definition of pollution damage.

In the 1969 CLC, pollution damage is defined as a

loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.<sup>96</sup>

Preventive measures are defined as “any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.”<sup>97</sup>

An incident is defined as “any occurrence, or series of occurrences having the same origin, which causes pollution damage.”<sup>98</sup>

In the 1992 Convention the definition of “pollution damage” was slightly changed read as follows:

a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;

b) the costs of preventive measures and further loss or damage caused by preventive measures.<sup>99</sup>

The definition of “incident” read as follows:

any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage.<sup>100</sup>

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<sup>96</sup> CLC 1969, article 1(6).

<sup>97</sup> *Ibid*, article 1(7).

<sup>98</sup> *Ibid*, article 1(8).

<sup>99</sup> CLC 1992, article 1(6).

<sup>100</sup> *Ibid*, 1(8).

Bunkers has got a similar definition although it, of course, relates to damage from bunker oil pollution.<sup>101</sup>

The new definition of incident means that in the “current regime” the right of recovery is extended to include so-called threat removal measures, while the “old regime” is generally regarded to exclude pre-spill costs incurred in “pure threat” situations.<sup>102</sup> Former Director of the IOPC Fund, Måns Jacobsson stated in regards to the old regime that-

The IOPC Fund has taken the position that the Civil Liability Convention and the Fund Convention apply only to damage caused and measures taken after an incident has occurred in which oil has escaped or been discharged. The Conventions do not apply to what have been called ‘pure threat-removal measures’, i.e., measures which are so successful that there is no actual spill of oil from the tanker concerned. In addition, the position of the IOPC Fund has been that if a spill occurs, only damage caused or costs of measures taken after the spill are compensable; costs of so-called pre-spill measures are thus not compensated.<sup>103</sup>

The changes made to the definition of “incident” were therefore much needed to ensure that all types of preventive measures are covered.

Under the old regime, the definition of “pollution damage” has a very general meaning, giving national courts a high amount of freedom to interpret pollution damage as they see fit, which is normal and acceptable for international conventions on civil liability, according to Jacobsson and Trotz.<sup>104</sup> This may lead to “considerable divergences of interpretation of this definition.”<sup>105</sup>

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<sup>101</sup> Bunkers 2001, Article 1(9).

<sup>102</sup> De La Rue & Anderson, *supra* n. 38, p. 358.

<sup>103</sup> Måns Jacobsson and Norbert Trotz, “The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention” in *Journal of Maritime Law and Commerce*, Volume 17, 1986, p. 472-473.

<sup>104</sup> *Ibid.*, p. 481.

<sup>105</sup> *Ibid.*

However, since in respect of the Fund Convention, states share the costs of compensation, a uniform interpretation of the definition of pollution damage was essential as this could otherwise lead to unfairness<sup>106</sup> and some legitimate types of claims would be rejected by courts with no case-law allowing for compensation in this specific case.<sup>107</sup>

The addition of “provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken”<sup>108</sup> specifies what is covered by the conventions.

... claims for damage to the marine environment as such are not admissible, and on the other hand, that the costs incurred in restoring the marine environment after a pollution incident are recoverable under the Conventions.<sup>109</sup>

In order to avoid speculative claims, compensation for reinstatement of the environment must have been actually undertaken or to be undertaken.

This is to prevent claims which are based on theoretical quantification of environmental damage and do not relate to actual reinstatement of the environment.<sup>110</sup>

It should also be noted that measures to reinstate the environment must be reasonable. There have been several incidents where this rule has been set to the test, especially in cases concerning subsea pumping operations.

In essence this type of claim is reasonable depending on certain factors such as: risk of oil being released from the wreck in the foreseeable future; the wreck has been situated in a location where an escape of oil would likely cause significant damage to the marine environment.<sup>111</sup>

One such claim was made after the *Dolly*, carrying about 200 tonnes of bitumen sank on 5 November 1999 in 20 metres depth in Robert Bay,

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<sup>106</sup> *Ibid.*

<sup>107</sup> Wu, *supra* n. 44, p. 132.

<sup>108</sup> *Supra* n. 99.

<sup>109</sup> Jacobsson & Trotz, *supra* n. 103, p. 487.

<sup>110</sup> Wu, *supra* n. 44, p. 152.

<sup>111</sup> De La Rue & Anderson, *supra* n. 38, p. 380.

Martinique. The ship sank very close to a national park, a coral reef and mariculture and artisanal fishing is carried out in the area. There were fears that fishing and mariculture would be affected if bitumen were to escape. As the ship was not originally a tanker, but a general cargo vessel, there was an issue whether the *Dolly* was a “ship” as defined by the conventions but it was found that-

...although the *Dolly* had been originally designed as a general cargo vessel, it had subsequently been adapted for the carriage of oil in bulk as cargo, and that it therefore fell within the definition of 'ship' laid down in the 1992 Civil Liability Convention.<sup>112</sup>

The shipowner was ordered by the authorities to remove the wreck but failed to do so, therefore the French authorities arranged for the removal of 3.5 tonnes of bunker oil and requested three international salvage companies to investigate what measures could be taken to eliminate the threat of pollution by bitumen.<sup>113</sup>

In July 2001 the Committee concurred with the Director's opinion that, in view of the location of the wreck in an environmentally sensitive area, an operation to remove the threat of pollution by the bitumen would in principle constitute 'preventive measures' as defined in the 1992 Conventions.

In March 2006 the French Government submitted a claim for €1 388 361 (£980 000) for the costs of removing the bunker fuel and the bitumen cargo from the wreck. In June 2006 the claim was increased to €1 457 753 (£1 030 000) to take into account additional costs arising from the technical and meteorological problems.

The shipowner does not have financial resources to pay any compensation. As mentioned in paragraph 1.3, the ship did not have any liability insurance. For these reasons the Director decided that the 1992 Fund should compensate the French Government under Article 4.1(b) of the 1992 Fund Convention.<sup>114</sup>

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<sup>112</sup> 92FUND/EXC.34/5.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

Even though it was unlikely in this case that the oil would surface, the ship was in such a sensitive area it was enough for the preventive measures to be deemed as reasonable.

In another recent case the outcome was different.

On 13 November 2002, the Bahamas-registered tanker *Prestige* carrying 76 972 tonnes of heavy fuel oil, began listing and leaking oil some 30 kilometres off Cabo Finisterre (Galicia, Spain). On 19 November, whilst under tow away from the coast, the vessel broke in two and sank some 260 kilometres west of Vigo (Spain), the bow section to a depth of 3 500 metres and the stern section to a depth of 3 830 metres. The break-up and sinking released an estimated 63 272 tonnes of cargo. Over the following weeks oil continued to leak from the wreck at a declining rate. It was subsequently estimated by the Spanish Government that approximately 13 700 tonnes of cargo remained in the wreck.<sup>115</sup> The Spanish Government concluded that the oil left in the wreck needed to be dealt with and consequently hired a company to remove the oil. This was concluded in 2004. The Spanish Government submitted a claim for €109.2 million (£75 million) for the cost of the operation to remove the oil from the wreck of the *Prestige*, including the costs of preparatory work and the feasibility trials conducted in the Mediterranean and at the wreck site. In February 2006 this claim was reduced to €24.2 million (£16.5 million).<sup>116</sup>

The issue is whether the operation to remove oil was reasonable or not according to the 1992 Fund's admissibility criteria. This criteria can be found in the IOPC Fund Claims Manual.

Claims for the costs of measures to prevent or minimise pollution damage are assessed on the basis of objective criteria. The fact that a government or other public body decides to take certain measures does not in itself mean that the measures are reasonable for the purpose of compensation under the Conventions. The technical reasonableness is assessed on the basis of the facts available at the

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<sup>115</sup> 92FUND/EXC.32/4/Add.1.

<sup>116</sup> *Ibid.*

time of the decision to take the measures. However, those in charge of the operations should continually reappraise their decisions in the light of developments and technical advice.<sup>117</sup>

Technical experts stated that the most likely outcome if the oil was left alone would-

...have been a slow escape of oil from the wreck over many years resulting in the widespread scattering of tar balls over a vast area of the Atlantic Ocean which, depending on winds and currents could have impacted coastlines...<sup>118</sup>

The experts further stated that-

...it was impossible to quantify the scale of likely pollution damage in monetary terms had the oil not been removed from the wreck, but that the most likely oil release scenario would not have constituted a serious threat to marine resources.<sup>119</sup>

In the opinion of the Director the claim is inadmissible.

The Director remains of the view that the costs of the actual operation to remove the oil from the wreck of the *Prestige* were disproportionate to any potential economic and environmental consequences of leaving the oil in the wreck and that for this reason the claim by the Spanish Government does not fulfil the 1992 Fund's admissibility criteria, namely that the operation should be reasonable from an objective, technical point of view.<sup>120</sup>

As such, the Spanish Government did not receive compensation for the measures taken in removing the oil from the wreck.

