

THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE AND RECKLESSNESS

Dissertation
Zur Erlangung der Doktorwürde
an der Fakultät für Rechtswissenschaft
der Universität Hamburg

vorgelegt von

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Hamburg 10.August 2009

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Tag der mündlichen Prüfung: 29.Oktober 2008

Die vorliegende Arbeit wurde unter dem Namen Nina
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Fakultät für Rechtswissenschaft der Universität
Hamburg als Dissertation eingereicht und von dieser angenommen

Contents

Chapter 1	Introduction	1
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Chapter 2	The International Convention on Civil Liability for Oil Pollution Damage	4
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2.1	Before the 1969 Convention	4
2.1.1	The “Torrey Canyon”	6
2.1.1.1	Factual aspect	6
2.1.1.2	Legal aspect.....	8
2.1.1.2.1	Jurisdiction	8
2.1.1.2.2	English Law	9
2.1.1.2.2.1	Jurisdiction	9
2.1.1.2.2.2	Tort.....	9
2.1.1.2.2.2.1	Esso Petroleum Co Ltd -v- Southport Corporation.....	10
2.1.1.2.2.2.2	Trespass	11
2.1.1.2.2.2.3	Private Nuisance	12
2.1.1.2.2.2.4	Public Nuisance.....	14
2.1.1.2.2.2.5	Rylands -v- Fletcher	14
2.1.1.2.2.2.6	Negligence.....	15
2.1.1.2.2.2.7	Unseaworthiness	16
2.1.1.2.2.3	Limitation of liability	16
2.1.1.2.3	French Law	17
2.1.1.2.3.1	Jurisdiction	17
2.1.1.2.3.2	Article 1382 of the Civil Code.....	17
2.1.1.2.3.3	Article 216 of the Commercial Code of 1807	17
2.1.1.2.3.4	Article 1384, §1 of the Commercial Code	18
2.1.1.2.3.5	Limitation of liability	18
2.1.2	Conclusion.....	18
2.2	The International Convention on Civil Liability for Oil Pollution 1969.....	22
2.2.1	Introduction	22
2.2.2	The provisions of the 1969 Convention.....	26
2.2.2.1	The definition of “ship”	27
2.2.2.2	The definition of “oil”	29

2.2.2.3	The definition of “pollution damage”	31
2.2.2.4	The definition of “preventive measures”	33
2.2.2.5	Article II	33
2.2.2.6	Article III.....	35
2.2.2.6.1	Article III (1).....	35
2.2.2.6.1.1	Liability of the owner.....	35
2.2.2.6.1.1.1	Proposals to place liability on cargo interests	35
2.2.2.6.1.1.2	Proposals to place liability on the operator.....	38
2.2.2.6.1.1.3	Proposals to place liability on both the owner and the charterer.....	40
2.2.2.6.1.1.4	Further proposals.....	40
2.2.2.6.1.1.5	The decision	40
2.2.2.6.1.2	Strict liability	41
2.2.2.6.2	Article III (2) and (3)	45
2.2.2.6.3	Article III (4).....	46
2.2.2.6.4	Article III (5).....	46
2.2.2.7	Article IV.....	47
2.2.2.8	Article V	47
2.2.2.8.1	Article V (1).....	47
2.2.2.8.2	Article V (2).....	48
2.2.2.8.3	Article V (3).....	49
2.2.2.8.4	Article V (4), (5), (6) and (7).....	50
2.2.2.8.5	Article V (8).....	50
2.2.2.8.6	Article V (11).....	51
2.2.2.9	Article VI.....	51
2.2.2.10	Article VII.....	51
2.2.2.10.1	Article VII (1).....	51
2.2.2.10.2	Article VII (2)-(7), (9), (10) and (12).....	53
2.2.2.10.3	Article VII (8).....	53
2.2.2.10.4	Article VII (11)	57
2.2.2.11	Article VIII	59
2.2.2.12	Article IX.....	59
2.2.2.12.1	Article IX (1).....	59
2.2.2.12.2	Article IX (2).....	60
2.2.2.12.3	Article IX (3).....	61
2.2.2.13	Article X	61
2.2.2.14	Article XI.....	61
2.2.2.15	Article XII.....	61
2.2.2.16	Article XIII and XIV	62
2.2.2.17	Article XV.....	62
2.2.2.18	Article XVI	62
2.2.2.19	Article XVII	62

2.2.2.20	Article XVIII.....	63
2.2.2.21	Article XIX and XX.....	63
2.2.2.22	Article XXI.....	63
2.3	The 1976 Protocol.....	63
2.4	The 1984 Protocol.....	64
2.5	The 1992 Convention.....	72
2.5.1	The provisions of the 1992 Protocol.....	74
2.5.1.1	The definition of “ship”.....	74
2.5.1.2	The definition of “oil”.....	76
2.5.1.3	The definition of “pollution damage”.....	81
2.5.1.4	The definition of “incident”.....	90
2.5.1.5	Article III.....	92
2.5.1.6	Article IV.....	96
2.5.1.6.1	Exoneration from liability.....	96
2.5.1.6.2	Article IV (2).....	98
2.5.1.7	Article VI.....	102
2.5.1.7.1	Article VI (1).....	102
2.5.1.7.2	Article VI (2).....	107
2.5.1.7.3	Article VI (3).....	113
2.5.1.7.4	Article VI (4) and (5).....	115
2.5.1.8	Article VII.....	116
2.5.1.9	Article XII bis.....	116
2.5.1.10	Article XII ter, Article 10.....	117
2.5.1.11	Article XIII.....	117
2.5.1.12	Article XV.....	119
2.5.1.13	Article XVIII.....	121
2.6	The 2000 Amendments.....	121
2.7	The future.....	124
2.7.1	The problems.....	124
2.7.2	Proposals for change.....	126
2.7.2.1	The European Union.....	126
2.7.2.2	The IPOC Fund Working Group.....	128
2.7.2.3	The Small Tanker Oil Pollution Indemnification Agreement.....	129

Chapter 3	Recklessness	131
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3.1	General description and introduction.....	131
3.2	History of the term in English Law.....	132
3.3	How is it used in Criminal Law?.....	133

3.3.1	Cunningham.....	137
3.3.2	Caldwell.....	140
3.3.3	Post Caldwell.....	151
3.3.4	Conclusion.....	154
3.4	How is it used in Civil Law?.....	156
3.4.1	Academic writings.....	157
3.4.2	Case-law	159
3.4.2.1	General Torts	159
3.4.2.2	Constructive Trusts	161
3.4.2.3	Shipping Law.....	161
3.4.2.4	Trespassing.....	165
3.4.3	Conclusion.....	171
3.5	How is it used in Statute Law?	172
3.5.1	Criminal.....	172
3.5.2	Civil.....	173
3.5.3	Conclusion.....	175
3.6	How is it used in International Conventions similar to the Oil Convention?.....	176
3.6.1	The Warsaw Convention	176
3.6.1.1	Conclusion.....	184
3.6.2	Convention on Limitation of Liability for Maritime Claims 1976	185
3.6.2.1	Conclusion.....	193
3.6.3	Conclusion.....	194
3.7	Other Maritime Conventions where the term will appear in future.....	194
3.7.1	The International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances (HNS)	194
3.7.2	The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention).....	197
3.7.3	CMI/UNCITRAL Draft Instrument on Transport Law (10 th December 2001 and 8 th January 2002)	198
3.7.4	Conclusion.....	199
3.8	Conclusion.....	199

Chapter 4	How is Recklessness used in the International Convention on Civil Liability for Oil Pollution? What is it understood to mean?	204
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4.1	An attempt at construing how “recklessness” will be interpreted within the International Convention on Civil Liability for Oil Pollution.....	206
4.2	Conclusion.....	208

Chapter 5	Conclusion	209
Appendix I	Oil Spill Statistics	211
Appendix II	Causes of Spills	215
Appendix III	Major Oil Spills	216
Appendix IV	Clean-up Operations and Fate of Oil Spills	218
Appendix V	The Cost of Oil Spills	221
Bibliography		222
List of Cases		245
List of Abbreviations		253

Chapter 1

Introduction

Since the 1960's marine oil pollution has been an important topic, each major incident causing intense media attention and political debate.

Strangely enough, however, this flood of attention has not lapped the legal shores. The moon and the stars were protected from contamination by an international convention even before man set foot on the moon. Our seas however, which have been used as a transport route since time immemorial, were not afforded protection from oil pollution by means of a convention until 1969.

Nowadays 1.4 billion tons of oil are moved every year by some 3,000 tankers over an average distance of 4,700 nautical miles¹, but still civil liability for any oil pollution occurring as a result of such transport attracts very little academic interest.

As a result, despite the evident importance of the subject, little is known by few about civil liability for oil pollution.

If little is known about civil liability for oil pollution, even less is known about how such liability, ordinarily limited under the International Convention on Civil Liability for Oil Pollution, can be broken.

The tool employed by the Convention, along with other modern liability conventions, is that of recklessness as a requirement for breaking limitation.

The Convention as a whole is a finely balanced series of international compromises, but the most important of them is encapsulated in the term "reckless". While recklessness is generally a nebulous term, its politically charged stance makes it even more elusive. Therefore, despite its pivotal role

¹ Anderson, James "Clean Seas/Oil Pollution: An Independent Tanker Owner's View", Lecture, 6th National Marine Conference, Vancouver, October 1990

within the Convention, its meaning is unknown. No information from either a practical or academic source exists so far. Such a state of affairs is alarming because the size of an unlimited liability may potentially be vast given the nature of marine oil pollution. It is easy to imagine examples of major incidents, such as a major oil spill in the Bosphorus.

The question of the interpretation of recklessness within the International Convention on Civil Liability for Oil Pollution is also an inevitable one as at some stage in the future it will be presented to a court in one of the states who are party to the Convention. Given the nature of marine oil pollution, the question whether liability can be limited or whether the responsible party may have to face up to a potentially vast unlimited and undoubtedly uninsured liability, will be of the greatest importance.

Given the practical importance of oil pollution and civil liability for it, it is worthwhile seeking to understand the liability regime in general and recklessness specifically and how it could or ought to be interpreted within this regime.

It is therefore the aim of this paper to explain in detail the provisions concerning civil liability for oil pollution, to show the origins of these provisions, the intentions behind them, the political compromises they encompass and their practical significance. Having explored the civil liability regime and its limitation of liability, the focus will then lie on analysing the meaning of recklessness, proof of which will break limitation under the Convention. The aim of this analysis is to understand the meaning of recklessness and its political importance within the Convention and to enable us to draw conclusions therefrom as to how recklessness ought to be or will be interpreted within the context of the Convention, so that not only limited liability for oil pollution can be understood but also the potential for unlimited liability.

To this end the history of civil liability for oil pollution will be discussed. The provisions of the International Convention on Civil Liability for Oil Pollution, its 1976 and 1984 Protocol and the revised 1992 Convention will then be analysed in detail. Given the absence of direct information on how recklessness is to be interpreted within the Convention, the term recklessness will then be analysed in its historical context, within the criminal and civil law, within statute law, in the context of similar international conventions, and finally within similar maritime conventions. Based on the conclusions drawn as to the meaning of recklessness in other

legal contexts, an attempt is made to define how its meaning will be interpreted within the International Convention on Civil Liability for Oil Pollution.

All available sources such as academic writing, dictionaries, case-law from England and other comparable jurisdictions such as Australia and New Zealand as well as the travaux préparatoires, as suggested in *Fothergill -v- Monarch Airlines Ltd*², have been consulted. Information requests have been made to all major organisations involved in the day to day handling of civil liability for oil pollution and consultations with several individuals involved in the practical as well as legal side of oil pollution took place. Surprisingly, no direct information on the interpretation of recklessness in the International Convention on Civil Liability for Oil Pollution is available at all, which clearly shows the need for clarification on this point.

It is hoped that this analysis will further an understanding of this highly political and complex field of limited and unlimited civil liability for oil pollution and will help prepare those dealing with such incidents for the time when the question of recklessness within the Convention will come before the courts.

² *Fothergill -v- Monarch Airlines Ltd* [1980] 3 WLR at 209

Chapter 2

The International Convention on Civil Liability for Oil Pollution Damage

2.1 Before the 1969 Convention

Efforts to agree an international convention dealing with oil pollution started as early as 1926. In 1926 an International Maritime Conference was held in Washington during which an international convention in relation to oil pollution was agreed. Unfortunately, however this convention was spectacularly unsuccessful. It was never ratified by any state.

There then followed the Second World War during which navy action caused a fair amount of oil pollution, especially off the shores of the Atlantic Ocean, as vessels were damaged and sunk.

In March 1948 an international conference held by the United Nations in Geneva adopted the Convention on the International Maritime Organization (the IMO Convention), which formally established the Inter-Governmental Maritime Consultative Organisation (IMCO) to promote maritime safety and control and prevent pollution from ships.³ The name was changed in 1982 to International Maritime Organisation (IMO)⁴.

After the war, as a result of the economic increase which took place in the 1950's, larger quantities of oil were transported than previously and increasing concern about oil pollution led to the International Convention for the Prevention of Oil Pollution (OILPOL) 1954 which entered into force in 1958. OILPOL however only deals with intentional discharges and the question of enforcement is left to flag states. OILPOL has now been largely, though not entirely, superseded by the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL).

³ www.imo.org/home.asp. <http://untreaty.un.org/English/bible/titles/english.htm>. On 2.4.2004

⁴ For ease of reference this organisation will be referred to as the International Maritime Organization or IMO throughout

The IMO Convention entered into force in 1958. In the same year the first Conference of the United Nations Law of the Sea took place in Geneva. However, marine pollution was only superficially considered during this Conference.

In 1959 another international conference on oil pollution took place in Copenhagen. The recommendations of this Conference were to extend the effectiveness as well as the territory in which OILPOL would be effective. The majority of these recommendations were adopted during a further conference held in London in 1962.⁵

In 1965 IMO set up a special Subcommittee on Oil Pollution under the auspices of its Maritime Safety Committee. The purpose of this Subcommittee was, as the name implies, to address oil pollution issues. Over the years this Subcommittee has turned into the Marine Environment Protection Committee (MEPC), IMO's senior technical body on matters of marine pollution.⁶

While major oil pollution incidents continued to take place (IMO alone recorded 48 major marine oil pollution incidents between 1959 and 1969 in the territory of states which later became parties to the 69 Convention ⁷), it was not until the spectacular sinking of the "Torrey Canyon" in 1969 that the world was first alerted to the urgent necessity of taking action and dealing with the problem of marine oil pollution on the basis of an international convention. Such a response was by no means too soon, for, as Mr Muller is quoted to have said during one of the 1969 Convention meetings while congratulating the US on their second moon-landing: *"Recalling that the 1967 Treaty of the Law of Outer Space stipulated that contamination of the moon and the stars should be strictly prevented, I urge that the seas of our own planet could and should be similarly protected"*⁸. Having protected outer space against contamination by a convention two years before man for the first time set foot on the moon, it was clearly high time to protect the oceans thousands of years after man had discovered them as a route of transportation.

⁵ Gold, Edgar, Gard Handbook on Marine Pollution, Second Edition, published by Assuranceforeningen Gard, 1997, printed by B.A.S Printers Limited, p.30

⁶ www.imo.org/Environment/mainframe.asp?topic_id=231. On 21.3.2004

⁷ LEG/CONF/6 Official Records 1969, October 13, 1969

⁸ LEG/CONF/C.2/SR.10., Official Records 1969, p. 671

2.1.1 The “Torrey Canyon”

2.1.1.1 Factual aspect

The reason why the “Torrey Canyon” disaster caused such upheaval was not only because of the spectacular way in which the incident took its course, but also because it showed a size of potential damage hitherto unimagined. The expanding demand for oil in the industrialised nations during the 1960s meant that tanker capacity increased very rapidly. While a tanker of 45,000 tons was considered large in the mid 1950s, by the late 1960’s supertankers with a capacity of 300,000 tons and more were coming into service⁹. Another thing the incident also made very clear was that the available national legal tools were insufficient to deal with such situations.

The T/V “Torrey Canyon” was a 61,263 gross tonnes tanker under Liberian flag owned by Barracuda Tanker Corporation. The vessel was built in 1959 and was one of the new very large oil tankers that were constructed in the late 1950’s to early 1960’s. In 1965 she had been extended by fitting her with a new, larger, mid-section making her one of the largest vessels in the world at the time. She was on her way from Mena al Ahmadi, Kuwait, to Milford Haven under voyage charter to British Petroleum and loaded with a cargo of 119,328 tons of Kuwait crude oil¹⁰. Her crew of 36 as well as her master were Italian.



“Torrey Canyon, UK, 1967”¹¹

⁹ Royal Commission on Environmental Pollution. Chairman Sir Hans Kornberg, 8th Rep., Oil Pollution of the Sea, Presented to Parliament by Command of Her Majesty, October 1981, London, Her Majesty’s Stationary Office, Cmnd. 8358, p.60

¹⁰ Kuwait crude oil has an API gravity of 31.4 and a pour point of 0 degrees F°. Green Nature, Article, “Oil Spills: The “Torrey Canyon”, greennature.com. On 12.2.2004

¹¹ ITOPF webpage, www.itopf.com. On 20.3.2007

At 9.11 am on 18th March 1967, the “Torrey Canyon” went aground on Pollard Rock, part of the Seven Stones reef off the Scilly Islands. Many of her 18 cargo holds were damaged and holed in the process. As about 30,000 tons of oil were spilling from her hull the Royal Navy along with commercial vessels sprayed detergent in an attempt to minimise pollution. Salvors Bureau Wijismuller tried to refloat the vessel, but the fact that she was pivoting amidships on rocks in gale force wind conditions frustrated all their efforts. The vessel finally broke up on 26th March, first in two, later in three pieces. Bureau Wijismuller ended the salvage contract on 28th March, as there was nothing else they were able to do to save the vessel. The British Government thereupon gave orders to bomb the remainder of the vessel in an (not wholly successful) attempt to burn off the roughly 40,000 tons of oil still remaining on board. The “Torrey Canyon” was bombed with napalm and rockets and sprayed with aviation fuel for three days to ensure the oil would burn off.¹²

The vessel nevertheless polluted one hundred kilometres of English, and eighty kilometres of French coastline¹³ .

The cost of the incident by far exceeded the insured value of the vessel and cargo.

The total cost of the accident, excluding any ecological damage which cannot really be quantified, was roughly £14.24 million¹⁴. The insurance value of the “Torrey Canyon” and its cargo was roughly £6.49 million¹⁵. The insurance of the “Torrey Canyon” was carried to 55% by the American market and to 45% by the London market, two-thirds of which were underwritten by Lloyd’s¹⁶.

The disaster cost the United Kingdom roughly £4.70 million and France about £3 million. Following an arrest of the sister vessel “Lake Palourde”, the owners of the “Torrey Canyon” eventually settled out of court for a total compensation of £3 million to be divided equally between the United Kingdom and France¹⁷. The settlement sum however clearly shows the uncertainty England and France felt in respect of their legal position.

¹² Hooke, Norman, *Modern Shipping Disasters 1963-1987*, Lloyd’s of London Press Ltd 1989. Also: *Scilly News*, Newspaper

¹³ Chao, Wu, *Pollution from the Carriage of Oil by Sea, Liability and Compensation*

¹⁴ Hull: £5.89 million. Cargo: £0.60 million. Salvage Operation: £0.05 million. Clean-up and pollution prevention United Kingdom: £4.70 million. Clean-up and pollution prevention France and Guernsey: £3 million

¹⁵ Burrows, P., Rowling C. and Owen D., “The Economics of Accidental Oil Pollution by Tankers in Coastal Waters”, *Journal of Public Economics*, Vol. 3, 1974

¹⁶ Hooke, Norman, *Modern Shipping Disasters 1963-1987*, Lloyd’s of London Press Ltd 1989

¹⁷ *Oil Transportation by Tankers: An Analyses of Marine Pollution and Safety Measures*, Congress of the United States Office of Technology Assessment, July 1975, NTIS Order Number PB-244457

2.1.1.2 Legal aspect

There was, as already stated, no international convention in place to deal with this sort of incident. In the absence of international law, national law had to be relied on to deal with the issue of oil pollution. For the reasons set out below, national law was however ill equipped to deal with incidents such as the “Torrey Canyon”. To illustrate the shortcomings of the national law and underline why a convention was urgently needed, there follows an analyses of the national legal situations which the victims of the “Torrey Canyon”, being English and French, would have had to face in their jurisdiction.

2.1.1.2.1 Jurisdiction

On the facts of the case, several jurisdictions could potentially have been involved, because, as is usual in the shipping industry, the matter was highly international, involving a plethora of nationalities. The registered owner of the vessel was a Bermudan company. The vessel itself was registered in Monrovia and flew the Liberian flag. She had been time-chartered to the owner’s US holding company¹⁸ and voyage-chartered to the cargo owners, a British company. The master and crew were Italian. The victims of the pollution were British and French. To complicate matters even further, the vessel had grounded on the high seas outside both United Kingdom and French territorial waters.

At the time of the incident there was no international law in place which attributed jurisdiction to any specific national court, so, aside from any problems presented by the substantive law which shall be considered below, there were several jurisdictions which could potentially apply for the reasons given above. In addition, having established the competence of any national court, it was further unclear what law such court should apply.

The owners of the “Torrey Canyon”, denying all liability, simply relied on the fact that the vessel had grounded outside both United Kingdom and French territory, on the complex web of different nationalities and on the lack of any laws specifically dealing with this type of situation.

¹⁸ Oil Transportation by Tankers: An Analyses of Marine Pollution and Safety Measures, Congress of the United States Office of Technology Assessment, July 1875, NTIS Order Number PB-244457

2.1.1.2.2 English Law

2.1.1.2.2.1 Jurisdiction

For those seeking redress in the English courts, English law and jurisdiction could be established based on the general rule expressed in *Phillips -v- Eyre*¹⁹ that an action may be brought in the English courts for a wrong committed abroad if the wrong was actionable both in England and in the place where it was committed. Alternatively, based on *Boys -v- Chaplin*²⁰, English law and jurisdiction were applicable because the matter had most connection to England, being the place where the damage occurred and where the claimants were resident^{21 22 23}.

2.1.1.2.2.2 Tort

The next hurdle on the way to recovery of the loss was a basis on which liability could be founded. In the absence of any specific law dealing with civil liability for oil pollution²⁴, let alone a convention, the issue had to be dealt with employing the general rules of the common law. In the absence of a contractual relationship and as we are dealing with civil law matters here,

¹⁹ *Phillips -v- Eyre* (1870) LR QB 1

²⁰ *Boys -v- Chaplin* (1971) AC 356

²¹ These decisions have since been followed, for example in *Coupland -v- Arabian Gulf Oil Co.* (1983) 1 WLR 1136; *Johnson -v- Coventry Churchill International Ltd* (1992) 3 All ER 14; *Red Sea Insurance Co. Ltd -v- Bouygues SA & Ors* (1994) 3 All ER 749; *Edmunds -v- Simonds* (2001) WLR 1003

²² For an insight in what impact the Private International Law (Miscellaneous Provisions) Act 1995 had on the common law rule outlined above, please see Jonathan Harris (University of Birmingham), "Choice of Law in Tort – Blending in with the landscape of the conflict of laws? The Modern Law Review, January (1998) MLR Vol. 61 No.1, pp.s 33-55

²³ For procedural problems as to service outside the jurisdiction for actions in personam please see Civil Procedure Rules, Part 6 (formerly, and at the time of the "Torrey Canyon" incident the rules in question were contained in the Rules of the Supreme Court, Order 11). For actions in rem no service outside the jurisdiction can be effected in such cases as the court's right to hear the case depends on the physical presence of the ship - or a sister vessel - within United Kingdom territorial jurisdiction (John H. Bates, *United Kingdom Marine Pollution Law*, Lloyd's of London Press Ltd, 1985, p.7). An action in rem is therefore only useful where the incident occurred in territorial waters. It is furthermore only useful where there is still some value in the vessel remaining so as to make it worthwhile to arrest and sell it

²⁴ Devlin J at first instance in the Southport case (*Southport Corporation -v- Esso Petroleum Co. Ltd* [1956] A.C. 218, H.L. [1954] 2 QB 182, C.A. [1953] 3 WLR 773 QB) even then bemoaned the fact that there was no law dealing specifically with oil pollution in civil cases when he said at p. 223 "At first sight it may appear unreasonable that shipowners whose servants cause such damage in order to save their own property should not automatically have to pay for it. But Mr Nelson, for the defendants, submits that at common law there is no duty at all upon ships to avoid this type of damage. If Parliament considers that further legislation is necessary for the protection of the public, no doubt such legislation will be enacted".

the legal remedy should be sought in the law of torts²⁵. The torts most likely to deal with the issue are discussed below.

It should be born in mind at this stage, that even though an oil convention is now in place, any claims falling outside the Convention still have to be dealt with under the common law as described below. This would be the case for example where oil escaped from a dry cargo ship not capable of carrying oil, or from a vessel not carrying oil in bulk, or where the spill was caused by a type of oil not covered under the Convention. It is therefore worthwhile considering the common law position in detail here.

2.1.1.2.2.2.1 Esso Petroleum Co Ltd -v- Southport Corporation

Oil pollution under common law rules was considered in the case of *Esso Petroleum Co Ltd -v- Southport Corporation*²⁶.

On the 3rd of December 1950 the “Inverpool”, a small oil tanker of 680 tons gross, sailed from Liverpool to Preston with a cargo of oil. When she turned into the Ribble estuary she encountered heavy seas and her steering became erratic. Rather than turning back into the heavy seas, the master decided to hold course to Preston. While navigating the narrow and shallow channel the vessel ran aground on a revetment wall. The propeller was obstructed so that the engines could not be used to get her free. If she stayed where she was she was in danger of breaking up. In order to avert danger from both the crew and the ship, the master decided to discharge about 400 tons of oil to lighten the ship. The discharged oil was carried by the wind and tide to the claimants’ foreshore, which had to be cleaned at considerable cost.

The claimants pleaded trespass, private nuisance, public nuisance and negligence on the part of the master for a) carrying on into the estuary and b) jettisoning the cargo instead of seeking assistance from a pilot or tugs.

It was held that while there may have been a case to be made on unseaworthiness of the vessel, this was not pleaded. The pleaded torts of trespass, private and public nuisance and negligence²⁷ however would only have succeeded if negligence had been proven. As it was not proven, Southport lost the action.

²⁵ For the English law of Torts see Hepple & Matthews, *Tort, Cases and Materials*, 4th Edition, Butterworth & Co, London, 1992

²⁶ *Esso Petroleum Co Ltd -v- Southport Corporation* [1956] AC 218; revsd. [1954] 2 QB 182, CA; restored [1956] AC 218 HL

²⁷ For a more detailed analysis of these torts, please see below

2.1.1.2.2.2.2 Trespass

Trespass as an action dates back to the 13th century²⁸. Trespass to land is “the name given to that form of trespass which is constituted by unjustifiable interference with the possession of land”²⁹. Whether the discharge of oil into the sea or a navigable river, which is then carried to land, polluting the shore constitutes trespass was considered in *Southport Corporation -v- Esso Petroleum Co. Ltd*³⁰.

In the Court of Appeal, Morris L.J.’s opinion was that “*there may be trespass if something is thrown upon land or if the force of the wind or of moving water is employed to cause a thing to go on land*”³¹. This view was however dismissed by Lord Tucker in the House of Lords, who agreed with Denning LJ in the Court of Appeal, that trespass does not lie where oil is discharged into the sea and carried on land by the action of the wind and the waves as it requires a direct and willed - as opposed to an unwilled, accidental - interference with property rights. Even if trespass could lie in such a case it would, per Lord Tucker³² and Devlin J³³, only lie where the damage was caused negligently. He cited Lord Blackburn in *River Wear Commissioners -v- Adamson*³⁴ who said that property adjoining a public road, navigable river or the sea is liable to be injured by the users of such roads, rivers, or the sea and that any owner of property adjoining it has to “*bear his own loss unless he can establish that some other person is at fault, and liable to make it good*”. Establishing negligence however, is not always an easy task and in the Southport case the claimants failed to do so.

Even if the claimant could establish negligence, the defendant could still escape liability via the defence of necessity which is available in actions for trespass³⁵. In order to succeed with such a defence the defendant would have to show that the trespass was necessary to save human life and, in cases not involving third party claims, to save property, unless of course the situation

²⁸ Page-Keeton, W. (ed.), Prosser and Keeton on Torts, Fifth Edition, p. 29

²⁹ Rogers W.V.H., Winfield and Jolowicz on Tort, 14th Edition, p. 383

³⁰ *Southport Corporation -v- Esso Petroleum Co. Ltd* [1956] A.C. 218, H.L. [1954] 2 QB 182, CA [1953] 3 WLR 773 QB

³¹ *Southport Corporation -v- Esso Petroleum Co Ltd* [1954] A.C. at 204

³² *Southport Corporation -v- Esso Petroleum Co Ltd* [1956] A.C. 218, H.L. at 244

³³ *Southport Corporation -v- Esso Petroleum Co Ltd* [1956] A.C. 218, H.L. at 224, 225

³⁴ *River Wear Commissioners -v- Adamson* (1877) 2 App.Cas. 743,767

³⁵ *Mouse’s Case* (1608) Co Rep 63

had been brought about by the defendant's negligence in the first place³⁶, which as said above, is not always easy to establish.

2.1.1.2.2.2.3 Private Nuisance

As pollution interference is indirect, an action in nuisance is also possible. Private nuisance requires an interference with a person's right to use and enjoy their property. Devlin J held in the *Southport* case³⁷ that oil pollution from a vessel could constitute a private nuisance. He could not see why a difference ought to be made between the use of land or the use of water in such a way as to damage neighbouring property. However, Denning L.J. in the Court of Appeal³⁸ held that such action would not constitute a private nuisance because in his opinion a private nuisance had to emanate from land. Lord Radcliff in the House of Lords³⁹ also voiced the opinion that this would not constitute a private nuisance. Devlin J, as he then was, made a valid argument because surely water is used in the same manner as land for travel and transport. The problem with this argument however is, that a nuisance, conceptually speaking, has to be, as expressed by Talbot J in *Cunard -v- Antifyre Ltd*⁴⁰ an "interference for a substantial length of time", or as per *Attorney General -v- Tod-Heatley*⁴¹ "periodic". An oil pollution incident however is neither periodic nor does it subsist over a substantial length of time. It is one incident that happens more or less quickly and is then over and done with. It is therefore not entirely clear whether an action in private nuisance would lie.

Assuming a claim in private nuisance would be possible, however, the claimant would first have to show that he had a proprietary interest in the land or chattel⁴². Often however, those affected have no proprietary rights, such as where damage to public beaches is complained of. Private nuisance would therefore not be helpful in all types of claim.

A recent pollution case however seems to indicate that this problem may be avoided by bringing a claim under the Human Rights Act 1988. In *Nora*

³⁶ Devlin J, p.226 and Earl Jowitt, p.235 in *Southport Corporation -v- Esso Petroleum Co Ltd*

³⁷ *Southport Corporation -v- Esso Petroleum Co Ltd* [1956] A.C. 218, H.L at 225

³⁸ *Southport Corporation -v- Esso Petroleum Co Ltd* [1954] 2 QB 182 at 196

³⁹ *Southport Corporation -v- Esso Petroleum Co Ltd* [1956] A.C. 218, H.L at 242

⁴⁰ *Cunard -v- Antifyre Ltd* [1933] 1 KB 551

⁴¹ *Attorney General -v- Tod-Heatley* [1897] 1 Ch 560

⁴² The case of *Halsey -v- Esso Petroleum* [1961] 1 WLR 683 suggests that damage to an occupier's chattels would also be recoverable. This does seem logical as it would be arbitrary to allow a claimant to recover e.g. for the cleaning of his land but not the cleaning of a boat or other chattel which was polluted as a result of the same incident

*Mckenna & Ors -v- British Aluminium Ltd*⁴³, British Aluminium sought to strike out an application by a number of children claiming that emissions, noise pollution and invasion of privacy from the defendant's neighbouring factory had caused them mental distress and physical harm. British Aluminium sought to have the claim struck out inter alia on the grounds that the claimants had no proprietary interest in their homes. It was however held that their claim could come under Art. 8.1 of the European Convention on Human Rights which safeguards respect for private and family life and that the claim should therefore not be struck out. The judge further found that the Human Rights Convention may not be served appropriately by making such a liability limited.

It therefore seems that, at least as concerns cases that occurred from the date when the Convention was implemented, Human Rights provisions may, in certain circumstances, save the day.

For an action in private nuisance to succeed, the damage must furthermore have been foreseeable by the wrongdoer⁴⁴. As Lord Goff in *Cambridge Water Company Ltd -v- Eastern Counties Leatherworks plc*⁴⁵ remarked "*Foreseeability of harm is.. a prerequisite of the recovery of damages in private nuisance, as in the case of public nuisance*".

An example in which damage from oil pollution has been held to be foreseeable is the case of "*The Wagon Mound*"⁴⁶. The "Wagon Mound" was taking in bunkers in Sydney harbour near the claimant's ship-repair wharf. Oil was spilt during the bunkering process. Sparks from welding works undertaken in the yard ignited the escaped oil causing a fire which damaged the wharf and equipment belonging to the ship-repairer. It was held that this type of damage should have been foreseeable by a reasonable ship engineer. It is clear from this case that foreseeability is interpreted very widely by the courts when it comes to pollution cases.

Equally, in the *Southport* case Devlin J had also found that the damage which occurred had been foreseeable. He held that: "*He [the master] must be aware that if in an estuary he gets himself into a position where he has to jettison oil, it is very likely to reach some part of the coast*"⁴⁷.

⁴³ Nora Mckenna & Ors -v- British Aluminium Ltd TLR 25/4/2002

⁴⁴ Hill, Christopher , *Maritime Law*, 5th Edition, LLP, 1998

⁴⁵ *Cambridge Water Company Ltd -v- Eastern Counties Leatherworks plc* [1994] 1 All ER 53

⁴⁶ "*The Wagon Mound*" [1961] 1 Lloyd's Rep.1.

⁴⁷ *Southport Corporation -v- Esso Petroleum Co Ltd* [1956] A.C. 218, H.L at 228

Private nuisance is also, according to Devlin J in the *Southport* case⁴⁸, subject to the same two defences as trespass⁴⁹, namely a) that proprietors of land lying close to publicly navigable waterways have to bear their losses themselves unless it can be shown that the damage was done negligently, and b) the defence of necessity.

2.1.1.2.2.2.4 Public Nuisance

Public nuisance, per Romer LJ, in *Attorney General -v- P.Y.A. Quarries Ltd*, is a nuisance which “*materially affects the reasonable comfort and convenience of life*” of a sufficiently large part of the population⁵⁰. What constitutes a sufficiently large part of the population is a question of fact in each case⁵¹. Denning LJ held in the same case that “*a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large*”⁵².

It was held by Devlin J in *Southport Corporation -v- Esso Petroleum Co Ltd*⁵³ that whether an action in public nuisance would lie in cases of oil pollution “*must depend upon whether the plaintiff’s property is sufficiently proximate to the highway [which he earlier on in the judgment equated to waterway] to be affected by the misuse of it*”.

As in the case of private nuisance, the damage also has to be foreseeable. To succeed, a claimant furthermore has to show that he has suffered special damages, personal to him. Actions in public nuisance are furthermore subject to the two defences mentioned above.

2.1.1.2.2.2.5 Rylands -v- Fletcher

This rule was not considered in the *Southport* case. It is a tort in its own right and was developed in the case of *Rylands -v- Fletcher*⁵⁴.