While the Conventions do give some meaning to the definition of “pollution damage” and when it is compensable there are still many uncertainties such as defining “environmental damage”, who has standing (*locus standi*) in court and compensation for pure economic loss.

These issues will be discussed in the following chapters

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<sup>117</sup> IOPC Fund Claims Manual 2008, p. 23.

<sup>118</sup> 92FUND/EXC.32/4/Add.1.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

## 4. ENVIRONMENTAL DAMAGE

The definition of “pollution damage” in the CLC/Fund reads as previously seen:

loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.<sup>121</sup>

While this definition is perchance not as unclear and general as it was in the 69 CLC<sup>122</sup> it still does not give a definition that makes for a uniform application of the Conventions, leaving the outcome for oil pollution claims uncertain depending on where the incident take place.

### 4.1 Definition

“Environment” is often used in international conventions without being defined.<sup>123</sup>

This is largely because defining “environment” is very difficult as it is such a broad term. For the purpose of preserving and preventing marine pollution, UNCLOS refers to the “environment” as “rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”<sup>124</sup>; and marine pollution as:

“pollution of the marine environment” means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.<sup>125</sup>

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<sup>121</sup> *Supra* n. 99.

<sup>122</sup> *Supra* n. 96.

<sup>123</sup> E.g. CLC.

<sup>124</sup> UNCLOS, Article 194(5).

<sup>125</sup> *Ibid*, Article 1(4).

Natural resources can be defined as “including living and non-living natural resources such as land, habitats, fish, wildlife, air, water, ground water and ecosystems.”<sup>126</sup>

There are two dimensions to the environment; the tangible and the intangible.<sup>127</sup>

The tangible aspect is characterized by things readily perceptible even if invisible and can be conveniently captioned as natural resources, living or non-living. The intangible aspect is circumscribed by the aesthetic attribute of the environment, which translates into the human enjoyment factor, or where damage is alleged, deprivation of it.<sup>128</sup>

There might be merit to leaving the definition of “environment” vague as done in the CLC as it is such a difficult to define and in any case “any definition of ‘the environment’ will simply have the Alice-in-Wonderland quality of meaning what we want it to mean.”<sup>129</sup> On the other hand, a clear definition would give a more uniform treatment and certainty when dealing with environmental damage in conventions.

First, a distinction has to be made in that “environmental damage” can be damage to the environment *per se*; or damage to property, personal injury or pure economic losses occurring as a consequence of damage to the environment.<sup>130</sup> The general definition in the old regime (1969 CLC/71 Fund) led to uncertainty, leaving interpretation to the national courts. The consequence of this being several cases where national courts have allowed claims for compensation, later rejected by the IOPC Fund, e.g. in the

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<sup>126</sup> Edward H.P. Brans, *Liability for Damage to Public Natural Resources: Standing Damage and Damage Assessment* (The Hague: Kluwer Law International, 2001), p. 11.

<sup>127</sup> Proshanto K. Mukherjee “Liability and Compensation for Environmental Damage Caused by Ship-Source Oil Pollution: Actionability of Claims” in Michael G. Faure, Han Lixin & Shan Hongjun (eds.) *Maritime Pollution Liability and Policy China, Europe and the US* (The Netherlands: Kluwer Law International 2010), p. 76.

<sup>128</sup> *Ibid.*

<sup>129</sup> Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law & the Environment* (3rd edition, Oxford: University Press, 2009), p. 6.

<sup>130</sup> Brans, *supra* n. 126, p. 12.

*Antonio Gramsci* case<sup>131</sup> The definition led to criticism and as put by Abecassis “The 1969 Convention’s definition is so vague that it is not really a definition.”<sup>132</sup>

The definition in the “current” regime<sup>133</sup> relates to reinstatement, or reimbursement of the costs for restoration. However, there are still issues surrounding pollution damage, and as stated by Gautier: “...in particular as regards damage that cannot be repaired and temporary loss of ecological services pending the restoration of the environment.”<sup>134</sup>

On the topic of environmental damage, it is stated in the IOPC Fund claims manual that-

Compensation is payable for the costs of reasonable reinstatement measures aimed at accelerating natural recovery of environmental damage. Contributions may be made to the costs of post-spill studies provided that they relate to damage which falls within the definition of pollution damage under the Conventions, including studies to establish the nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible.<sup>135</sup>

Claims for the costs of measures of reinstatement of the environment will qualify for compensation only if the following criteria are fulfilled:

- The measures should be likely to accelerate significantly the natural process of recovery.
- The measures should seek to prevent further damage as a result of the incident.

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<sup>131</sup> *Infra* n. 170

<sup>132</sup> David W. Abecassis, Richard L. Jarashow, *Oil Pollution from Ships: International, United Kingdom and United States Law and Practice* (2nd edition, London: Stevens & Sons, 1985), p. 210.

<sup>133</sup> *Supra* n. 99.

<sup>134</sup> Philippe Gautier, “Environmental Damage and the United Nations Claims Commission: New Directions for Future International Environmental Cases?” in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds.) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Leiden: Martinus Nijhoff Publishers, 2007), p. 185.

<sup>135</sup> IOPC Fund Claims Manual 2008, p. 13.

- The measures should, as far as possible, not result in the degradation of other habitats or in adverse consequences for other natural or economic resources.
- The measures should be technically feasible.
- The costs of the measures should not be out of proportion to the extent and duration of the damage and the benefits likely to be achieved.<sup>136</sup>

However, this does not do much to give any clarity as to what is environmental damage.

By comparison, the Oil Pollution Act of 1990 (OPA 90) takes a more detailed approach in defining “environmental damage”.<sup>137</sup> OPA 90 also defines the meaning of natural resources and removal of oil:

"natural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of

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<sup>136</sup> *Ibid*, p. 36.

<sup>137</sup> 1990 Oil Pollution Act Sec. 2702 (b)

The damages referred to in subsection (a) of this section are the following:

“(A) Natural resources

Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.

(B) Real or personal property

Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) Subsistence use

Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.

(D) Revenues

Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.

(E) Profits and earning capacity

Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

(F) Public services

Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of *oil*, which shall be recoverable by a State, or a political subdivision of a State.”

the exclusive economic zone), any State or local government or Indian tribe, or any foreign government.<sup>138</sup>

"remove" or "removal" means containment and removal of *oil* or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.<sup>139</sup>

The CLC/Fund definitely leaves some uncertainties. In the CLC, compensation is only available for impairment of the environment, limited to costs of reasonable measures of reinstatement; however there is no criterion for determining whether the impairment is such that restoration is necessary.<sup>140</sup> Measures need to be reasonable but there is no test of reasonableness mentioned in the CLC/Fund. The 1993 Working Group establishes that measures for reinstatement of the environment would have to fulfill the following criteria in order to be admissible for compensation:

- (a) the costs are reasonable;
- (b) the cost of the measures should not be disproportionate to the results achieved or the results which could reasonably be expected; and
- (c) the measures should be appropriate and offer a reasonable prospect of success.<sup>141</sup>

However, these are just guidelines and not actually a part of the Fund or the CLC. As such, there are definitely flaws with the definition in the "current regime".

Professor Mukherjee proposed the following changes to the CLC:

First, the definition of pollution damage may be re-crafted as follows: 'Pollution damage' means Loss or damage caused outside the ship by contamination resulting from the escape or discharge of

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<sup>138</sup> 1990 Oil Pollution Act Sec. 2701(20)

<sup>139</sup> *Ibid*, Sec. 2701(30)

<sup>140</sup> Brans, *supra* n. 126, p. 349.

<sup>141</sup> Fund/WGR.7/21 (1994)

oil from the ship, wherever such escape or discharge may occur including environmental damage; The costs of preventive measures and further loss or damage caused by preventive measures. Second, flowing from the above and for the sake of completeness, a new definition should be included as follows: 'Environmental damage' includes damage to natural resources, loss of amenities and deprivation of quiet enjoyment in relation to the environment.<sup>142</sup>

He further stated that at an appropriate place the following should be inserted:

- (1) The locus standi of a claimant in respect of a claim for environmental damage may be based on a proprietary interest vested in the claimant, or the doctrine of public trust or *parens patriae* as may be appropriate.
- (2) Compensation for environmental damage shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken, and may include loss of profit suffered by the claimant as a consequence of the environmental damage.<sup>143</sup>

#### **4.2 Locus Standi**

One of the issues with the CLC is that it is not concerned with who is entitled to claim compensation for costs incurred in restoring the environment. As stated by Professor Mukherjee-

The tribunal must have jurisdiction over the subject matter under dispute and the parties appearing before it and the litigants must have locus standi or standing to appear in that tribunal to plead their respective cases.<sup>144</sup>

However, the CLC/Fund does not specify who has standing. This is particularly troublesome when damage is done to property where it is difficult to say who the owner is, or if the property has the status of *res nullius* i.e belonging to no one.

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<sup>142</sup> Mukherjee, *supra* n. 127, p. 80

<sup>143</sup> *Ibid*, p. 80-81

<sup>144</sup> *Ibid*, p. 81.

If there is no proprietary interest vested in the subject-matter damaged, the plaintiff's claim may well be denied.<sup>145</sup>

It is evident that *locus standi* is dependent on a proprietary interest vested in the environment, this in most cases meaning ownership of the property. As mentioned above the environment is either tangible or intangible. Natural resources e.g. the seabed, flora and fauna, fish are all tangible and can therefore be subject to ownership. In the event that ownership is successfully established, a claimant should be able to plead *locus standi*.<sup>146</sup> For damage done to the intangible dimension of the environment it is stated by Professor Mukherjee that-

It is arguable that by virtue of ownership, a person can claim compensation for deprivation of enjoyment derived from the aesthetic attributes of the environment caused by environmental damage.<sup>147</sup>

As seen, if ownership of the damaged property can be proven, the claimant should be able to plead *locus standi*, however this may differ depending on the jurisdiction. For example, in some jurisdictions ownership of the property does not necessarily include a proprietary interest. In common law jurisdictions, private parties can only on occasion claim an ownership interest in natural resources such as air, water, fish and wildlife sufficient to support a claim for damages to the resource itself.<sup>148</sup>

This reflects the common law rule of *ferae naturae*, meaning that private ownership of animals and other living resources is prohibited before they are captured or otherwise reduced to possession.<sup>149</sup>

Public entities are able to plead *locus standi* if they manage to prove a proprietary interest in the subject-matter damaged. However, ownership of

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<sup>145</sup> Gauci, *supra* n. 31, p. 253.

<sup>146</sup> Mukherjee, *supra* n. 127, p. 82.

<sup>147</sup> *Ibid.*

<sup>148</sup> De La Rue & Anderson, *supra* n. 38, p. 491.

<sup>149</sup> *Ibid.*

land and water is rarely vested in the state with some exceptions, most notably in certain communist legal regimes.

As mentioned by De la Rue and Anderson in reference of the 1969 CLC/1971 Fund in respect of claims for environmental damage:

In most contracting States it is likely that the absence of any proprietary interest in the marine environment, coupled with difficulties in valuing the environment (or damage to it) by methods which are not unduly or arbitrary, would constitute insuperable obstacles to such a claim.<sup>150</sup>

In reference to the *Amoco Cadiz* it has been said that-

As far as ecological damage is concerned, the claim, which was based on the value determination of species killed in the intertidal zone by the oil spill, was rejected by the District Court on the ground that the damage was “subject to the principle of *res nullius*” and that under French law “neither the state nor the communes has standing to assert claims for damage to the ecosystem in the maritime public domain”.<sup>151</sup>

In order to establish *locus standi* for public entities, there are, notwithstanding ownership, two different principles applicable; the public trust doctrine and the principle of *parens patriae*.

#### **4.2.1 Public trust doctrine and *parens patriae***

“Some types of natural resources are held in trust by government for the benefit of the public” and “these resources are protected by the trust against unfair dealing and dissipation, which is classical trust language suggesting the necessity for procedural correctness and substantive care”.<sup>152</sup>

The trustee has a “duty” to protect the property and deal with it accordingly. Because of the trust, *locus standi* is conferred on the public authority as a “trustee in the event of damage inflicted on the protected resources.”<sup>153</sup>

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<sup>150</sup> *Ibid*, p. 481

<sup>151</sup> Gautier, *supra* n. 134, p. 180-181.

<sup>152</sup> Gauci, *supra* n. 31, p. 253-254.

<sup>153</sup> Mukherjee, *supra* n. 127, p. 86.

In reference to the United States (where the public trust doctrine is perhaps most advanced) it has been said that through the public trust doctrine common law standards are established for judicial protection of the public's interest in navigation, fisheries, the environment, and in clean water, especially in the absence of statute law.<sup>154</sup>

However, in the United States most states have primary control over most living resources within their borders as was established in *McCready v. Virginia* where it was held:

The State owns the tide-waters themselves, and the fish in them so far as they are capable of ownership while running. For this purpose the State represents its people and the ownership is that of the people in their united sovereignty.<sup>155</sup>

In many states there are specific statutes authorizing the recovery of natural resource damage.<sup>156</sup> In OPA 90 it says:

"natural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in *trust* by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government.<sup>157</sup>

The polluter is liable through section 2702 of OPA 90; when damage is done to the environment, the entities named in said section<sup>158</sup> will enjoy *locus standi*.

*Parens patriae* is a version of the public trust doctrine. Through *parens patriae* a state may claim a right of action for a common injury to a number of its citizens.<sup>159</sup> As pointed out by de la Rue and Anderson, *parens patriae* may be invoked even if no state proprietary interest has been injured if two

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<sup>154</sup> Gauci, *supra* n. 31, p. 254.

<sup>155</sup> (1876), 94 US 391 at 394.

<sup>156</sup> De La Rue & Anderson, *supra* n. 38, p. 496.

<sup>157</sup> 1990 Oil Pollution Act Sec. 2701(20)

<sup>158</sup> *Ibid*, Sec. 2702(b)(2) "Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee."

<sup>159</sup> Gauci, *supra* n. 31, p. 254.

conditions are met. First, the action must be based on a state interest which is separate from damage suffered by individual citizens. Secondly, a substantial part of the citizens of the state must have suffered from the incident.<sup>160</sup>

There are several cases supporting the doctrines of public trust and *parens patriae*. In the case of *Patmos*, a Greek tanker (*Patmos*) collided with a Spanish vessel in the straits of Messina and approximately 700 tonnes of oil escaped. The Italian Ministry of Shipping claimed for ecological damage, it was held by the Court that-

The right to pursue a case for the damage in question cannot but appertain to the State, as the representative body of the national collectivity (the same State safeguards the interests of the said collectivity in relation to the ecological, biological and sociological equilibrium of the territory including the territorial sea); this right of action has its basis not so much in the fact that the State pays for the repair of pollution damage or in the fact of having suffered an economic loss, but in its function in safeguarding the collectivity and interests referred to above.<sup>161</sup>

The Court defined “damage to the environment” as “anything that impairs, deteriorates or destroys the environment”<sup>162</sup>; this also includes damage suffered by the community which benefits from natural resources present in the area.<sup>163</sup> This was referred to as the “Public’s loss of use and enjoyment of natural resources, and of other values that these resources have for the community (health, food, tourism, research, biological studies).<sup>164</sup>

Because of these losses, the state had *locus standi*.

In another Italian case, that of the *Haven*, the judge held that-

[T]he 1969 Liability Convention and the 1971 Fund Convention did not exclude environmental damage; that the State of Italy was entitled to compensation for such damage, but not other parties such

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<sup>160</sup> De La Rue & Anderson, *supra* n. 38, p. 495-496.

<sup>161</sup> Gauci, *supra* n. 31, p. 254, and fn. 63 at said page.

<sup>162</sup> Brans, *supra* n. 126, p. 328.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

as local authorities; and that the damage could not be quantified according to a commercial or economic evaluation.<sup>165</sup>

In the American case of the *Zoe Colocotroni* it was held-

As a sovereign it [Puerto Rico] represents the collective interests of the People of this jurisdiction. The Commonwealth holds title in trust to the public property and domain, and it is charged with the protection of the People's interest in the same. . . . In the execution of these endeavours the Commonwealth may bring legal actions in court to protect its property and recover damages to the same. . . . The Commonwealth has title to all beaches and to the maritime terrestrial zone abutting the navigable waters. . . . The Commonwealth is thus the owner of both the living and nonliving resources located in the navigable waters of the Commonwealth and those on the bottom and its subsoil, as well as those located within the referred to maritime-terrestrial zone. . . . The Commonwealth therefore has standing to sue to recover for oil pollution to Bahia Sucia and related resources because it has proprietary interest in the same . . . and because it is the trustee of the public trust in these resources. . . . Additionally, in its capacity as *parens patriae*, the Commonwealth has a sovereign interest in the general welfare of its citizens which transcends any injury which may be caused to its proprietary interests or to the property of its individual citizens. Particularly when a nuisance of disastrous proportions occurs such as in the case of a maritime oil spill, the special status of the body politic vis-a-vis its citizens gives rise to a right to seek redress on behalf of the collective community which is not limited to the abatement of the nuisance, but which can allow for recovery of damages by the body politic.<sup>166</sup>

As seen, there is strong evidence for governing bodies to have standing to claim for damage done to the environment even in the absence of proprietary rights. However, whether private entities have the same right is

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<sup>165</sup> De La Rue & Anderson, *supra* n. 38, p. 485.

<sup>166</sup> 456 F. Supp. 1327 (1978) at 1336-1337.

difficult to say, especially as in a number of jurisdictions living resources such as fish are “only subject to a qualified right of ownership.”<sup>167</sup>

It has been suggested by Gauci that-

[O]ne should not *a priori* exclude the right of an individual to protect the natural environment and it is suggested that future environmental legislation should specify that *locus standi* in these matters should not be dependent on proprietary rights and that the award of damages should be assigned to a fund set up appositely for the restoration of environmental damages.<sup>168</sup>

### 4.3 Quantification and Compensation

Quantification of environmental damage is another issue relating to admissibility of claims.