The facts of the case were that Mr Rylands had a reservoir constructed on his land. When it was filled with water the water flowed into Mr Fletcher’s mine

⁴⁸ *Southport Corporation -v- Esso Petroleum Co Ltd* [1956] A.C. 218, H.L. at 224-225

⁴⁹ see above

⁵⁰ Court of Appeal in *Attorney General -v- P.Y.A. Quarries Ltd* [1957] 2 W.L.R. 770, CA at 780

⁵¹ *Attorney General -v- P.Y.A. Quarries Ltd* [1957] 2 W.L.R. 770

⁵² Denning LJ ([1957] 2 W.L.R. 770, CA at 785

⁵³ *Southport Corporation -v- Esso Petroleum Co Ltd* [1956] A.C. 218, H.L. at 225

⁵⁴ *Rylands -v- Fletcher* (1868) L.R. 3HL 330

because the reservoir had been built over disused mine shafts. It was held by Mr Justice Blackburn in the Exchequer Chamber that: “*We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape*”⁵⁵. The rule is thus one of strict liability.

The rule was however restricted by Lord Cairns in the House of Lords⁵⁶, who held that it would only apply where the use of the land which created the danger was “non-natural”. What constitutes “non-natural” was defined by Lord Moulton in *Rickards -v- Lothian*⁵⁷ as being “*some special use bringing increased danger to others, and not merely the ordinary use of land or such use as is proper for the general benefit of the Community*”.

It would probably be near impossible to show that the carriage of oil by sea was a non-natural or exceptionally hazardous use of the sea. Even leaving aside the comments in the Southport case that the sea was a form of highway or transportation medium⁵⁸, the transportation of oil by ship is commonplace and for the “general benefit of the Community” and is by no means a non-natural or exceptionally hazardous use.

To fall under the rule in *Rylands-v-Fletcher* the damage furthermore has to be foreseeable⁵⁹.

2.1.1.2.2.2.6 Negligence

Negligence, which has been held to be applicable to cases of pollution caused by vessels⁶⁰ is a tort in its own right and in cases of oil pollution probably the most realistic basis on which to establish liability. However, it has to be born in mind that a finding of negligence will not provide a remedy for distress, annoyance, inconvenience and physical symptoms short of personal injury⁶¹.

⁵⁵ *Fletcher -v- Rylands* (1868) L.R. 1 Ex. 265 at 270

⁵⁶ *Rylands -v- Fletcher* (1868) L.R. 3HL 330

⁵⁷ *Rickards -v- Lothian* [1913] AC 263 at 279

⁵⁸ *Lord Tucker, Southport Corporation -v- Esso Petroleum Co Ltd* [1956] A.C. 218, H.L. at 244

⁵⁹ *Cambridge Water Company Ltd -v- Eastern Counties Leatherworks plc* [1994] 1 All ER 53

⁶⁰ For example: *The Lord Bailiffs and Jurats of Romney Marsh -v- Trinity House Corporation* (1870) 22 L.T. 446; *Southport Corporation -v- Esso Petroleum Co Ltd* [1956] A.C. 218, H.L., *The Wagon Mound (No.2)* [1966] 2 All ER 709 (P.C.)

⁶¹ *Hicks -v- Chief Constable of Yorkshire* (1992) 2 All ER 65, *Nora Mckenna & Ors -v- British Aluminium Ltd* TLR 25/4/2002

In order to establish negligence it has to be established that the defendant owes a duty of care⁶² and that he has breached that duty⁶³. The master of a vessel has a duty to act in such a manner as any officer of competent skill and experience in command would do⁶⁴ ⁶⁵. It is furthermore necessary that a loss has occurred which was caused by the defendant's act or omission⁶⁶. The owner is responsible for acts done by his servants or agents if committed during the course of their employment⁶⁷. Negligence is also subject to the defence of necessity as above.

2.1.1.2.2.2.7 Unseaworthiness

This was not pleaded in the *Southport* case. It is a form of negligence. An owner who lets a vessel sail in an unseaworthy state is negligent⁶⁸. In the *Southport* case his Lordships in the House of Lords hinted that this might have been an argument on which the claimants may have succeeded had they investigated and pleaded it⁶⁹.

2.1.1.2.2.3 Limitation of liability

Any recovery in the English courts which a claimant would have achieved prior to the 1969 Convention would, moreover, have been limited under s.503 of the Merchant Shipping Act 1894 to £8 per net register ton of the ship for losses other than personal injury. In the case of the "Torrey Canyon", liability would therefore have been limited to roughly £1,430,000, a sum

⁶² For a definition of "duty of care" see *Donoghue -v- Stevenson* H.L. [1932] All ER 1 at 580, Lord Atkin, "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".

⁶³ The test to be applied is what a reasonable and prudent man with the qualifications of the defendant would have done. If the defendant acted below that standard he has breached his duty of care

⁶⁴ *Inman -v- Reck* (1868) L.R. 2 P.C. 25

⁶⁵ For evidence that the master of the "Torrey Canyon" may have acted negligently see: Log Books of the "Torrey Canyon", "The Torrey Canyon Supertanker Disaster", Department of Human Sciences, Loughborough University, Publication of Research School, The "Torrey Canyon's Last Voyage – An Ergonomic Commentary in Six Parts, Department of Human Sciences, Loughborough University. The inquiry held by the Liberian Government came to the conclusion that the master had been responsible for the event

⁶⁶ In cases of pollution see: *The Daressa* [1971] 1 Lloyd's Rep. 60

⁶⁷ *The Druid* (1842) 5 L.T. 61

⁶⁸ *The European* (1885) 52 L.T. 868; *Steel -v- State Line SS Co. Ltd* (1877) 33 L.T. 333; *The Tatjane* (1911) A.C. 194; *The Louis Shield* [1958] 1 Lloyd's Rep 606; *Smith Hogg Co Ltd -v- Black Sea & Baltic General Ins. Co. Ltd* [1940] 3 All ER 405

⁶⁹ It is established English law that a court cannot hear an argument which has not been pleaded by the parties

which would not even have covered half of the British Government's expenses.

The International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 (the 1957 Convention) to which the United Kingdom later became a party had not come into force at the time of the "Torrey Canyon" casualty. This Convention would have entitled owners, charterers and managers to limit their liability for all types of civil liability provided the loss was not due to their fault or privity. The 1957 Convention entered into force on 31st May 1968, more than a year after the "Torrey Canyon" incident.

The United Kingdom was not a party to the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-Going Vessels.

2.1.1.2.3 French law

2.1.1.2.3.1 Jurisdiction

Under French law the question of jurisdiction was somewhat clearer. Pursuant to Art. 14 of the French Civil Code a French citizen may bring a claim in the French courts even if the defendant has no relation with France⁷⁰.

2.1.1.2.3.2 Article 1382 of the Civil Code

Art. 1382 of the Civil Code would have been of limited use in cases of oil pollution, as tortuous liability under this Article would only attach where the owner of the vessel was personally at fault. Where the master is negligent it is possible to make a claim against him. Given the size of oil pollution claims however, such an exercise is likely to be pointless as the master would not have the financial means to make good the damage. It would certainly have been pointless in the case of the "Torrey Canyon".

2.1.1.2.3.3 Article 216 of the Commercial Code of 1807

Liability could have attached under Art. 216 of the Commercial Code of 1807 which makes the owner liable for the master's negligence, but liability would have been limited to the value of the vessel and the freight. Worse still, Art. 216 did permit the owner to abandon the vessel and freight, in which case all

⁷⁰ French case-law has explicitly held that Article 14 applies to all types of claims. Court de Cassation Civ. 1^{er} Feb. I, 1955, J.C.P., 1955 T. II, 8657

liability would have ceased. In cases where the vessel was a worthless wreck (like the “Torrey Canyon”), and where freight may not be paid in such circumstances, such as where the charterparty stipulates for payment on delivery, and in the face of the potential size of claims, owners would have been very likely to choose the abandonment route.

2.1.1.2.3.4 Art. 1384, §1 of the Commercial Code

A further possible basis for liability would have been Art. 1384, §1 of the Commercial Code of 1807 which established liability for things which are in a person’s custody. It was however unclear whether Art. 216 could take precedence over Art. 1384, in which case the owner could, again, merely have abandoned vessel and freight and thus escaped any further liability.

2.1.1.2.3.5 Limitation of liability

Liability in France could, at the time of the “Torrey Canyon” incident, have been limited to the actual value of the vessel under the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-Going Vessels (Art. 1.1), unless the actual fault or privity of the owner could have been proven (Art.2.1).

2.1.2 Conclusion

A problem common to both jurisdictions would have been the simple practicality of enforcement of any potential recovery against the owners. In cases such as the “Torrey Canyon” where no assets are within the jurisdiction, enforcement can be almost impossible in practice, meaning no recovery for the victims.

Given the uncertainty of the legal situation, the British and French Governments both ended up arresting a sister vessel of the “Torrey Canyon” and reaching an out of court settlement with the owners. The United Kingdom and France jointly accepted a payment of £3 million for losses of £7.7 million. The size of the accepted settlement payment clearly reflects that neither government felt their claim to be founded on particularly strong legal grounds.

The “Torrey Canyon” catastrophe had made abundantly clear that legislation was needed to deal with situations of this kind. The very complex web of nationalities involved in the incident was and is typical for the shipping

industry and as such it was clear that this type of scenario was by no means unusual. Such incidents tend to be international and so is the shipping and oil industry, hence an international convention was needed. The problem could not be dealt with effectively under national law. It is also generally preferable to deal with environmental matters by way of international conventions rather than at national law as each country will have different ideas of what constitutes effective protection of the environment, and, sadly enough those ideas are often influenced by economic considerations, as can be seen for example in the case of the exploitation of oil resources in shelf waters off Russia's Sakhalin Island.⁷¹ International conventions are slightly less susceptible to economic considerations as a consensus has to be reached by different countries each with slightly different priorities. The subject matter itself also means that international legislation is necessary as environmental problems do of course not stop at national borders.

The "Torrey Canyon" incident had thus made it apparent that no effective legal tools - national or international - were available to take recourse against the polluter for the cost of the pollution. This problem was exasperated by the fact that following an incident an owner is unlikely to have any assets to pay for the damage incurred because of the practice of one-ship companies, and because in many countries there is still the abandonment system of limitation of liability (i.e. abandonment of vessel and freight). Also, following the "Torrey Canyon" there was considerable public pressure to bring about change. Towards the end of the 1960's the public had started to be concerned about environmental protection generally and the need for protection against oil pollution of the sea, fuelled by media attention, was a specific concern following the "Torrey Canyon" disaster. Politicians themselves were willing to bring about legislation having realised that states would have to pay for cleaning up their coast-lines but that there was no legal framework in place which ensured their reimbursement. Tanker owners were also interested in setting up a convention as they feared that otherwise governments would regulate their everyday trade for example by only allowing them to navigate along certain routes etc.⁷² They were also quite keen to show their good-will and maintain a positive public image. This was also why they set up the voluntary compensation fund TOVALOP even prior to the Conventions. It was also in the interest of shipowners to have a sure

⁷¹ From Concept to Design: Creating an International Environmental Ombudsperson, A Project of The Earth Council, San José, Costa Rica, Conflicts over International Oil and Gas Development off Sakhalin Island in the Russian Far East: A David and Goliath Tale, Erika Rosenthal, with Dr. Vera L. Mischenko, Ecojuris Institute, Moscow, Project Director, The Nautilus Institute for Security and Sustainable Development, Berkeley, California, August 1998

⁷² Herber, Dr., Rolf, Seehandelsrecht, Systematische Darstellung, Walter de Gruyter 1999, p.190

legal framework which enabled them to calculate their potential liability exposure in advance. This certainty also made the risk insurable. A certain legal framework was furthermore of some benefit to the economy which reacts to catastrophes such as major oil spills and is more stable if a safety net is in place to compensate the damage. For all these reasons it was therefore clear that international legislation, or more precisely a convention, was needed and wanted to deal with this type of situation.

Both the United Kingdom and France therefore raised the matter of oil pollution with the Inter-Governmental Maritime Consultative Organization. Shortly thereafter IMO presented its conclusions in a paper entitled “Conclusions of the Council on the Action to be Taken on the Problems Brought to Light by the Loss of the “Torrey Canyon”⁷³. The conclusions of the Council were that the following questions had to be looked into:

“All questions relating to the nature (whether absolute or not), extent and amount of liability of the owner or operator of a ship or the owner of the cargo (jointly or severally) for damage caused to third parties by accidents suffered by the ship involving the discharge of persistent oils or other noxious or hazardous substances and in particular whether it would not be advisable

- (a) to make some form of insurance of the liability compulsory;*
- (b) to make arrangements to enable governments and injured parties to be compensated for the damage due to the casualty and the costs incurred in combating pollution of the sea and cleaning polluted property”⁷⁴*

IMO set up an ad hoc Legal Committee (which has since become permanent and meets twice a year to deal with any legal issues raised at IMO) to deal with the above issues and create a draft for a convention⁷⁵.

At the same time the Comité Maritime International (CMI)⁷⁶ formed a working group to consider the actions which should be taken. While the CMI were already working on the oil pollution problem, the Legal Committee of IMO were still discussing whether they wanted the CMI to participate or not⁷⁷.

⁷³ IMCO-Documents C/ES.III/5 dated 8.5.1967

⁷⁴ IMCO-Documents C/ES.III/5 dated 8.5.1967, p.16

⁷⁵ <http://www.imo.org/home.asp>. On 17.3.2004

⁷⁶ For further information on this organisation please see their web-page at www.comitemaritime.org/histo/his2.html. On 18.8.2003

⁷⁷ Gehring, Thomas, Jachtenfuchs, Markus, Haftung und Umwelt, Interessenkonflikte im internationalen Weltraum-, Atom- und Seerecht, Völkerrecht und internationale Politik, Herausgegeben von Prof. Dr. Günther Doeker LL.M., PhD, Band 7, Verlag Peter Lang GmbH, Frankfurt am Main 1988, p. 151

The working group was chaired by Lord Devlin⁷⁸. The first report of the chairman recommended strict liability as being the “modern tendency in English law”⁷⁹. The group also suggested a scheme of compulsory insurance⁸⁰. In the opinion of the working group, the amount of insurance should be measured according to the capacity of the market⁸¹.

In July 1968 the first draft of the CMI working group⁸² made the following recommendations based on proposals from the national Associations:

- a) A separate oil pollution convention should be set up which would make the owner liable, based on fault.
- b) The owner should be able to limit his liability depending on the ship’s tonnage.

The national Associations were against compulsory insurance. It was said that such insurance would not be possible in practice⁸³.

Even though the CMI draft lacked detail, it nevertheless formed a basis for discussion during the Conference which followed in 1969.

Once IMO’s Legal Committee had prepared and circulated a draft convention, a Conference to finalise and adopt the convention was held in November 1969 in Brussels⁸⁴. The resulting convention was the International Convention on Civil Liability for Oil Pollution Damage 1969, which was adopted on 29th November 1969 and entered into force on 19th June 1975.

⁷⁸ Gehring, Thomas, *Jachtenfuchs, Markus, Haftung und Umwelt Interessenkonflikte im internationalen Weltraum-, Atom- und Seerecht, Völkerrecht und internationale Politik*, Herausgegeben von Prof. Dr. Günther Doeker LLM, PhD, Band 7, Verlag Peter Lang GmbH, Frankfurt am Main 1988, p. 148

⁷⁹ CMI 1968, BD I TC-1 para 12

⁸⁰ CMI 1968, BD I TC-1 para 7

⁸¹ CMI 1968, BD I TC-1 paras 24-29

⁸² CMI 1968, Bd. IV, TC-22

⁸³ LEG III/SR.8, p.8-9

⁸⁴ For information on IMO’s process for adopting conventions please see IMO’s web p. at www.imo.org

2.2 The International Convention on Civil Liability for Oil Pollution 1969

2.2.1 Introduction

In 1969 the International Maritime Organisation convened a conference (hereafter referred to as the 1969 Conference) held in Brussels, at which, on 29th November 1969, the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC) was adopted.

Discussions were based on a draft produced by IMO and proposals made by the CMI.

In the United Kingdom, the Convention entered into force on 19th June 1975, having been signed on 29th November 1969 and ratified on 17th March 1975. It was contained in the Merchant Shipping (Oil Pollution) Act 1971 c.59.

In Germany the Convention entered into force on 19th June 1975, having been signed on 29th November 1969 and ratified on 17th March 1975. It was incorporated into German law as the „Internationales Übereinkommen v. 29.11.1969 über die zivilrechtliche Haftung für Ölverschmutzungsschäden“ – shortened to „ÖlHÜ“⁸⁵. In 1992 a Protocol⁸⁶ to the Convention was agreed. From 16th May 1998, Parties to the 1992 Protocol ceased to be Parties to the 1969 CLC by a mechanism of compulsory denunciation contained in the 1992 Protocol. Prior to the 1992 Protocol being adopted the 1969 Convention had had 98 member states, which for a maritime convention is a truly remarkable number⁸⁷. The popularity of the Convention is partly due to the fact, as Gold puts it, that it basically provides states with “...*“free” environmental insurance*” so that “*it can be said that it would be almost negligent for any coastal state not to have accepted this Convention*”⁸⁸. The 1969 Convention has however not been replaced entirely by the Protocol. As at 31st March 2003, the 1969 Convention still had 46 contracting states, representing 4.91% of world tonnage, as many states have not yet ratified the 1992 Protocol⁸⁹. The 1992 Protocol however is

⁸⁵ BGBI 1975 II 301, 305

⁸⁶ For details on this Protocol please see below

⁸⁷ Herber, Dr., Rolf, Seehandelsrecht, Systematische Darstellung, Walter de Gruyter 1999, p.37

⁸⁸ Gold, Edgar, Gard Handbook on Marine Pollution, Second Edition, published by Assuranceforeningen Gard, 1997, printed by B.A.S. Printers Limited, p.223

⁸⁹ States which have not yet ratified the 1992 Protocol are, for example, Brazil, Costa Rica, Kuwait and Malaysia

very well established. On the same date the 1992 Protocol had 92 contracting states representing 91.54% of world tonnage⁹⁰.

The purpose of the 1969 Convention was to provide adequate compensation for persons suffering damage, including, according to *Black -v- The Braer Corporation*⁹¹, in cases of personal injury. This was to be achieved via an international set of rules determining liability for such pollution. In the case of *Black -v- The Braer Corporation* a farmer claimed damages on account of stress, anxiety and depression caused to him by the contamination occasioned by the grounding of the “Braer” off the Shetland Islands on 5th January 1993.



“Braer”, UK, 1993⁹²

It was held that “damage” under the Convention includes physical injuries and even psychological conditions such as stress, anxiety and depression from oil pollution resulting from the escape or discharge of oil from vessels carrying oil in bulk as cargo.

The Convention is empirical in character. It was triggered by the “Torrey Canyon” and is clearly a reaction to this specific incident. This can be seen for example by the fact that, despite suggestions that the Convention should

⁹⁰ IMO database: Status of Conventions.
http://www.imo.org/Conventions/mainframe.asp?topic_id=248. On 31.3.2003. Brown, Ben, Developments in oil pollution law, S. & T.L.I. (Shipping and Transport Lawyer) 2002, 3(1)

⁹¹ Outer House 30th July 1998, Scots Law Times 39, 3.12.99 and 2000 Dir. Mar. 999

⁹² ITOPF webpage, www.itopf.com. On 20.3.2007

deal with all forms of oil pollution,⁹³ it only deals with oil pollution from ships. This is a regrettable fact considering that even at that time oil pollution from vessels amounted to only 10% of marine pollution⁹⁴. The other causes of oil pollution are not remedied by the Convention.

At the Conference several delegations had even wanted to go further and had expressed the wish for the Convention to be extended beyond oil pollution. The delegation of Kuwait for example suggested the Convention should be extended to cover “oil or other substances causing pollution to the sea and coastline”⁹⁵. The Swedish Government agreed and also wanted to extend the Convention to other hazardous matter.

The delegation of the Netherlands however voiced the concern shared by many delegations at the Conference that for pragmatic reasons the Convention could not be extended to other noxious and hazardous matters⁹⁶. It was felt that there would not be sufficient time to agree on a general anti-pollution convention. It should be born in mind that there was considerable public pressure to agree at least a convention dealing with oil pollution caused by oil tanker casualties like the “Torrey Canyon”, such that it can be assumed that none of the delegations seriously wanted to jeopardise the agreement of such a convention in return for dealing with the wider problem. Also, as pointed out by Liberia and West-Germany, transport conditions for oil are different to those for other substances making it difficult to bring them together in one convention. It was furthermore hoped that the 1969 Convention would be used as an example for any later conventions dealing with pollution⁹⁷. This was indeed the case as both the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996⁹⁸ and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001⁹⁹ are closely modelled on the Oil Pollution Convention.

A test vote taken at the Conference made clear that the majority wanted to limit the Convention to pollution caused by oil¹⁰⁰. It was therefore agreed that

⁹³ The Canadian delegation amongst others advocated this view. See LEG/CONF/SR.2, Official Records 1969, p. 85

⁹⁴ Gold, Edgar, *Gard Handbook on Marine Pollution*, Second Edition, published by Assuranceforeningen Gard, 1997, printed by B.A.S. Printers Limited, p.33.

⁹⁵ LEG/CONF/SR.2, Official Records 1969, p.85

⁹⁶ LEG/CONF/C.2/1, Official Records 1969 p.439

⁹⁷ LEG/CONF/C.2/1, Official Records 1969 p.439

⁹⁸ not yet in force

⁹⁹ not yet in force

¹⁰⁰ LEG/CONF/C2/WP1, Official Records 1969, p.617

the CLC should restrict itself to pollution caused by (specific types of) oil and that the problem of pollution by other substances would be subject to a separate convention to be considered by IMO in the future.

The fear leading up to the 1969 Convention that a convention dealing with all types of polluting matter would take too long to agree was indeed well founded. Efforts were made to agree such a convention separately in the form of the Convention on the Carriage of Hazardous and Noxious Substances by Sea 1996 (HNS). Work on the HNS Convention was started shortly after the 1969 Convention, but to this day it has not come into force.

The pragmatic, problem focused, approach taken by the Convention is very much an English common law approach. The common law traditionally reacts in a pragmatic manner to specific problems rather than dealing with an issue or a problem area as a whole.

This typical problem-specific, pragmatic common-law approach to the problem taken by the 1969 Convention and its later Protocols was stressed by the Secretary General of IMO, Mr. Srivastava, during the 1984 Conference when he said that it was IMO's experience that international regulations which dealt with genuine rather than theoretical problems prescribing the highest practicable rather than the highest possible requirements, gained swift acceptance by states and were readily implemented both by governments and by the shipping and maritime industries¹⁰¹. The CLC's secret of success may therefore in fact lie in its pragmatic approach.

The Convention is clearly not only in style but also in approach a common law convention.

The Convention is based on four main principles:

- 1) Liability for oil spills should rest with the owner
- 2) Liability is strict. There are only very few exceptions
- 3) Liability can be limited to an amount relative to the ship's tonnage. Limitation becomes unavailable where the owner is personally at fault
- 4) Insurance is compulsory

¹⁰¹ LEG/CONF.6/SR.1, Off Rec. 84, Vol. 3, p.160

The 1969 Convention and the above principles represent a compromise which could only be agreed on condition that the Convention would be combined with a second convention under which compensation would be paid out up to a certain maximum in cases in which the damage exceeded the liability limit or where the owner did not or could not pay compensation. This second convention would establish a fund, which would be funded by oil importers. The choice fell on importers rather than exporters because it would be simpler to assess those oil quantities for contribution purposes which are received in Member States. It also meant that the contribution burden was ultimately born by the consumer in industrialised countries.

This solution seems appropriate as the receivers are the people who require the oil to be carried and who therefore initially create the risk – although of course they have no means of controlling the risk.

The decision to set up such a second convention was made at the 1969 Conference and put into the form of a Resolution¹⁰². IMO was given the task of realising the convention. The resulting instrument was the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Convention 1971). The Fund Convention will not be discussed in any detail here, as this would go beyond the ambits of this thesis. The Fund Convention furthermore concerns itself with compensation whereas this thesis deals with liability.¹⁰³

2.2.2 The provisions of the 1969 Convention

In the following the individual provisions of the Convention shall be discussed, why they were included, what they intended to achieve, what they did achieve and what they failed to achieve. Only the salient provisions of the Convention shall be discussed here, leaving out those provisions which are either self-explanatory or outside the scope of this thesis, which concerns itself with the question of liability.

¹⁰² Resolution on the Establishment of an International Compensation Fund for Oil Pollution Damage, p.75. Drucksache 7/2299

¹⁰³ For more information on the Fund Convention see, for example, Gold, Edgar, *Gard Handbook on Marine Pollution*, Second Edition, published by Assuranceforeningen Gard, 1997, printed by B.A.S. Printers Limited; Gauci, Gotthard, *Oil Pollution at Sea, Civil Liability and Compensation for Damage*, John Wiley & Sons, 1997; Chao, Wu, *Pollution from the Carriage of Oil by Sea: Liability and Compensation*, Kluwer Law International, 1996

2.2.2.1 The definition of “ship”

Art. I (1) of the 1969 Convention defines “ship” as a “*sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo*”.

The Convention is therefore only applicable to ships carrying oil in bulk and as cargo.

Pollution from residues still on board a vessel in ballast, such as slops, is therefore not included even though such pollution may be significant.

Pollution from the bunkers of a vessel not carrying oil in bulk as cargo is also not included. This lacuna is very significant as bulk carriers can contain significant amounts of fuel oil, a spill of which could lead to extensive pollution. An example of such an incident was the grounding of the “Olympic Bravery”. On the 24th of January 1976, the Liberian oil tanker “Olympic Bravery”, on ballast voyage from Brest to Foresund, suffered a series of engine failures. In the vicinity of Ushant island in Brittany, the vessel attempted to anchor but the anchor failed and the vessel ran aground. Tugs were unable to refloat her. A gale then broke the ship up and 1,200 tonnes of oil were spilled. The 1969 Convention did not apply because the oil which escaped and caused the pollution was bunker oil rather than oil carried as cargo.

Pollution from laden tankers’ bunkers however was included in the Convention¹⁰⁴ so as to avoid any arguments as to the source of the pollution in cases of spills¹⁰⁵.

During the Conference, France had requested the inclusion of pollution by bunker oil in general on the grounds that a vessel’s bunkers can exceed 5,000 tons and pollution from this source should therefore be taken serious¹⁰⁶. Australia had suggested extending the Convention to cover at least vessels carrying more than 2,000 tons of oil as bunkers¹⁰⁷.

The French position has to be preferred and the Convention should have been extended to include pollution of all types of bunker oil spills as it

¹⁰⁴ see definition of “oil” below

¹⁰⁵ LEG/CONF/C.2/WP.7, Official Records 1969, p.565; LEG/CONF/C.2/SR.14, Official records 1969, p.713

¹⁰⁶ LEG/CONF/C.2/WP.1, Official Records Book 1969, p.616

¹⁰⁷ LEG/CONF/4/Add.1, Official Records 1969, p.503

makes little difference to pollution whether the oil carried was intended for use by the ship itself or for use by a third party at its destination. Also, chemically speaking, bunker oil is exactly the type of oil the Convention deals with as it is persistent oil. To make a distinction based on which tank the polluting oil came from seems very arbitrary. There would arguably be a difference between bunker and cargo oil in terms of the compensation paid out by the Fund which in turn is fed by import levies imposed on oil importers, because the oil covered by the Convention is cargo, sold or to be sold to a refinery or retailer at a profit, whereas bunker oil has already been passed along that chain and been sold to the end user. However, the ethical reason for requiring payment from the oil industry, i.e. because they profit from dealing in oil, surely is true in both cases. Moreover, in terms of pollution, it should be kept in mind that a large part of pollution claims stem from bunker oil spills and that such spills often occur near shore. The physical nature of bunker oil furthermore makes clean-up operations especially difficult and damage expensive.

It was the intention of the international community to deal with pollution from bunker oil in a separate convention. However, to this day bunkers are not covered neither under the CLC Convention nor under the Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention), because the latter still has not come into force, and probably will not come into force for some time¹⁰⁸.

There has been some debate whether a wreck would count as a “ship” within the meaning of the Convention and whether an escape of oil from such wreck would therefore fall within the ambit of the Convention. It could be said that a wreck does not come within the definition of “ship” because it no longer carries oil in bulk as cargo because the oil is no longer for sale¹⁰⁹. This however is not an overly convincing argument, as there seems to be no need to include in the definition of cargo that it is for sale. If oil is carried by the producer to his own refinery and sold on from there once it has been refined then it cannot really be said to be for sale during the voyage either, but it would nevertheless be referred to as cargo. Furthermore, oil in a wreck may at some time in the future be salvaged and become marketable again. Another argument which could be mounted would be that the oil contained in a wreck is no longer “carried” as carriage implies some sort of movement

¹⁰⁸ As of 29th February 2004 the Bunker Convention only had three contracting states representing 0.47% of world tonnage: www.imo.org/home.asp?topic_id=161. On 2nd April 2004

¹⁰⁹ Chao, Wu, *Pollution from the Carriage of Oil by Sea: Liability and Compensation*, Kluwer Law International, 1996, p.43

between two points. However, looking at the spirit of the Convention, which sought to cover pollution of persistent oil escaping from tankers, it would seem the intention was that wrecks should be included. After all, most spills will be caused by some sort of casualty and in many if not most cases the vessel will be a wreck at the time of the pollution as a result of the incident. It also has to be born in mind that the 1969 Convention is very much a response to the “Torrey Canyon” disaster and in that case the vessel also leaked once it had become a wreck. It is therefore difficult to imagine that the intention of the Convention could be to exclude oil spills from wrecks. Abecassis is also of the opinion that a spill from a wreck would come within the Convention, provided however the spill resulted from the incident which caused the vessel to become a wreck in the first place¹¹⁰.

A further problem is posed by floating barges or vessels permanently moored. Gauci¹¹¹ and Abecassis’¹¹² view is that such barges or vessels are probably not within the ambit of the Convention as such vessels should be considered as storing rather than carrying oil, the latter, as mentioned above, implying some movement from A to B. Their argument seems logical. Furthermore, unlike in the case of a wreck, with floating barges and permanently moored vessels there is not even an intention (or at least recent intention) of movement. The intention is rather one of storage.

2.2.2.2 The definition of “oil”

Art. I (5) of the Convention defines “oil” as *“persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil”*¹¹³.

Any other forms of oil are therefore not covered by the Convention.

According to Anderson, the Convention deals with persistent oils only because such oils, as the name implies, persist longer in the environment hence demanding some form of response¹¹⁴. Persistent oils are also of course those oils which cause the sort of visible damage the media like to focus on in terms of television and photography when an incident occurs. This does not mean, however, that non-persistent oil is not damaging. While

¹¹⁰ Abecassis and Jarashow, *Oil Pollution from Ships*, Stevens & Sons, 2nd ed. 1985, p.199

¹¹¹ Gauci, Gotthard, *Oil Pollution at Sea, Civil Liability and Compensation for Damage*, John Wiley & Sons, 1997, p.63

¹¹² Abecassis and Jarashow, *Oil Pollution from Ships*, Stevens & Sons, 2nd ed. 1985, p.196

¹¹³ The reference to whale oil was included at the request of Japan. LEG/CONF/C.2/SR.14., Official Records 1969, p.713

¹¹⁴ Anderson, Caryn, Article in *Beacon* (Skuld Newsletter), July 2001

it tends to evaporate quickly, so that clean-up responses are not usually needed, such oil can damage paint-works in harbours and marinas and, either in high concentrations or under certain conditions such as in shallow or cold water, non-persistent oil is acutely toxic to marine organisms.

The Convention does not define persistent oil. It only gives examples. The IOPC Fund¹¹⁵ (the Fund) therefore commissioned a study to define persistent oils.

The study based the distinction between non-persistent oils and persistent oils on the different distillation characteristics of each and laid down that oil is considered non-persistent where *“at the time of shipment at least 50% of the hydrocarbon fractions, by volume, distil at a temperature of 370 C° when tested in accordance with the American Society for testing and Materials’ Method D86/78 or any subsequent revision thereof”*¹¹⁶ .

The results of the study were adopted by the IOPC Fund and are now used by the Fund as its guidelines for distinguishing between persistent and non-persistent oil. As a result of the Fund using these guidelines the P&I Clubs have also adopted them for assessing premiums and handling claims.

The classification of different oils can be seen in the table below:

Oil classification

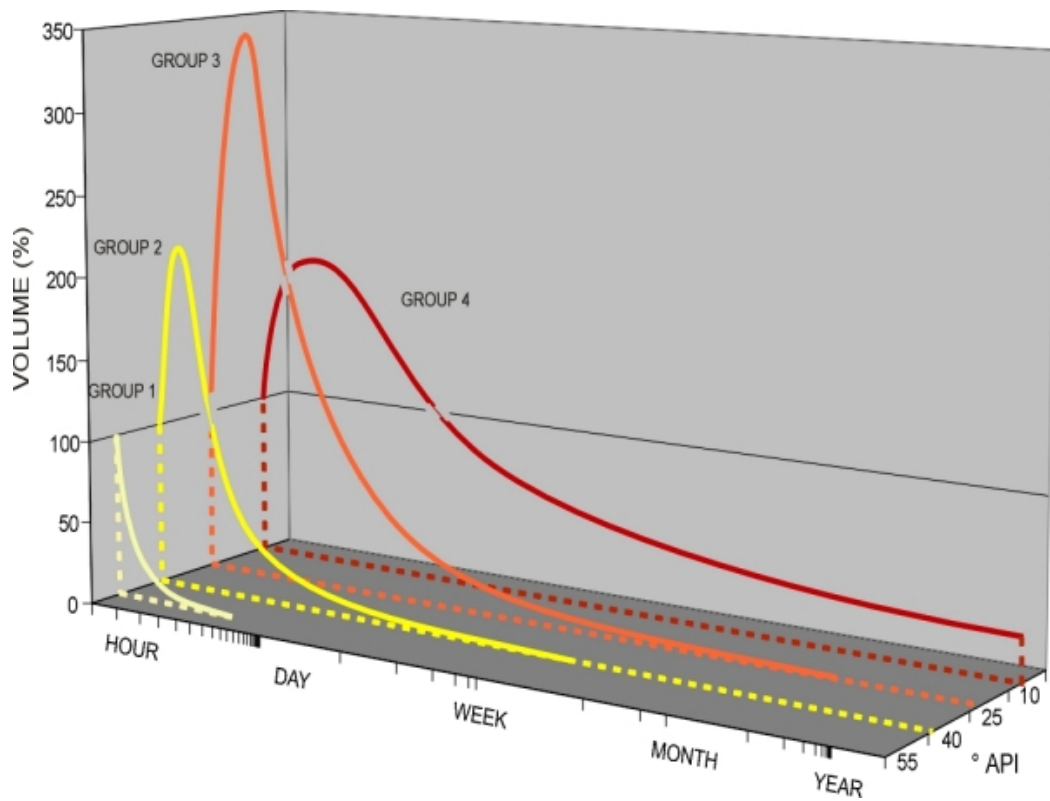
Group	Density	Examples
Group I	less than 0.8	Gasoline, Kerosene
Group II	0.8 - 0.85	Gas Oil, Abu Dhabi Crude
Group III	0.85-0.95	Arabian Light Crude, North Sea Crude Oils (e.g. Forties)
Group IV	greater than 0.95	Heavy Fuel Oil, Venezuelan Crude Oils ¹¹⁷

¹¹⁵ The fund was set up and administered in accordance with the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971. For further information on the Fund please see www.iopcfund.org

¹¹⁶ The International Tanker Owners Pollution Federation Limited (ITOPF) Handbook 2003/2004, p.26

¹¹⁷ Graph: <http://www.itopf.com/fate.html>. On 4.4.2004

The rate of oil removal from the sea surface according to type



2.2.2.3 The definition of “pollution damage”

Pollution damage is defined as follows in Article I (6):

“Pollution damage” means 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.”

Obviously, this means that the damage has to occur outside the vessel. Hence any damage to the vessel itself or any damage occurring inside the vessel (e.g. damage to cargo) does not fall within the definition of pollution damage under the Convention.

It also means that only contamination damage is included. No other type of damage or injury such as for example damage occasioned by fire or

explosion, is included. In the “Aegean Sea”, the IOPC Fund experienced how difficult it can be to distinguish between damage caused by fire and damage caused by contamination. In this case oily smoke from a fire had caused the damage. The Fund decided that this type of damage had been caused by contamination¹¹⁸.