In 1979 the *Antonio Gramsci* grounded near Ventspils (former USSR) in the Baltic Sea. About 5,500 tonnes of crude oil was spilled, resulting in damage to the coastline of Sweden, Finland and the USSR. The claim put forward by the USSR for environmental damage was calculated with the so-called “Methodika” formula according to national legislation in the USSR.

The damage assessed was at a rate of 2 Roubles per cubic meter of polluted water (estimated according to the quantity of the oil spilt). At the time the USSR was party to CLC but not to the Fund. The claim was rejected by the IOPC Fund, partly because the USSR was not party to the Fund but also because the damage was not considered to be “pollution damage” as defined by the Conventions. The case led the Fund to adopt a resolution in 1980 stating that “the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.”<sup>169</sup>

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<sup>167</sup> Gauci, *supra* n. 31, p. 257.

<sup>168</sup> *Ibid*, p. 257-258.

<sup>169</sup> Activities of the International Oil Pollution Compensation Fund 1980, Resolution No. 3

In the case of *Patmos* the claimant was awarded an amount of Lit 2,100 million (£861,000) but the judgment did not show how this was calculated. Experts appointed by the court used a model to assess the damage to fishing activities; however this model was only partly used by the court as the value of the environment was more than just fish, as natural resources have a value to the environment.<sup>170</sup>

The claim was rejected by the Fund because it was non-economical environmental damage but since the award did not exceed the shipowner's liability, the IOPC Fund did not have to pay any compensation and therefore was not entitled to appeal the decision of the court.<sup>171</sup>

Following the *Haven* incident, the Italian Government claimed compensation for:

Restoration of 43 hectares of phanerogams; LIt 266 042 million (£102 million); consequences of the beach erosion caused by damage to the phanerogams: not quantified but left to the assessment of the Court on the basis of equity; damage restored by the natural biologic recovery of the resources; LIt 591 364 million (£227 million) for the sea and LIt 6 029 million (£2.3 million) for the atmosphere, or a total of some £229 million; irreparable damages to the sea and atmosphere; not quantified but left to assessment by the Court on the basis of equity<sup>172</sup>

The IOPC Fund rejected the claim on the basis that “claims relating to non-quantifiable elements of damage to the environment could not be admitted” and that “compensation could only be granted if a claimant had suffered quantifiable economic loss.”<sup>173</sup>

The court determined that the State of Italy was entitled to compensation for environmental damage. As the environmental damage could not be assessed according to a commercial or economic valuation, the court assessed the damage as a portion of the cleanup costs (approximately one-third) at a sum

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<sup>170</sup> Brans, *supra* n. 126, p. 329.

<sup>171</sup> *Ibid.*, p. 328-330.

<sup>172</sup> 71 FUND/EXC.43/2.

<sup>173</sup> *Ibid.*

of about £16.8 million.<sup>174</sup> This amount would, in the view of the judge, represent the damage not made good by these operations.<sup>175</sup>

The Fund rejected the decision of the court, stating that the judge had reached an “absurd conclusion that compensation for environmental damage increases with the increase of the cost of the clean-up operations.”<sup>176</sup>

The Fund also objected to the decision because the provision in Italian statute applied by the judge, is not applicable in relation with the Fund since in that provision liability is based on negligence and the compensation must be assessed by the judge on the basis of the degree of the fault of the wrongdoer, the profit achieved by him and the cost necessary for the restoration of the environment.<sup>177</sup> “The Fund has stated that according to Italian case law and legal doctrine, the compensation awarded under this Act has the nature of a sanction and the damage thus assessed is punitive.”<sup>178</sup>

Eventually the claim was settled in 1999. It should be noted that in the agreement it explicitly says that “there is no right to compensation for environmental damage.”<sup>179</sup>

In the *Zoe Colocotroni* case<sup>180</sup> the court decided on a strange method of quantification.

Plaintiffs' proven claim of damage to marine organisms covers an approximate area of about 20 acres in and around the West Mangrove. The surveys conducted by Plaintiffs reliably establish that there was a decline of approximately 4,605,486 organisms per acre as a direct result of the oil spill. This means that 92,109,720 marine animals were killed by the COLOCOTRONI oil spill. The uncontradicted evidence establishes that there is a ready market with reference to biological supply laboratories, thus allowing a reliable calculation of the cost of replacing these organisms. The lowest

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<sup>174</sup> Brans, *supra* n. 126, p. 334.

<sup>175</sup> De La Rue & Anderson, *supra* n. 38, p. 485.

<sup>176</sup> FUND/EXC.50/3.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> 71 FUND/EXC.61/2.

<sup>180</sup> *Supra* n. 166.

possible replacement cost figure is \$.06 per animal, with many species selling from \$1.00 to \$4.50 per individual. Accepting the lowest replacement cost, and attaching damages only to the lost marine animals in the West Mangrove area, we find the damages caused by Defendants to amount to \$5,526,583.20.<sup>181</sup>

In the Court of Appeal, this method of quantification was dismissed. Instead the Court used the restoration cost method.

...we think the appropriate primary standard for determining damages in a case such as this is the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is feasible without grossly disproportionate expenditures. The focus in determining such a remedy should be on the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive.<sup>182</sup>

This method is more in line with the one established by the Fund.

It should be noted that while in the CLC, compensation is only payable for reinstatement of the environment.<sup>183</sup> By comparison, in the OPA 90

compensation is payable for the following:

(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources; (B) the diminution in value of those natural resources pending restoration.<sup>184</sup>

As such, the OPA 90 covers a wider array of damages; unlike the CLC, even interim losses may be compensable.

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<sup>181</sup> *Ibid.*, p. 1344-1345.

<sup>182</sup> 628 F.2d 652 (1980) p. 675.

<sup>183</sup> *Supra* n. 99.

<sup>184</sup> 1990 Oil Pollution Act Sec. 2706 (d)

## 5. PURE ECONOMIC LOSS

One of the more controversial areas pertaining to compensation for oil pollution damage is that of pure economic losses. Deciding whether a claimant should be compensated or not for economic loss, can be quite a problematic matter. While many claims are for damage suffered directly, there are those where claims for losses sustained are “less” directly, in which the courts have to consider matters of causation, remoteness and proximity.<sup>185</sup>

Claims for economic losses such as reductions in profits are frequently seen in relation to oil pollution incidents. Common claims are those of claimants involved in the fishing industry, e.g. fishermen suffering from reduced catches and reduced prices because of the public’s faith in the product has been damaged. Another industry where claims for financial loss are frequently seen is the tourist industry, e.g. owners of hotels and restaurants.

The case of *Hedley Byrne v. Heller and Partners*<sup>186</sup> is a leading case, although non-maritime, relating to compensation for economic loss. In *Hedley Byrne*, the plaintiffs (a firm of advertising agents) brought a claim against the defendants (a bank) for financial loss suffered by relying on statements made negligently by the defendants. In this case it was established that a pure economic loss can be recoverable outside of contracts.

Lord Morris of Borth-Y-Gest held-

My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference.

Furthermore, if in a sphere in which a person is so placed that others

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<sup>185</sup> De La Rue & Anderson, *supra* n. 38, p. 415.

<sup>186</sup> [1963] 1 Lloyd's Rep. 485

could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.<sup>187</sup>

The matter of “reasonable foreseeability” is a concept of law that came to carry over into maritime law and is along with remoteness/proximity and directness, the key factors in determining compensability of ship-source oil pollution damage.

There are numerous varieties of economic loss, such as loss of profits, loss of income, loss of future income but a distinction has to be made between losses that are “pure economic losses”, meaning a loss “without antecedent harm to plaintiff’s person or property”<sup>188</sup> and losses that are “consequential”, meaning that the loss is connected with damage to a proprietary interest.

### **5.1 Consequential loss**

In common law jurisdictions, claims for pure economic loss are generally not compensable as it could “open the floodgates of litigation.”<sup>189</sup> However, in some cases economic losses which are not truly “pure” in character are in certain cases recoverable.

In *Spartan Steel and Alloys Limited v. Martin & Co. (Contractors) Ltd*<sup>190</sup> the concepts of consequential and pure economic loss were discussed.

While digging up a road with a power-driven excavating shovel, men employed by the defendants, Martin & Co. (Contractors) Ltd., damaged a

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<sup>187</sup> *Ibid.*, p. 501.

<sup>188</sup> Mauro Bussani and Vernon Valentine Palmer, “The notion of pure economic loss and its setting” in Mauro Bussani and Vernon Valentine Palmer (eds.) *Pure Economic Loss in Europe*, p. 5.