The United Kingdom delegation had propagated this restriction during the Conference, whereas the French delegation thought it immoral to restrict compensation in such a way¹¹⁹. In practice the outcome could produce some unethical results, given that the limitation amounts under the Convention on Limitation of Liability for Maritime Claims 1976 (the 1976 Convention)¹²⁰ which will apply in cases where the CLC does not, are lower than the limitation amounts under the CLC. So that one type of damage will occasion less compensation than another. This would even be the case where both types of damage are caused by the same event. On the other hand, having a second fund under a separate convention under which the CLC compensated victims of the pollution incident cannot claim may in some instances be a good thing and may mean all victims stand a better chance to be fully compensated for their damage. It does however remain a matter of curiosity that the limits for oil pollution are higher than for any other type of claim. This can, to some extent, however, be explained by the fact that oil spills tend to cause greater and more expensive damage over all, or at least have the potential to do so.

The need to include damage caused by preventive measures was pointed out by the Netherlands delegation¹²¹ as well as by (Western) Germany¹²². The inclusion is a fairly important one as preventative measures can cause substantial damage. For example, dispersants used to disperse the oil can be more harmful than the oil itself¹²³. This was particularly so in the early days of oil pollution clean-up operations where the consequences of certain types of clean-up operations were not yet fully known. It should be noted here that damage caused by preventive measures is included even if such damage is not caused by contamination. Damage caused by fire or explosions for example would therefore be included in such cases.¹²⁴

¹¹⁸ FUND/Exec.38.9, 11th February 1994, § 3.3.3.

¹¹⁹ LEG/CONF/4, Official Records 1969, p. 446

¹²⁰ The predecessor of the 1976 Convention was the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957

¹²¹ LEG/CONF/4, Official Records 1969 pp.454, 455

¹²² LEG/CONF/4/Add.1, Official Records 1969, p.504

¹²³ Bergmann “No fault liability for oil pollution damage” JMLC, Vol. 5, 1973, N.1, p.14, n.13

¹²⁴ For a further commentary on pollution damage and its definition see Oosterveen, Willem “Some recent developments regarding liability for damage resulting from oil pollution - from the perspective of an EU Member State”, *Environmental Law Review* 6 (2004) pp. 223-229

2.2.2.4 The definition of “preventive measures”

Art. I (7) of the Convention provides:

“Preventive measures” means any reasonable measures taken by any person after an incident¹²⁵ has occurred to prevent or minimize pollution damage.”

The provision concerns itself both with pollution damage as such and with compensation for the cost of preventive measures which were reasonably undertaken following an incident in order to prevent or minimise pollution damage.

Any preventive measures successful enough to avoid any pollution occurring at all however are not covered and will therefore not be compensated. To some extent efficient pollution management is therefore financially punished. It would of course have been better to create an incentive for people to ensure pollution incidents do not happen at all, let alone punish them for it. However, it can be said that this would be a step too far as it may then include general measures taken to prevent pollution, and that, after all, it is their duty to act in such a way as to prevent pollution in any event.

2.2.2.5 Article II

Article II provides that:

“This Convention shall apply exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimize such damage”.

Only damage caused on the territory, including the territorial sea¹²⁶ is covered by the Convention. The Convention therefore does not cover the high seas. It was however intended that preventive measures taken outside territorial waters with the aim of preventing damage within territorial waters should be covered. The Article fails to state this intention explicitly. The omission was

¹²⁵ “Incident” is defined in Art. I (8) as “any occurrence, or series of occurrences having the same origin, which causes pollution damage”

¹²⁶ The breadth of the territorial sea is not defined but left to the discretion of each member state. In 1982 Art. 3 of the Law of the Sea Convention 1982 defined the breadth of the territorial sea as 12 nautical miles

however later realized and included as an interpretation in the Preamble to the 1971 Fund Convention¹²⁷.

Canada had wanted the Convention to cover the high seas. As a fishing nation it was concerned about the risk of damage to fish stock. However, the report of the working party considering some effects of the Convention on third parties, which reported on 14th November 1969 had come to the conclusion that damage caused outside national territory should not be covered by the Convention because such damage was unlikely to be grave and could therefore be dealt with under the existing rules. The working party therefore recommended that only protective measures taken outside the territory in order to protect the coast should be covered¹²⁸. This was a view shared by a majority of participants who voted by 23 to 13 with 7 abstentions against extending the Convention to the high seas¹²⁹. The findings of the working party and the vote are somewhat unsurprising as major losses are usually only incurred when the oil gets close to shore in which case it is already within the territorial sea. It has been empirically proven that oil spilled further away from the shore causes less damage. The three largest tanker spills of all time – the “Atlantic Empress” off Tobago, West Indies in 1979 (287,000 tonnes), the “ABT Summer” off Angola in 1991 (260,000 tonnes) and the “Castillo de Bellver” casualty off South Africa in 1983 (252,000 tonnes) resulted in only minimal clean-up and damages because these spills happened well off-shore and none of the spilled oil contaminated coastlines. In cases such as these the cost of the response would normally be limited to aerial surveillance to monitor slick movement and natural dissipation.¹³⁰

In terms of fishing it also has to be born in mind that damage to fish stock is not usually such a large problem where oil is spilt in deep water as will be the case on the high seas. It is sea-birds who are more at risk in such cases if they get oil into their plumage either by roosting on the water or diving for their food, provided however they are that far out to sea.

¹²⁷ Ganten, Dr., Reinhard H. “Entschädigung für Ölverschmutzungsschäden aus Tankerunfällen“, p.6, Schriften des Deutschen Vereins für Internationales Seerecht, Reihe A: Berichte und Vorträge, Heft 41, Hamburg 1980

¹²⁸ LEG/CONF/C.2/WP.3, Official Records 1969, p.563

¹²⁹ LEG/CONF/C.2/SR.20, Official Records 1969, p.761

¹³⁰ <http://www.itopf.com/costs.html>. On 3.4. 2004

2.2.2.6 Article III

2.2.2.6.1 Article III (1)

2.2.2.6.1.1 Liability of the owner

Art III (1) provides:

“Except as provided in paragraphs 2 and 3 of this Article, 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 oil which has escaped or been discharged from the ship as a result of the incident”.

The Convention thus places liability for any pollution damage primarily on the owner of the vessel. The decision whom to burden with liability however was not easily taken and occasioned some considerable debate during the Conference.

2.2.2.6.1.1.1 Proposals to place liability on cargo interests

The Netherlands suggested that cargo, i.e. the oil industry ought to be liable for any damage caused because it was the party that determined technological developments in transportation. It was also fairer in their opinion to make the owner of a noxious cargo pay rather than the carrier. This had also been done in relation to liability for nuclear damage¹³¹.

The argument made by the Netherlands carries some weight as it is very close to reality. Of course it is cargo who chooses the vessel and where low freight rates are paid, the attention is focused more on prices and less on safety and old tankers with less than optimum safety standards are used. So the advantage of putting liability on cargo would have been that better quality tankers would have been hired because cargo would have been afraid of potential liabilities. It does, however, have to be borne in mind that many oil companies own their vessels or run their operations by sale and lease-back whereby the “owner” is likely to be a Special Purpose Vehicle set up by the oil company for that purpose. In such cases the arguments made would apply to a lesser extent.

Denmark also suggested putting liability on the cargo.¹³²

¹³¹ Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960

¹³² LEG/CONF/4, Official Records 1969, p.437

The Swedish government was also for imposing liability on the cargo, taking a wider view on the subject. Sweden argued that in the long run pollution from oil had to be addressed not only in the context of pollution from ships but also in relation to spills from oil rigs, pipe-lines and land-based facilities. It was therefore important to find a solution in relation to pollution from ships which would fit into a bigger picture and also work in relation to other legislation dealing with other sources of pollution. In relation to nuclear damage the nuclear industry was made liable as the ones best placed to carry the risk. The Swedish delegation thought that the same will probably be found to be true in relation to damage from oil pollution. The Convention should therefore, in their view, place liability on the industry, i.e. the shipper, because in the long run the overall solution will be to make the industry liable¹³³.

The delegation most vehement about putting liability on cargo was Ireland. Its starting point was that strict liability ought to be introduced. However, if it were introduced countries with a large fleet might not have accepted the Convention.

Ireland further argued that the oil industry would be better placed to pay out the compensation than shipowners and it would not be too difficult for the oil industry to set up a joint compensation fund¹³⁴. Another argument brought forward was that strict liability for the ship would be a fundamental departure from existing maritime law. Imposing liability on cargo however was acceptable as it was a new industrial risk which they had created¹³⁵. This latter argument seems based on form only and presents no convincing substance against strict liability being imposed on the ship. The suggested solution to the problem of cargo being liable to pay compensation where they were not at fault would be that if the vessel had been at fault the cargo owner could then seek reimbursement from the shipowner for the compensation paid. The same would be the case for cargo's insurance.

In response to the potential difficulty of tracing the liable party, Ireland suggested that where the shipowner would not or could not identify who the liable shipper (meaning cargo) was, they would themselves be liable. So

¹³³ LEG/CONF/4/Add.2, Official Records 1969, p.512

¹³⁴ LEG/CONF/4, Official Records 1969, p.439

¹³⁵ LEG/CONF/SR.7, Official Records 1969, p.650

unless the owner could point to the responsible party they would themselves be held liable¹³⁶.

So far so good, however, Ireland further argued that ownership of oil being shipped would be in the hands of only a few companies¹³⁷, which would make monitoring easy. This however is not entirely correct. The seven major oil companies at the time accounted for 50% only of all oil shipped¹³⁸. It would also very often be rather problematic to establish who the owner of the cargo was, especially because the cargo may be traded several times while on board. Endless arguments could then ensue over who was the owner at the precise time of the incident if the cargo had been traded around the time of the incident which caused the pollution. It would have to be analysed which exact point in time would be relevant in terms of the occurrence of an incident under the Convention and arguments would arise over when exactly a specific sale was complete and when exactly ownership had passed etc. In contrast, finding the registered owner of a vessel is a very simple and straightforward process as it can be checked easily, for example in Lloyd's Confidential. Also, a scheme of compulsory insurance is easy enough to monitor if imposed on the vessel, but difficult to monitor if imposed on cargo, as administration and paperwork would be high. Problems could arise with fraud and in cases where the cargo carried was not the cargo insured. Also, it may often be difficult in practice to insure cargo, as the final destination is not necessarily known at the start of a voyage, for example where cargo is traded en route. Furthermore, the person taking out the insurance would not be the person responsible for the cargo¹³⁹; hence it would be more difficult for an insurer to assess the insurable risk. Moreover, as pointed out by the French delegation, in the case of an incident it may not be clear whether or to what extent bunker oil rather than cargo had been responsible for the damage. Cargo may therefore end up paying for damage caused by bunkers which have nothing to do with them¹⁴⁰. A further argument against imposing liability on the cargo is that the shipowner has at least one, though often admittedly limited, and in the case of casualties mostly worthless, identifiable asset against which enforcement is possible, namely the vessel. Cargo's asset (the cargo) however will, by definition, have been lost to at least some degree in a pollution incident. It should also be born in mind that those cargo interests situated outside Convention

¹³⁶ LEG/CONF/4, Official Records 1969, p.451

¹³⁷ LEG/CONF/4/Add.4, Official Records 1969, p.537

¹³⁸ Netherlands, LEG/CONF/C.2/SR.5, Official Records 1969, p. 643

¹³⁹ France, LEG/CONF/C.2/SR.5, Official Records 1969, p. 639

¹⁴⁰ LEG/CONF/C.2/SR.5/14/11/69, Official Records 1969, p. 639

countries could not be forced to pay compensation. Each cargo imported from non-Convention countries would therefore have to carry some form of security to enter the territory of Convention countries. This would represent a considerable administrative burden for cargo and Convention country authorities. Most importantly however, the security required could not exceed the value of the cargo, which may very well be insufficient to cover any potential damage caused by pollution.

In the end the Irish proposal was rejected as it caused far too many practical difficulties and, as Lord Devlin quite rightly said, the most important thing was to achieve the most convenient way for pollution victims to get compensation. The party ultimately paying would be the consumer in any event¹⁴¹.

From a moral perspective the Irish delegation was arguing that it was the cargo that had caused the pollution because it was an inherently dangerous substance, not the vessel¹⁴². This seems fairly superficial logic. The cause of any oil pollution will always lie in some problem or other the vessel has in transporting the cargo, be it negligent navigation, a collision, Act of God or a construction fault. On the basis of moral justification the problem is, that while cargo chose the vessel, it did not choose the master or crew who run it and has no control whatsoever over the way the vessel is run. It can of course exercise some control via the forces of the free market by only choosing owners with a good safety record thereby forcing shoddy owners out of the market or requiring them to clean up their act. However, the owner or bareboat charterer is the person closest and best able to control and influence how a vessel is run.

2.2.2.6.1.1.2 Proposals to place liability on the operator

These considerations lead to many countries such as Germany¹⁴³, the USSR¹⁴⁴, Finland, or Poland to opt for liability to be imposed on the operator¹⁴⁶. The

¹⁴¹ LEG/CONF.2/SR.4, Official Records 1969, p. 638

¹⁴² LEG/CONF/4/Add.4, Official Records 1969, p. 536

¹⁴³ LEG/CONF/4/Add.1, Official Records 1969, p. 504

¹⁴⁴ LEG/CONF/4/Add.1, Official Records 1969, p. 510

¹⁴⁵ In addition to these considerations the USSR also had their own "socialist" problem with the imposition of liability on owners because all vessels were owned by the state but operated by shipping companies. Making the state liable was against their economic system. Hence they, along with the other socialist countries, preferred to make the operator liable (LEG/CONF/C.2/SR 12, Official Records 1969, p. 690). This problem was later solved when it was decided that liability should be imposed on the owner, by providing in Art I (3) that "in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "owner" shall mean such company"

¹⁴⁶ LEG/CONF/4, Official Records 1969, p. 443

operator is the person using the ship (for example a bareboat charterer – incidentally these are often oil companies) and he is therefore also the person who can morally be made responsible for any damage caused by the vessel. This argument is strengthened by the common practice of finance leasing in ship-finance where the financing institution retains legal ownership while the “de facto” owner chartered the vessel from the financier¹⁴⁷. In such cases it is in fact the operator who bears the risks but also earns the fruits of the vessel’s employment rather than the legal owner.

Under this proposal the owner would have been presumed the operator unless he could show that someone other was the operator.

This alternative however faced the same drawbacks as putting liability on cargo: the operator can be difficult to identify. One should only think for a minute of maritime practice: it is by no means unusual for a vessel to be at any one time on bareboat charter, time charter and voyage charter, one company supplying the vessel and yet another managing it. In such circumstances it is by no means clear who the operator is, and, it has to be added, the term “operator” was and is no firmly and clearly established concept in maritime law. Germany did suggest making the owner liable unless he discloses the operator¹⁴⁸. This solution would, however, in itself have presented problems, as for example time and money would have to be spent in many cases suing an owner until he may in the end be able to prove that not he but another party was the operator of the vessel¹⁴⁹. Furthermore, monitoring and implementing compulsory insurance would be difficult. As pointed out by the United States of America, insurance certificates would have to be issued and revoked every time the terms of a charter changed¹⁵⁰. Germany suggested that the owner’s insurance could cover the operator¹⁵¹. However, this solution would not have been without difficulties, as there would have been the problem of double insurance and the problem that the person seeking cover was seeking it, inter alia, or rather primarily, for others who at that point in time would be unknown to the insurer and who, in case of an incident, would be first in line before the owner.

Defining the term “operator” was also proving difficult. For example, where an owner let his vessel on demise charter and the demise charterer let it on a

¹⁴⁷ The tanker industry in the 1990’s, SBS (Shell Briefing Service) No.5, 1991, p.3

¹⁴⁸ LEG/CONF/4/Add.1, Official Records 1969, p. 505

¹⁴⁹ United Kingdom, LEG/CONF/C.2/SR 12, Official Records 1969, p. 691

¹⁵⁰ LEG/CONF/C.2/SR 12, Official Records 1969, p. 690

¹⁵¹ LEG/CONF/C.2/SR 12, Official Records 1969, p. 690

voyage-charter and the voyage-charterer let it on a time-charter, a scenario not unlikely in practice, it is questionable who should be called the operator under the Convention. Furthermore, each legal-system would have interpreted “operator” differently as it is not an entity which can be identified with such ease and certainty as the “registered owner”. Differing interpretations would have led not only to uncertainty in the law but also to differing liabilities under differing jurisdictions. This would have been an unbearable lack of uniformity in the application of the Convention.

In the event the Conference voted against the proposal¹⁵².

2.2.2.6.1.1.3 Proposals to place liability on both the owner and the charterer

Canada proposed to make the owner liable up to a certain sum and to make the charterer liable for the balance. This, so the delegation, would ensure enhanced recovery for victims of oil spills¹⁵³. This may well be the case where the charterer is an oil company, which was the moral reasoning behind imposing liability on the charterer in the first place. However, if one imagines other constellations victims would be no better off in cases where there is no charterer for example. The moral basis for the proposal would fail in cases where the charterer is not the cargo owner. In the end the proposal was rejected.

2.2.2.6.1.1.4 Further proposals

Further suggestions which attracted minor support were: primary liability to be imposed on the operator, secondary liability on the owner, a proposal made by Sweden¹⁵⁴. Another proposal was to impose joint and several liability between shipowner and shipper¹⁵⁵.

2.2.2.6.1.1.5 The decision

In a vote taken on 18th November 1969 during a Conference meeting, 25 delegations voted in favour of liability to be imposed on the ship, and only 13 delegations voted for liability to be placed on the cargo¹⁵⁶. Placing liability on the owner was the solution which made it easiest for victims to identify the

¹⁵² LEG/CONF/C.2/SR 12, Official Records 1969, p. 683

¹⁵³ LEG/CONF//SR2., Official Records 1969, p.s 84, 85

¹⁵⁴ LEG/CONF/4/Add .2 , Official Records 1969, p. 513

¹⁵⁵ Canada: LEG/CONF/4/Add .3, Official Records 1969, pp. 520-530 and Indonesia: LEG/CONF/C.2/SR.3, Official Records 1969, p. 625

¹⁵⁶ LEG/CONF/C.2/SR.9, Official Records 1969, p. 664

person liable. This was further facilitated by establishing that the owner of the vessel within the meaning of the Convention was prima facie the registered owner¹⁵⁷.

It can of course be said that the reason why the shipping industry was left at the forefront of liability is due to the fact that the oil industry via its representative organisation the Oil Companies International Marine Forum (OCIMF) have a more effective and more united lobby than the shipping industry.

The end result, however, was nevertheless a compromise by which liability was put on the owner, but cargo would have to contribute to a fund which would compensate victims for all damage they were not compensated for by the owner. There was a vote of 25 against 7 for combining the liability of the ship with a fund¹⁵⁸. A resolution was adopted at the Conference to set up the Fund.¹⁵⁹ The concept of the Fund, later enshrined in the Fund Convention 1971 and administered by the International Oil Pollution Compensation Fund¹⁶⁰ (IOPC), is thus an important part of the fine balance of compromise struck at the Conference.

2.2.2.6.1.2 Strict liability

Liability under the Convention is generally referred to as strict. This classification can be slightly confusing as liability is not in fact absolutely strict. The Convention provides for some exceptions to such liability¹⁶¹. What is meant by strict liability is that it is a liability independent of fault. Whether or not the Convention ought to apply strict liability or a fault principle but with a reversal of the burden of proof, was a hot topic of debate during the Conference.

Two alternatives were discussed: The first alternative was that liability be based on fault but that the burden of proof should rest with the owner. The second alternative was strict liability. Amongst others, the Swedish¹⁶², Portuguese¹⁶³, French and Spanish delegations advocated strict liability.

¹⁵⁷ Art. I (3)

¹⁵⁸ LEG/CONF/ C.2/SR.9, Official Records 1969, p. 665

¹⁵⁹ Resolution on Establishment of an International Compensation Fund for Oil Pollution Damage, International Legal Conference on Marine Pollution Damage, 1969, London 1970, p. 47

¹⁶⁰ For further information on the IOPC Fund please see their webpage at www.iopcfund.org .On 3.4.2004

¹⁶¹ See below

¹⁶² LEG/CONF/4/Add.2, Official Records 1969, p. 514

¹⁶³ LEG/CONF/C.2/WP.1/Rev.1/LEG/CONF/4/Add.4, Official Records 1969, p. 632

Ireland was also for strict liability (see below however) because it feared that anything less would mean victims would not be compensated in cases where pollution occurred without any fault¹⁶⁴. It should be kept in mind here that Ireland has a long coastline and is therefore prone to pollution, so are France and Spain. All three countries also rely heavily on tourism. Germany also supported the idea of strict liability. The German argument was that strict liability would be in line with other modern technical risks and that the owner (or operator as suggested by Germany) would be best placed, economically, to carry the risk¹⁶⁵. The latter is true if one bears in mind that it is of course ultimately not the individual owner, but the insurance companies, meaning, very ultimately the shipowning community, who would carry the risk, and they are in a good position to spread and absorb the risk. The French delegation argued that strict liability was justified because liability was imposed, not on fault, but rather on risk¹⁶⁶. This argument carries some justification as most legal systems will have strict liability in certain circumstances where the actions of the defendant create a certain type of risk which it is thought society ought not to carry but at the same time it is not the kind of risk one can or wants to forbid entirely. The same seems true of oil pollution or rather, the risk of carrying oil by sea. The carriage of oil by sea creates a risk society ought not to carry, but at the same time society depends on the transportation of oil. It is both impossible to prevent accidents occurring during such carriage and impossible to stop such carriages altogether. France further argued there were precedents for this type of strict liability for the creation of a particular risk, namely in the case of nuclear ships, damage by aircraft and space damage¹⁶⁷. These risks seem indeed to be akin to oil pollution. They are all risky activities which are useful or necessary in a modern civilisation, but we do not feel that certain randomly selected parts of the public (in case of oil pollution people happening to live near the coast) ought to be carrying the risk.

The USSR was against strict liability arguing that it represented a departure from maritime law. The International Convention Relating to Liability of Operators of Nuclear Ships 1962 had made an exception to maritime law by introducing strict liability. This, according to the USSR, was warranted in the case of nuclear energy because it was impossible to control and because the

¹⁶⁴ LEG/CONF/4, Official Records 1969, pp. 459, 450, 460, 461

¹⁶⁵ LEG/CONF/4/Add. 1, Official Records 1969, p. 505

¹⁶⁶ LEG/CONF/C.2/WP.1/REV.1; LEG/CONF/4/Add.4, Official Records 1969, p. 632

¹⁶⁷ LEG/CONF/C.2/WP.1/REV.1; LEG/CONF/4/Add.4, Official Records 1969, p. 632

damage could potentially be very large. According to the USSR delegation this was not the case in relation to oil pollution¹⁶⁸.

As pointed out by the Canadian delegation¹⁶⁹ this view is untenable. Oil spills are also of a potentially enormous extent and as tankers at that time were already increasing in size, so was the danger potential, and hence strict liability was warranted because of the potential size of any damage.

Ireland was also against strict liability in case this were to be adopted in conjunction with a liability imposed on owners. Their concern was that those countries with large fleets would not agree to the Convention under such circumstances, and if those countries with large fleets did not adopt the Convention the Convention would not be very effective¹⁷⁰.

The United Kingdom, which has both a long coastline and, at the time, had a substantial merchant navy and was a heavy importer of oil, was also against the imposition of strict liability and argued instead for a reversal of the burden of proof which it viewed sufficient for the protection of claimants. The delegation further said that strict liability would not catch significantly more cases because most cases involved fault in any event. Furthermore, if liability were fault based the available insurance cover would be higher. Strict liability would mean that the limits of liability would have to be lower because less insurance cover would be available. Research undertaken by the British delegation indicated that the United Kingdom insurance market was willing to cover £6 million if fault based liability were imposed on the shipowner and just £4 million in the case of strict liability¹⁷¹. Liberia said that enquiries in other insurance markets had yielded similar, in fact worse results¹⁷², so that the available compensation would indeed be higher in a fault based system.

While this is a valid point, the problem is that although in a fault based system compensation will be higher once the claimant is entitled to it, fewer claimants will be entitled to compensation in the first place, which is of course exactly the calculation undertaken by the insurance market and the reason why cover offered by them for a fault based system was higher. Ultimately, the question is whether one prefers all victims to be compensated

¹⁶⁸ LEG/CONF/4/Add.1, Official Records 1969, p. 510

¹⁶⁹ LEG/CONF/4/Add.3, Official Records 1969, p. 519

¹⁷⁰ LEG/CONF/4/Add.3, Official Records 1969, p. 519

¹⁷¹ LEG/CONF/C.2/SR.8, Official Records 1969, p. 657

¹⁷² LEG/CONF/C.2/SR.8, Official Records 1969, p. 659

with lesser amounts or fewer with larger amounts. Another problem in terms of a fault based approach is that any concept of fault will automatically lengthen litigation. It will mean long and costly litigation. Also, victims will not be compensated where no fault is involved, such as for example where the incident causing the pollution is brought about by an Act of God. In such cases it would be entirely unjust to expect victims who neither created nor controlled the risk, to bear the damage. While it may well be true that incidents not involving fault are very rare, as Norway said¹⁷³, they may nevertheless happen and given the potential damage even one such incident may wreak, this argument should not be disregarded entirely. All in all strict liability is cheaper and quicker. Some element of “rough justice” could be an appropriate price to pay for its advantages. It is also doubtful whether insurance cover would really have had to be more expensive or insurance companies less willing to cover in the case of strict liability. After all, certainty is a great advantage to an insurer. It would also be a disadvantage to the insurer to have longer disputes in respect of claims which involve time and legal costs and require the insurer to carry reserves for a long time waiting for the outcome of the case.

Another argument against a concept based on the reversal of the burden of proof was made by the German delegation: the introduction of the concept of fault would jeopardise the uniform application of the Convention as each country would interpret the concept differently¹⁷⁴. This is no doubt a weighty argument. It is argued within this dissertation that the term “reckless” has caused interpretation difficulties in practice which, if not remedied, will in future lead to an application of the Convention which is not uniform. Such difficulties however would probably be negligible compared to the type of difficulties a term as general as “fault” would have introduced. It should also be born in mind that different legal systems have different legal practice rules in relation to proof of a matter in court. Where, for example, full discovery of documents is made by the parties under English law, this is not the case under German law.

A roll-call vote taken during a Conference meeting on 14th November 1969 to find out the first and second choices of the delegations on this point yielded the following results: in favour of strict liability of the ship: 14 including Germany. Liability of the ship based on fault: 8 including the United Kingdom. Strict liability of the cargo: 10. Joint strict liability on ship and

¹⁷³ LEG/CONF/C.2/SR.7, Official Records 1969, p. 653

¹⁷⁴ LEG/CONF/4/Add. 1, Official Records 1969, p. 505

cargo with initial liability up to a fixed amount on ship and remaining liability on cargo: 4.¹⁷⁵

The outcome of the final vote on this subject was a majority of 22 to 17 in favour of strict liability being imposed on the owner¹⁷⁶.

2.2.2.6.2 Article III (2) and (3)

Art. III (2) provides that:

“No liability for pollution damage shall attach to the owner if he proves that the damage:

- a. resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or*
- b. was wholly caused by an act or omission done with intent to cause damage by a third party, or*
- c. was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.”¹⁷⁷*

Art. III (3) says:

“If the owner 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 owner may be exonerated wholly or partially from his liability to such person”.

As can be seen, the circumstances in which the owner escapes liability are very narrow. It also has to be born in mind that these cases are exceptions and that it is for the owner to prove that they apply.

It could of course be said that the mere existence of exceptions counteracts the notion of strict liability, however, these exceptions were deemed

¹⁷⁵ LEG/CONF/C.2/SR.6, Official Records 1969, pp. 647, 648

¹⁷⁶ LEG/CONF/C.2/WP.6, Official Records 1969, p. 565

¹⁷⁷ Art. III (2) (b) and (c) were introduced at the behest of the United Kingdom delegation who sought to have these exceptions included in the interests of the insurance market LEG/CONF/C.2/WP.35, Official Records 1969, p. 597

necessary in order to make the liability insurable. The insurability argument was in particular proffered by the United Kingdom¹⁷⁸.

2.2.2.6.3 Article III (4)

Art. III (4) provides:

“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.”

The owner may only be made liable for compensation under the Convention. He can therefore not be made liable for the pollution damage under any other law.

Liability is also primarily channelled to him. The servants or agents of the owner cannot be made liable under the Convention or, indeed, otherwise.

What exactly is meant by “servants or agents” is unfortunately unclear.

The German law implementing the Convention explicitly includes salvors as long as they do not act with intent or grossly negligent¹⁷⁹. This extension was made so as to encourage people to undertake salvage activities.¹⁸⁰ The English provisions, contained in the Merchant Shipping Act, as well as Scandinavian law go further in including anyone acting under the instruction of the owner¹⁸¹. The channeling of liability to the owner in Art III (4) however is far from complete. Charterer, manager and operator for example are not afforded the same immunity as is granted to the category of “servants or agents” of the owner.

2.2.2.6.4 Article III (5)

Art. III (5) provides:

“Nothing in this Convention shall prejudice any right of recourse of the owner against third parties”

¹⁷⁸ Liability for Oil Pollution and Collisions, Oya, p. 217

¹⁷⁹ Artikel 2(4) Deutscher Bundestag 7. Wahlperiode, 20.6.74, p. 4. Drucksache 7/2299

¹⁸⁰ Deutscher Bundestag 7. Wahlperiode. 20.6.74, pp. 8, 9. Drucksache 7/2299

¹⁸¹ Ganten, Dr. Reinhard H., Entschädigung für Ölverschmutzungsschäden aus Tankerunfällen, Schriften des Deutschen Vereins für Internationales Seerecht, Reihe A: Berichte und Vorträge, Heft 41, Hamburg 1980, p.8

Art. III (5) therefore gives the shipowner a right of recourse. If, for example, an owner is made liable for pollution damage which was caused by the negligence of a third party, such as where the vessel had a construction fault which led to the casualty which caused the pollution, he is not prevented from seeking recourse under the general law for the compensation paid out by him in respect of the pollution.

2.2.2.7 Article IV

Where the pollution is caused by two or more ships the owners of all ships are jointly and severally liable under Art. IV for any damage which is not reasonably separable.

2.2.2.8 Article V

2.2.2.8.1 Article V (1)

Art V (1) stipulates:

“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 of 2,000 francs¹⁸² for each ton of the ship's tonnage¹⁸³. However, this aggregate amount shall not in any event exceed 210 million francs”.

The owner may limit his liability according to Article V. Limited liability was of course nothing new in the maritime field.

In the case of the Convention it was needed to balance out strict liability. Limitation was also economically necessary. Had there been unlimited liability the industry may in the long run not have been able to afford or would have found it unprofitable to carry oil. Alternatively, in order to make it profitable, the price of oil to the consumer may have soared. The carriage of oil is however a necessity of our modern world. The concept of limitation was therefore accepted by all delegations.

There was some support¹⁸⁴ for the idea of assimilating the 1969 Convention to the Limitation Convention 1957 in order to harmonise all types of maritime claims. The 1957 Convention and the 1969 Convention are indeed

¹⁸² The “franc” is further defined in Art. V (9)

¹⁸³ “Ship's tonnage” is further defined in Art.V (10)

¹⁸⁴ e.g. from the German delegation, see LEG/CONF/ 4/Add.1, Official Records, p. 506

very similar. However, the limitation amounts under the 1969 Convention are double those of the 1957 Convention. Even though the limits were already set comparatively high, the United Kingdom delegation already pointed out in 1969 that the limits of the 1969 Convention would have to be revised in the near future¹⁸⁵.

2.2.2.8.2 Article V (2)

Art. V (2) provides that:

“If the incident occurred as a result of the actual fault or privity of the owner, he shall not be entitled to avail himself of the limitation provided in paragraph 1 of this Article”

The owner therefore only loses his right to limit liability where the incident occurs “as a result of the actual fault or privity of the owner”. The concept of losing one’s right to limit liability as a result of one’s actual fault and privity is a concept copied from the 1957 Convention. The 1957 Limitation Convention and the 1969 Convention are closely linked, not only in wording but also in the way they work. The root of such similarity is obvious given that they both Conventions seek to strike a balance between the different interests involved in shipping.

“Actual fault and privity” means that the culpable party has to be blameworthy himself. Constructive fault, for example of a servant or agent is insufficient¹⁸⁶. Increasingly however, the courts will hold that the faulty management of a vessel constitutes actual fault¹⁸⁷. Buckley LJ defined “actual fault and privity” in *Asiatic Petroleum Co.-v- Lennard’s Carrying Co.*¹⁸⁸ as follows: *“actual fault or privity ... infers something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents. But the words “actual fault” are not confined to affirmative or positive acts by way of fault....It is not necessary to shew knowledge. If he has means of knowledge which he ought to have used and does not avail himself*

¹⁸⁵ LEG/CONF/C.2/SR.16, Official Records 1969, p. 724

¹⁸⁶ *Asiatic Petroleum Co. -v- Lennard’s Carrying Co.* [1914] 1 KB 419 (CA) at p. 432; “*The Lady Gwendolen*” [1965] 1 Lloyd’s Rep. 335

¹⁸⁷ See for example “*The Marion*” [1984] 2 Lloyd’s Rep.1. Here the vessel had damaged an oil pipe with its anchor. The master had been unaware of the existence of the pipe because he was using an old chart even though an up-to-date chart would have been available from the vessels’ chart room. The owner was held to have been actually at fault and prevented to limit his liability because, according to the House of Lords, he should have supervised the master in a proper manner to ensure that he was using up-to-date charts

¹⁸⁸ *Asiatic Petroleum Co.-v- Lennard’s Carrying Co.* [1914] 1 KB 419 (CA) at p. 432

of them, his omission so to do may be a fault, and, if so, it is an actual fault and he cannot claim the protection...".

The meaning of “privity” was further considered in *“The Eurysthenes”*¹⁸⁹.

The “Eurysthenes” had stranded and the main part of her cargo had been either lost or damaged. It was alleged that the vessel had been unseaworthy due to lack of due diligence. The question before the court was whether the owner had been privy to the unseaworthiness and whether or not he was entitled to limit his liability under the Merchant Shipping Act 1894. The Court of Appeal held that privity did not mean that the owner himself had to personally do anything, but that someone else did and that the owner knew this and concurred.

Under the 1957 Convention the onus of proof clearly lay with the owner seeking to limit his liability to prove that he had no actual fault or privity. The wording of the 1969 Convention however is unfortunately unclear on this point. Art. V (1) affords little help in the resolution of this question as it only provides that the owner “shall be entitled to limit his liability”. This leaves open the question whether the owner has to prove there was no actual fault or privity on his part because he is the party seeking the remedy of limitation, or whether the Article should be interpreted to mean that the owner is entitled to limit his liability as of right unless fault or privity are proved against him. It seems from both the spirit of the Convention and the wording of the Article that the Convention deems limitation as an entitlement which will only be forfeit where actual fault or privity are proved. However, different national laws may have different answers to this question, which of course endangers the uniform application of the Convention.

2.2.2.8.3 Article V (3)

Art V (3) stipulates that in order to avail himself of the limitation the owner has to constitute a fund for the total sum representing the limit of his liability at a court or other competent authority of any one of the contracting states in which an action is brought under Article IX (see below). The fund can be constituted either by depositing the sum or by producing a guarantee which is acceptable under national law. Even though the Convention states that an action has to be brought before a fund can be set up this is not

¹⁸⁹ *Compania Maritima San Brasilio S.A. -v- The Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1976] 2 Lloyd’s Rep.171 (CA)

always enforced in practice. In the case of the "Tanio" for example the court permitted the setting up of the fund before an action was brought¹⁹⁰.

2.2.2.8.4 Article V (4), (5), (6), (7)

Art. V (4) provides that claimants are satisfied out of the fund in proportion to their claim. Art. V (5), (6) and (7) deal with situations where compensation payments were made before the constitution of the fund or payments are anticipated after the distribution of the fund.

2.2.2.8.5 Article V (8)

Art.V (8) stipulates that:

"Claims in respect of expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimize pollution damage shall rank equally with other claims against the fund".

While this does of course reduce the amount available to victims, it provides an incentive to owners to take action to protect the environment. After all, the owner is the one closest to the events and as such in the best position to act. However, only reasonable costs, which the owner incurred voluntarily in order to combat pollution, are compensated. Involuntary sacrifices are not compensated and neither is damage to the vessel. The owner's costs for preventive measures taken by him are also paid out of the fund.

Where vessels are on charter the charterer will of course be in a better position than the owner to undertake prompt anti-pollution action. Most charterparties therefore provide for this possibility by stipulating that the charterer is authorised to take action and that any expenses incurred in this way will be paid for by the owner, provided of course that the incident was not caused by the charterers' fault.

The Convention is silent in respect of the fate of interest accruing to the fund from the time it was set up to the time it is paid out which, if the litigation is long drawn out, may amount to quite a sum. The question is left to national law to regulate.

¹⁹⁰ Chao, Wu, Pollution from the carriage of oil by sea: liability and compensation, Kluwer Law International 1996, p.64

2.2.2.8.6 Article V (11)

Art V. (11) gives the insurer or other person providing financial security the right to constitute a fund.

2.2.2.9 Article VI

Art. VI provides that once the fund is constituted, claimants have no more rights against any other assets of the owner, provided the owner is entitled to limit his liability, the claimant has access to the court administering the fund and the fund is actually available in respect of his claim. Any arrests have to be lifted once the fund is constituted and actually available. It should be born in mind that Art. VI of course applies only in relation to assets attached or to be attached in Convention countries. Assets outside the influence of the Convention do remain untouched by the provision, certainly as concerns claimants situated outside Convention countries.

2.2.2.10 Article VII

2.2.2.10.1 Article VII (1)

Art. VII (1) introduces a scheme of compulsory insurance by providing that all ships registered in a contracting state and carrying more than 2,000 tons of oil in bulk as cargo are required to maintain insurance or another form of financial security covering the total liability of the vessel under the Convention.

At the Conference the limit was set at vessels carrying over 2,000 tons as it was felt that vessels of a lesser size would not cause serious pollution and that such vessels were likely to be national vessels operating in coastal waters and could therefore be dealt with under national legislation.¹⁹¹

Even though compulsory insurance was a novel concept in shipping at the time (and still is an exception), support for it was overwhelming. A vote taken during a Conference meeting on 21st November 1969 showed 33 to 0 in favour of compulsory insurance¹⁹². Compulsory insurance indeed seems indispensable for various reasons. Firstly, because of the potential size of liability. Furthermore, because many owners run their vessels as one-ship companies as a way of escaping or at least minimizing their liability

¹⁹¹ LEG/CONF/C.2/SR.14 Official Records 1969, pp. 708, 709

¹⁹² LEG/CONF/C.2/SR.14, Official Records 1969, p. 707

exposure. Moreover, owners are mostly registered where they cannot easily be traced, making enforcement against them very difficult or even impossible.

Some delegations however did voice doubts about the compulsory insurance scheme. The German delegation for example was concerned that it would be difficult for flag states to estimate the financial security of a particular insurer¹⁹³. While at this time globalisation and the move towards ever larger and fewer suppliers of services was not as advanced as it is today, this never presented a large problem because even then, at least as concerned the world of shipping, the insurance market was (and still is) in the hands of comparatively few. These few are P&I Clubs, the vast majority of which operate from London.¹⁹⁴ Mr Herber confirms that in practice this issue has never presented a problem as virtually all tankers are insured with one of the few P&I Clubs mentioned which are well known and work closely with the Fund¹⁹⁵.

The Netherlands considered that problems may occur where an insured vessel changed ownership and possibly also flag and both vendor and buyer failed to inform the insurer¹⁹⁶. Without knowing it, the insurer would then be left with the insurance of a vessel whose owners he did not know and had not been able to assess. The matter is made even more pertinent by the fact that vessels can change their ownership while at sea and therefore can, potentially, be at immediate risk.

The Dutch concern is of course correct. However, the problem cannot be one confined to oil pollution insurance alone and insurance companies have found ways and means of dealing with this problem. The obvious route of dealing with the problem would of course have been to provide for the

¹⁹³ LEG/CONF/4/Add.1, Official Records 1969, p. 505

¹⁹⁴ P&I Clubs are mutual, non-profit making insurance associations which insure owners, inter alia, against oil pollution. As a means of reinsurance the major P&I Clubs then have a higher level of mutuality. They are members of the International Group. Here losses above a certain amount are pooled, so that the individual Club has a limited exposure. For incidents which would exhaust even the capacity of the pool reinsurance, up to US \$1 billion is placed by the International Group on the world's insurance markets. Oil Spill Compensation, A Guide to the International Conventions on Liability and Compensation for oil pollution damage. A joint IPIECA (International Petroleum Industry Environmental Conservation Association)/ITOPF (The International Tanker Owners Pollution Federation) Briefing Paper, March 2000, p.4

¹⁹⁵ Herber, Prof. Dr. Rolf, Entwicklung und Stand des internationalen Haftungsrechts für Schäden aus der Meeresverschmutzung, 1. Rostocker Gespräch zum Seerecht, Aktuelle Probleme der Haftung für Schäden aus der Meeresverschmutzung, Schriften des Deutschen Vereins für Internationales Seerecht, Reihe A: Berichte und Vorträge, Heft 84, Hamburg 1994, p. 4

¹⁹⁶ LEG/CONF/4, Official Records 1969, p. 473

certificate to lapse in case of transfer of ownership without notification. Unfortunately Art. VII (5) of the Convention specifically prevents that.

2.2.2.10.2 Article VII (2)-(7), (9), (10) and (12)

Art. VII (2), (3), (4), (6) and (10) deal with the certificate to be issued in respect of the insurance or financial security in place, its form and content and that it has to be carried on board the vessel. Art. VII (5) deals with modifications to and lapses of the insurance or financial security. Art. VII (7) deals with the recognition of certificates by other contracting states. The validity of certificates can only be discussed via diplomatic channels. They cannot be doubted in individual cases nor can sanctions be imposed against a specific vessel. This provision is important to speed matters up “on the ground” and so as to ensure that not every certificate is put through a lengthy process of examination. Art. VII (9) provides that any sum provided by the insurance shall be available exclusively for the satisfaction of claims. Art. VII (12)¹⁹⁷ makes provision for ships owned by states. Such ships only have to carry confirmation that they are state owned and that their liability under the Convention is covered.

2.2.2.10.3 Article VII (8)

Art. VII (8) provides:

“Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage. In such case the defendant may, irrespective of the actual fault or privity of the owner, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner himself would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the owner himself, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him¹⁹⁸. The defendant shall in any event have the right to require the owner to be joined in the proceedings.”

¹⁹⁷ Art. VII (12) was included at the behest of the USSR. LEG/CONF/4 Official Records 1969, p.707

¹⁹⁸ i.e. matters in relation to the contract of insurance such as non-payment of premium or non-disclosure of material facts

Direct recourse against the insurer was a concept heavily opposed by the United Kingdom delegation¹⁹⁹. This is rather unsurprising as the United Kingdom has the biggest insurance market for ships worldwide. It was argued by the United Kingdom delegation that direct recourse would mean the insured had little interest in assisting the insurer in a defence action and it may also lessen the insured's incentive to take care in the first place. These arguments carry little weight because the insured can be joined in the proceedings (Art. VII (8))²⁰⁰. Any claimant anticipating the sort of information gathering problem which could ensue if the owner was not a party to the proceedings will join the owner. Also, the owner may fear a recourse action against himself and will therefore assist the insurer in his defence. For the same reason, and also in the interest of his claims record (if not his vessel), an owner will also have an incentive to take care not to cause an incident in the first place. Lastly, because of the nature of shipping insurance, owners usually have a fairly close working relationship with their insurer and are therefore more likely to co-operate with them.

The US was also opposed to direct access speculating that it would increase insurance premiums²⁰¹. However, no information to support this suspicion was produced.

The right of unlimited direct access to the insurer was also criticised by the Netherlands. The Dutch delegation argued that it left the insurer far too exposed. Direct access should in their view only be given in cases where the insured was bankrupt or insolvent. It was further said that an insurer who is made liable ought furthermore to have not only all the defences the owner himself would have had, but also all defences he would have had against the owner (e.g. fraud or wilful misconduct)²⁰². The United Kingdom made clear that should direct access be granted despite their objections, they were most certainly fervently against any such access being unlimited. They insisted direct access should only be granted in cases of bankruptcy. This proposal was, correctly, met by the concern of the Greek delegation, who said that in some jurisdictions a declaration of bankruptcy could take over a year to obtain which would be detrimental to the victims who would not be

¹⁹⁹ LEG/CONF/4, Official Records 1969, p. 477

²⁰⁰ A proposal made by the Swedish delegation and adopted by 20 to 6 votes. LEG/CONF/C.2/SR16, Official Records 1969, p. 721

²⁰¹ LEG/CONF/4, Official Records 1969, p. 477

²⁰² LEG/CONF/4, Official records 1969, p. 475

compensated swiftly²⁰³. The victims ought not to suffer from any uncertainty about the financial status of the owner.

In order to lessen the burden for the insurer the following compromises were made to soften the direct access provision: a) the insurer may limit his liability irrespective of the actual fault or privity of the owner; b) the insurer may require the insured to be joined in the proceedings; c) the insurer may invoke the defence of wilful misconduct.

As for the defence of wilful misconduct, according to information gathered by the United Kingdom on its insurance market, underwriters had indicated that, should direct access be agreed, they would insist on a defence of “wilful misconduct” in cases where the owner had acted deliberately.²⁰⁴ The request of the British insurance market was of course backed by the United Kingdom delegation. The argument made by the delegation that deliberate acts are uninsurable²⁰⁵ - one cannot for example take out a fire insurance against arson committed by the insured - is of course a compelling argument, and it was accepted by the Conference.

It seems right that, otherwise, unlimited direct action was granted. The argument made by the French delegation that a victim of pollution should not suffer from any contractual disputes between the insurer and the insured²⁰⁶ is convincing. The insurer always has the option of recouping the money by taking recourse against the insured with whom, unlike the victim, he entered into a voluntary legal relationship. Even if this may in practice often be a futile exercise, the insurance company is, economically speaking, better placed than the victim to spread the risk.

As regards ships carrying less than 2,000 tonnes of cargo the position is that insurance is optional, but if insurance is taken out then direct action against the insurer will apply²⁰⁷.

It is worth considering a specific problem in relation to direct access here even though it is a problem peculiar to the application of the Convention in the United Kingdom.

²⁰³ LEG/CONF/C.2/SR.14, Official Records 1969, p. 707

²⁰⁴ Some delegations, inter alia, Italy, Yugoslavia and Germany asked for a different wording saying that “wilful misconduct” was a legal concept which was unknown in many countries

LEG/CONF/C.2/SR.17, Official Records 1969, p. 732, 733

²⁰⁵ LEG/CONF/C.2/SR.17, Official Records 1969, p. 727, 728

²⁰⁶ LEG/CONF/4, Official Records 69, p.467-468

²⁰⁷ “Akari”, IOPC Fund Annual Report 1990, p.32

The problem is worth considering because in practice vessels are generally insured with a P&I Club and most P&I Clubs operate from the United Kingdom.

Direct access is against the usual policy of P&I Clubs who would not usually accept direct liability. Instead, the Clubs usually operate a “pay to be paid” policy, which means members are only reimbursed for payments made by them once they have paid the third party. In practice this rule does not seem to be applied too strictly, but dispensing with it is nevertheless discretionary. It is obvious however that especially in cases of bankruptcy, or impending bankruptcy, victims would look towards the insurer for payment and that they would desire direct action against him. Therefore, s. 1(1) of the Third Parties (Rights against Insurers) Act 1930²⁰⁸ gives third parties a direct right of action against the insurer *“in the event of the insured becoming bankrupt”* or *“in the event of a winding-up order being made”*. A defendant P&I Club however can defend itself against such an action by a third party because the member has not fulfilled his contract. He has not paid out any money and therefore, according to the terms of the insurance contract and/or the Club Rules he has not gained the right to be paid by the Club. Under the Act however, a third party only gets the rights the insured has against the insurer: *“his rights against the insurer under the contract in respect of the liability shall, notwithstanding any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.”* Therefore, if the insured has no right to be paid, neither does the third party. The House of Lords confirmed this when it held in *“The Fanti and Padre Island”*²⁰⁹ that a third party claimant stepping into the shoes of the assured under the Third Parties (Rights against Insurers) Act 1930 and who therefore takes over the rights of the assured under the P&I policy cannot recover from the insurer under the Act unless and until the assured has complied with the Club Rules and first paid the claim. It was held that the Act had not intended to put a third party into a better position than the assured himself. The House of Lords further held that the “pay to be paid” provision was legal and did not constitute a breach of Art. 1(3) of the Third Parties Act.

While it seems a logical analysis that a third party should not be better off than the original insured, it would seem that the “pay to be paid” rule of the Clubs goes against the Convention and that the cover provided by them will

²⁰⁸ Third Parties (Rights against Insurers) Act 1930, 20&21 Geo.5 c.25

²⁰⁹ *“The Fanti and Padre Island”* [1990] 2 Lloyd’s Rep.191 H.L.

hence be insufficient. However, Art. VII (8) of the Convention specifically provides “*the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him*”. This would seem to clearly include the “pay to be paid” defence and thereby solve the problem.

However, The Merchant Shipping Act 1995 does not implement this part of the Convention. The problem is however solved by s.165 (5) of the Merchant Shipping Act 1995 which specifically excludes the application of the Third Parties Act altogether. This seems to deal with the problem presented by the Third Parties Act and the Fanti case law such that the cover provided by the P&I Clubs should be in accordance with the Convention.²¹⁰ Also, in practice, the United Kingdom Department of Transport will only issue a certificate in relation to compulsory insurance on production of a so-called “Blue Card”. Blue Cards issued by P&I Clubs specifically certify that the insurance in place satisfies Art. VII of the 1992 CLC Convention²¹¹. For these reasons Gauci seems to be mistaken when he asserts that the “pay to be paid rule” applies to oil pollution claims. It seems on the contrary that the “pay to be paid” rule cannot be applied in cases of oil pollution claims under the Convention and in practice the P&I Clubs seem to have no intention of applying the rule in such cases.

2.2.2.10.4 Article VII (11)

Article VII (11) provides:

“Subject to the provisions of this Article, each Contracting State shall ensure, under its national legislation, that insurance or other security to the extent specified in paragraph 1 of this Article is in force in respect of any ship, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an off-shore terminal in its territorial sea, if the ship actually carries more than 2,000 tons of oil in bulk as cargo”.

As rightly pointed out by the French delegation, this is a minimum requirement introduced to ensure that the Convention is effective²¹². The

²¹⁰ It does however create a potentially much larger problem, because at the same time it deprives claimants of their right to claim directly from the insurer where the defendant is bankrupt, as the Merchant Shipping Act, having excluded the Third Parties Act, does not implement that part of Article VII (8) of the Convention which specifically takes the defence of the insured’s bankruptcy away from insurers

²¹¹ Gauci, Gotthard, *Oil Pollution at Sea, Civil Liability and Compensation for Damage*, John Wiley & Sons, 1997, p. 226

²¹² LEG/CONF/C.2/1, Official Records 1969, p. 469

delegation would have wished to go one step further and provide that states can refuse access to any vessel not carrying a certificate of adequate insurance. However, as this may go against a state's arrangements with other states, as correctly pointed out by the USSR²¹³, it had to be left to national law.

The German delegation²¹⁴ had voiced concerns that ships of a contracting state would be put at a disadvantage as against their competitors from non-contracting states who would not have to obtain and carry a certificate. The requirement to have a certificate, no matter where the vessel is registered, deals with this problem. It does not however deal with another competition problem also voiced by the German delegation at the Conference²¹⁵, namely that contracting states would make themselves less competitive in terms of trade and as flag states by requiring all vessels calling at their ports as well as all vessels registered there, to have a certificate. Similar doubts were voiced by the Liberian delegation for example, who was against the introduction of the Article as it was thought that it may prevent some states getting an adequate supply of oil²¹⁶. In practice these concerns do not seem to have presented a problem and it did not seem to be a major concern at the Conference, presumably because it was a risk worth taking in view of the good to be gained.

A matter which unfortunately none of the provisions contained in Art. VII deals with is how ships from non-contracting states would come by acceptable certificates. Under Art. VII (7) of the Convention neither certificates issued by contracting states to ships registered in non-contracting states, nor certificates issued by non-contracting states to their vessels are valid. According to Art. VII (11), however all contracting states are required to ensure that all vessels entering or leaving their ports or offshore terminals have the required insurance or other security, which, in turn is proved by means of an Art. VII certificate. The fact that non-contracting states would need but could not get a certificate was a remarkable oversight in the drafting of the Convention which duly caused problems. The situation was however resolved on a pragmatic basis by means of a Circular Letter (No. 232) from the Secretary General of IMO sent in 1975²¹⁷. The problem was finally dealt with on Convention level in the 1992 Protocol.

²¹³ LEG/CONF/4/Add.1, Official Records 1969, p. 510

²¹⁴ LEG/CONF/4/Add.1, Official Records 1969, p. 505

²¹⁵ LEG/CONF/4/Add.1, Official Records 1969, p. 506

²¹⁶ LEG/CONF/4/Add.1, Official Records 1969, p. 509

²¹⁷ LEG/CONF.6/48, Official Records 1984 Vol. II, p. 58

2.2.2.11 Article VIII

Art. VIII provides:

“Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years²¹⁸ from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six year period shall run from the date of the first such occurrence”.

This Article has been subject to litigation following the “Braer” casualty. In *Stephen Gray and Stanley Gray -v- The Braer Corporation and Assuranceforeningen Skuld*²¹⁹ the Scottish Outer House held that time starts to run when the damage first occurred. Any claim under the Convention has to be brought within 3 years and in any event within six years of the damage first occurring. In *Eunson -v- The Braer Corporation and Assuranceforeningen Skuld*²²⁰ it was held by the Outer House that claims brought under the Convention are extinguished after three years (six years in certain circumstances). Thereafter it was not within the discretion of the court to entertain them.

2.2.2.12 Article IX

2.2.2.12.1 Article IX (1)

Art IX (1) provides that actions for compensation may only be brought in the courts of those contracting states where damage has occurred or where preventive measures were taken. Reasonable notice of any such action is to be given to the defendant.

This solution was suggested by the French delegation²²¹. It seems entirely logical to conduct the litigation where the damage occurred. It is also the most convenient forum for victims who are likely to be resident in the country where the damage occurred. The winning argument for the French

²¹⁸ A period of six years instead of ten was proposed by the Netherlands, Germany and Norway. LEG/CONF/C.2/SR19, Official Records 1969, p. 754

²¹⁹ *Stephen Gray and Stanley Gray -v- The Braer Corporation and Assuranceforeningen Skuld*, Outer House, Court of Session, Edinburgh, 29th December 1998. Reported 1999 S.L.T. 1410

²²⁰ *Eunson -v- The Braer Corporation and Assuranceforeningen Skuld*, Outer House of Session, Edinburgh, 30th July 1998. Reported 1999 S.L.T. 140

²²¹ LEG/CONF/4, Official Records 1969, p. 491

proposal however was that it was the simplest. All other proposals were overtly complex. The United Kingdom and the US had favoured a solution where there was a choice of several possible jurisdictions including the country of the owner's residence, the place of arrest of the polluting vessel or even the place of arrest of a sister-vessel²²². It was argued that such a solution would give victims a better choice of forum. This however would not have been the case in practice. The chief, and possibly sole, beneficiary of forum shopping would in most cases have been the owner. Victims are likely to be locals in the place of pollution who have very little litigation experience, let alone on an international plane. Conducting the litigation in their home courts in their mother-tongue will therefore usually be their preferred forum. Shipowners on the other hand are much more astute about forum shopping. They themselves as well as their established network of insurers and lawyers are used to dealing with claims on an international basis and will be well placed to use the choice of jurisdiction to their best advantage. The result would have been forum shopping which would often drag litigation out making it expensive²²³, and delaying compensation. There would also have been a danger that the court seized may not be a court within a Convention country.

It has been held by the Italian courts that Art. IX must be interpreted such that the exclusive jurisdiction of the courts is not limited to cases where actions are brought against the owner of the ship or its insurer but exists in respect of any person against whom actions for compensation are brought.²²⁴ This is certainly a wise decision as it ensures all legal disputes relating to the incident are pooled which will, apart from ease, mean that decisions are uniform.

2.2.2.12.2 Article IX (2)

Art IX (2) stipulates that contracting states shall ensure that their courts have the necessary jurisdiction to entertain such actions.

²²² LEG/CONF/4 Official Records 1969, pp.491-493, 495

²²³ See for example Owners of the "Herceg Novi" -v- Owners of the "Ming Galaxy" [1998] 2 Lloyd's Rep. 454

²²⁴ Corte di Cassazione – Sezioni Unite 17 October 2002, No.14769 – International Oil Pollution Compensation Fund 1992 -v- RINA S.p.A. and Others –Total Fina Elf S.A. and Others -v- RINA S.p.A. and Others – French State -v- RINA S.p.A. and Others – m/t "Erika". Here RINA tried to establish that the proper jurisdiction for its claims against the French state, the owners of the Erika, Steamship Mutual and Total Fina for a declaration of non-liability, was the Tribunal of Syracuse because the "Erika" had been classified in Augusta and the alleged wrong would therefore have taken place there

2.2.2.12.3 Article IX (3)

Art IX (3) provides that once the fund has been constituted, the *“courts of the state in which the fund is constituted shall be exclusively competent to determine all matters relating to the apportionment and distribution of the fund”*.

While Article IX limits the number of possible jurisdictions, a remaining problem is that liability may well be determined by a court in one country (or even several courts in several countries) while the fund is being administered by a court in another country. It would have been far preferable had the Convention provided that the court first seized with the action shall deal with all matters concerning the incident. Such a provision would have been logical and would have ensured an easier and smoother way of dealing with claims.

2.2.2.13 Article X

Art X deals with enforcement and the recognition of judgments.

2.2.2.14 Article XI

Art XI deals with ships owned by states and used for governmental and military purposes on the one hand and commercial purposes on the other hand. The provisions are those generally used in international conventions.

2.2.2.15 Article XII

Art. XII stipulates that in case of conflict the 1969 Convention shall supersede any other convention in force or open for signature, ratification or accession at the date on which the 1969 Convention was opened for signature. It is however further stipulated that the obligations of contracting states towards non-contracting states arising under such other conventions shall remain unaffected.

Potential conflicts exist with the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-Going Vessels. This can however be disregarded as this Convention is now of little practical use. The relationship with the 1976 Convention is dealt with by Art. III of that Convention as well as by case law²²⁵. Despite such efforts, however, the relationship between these

²²⁵ See *Aegean Sea Traders Corporation -v- Repsol Petroleo SA and Repsol Oil International Ltd* [1998] 2 Lloyd's Rep. 39

Conventions is not entirely clear. A real conflict exists with the 1957 Convention. The 1969 Convention does not apply where a ship from a country which is party to the 1957 Convention but not party to the 1969 Convention causes pollution within the territory of a 1969 Convention state which is also party to the 1957 Convention. In that case the 1957 Convention limits apply, and these are very low. This may be one of the reasons why some states (such as South Africa and Malaysia) have not ratified the 1976 Convention and are still a party to the 1957 Convention.

2.2.2.16 Article XIII and XIV

Article XIII and XIV deal with signature, ratification, acceptance, approval and accession to the Convention.

2.2.2.17 Article XV

Art. XV provides that:

“the present Convention shall enter into force on the ninetieth day following the date on which Governments of eight States including five States each with not less than 1,000,000 gross tons of tanker tonnage have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization”.

The coming into force provision is relatively strict because Member States wanted to ensure a sufficient number of participants for competition reasons. Having a significant number of participants to some degree levels out competition from the start ²²⁶.

2.2.2.18 Article XVI

Article XVI deals with denunciation of the Convention.

2.2.2.19 Article XVII

Article XVII deals with extension to other territories.

²²⁶ Deutscher Bundestag, Drucksache 7/2299, p.65

2.2.2.20 Article XVIII

Art. XVIII stipulates that a conference for the purpose of revising or amending the Convention may be convened at the request of not less than one-third of contracting states.

France had advocated a more flexible amendment procedure because they correctly foresaw that the Convention would need to be amended in a few years time²²⁷.

The United Kingdom and Italy, amongst others, however favoured the solution adopted, which means that a Conference was necessary to revise or amend the Convention. The French approach however was the one that carried the day in the long run as a simplified amendment procedure was later introduced by the 1992 Protocol.

2.2.2.21 Article XIX and XX

Article XIX and XX deal with the depository for the Convention which is IMO, and with its duties.

2.2.2.22 Article XXI

Art. XXI provides that the *“Convention is established in a single copy in the English and French languages, both texts being equally authentic”*. The German translation is therefore not authentic, nor is it an official translation, as such translations only exist for Spanish and Russian in accordance with Art. XXI.

2.3 The 1976 Protocol

By 1976 the first amendments, albeit minor, to the Convention became necessary.

The adoption of the “Poincaré franc”, based on the “official” value of gold, as a payment unit in the 1969 Convention had been thought to ensure uniformity in the levels of limitation. However, the world currency crises meant that the major currencies were floated on the international markets.

²²⁷ LEG/CONF/C.3/SR.2, Official Records 1969, p. 806

The result of this was, that the efficacy and conversion of the gold franc at an official rate was destroyed²²⁸.

The Convention therefore had to be revised. This was done by the adoption of the Protocol of 1976 which changed the units of account from Poincaré francs to Special Drawing Rights (SDR)²²⁹ as used by the International Monetary Fund (IMF)²³⁰. In order to cater for those countries which are not members of the IMF and whose laws did not permit the use of the SDR, the Protocol provided for an alternate monetary unit - based, as before, on gold.

The 1976 Protocol was adopted on 9th November 1976 and entered into force on the 8th April 1981²³¹. By 1st May 1984, while the 1969 Convention had 54 contracting states, only 18 states were party to the 1976 Protocol. Amongst these were Germany and the United Kingdom. Germany had ratified the Protocol on 28th August 1980, and it entered into force on 8th April 1980. The United Kingdom had ratified the Protocol on 31st January 1980 and it entered into force on 8th April 1981²³².

2.4 1984 Protocol

In 1984 it was felt that the limits of liability were too low to provide adequate compensation²³³ in the event of a major oil pollution incident such as the “Amoco Cadiz” or the “Tanio”.²³⁴

²²⁸ Özçayır, Z. Oya, *Liability for Oil Pollution and Collisions*, LLP, 1998, p.218

²²⁹ The limitation amounts applicable will be converted from SDR into national currency on the date the limitation fund is set up. The daily conversion rates for SDR can be found on the International Monetary Fund website at www.imf.org under “IMF Finances” or in financial newspapers.

²³⁰ For further information on the International Monetary Fund (IMF) as well as Special Drawing Rights, please see the IMF web-page at www.imf.org. At www.imf.org/external/np/exr/facts/sdr.htm, “Special Drawing Rights, A Factsheet” provides a short summary of the function and history of SDR’s. Webpages on 4.5.2003.

²³¹ In Germany: BGBl 1980 II 721,724

²³² LEG/CONF.6/C.2/INF.3, Official Records 1984, Vol. 1, p. 269. Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions, IMO E J/8387, I:\J_\8387.doc

²³³ This view was expressed e.g. by the IOPC Fund LEG/CONF.6/21, Official Records 1984, Vol. II, p.33 and the International Associations of Ports and Harbours (IAPH) LEG/CONF.6/34, Official Records 1984, Vol. II, p.40. In the 48th Meeting of the IMO Legal Committee the revision of the limitation amounts was said to be the “heart of the work”. Report of the Legal Committee on the work of its 48th Session, LEG 48/6, p.12

²³⁴ For a detailed account, see “The French Experience “Tanio” and “Amoco Cadiz” Incidents Compared”, Emmanuel Fontaine, Genoa Seminar, September 21-23, 1992, Comité Maritime International (CMI)



“Amoco Cadiz”, France, 1978²³⁵.



“Tanio”, France, 1980²³⁶

Despite the claims statistics of the International Group of P& I Associates ²³⁷ which showed that out of all oil spills which had occurred between 1970 and 1982 only 55 incidents (less than 5%) would have exceeded shipowner’s limits

²³⁵ ITOPF webpage, www.itopf.com. On 20.3.2007

²³⁶ ITOPF webpage, www.itopf.com. On 20.3.2007

²³⁷ In 1984 the Group had 15 members: Assuranceforeningen Gard, Assuranceforeningen Skuld, The Britannia Steamship Insurance Association Limited, The Japan Ship Owners’ Mutual Protection and Indemnity Association, The Liverpool and London Steamship Protection and Indemnity Association Limited, The London Steam Ship Owners’ Mutual Insurance Association Limited, Newcastle Protection and Indemnity Association, The North of England Protecting and Indemnity Association Limited, The Standard Steamship Owners’ Protection and Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, The Sunderland Steamship Protecting and Indemnity Association, Sveriges Angfartygs Assurans Forening (The Swedish Club), The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited, The West of England Ship Owners’ Mutual Protection and Indemnity Association (Luxembourg). In 1984 the Group together covered 90% of the world’s tanker tonnage for risks including oil pollution. LEG/CONF.6/14, Official Records 1984, Vol. II, p.15

of liability of US\$120 per ton under the 1969 Convention²³⁸, the shock of recent disasters sat deep. It was clear that spills had become more expensive. This was partly due to the fact that tanker size had steadily increased from the first tankers like the “Glueckauf” built in 1886 with a deadweight of 3,060 tons to Ultra Large Crude Carriers (ULCC) tankers like the “Batillus” with a deadweight of 550,000 tons in 1978. It is interesting to note, especially given the 1969 Convention’s failure to cover bunker spills, that the bunker capacity of the “Batillus” alone went beyond the load capacity of the “Glueckauf”. Also, oil production had increased from 524 million tonnes in 1950 to 3,049 million tonnes in 1977. Equally, the transportation of crude oil had increased from 225 million tonnes in 1950 to 1,818 million tonnes in 1977²³⁹.

Insurance capacity had also risen from USD\$ 0.10 million Club Retention, USD\$ 1.40 million Pool Retention and USD\$ 10.00 million Pollution Retention to USD\$ 1.00 million Club Retention, USD\$ 8.00 million Pool Retention and USD\$ 300.00 million Pollution Retention in 1984.²⁴⁰ According to Gold this increase in insurance capacity can partly be explained by the fact that in 1969, when limits were first discussed, underwriters were understandably cautious because they were suddenly faced with strict liability at a time when oil pollution had “*almost assumed hysterical proportions*”. Since that time claims experience has calmed the waters and increased the market’s confidence, so that increasing limits could be agreed.²⁴¹ Inflation, too, had eroded the limitation amounts. Worse still however, according to the Advisory Committee on Pollution of the Sea (ACOPS), spill costs had grown faster than the rate of inflation during the 1970’s due to, inter alia, increased clean-up activities and more generous compensation which was not counter-acted by more efficient clean-up operations²⁴².

²³⁸ LEG/CONF.6/14, Official Records, Vol. II, p. 19. According to Trotz, if one were to apply the Fund Convention to the incidents which were not covered by the Oil Convention then one would find that only two incidents remained where no full compensation could have been provided, namely the “Tanio” and the “Amoco Cadiz”. Trotz, Norbert, *Die Revision der Konvention über die zivilrechtliche Haftung für Schäden aus der Ölverschmutzung des Meeres und über die Errichtung eines Entschädigungsfonds*, Akademie für Staats- und Rechtswissenschaft der DDR, Institut für ausländisches Recht und Rechtsvergleichung, Aktuelle Beiträge der Staats- und Rechtswissenschaft, Heft 340, Potsdam-Babelsberg, 1987, p.7

²³⁹ Statistics from “Öl auf See, Risiken Haftung Versicherung“, Münchner Rück, Munich Re, 1980, p. 4-5

²⁴⁰ By 1992 these figures had further increased to USD\$ 2.00 million Club retention, USD\$ 15 million Pool retention and USD\$ 500.00 million Pollution limit. Gold, Edgar, *Gard Handbook on Marine Pollution*, Second Edition, published by Assuranceforeningen Gard, 1997, printed by B.A.S Printers Limited, p. 35

²⁴¹ Gold, Edgar, *Gard Handbook on Marine Pollution*, Second Edition, published by Assuranceforeningen Gard, 1997, printed by B.A.S Printers Limited, p.34

²⁴² LEG/CONF.6/58, Official Records 1984, Vol. II, p.67-72

Pressure was also building up to revise the regime because during the first years of the regime shipowners had borne the brunt of the compensation payments²⁴³. However, five exceptionally expensive incidents between 1978 and 1980²⁴⁴ resulted in cargo owners having to make larger compensation payments under the Fund Convention 1971²⁴⁵. Although, even then, owners bore almost 60% of the costs of these years according to The International Association of Independent Tanker Owners (INTERTANKO)²⁴⁶, cargo interests were unhappy about this development. Accordingly, cargo was seeking to put a larger share of compensation payments on the shipping industry. The Advisory Committee on Pollution of the Sea (ACOPS) thought an increase in shipowners' liability by a factor higher than 3 would be justified to redress the previous balance between owners and cargo²⁴⁷. The oil industry, in the shape of OCIMF however, pressed for an almost 100% payment of costs by the shipowner²⁴⁸. One argument made by the oil industry in the battle between the shipping industry and the oil industry (a battle which has and will continue to well up time and again), was made by OCIMF director John Hughes who said that *"The CLC convention for an owner with a specific ship and cargo is an insurable loss. For the oil interests, it is a levy into a great big fund and therefore not economically insurable"*²⁴⁹. This increased payment pressure on the oil industry therefore led in turn to pressure from the oil industry to amend both Conventions even before the Fund Convention Assembly had made use of the possibility to increase the value of the Fund to the full extent authorised²⁵⁰ without amending the Convention²⁵¹. The pressure exerted by

²⁴³ According to TOVALOP and CRISTAL's submission to IMO's Legal Committee at its 45th Session in March 1981, tanker owners had been liable for a total of \$375 million in the previous 10 years compared with \$165 million contributed by the oil industry. LEG/CONF. 6/INF.2/Rev.1, Official Records 1984, Vol. II, p.81

²⁴⁴ According to statistical information from the International Group of P & I Associations claims between 1978 and 1980 amounted to \$236.5 million. LEG/CONF.6/14, Official Records 1984, Vol. II, p. 32

²⁴⁵ LEG/CONF.6/INF.2/Rev.1, Official Records 1984, Vol. II, p.83

²⁴⁶ In 1984 INTERTANKO had a membership of independent tanker owners of 180 million tons deadweight, about 80 % of all independently owned tanker tonnage and 53% of the entire world tanker and combined carrier fleet. LEG/CONF.6/INF.2/Rev.1, Official Records 1984, Vol. II, p.78

²⁴⁷ LEG/CONF.6/58, Official Records 1984, Vol. II, p.67

²⁴⁸ For OCIMF's position please see: LEG 49/3/8, LEG 51/3/8, LEG/CONF.6/INF.3

²⁴⁹ "Third tier troubles, OCIMF calls for owners to cough up", Fairplay July 12th 2001, 342 (6131), p. 24. The same thought is found in Trotz, Norbert, Die Revision der Konvention über die zivilrechtliche Haftung für Schäden aus der Ölverschmutzung des Meeres und über die Errichtung eines Entschädigungsfonds, Akademie für Staats-und Rechtswissenschaft der DDR, Institut für ausländisches Recht und Rechtsvergleichung, Aktuelle Beiträge der Staats-und Rechtswissenschaft, Heft 340, Potsdam-Babelsberg, 1987, p.14

²⁵⁰ See Art. IV of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971

²⁵¹ LEG/CONF.6/12, Official Records 1984, Vol. II, p. 5

the oil industry was such that Trotz hints that it was the real reason for the revision of the Convention²⁵². That such pressure would ensue was inevitable. The 1969 Convention represents a very finely balanced compromise between, inter alia, shipowners and cargo owners. Any change in this balance was necessarily going to lead to a cry for revision, even if this was not perceived as particularly fair by the shipowning community (represented for example by INTERTANKO), who argued that by 1984 the oil industry would have been much better placed to bear a heavier burden than the shipowning community as oil prices had soared between 1970 and 1983 whereas freight rates had decreased over the same period²⁵³.