<sup>189</sup> Proshanto K. Mukherjee, “Economic Losses and Environmental Damage in the Law of Ship-Source Pollution” in Aldo Chircop, Norman Letalik, Ted L. McDorman, Susan J. Rolston (eds.) *The Regulation of International Shipping: International and Comparative Perspectives Essays in Honor of Edgar Gold* (Leiden: Martinus Nijhoff Publishers, 2012), p. 345.

<sup>190</sup> [1973] Q.B. 27.

cable, which the defendants knew supplied electricity from the Mechalls Power Station of the Midland Electricity Board direct to the Spartan Works, Birmingham. The plaintiffs, Spartan Steel & Alloys Ltd., were the owners of the factory and they manufactured stainless steel alloys.

The plaintiffs made a claim based on negligence since material in the furnace was damaged and depreciated in value. Their loss and damage totaled £2,535. That sum was made up of £368 for loss of value of the metal in the furnace at the time the electricity supply failed, £400 for loss of profit on that metal and £1,767 for loss of profit on four further melts which could have been carried out during the period that there was no electricity supply. In the Court of Appeal, the one melt (£368), and the loss of profit on that melt consequent thereon (£400) were recoverable but not the £1,767 because that was as Lord Denning put it “economic loss independent of the physical damage.”<sup>191</sup>

Edmund Davies L.J. did not agree with the judgment and stated that-

For my part, I cannot see why the £400 loss of profit here sustained should be recoverable and not the £1,767. It is common ground that both types of loss were equally foreseeable and equally direct consequences of the defendants' admitted negligence, and the only distinction drawn is that the former figure represents the profit lost as a result of the physical damage done to the material in the furnace at the time when power was cut off.<sup>192</sup>

Lord Denning held-

Rather than expose claimants to such temptation and defendants to such hard labour - on comparatively small claims - it is better to disallow economic loss altogether, at any rate when it stands alone, independent of any physical damage.

Consequential losses are generally compensable, assuming the claimant is the owner of the damaged property. This was the case in *Weller & Co. v. Foot & Mouth Disease Research Institute*.<sup>193</sup>

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<sup>191</sup> *Ibid*, p. 39.

<sup>192</sup> *Ibid*, p. 41.

<sup>193</sup> [1965] 2 Lloyd's Rep. 414.

In the case there was an escape of virus from defendants' premises infecting cattle in vicinity with foot and mouth disease. Two cattle markets were consequently closed on order of the Minister of Agriculture, causing a loss of profits for the plaintiff auctioneers. The plaintiffs claimed against defendants alleging that, as the result of their negligence and/or breach of absolute duty in allowing escape of dangerous thing, plaintiffs suffered loss by closure of markets. It was held by Widjery, J. that-

assuming in plaintiffs' favour, that their loss was foreseeable and that defendants' negligence caused escape of virus, that defendants' duty of care was owed to owners of cattle in neighbourhood and plaintiffs were not owners of cattle and did not have any proprietary interest in anything which might conceivably be damaged by virus if it escaped; that, even if plaintiffs had proprietary interest in market premises, those premises were not in jeopardy; and that, therefore, plaintiffs' claim in negligence failed.<sup>194</sup>

This was further established in the case of *Candlewood Navigation Corporation Ltd. v. Mitsui OSK Lines Ltd. (The Mineral Transporter)*<sup>195</sup> where the plaintiff time charterer collided with the appellants vessel and claimed for recovery for the wasted hire under the terms of the charterparty and the loss of profits during the period while *Ibaraki Maru* (the time chartered ship) was unoperational. It was held in the Privy Council that-

the general proposition was that a time charterer was not entitled to recover for pecuniary loss caused by damage by a third party to the chartered vessel because a time charterer had no proprietary or possessory right in the chartered vessel and his only right in relation to the vessel was contractual.<sup>196</sup>

It is apparent that although common law courts have been hesitant in allowing recoverability for economic loss, if there is a proprietary interest invested in the damaged property, the claimant has a claim for recoverability.

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<sup>194</sup> *Ibid.*

<sup>195</sup> [1985] 2 Lloyd's Rep. 303.

<sup>196</sup> *Ibid.*

## 5.2 Common law

As seen above, the position in the UK has been that pure economic losses, unless consequential, are generally not compensable. However, with the decision in the *Hedley Byrne*<sup>197</sup> the English courts have seen more inclined to admit claims for pure economic losses. One of the most important cases relating to pure economic loss is the non-maritime case of *Junior Books Ltd. v. Veitchi*<sup>198</sup>.

The defenders, specialist flooring contractors, were engaged as sub-contractors to lay a floor in a factory which was being erected for the pursuers (plaintiffs) by a building company. The pursuers claimed that the floor was defective due to negligence of the defenders and as a result of the floor cracking they had suffered loss and damage (including loss of profits). There was no contractual relationship between the pursuers and the defenders. It was held in the House of Lords:

that where the relationship between the parties was sufficiently close, the scope of the duty of care in delict or tort owed by a person doing work was not limited to a duty to avoid causing foreseeable harm to persons or to property other than the subject-matter of the work by negligent acts or omissions, but extended to a duty to avoid causing pure economic loss consequential on defects in the work and ...to avoid defects in the work itself, and that, on the assumption that the pursuers' averments were correct, they disclosed a sufficient degree of proximity to give rise to a duty of care.<sup>199</sup>

It should be noted that in the case of *Murphy v. Brentwood*<sup>200</sup>, the House of Lords reversed its decision and held that *Veitchi* and the similar case of *Anns v. London Borough of Merton*<sup>201</sup> were wrongly decided, and that the losses incurred in those cases were considered to be “pure economic loss” and therefore not recoverable.<sup>202</sup>

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<sup>197</sup> *Supra* n. 187.

<sup>198</sup> [1983] 1 A.C. 520.

<sup>199</sup> *Ibid.*

<sup>200</sup> [1990] 2 W.L.R. 944.

<sup>201</sup> [1978] A.C. 728.

<sup>202</sup> [1990] 2 W.L.R. 944.

As such, there is a lack of uniformity in the decisions made by the House of Lords, causing uncertainty as to what kinds of economic losses are recoverable.

In the Canadian case of *Canadian National Railway Company v. Norsk Pacific Steamship Company Limited (The Jervis Crown)*<sup>203</sup> a barge being towed down the Fraser River by a tug owned by Norsk collided in heavy fog with the New Westminster railway bridge to which it caused extensive damage which closed the bridge for several weeks. The bridge formed part of the plaintiff's (CNR) main line and connected with tracks and land owned by CNR on either side of the bridge, however CNR did not own the bridge but only used under a contract with Public Works Canada (PWC).

The plaintiff sued the tug owners and operators for losses incurred in re-routing their traffic and loss of profit for the time it took to repair the bridge. It was held by the Supreme Court of Canada by a 4:3 majority that the plaintiff's claim should succeed. The Court expanded on liability for pure economic loss in the following words:

Pure economic loss is *prima facie* recoverable where, in addition to negligence and foreseeable loss, there is sufficient proximity between the negligent act and the loss. Proximity is the controlling concept, avoiding the spectre of unlimited liability. Proximity may be established by a variety of factors depending on the nature of the case. The categories are not closed and further definition as to what factors give rise to liability for pure economic loss will occur as more cases are decided. In determining whether liability should be extended to a new situation, the courts should consider the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. Sufficient special factors must exist to avoid the imposition of indeterminate and unreasonable liability. The result would be a principled, yet flexible, approach to tort liability for pure economic loss. Recovery would be allowed where justified, while

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<sup>203</sup> [1992] 1 S.C.R. 1021.

excluding indeterminate and inappropriate liability, and it will permit the coherent development of the law.<sup>204</sup>

In *Rivtow Marine Ltd. v. Washington Iron Works*<sup>205</sup> it was held-

The breach of the duty to warn constituted negligence on the part of both respondents. The economic loss solely attributable to the interruption of the appellant's business during "coastal operations" was the immediate consequence of that breach and such damage was recoverable in an action for negligence.

In the U.S, claims for pure economic losses have generally been declined as otherwise it would lead to "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."<sup>206</sup> This can be exemplified by the case of *Robins Dry Dock & Repair Co. v. Flint*<sup>207</sup> where time charterers of the steamship Bjornefjord sued the Dry Dock Company for recovery for the loss of use of the steamer for two weeks. By the terms of the charter party the steamer was to be docked at least once in every six months, and payment of the hire was to be suspended until she was again in proper state for service. In accordance with these terms the vessel was delivered to the petitioner and docked, and while there the propeller was so injured by the petitioner's negligence that a new one had to be put in, thus causing the delay for which this suit is brought.

The injury to the propeller was no wrong to the respondents but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners-and while intentionally to bring about a breach of contract may give rise to a cause of action. ... no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with

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<sup>204</sup> *Ibid.*

<sup>205</sup> [1974] S.C.R. 1189.

<sup>206</sup> *Ultramares Corporation v. Touche*, 174 N.E. 441 (N.Y. 1931).

<sup>207</sup> 275 U.S. 303 (1927).

that other unknown to the doer of the wrong. The law does not spread its protection so far.<sup>208</sup>

There seems to be a lack of certainty regarding pure economic losses in common law jurisdictions and as such any general rule of when pure economic losses are compensable or not is difficult to ascertain.

As most common law states are parties to the CLC/Fund (with the glaring exception of the U.S) discussion on cases of oil pollution can be seen in Chapter 5.5.

### 5.3 Civil law

Pure economic losses are naturally treated differently depending on the jurisdiction. Some jurisdictions can be regarded as liberal, e.g. France, while some can be regarded as conservative, e.g. Sweden.<sup>209</sup>

In France traditionally, all claims for pure economic loss can generally be granted. Article 1382 of the Code Napoléon reads “Every action of man whatsoever which occasions injury to another, binds him through whose fault it happened to reparation thereof.” Article 1383 adds: “Everyone is responsible for the damage of which he is the cause, not only by his own act, but also by his negligence or by his imprudence.”

As such, all losses are treated in the same way, no matter if they are what is in common law referred to as “pure economic loss” or not. Indeed, as put by Bussani and Palmer, “the expression ‘pure economic loss’ is virtually unknown.”<sup>210</sup>

In Sweden, a pure economic loss is described as an “economic loss arising without connection to anyone’s bodily injury or property damage.”<sup>211</sup>

Further, “whoever causes pure economic loss through a crime shall compensate that injury.”<sup>212</sup> It seems like pure economic losses are only

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<sup>208</sup> *Ibid*, p. 308-309.

<sup>209</sup> Bussani & Palmer, *supra* n. 188, p. 126 and 156 respectively.

<sup>210</sup> *Ibid*, p. 130.

<sup>211</sup> Tort Liability Act, (1972:207) § 1:2

<sup>212</sup> *Ibid*, §2:2

compensable if the damage is caused by a crime. However, this is not necessarily the case as there are exceptions to the general rule and at certain times, the court may decide that pure economic loss is compensable even if it is not caused by a crime<sup>213</sup> which can be seen in case law.<sup>214</sup> As such, it seems like Sweden is moving towards a more liberal approach.

#### **5.4 The CLC/Fund Regime**

Although the IOPC Fund is an intergovernmental organisation that provides compensation for oil pollution damage its decisions and guidelines are not binding to parties. However, it does provide a foundation for which states can use as criteria for when losses are compensable.

The 1969 CLC defines pollution damage as:

loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.<sup>215</sup>

The definition does not give an answer to whether pure economic losses are compensable, instead leaving it to national courts to decide.

In the 1984 Protocols and then consequently the 1992 CLC the definition changed to mean:

(a) loss or damage caused outside the ship by contamination resulting from escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

(b) the costs of preventive measures and further loss or damage caused by preventive measures.

The definition includes loss of profit, but other than that economic loss is not mentioned.

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<sup>213</sup> Proposition 1972:5 s. 568.

<sup>214</sup> NJA 1987 s. 692

<sup>215</sup> CLC 1969, article 1(6)

The Fund has, at any rate, been somewhat liberal in allowing recovery. In one of the earlier cases concerning the Fund regarding the *Tanio* incident, compensation for loss of income of the tourist industry was compensable if it could be regarded as a direct result of the pollution.<sup>216</sup> Owners of restaurant and hotels were compensated even though they might not have been situated very close to the beach.<sup>217</sup> However, in the same case the Fund rejected a claim by the town of Cleder for loss of tax revenues due to reduction of income of businessmen as a result of the incident.<sup>218</sup>

The Fund has allowed recovery for pure economic loss in cases where economic losses are suffered by persons who depend directly on earnings from coastal or sea-related activities, e.g. fishermen, owners of hotels and restaurants.<sup>219</sup>

As claims for pure economic loss are admissible only if they are for loss or damage caused by contamination, the starting point is the pollution, not the incident itself.<sup>220</sup>

In the 1990's there were a rather large number of claims for economic loss as a consequence of the *Haven*, *Aegean Sea* and *Braer* incidents.

The practice established by the Fund worked on a case-by-case basis, leaving the Fund without any real significant principle established, but with the large number of claims presented in relation to the above mentioned incidents, a clear definition was needed.

The Fund has taken means to establish a sort of principle for compensability of economic loss, a working group was established where the following criteria were set out:

- the geographic proximity between the claimant's activity and the contamination;

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<sup>216</sup> Ganten, *supra* n. 54.

<sup>217</sup> 1993 FUND/EXC.35/3

<sup>218</sup> Jacobsson & Trotz, *supra* n. 103, p. 479.

<sup>219</sup> *Ibid*, p. 478.

<sup>220</sup> Z. Oya Özçayır, *Liability for Oil Pollution and Collisions* (London: LLP, 1998), p. 251.

- the degree to which the claimant was economically dependent on an affected resource;
- the extent to which a claimant had alternative sources of supply or business opportunities;
- the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.<sup>221</sup>

Further, claims for costs of measures to prevent pure economic loss may also be recoverable if the following criteria are met:

- The cost of the measures should be reasonable.
- The cost of the measures should not be disproportionate to the further damage or loss that they are intended to mitigate.
- The measures should be appropriate and offer a reasonable prospect of being successful (for example, measures to restore confidence in seafood products should normally only be undertaken once fishing grounds are cleared of contamination and there is little or no risk of further contamination).
- In the case of marketing campaigns, the measures should relate to actual targeted markets (for example, measures to counteract the negative effects on tourism in a particular area should normally be focused on the normal visitor client base of that area)<sup>222</sup>

In the CMI guidelines on Oil Pollution Damage (1994) "Pure economic loss" means financial loss sustained by a claimant otherwise than as a result of such physical loss of or damage to property. The guidelines objective is to provide assistance to which claims are thought to be recoverable under the law as applied in the majority of countries. In the guidelines there is a provision for when pure economic loss may be compensated.<sup>223</sup>

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<sup>221</sup> FUND/WGR.7/21, paragraph 7.2.30. This can also be found in the IOPC Funds Claims Manual 2008, section 3.

<sup>222</sup> IOPC Fund Claims Manual 2008, p. 34.

<sup>223</sup> 5. Pure economic loss may be compensated when caused by contamination by oil, but normally only as set out below. The loss must be caused by the contamination itself. It is not sufficient for a causal connection to be shown between the loss and the incident which caused the escape or discharge of the oil from the vessel involved in the incident.

Although there is in principle a test to decide recoverability, there has been inconsistency in the Fund's decisions. A claim made by a sculptor for economic loss suffered as a result of a decline in the sales of his work due to the reduction of the tourism in the area was deemed recoverable by the Fund in the wake of the *Erika* disaster but in another incident the main ferry operator carrying tourists to the contaminated area (Shetlands) was not allowed by the fund to recover for its economic loss, which was the result of a decline in the number of tourists visiting the area.<sup>224</sup>

A large number of claims for pure economic loss are related to fishing activities. Generally a claim for pure economic loss is accepted for compensation if there is a sufficiently close link of causation between the contamination and the loss or damage.<sup>225</sup>

As a result of the *Sea Empress* incident, the Fund received claims from fish processing and sales companies located outside the area covered by the

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6. (a) Pure economic loss will be treated as caused by contamination only when a reasonable degree of proximity exists between the contamination and the loss.  
(b) In ascertaining whether such proximity exists, account is to be taken of all the circumstances, including (but not limited to) the following general criteria:
- i. the geographic proximity between the claimant's activities and the contamination;
  - ii. the degree to which the claimant is economically dependent on an affected natural resource;
  - iii. the extent to which the claimant's business forms an integral part of economic activities in the areas which are directly affected by the contamination;
  - iv. the scope available for the claimant to mitigate his loss;
  - v. the foreseeability of the loss; and
  - vi. the effect of any concurrent causes contributing to the claimant's loss.
7. Whilst the result in practice of applying the foregoing general principles will always depend on the circumstances of the individual case, recovery will not normally extend --
- a. to parties other than those who depend for their income on commercial exploitation of the affected coastal or marine environment, such as, for example, those involved in:
    - i. fishing, aquaculture and similar industries;
    - ii. the provision of tourist amenities such as hotels, restaurants, shops, beach facilities and related activities;
    - iii. the operation of desalination plants, salt evaporation lagoons, power stations and similar installations reliant on the intake of water for production or cooling processes;
  - b. [not] to parties claiming merely to have suffered;
    - i. delay, interruption or other loss of business not involving commercial exploitation of the environment;
    - ii. loss of taxes and similar revenues by public authorities.

<sup>224</sup> Baris Soyer, "Ship-sourced oil pollution and pure economic loss: The quest for overarching Principles", (2009) 17 Torts Law Journal, p. 275, at n. 24.