The need as well as the possibility to revise the Convention, even though it had only been adopted for a relatively short time, was therefore clear, and informal consultations commenced aimed at increasing the limitation amounts.

The first attempts at revision of the initial Conventions began in 1979. The process was started by the IOPC Fund Assembly, which asked IMO to consider whether the limits could be raised and to consider the problem of the limits applying to small tankers²⁵⁴.

In 1980 negotiations were taken up between the IOPC Director and the International Group of P&I Clubs. This led to a general agreement that the P&I Clubs would cover higher limits than before and that these would be capped at a mutually agreed level²⁵⁵.

It was found that the issue of raising limits of liability could not be decided informally and that an international conference was called for. Preparatory work was therefore embarked on. Between 1981 and 1983 the Convention was discussed very intensively by IMO²⁵⁶. An informal working group consisting of interested delegations met during the same time-frame. The first meeting took place in June 1980 following an invitation by the US to Washington. During this meeting the working group felt that if the limits of liability were to be raised the right to limit must be made unbreakable except

²⁵² Trotz, Norbert, *Die Revision der Konvention über die zivilrechtliche Haftung für Schäden aus der Ölverschmutzung des Meeres und über die Errichtung eines Entschädigungsfonds*, Akademie für Staats- und Rechtswissenschaft der DDR, Institut für ausländisches Recht und Rechtsvergleichung, Aktuelle Beiträge der Staats- und Rechtswissenschaft, Heft 340, Potsdam-Babelsberg, 1987, p.7

²⁵³ INTERTANKO. LEG/CONF.6/INF.2/Rev.1, Official Records 1984, Vol. II, p.94, 95

²⁵⁴ Fund Assembly Resolution. F.D. FUND/A.2/17. 20/4/79

²⁵⁵ F.D. FUND/A.3/15. 19/3/80

²⁵⁶ 45th to 51st meeting of the Legal Committee of IMO

in the case of wilful misconduct by the shipowner. This shows very clearly that the intention of the 1992 Protocol, which followed some time later, was that the right to limit liability should be unbreakable other than in exceptional circumstances²⁵⁷. The second meeting was held in Stockholm in December 1981. Three further meetings in London followed at the invitation of the IOPC Fund. These meetings analysed in further depth the questions raised by the Legal Committee and a draft text for the Protocol was formulated.²⁵⁸

Following these preparatory steps, IMO then convened the “International Conference on Liability and Compensation for Damage in Connexion with the Carriage of Certain Substances by Sea”. The Conference took place in London from 30th April to 25th May 1984. The Protocol of 1984 was adopted at the end of this Conference on the 25th May 1984. It was intended to enter into force 12 months after being accepted by 10 states, including six states with tanker fleets of at least 1 million gross tons²⁵⁹.

However, the entry into force provisions of the 1984 Protocols were too optimistic, mistakenly assuming that the USA would ratify. Without American participation the conditions for entry into force could not be met. The reason behind this was the very close link between the 1969 Convention and the 1971 Fund Convention. Contracting states to one Convention are also members of the other. Both Conventions were revised at the same time. The 1984 Fund Protocol was designed in such a way that it could not come into force without US participation as the US was one of the main oil importers. The majority of the Fund was fed by relatively few states, namely Japan (28.92% in 1990), Italy (16.14% in 1990), Holland (10.11% in 1990), France (9.59% in 1990) and the United Kingdom (9.14% in 1990). In 1991 Japan contributed 266,411,278 tonnes of the total of 973,208,731 tonnes of contributing oil²⁶⁰. Japan, as can be seen, therefore bore the biggest burden in terms of contributing to the Fund²⁶¹. Without the US joining to share the burden of contributions under the revised 1971 Convention, the increase for Japan in the contributions to the Fund would have been a very heavy burden indeed which Japan was unwilling to shoulder. Had the US joined they would

²⁵⁷ JMM no 3248, 18 March 1982, p.603

²⁵⁸ Ganten, Dr, Reinhard, Die Protokolle von 1984 zum Ölhaftungsübereinkommen von 1969 und zum Fondsübereinkommen von 1971, Schriften des Deutschen Vereins für Internationales Seerecht, Reihe B: Dokumente und Materialien, Heft 17, Hamburg 1986, p.9

²⁵⁹ Art. 13 of the 1984 Protocol

²⁶⁰ LEG/CONF.9/10, Official Records 1984, Vol. 4, pp. 88, 89

²⁶¹ LEG/CONF.6/7, Official Records 1984, Vol. 1, p.178

have taken on 25% of the Fund contributions based on the amount of oil they imported around that time. Japan would therefore only have joined if the US would also have joined to share the financial burden. As it was, however, the US did not join, which meant Japan did not join. The loss of two states with a substantial fleet and heavy oil imports meant that neither the entry into force provisions of the Protocol to the 1969 Convention nor those of the Protocol to the 1971 Convention could be fulfilled.

Japan had already abstained from voting on both the 1969 Convention and the 1971 Fund Convention Protocols in 1984 explaining that the new limits were too high and the Convention only applicable in a very limited number of regions of the world. Japan's position is understandable considering that during the first 12 years of the Fund, Japan contributed £20 million, whereas only £5 million were paid out for damage incurred within its territory²⁶². Japan was further of the view that the Protocol did not maintain a sufficient balance between the interests of the shipowner and the maritime industry²⁶³. This is somewhat unsurprising as Japan represents one of the largest tanker fleets in the world²⁶⁴.

The Protocol thus never entered into force and was eventually superseded by the 1992 Protocol when it became clear that the US would never accept the 1984 Protocol. The US went its own way preferring a system of unlimited liability, which it enacted in its Oil Pollution Act of 1990²⁶⁵. The fact that the US did not sign the Protocol may not have come as such a surprise. Even though the US took part in the Conferences negotiating the 1969 Convention and the 1971 Fund Convention, they did not sign these either. They also, even at that point in time, had a very poor record of membership in international transport treaties. In fact, suspicions were already raised at the 1984 Conference during which it was said that, *inter alia*, the US system of ratification and implementation was too complex in any event to make ratification likely. The US delegate at the time tried to quell such suspicions by confirming that the US would ratify if they were satisfied with the end

²⁶² Göransson, Magnus, *The 1984 and 1992 Protocols to the Civil Liability Convention 1969 and the Fund Convention 1971*, p.76 in *Liability for Damage to the Marine Environment* edited by Colin M. De la Rue, LLP Lloyd's of London Press Ltd, 1993

²⁶³ LEG/CONF.6/SR.5, *Official Records 1984*, Vol. 3, p.182

²⁶⁴ In 1992 Japan had the fourth largest fleet of tankers with 23.8 million gross tonnage, while Greece took third place, Panama second and Liberia first. UK Department of Transport, www.dft.gov.uk/transtat

²⁶⁵ IMO www.imo.org/home.asp?topic_id=161. On 16.11.2003. Also: Chao, Wu, *Pollution from the Carriage of Oil by Sea, Liability and Compensation*, p.250

result²⁶⁶. Whether or not that was his true intention at the time is a matter of guess work. What is certainly true is that, as always, the US sought to impose their own views on international politics and that was an aim they achieved. Considering the Protocol, the wishes of the US were very well accommodated. Geographical coverage was extended as they wished, compensation for restoration of natural resources, economic losses and preventive measures were all implemented, and a simplified amendment procedure to raise the limits of liability was agreed. It is true that the US did not achieve one of their many objectives, which was to block the channelling of liability, but in return for such channelling being implemented the limits of liability were raised dramatically²⁶⁷. All in all therefore, the US achieved almost all of their objectives and should therefore have been pleased with the result, given that some small compromise is always necessary in any negotiation. The reason why the Protocol was not ratified by the US had indeed nothing to do with the Protocol itself, but lay in the general unwillingness of the US to become a party to international conventions in general for fear that their sovereignty may be compromised. This conclusion is inevitable when reading the speeches made on this subject before the Subcommittee on Coast Guard and Navigation, House Merchant Marine and Fisheries Committee, such as for example the speech of the US Attorney-General²⁶⁸.

The “Exxon Valdez” disaster of March 1989 finally brought the American antipathy against the Protocol to a head and presented a welcome justification for rejecting the Convention and its 1984 Protocol on the grounds that the compensation payable under the Convention would not have covered the damage²⁶⁹. It was thus that the US opted for its own system, the Oil Pollution Act 1990 (OPA). With the adoption of OPA it was clear that the US would never join the 1984 Protocol and it was therefore also clear that the Protocol would never enter into force.

The provisions of the 1984 Protocol will be discussed in the context of the 1992 Protocol below because (apart from the coming into force provisions

²⁶⁶ LEG/CONF.6/C.2/SR.8, Official Records 1984, Vol. II, p.399, 400

²⁶⁷ Wagner, JMLC, Vol. 21, N.4, Oct 1990, p.569

²⁶⁸ Hearing before the Subcommittee on Coast Guard and Navigation, House Merchant Marine and Fisheries Committee, 98th Cong., 2nd Sess. (1984), p.85

²⁶⁹ The Exxon Valdez ran aground in Prince William Sound, Alaska, in March 1989. The vessel spilled 40,000 tons of North Slope crude oil (Gold, Edgar, Gard Handbook on Marine Pollution, Second Edition, published by Assuranceforeningen Gard, 1997, printed by B.A.S Printers Limited, p. 44). So far it is the most expensive oil spill in history. Clean-up alone cost in the region of US\$2.5 billion and total costs (including fines, penalties and claims settlements) are estimated at US\$9.5 billion (The International Tanker Owners Pollution Federation Limited, ITOPF Handbook 2003/2004)

discussed above) the provisions are identical, so that a separate discussion would serve no purpose.

Due to budgetary restraints - the Conference was funded by IMO from extra-budgetary resources ²⁷⁰ - no summary records were produced during the 1992 Conference. The summary records of the 1984 Protocol will therefore have to be relied on in the following²⁷¹.

2.5 The 1992 Convention

The changes agreed to in the 1984 Protocol, particularly the increase in compensation amounts, were urgently needed, as demonstrated by further incidents, such as the “Haven” in April 1991 off the coast of Italy. Accordingly, there was a growing sentiment particularly amongst the European member states, that something had to be done to bring the substance of the 1984 Protocol into force in order to keep the international system up to date and avoid the threat of further regional schemes²⁷².

The IOPC Fund Assembly therefore asked a working party in 1990 to look into the likely fate of the 1984 Protocol. This group reported in October 1991 recommending that the Secretary General of IMO should call an International Conference to consider modifying the Protocol. The group had reached the conclusion that the Protocol could only enter into force if the conditions for entry into force were relaxed²⁷³.

In 1992, IMO therefore convened a Diplomatic Conference to remedy the situation. During this “International Conference on the Revisions of the 1969 Civil Liability Convention and the 1971 Fund Convention”, held in London from 23rd to 27th November 1992, new Protocols, the 1992 Protocols, were drawn up in such a way as to avoid the deadlock of entry into force created by the non-acceptance of the US. ²⁷⁴

²⁷⁰ LEG/CONF.9/11, Official Records 1984, Vol. 4, pp. 90, 91

²⁷¹ Official Records 1984, Vol. 1, Introduction, p.8

²⁷² This sentiment was expressed inter alia by the House of Commons Committee of Public Accounts in their 40th Report “Oil and Chemical Pollution at Sea”. Session 1990-1991

²⁷³ IOPC Report 1991, p.18/7/3 (a), (b) and (c)

²⁷⁴ Two 1992 Protocols were signed at the Conference. One to amend the 1969 Convention and a further 1992 Protocol to amend the 1971 Fund Convention. Since the 1971 Convention is not concerned with liability, only the 1969 Convention and its Protocols shall be considered here. The Fund Convention Protocol shall only be considered where relevant

The 1992 Protocols retained most of the provisions of the 1984 Protocols, except of course for the entry into force provisions. The 1992 Protocol to the Fund Convention also introduced a capping system in respect of contributions by any one member state.²⁷⁵ The latter was introduced to avoid the financial burden on Japan which its contributions to the IOPC Fund would have represented, as discussed above. This opened the way for Japan to join the Protocol thus removing a major stumbling block in the way of the Protocols coming into force.

The 1992 Protocol was adopted on 29th November 1992 and entered into force on 30th May 1996. In Germany the Convention was adopted as German law by Governmental Decision²⁷⁶ of 25th July 1994²⁷⁷ together with an official translation, and proclaimed with a “Bekanntmachung”²⁷⁸ on 23rd April 1996²⁷⁹ to come into force on 30th May 1996. The Convention was incorporated into German law directly on the basis of Art. 59 Grundgesetz²⁸⁰, such that the original text of the Convention is directly applicable and any translation of the text only serves as an aid. Those Parts of the Convention dealing with compulsory insurance and insurance certificates are dealt with separately in the “Gesetz für die Haftung und Entschädigung für Ölverschmutzungsschäden” (Ölschadengesetz – ÖLSG)²⁸¹ of 30th September 1988²⁸² and the “Ölhaftungsbescheinigungs Verordnung”²⁸³ of 10th May 1996²⁸⁴.

²⁷⁵ The cap was fixed at 27.5% of the total annual contributions to the Fund for any one state. The capping will apply until an amount of 750 million tones of contributing oil is achieved by Member States or, alternatively on the expiry of 5 years from the entry into force of the 1992 Protocol to the Fund Convention (which would have been 30th May 2001) whichever is the earlier. On 16th May 1998 this amount of contributing oil was achieved as the Fund Convention entered into force for Ireland, South Korea and Spain, so that capping will stop in 1998 (Özçayir, Z. Oya, Liability for Oil Pollution and Collisions, LLP, 1998, p.237)

²⁷⁶ Bundesregierungsbeschluss

²⁷⁷ BGBl 1994 II S. 1150

²⁷⁸ Proclamation

²⁷⁹ BGBl 1996 II 670 and 685

²⁸⁰ Basic law. The Grundgesetz contains the most fundamental German laws

²⁸¹ Law on liability and compensation for oil pollution damage

²⁸² BGBl. I S. 1770 i. V.m. Bek. vom 8.12.1995 (BGBl. S. 2084) idF des Gesetzes vom 29.10 2001 (BGBl I 2785)

²⁸³ Oil liability certification regulation

²⁸⁴ BGBl I 07

Introduced by the “Ölschadengesetz”, the Convention is further referred to in the Handelsgesetzbuch²⁸⁵.

In the United Kingdom the Convention was implemented by the Merchant Shipping (Salvage and Pollution) Act 1994 which was later consolidated by s.171 of the Merchant Shipping Act 1995 and is now contained in the Merchant Shipping Act 1995, Part VI, Chapters III-IV and came into force on 30th May 1996 pursuant to the Merchant Shipping Act 1995 (Appointed Day No.1) Order 1996²⁸⁶. Certificates of compulsory insurance are dealt with in the Merchant Shipping Act 1995, s.163 and Oil Pollution (Compulsory Insurance) Regulations 1997,²⁸⁷ which came into force on 1st September 1997. The Convention has therefore not been adopted directly, as in Germany, but was incorporated into national law.

2.5.1 The provisions of the 1992 Protocol

The Protocol corrects much of the deficiencies of the 1969 Convention. This is a development which is all the more important as the tanker fleet grew by 120% between 1968 and 1983²⁸⁸. As at 31st March 2004, the Protocol has been accepted by 94 states representing 69% of world tonnage^{289 290}. The Protocol has thus been a remarkable success. In the following, the provisions of the 1992 Protocol will be discussed in detail. Consequential changes will not be mentioned.

2.5.1.1 The definition of “ship”

The first attempts to redefine the meaning of “ship” within the Convention were made as early as 1977 in a Protocol produced by the Legal Committee of IMO²⁹¹. The proposal however did not satisfy a majority of states so that the

²⁸⁵ §§ 486-487e HGB (Handelsgesetzbuch – Commercial Code) make further regulations in relation to the Convention. For example § 486 Abs IV Nr 2: limitation of liability is not possible as concerns (legal) costs. The Convention is silent in this regard but is applied in practice in the same way in the United Kingdom. Furthermore § 486 Abs III also makes clear that any liability for a claim which cannot be limited under the CLC can be limited under the Convention on Limitation of Liability for Maritime Claims 1976. This is a point which is unclear under the Convention. For the English law solution see *Aegean Sea Traders Corporation -v- Repsol Petroleo SA and Repsol Oil International Ltd* [1998] 2 Lloyd’s Rep. 39

²⁸⁶ SI 1996/1210

²⁸⁷ SI 1997/1820

²⁸⁸ LEG/CONF.6/C.2/SR.24, Official Records 1984, Vol. II, p.570

²⁸⁹ www.imo.org

²⁹⁰ Original Parties to the Convention were Egypt, Denmark, France, Japan, Mexico, Norway, Oman, Sweden, Germany and Great Britain (BGBl 1995 II S. 974)

²⁹¹ LEG XXXIII/5 Annex III of 27.9.1977

effort was abandoned in favour of a more thorough reform later. The envisaged reform took the shape of the 1984 and later the 1992 Protocol.

The 1992 Protocol redefines “ship” in Art. II (1) as meaning:

“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.”

During the negotiations in 1969 the Irish and Western-German delegations had proposed the deletion of the originally proposed words “*constructed or adapted so that the greater part of it can carry, and usually does carry, oil in bulk as cargo*”. The proposal was accepted by 22 to 8 votes. It was therefore the express wish of the parties at the time not to extend the Convention to anything other than tankers. This view was, inter alia, expressed by the United Kingdom delegation²⁹². The adopted wording also meant that pollution from oil residue was not covered by the 1969 Convention. This was put to the test when the “Tolmiros” was suspected (the matter was not pursued due to lack of proof) of polluting the Swedish coast. The polluting oil stemmed from the lines and pumps of the vessel after she had discharged her cargo in Gothenburg. The IOPC Fund obtained expert advice, which came to the conclusion that oil residues would not fall under the Convention as they could not be said to be “carried as cargo”²⁹³. During the Conference leading to the 1992 Protocol however, overwhelming support was voiced for extending the Convention to cover pollution from combination carriers who had carried oil as cargo and still had residues on board²⁹⁴. The words deleted during the 1969 Conference were thus partly reintroduced to show that the parties wished to extend the Convention to cover all types of ships capable of carrying oil – provided they were in fact carrying oil or had residues from such carriage still on board. The extension not only meant that all types of vessels could potentially fall under the Convention but also that, unlike previously, pollution by oil residue was now also covered.

²⁹² LEG/CONF/C.2/SR14, Official Records 1969, p. 711

²⁹³ IOPC Fund Annual Report 1991, p.35

²⁹⁴ For example: United Kingdom, LEG/CONF.6/C.2/SR.2, Official Records 1984, Vol. II, p.331, France, India, Australia, Sweden, Japan, China, Greece, Netherlands, Italy and Nigeria LEG/CONF.6/C.2/SR.2, Official Records 1984, Vol. II, p.332-335

It was decided that the burden of proving that the vessel was clean of any cargo residue was to lie with the shipowner.²⁹⁵ The French delegation suggested such proof could be furnished by showing the certificate issued by the station which had cleaned the tanks²⁹⁶.

It was also agreed to extend the Convention to cover pollution from unladen tankers²⁹⁷. The Convention therefore now covers not only laden but also unladen tankers as well as bunker spills from such tankers. Bunker spills from combination carriers are only covered where they are carrying a cargo of oil in bulk or did so on their previous voyage and still have residue on board. The reason for this is simply the potential difficulty of deciding whether and/or which part of the pollution was caused by the bunkers and which by the cargo.

The Convention still does not cover spills from oil not carried in bulk, nor does it cover spills from tankers in ballast with no residue of oil cargo remaining. It also does not cover bunker spills from vessels not capable of carrying oil (a result propagated, inter alia, by the International Shipowners' Association (INSA)²⁹⁸). Such incidents will still have to be dealt with under the national law²⁹⁹ and the 1976 Limitation Convention.

Clearly the distinction between oil carried as cargo and oil carried as bunkers is not only confusing and seemingly arbitrary, but also leaves a gap in the liability for oil pollution damage that has not been filled to the present day, even though, empirically, bunker spills can have serious effects³⁰⁰.

2.5.1.2 The definition of "oil"

Art. II (5) provides:

"Oil" means any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship.

²⁹⁵ This view was advocated, inter alia, by Norway and Finland LEG/CONF.6/C.2/SR.2, Official Records 1984, Vol. II, p.331, Japan, China and Australia LEG/CONF.6/C.2/SR.2, Official Records 1984, Vol. II, p.332-335

²⁹⁶ LEG/CONF.6/19, Official Records 1984, Vol. I, p. 303

²⁹⁷ LEG/CONF/6.7, Official Records 1984, Vol. I, p.135

²⁹⁸ LEG.CONF. 6/10, Official Records 1984, Vol. II, p.3

²⁹⁹ In the United Kingdom for example the problem is solved by The Merchant Shipping Act 1995, s. 154 which extends the Convention regime to bunker oil spills generally

³⁰⁰ Group of International P & I Associations, LEG/CONF.6/47, Official Records 1984, Vol. II, p.52

There was some debate over the definition of “oil”. It was, inter alia, unclear whether or not the Convention covered non-hydrocarbon oils. It seemed that the draft Protocol assumed it did not, but the inclusion of whale oil counteracted that presumption³⁰¹. IMO’s Legal Committee suggested confining the application of the Convention to hydrocarbon mineral oil, excluding all non-hydrocarbon mineral oils such as silicones and all non-mineral persistent oils³⁰². Sweden was not in favour of confining the Convention to hydrocarbon oil³⁰³. Neither was the United Kingdom.³⁰⁴ Australia however was for a restriction to hydrocarbon mineral oils. In their opinion not enough non-mineral oil was transported to warrant an extension. If such oils did pose a threat they ought, according to the Australian delegation, be included in the HNS Convention instead.³⁰⁵ An indicative vote by the chairman showed that 28 delegations were in favour of a restriction to hydrocarbon mineral oil, whereas only 14 were against it³⁰⁶. The Convention’s application was therefore restricted to hydrocarbon mineral oil. The reference to whale oil, mainly interesting for Japan,³⁰⁷ was taken out as it had lost its practical significance³⁰⁸.

The Legal Committee’s suggestion to extend the application to non-persistent oils³⁰⁹ however was not taken on, even though it was recognised that non-persistent oils can have a grave effect, for example in shallow or cold³¹⁰ waters, as non-persistent oil is very toxic.³¹¹ However, the harmfulness of non-persistent oils alone may not be enough to warrant their inclusion. It is rather their potential to cause harm so great it could not be absorbed by the Limitation Convention 1976 that would warrant their inclusion in the Convention. This consideration was the reason Korea and the United Kingdom voted against their inclusion, stating that damage from non-

³⁰¹ LEG/CONF.6/C.2/SR.3, Official Records 1984, Vol. II, p.342

³⁰² LEG/CONF/6/4, 12 January 1984, Official Records 1984 Vol. I, p. 57

³⁰³ LEG/CONF.6/30, Official Records 1984, Vol.I, p. 336

³⁰⁴ LEG/CONF.6/50, Official Records 1984, Vol. I, p. 365

³⁰⁵ LEG/CONF.6/C.2/SR.3, Official Records 1984, Vol. II, p.339

³⁰⁶ LEG/CONF.6/C.2/SR.3, Official Records 1984, Vol. II, p.347

³⁰⁷ Herber, Dr. Rolf, *Seehandelsrecht*, Systematische Darstellung, Walter de Gruyter 1999, p.192

³⁰⁸ LEG/CONF.6/30, Official Records 1984, p. 337

³⁰⁹ LEG/CONF.6/C.2/INF.1, Official Records 1984, Vol. I, p. 241

³¹⁰ Norway LEG/CONF.6/32, Official Records 1984, Vol. I, p.346

³¹¹ The Swedish delegation had wanted to include non-persistent oils: LEG/CONF.6/30, Official Records 1984, Vol.I, p. 336. Norway had agreed with Sweden: LEG/CONF.6/32, Official Records 1984, Vol. I, p.346. In fact, on its own territory, Norway had extended the application of the 1969 Convention to non-persistent oil when implementing the Convention into domestic legislation. LEG/CONF.6/C.2/SR.3, Official Records 1984, Vol. II, p.346

persistent oil was less catastrophic than from persistent oil and that the extension would greatly complicate the various administrative procedures for contribution assessments (that the FUND would be faced with a greater administrative burden was confirmed by the IOPC Fund itself³¹²) and the enforcement of insurance certificates due to increased numbers and types of vessels³¹³. The International Shipowner Association shared this view saying that damage from non-persistent oils would be of a lesser scale so that the existing Limitation Convention 1976 was adequate to deal with such damage as it would be unlikely to exceed the limits of liability thereunder³¹⁴. This view was further supported by the Group of International P& I Associations which said that in its experience spills of non-persistent oils had caused no significant problems³¹⁵. It is true that fewer quantities of non-persistent oil are shipped worldwide compared to persistent oil. The percentage of non-persistent oil shipped is only approximately 20%³¹⁶. Furthermore, non-persistent oil is less of a threat to the environment than persistent oil as it disappears quicker. Oil of a density less than 0.8, like Gasoline and Kerosene will disappear in approximately one day. Oil of a density between 0.8 and 0.85 like Gas Oil and Abu Dhabi Crude will disappear in approximately 3-4 days, whereas oil of a density of between 0.85 and 0.95 such as Arabian Light Crude and North Sea Crude and oil of a density greater than 0.95 like Heavy Fuel Oil, and Venezuelan Crude Oils will take much longer to disappear³¹⁷. This does however not mean that non-persistent oil is harmless to the environment and should be disregarded. During the Conference opinions as to the harmfulness of non-persistent oils varied greatly. However, it seems that unfortunately, insufficient hard and fast scientific information was available to support either position.

A further argument made to support the position that non-persistent oils should not be included in the Convention was that the Convention deals with pollution and that damage from non-persistent oil is damage from toxicity, not pollution³¹⁸. Such damage should therefore be incorporated into the envisaged International Convention on Liability and Compensation for

³¹² LEG/CONF.6/C.2/SR.3, Official Records 1984, Vol. II, p.345

³¹³ LEG/CONF.6/C.2/SR.3, Official Records 1984, Vol. II, pp.340, 341

³¹⁴ LEG/CONF.6/10, Official Records 1984, Vol. II, p.3

³¹⁵ LEG/CONF.6/47, Official Records 1984, Vol. II p.53

³¹⁶ F.D. Fund / A.4/11, 15/7/81, pp.15,16

³¹⁷ "Environmental Impacts of a Major Marine Oil Spill", Stafford Reid, British Columbia Ministry of Water, Land and Air Protection, Government of British Columbia Publication

³¹⁸ West Germany, LEG/CONF.6/C.2/SR.3.x, Official Records 1984, Vol. II, p.343

Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) and not into the CLC.

The French delegation advocated the inclusion of non-persistent oils making a valid point: if both types were included it would do away with the need to decide whether the damage was caused by persistent or non-persistent oil³¹⁹, a differentiation which is indeed hard to draw. The problem of distinguishing between both types of oil has had to be solved in some ways arbitrarily and pragmatically. It was solved by the IOPC Fund establishing a definition for its own use and this definition has been accepted by all those dealing with the Convention. Also, as pointed out by the Australian delegation³²⁰, the capability of non-persistent oils to cause harm has already been recognised by other conventions such as the Intentional Convention for the Prevention of Pollution from Ships (MARPOL), which includes non-persistent oils. The inclusion of non-persistent oils in the CLC would therefore have aided harmonisation across the conventions³²¹.

Herber pointed out a gap in the 1992 Protocol³²²: The Convention only covers spills from vessels “carrying” oil, but does not define “carriage”. It is hence unclear who is liable for spills occurring during loading or discharge operations as it is unclear whether such operations can be viewed as part of “carrying”. The problem is by no means negligible. According to statistics published by ITOPF³²³ (please see tables below) 29% of oil spills between 7-700 tons in 1974 and 6% of oil spills of more than 700 tonnes between 1974 and 2002 occurred during loading and discharging. It goes without saying that any spills which do occur during loading and discharge occur close to the coast and therefore have a higher potential of causing harm to the coastline, its organisms and interests.

³¹⁹ LEG/CONF.6/C.2/SR.1, Official Records 1984, Vol. II, p.319

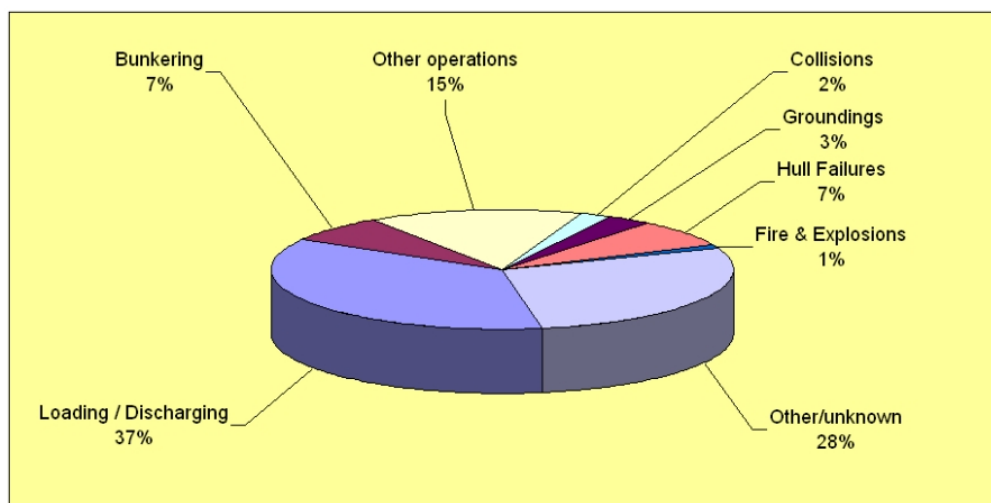
³²⁰ LEG/CONF.6/C.2/SR.3, Official Records 1984, Vol. II, p.340

³²¹ This was also pointed out by the Advisory Committee on Pollution of the Sea (ACOPS), which said that the inclusion of non-persistent oils would ensure harmonization of the relevant rules in MARPOL with those governing liability and compensation. LEG/CONF.6/59, Official Records 1984, Vol. II, p.74

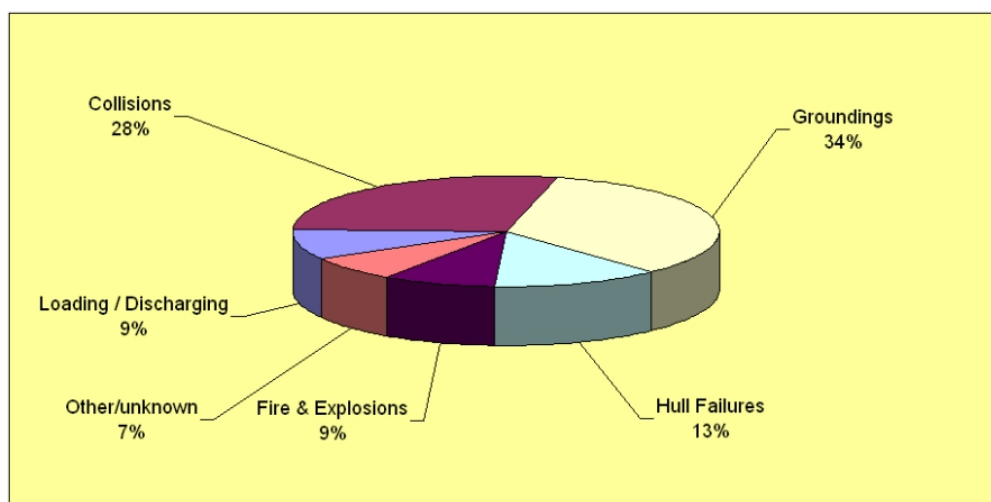
³²² Herber, Dr. Rolf, *Seehandelsrecht*, Systematische Darstellung, Walter de Gruyter 1999, p. 193

³²³ The International Tanker Owners Pollution Federation Limited, ITOPF Handbook 2003/2004, p.10

Incidence of Spills 7-700 Tonnes by Cause, 1974-2002



Incidence of Spills >700 Tonnes by Cause, 1974-2002



Since the CLC itself is unclear on the topic as to who should be liable for loading and discharge spills, assistance has to be sought from other, comparable sources. Art. 3 of the CRTD ³²⁴ solves the question as to who should be liable for any damage occurring during loading or unloading by putting liability for such spills squarely on the shoulders of the carrier. The solution Herber suggests however seems preferable³²⁵. In accordance with the solution found by German case law in relation to the

³²⁴ Transportrecht 1990, Luchterhand, p.83 et seq.

³²⁵ Herber, Dr. Rolf, Seehandelsrecht, Systematische Darstellung, Walter de Gruyter 1999, p. 193

Wasserhaushaltsgesetz³²⁶ and following commonsense, the determining factor should, according to Herber, be whether the spill originated from the vessel or the vessel's installations or from port installations. This approach should also be used in relation to the CLC.

2.5.1.3 The definition of “pollution damage”

Art. II (6) stipulates:

“Pollution damage” means:

- 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.”*

During the Conference it was felt that the previous definition of “pollution damage” was too imprecise and that it needed to be revised.

A warning against making the definition too precise, however, was voiced during the discussions of the IMO Legal Committee on 12th January 1984, where it was said that “pollution damage” was an evolving concept in many states and that it would not be helpful to attempt a rigid definition at this stage. The Advisory Committee on Pollution of the Sea likewise thought that this was a new aspect of international law and that any definition which would hinder the natural evolution of the concept of damage ought therefore to be avoided³²⁷. However, as correctly pointed out by the Polish delegation, the definition of pollution damage was being left to the judiciary of the national courts, which would lead to every country interpreting the Convention differently, so that uniformity would be lost³²⁸. In the context of the CLC this lack of uniformity is particularly grave as countries who do not recognise some types of pollution damage such as ecological damage would be funding compensation payments made under that head in other jurisdictions as all countries are paying into the same Fund via the Fund

³²⁶ (Waterlaws) BGHZ 76,35,40; Edye s.21 Fn.58

³²⁷ LEG/CONF.6/C.2/SR.4, Official Records 1984, Vol. II, p.358

³²⁸ LEG/CONF/. 6/7, Official Records 1984, Vol.1, pp. 137,138

Convention 1971³²⁹. Furthermore, a clearer definition would increase the predictability of claims and set standards of legitimacy which would reduce litigation in the interest of all parties involved, as rightly pointed out by Friends of the Earth³³⁰.

Also, many delegations felt that the definition should be made clearer so as to exclude any dubious, speculative or excessive claims. The International Group of P&I Associations³³¹ and OCIMF (whose members at that time owned more than a third of the world's tanker fleet³³²) also called for a more precise definition of the term so as to foster uniformity and discourage the presentation of speculative, dubious or excessive claims. OCIMF also advocated that threat removal measures be included in the definition of "pollution damage".³³³

The IOPC Fund also reported that in practice problems had arisen with regard to the definition of pollution damage. The Fund's problem had come to a head when the "Antonio Gramsci" grounded in Latvia in 1979. The USSR flagged vessel grounded on 27.2.1979 off Ventspils spilling 5,500 tons of oil. Swedish and USSR waters and coasts were polluted. The clean-up costs of the Swedish government were Skr 89. 057, 717³³⁴. The USSR Ministry for Conservation and Control and Use of Water brought a claim before the courts in Riga concerning, inter alia, the clean-up of the polluted waters. The sum claimed was calculated as two roubles per cubic meter of polluted water on the assumption that each tonne of oil would pollute a certain amount of water.³³⁵ The Executive Committee of the IOPC Fund refused to compensate the claim in respect of the "Antonio Gramsci", because it was based on mathematical models³³⁶ which did not take into account the specific factors and aspects of the specific incident such as the location of the incident, the composition of the oil, its fate in the marine environment, etc. In the Fund's

³²⁹ LEG/CONF.6/25, Official Records 1984, Vol.I, p. 323

³³⁰ LEG/CONF.6/C.2/SR.4, Official Records 1984, Vol. II, p.357

³³¹ LEG/CONF/. 6/7, Official Records 1984, Vol.1, pp. 137,138

³³² LEG/CONF.6/C.2/SR.2, Official Records 1984, Vol. II, p.329

³³³ LEG/CONF.6/INF.3, Official Records 1984, Vol. II, p.110

³³⁴ LEG/CONF.6/C.2/INF.4, Official Records 1984, Vol. II, p.146

³³⁵ F.D. FUND/A3/ES.1. /13.17/10/80, p.8; IOPC Fund 1980 Annual Report, p.2

³³⁶ Although not within the jurisdiction of the Fund a similar claim for compensation based on mathematical calculations was presented following the "Zoe Coloconroni" casualty. The US court of first instance had awarded damages based on the amount of micro-organisms which had been destroyed and the price laboratories would pay for them, even though these micro-organisms had not been economically exploited. The decision was however reversed on appeal. Brown E.E.: "Making the Polluter Pay for Oil Pollution Damage", Lloyd's Maritime and Commercial Law Quarterly, London (1985), p. 382.

opinion “*pollution damages should be based on quantifiable losses which can be positively attributed to a particular incident*”.³³⁷ Following this dispute, the IOPC Fund Assembly unanimously passed Resolution No.3 providing that no compensation will be paid out by the Fund for abstract quantification of damages which were based on theoretical models³³⁸. This Fund policy was later enshrined in the revised definition of “pollution damage” contained in the 1992 Protocol. The Conference relied heavily upon the experience of the Fund and so did the working group entrusted with the task of finding a new definition of “pollution damage”.

In light of the above, it was therefore decided during the Conference that it was necessary to redefine “pollution damage” in an attempt to exclude claims being made on the basis of an abstract quantification of damages calculated in accordance with theoretical models. It is interesting to note here that under OPA 1990 estimated environmental damage is recoverable, which, especially combined with the absence of limitation of liability, is one of the reasons why tanker owners find it rather difficult to obtain insurance cover for liabilities under this Act.³³⁹

Conceptually speaking, the approach taken by the 1992 Protocol must be correct. The civil law is there to ensure the compensation of losses which one person or entity has caused to another person or entity. Compensation in the abstract for damage to a common good is not conceptually part of the civil law. It is right for the civil law to compensate people who have or will have losses by cleaning the environment because they are truly out of pocket. But compensating environmental damage in the abstract would be conceptually misplaced. At the same time, the environment is a common good used and enjoyed by everybody. Pollution of the environment should therefore have repercussions for the polluter. The damage done to the environment in itself and the loss of local amenity such as recreational benefits should be redressed. Following the “Erika” casualty for example, the cost of pollution to recreational fishermen was estimated by Bonnieux and Rainelli (2003) at

³³⁷ F.D., FUND/A/ES/1/9/8/8/80, p.2

³³⁸ Resolution No.3 “Pollution Damage” (October 1980) F.D. FUND/A/ES/1/13

³³⁹ Schmuck, *Der Oil Pollution Act*, *Schriften zum Transportrecht* Bd. 17, 1996; Wagner *JMLC* 21 (1990), 569 et seq; Healy /Paulsen/Marion, *The United States Oil Pollution Act of 1990*, *DirMar.* 1991, 244 et seq cited in ³³⁹ Herber, Dr. Rolf, *Seehandelsrecht*, *Systematische Darstellung*, Walter de Gruyter 1999, p. 194

approximately 100 million Euros, a cost not compensated by the international liability and compensation system³⁴⁰.



Clean-up operations following the “Erika”, France, 1999³⁴¹

To ensure that the polluter does not walk away entirely scott-free in respect of damage done to the environment, a separate obligation should exist either to clean or pay for the cleaning of the environment, if and so far as this is necessary and beneficial to counteract the damage done by the pollution³⁴². Conceptually speaking, such payment or cleaning obligations would however be better placed within the criminal or administrative law. At present this is dealt with under national law. In the United Kingdom for example the relevant statute is the Prevention of Oil Pollution Act 1971. A part of any fine imposed under the Act may go towards clean-up and prevention. Such legal provisions ensure better restitution of the environment but also act as a deterrent. Removing such payments from the ambit of the civil law would

³⁴⁰ “The cost of oil pollution at sea: an analysis of the process of damage valuation and compensation following oil spills”. Olivier Thébaud, Denis Bailly, Julien Hay, José Pérez, p.8
http://www.aerna.org/Documentos_trabajo/Prestige7Hayetal..pdf. On 2.2. 2004

³⁴¹ ITOPF webpage, www.itopf.com. On 20.3.2007

³⁴² It should be born in mind that not every clean-up operation is necessarily beneficial to the environment. Clean-up such as hot water washing and sand-blasting for example, can often cause considerable damage. Animals bred in captivity can be released to restock an impaired fauna. While such actions are successful with non-mobile animals such as lobsters and shellfish, other species such as most sea-birds which are very mobile over large distances will just fly off. Such species can therefore only be encouraged to nest in the area. It should also not be forgotten when taking action to benefit the local fauna that it is a very delicate balance, which may easily be upset by human intervention. For example, if birds are protected from their predators in order to restock the species, the predators are harmed as their food source is interfered with

also deal with the conundrum of having to put a price tag on the environment. Fines in administrative or criminal law can be set at levels which are felt to be morally appropriate, and in the end the reason why we feel that damage to the environment should be compensated is largely moral.

The working group for pollution damage was chaired by Mr Trotz (German Democratic Republic). The members of this group were Brazil, Canada, China, Finland, France, Germany East and West, Greece, Japan, Poland, Trinidad and Tobago, the United Kingdom and the US as well as representatives of the IOPC Fund and CMI.³⁴³ The group relied heavily on the experience the IOPC Fund had gathered in handling claims. However, no single formulation could be agreed on. The difficulties, Trotz rightly recognised, lay in the fact that damage to the environment itself is a very difficult topic because traditional civil (not criminal) rules of compensation for damage are of no use and wholly new concepts have to be developed to deal with the problem.³⁴⁴ In the end two alternatives were proposed to the Plenary Committee³⁴⁵. What the working group had been able to agree on was that economic loss as a consequence of loss of use should be compensated, and so should justified costs of restoration and reinstatement. However, speculative claims for damage to the environment should not be compensated. The International Group of P&I Associations welcomed the statements made by the working group. In its experience of over 17,000 oil pollution claims in 13 years, it had realised that there was ample scope for unjustified and speculative claims and a stop should be put to these³⁴⁶. The view taken by the working group seems correct. The whole “science” of measuring a reinstatement claim is purely speculative because it relates to the future. This means not only that it is difficult to estimate how much the costs will actually be, but it is also impossible to say how exactly the environment will react to early cleaning efforts which may influence later cleaning efforts, and how much self-repair will take place. In the case of the “Exxon Valdez” for example, the reinstatement funds had still not been spent 14 years after the event and more self-repair had taken place than anticipated. Also, a large claim for reinstatement may mean that other claimants who have personally and tangibly suffered loss may not be compensated in full.

³⁴³ LEG/CONF.6/C.2/2, Official Records 1984, Vol. II, and p.187

³⁴⁴ Trotz, Norbert, *Die Revision der Konvention über die zivilrechtliche Haftung für Schäden aus der Ölverschmutzung des Meeres und über die Errichtung eines Entschädigungsfonds*, Akademie für Staats- und Rechtswissenschaft der DDR, Institut für ausländisches Recht und Rechtsvergleichung, *Aktuelle Beiträge der Staats- und Rechtswissenschaft*, Heft 340, Potsdam-Babelsberg, 1987, p.20

³⁴⁵ One was made by the CMI, the other by the UK

³⁴⁶ LEG/CONF.6/C.2/SR.15, Official Records 1984, Vol. II, p.476

The Protocol therefore now covers pollution damage as before but environmental damage compensation is limited to costs incurred for reasonable measures to reinstate the contaminated environment³⁴⁷. Such measures have to be actually taken or at least will be once the money becomes available.

The definition of pollution damage under the 1992 Protocol also now specifically includes a reference to loss of profit as it had to be made clear that losses of profit due to an impairment of the environment are recoverable, even if no physical damage to the property of the claimant was involved, such as, for example the lost profits of a hotel owner along a polluted coast³⁴⁸. The clarification of whether or not losses of profit fall within the definition of “pollution damage” under the Convention was necessary because many countries, including the United Kingdom, do not recognise claims for “pure economic loss” where no physical damage is involved.³⁴⁹ In the context of §22 WHG³⁵⁰ (which is comparable to the CLC in so far as it also deals with water pollution) German courts have also held that economic loss which is not caused by any damage to property e.g. loss of profit of a hotel which does not have its own beach, or loss of profit of people selling bathing costumes, will not be compensated.³⁵¹

The Fund, left to put the Convention into practice, had already paid compensation for loss of profit even before the 1992 Protocol, provided the claims were sufficiently “proximate” to the damage. The necessary proximity is assessed in terms of the geographical proximity between the activities of the claimant and the contamination, and the degree to which the claimant’s activity represented an integral part of the economy of the area affected by the spill. It will also be taken into consideration how much the claimant was economically dependent on the polluted resource and how many business alternatives the claimant had. It is further important whether, and if so to what extent, the claimant could have mitigated his loss.

³⁴⁷ This is an approach which has its roots in the roman law concept of “negotiorum gestio” where anyone acting on behalf of their neighbour or community had a right to recover the expenses

³⁴⁸ Following the “Amoco Cadiz” incident in 1978, tourism related businesses claimed compensation of approximately £3,9 million in court. The French state claimed a further £0,9 million for payments made to the tourism industry following the incident United States District Court, 1988. United States District Court for the Northern District of Illinois Eastern Division (1988), in re Oil Spill by the Amoco Cadiz off the coast of France on March 16, 1978

³⁴⁹ This was highlighted in the Landcatch decision *Landcatch Limited -v- The IOPC Fund and Landcatch Limited -v- The Braer Corporation and Others*, Edinburgh Court of Sessions, Opinion of Lord Gill 1997

³⁵⁰ Wasserhaushaltsgesetz (water laws)

³⁵¹ BGH, VersR 1972, 463,465

The criterion of proximity will lead to a rejection of claims for compensation where claimants are either based too far away from the spill area, or where they do not contribute substantially to the local economy. This is so even if the claimant is able to establish a causal link between the contamination and his economic prejudice. For example, following the “Braer” casualty a Scottish fish farmer located 500 km away from the incident claimed compensation because the salmon farms in the affected area did not buy any smolt from him anymore. His claim was considered too remote, being a secondary or relational claim only.³⁵²

This decision was followed in the “Sea Empress” litigation³⁵³. Following the grounding of the “Sea Empress” off Milford Haven in February 1996 a fishing ban was imposed. The claimant was a fish processing company based in Exmouth, Devon. The claimant had supply contracts for whelks with fishermen in the Milford Haven area. The claimant’s claim was dismissed as it was held that he was not engaged in a local activity in the physical area where the contamination occurred. His interest was in landed whelks not whelks in their natural habitat. His loss arose from the inability of fishermen to fulfill their supply contracts and not from pollution. His loss was therefore too remote.

This was of course not the only claim by fish and crustacean factories following the “Sea Empress” casualty. Claimants were only compensated if they were nearby the polluted area. However, other types of business, too had incurred losses as a result of the grounding of the “Sea Empress”. For example, a small construction firm claimed compensation because the local community could no longer pay for building works because they had to use their money for cleaning activities. This claim was also considered too remote. Similarly, a firm cleaning towels and tablecloths for hotels made a claim saying they had suffered losses because the hotels in the affected area had fewer guests. This claim, too, was considered too remote.^{354 355}

³⁵² Landcatch Ltd -v- International Oil Pollution Compensation Fund [1998] 2 Lloyd’s Rep.552, Lord Gill, [1992] 2 Lloyd’s Rep. 316 (Inner House). This case also established that costs incurred in pursuing the claim against the IOPC Fund are not recoverable

³⁵³ Alegrete Shipping Co Inc -v- International Oil Pollution Fund 1971

³⁵⁴ Jacobsson, Mans, Internationales Schadensersatzrecht für Ölverschmutzung beim Seetransport – Entwicklung in den letzten Jahren und Zukunftsperspektiven, Schriften des Deutschen Vereins für Internationales Seerecht, Reihe A: Berichte und Vorträge, Heft 90, Hamburg 1998, p.16-18

³⁵⁵ For further information on Fund practice in relation to compensation claims please see: Jacobsson, Mans, Internationales Schadensersatzrecht für Ölverschmutzung beim Seetransport – Entwicklung in den letzten Jahren und Zukunftsperspektiven, Schriften des Deutschen Vereins für Internationales Seerecht, Reihe A: Berichte und Vorträge, Heft 90, Hamburg 1998



“Sea Empress”, UK, 1996³⁵⁶

Under the Convention preventative measures are also compensated as being pollution damage. Measures “taken by any person after an incident has occurred to prevent or minimize pollution damage”³⁵⁷ have to be reasonable in order to be compensated³⁵⁸. The requirement of reasonableness is of course important, as it should be born in mind that clean-up operations have become a commercial business. Firms may therefore undertake clean-up operations that are not necessary or, worse still, which are counter-productive, in the interests of filling their pockets.

It is irrelevant where preventative measures are taken as long as they prevent damage occurring within the territory or the exclusive economic zone or equivalent area.³⁵⁹

The costs of disposing of oil which has been recovered during clean-up or preventative operations as well as any resulting debris will also be compensated as a preventative measure³⁶⁰.

Salvage operations whose primary purpose it is to salvage the ship or the cargo are not preventative measures which are compensated under the Convention. They remain salvage operations which are compensated in accordance with the International Convention on Salvage 1989 (the London Convention), even if they prevent pollution³⁶¹. Salvage operations where the

³⁵⁶ ITOPF webpage, www.itopf.com. On 20.3.2007

³⁵⁷ Art I (7) of the 1969 Convention – nothing was changed in the definition of preventative measures

³⁵⁸ Art I (7) of the 1969 Convention

³⁵⁹ Art III 9(b) of the 1992 Protocol. On preventative measures see further below under the definition of “incident”

³⁶⁰ Oil Spill Compensation, A joint IPIECA/ITOPF Briefing. March 2000, p. 8

³⁶¹ The “Patmos”, IOPC Fund Annual Report 1986, p.20 and IOPC Fund Annual Report 1988 p.62; The “Portfield”, F.D., FUND/EXE.28/7, 18/9/91; The “Rio Orinoco” where compensation was paid FUND /EXEC.28/9, 8. October 1991, § 3.3.2

primary purpose is to prevent pollution rather than to salvage vessel or cargo do however fall under the Convention and are compensated as preventative measures. Where it is not possible to decide which was the primary purpose the costs involved will be apportioned³⁶². In order to create an incentive for salvors to act in pollution incidents, Art. 14 of the London Convention provides that where the ship or its cargo had threatened to cause or had in fact caused pollution, salvors may recover their expenses plus an increment by way of special compensation where they did not earn normal salvage as per Art.13 of the Convention. The 1995 Lloyd's Standard Form of Salvage Agreement (LOF) incorporates the London Convention.

According to the IOPC Fund, measures taken to promote the touristic image of an area or the reputation of a local product such as fish, fall within the definition of preventive measures because these are measures to prevent or minimise economic loss. Following the "Haven" casualty³⁶³ for example claims were made for expenses incurred in promoting tourism. After the "Braer" incident expenses were claimed for promoting Shetland fish products³⁶⁴. The IOPC Fund will however only compensate such measures where the costs are reasonable and proportionate to the further loss to be mitigated and as long as they are appropriate with a reasonable prospect of success. In the case of a marketing campaign the costs further have to be related to actual targeted markets.³⁶⁵

Value Added Tax paid by the state of Italy in respect of clean-up operations after the "Haven" incident was also held recoverable³⁶⁶. However, claims by the City of Cannes and the Municipality of Lavandou in respect of loss of tax revenue were rejected for lacking a causative link.³⁶⁷

At the 35th International Conference of the CMI which took place in Sydney from 2-8th October 1994, the CMI adopted Guidelines for the interpretation of

³⁶² The "Agip Abruzzo" IOPC Fund Annual Report 1991 p.57, FUND/EXC. 30/5, 17 December 1991, §4.2.3

³⁶³ The "Haven" caught fire on 11.4.1991 while at anchor seven miles off Genoa. The "Haven" was a Cypriot tanker of 109,977 GRT and had discharged part of her cargo of Iranian crude oil at Genoa prior to the accident. When the fire broke out she still had 144,000 tons of crude oil on board. The vessel broke up, one part sinking off Genoa, the other off Arenzano. The wreck continued to leak oil until the autumn. The total of Italian claims was Lit 1,541,488,793,305. The total of French claims was FF 28,284, 592. IOPC Fund Annual Report 1991, p.62

³⁶⁴ IOPC Fund, Executive Committee of the IOPC FUND, F.D. FUND/EXEC.35/10, 8/6/93 pp .7-13

³⁶⁵ FUND/EXEC.35/10, §3.4.19 and IOPC Fund Claims Manual, Fifth Ed. 1996, p.28

³⁶⁶ Judgment of the Tribunale di Genoa, presided by Judge Dott. Alberto Haupt cited in Gauci, Gotthard, *Oil Pollution at Sea, Civil Liability and Compensation for Damage*, John Wiley & Sons, 1997, p. 36

³⁶⁷ FUND/EXEC. 35/10 §3.2.17 and §3.2.19

the 1992 Protocol. These Guidelines are intended as an aid for national courts. Their aim is to promote the consistent application of the Convention. They define economic loss, preventative measures, clean up and restoration and give guidance on what sort of damage should be compensated under the Convention³⁶⁸.

2.5.1.4 The definition of “incident”

Article II (8) of the 1992 Protocol defines “incident” as *“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”*.

Under the 1992 Protocol “incident” was redefined so as to make clear that the Convention also covers preventive measures taken prior to an actual spill and measures which prevent an actual spill altogether. This had not been the case under the 1969 Convention where the costs of preventative measures would, paradoxically, only be compensated where the measures were either too late or unsuccessful, i.e. where oil had escaped or been discharged. Where measures were so successful that no pollution occurred, the IOPC Fund would not compensate efforts to prevent such escape, such as in the case of the “Tarpenbek”³⁶⁹. The “Tarpenbek”, loaded with lubricating oil, had collided with the “Saint Geraint” off the English coast. None of the cargo was spilled but some non-persistent light diesel oil escaped from the bunker tanks. The vessel was towed into a bay and the cargo was pumped out. There was a dispute as to whether any cargo escaped during the pumping operations. The United Kingdom Government incurred costs in taking preventative measures to avoid any pollution being caused by the pumping operations. The IOPC Fund refused to pay compensation as there had been no escape of persistent oil.

The revision was a very important one as it was grossly unjust to compensate someone who had tried, but failed to completely avoid pollution when another, who has been entirely successful, was not compensated. It also created no incentive whatsoever, to take action to prevent pollution from occurring in the first place. On the contrary, an incentive was created not to do so and to wait for pollution to occur before taking action. The new definition now encourages preventive action which, as is proverbial, is generally better than cure.

³⁶⁸ CMI Guidelines on Oil Pollution, <http://www.comitemaritime.org/cmids/docs/rulesoil.html>. On 6.8.2003

³⁶⁹ IOPC Fund Annual Report 1982 and 1983, FUND/EXC.4/3; FUND EXC.7/2, p. 5

Prior to the Conference, the IOPC Fund Assembly had specifically requested IMO *“to ensure that the cover for preventative measures provided for in the two Conventions clearly includes cover for measures taken before an actual spill of oil, if any, has occurred”*³⁷⁰ ³⁷¹

Some courts had interpreted the term “incident” very generously, so as to enable them to include threat removal measures and compensate such efforts even where no pollution occurred³⁷². Such practices of course aid neither the uniform application of the Convention nor do they ensure legal certainty.

The extension also brings the Convention in line with the voluntary compensation schemes TOVALOP and CRISTAL as well as the Intervention Convention.

There was considerable discussion at the Conference over whether the term “serious” or the term “grave and imminent” should be used to describe “threat”. Italy, the USSR and Japan, amongst others, favoured the use of the term “grave and imminent”, which is unsurprising given that they are shipowning states. The CMI, France, the US, Germany and others favoured the use of the term “serious”. The main argument in favour of using “serious” was made by the CMI. The CMI argued that “grave and imminent” requires an immediate danger, but significant danger of the same severity could be posed by a situation that was not immediately threatening but could become so at any moment, such as a tanker which has sunk but starts leaking months or even years later³⁷³. This was the case for example with the “Haven”. Even though the argument made by the CMI is very convincing, it did not carry the day. The argument that the term “grave and imminent” was used in the Intervention Convention and that the conventions should be harmonised as far as possible carried more weight ³⁷⁴and so the term “grave and imminent” was adopted.

The Convention still fails to cover the cost of general preventive measures which are taken without a specific risk occurring such as the setting up of

³⁷⁰ IOPC FUND Statistics, p.8: Resolution No.6

³⁷¹ LEG/CONF/6.7, Official Records 1984, Vol. 1, p. 145

³⁷² “Liability and Compensation for pollution damage caused by ships revisited – Report on an important international conference”, Popp, Alfred, H.E., L.M.C.L.Q. 1985/2, p.127

³⁷³ LEG/CONF.6/C.2SR.17, SR 18, Official Records 1984 , Vol. II, pp. 492-516

³⁷⁴ LEG/CONF.6/C.2SR.17, Official Records 1984, Vol. II, p.504

pollution plans etc. This is probably correct as it is outside of what the Convention wants to achieve, which is compensation in cases of specific spills or threatened spills. Also, general measures could be very expensive, opening the “floodgates” as it were, and exceeding the financial capabilities (and certainly wishes) of the member states of the Fund Convention.

2.5.1.5 Article III

The Convention was widened from the territorial sea, which under Part II, Section 2, Art. 3 of the United Nations Convention on the Law of the Sea 1982 would be 12 nautical miles, to apply to any damage incurred in the exclusive economic zone. The exclusive economic zone encompasses a maximum of 200 nautical miles according to Part V, Art. 57 of the United Nations Convention on the Law of the Sea 1982, or equivalent area of a state party. The extension was agreed in order to bring the Convention into line with the new concept of the exclusive economic zone “invented” by the United Nations Convention on the Law of the Sea, 1982. The extension was adopted at the Conference by 38 to 18 votes following much debate³⁷⁵. The proposal was supported, inter alia, by Korea, the US³⁷⁶ and Malaysia³⁷⁷. The Advisory Committee on Pollution of the Sea (ACOPS) also welcomed the extension because it would help fishermen. Claims by fishermen were already firmly established as being compensable, as long as they were reasonable³⁷⁸. Australia, quite logically, remarked that there were no legal or ecological reasons why the Convention ought to be geographically more restricted than the area over which a state exercised jurisdiction³⁷⁹. New Zealand, who also supported the proposal, pointed out that coastal states had a duty to protect the environment within their exclusive economic zone³⁸⁰. By the same token, it would therefore be logical to also have some protection against interference by oil pollution in this area.

OCIMF on the other hand saw no reason why the Convention ought to be extended to areas over which states claim rights to natural resources³⁸¹. This however is exactly the reason why the area of applicability of the Convention should be extended. The Convention of the Law of the Sea has given voice to an international feeling that countries have a right to the natural resources

³⁷⁵ LEG/CONF.6/SR.5, Official Records 1984, Vol. 3, p.176

³⁷⁶ LEG/CONF.6/C.2/SR.1, Official Records 1984, Vol. II, p.316, 317

³⁷⁷ LEG/CONF.6/C.2/SR.1, Official Records 1984, Vol. II, p.320

³⁷⁸ LEG/CONF.6/59, Official Records 1984, Vol. II, p.75

³⁷⁹ LEG/CONF.6/SR.5, Official Records 1984, Vol. 3, p.176

³⁸⁰ LEG/CONF.6/C.2/SR.1, Official Records 1984, Vol. II, p.323

³⁸¹ LEG/CONF.6/INF.3, Official Records 1984, Vol. II, p.111

contained within a 200 nautical mile radius from their coast. Even though the Convention had not entered into force it had already been signed by 135 nations and ratified by a further 9 states at that time who clearly shared this feeling. Moreover, a 200 nautical miles exclusive fishing zone has been customary international law for quite some time prior to this and many countries have incorporated it into their national law³⁸². A logical consequence of having a right to natural resources within a given area is the corresponding right that such resources will not be interfered with by way of pollution. A further argument voiced by OCIMF against the extension, was that damage occurring outside a 12 nautical mile radius from the coast was unlikely to be sufficient to justify a strict liability regime being applied³⁸³. Empirically speaking, this is a valid argument to some extent. It is clear that the further from the shore the incident takes place, the lesser the extent of the damage. The extension was therefore never going to be as breathtaking in practice as it may have seemed in theory.

Belgium³⁸⁴ and Greece³⁸⁵ also expressly stated that they were against the geographical extension. Belgium argued that states did not have sovereign rights over their exclusive economic zones because they had to allow the peaceful passage of merchant ships through this area. It further said that the whole Convention was a political compromise and deliberately vague as concerned certain points and that it would be dangerous to link a strict liability convention to a political compromise in the field of international law. Belgium also feared that such an extension may lead in time to states declaring the 200 nautical mile radius as their territorial sea because they were able to get compensation for damage incurred there³⁸⁶. It is difficult to see how allowing the peaceful passage of merchant ships would negate sovereignty as this right was originally granted voluntarily. Even if things were not so, states were given sovereign rights over the natural resources to be found in the exclusive economic zone in any event and this is after all what would be damaged by any pollution. As to the Law of the Sea Convention being a political compromise to which no system of strict liability ought to be linked, this seems true. All international conventions represent to a lesser or greater extent a political compromise. However, the CLC itself also represents a political compromise and possibly more so than other conventions. The CLC very much balances between states who have a more

³⁸² LEG/CONF.6/C.2/SR.5, Official Records 1984, Vol. II, p.370

³⁸³ LEG/CONF.6/INF.3, Official Records 1984, Vol. II, p.111

³⁸⁴ LEG/CONF.6/SR.6, Official Records 1984, Vol. 3, p. 183

³⁸⁵ LEG/CONF.6/C.2/SR.1, Official Records 1984, Vol. II, p.321

³⁸⁶ LEG/CONF.6/C.2/SR.5, Official Records 1984, Vol. II, p.363

environmentally driven policy, those who rely on tourism and fishing and those who rely on shipping and oil import and export. There can therefore be no harm in linking one political compromise to another and the combination between strict liability and political compromise is already contained in the CLC in any event. The fear that states may extend their territorial sea to 200 nautical miles based on the argument that they can claim damages for pollution which occurred in this area is probably a slightly exaggerated and quite unfounded fear. Certainly no signs of such behaviour have been observed in practice. Furthermore, if states were that way inclined they could already base such an extension on the Law of the Sea Convention. In reality however, states rarely feel the need to provide plausible and intricate legal arguments for territorial extensions.

The International Chamber of Shipping voiced some concern as to the geographical extension, saying that the area covered may be vast and that the Convention may become unmanageable, not least because the legal rights and obligations of states with regard to the exclusive economic zone were at this point still unclear in international law³⁸⁷. In practice, this concern proved unfounded.

Friends of the Earth had obtained information that the extension of the Convention to the exclusive economic zone would not increase the cost of insurance because, apparently, underwriters did not in general consciously assess the geographical jurisdiction applied by particular conventions or courts in any event³⁸⁸. Even if that were wrong the risk assessment would not be greatly perturbed by the extension, as the risk would not normally be greatly increased because damage further than 12 nautical miles away from the coast is likely to be of a lesser extent than the damage which a spill closer to land would occasion.

The Protocol also clarifies in Art III (b) that the Convention applies “*to preventive measures, wherever taken, to prevent or minimize such damage*”. Measures taken to prevent or minimize damage are therefore recoverable even if taken outside the exclusive economic zone (or equivalent) of a contracting state, provided such measures were taken to prevent or minimize damage within the exclusive economic zone. According to both Ganten and

³⁸⁷ LEG.CONF.6/12, Official Records 1984, Vol. II, p.8

³⁸⁸ LEG/CONF.6/INF.4, Official Records 1984, Vol. II, p.124

Trotz ³⁸⁹ it had already been the intention in 1969 to include such a provision in the original Convention but it was left out by mistake. It is however mentioned in the Preamble to the Fund Convention and in practice it had been assumed that the Convention would apply to preventive measures taken outside the territorial sea³⁹⁰.

ITOPF criticised the extension. Based on their experience such an extension was unnecessary. Of the 70 spills ITOPF attended between 1978 and 1983, only one had posed a threat (in this instance to fisheries), outside the territorial sea without also threatening the territorial sea at the same time. Where the threat includes the territorial sea, the damage would of course be covered upon impact on the territorial sea without the need for an extension. From the many oil spills ITOPF had attended they had also learnt that oil spilled away from the territorial sea and therefore away from the shore, which did not move towards it, were best left alone, as any cleaning attempt was unlikely to help and could even do harm. ITOPF feared that if compensation could be claimed for such cleaning activities, they would be taken even if they served no useful purpose and were merely very expensive³⁹¹. A similar concern was voiced by Germany³⁹². This concern, however, is dealt with by the requirement that preventive measure have to be reasonable in order to be compensated (see above). In this respect ITOPF may also have underestimated the importance of the role it would take on over time. Due to their vast expertise they are generally called in to advise on measures taken in relation to oil pollution. Nowadays, if a clean-up action was undertaken against ITOPF's advice, a claimant would find it an uphill struggle to convince the Fund or a court that it was reasonable to undertake the activity and that they ought to be compensated for the expenses

³⁸⁹ Ganten, Dr Reinhard H., Die Protokolle von 1984 zum Ölhaftungsübereinkommen von 1969 und zum Fondsübereinkommen von 1971, Schriften des Deutschen Vereins für Internationales Seerecht, Reihe B: Dokumente und Materialien, Heft 17, Hamburg 1986, p.10. Trotz, Norbert, Die Revision der Konvention über die zivilrechtliche Haftung für Schäden aus der Ölverschmutzung des Meeres und über die Errichtung eines Entschädigungsfonds, Akademie für Staats- und Rechtswissenschaft der DDR, Institut für ausländisches Recht und Rechtsvergleichung, Aktuelle Beiträge der Staats- und Rechtswissenschaft, Heft 340, Potsdam-Babelsberg, 1987, p.49

³⁹⁰ Ganten, Dr Reinhard H., Die Protokolle von 1984 zum Ölhaftungsübereinkommen von 1969 und zum Fondsübereinkommen von 1971, Schriften des Deutschen Vereins für Internationales Seerecht, Reihe B: Dokumente und Materialien, Heft 17, Hamburg 1986, p.10. Trotz, Norbert, Die Revision der Konvention über die zivilrechtliche Haftung für Schäden aus der Ölverschmutzung des Meeres und über die Errichtung eines Entschädigungsfonds, Akademie für Staats- und Rechtswissenschaft der DDR, Institut für ausländisches Recht und Rechtsvergleichung, Aktuelle Beiträge der Staats- und Rechtswissenschaft, Heft 340, Potsdam-Babelsberg, 1987, p.49

³⁹¹ LEG/CONF.6/C.2/SR.5, Official Records 1984, Vol. II, pp.369, 370

³⁹² LEG/CONF.6/C.2/SR.5, Official Records 1984, Vol. II, p.362

incurred. In practice, ITOPF will therefore now be consulted wherever possible before clean-up actions take place.

2.5.1.6 Article IV

2.5.1.6.1 Exoneration from liability

There was again some debate in 1984 in relation to the grounds for exoneration from liability. Art. III 2 (c) of the 1969 Convention was criticised. It provides that: *“No liability for pollution damage shall attach to the owner if he proves that the damage: .. was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function”* . As in 1969, the argument was raised that such a provision was not in line with the idea of strict liability as this was not an incident of force majeure³⁹³.

While, conceptually speaking, this analyses seems correct, the decision taken by the 1984 Conference to keep this provision was nevertheless right. It would be unjustifiable to burden the shipowner with the responsibility of navigational aids. Navigational aids are something quite outside his control and were he carrying another cargo or if the same vessel had been in ballast, he would not be liable for the damage. Faulty navigational aids are not a typical risk of the carriage of oil. Furthermore, as pointed out during the Conference³⁹⁴, it is preferable to make states liable for their negligence in keeping navigational aids so as to provide an incentive in keeping them well. Also, all states that are members of SOLAS³⁹⁵ have a legal obligation under that Convention to maintain lights and other navigational aids anyway. Members of the International Association of Lighthouse Authorities equally have such an obligation³⁹⁶. It should also be born in mind that, according to the IOPC Fund³⁹⁷, the biggest claims upon the Fund in cases involving Art. III (2) (c) were from governments themselves, which, in such cases are often the main or sole claimant³⁹⁸. It would therefore be a ludicrous situation if a government had been negligent in the maintenance of lights and navigational aids, an incident was caused as a result of such negligence, and the shipowner would then have to pay that same government for any resulting damage. Moreover, the provision in question was included in 1969 as part of

³⁹³ LEG/CONF.6/7, Official Records 1984, Vol. 1, p.148

³⁹⁴ LEG/CONF.6/7, Official Records 1984, Vol. 1 p.149

³⁹⁵ International Convention for the Safety of Life at Sea 1974

³⁹⁶ LEG/CONF.6/C.2/SR.10, Official Records 1984, Vol. II, p.426

³⁹⁷ LEG/CONF.6/7, Official Records 1984, Vol. 1, p.152

³⁹⁸ LEG/CONF.6/C.2/SR.10, Official Records 1984, Vol. II, p.427

a very finely balanced compromise which should not be upset if possible³⁹⁹. Also, economically speaking, making the government liable spreads the risk much better than if the owner was made liable. The remaining danger that the satisfaction of victims could be delayed by litigation between the shipowner and a government as to whether or not faulty navigational aids caused the incident is very unfortunate but, in the circumstances, it seems unavoidable or in any event the lesser of two evils. The French delegation⁴⁰⁰ mentioned as a further drawback the possibility that victims may have to claim in negligence against a state rather than under the Convention against the shipowner and that the former was generally more difficult. This is an argument which is certainly true, but adds little, as this is a situation many victims of negligence will generally find themselves in and had they suffered damage from an incident not involving oil that was caused by negligently maintained navigational aids they would also have to claim against the government. The Belgium delegation was similarly in favour of deleting the exception as actions against governments, at least as far as Belgium was concerned, were very lengthy and it would be better to burden the owner with lengthy litigation against a government rather than the victims of pollution⁴⁰¹. While, again, this is certainly true, individual national legal problems cannot be the concern of the CLC.

Both the USSR and the CMI proposed revised wordings for Article III 2(c). The USSR felt that the wording in the 1969 Convention was unclear and that it might not cover instances where a vessel had relied on faulty navigational charts, such as in the “Tsesis” casualty where the vessel had relied on faulty navigational charts. In 1977 the Soviet tanker “Tsesis” hit a submerged rock near the Swedish coast which had not been marked on the chart. Considerable oil pollution ensued when the rock split open the hull of the vessel. The Swedish government claimed damages from the vessel owners. The owners counterclaimed for the damage to their vessel and for indemnity for the costs of salvage on the basis that the Swedish state had negligently omitted to mark the shoal in the chart. It was found that the Charting Division of the National Swedish Administration of Shipping and Navigation knew about the shoal but had not included it in the chart. The Supreme Court found the government negligent and wholly liable for the damage⁴⁰².