<sup>225</sup> IOPC Fund Claims Manual 2008, p. 29.

fishing bans which had maintained that they had been deprived of their supply of shellfish as a result of the incident.<sup>226</sup>

The Committee noted that, in the Director's view, the mere fact that a claimant's activities were located slightly outside the area immediately affected by the spill should not, by itself, disqualify the claimant from compensation. The Committee further noted that the Director was of the view that the further away from the affected area that the claimant's business was located the greater the weight that would need to be given to the other criteria.

The Executive Committee considered that as this processing plant was located close to the area covered by the fishing ban (80 kilometers north by road), this claim fulfilled the criterion of geographic proximity between the claimant's activity and the contamination. It was further noted by the Committee that the claimant was highly dependent on the supplies from the area and that it had limited possibilities of obtaining supplies elsewhere. The Committee took the view that the claimant's business should be considered as forming an integral part of the economic activity of the area. For these reasons, the Committee was of the opinion that there was a reasonable degree of proximity between the contamination and the alleged loss, and decided that this claim was admissible in principle.<sup>227</sup>

In regards to the principle set out in the claims manual Professor Soyer stated that-

The admissibility criteria should simply be viewed as a formulation developed by the fund in order to assist in the consideration of the claims submitted. There is no doubt that the criteria have implications for the fund, but one should not lose sight of the fact that the decisions of the fund are themselves subject to the judicial control of the courts in member jurisdictions.<sup>228</sup>

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<sup>226</sup> 71 FUND/EXC.49/12.

<sup>227</sup> *Ibid*, 3.8.8

<sup>228</sup> Soyer, *supra* n. 224, p. 275-276.

It is important to bear in mind that the so called “fund jurisprudence” consisting of the criteria set out in the claims manual and decisions by the Fund is not legally binding.

As Lord Cullen held in *Landcatch Ltd. v. International Oil Pollution Compensation Fund*-

The answer to the main issue under discussion depends on the interpretation of s. 1 of the 1971 Act. I do not consider that it is proper or appropriate to treat the criteria and decisions of the Fund as an aid to the construction of the legislation. It is conceded that they have no binding effect on the Fund and that they were not to be treated as authorities so far as this Court is concerned. They do not have the status of an international agreement for the interpretation of a Convention. They are no more than indications of the Fund’s response to certain types of claims. Whether or not the criteria or decisions were well-founded on an interpretation of the Convention is a matter that is neither here nor there so far as the present case is concerned. The Fund rejected the claim by Landcatch with which the present actions are concerned. It appears to me to be an entirely improper exercise to divert the Court from seeking a proper statutory interpretation by submitting that assistance can be gained by considering whether rejection of Landcatch’s claim was inconsistent with the criteria adopted by a party.<sup>229</sup>

As the Fund is a legal entity and therefore party to the proceedings it is questionable how much the courts can base their decisions on the Fund’s criteria. According to the Vienna Convention on the Law of Treaties-

3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.<sup>230</sup>

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<sup>229</sup> [1999] 2 Lloyd’s Rep. 316, p. 327.

<sup>230</sup> 1969 Vienna Convention on the Law of Treaties, Article 31.3.

Whether the “Fund jurisprudence” is such as to be effected by the Vienna Convention is doubtful as it is rarely referred to as an agreement of that kind, but in any case it seems that although not binding, most courts seem to uphold the decisions made by the Fund.<sup>231</sup>

#### **5.4.1 Decisions of national courts**

As seen above, national courts do not seem to recognize the Fund’s criteria to be legally binding. Although they may view them as a reference or assistance, they have their own interpretation of the Conventions.

##### **5.4.1.1 Civil law**

The civil law approach leaves much to the court’s discretion in the specific case. As seen above, France for example is generally liberal in allowing recovery for pure economic loss.

On 12 December 1999 the Maltese-registered Tanker Erika (19 666 GT) broke in two in the Bay of Biscay, some 60 nautical miles off the coast of Brittany, France, some 19 800 tonnes of oil were spilled at the time of the incident. There were many claims for compensation for pure economic loss relating to the incident. A tour operator in the U.K. specialising in selling holidays in various European countries submitted a claim for pure economic loss.

In the Commercial Court in Rennes a claim was accepted for loss of income by a student who, unlike in 1998 and 1999, had not been employed in the summer of 2000 at a camping site in Névez, Department of Finistère.

As this claim involved a matter of principle the Executive Committee of the IOPC Fund instructed the Secretariat to appeal against the judgment. In the Court of Appeal in Rennes, the Fund’s appeal was accepted and the Court reversed the first instance judgment and rejected the claim.

The Court stated that the criteria for the admissibility of claims contained in the Claims Manual could not be assimilated to agreements between the parties in the sense of Article 31.3 of

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<sup>231</sup> De La Rue & Anderson, *supra* n. 38, p. 369.

the Vienna Convention on the Law of Treaties nor to international custom in the sense of the same Vienna Convention. The Court also stated that it was for the national courts to decide the interpretation of the term ‘pollution damage’, but that in doing so they should take into account the terms of the 1992 Conventions, which by virtue of the French Constitution had a higher value than internal law, and that the criteria for the admissibility of claims, in particular the criterion not to compensate ‘second degree’ tourism claims, was internal to the Fund. The Court stated that the student who was employed in August 2000 had not shown that he had not been employed in July 2000 as a consequence of the reduction in tourism resulting from the Erika incident and had not provided evidence that he had attempted to obtain employment elsewhere.<sup>232</sup>

The same line of reasoning can be seen in the Commercial Court in Lorient where the Fund had rejected a claim from the owner of a restaurant based on losses in 2001 (but accepted the claim based on losses in 2000) since there was not a sufficient link of causation between the claimed losses in 2001 and the Erika incident.

In a judgement rendered in July 2007 the Court stated that it was not bound by the Fund’s criteria for the admissibility of claims and that it was for the Court to interpret the concept of ‘pollution damage’ in the 1992 Conventions and to apply it in each individual case by determining whether there was a sufficient link of causation between the event and the damage. The Court considered that the Erika incident had not had a significant impact on the 2001 tourism season since, according to studies carried out, the results of 2001 were the consequence of factors unrelated to the oil spill. The Court therefore adopted the Fund’s views on the absence of a link of causation and held that the claimant had not proved that he had suffered losses beyond the loss of income assessed by the Fund.<sup>233</sup>

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<sup>232</sup> Report on the Activities of the International Oil Compensation Funds in 2007, p. 85.

<sup>233</sup> *Ibid.*, p. 88.

#### 5.4.1.2 Common Law

Courts in common law countries have in general been more hesitant to allow recovery for pure economic loss. As seen in the *Veitchi* case<sup>234</sup>, a special relationship is required for recoverability to be allowed for losses that are not consequential.

In the 1990's, United Kingdom courts were forced to deal with compensation for pure economic loss on several occasions.

In the case of *Landcatch v. IOPCF and Braer* the pursuer's business was to rear salmon from eggs to smolt in freshwater conditions and then to sell them for growing to maturity in seawater conditions. Their principal place of business was at Ormsary Argyll, which was about 500 kilometres distant from Shetland.<sup>235</sup> *Braer* grounded off the coast of Shetland and 84,700 tonnes of crude oil and 1600 tonnes of bulk fuel oil escaped or were discharged. An area which could be affected by oil or other chemical substances which were likely to create a hazard to human health if fish or shellfish drawn from within the area were consumed was designated by the Scottish State. That order was replaced by an order of Jan. 17, 1993 which enlarged the designated area or exclusion zone to about 400 square miles. The pursuers contended that as a result of the oil pollution and the exclusion zone designation they suffered losses namely (1) smolt culled because of the lack of sales; (2) reduced selling price of smolt sold in 1993 and in 1994 when prices had not resumed their normal level; (3) additional rearing costs incurred in making special arrangements for on-growing 260,000 smolt; and (4) "expenses in pursuing claim".<sup>236</sup> The claim was rejected<sup>237</sup> as the pursuers had not proved the necessary proximity:

"I conclude therefore that while the fact that these are claims for economic loss is not sufficient per se to exclude them, the statutory liabilities on which they are founded are not indeterminate in extent. In the context of these sections the liability for pure economic loss can be satisfactorily

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<sup>234</sup> *Supra* n. 198.

<sup>235</sup> [1998] 2 Lloyd's Rep. 552.

<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*, p. 573.

interpreted to mean a liability for such loss where it is directly caused by the contamination in accordance with established principles of law. It is therefore for the pursuers to aver and prove that the necessary proximity exists between the parties in order to bring themselves within the category of cases in which such losses are recoverable.” “I therefore reject the first submission for the pursuers.”<sup>238</sup>

The case was appealed to the Inner House Second Division of the Court of Session. Landcatch claimed that causation should be based on the “but for” test<sup>239</sup> in cases of pure economic loss. This was rejected by the court

...if Landcatch’s “but for” construction of causation is correct it opens up a limitless chain of claims as the implications of ever more remote effects are worked out.<sup>240</sup>

Lord Cullen held:

I have no difficulty in accepting that the mere fact that the expression “loss” is apt to include claims of pure economic loss in the context of this legislation does not entail that every claim for pure economic loss is admissible. That is clearly so where, as in this case, the claim is of a secondary or relational type.