³⁹⁹ LEG/CONF.6/7, Official Records 1984, Vol. 1 p.149

⁴⁰⁰ LEG/CONF.6/19, Official Records 1984, Vol. 1, p.304

⁴⁰¹ LEG/CONF.6/C.2/SR.10, Official Records 1984, Vol. II, p.426

⁴⁰² Brown, Ben, Port Authorities and Marine Oil Pollution Compensation, Port Technology International, Edition 9, p.193-198

According to this decision, sea charts therefore fall under the definition of “navigational aids”.

Friends of the Earth also specifically requested “charts” and “sailing directions” to be expressly included in the definition because it is the responsibility of coastal state governments and public authorities to ensure that such documents are correct and kept up-to-date. It would therefore be unfair to make the shipowner liable for damage resulting from mistakes made in these documents⁴⁰³.

The requested amendment should not only have been made for clarity’s sake, but also because governments should be made liable under such circumstances. Especially since case-law to that effect was already in existence. This is especially justified in cases where the responsible state is also the biggest claimant, as will often be the case. Furthermore, such an express inclusion would ensure that states and the relevant public authorities were given a further incentive to ensure the accuracy of such documents. However, the fact that charts and sailing directions are not specifically mentioned does not, from the wording of the Article, exclude them as was seen in the “Tsesis”. It can be left to the courts to find that they are included in the Article’s wording, even if that is not the best solution in terms of the uniform interpretation of the Convention.

The Director of the IOPC Fund thought that the formulation “government or other authority” might not be clear in countries which have a federal system⁴⁰⁴.

Neither of these suggestions however made enough impact to change the Convention, and the original 1969 wording was kept.

2.5.1.6.2 Article IV (2)

Under Art. IV (2) of the Protocol the group of people exempt from liability for pollution damage under the Convention or otherwise was widened from the servants or agents of the owner to further include members of the crew, pilots, managers, operators, salvors⁴⁰⁵ operating with the consent of the owner or on the instructions of a competent public authority, persons taking

⁴⁰³ LEG/CONF.6/INF.4, Official Records 1984, Vol. II, p.127

⁴⁰⁴ LEG/CONF.6/7, Official Records 1984, Vol. 1, pp. 150-152

⁴⁰⁵ For detailed arguments on why salvors and tugowners ought to be included see the submission of the European Tugowner Association, ETA, LEG 49/3

preventative measures and charterers, including bareboat charterers, as well as any servants or agents of any of the aforementioned category of people.

The wish to extend the freedom from liability was partly due to the “Tanio” incident. In the “Tanio” the bareboat charterers, the technical managers, the classification society and the ship repairer were sued under national French law. The registered owner was sued under the Convention⁴⁰⁶. The litigation showed that the charterer and the salvor could be held liable to the full extent while the owner was able to limit. Needless to say, this result was thought to be unfair⁴⁰⁷.

The position of the bareboat charterer under the Convention had hitherto been unclear. The position of this type of charterer is traditionally slightly unclear as his role is something between a charterer and (for all intents and purposes) an owner. The uncertainty as to how the bareboat charterer should be treated under the 1969 Convention was pointed out during the 1984 Conference and this point needed to be clarified. The need for clarification was all the greater as there was some uncertainty as to whether or not the 1976 Convention would apply to claims against the bareboat charterer if he did not fall under the 1969 Convention. Some delegations thought this would be the case, others thought it would not⁴⁰⁸. The Greek and the (West) German delegations wanted the bareboat charterer to be put on the same footing as the owner by including the bareboat charterer in the definition of “owner”⁴⁰⁹. Japan voiced the valid concern that this proposal would involve a very heavy administrative burden and therefore rejected it⁴¹⁰. Sweden and France suggested that the owner and the bareboat charterer could solve their problems contractually within the charter-party⁴¹¹. This suggestion would have been a far better solution than treating bareboat charterers like owners under the Convention. There is no obvious need to involve a Convention in a matter that may be dealt with contractually between two private parties. Also, as was pointed out quite rightly by China, including the bareboat charterer would mean wasteful double insurance and the definition of bareboat charterer could again become a problem⁴¹². The solution finally

⁴⁰⁶ Özcayir, Z. Oya, *Liability for Oil Pollution and Collisions*, LLP 1998, p.214

⁴⁰⁷ Herber, Dr. Rolf, *Seehandelsrecht*, Systematische Darstellung, Walter de Gruyter 1999, p.192

⁴⁰⁸ LEG/COMF.6/7, Official Records 1984, Vol. I., pp. 155-157

⁴⁰⁹ LEG/CONF.6/C.2/WP.5, Official Records 1984, Vol. II, p.259. The proposal was later withdrawn in light of the decision to extend the channelling provision to the bareboat charterer:

LEG/CONF.6/C.2/SR.12, Official Records 1984, Vol. II, p.443

⁴¹⁰ LEG/CONF.6/C.2/SR.9, Official Records 1984, Vol. II, p.415

⁴¹¹ LEG/CONF.6/C.2/SR.9, Official Records 1984, Vol. II, p.415

⁴¹² LEG/CONF.6/C.2/SR.10, Official Records 1984, Vol. II, p.419

adopted by the Convention, namely to free the bareboat charterer from liability for oil pollution altogether, however is a better solution still, as it avoids any double insurance and owners can easily protect themselves on a contractual basis if they so wish by including appropriate clauses in the charterparty.

Though the Article increases the channelling of liability to the owner, it by no means makes it absolute. Parties other than the owner can still be liable under the Convention under certain circumstances. The 1992 Protocol introduced a caveat (identical to that contained in the HNS Convention) to the exemption from liability. The category of people listed in Art. IV (2), like the owner, will not escape liability where *“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”*. The liability exposure of servants and agents was therefore in fact increased under the 1992 Protocol. Under the 1969 Convention servants and agents had enjoyed absolute immunity. Under the 1992 Protocol however this was reduced to cases where they did not act with intent or recklessly. The wording of the caveat was suggested by the CMI and accepted because it was in line with the 1976 Limitation Convention⁴¹³ even though, at the time of the 1984 Conference, the 1976 Convention had not yet come into effect⁴¹⁴. Channelling is furthermore not absolute because anyone not listed in Art. IV (2), even though they cannot be made liable under the Convention, can still be made liable under the principles of national law, such as for example shipbuilders or surveyors. Also, the owner is free to bring recourse actions under national law against any person at fault, including those parties listed in Art. IV (2) of the Protocol (Art. III (5) of the 1969 Convention).

The channelling of liability under the 1992 Protocol, though not absolute, was however undoubtedly extended. The International Salvage Union in particular welcomed the wording because salvage operations by their nature require a margin of error as decisions have to be taken under grave and often pressured circumstances⁴¹⁵. The extended channelling of liability to the owner under the 1992 Protocol has the further advantage of relieving the group of people exempt from liability of the necessity to take out insurance and thus avoids the wastefulness of double insurance. From the point of view of the

⁴¹³ LEG.CONF.6/7, Official Records 1984, Vol. I, p.158

⁴¹⁴ Two signatures were missing to achieve the required 12. LEG/CONF.6/C.2/SR.5, Official Records 1984, Vol. II, p.360

⁴¹⁵ LEG/CONF.6/7, Official Records 1984, Vol. I, p. 158

insurance market, it also makes better use of the market capacity because it is only necessary to reserve one fund for shipowners' liability⁴¹⁶.

Channeling furthermore has the obvious advantage of making the process of recovery more straightforward leaving less room for debate. Also, previously a situation could arise where one person would have to pay for the same damage twice. A charterer who was also cargo owner (this in fact happens very often in practice) would first have to contribute to the IOPC Fund and could then also be made liable for the pollution damage.

A problem which channelling may present is that the person closest to the daily operations of the vessel (and therefore with most influence over the condition of the vessel and the competence of its master and crew – all vital factors when it comes to the likelihood of an incident occurring) will in many cases be the charterer or operator rather than the owner. However, due to the provision allowing the owner to take recourse against third parties⁴¹⁷, such as charterers and operators, these parties are given an incentive to avoid incidents, and the owner will not necessarily be left shouldering the burden. Conversely however, it also means that the benefits channelling would have had for parties other than the owner (e.g. charterer, servants, agents, etc) are greatly limited as they are still exposed to potential recourse actions.

The increased channelling of liability to the owner is also connected to the increased limits of liability. The connection is obvious: the more liability is channelled, the fewer funds are potentially available as there are fewer pockets the victims can rely on. Some delegations, such as the US and France⁴¹⁸, therefore said that they would only agree to absolute channelling if the limits of liability would be sufficiently increased⁴¹⁹.

The channelling provisions agreed were one of the reasons why the US did not ratify the 1992 Protocol.⁴²⁰ The concept of channelling liability was unknown to American law.⁴²¹

⁴¹⁶ Harry Lawford, Thomas Miller
http://www.pcs.gr.jp/doc/esymposium/12173/2000_herry_lawford_e.pdf. On 2.2. 2004

⁴¹⁷ Art. III (5) of the 1969 Convention

⁴¹⁸ LEG/CONF.6/C.2/SR.11, Official Records 1984, Vol. II, p.434

⁴¹⁹ LEG/CONF.6/7, Official Records 1984, Vol. I, p. 152

⁴²⁰ Senator Mitchell (G.J.): "Preservation of state and federal authority under the OPA of 1990", Environmental Law V.21, 1991, pp.237-240

⁴²¹ LEG/CONF.6/C.2/SR.1, Official Records 1984, Vol. II, p.317

2.5.1.7 Article VI

2.5.1.7.1 Article VI (1)

Art. VI (1) of the 1992 Protocol increases the limits of liability as agreed during the 1984 Conference.

Increasing the limits of liability of both the 1969 and the 1971 Fund Conventions had been one of, if not the main, reason for the revision of the Convention in 1984.

All parties agreed in principle that it was necessary. It was the “how” that caused problems. The oil industry in the shape of OCIMF wanted to increase the limits of liability in such a way that the shipping industry would pay in all cases. Only where claims were very large, would the IOPC Fund provide a top-up⁴²². The proposal would of course have meant that the shipping industry would have shouldered the lion share of the burden. Needless to say, the shipping industry was unhappy with the proposal and its mouthpiece INTERTANKO argued for the maintenance of the fair distribution which the 1969 and 1971 Conventions had established. One of the arguments made was, that the oil industry had profited much more from the transport of oil and therefore had better resources for making compensation payments than the shipping industry. In fact, according to OECD statistics the cost to the oil industry of shipping oil had dropped from 40% of the price of oil during the last Conference to 2% in 1982⁴²³. Furthermore, INTERTANKO argued that it was only fair for the oil industry to partake in compensating victims as it was the nature of the cargo that caused the pollution. The argument of the shipowners succeeded, not least because it really does seem the fairer solution. If nothing more, splitting the burden of compensation payments between both industries will at least give both an incentive to avoid any pollution by, for example, chartering only vessels which are in a fit and proper state and training and supervising their personnel in an appropriate manner.

The reason why the limits contained in the 1969 Convention had to be revised was because they had become insufficient. Inflation had eaten into the amounts. But this was not the only reason why the limits contained in the Convention had become too low to provide adequate compensation. France had commissioned a study undertaken by Professor Henri Smets of the

⁴²² LEG/CONF/6/7, Official Records 1984, Vol. I, p.165

⁴²³ LEG/CONF/6/7, Official Records 1984, Vol. I, p.165

University of Paris I which showed that the cost of oil spills had increased at a rate higher than inflation between 1970 and 1980⁴²⁴. In 1971 OCIMF had estimated the cost of cleaning up spills greater than 5,000 tons at around US\$40 per ton. From 1970-1980 the actual cost of oil spills had increased 19 times in real terms⁴²⁵.

Some of the reasons given for this were that the clean-up requirements had become more stringent and that the compensation of victims had become more generous. Clean-up methods had become more extensive and more expensive. Wages and the price of cleaning chemicals had increased. There had also been an increase in the average size of spills which was partly due to the fact that tankers had become larger. Recent disasters such as the “Amoco Cadiz” and the “Tanio” casualties had shown the insufficiency of the Convention amounts in a rather dramatic manner.

The “Amoco Cadiz” grounded on 16th March 1978, off the coast of Northern Brittany. Her entire cargo of 220,000 tons of crude oil spilled, causing the largest ever oil spill. More than 350 kilometres of coastline were contaminated⁴²⁶. Under the 1969 Convention regime the liability of the shipowner was limited to FF77 million. The total of compensation claimed however amounted to £469,9 million, making very clear that the limitation amounts were far too low to cover the damage. This situation was made even worse as the 1971 Fund Convention, which would have been a further source of compensation, was not yet in force. The compensation process took 13 years. So as to avoid the limitation of liability under the Convention, the French state sued the management company Amoco International in the US rather than suing the owner under the 1969 Convention in France⁴²⁷. This in itself was already a clear sign that the Convention had failed in practice. The ensuing litigation proved to be long and costly and this of course reflected badly on the effectiveness of the Convention.

Two years later, on 7th March 1980, during heavy seas, the “Tanio” broke in two again off the coast of Northern Brittany. 13,500 tons of oil were spilt. As a result 200 kilometres of French coast as well as the islands of Jersey and Guernsey were polluted. Compensation claims in the order of £110,7

⁴²⁴ LEG/CONF.6/36, Official Records 1984, Vol. I, p.349

⁴²⁵ LEG/CONF.6/36, Official Records 1984, Vol. I, p.350

⁴²⁶ Chelminski, Superwreck: “Amoco Cadiz”. Hooke, Modern Shipping Disasters: 1963-1987 and Diver - February 2000

⁴²⁷ Ganten, Dr. Reinhard H., Entschädigung für Ölverschmutzungsschäden aus Tankerunfällen, p.6, Schriften des Deutschen Vereins für Internationales Seerecht, Reihe A: Berichte und Vorträge, Heft 41, Hamburg 1980, p.8

million⁴²⁸ were made. 90% of the claims made were in respect of oil recovery and clean-up costs incurred by the French authorities. The shipowner's liability was limited to FF11,8 million⁴²⁹ under the 1969 Convention. This time the 1971 Fund Convention applied, providing further funds for compensation. However, the responsibilities of the Fund were limited to FF 244,7 million⁴³⁰ under the 1971 Fund Convention. Claims could therefore only be paid up to approximately two thirds of the damage incurred. The compensation process was however dealt with much quicker this time with most compensation payments being made within 3-5 years.⁴³¹

These two disasters clearly showed the need for an increase in the limits of liability.

By 1984 the capability of the insurance market had also increased to about US\$ 300 million per ship per incident,⁴³² which meant it was quite possible to increase the limits. In 1984 P&I Clubs within the International Group paid the first layer of up to US\$1 million themselves. The second layer (US\$1-8 million) was pooled by the Clubs belonging to the International Group. The third layer (i.e. anything above US\$8 million) was reinsured with a ceiling of US\$300 million for oil pollution⁴³³. However, the International Chamber of Shipping (ICS) correctly warned not to set liability at a level which would exhaust that capability as the insurer would typically not only be on risk for oil pollution but also for general liabilities, and an owner may be liable both in a convention and in a non-convention state and will therefore require cover for both. The cover provided will thus in practice considerably exceed the Convention figures⁴³⁴.

Another reason why the limits had to be increased lies in the fact that the Convention is a finely woven balance of differing interests and that therefore almost every provision is linked in some way to another provision. The amount of liability is, amongst other things, linked to the channelling of liability. As the revised version of the Convention channels liability even more to the owner, the limits of liability had to be put up, because if the

⁴²⁸ Rate in 2001

⁴²⁹ Representing £2,5 million in 2001

⁴³⁰ Representing £51,4 million in 2001

⁴³¹ "The cost of oil pollution at sea: an analysis of the process of damage valuation and compensation following oil spills", Olivier Thébaud, Denis Bailly, Julien Hay, José Pérez. pp. 3,5,9. http://www.aerna.org/Documentos_trabajo/Prestige7Hayetal..pdf. On 2.2. 2004

⁴³² LEG/CONF.6/7, Official Records 1984, Vol. I, p.161

⁴³³ LEG/CONF/.6/14 , Official Records 1984, Vol. II, p.29

⁴³⁴ LEG/CONF.6/INF.5, Official Records 1984, Vol. II, p.142

number of potential defendants was going to be reduced, at least the amount of compensation from the remaining source had to be increased. This is one of the reasons why the US, unaccustomed to the concept of channelling liability, demanded that shipowner's liability be set at a sufficiently high level. A demand which also had to be balanced against the ability to break through limitation⁴³⁵.

The level at which the limitation amounts should be pitched was so interwoven with other considerations such as the channelling of liability, breaking limitation etc., that the Chairman himself, Mr Jacobsson, proposed limitation figures as well as a minimum liability for small vessels to the Conference. He took this unconventional step having discerned after consultations with many delegations that this matter was going to be too difficult to put to a vote. The figures which had been put forward by the various delegations were of such a wide range (proposals for maximum liability ranged from US\$30 to US\$100 million⁴³⁶) that agreement without his intervention seemed unlikely⁴³⁷.

Under the 1969 Convention the limit of the shipowner's liability was the lower of 133 Special Drawing Rights (SDR) per ton of the ship's tonnage or 14 million SDR. The proposal made by the Chairman was that the limits should be raised as follows: For a ship not exceeding 5,000 gross tonnage, liability should be limited to 3 million SDR. Having a minimum amount of liability for small ships ensures that victims are compensated because small ships could otherwise very easily cause damage well exceeding their liability limit if they have a very low tonnage. Having a minimum liability for small vessels would also mean that the Fund would not have to get involved in relatively small cases. The concept of a minimum liability for small vessels was supported by, inter alia, Friends of the Earth.⁴³⁸

Ships of under 20,000 GRT had caused claims of between US\$15 and US\$30 million but under the 1969 Convention they were only liable for up to US\$3,2 million. It was shown during the Conference that most of the claims which went above the limits of liability were caused by ships under 40,000 GRT. For a ship of between 5,000 and 140,000 gross tonnage, liability was therefore proposed to be limited to 3 million SDR plus 420 SDR for each additional

⁴³⁵ LEG/CONF.6/C.2/SR.1, Official Records 1984, Vol. II, pp.317, 318

⁴³⁶ LEG/CONF.6/C.2/SR.6, Official Records, Vol. II, p.382

⁴³⁷ LEG/CONF.6/C.2/SR.28, Official Records, Vol. II, p.615

⁴³⁸ LEG/CONF.6/INF.4, Official Records, Vol. II, pp.120, 121

unit of tonnage. It was proposed that for a ship of over 140,000 gross tonnage liability should be limited to 59.7 million SDR.

Brazil, Chile, India, France, Italy, Denmark, East and West Germany, amongst others supported the proposals made by the Chairman⁴³⁹. The Japanese delegation however thought the figures proposed were too high and felt that they could not accept these levels⁴⁴⁰. Given that at the time Japan had one of the biggest fleets of tankers world-wide, this should not have come as much of a surprise. The Republic of Korea agreed with Japan and so did Belgium and Greece⁴⁴¹. INTERTANKO was also against the increase saying that a six-fold increase in maximum liability (from a maximum liability of US\$10 million to US\$60 million at 1984 rates) was far too much, especially given the economic crises which was plaguing the shipping industry at the time⁴⁴². INTERTANKO voiced the suspicion that the proposed increase was only so dramatic in order to please the US and to entice them to ratify the 1969 and 1971 Conventions⁴⁴³.

Conversely, Canada voiced its regret that the increase had been too low⁴⁴⁴. Italy agreed giving the recent disaster of the “Haven” as an example for why the limits should be higher⁴⁴⁵.

In the end, the proposals made by the Chairman were however adopted.

⁴³⁹ LEG/CONF.6/C.2/SR.28, Official Records, Vol. II, pp.616, 617

⁴⁴⁰ LEG/CONF.6/C.2/SR.28, Official Records, Vol. II, p.616

⁴⁴¹ LEG/CONF.6/SR.6., Official Records, Vol. III pp.182, 183

⁴⁴² In 1983, 60 Very Large Crude Carriers had been sold for demolition and 25 more were sold in 1984 because of the unfavourable economic situation

⁴⁴³ LEG/CONF.6/C.2/SR.28, Official Records 1984, Vol. II, p.617

⁴⁴⁴ LEG/CONF.6/C.2/SR.28, Official Records 1984, Vol. II, p.616

⁴⁴⁵ LEG/CONF.9/INF.2, Official Records 1984, Vol. IV, p.176

2.5.1.7.2 Article VI (2)

Art. VI (2) of the 1992 Protocol provides:

“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 omission⁴⁴⁶, committed with the intent⁴⁴⁷ to cause such damage, or recklessly⁴⁴⁸ and with knowledge that such damage would probably result”.

Arguably the most dramatic change effected by the 1992 Protocol was the change it made to the mode of breaking limitation. While the Convention in its original form provided that the owner could not limit his liability if the damage was *“a result of the actual fault or privity of the owner”*, meaning ordinary negligence would have sufficed, the 1992 Protocol changed the threshold to *“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”*. This means the highest forms of pre-meditation are now required: intent or at least something very close to it: recklessness, have to be proved to break limitation. Secondly, the burden of proof was reversed, which, in practice is a very heavy burden to bear.

The actual wording of the revised Art. VI (2) was found during an informal meeting held in Stockholm from 7-11th December 1981. It was later adopted by IMO’s Legal Committee, which in turn proposed it to the Conference⁴⁴⁹. The wording had been borrowed from Art. IV of the Convention on Limitation

⁴⁴⁶ What is meant by “personal act or omission” remains unclear. In the case of *McDermid -v- Nash Dredging & Reclamation Co Ltd* [1987] 1AC 906 it was held that the term should be interpreted strictly, so that the actions of a ship manager or charterer will not be attributed to the owner, however, the owner does have to ensure a safe system of work is in place on board the vessel. The earlier law on “actual fault or privity” is instructive: *Tesco Supermarkets -v- Natrass* [1972] A.C. 153; *Seaboard Offshore -v- Secretary of State for Transport (The Safe Carrier)* [1994] 1Lloyd’s Rep. 589. For the directing mind of the corporate owner: *Lennard’s Carrying Co. -v- Asiatic Petroleum Co.* [1915] AC 705, *The Truculent* [1952] P.1, *The Lady Gwendolen* [1965] P.294, *The Garden City* [1982] 2 Lloyd’s Rep 382, *The Marion* [1984] 1 AC 563, *The Ert Stefanie* [1989] 1 Lloyd’s Rep. 349

⁴⁴⁷ For a definition of “intent” see *R-v-Moloney* [1985]1 AC 905, *R-v- Hancock & Shankland* [1986] AC 445

⁴⁴⁸ The definition of this term will of course be discussed in detail during the rest of this thesis, but definitions of the meaning of “reckless” can be found in criminal law: *R -v- Lawrence* [1981] 1 All ER 961, *Metropolitan Police Commissioner -v- Caldwell*[1982] AC 341; in the Warsaw Convention: *Goldman -v- Thai International Airways Ltd* [1986] 3 All ER 693, *Gurtner -v- Beaton* [1993] 2 Lloyd’s Rep 369. In the Hague-Visby Rules: *The European Enterprise* [1989] 2 Lloyd’s Rep 185. In the Athens Convention: *The Lion* [1990] 2 Lloyd’s Rep 144

⁴⁴⁹ LEG’CONF/6/4, Official Records 1984, Vol.1, p.63

of Liability for Maritime Claims 1976⁴⁵⁰, which in turn took it from Art. XIII of the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12th October 1929, done at The Hague On 28th September 1955 (the “Warsaw Convention”).

During discussions held at the 49th Session of the Legal Committee, prior to the Conference, it was considered that the wording used for conduct barring limitation ought to be revised, inter alia, because the formulation “fault or privity” had given rise to varying judicial interpretations as to its meaning. This of course was not a satisfactory state of affairs as it prejudiced the desired uniform application of the Convention⁴⁵¹. Introducing the new concept of fault would also bring the Convention into line with similar conventions recently adopted, such as the 1976 Limitation Convention.

The CLC is a very finely weaved web of compromises and balances which are interdependent. The more liability is channelled, and the 1992 Protocol does increase the channelling of liability, the higher the liability can and must be as there are less potential defendants available for compensation. The higher the liability, the tougher it must be to break it so as to avoid overstressing the insurance market. It was therefore already clear during the discussions which took place during the 49th Session of the Legal Committee that acceptance of the new formulation for breaking limitation would depend on the limits of liability being significantly raised⁴⁵². It is certainly true that one was a trade-off for the other.⁴⁵³ According to Ganten,⁴⁵⁴ the new test made the limits unbreakable, a perception which was shared by the participants of the Conference at the time.

OCIMF, for example, was happy with the new formula, as long as the limits of liability were increased at the same time⁴⁵⁵. The fact that introducing the concept of “recklessness” would make it possible for limitation amounts to be raised was also recognised and welcomed by the United Kingdom

⁴⁵⁰ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.455

⁴⁵¹ LEG/CONF.6/7, Official Records 1984, Vol. I, p.149

⁴⁵² LEG/CONF.6/7, Official Records 1984, Vol. I, p.149, 150

⁴⁵³ LEG/CONF.6/7, Official Records 1984, Vol. I, p.149

⁴⁵⁴ Ganten, Dr Reinhard H., Die Protokolle von 1984 zum Ölhaftungsübereinkommen von 1969 und zum Fondsübereinkommen von 1971, Schriften des Deutschen Vereins für Internationales Seerecht, Reihe B: Dokumente und Materialien, Heft 17, Hamburg 1986, p. 26

⁴⁵⁵ “Oil Spill Pollution Liability and Compensation. A Position statement by the Oil Companies International Marine Forum and the Oil Companies Institute for Marine Pollution Compensation Limited, Concerning Revisions to the Civil Liability Convention 1969 and the Fund Convention 1971”, July 1982, p.6

government⁴⁵⁶. The International Group of P & I Associations also welcomed the adoption of the new test for breaking limitation. According to them the test of “fault and privity” had been “one of the most glaring defects in the CLC”⁴⁵⁷. Under the previous regime it had, according to the Group, been difficult to determine whether limitation was available, which had in many cases postponed settlement. The Group thought the new test much clearer and of more certainty which, naturally, from their point of view as insurers, was important⁴⁵⁸. Also, as pointed out by Trotz⁴⁵⁹, the former test, in combination with the fact that it was left to national law to decide who should bear the burden of proof, meant that it was very unclear whether limitation could be relied on or not. Such uncertainty evidently counteracts the purpose of the Convention. The political motive behind limitation of liability was, after all, that there would be a (more or less) fixed basis on which damages could be assessed in advance and hence also be made more insurable.

Some governments, however, were not so happy about the compromise reached. Belgium for example thought that the position of the shipowner had been compromised by the higher limits and evidently did not see the introduction of the concept of “recklessness” as enough of a bonus to outweigh the higher limits.⁴⁶⁰

Another defect in the test for breaking limitation under the 1969 Convention had been that it was unclear who bore the burden of proof⁴⁶¹. This was another reason why the informal meeting held in Stockholm from 7-11th December 1981 had proposed that the wording “recklessly and with knowledge that such pollution damage would probably result” should replace the old test⁴⁶².

The 1992 Protocol now firmly places the burden of proof onto the claimant, i.e. the victim of pollution. This of course further improves the situation of the owner. The party with the burden of proof always faces an uphill struggle

⁴⁵⁶ LEG/CONF.6/50 Official Records 1984, Vol. I, p.366

⁴⁵⁷ For an analysis of the meaning of fault and privity see above

⁴⁵⁸ LEG/CONF.6/47, Official Records 1984, Vol. II, p.55

⁴⁵⁹ Trotz, Norbert, Die Revision der Konvention über die zivilrechtliche Haftung für Schäden aus der Ölverschmutzung des Meeres und über die Errichtung eines Entschädigungsfonds, Akademie für Staats- und Rechtswissenschaft der DDR, Institut für ausländisches Recht und Rechtsvergleichung, Aktuelle Beiträge der Staats- und Rechtswissenschaft, Heft 340, Potsdam-Babelsberg, 1987, p.58

⁴⁶⁰ LEG/CONF.6/SR.6, Official Records 1984, Vol. III, p.183

⁴⁶¹ LEG/CONF.6/7, Official Records, Vol. I, p.159

⁴⁶² LEG/CONF.6/7, Official Records 1984, Vol. I, p.159

in any litigation. In fact, the Turkish delegation thought the victim may in some cases not succeed at all with the burden of proof on his shoulders and thought this an unjust burden. The Turkish delegation therefore advocated placing the burden of proof on the owner instead⁴⁶³. The proposal was however withdrawn shortly afterwards, as it did not find any support amongst the delegates.⁴⁶⁴ Given the benefit of hindsight, the Turkish delegation had had a very good point. Time would show that the reversal of the burden of proof would indeed become a burden too heavy to bear.

Denmark was also against the proposed change because of the difficulties it would present in proving responsibility⁴⁶⁵. The Eastern German delegation on the other hand spoke out in favour of the new wording. It pointed out that the burden of proof had also been placed on the victims in the 1976 Limitation Convention because unbreakability had been considered a very important factor. This, they said, was also the case here, which is why the Legal Committee had copied the wording from the 1976 Limitation Convention⁴⁶⁶. The most convincing conceptual argument in favour of the decision regarding the burden of proof however was made by the USSR delegation. The USSR argued that the owner has been granted a right to limit. He therefore does not need to prove anything. On the contrary, any derogation from his right is a specific denial of that right⁴⁶⁷. It is therefore only logical that the burden of proof should lie on the party seeking to take that right away from the owner. And the situation of the owner within the CLC is indeed very different from a situation where someone is asked to prove that he is eligible for a benefit. One has to prove eligibility for a benefit but not for a right. The second point made by the USSR delegation was, that in legal disputes parties are required to prove positive facts but never the absence of facts, which is, as we all know, often a practical impossibility. This being the case, it follows that the victim should have to bear the burden of proving that the owner acted recklessly or with intent,⁴⁶⁸ rather than the owner having to prove that he had not.

The undoubted advantage of the 1992 Protocol is, of course, that the situation is clarified and that it is clear who bears the burden of proof. The decision to place it on the victim is undoubtedly part of the diplomatic

⁴⁶³ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, pp.279, 455

⁴⁶⁴ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.456

⁴⁶⁵ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.455

⁴⁶⁶ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, pp.455, 456

⁴⁶⁷ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.456

⁴⁶⁸ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.456

balance of the Convention. The device makes the limits of liability even more unbreakable. The situation is theoretically less grave within Anglo-Saxon legal systems where the device of disclosure makes it easier for the victim to prove the intent or recklessness of the owner, than it is in other legal systems. Also, the International Management Code for the Safe Operation of Ships and for Pollution Prevention (the ISM Code) should lighten the victims' burden in this respect.

There is as yet no relevant litigation involving the CLC but judging in its absence by comparable litigation involving the 1976 Convention which has the same formulation to break limitation, the courts seem so far to take the view that the limits of liability under the Convention are unbreakable and they will not be convinced easily, if at all, that limitation can be broken⁴⁶⁹.

Unlike other Articles, Article VI (2) was adopted by the 1984 Conference with astonishingly little debate as to the new concept of "recklessness". The Protocol⁴⁷⁰ simply notes that "Paragraphs 2 to 6 [of Article VI] were adopted"⁴⁷¹.

One concern in relation to the new test was that it may provide owners with too much protection and open the door to shoddy management, substandard ships and poor safety standards. This however should be counteracted by other conventions such as MARPOL or the International Convention on the Safety of Life at Sea (SOLAS) as well as by Port State Control, all of which are better placed to deal with these aspects than the Convention would have been. Also, stricter channelling and a more stringent test for breaking limitation have undoubtedly contributed to a faster settlement of claims, which especially benefits claimants who often do not have the financial means to sustain long and costly litigation to establish who is liable and whether, once the responsible party is identified, that person can maintain the right to limit liability⁴⁷².

⁴⁶⁹ See for example the case of the "Leerort", Schiffahrtsgesellschaft MS "Mercury Sky" m.b.H. & Co. K.G. -v- MS Leerort NTH Schiffahrts GmbH & Co KG [2001] 2 Lloyd's Rep. 291. For a more detailed discussion of this point see below.

⁴⁷⁰ LEG/CONF.6/SR.5

⁴⁷¹ LEG/CONF.6/SR.5, Official Records 1984, Vol. III, p. 179

⁴⁷² "Oil Spills – Who Pays for them and How Much? An overview of the international compensation scheme", Alfred H.E. Popp, QC – Senior General Counsel, Admiralty and Maritime Law, Justice Department, Ottawa, Canada. Speech held at Spillcon 2002, 9th International Oil Spill Conference 16-20th September 2002, Manly, Sydney, Australia, www.spillcon.com. On 14.3.2003

One problem with the new test however seems to have been overlooked. An owner behaving recklessly or with intent loses his right to limit liability under both the 1976 Limitation Convention and the CLC.

In terms of insurance, the owner would also lose his insurance cover if he acted with intent or recklessly. In the United Kingdom, where most vessels are insured, this is regulated by section 55(2) (a) of the Marine Insurance Act 1906, which provides: *“The insurer is not liable for any loss attributable to the wilful misconduct of the assured...”*

“Wilful misconduct” includes both damage caused intentionally (deliberate misconduct),⁴⁷³ and a reckless assumption of risk⁴⁷⁴. The interpretation of “reckless assumption of risk” is subjective. The decisive test is whether the assured is acting “without caring whether the action was wrongful or not” or if there is a “deliberate courting of a known risk”, i.e. where he is indifferent towards the result of the act⁴⁷⁵. The interpretation is supported by case law concerning dry insurance and transport by road as well as aviation law⁴⁷⁶. Apparently, there are no court cases concerning marine insurance on this issue.⁴⁷⁷

Once the owner has lost his insurance cover, it will of course be much more difficult for the victim to obtain compensation, because the victim will have to rely on the owners’ own funds and most owners hedge their liabilities very skillfully by founding one-ship companies and by employing other such devices.

This in itself however is not necessarily the end of the matter for a victim for, even if the owner has no money to compensate him, the victim can still claim directly against the insurer under Art. VII (8) of the Convention.

⁴⁷³ Johnson -v- Marshall, Sons & Co. Ltd. [1906] A.C. 409, 411. The “Eurysthenes” [1976] 2 Lloyd’s Rep. 171 (C.A.). Also: Arnould, *The Law of Marine Insurance and Average*, Mustill J.C., Gilman, B., 16th Edition, Sweet and Maxwell, 1996, § 786

⁴⁷⁴ Bennett: *The Law of Marine Insurance*, Clarendon Press, 1996, p. 218. Wood -v- Associated National Insurance Co. Ltd. (1985) 1 QdR 297, Australia

⁴⁷⁵ Arnould, *The Law of Marine Insurance and Average*, Mustill J.C., Gilman, B., 16th Edition, Sweet and Maxwell, 1996, § 786. Also Bennett, *Law of Marine Insurance*, Clarendon Press, 1996, p. 218.

⁴⁷⁶ See Clarke: *International Carriage of Goods by Road: CMR*, 2nd Ed., Sweet and Maxwell, 1997, p. 501 et seq.

⁴⁷⁷ “Issues of marine insurance misconduct of the assured and identification”, Professor Trine-Lise Wilhelmsen, *Scandinavian Institute of Maritime Law*, www.comitemaritime.org/future/pdf/misconduct_a_id.pdf. On 31.4.2003

Under this Article the insurer has limited means of defending himself. However, and this is the crux, he is expressly given the right to “*avail himself of the defence that the pollution damage resulted from the wilful misconduct of the owner himself*”. It is at this point that the victim will now encounter difficulty, because the insurer will also now refuse to compensate the victim for the damage, because, as established above, cases of recklessness and intent are instances of “wilful misconduct”. The result of this is that in cases where the owner has acted especially unethically and the victim has been able to prove intent or recklessness, in other words in all those cases where the owner no longer deserves any protection according to the Convention, and where the draftsmen of the Convention felt that full compensation was appropriate, the victim is likely to end up with no compensation.

This interpretation seems to sit uneasily with the provision in the same Article that the insurer may limit his liability even where the owner has lost his right to limit due to his reckless or intentional behaviour and it therefore seems that such a result could not have been intended by the Conference. It seems to have been an oversight. It is however nevertheless the result of this Article and claimants should therefore be very careful when contemplating an action to break limitation.