In these circumstances I consider that “loss”, as included in “damage” for the purposes of s. 1(1) of the 1971 Act, does not cover secondary or relational claims.<sup>241</sup>

Lord McCluskey did a comparison between a fisherman whose livelihood is earned fishing in particular waters and a trader who regularly supplies him with the diesel and the nets.

That loss of prospective profit is pure economic loss. In a figurative sense what he has in the waters is a direct economic interest. That interest is directly affected by the contamination.

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<sup>238</sup> *Ibid*, p. 568.

<sup>239</sup> [1999] 2 Lloyd’s Rep. 316 p. 331. “... the owner must be held liable for all loss which any claimant could show he had sustained in consequence of the contamination, being loss which he would not have sustained but for the contamination.”

<sup>240</sup> *Ibid*, p. 328.

<sup>241</sup> *Ibid*, p. 329.

The trader's loss of profit, which begins to occur when his expected sales do not eventuate, is essentially relational loss. It is, of course, pure economic loss; but it is not that which is important; what is important is that it is not a loss that is caused directly by contamination.<sup>242</sup>

Eventually it was held that their (Landcatch) claim for pure economic loss is seen to be unquestionably relational, indirect and remote.<sup>243</sup>

In February, 1996 the *Sea Empress* grounded off Milford Haven and 72,000 tonnes of crude oil spilled into the sea. The spillage led to the imposition of a fishing ban pursuant to Part 1 of the Food and Environment Pollution Act, 1985. The claimant Tilbury was a company engaged in the business of fish processing. Tilbury had supply contracts with fishermen who fished the whelk ground between Tenby and Saundersfoot landing their catch in the Milford Haven. As a result of the fishing ban Tilbury claimed to have lost the profit that it would have made from processing whelks supplied by the fishermen.

In the Queen's Bench, David Steel, J. held:

that (1) the causative link between the escape of oil and the loss of profitable sales of processed whelks was unconnected with, let alone, interrupted by any fresh or intervening cause; the loss would not have been sustained but for a range of other factors such as the contracts with the fishermen, the absence of an alternative source of whelks; but these pre-existing factors were simply the circumstances in which the escape could occasion the loss; the escape was the only legally effective cause of the loss

(2) it was common ground that the loss sustained by the claimants was foreseeable

(3) the processors claim was secondary derivative relational and/or indirect; and this lack of proximity rendered the claim too remote; the claim failed<sup>244</sup>

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<sup>242</sup> *Ibid*, p. 332.

<sup>243</sup> *Ibid*, p. 335.

I am fully persuaded that, as the Fund contended, this claim must fail for the same reasons as those in *Landcatch*.<sup>245</sup>

In the Court of Appeal, the decision by Justice Steel was upheld, affirming that relational or secondary losses are non recoverable.

[T]he appellant was not engaged in any local activity in the physical area of contamination; its interest was in landed whelks not in the whelks in their natural habitat; the contamination had prevented the fishermen, whose physical activities were closely affected by the contamination of the waters and of whelks, from supplying the appellants with the landed whelks for which it had contracted; the appellants' resulting loss arose from its inability to carry out processing and packing and deliveries of processed and packed whelks far from the contaminated area; this was a term of secondary economic loss which was outside the intended scope of a statute which was closely focused on physical contamination and its consequences.<sup>246</sup>

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<sup>244</sup> [2003] 1 Lloyd's Rep. 123.

<sup>245</sup> *Ibid.*, p. 129.

<sup>246</sup> [2003] 1 Lloyd's Rep. 327.

## 6. CONCLUSION

Since the *Torrey Canyon* much has happened in the field of liability and compensation for oil pollution damage. The strict liability regime set out in the conventions, although controversial at the time, seems the best way to ensure adequate compensation; in fact, anything other than strict liability would be almost unthinkable today. As both the Bunkers Convention and the HNS Convention (and later Protocol) are largely based on the CLC and considering the number of states party to the CLC, there is no doubt that it has accomplished much of what it set out to do, that is “to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships.”<sup>247</sup> Undoubtedly the victim today has a better case for obtaining compensation from oil pollution damage than he did 50-60 years ago.

There is however still some question marks in the current regime for oil pollution damage. The very limited definition of “pollution damage” in the conventions is a cause for concern. Whilst defining environmental damage might prove difficult as the environment is such an amorphous object, not dealing with subjects like standing is indeed questionable. It seems that the legislators’ intentions are to leave these matters to the national courts to decide, causing uncertainty as to when a claim will be compensated.

Further, compensation for environmental damage is only admissible for impairment of the environment, limited to costs of reasonable measures of reinstatement. There is an issue regarding when impairment is such that a reasonable measure of reinstatement is necessitated and what is the threshold for “reasonableness”. If an action of reinstatement is not deemed as reasonable, restoration measures might not be taken at all. This could be dire as some measures are simply not technically feasible or the costs for restoration will be too high. This could lead to further damage to the

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<sup>247</sup> CLC 1992.

environment and also possibly affect the liability of the polluter or at least reduce the total amount of compensation. This would certainly work against the interest of “making the polluter pay”.

The Fund has on several occasions been at odds with national courts when dealing with environmental damage, standing (*locus standi*) and quantification. While some courts have been inclined to award compensation for damage to the environment *per se*, the Fund is of the opinion that “there is no right to compensation for environmental damage.”

As seen above, it has been said that a uniform interpretation of the definition of pollution damage is essential as it could otherwise lead to unfairness. It is in the opinion of this author questionable whether the new regime has in fact succeeded in constructing a definition of “pollution damage” that gives certainty and a uniform treatment. The issue of standing has been entirely left out of the CLC/Fund. Standing is based on a proprietary interest vested in the damage suffered. As such, there is no real issue where the damage is done to property or resources subject to ownership. However, when there is no clear proprietary interest involved, e.g. if the damaged property belongs to no one in particular. Where states have solved this by e.g. the doctrines of public trust or *parens patriae* as in the U.S. there is not much of an issue but this is not always the case. By comparison, the OPA 90 covers a wider array of damages, and as such, in respect of environmental damage, it offers victims more options for obtaining compensation. While evidently the legislators of the CLC/Fund has taken the approach to leave certain issues, such as standing, to the discretion of national courts; it would for the sake of uniformity and ensuring compensation, in the opinion of this author, have been preferable to give “environmental damage” a more detailed definition.

Another issue pertaining to the definition of “pollution damage” in the conventions is that of “pure economic loss.”

The position taken in the CLC/Fund regime concerning pure economic loss can again be said to be flexible, affording national courts freedom to

interpret the Conventions in their own way. Determining whether a loss is compensable or not, the courts look at remoteness/proximity, reasonableness and directness of the loss. This is certainly in line with the guidelines set out by the Fund, although the Fund seems to put more emphasis on if the claimant is economically dependent on an affected resource, the extent to which the claimant's business forms an integral part of the economic activity within the area affected by the spill and alternative sources of supply and business opportunities.

Indeed, in regards to pure economic loss it seems that often courts follow the so called "fund jurisprudence", although not legally bound by it, as many judges adamantly hold. The biggest difference between common law jurisdictions and the Fund's decisions is probably concerning claims relating to relational or secondary losses which are often accepted by the Fund but are generally not considered to be recoverable in common law jurisdictions. Civil law courts are in contrast more inclined to treat "pure economic losses" as any other loss, causing a discrepancy between different jurisdictions. Considering the inconsistency in the decisions of the Fund and the different views of common law and civil law jurisdictions a conclusive formula of when "pure economic losses" are compensable is virtually impossible. It is therefore questionable to give the so-called "fund jurisprudence" too much credence.

Although Bunkers has not been the focus point of this thesis, it is an important Convention to fill the gap left in the international regime of oil pollution damage. There are some peculiarities in Bunkers in that there is in the Convention no basis for limitation of liability. There is also no fund dedicated to oil pollution damage caused by bunker oil. This is in the opinion of this author, a questionable choice by the legislators as this means that claimants for oil pollution damage will have to compete with non pollution claims subject to limitation of liability under national law. Considering e.g. the LLMC does not expressly give the right to limit liability for oil pollution damage and limits may differ a lot between

different states, it causes uncertainty and uniformity as to when you can limit your liability. Bunker oil pollution can be very costly and in jurisdictions where the limit is very low it is not at all unlikely that compensation will be inadequate.

The issues this thesis has focused on can largely be attributed to the definition of “pollution damage” in the Conventions. This has in much been a conscious approach taken by the legislators leading to a lack of uniformity when dealing with oil pollution damage. In order to achieve harmonization and certainty in cases of oil pollution damage, the definition needs to be revised.

However, it should be said that while the regime of liability for oil pollution damage is far from perfect; the work done throughout the last 40 or so years in not only legislation but also through guidelines, decisions and so on, today victims of oil pollution damage have indisputably stronger means of obtaining compensation.

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