2.5.1.7.3 Article VI (3)

Art. VI (3) provides that:

“For the purpose of availing himself of the benefit of limitation provided for in paragraph 1 of this Article the owner shall constitute a fund for the total sum representing the limit of his liability with the Court or other competent authority of any one of the Contracting States in which an action is brought under Article IX or, if no action is brought, with any Court or other competent authority in any one of the Contracting States in which an action can be brought under Article IX. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the Court or other competent authority.”

It was noted that the provision contained in the 1969 Convention which stipulated that the shipowner could establish a fund only once a claim had been filed at court, often presented an unnecessary delay in the settlement of

claims. Many states therefore advocated for this provision to be abandoned⁴⁷⁸.

The provision was indeed abandoned by the 1992 Protocol so that a fund can now be set up even before a claim is brought.

While this certainly speeds matters up and will often dispense with the bringing of a formal claim in the first place, it has been criticised by, inter alia, Turkey⁴⁷⁹ as it does provide the owner with an opportunity for forum shopping because it enables him to make the first move. The owner can now set up the fund in any contracting state which would have jurisdiction under Article IX of the 1992 Convention. The owner will often be faster to react than the victims as he will usually be well versed in international litigation, and will also generally have one of the experienced P&I Clubs in the background as well as specialist lawyers familiar with the advantages of bringing claims in different jurisdictions. The jurisdiction chosen by the owner may not always be the jurisdiction most convenient for the majority of claimants. In practice, however, this is unlikely to present much of a problem as Art. IX already considerably restricts the number of jurisdictions available.

Norway wanted to have the fund made optional altogether and (together with Japan⁴⁸⁰) preferred leaving legislation up to individual states, as is the case under Art. X of the 1976 Limitation Convention⁴⁸¹. Poland also favoured an optional fund⁴⁸².

However, Italy, the USSR, Australia, Argentina, Belgium, Chile, Cuba, Panama, New Zealand and others thought that the setting up of a fund should be mandatory⁴⁸³. The Netherlands shared this view on the grounds that the limitation fund constituted a guarantee for victims and that especially in cases where the owner went bankrupt the victims could at least still claim against the fund⁴⁸⁴.

⁴⁷⁸ LEG/CONF.6/7, Official Records 1984, Vol. I, p.160 and West Germany: LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.457 and UK: LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.458. Italy: LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.459

⁴⁷⁹ LEG/CONF.6/C.2/WP.20, Official Records 1984, Vol. II, p.280 and LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.457

⁴⁸⁰ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.457

⁴⁸¹ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.457

⁴⁸² LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.458

⁴⁸³ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.459

⁴⁸⁴ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.459

The United Kingdom countered this position with a weighty argument by pointing out that the Convention relied on compulsory insurance provided by P&I Clubs. The absence of a fund would therefore not prejudice the victims in terms of security but may very well delay procedures which was a much more tangible and likely prejudice for the victims⁴⁸⁵. The IOPC Fund also said that, in its experience, it was not always necessary to set up a fund and thought that the matter of the fund should be made optional⁴⁸⁶. The IOPC Fund had also found that the setting up of the fund unduly delayed compensation in many cases, causing hardship to claimants. The IOPC Fund in practice had therefore often made compensation payments before a limitation fund was set up.

The advantage of having a fund is that it accumulates interest which, depending on national legislation, may be available for the victims. If the process of dealing with compensation claims is a lengthy one, such interest may turn out to be a sum of some proportion which should not be disregarded. In the “Tanio” for example, the Fund which had been set up under the CLC almost doubled due to interest⁴⁸⁷.

It should, on the other hand, be kept in mind that the requirement to set up a fund may present a heavy burden for a shipowner who in case of a casualty may be in a difficult financial situation anyway. This could even lead to an insolvency which would in the end directly prejudice the victims for whose benefit the fund was intended. Many businesses do not have the sort of ready cash they can just spare over a long period of time. To draw it out of a going concern may often present hard-ship and in many jurisdictions funds have to be paid in cash at court, bank guarantees being insufficient under national law. This is especially harsh considering that usually in the shipping business bank guarantees or letters from the P&I Club are sufficient.

However, in the end the Conference decided to take a golden middle position by keeping the requirement of a mandatory fund but lifting the requirement that a fund can only be set up once a claim has been brought.

2.5.1.7.4 Article VI (4) and (5)

Art.VI (4) reiterates the changes introduced by the 1976 Protocol.

⁴⁸⁵ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.460

⁴⁸⁶ LEG/CONF.6/C.2/SR.13, Official Records 1984, Vol. II, p.460

⁴⁸⁷ Ganten, LEG/CONF.6/C.2/SR.17, Official Records 1984, Vol. II, p.500

Art VI (5) changes the calculation of tonnage to accord with the calculation of gross tonnage in accordance with the International Convention on Tonnage Measurement of Ships 1969 which had come into force on 18th July 1982⁴⁸⁸. France had already pointed out in 1969 that the wording of the CLC should be formulated so as to be in accordance with the Tonnage Measurement Convention, but surprisingly the French suggestion was not taken up at the time⁴⁸⁹.

2.5.1.8 Article VII

Article VII, which deals with certificates to be issued to ships, was changed to allow contracting states to issue certificates to ships not registered in contracting states. It furthermore provides for all contracting states to accept such certificates.

Prior to the 1992 Protocol ships registered in non-contracting states had no means of coming by an acceptable certificate, because a certificate issued by a non-contracting state was not valid under the Convention and a certificate issued by a Contracting state to a vessel from a non-contracting state was not valid either.

This gap in the Convention was of course a remarkable oversight, which had to be remedied as it had caused some problems. The issue had already been considered by IMO's Legal Committee at its 27th session from 16-20th June 1975. The outcome of these considerations had been that Circular Letter No. 232 was sent by the Secretary-General to all interested parties, asking them to adopt a pragmatic approach and to consider accepting certificates issued to ships from non-contracting states and those issued by non-contracting states. A number of bilateral and multilateral arrangements between states had followed, which had dealt with the problem in a pragmatic fashion.⁴⁹⁰

2.5.1.9 Article XII bis

Transitional provisions are provided for in Art. XII bis of the 1992 Protocol. These applied from the coming into force of the Protocols on 30th May 1996 to 15th May 1998 when parties to the 1992 Protocol ceased to be parties to the 1969 Convention due to a system of compulsory denunciation⁴⁹¹.

⁴⁸⁸ LEG/CONF.6/C.2/SR.15, Official Records 1984, Vol. II, p.473

⁴⁸⁹ LEG/CONF/4 Official Records 1969, p. 483

⁴⁹⁰ LEG/CONF.6/48, Official Records 1984, Vol. II, p.58

⁴⁹¹ Internationale Gefahrguthaftung beim Seetransport“, Ministerialdirigent Dr. Reinhard H. Ganten, Transportrecht, Heft 11/12 November/Dezember 1997, pp. 397-403. Also Özçayir, Oya Z., Liability for Oil Pollution and Collisions, LLP, 1998, p.234

2.5.1.10 Article XII ter, Article 10

The 1992 Protocol replaced the model certificate in relation to insurance annexed to the 1969 Convention by a new model annexed to the Protocol.

2.5.1.11 Article XIII

The 1992 Protocol changed the requirements for entry into force. Previously, ratification by ten states including six states each with not less than one million gross tanker tonnage⁴⁹² was required⁴⁹³. The Protocol changed this requirement to ratification by ten states including four states each with not less than one million units of gross tanker tonnage. The new requirements could be met without the participation of the US. This was important as the 1984 Protocol had not come into force because of the unwillingness of the US to participate.

There had been three proposals at the Conference as to how to change the entry into force requirements. One proposal was to make the entry into force dependent on a certain percentage of world tonnage ratifying the Convention. This proposal was supported by, inter alia, Brazil, China, India, Indonesia and Greece. Another proposal, made by the United Kingdom and backed by Ireland, Denmark, the Netherlands, Sweden and Canada⁴⁹⁴, was that the old system from 1969 should be retained in substance. Japan made a third proposal that the old provisions should be retained but the figures changed⁴⁹⁵.

The United Kingdom, quite rightly, pointed out during the Conference that having the Convention come into force merely upon ratification by a certain percentage of world tonnage as suggested by China, Brazil, India, Indonesia and Greece⁴⁹⁶ was flawed, in that it would mean that one or two countries with large fleets could either bring the Convention about or block it. The United Kingdom therefore proposed to retain the old 1969 system for entry

⁴⁹² In 1983 there were 24 countries with tanker fleets which represented more than one million gross tons .LEG/CONF.6/C.2/SR.24, Official Records 1984, Vol. II, p.570

⁴⁹³ Lloyd's Register of Shipping, Statistical Tables, November 1991, shows that as at 30.6. 1991 the following 21 states had a gross tanker tonnage exceeding one million units: Bahamas, Brazil, China, Cyprus, Denmark, France, Greece, India, Iran (not a party to the Convention), Italy, Japan, Kuwait, Liberia, Malta, Norway, Panama, Russian Federation, Singapore, Spain, the United Kingdom and the US (not a party to the Convention)

⁴⁹⁴ LEG/CONF.6/C.2/SR.24, Official Records 1984, Vol. II, pp.571, 572

⁴⁹⁵ LEG/CONF.6/C.2/SR.25, Official Records 1984, Vol. II, p.576

⁴⁹⁶ LEG/CONF.6/C.2/SR.24, Official Records 1984, Vol. II, pp.568, 569

into force and reminded the Conference that the two largest national fleets together already represented 35% of the world's tonnage. While the requirement of a certain percentage of world tonnage participating was possibly warranted in the case of technical conventions, it was not so important in the case of a civil liability convention such as the one under discussion. France agreed with the United Kingdom saying that if the entry into force were made dependant on a percentage of world tonnage joining, the coming into force of the Convention would be made to depend on the countries with the largest fleets⁴⁹⁷. Denmark was also against the Chinese proposal saying that it could potentially delay the coming into force of the Convention indefinitely⁴⁹⁸.

Far more extensive debates in relation to the entry into force requirements however ensued in relation to what was termed the "treaty law question". The CLC is linked but entirely separate to the Fund Convention and bringing them into force together proved quite a drafting challenging. A large part of the discussions at the Conference and at the Legal Committee therefore focused on the resolution of this so-called "treaty law question", which also involved problems of national law for many member states. The problem which presented itself was as follows: Any state is free to become a member of the CLC. Only members of the CLC are however allowed to become members of the Fund Convention. The reason behind this is that the Fund Convention supplements the compensation available under the CLC. Therefore, a member state cannot denounce the CLC without also denouncing the Fund Convention. This of course creates a problem for all states that are a member to the Fund Convention because it becomes difficult to bring into force both revised treaty instruments, the new CLC and the new Fund Convention at the same time. Three types of solutions were envisaged at the Conference: an immediate denunciation approach (favoured for example by France and the Bahamas⁴⁹⁹), a delayed denunciation approach (favoured for example by Canada, Italy, the US and Japan⁵⁰⁰) and a phased-in approach, submitted by the United Kingdom⁵⁰¹ and favoured by, inter alia, West Germany, East Germany, Sweden, Australia, Denmark and Greece⁵⁰². In the end the problem was solved by adopting the phased-in approach whereby states would not be

⁴⁹⁷ LEG/CONF.6/C.2/SR.24, Official Records 1984, Vol. II, p.569

⁴⁹⁸ LEG/CONF.6/C.2/SR.25, Official Records 1984, Vol. II, p.577

⁴⁹⁹ LEG/CONF.6/C.2/SR.9, Official Records 1984, Vol. II, pp.410, 411

⁵⁰⁰ LEG/CONF.6/C.2/SR.9, Official Records 1984, Vol. II, pp.409-411

⁵⁰¹ LEG/CONF.6/C.2/WP.17, Official Records 1984, Vol. II, p.275

⁵⁰² LEG/CONF.6/C.2/SR.9, Official Records 1984, Vol. II, pp.406-411

obliged to denounce the existing instrument before becoming party to a new instrument.

2.5.1.12 Article XV

Article XV puts a simplified procedure in place in order to be able to raise the limits of liability in the future without the need to revise the entire Convention. Given how long it took in the past for amendments to enter into force, this was certainly a wise decision.

The 1992 Protocol provides that at the request of one quarter of contracting states new limits can be proposed. These new limits can be introduced if approved by a two-thirds majority of contracting states. The amount of the increase is restricted to the equivalent of the limitation figures increased by 6% per year, calculated on a compound basis, from 15th January 1993, with an overall ceiling of 3 times the existing 1992 limits⁵⁰³.

The suggestion to introduce such a simplified amendment procedure had already been made by the US during the Conference in 1969⁵⁰⁴. The suggestion however failed because the US had proposed that each country would be able to increase the limits independently. This would however have run counter to the idea of uniformity which the Convention tried to achieve. While each country raising the limits independently would not have been a very good idea, it is nevertheless a shame that the Conference could not look beyond the details of the delegation's proposal to the idea behind it.

There had also been attempts to incorporate a simplified amendment provision into the 1976 Limitation Convention but the attempt had failed at the same stage.⁵⁰⁵

Rapid amendment procedures having been incorporated into SOLAS and MARPOL⁵⁰⁶, the idea finally found widespread support in 1984. At the Conference the International Association of Ports and Harbours (IAPH),⁵⁰⁷ the United Kingdom, Norway, Canada, West Germany, Bahamas, USSR, Belgium, Poland, Sweden and Greece for example all welcomed the idea⁵⁰⁸. The

⁵⁰³ Harry Lawford, Thomas Miller.

http://www.pcs.gr.jp/doc/esymposium/12173/2000_herry_lawford_e.pdf. On 2.2.2004

⁵⁰⁴ LEG/CONF/WP.2

⁵⁰⁵ LEG/CONF.6/C.2/SR.7, Official Records 1984, Vol. II, p.386

⁵⁰⁶ LEG/CONF.6/C.2/SR.7, Official Records 1984, Vol. II, p.387

⁵⁰⁷ LEG/CONF.6/34, Official Records 1984, Vol. II p.40

⁵⁰⁸ LEG/CONF.6/C.2/SR.6 and SR.7, Official Records 1984, Vol. II, pp.383-391

suggestion was, inter alia, promoted by the United Nations Commission on International Trade Law (UNCITRAL) which during its fifteenth session recommended that simplified adjustment procedures for limits of liability be included in international transport and liability conventions⁵⁰⁹. Both the United Kingdom delegation⁵¹⁰ and Mr Herber speaking for the West German delegation voiced the concern at the Conference that the new limits would have to be binding on all countries and that countries should be free to denounce the Convention altogether before amendments came into force if they disagreed with these amendments⁵¹¹. These concerns were, quite rightly, heard and accepted and the provision was drafted accordingly. The simplified amendment procedure was adopted despite the concerns of both Spain and Mexico that the procedure had to take account of the legislative and constitutional requirements of various countries. Mexico was further concerned (a concern shared by Greece, China, Japan and the USSR) that such a provision infringed on the sovereignty of states because it required them to either accept an amendment they had not agreed to or denounce the Protocol altogether⁵¹². China and Japan doubted whether infringing states in such a manner was in line with the Vienna Convention on the Law of Treaties 1969⁵¹³. France however quite rightly pointed out that the Convention could not operate in practice if different countries applied different limits of liability. France also rejected the view that the provision would be contrary to the law of treaties on the grounds that it followed recommendations by UNCITRAL. Also, as pointed out by Mr Herber of West Germany, such provisions were even recommended by the General Assembly of the United Nations⁵¹⁴. Similar provisions were furthermore contained in the IMO Convention itself⁵¹⁵. The United Kingdom quite correctly perceived that the provisions could not be contrary to treaty law as it was open to states to leave a system they did not agree with⁵¹⁶.

The time between acceptance and entry into force was made deliberately long so as to enable states to implement the changes without causing any problems to their national laws which may otherwise have arisen where national legislation processes, such as approval by Parliament, take time.

⁵⁰⁹ a/37/17 and Corr.2 para 63

⁵¹⁰ LEG/CONF.6/C.2/SR.6, Official Records 1984, Vol. II, p.383

⁵¹¹ LEG/CONF.6/C.2/SR.7, Official Records 1984, Vol. II, p.387. LEG/CONF.6/7, Official Records 1984, Vol. I p. 179

⁵¹² LEG/CONF.6/C.2/SR.7, Official Records 1984, Vol. II, pp.388-392

⁵¹³ LEG/CONF.6/C.2/SR.7, Official Records 1984, Vol. II, p.388

⁵¹⁴ LEG/CONF.6/C.2/SR.7, Official Records 1984, Vol. II, p.393

⁵¹⁵ LEG/CONF.6/C.2/SR.7, Official Records 1984, Vol. II, p.393

⁵¹⁶ LEG/CONF.6/C.2/SR.7, Official Records 1984, Vol. II, p.394

2.5.1.13 Article XVIII

Art XVIII provides that the 1992 Convention is established in a single original in Arabic, Chinese, English, French, Russian and Spanish, each text being equally authentic. The German translation is thus neither official nor indicative.

The official languages at the 1984 Conference were Chinese, English, French, Russian and Spanish. The working languages were English, French and Spanish.⁵¹⁷ The term “reckless” and what it means was therefore discussed in English and never in German, such that any interpretation of the term can only be based on an English understanding of it.

2.6 The 2000 Amendments

Although the 1992 Convention had been very successful and had fulfilled its purpose well, by 2000 it was felt that the limits had, once again, slipped below what was needed to compensate victims.

Following proposals from a number of states to increase the limits of liability and compensation under the 1992 Conventions, the 2000 Amendments were adopted on 18th October 2000 during the IMO Legal Committee’s 82nd session held from 16th to 20th October 2000. The amendments came into force on the 1st of November 2003 by tacit acceptance, meaning that the amendments were accepted in the absence of one quarter of contracting states objecting in writing by a certain date. In this case the deadline was 1st of May 2002, and the amendments were accepted.

The amendments raised the compensation limits by 50.37 % compared to the limits set in the 1992 Protocol. In combination with the amendment to the 1992 Fund Convention this brought the total amount of compensation available under the 1992 Conventions up to 203 million SDR⁵¹⁸. Liability for a ship not exceeding 5,000 gross tonnage is limited to 4.51 million SDR. A ship of between 5,000 and 140,000 gross tonnage has a limit of liability of 4.51 million SDR plus 631 SDR for each additional gross tonne over 5,000.

⁵¹⁷ LEG/CONF.6/2, Official Records 1984, Vol. I p.23

⁵¹⁸ IOPC Fund Annual Report 2002, p.16

For a ship over 140,000 gross tonnage, liability is limited to 89.77 million SDR.

Practical experience, too had shown the need to increase the limits to reflect the greater cost of oil spills.

By 2002 the 1992 IOPC Fund had been involved in 12 incidents (most of which have been settled out of court) and paid out compensation in the amount of US \$68 million. Amongst these incidents however were also major casualties which occurred after the adoption of the 1992 Convention and which were so expensive that they gave rise to concerns that the international scheme may still not be in a position to pay full compensation in all cases.

The “Nakhodka” incident off the coast of Japan in 1997, for example was one of these major casualties⁵¹⁹. The Russian tanker “Nakhodka” (19,684 DWT) was on its way from Shanghai to Petropavlovsk with a cargo of 19,000 tonnes Medium Fuel Oil. On 2nd of January 1997 she encountered heavy seas and broke up off the Oki Islands spilling 6,200 tons of oil⁵²⁰. The damage caused amounted to around US\$ 219 million, which far exceeded the available US \$180 million available under the 1992 CLC and Fund Conventions⁵²¹. Claims included, inter alia, the cost of the clean-up and preventative measures organised by the Japan Maritime Disaster Prevention Centre, local government agencies, and electricity companies whose plants were threatened by pollution. There were also many tourism claims from businesses in coastal resorts for loss of income, as well as claims from fishery and maricultural interests.

Another landmark incident occurred on 12th December 1999, when the Maltese tanker “Erika” (19, 666 GT) broke in half in the Bay of Biscay some 60 nautical miles off the coast of Brittany during gale force winds. The tanker was carrying a cargo of 31,000 tones of heavy fuel oil of which some 19,800 tones were spilled at the time of the incident polluting roughly 400 km of beaches including many popular holiday resorts. At the request of the shipowner, the Tribunal de Commerce in Nantes issued an order on 14th March 2000 opening limitation proceedings. The court determined the

⁵¹⁹ The spill caused by the “Braer” off the Shetland islands in 1993 was larger, but due to favourable weather conditions prevailing after the spill, less damage was caused and compensation costs were relatively low at around US \$83 million

⁵²⁰ “The Nakhodka Oil Spill Response –The Technical Adviser’s Perspective”, Dr. T.H. Moller, Technical Team Manager, ITOPF, Paper presented at the Petroleum Association of Japan (PAJ) Oil Spill Symposium 1997, 10-11.7.1997, Tokyo, Japan

⁵²¹ www.itopf.com/costs.html. On 21.4.2004

limitation amount applicable to the “Erika” at £8.4 million and declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by Steamship Mutual⁵²². It was uncertain in the beginning whether the damage was likely to exceed the amounts available under the 1992 Conventions (135 million SDR per incident from both the CLC and the Fund Convention 1992 together). The IOPC Executive Committee therefore decided in July 2000 that payments of compensation from the Fund should be limited to 50% at first as there was a danger that the claims might exceed the compensation available under the 1992 Conventions. The charterer, Total Fina, made a public commitment to voluntarily contribute up to 700 million French Francs (about US\$108 million) to the oil removal and clean-up expenses, and both Total Fina and the French Government indicated that they would refrain from claiming on the IOPC Fund to the extent that this would reduce the compensation available to other third parties. However, while a total figure for the damage is still not available⁵²³ as claims continue to be processed, the French state has now been paid and the Executive Committee authorised the Director of the 1992 Fund in February 2003 to increase the payment of compensation to 100%⁵²⁴.

Both of these incidents, particular the latter, led to an animated debate about the need to raise limitation amounts under the Conventions. The “Erika” disaster was certainly a major force behind the adoption of the 2000 Amendments.

Only six months after the deadline for objection to the 2000 Amendments had passed, a further casualty confirmed how much the increased limits had been needed.

The “Prestige”, laden with 77, 000 tones of heavy fuel oil, broke in two off the coast of Galicia on 19th November 2002 spilling an unknown but substantial quantity of heavy fuel oil⁵²⁵.

⁵²² International Oil Pollution Compensation Fund 1992, Executive Committee, 9th session, Agenda item 3, 92FUND/EC.9/7, 28.9.2000, p.9

⁵²³ So far £77.4 million have been paid out. www.iopcfund.org. On 25.5.2006

⁵²⁴ IOPC Fund Annual Report 2003, pp. 87-89

⁵²⁵ IOPC Fund Annual Report 2003, p.42



“Prestige”, Spain, 2002⁵²⁶

As the casualty occurred before the coming into force of the new limits on 1st November 2003 the damage was still subject to the original 1992 Convention limits. Although it is too early to speculate on the total cost of the incident, it seems almost inevitable that it will exceed the total amount of compensation available under the 1992 Conventions. The IOPC Fund Executive Committee therefore decided in October 2003 to limit compensation payments to 15% at first⁵²⁷. As of June 2005 this has not changed. In October 2005 the Executive Committee however decided to grant payments of 30% to those governments which had incurred losses, in return for financial guarantees in case it should later transpire that the Fund has thereby made an overpayment⁵²⁸.

2.7 The future

The above casualties and in particular the “Erika” fuelled debates within several bodies which go beyond the mere raising of the limits of the 1992 Conventions. Much farther reaching changes are advocated. The European Union proposed new legislation and the IOPC Fund set up a special working group to enquire into the adequacy of the 1992 Conventions regime.

2.7.1 The problems

Even though the new Conventions only entered into force in 1996, the large majority of their content was finalised more than 15 years ago, in 1984. Since

⁵²⁶ ITOF webpage, www.itopf.com. On 20.3.2007

⁵²⁷ IOPC Fund Annual Report 2003, p.115

⁵²⁸ www.iopcfund.org. On 25.5.2006

that time, monetary inflation, increased clean-up costs, and an increased public awareness of pollution issues, have all contributed to raise the cost of spills. Casualties like the “Nakhodka” and the “Erika” have drawn attention to the need to keep the limitation amounts and the compensation system under review.

Following the “Erika” spill the old debate between shipowners and the oil industry as to who should bear the lion share of the damage has been rekindled. Some commentators have suggested that the compensation system should be amended to introduce an additional element of charterer's liability with the aim of discouraging oil companies from chartering ships of poor quality. However, the idea is controversial. This is so because, firstly, oil spills are not necessarily the result of poor quality tonnage (the “Amoco Cadiz”, for example, was a new ship), and secondly, because oil companies, which will mostly also be the charterers, already contribute to the costs of large spills through the IOPC Fund.

Others have suggested that the oil companies should pay less than they do at present, and the shipowners more, on the basis that in cases of major casualties such as the “Nakhodka” and the “Erika” for example, the shipowner's contribution is only a small percentage (less than 10%) of the total compensation. This argument however does not take into account that the increase in the shipowner's contribution under the 1992 Convention means that the shipowner will now provide 100% of the compensation for most spills without the Fund contributing at all. It is therefore clear that, overall, the Convention does contain a careful balance between contributions from shipowners and contributions from the oil industry⁵²⁹. A change in that balance is therefore neither necessary nor possible without upsetting the finely woven interdependent web of compromises the Convention contains, just as it had not been necessary or possible to change that balance when the Convention was revised in the past.

Another point of criticism of the 1992 regime, voiced by the European Commission, has been that the existing provisions for compensation for environmental damage do not go far enough. However, by 2001 no claim for reinstatement measures, other than clean-up costs, has ever been presented

⁵²⁹ Harry Lawford, Thomas Miller
http://www.pcs.gr.jp/doc/esymposium/12173/2000_herry_lawford_e.pdf. 2.2. 2004

to the 1992 Fund⁵³⁰, such that the problem seems to be of an academic nature only. The European Commission nevertheless proposed in its communication dated 6th December 2000 that “*compensation of damage caused to the environment should be reviewed (by IMO or the 1992 Fund) and widened in light of comparable compensation regimes established under Community law*”. It was further said that “*the existing coverage of reinstatement costs could be expanded to include at least costs for assessing the environmental damage of the incident as well as the costs for the introduction of components of the environment equivalent to those that have been damaged, as an alternative in case reinstatement of the polluted environment is not feasible*”. Others, such as ITOPF, however do not agree, arguing that it would be premature and unnecessary for the 1992 Fund to extend the definition of “pollution damage” beyond reasonable reinstatement measures and that it would be preferable instead to encourage the use of innovative measures and post-spill studies which establish the need for such restoration⁵³¹.

2.7.2 Proposals for change

2.7.2.1 The European Union

Further from the above, in the wake of the “Erika” the European Commission has taken some interest in the issue of oil pollution and having identified several shortcomings in the liability and compensation regime, has made some proposals for reform.

The Commission has stated that some recent accidents, most notably the “Erika” incident, have clearly shown the insufficiency of the existing limits. Consequently, victims may not be fully compensated and significant delays in the payment of compensation will occur as the Fund restricts payments to a certain percentage until it is clear how much can be paid out to each. The Commission considered the increase in existing limits through the 2000 Amendments to be insufficient to remedy the problem. It was therefore decided that something had to be done quickly to create a mechanism for raising the limits of compensation in order to ensure that victims of oil spills in Europe will be adequately compensated in future⁵³².

⁵³⁰ “Admissibility of claims for compensation for environmental damage under the 1992 Civil Liability and Fund Conventions (2001)”. Submitted by ITOPF at the Third Intersessional Working Group of the 1992 International Oil Pollution Compensation Fund, 27.2. 2001

⁵³¹ “Admissibility of claims for compensation for environmental damage under the 1992 Civil Liability and Fund Conventions (2001)”. Submitted by ITOPF at the Third Intersessional Working Group of the 1992 International Oil Pollution Compensation Fund, 27.2.2001

⁵³² Commission of the European Communities, Communication From the Commission to the European Parliament and the Council of a Second Set of Community Measures on Maritime Safety Following the Sinking of the Oil Tanker the Erika, Brussels, 6.12.2000 COM (2000) 802 final, 2000/0325 (COD)-2000/0326(COD)-2000/0327(COD), p.4 and pp. 51-83

To this end, the Commission proposed to create a European supplementary fund, the Compensation for Oil Pollution in European Waters Fund (COPE Fund), to compensate victims of oil spills in European waters⁵³³. The Fund was intended only to compensate victims who were entitled to compensation under the 1992 regime but had not been compensated in full, owing to insufficient compensation limits. The COPE fund would have operated on the same principles and rules as the 1992 regime and would have been subject to a maximum ceiling per incident. It would have raised the overall compensation available per incident to 1 billion Euros and would have been financed by European oil receivers. Any person in a Member State receiving in excess of 150,000 tonnes of crude oil and/or heavy fuel oil per year would have had to pay contributions to the COPE Fund in proportion to the amounts of oil received.

Some very valid concerns were voiced by Dr Wu Chao of Thomas Miller in relation to this proposal. Her concern was that such a European fund could have led to companies restructuring their businesses in such a way as to create a number of smaller companies importing smaller amounts which fall beneath the threshold for contributions to the Fund. Alternatively, it may even have led to oil companies moving out of the European Union altogether⁵³⁴.

The IOPC Fund members however also voiced a valid concern during discussions within the IOPC working group⁵³⁵ on the future of the international conventions in April 2001⁵³⁶ when they said that it was impossible just to keep raising the Convention limits all the time. Especially developing countries would eventually find it difficult to remain in the Fund.

⁵³⁷

The proposed European Union legislation also included an article introducing financial penalties for “grossly negligent” behaviour by any person involved in the transport of oil by sea. The Commission preferred to put the threshold at “grossly negligent” behaviour as it was felt that the test of “reckless and

⁵³³ Proposal for a regulation of the European Parliament and of the Council on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures [COM (2000) 802 final - Official Journal C 120 E, 24 April 2001]

⁵³⁴ “Post-Erika proposals”, *Fairplay*, April 12, 2001, Vol.341, Issue 6118

⁵³⁵ As to this group please see below

⁵³⁶ The conclusions of these discussions are contained in a paper entitled “Review of the International Compensation Regime”

⁵³⁷ “ IOPC to revise international outlook”, *Fairplay*, April 12, 2001 Vol.341, Issue 61,p.18

with knowledge that such damage would probably result” was too protective of shipowners⁵³⁸. According to the proposal, the penalty would have been imposed by Member States outside the scope of liability and compensation and would thus be unaffected by any limitation of liability.

In the event the Council of Europe did not take up the Commission’s COPE proposal because Member States (and other bodies such as OCIMF) considered, quite rightly, that it would be preferable to establish a single mechanism at international level rather than establishing a fund restricted to Europe only. Instead, the Commission has therefore promoted the establishment of a further international fund by means of a Protocol to the 1992 Fund Convention which would be accessible to all⁵³⁹.

2.7.2.2 The IOPC Fund Working Group

In April 2000 the 1992 Fund Assembly established an intersessional Working Group to assess the adequacy of the 1992 regime. The Working Group was sponsored by the United Kingdom, Australia, Canada, Denmark, the Netherlands, Norway and Sweden. Mr. Alfred Popp QC (Canada) was elected as its Chairman. The conclusions of the group are contained in a paper entitled “Review of the International Compensation Regime”.

It was the initial task of the Working Group to create a draft Protocol to establish an optional third tier of compensation by means of a Supplementary Fund which would provide compensation over and above the compensation which was available under the 1992 Fund Convention in states which became parties to that new Protocol. The Supplementary Fund would be financed by contributions from oil receiver.

In October 2001, the IOPC Assembly approved the text of the draft Protocol. The draft was then submitted to the Secretary-General of IMO with the request to convene a Diplomatic Conference to consider it. Following approval by the IMO Legal Committee, the IMO Council decided at its June 2002 session to instruct the Secretary-General to convene such a Conference. The Conference was duly held at IMO’s headquarters in London from 12th to

⁵³⁸ “Post-Erika proposals, Fairplay”, April 12, 2001 Vol.341, Issue 6118

⁵³⁹ European Commission Directorate General for Energy and Transport, Memo. The accident. The oil spill press package. 21st November 2002. www.titanic.com/documents/prestige-europe-union.pdf. Also: A Greenpeace Critique of the Communication from the Commission to the European Parliament and to the Council on improving safety at sea in response to the Prestige Accident COM (2002) 681 Greenpeace International 5th December http://www.greenpeace.se/files/1800-1899/file_1846.pdf.

16th May 2003 and the Protocol establishing an International Oil Pollution Compensation Supplementary Fund was adopted.

The Supplementary Fund will supplement the compensation available under the 1992 Civil Liability and Fund Conventions with an additional third tier of compensation. The total amount of compensation available per incident is a now a combined total of 750 million SDR, the equivalent of approximately US\$1,000 million, including the amount paid under the existing Conventions⁵⁴⁰. Membership of the Supplementary Fund is optional and any state which is a party to the 1992 Fund may join the Supplementary Fund. The Supplementary Fund will however only pay compensation for pollution damage in states which are members of the Supplementary Fund.

The total amount of compensation available for any one incident will be 750 million Special Drawing Rights.

The Protocol will enter into force three months after it has been ratified by at least eight states that have received a combined total of 450 million tons of contributing oil in one calendar year⁵⁴¹. The Protocol entered into force on 3rd March 2005. There are presently 15 Member States including Japan, Germany, France and Denmark⁵⁴².

2.7.2.3 The Small Tanker Oil Pollution Indemnification Agreement

So as to re-balance the imbalance created by the Supplementary Fund, the International Group of P&I Clubs voluntarily entered into a legally binding agreement volunteering to pay an increase in the limits for small ships⁵⁴³. Pursuant to the “Small Tanker Oil Pollution Indemnification Agreement”, shipowners and P&I Clubs undertake to indemnify the 1992 Fund for all claims up to 20 million SDR where the limitation amount under the Convention was lower. This would be the case for ships of 29,548 tonnage or less⁵⁴⁴. The increase only applies in those states that have ratified the

⁵⁴⁰ www.imo.org. On 25.5.2006

⁵⁴¹ IOPC Fund Press Release. “The International Community Adopts Protocols on the Establishment of a Supplementary Fund for Compensation for Oil Pollution”, London, 16th May 2003. www.iopcfund.org. On 23.5.2003

⁵⁴² www.iopcfund.org. On 16.5.2006

⁵⁴³ Discussions of the IOPC Fund Working Group in April/May 2002. IOPC Fund Annual report 2002, pp.31,32

⁵⁴⁴ IOPC Fund Annual Report 2005, p.31. www.iopcfund.org. On 20.5.2006

Supplementary Compensation Fund.⁵⁴⁵ The Agreement entered into force on 3rd March 2005.⁵⁴⁶

The review of the IOPC Fund Working Group, chaired by Mr. Alfred Popp QC, carries on. The issues which are being considered include:

- shipowners' liability and related issues, including the financial balance between shipping and cargo interests
- clarification of the definition of 'ship' as regards offshore craft and unladen tankers
- uniformity of application of the Conventions⁵⁴⁷

An update of the progress of the discussions is contained in the latest IOPC Fund Annual Report⁵⁴⁸.

⁵⁴⁵ Brown, Ben, Developments in oil pollution law, S. &T.L.I. (Shipping and Transport Lawyer) 2002, 3(1), 24-27

⁵⁴⁶ IOPC Fund Annual Report 2005, p.31. www.iopcfund.org. On 20.5.2006

⁵⁴⁷ IOPC Fund Annual Report 2005, pp.31,32

⁵⁴⁸ IOPC Fund Annual Report 2005, pp. 28-33, available at www.iopcfund.org. On 22.5.2006

Chapter 3

Reckless

3.1 General description and introduction

Etymologically, “reckless” comes from Old English “receleas”: careless, thoughtless, heedless, earlier “reccileas”, from “-leas” -less and “rece”/“recce”: to care, heed, from “reccan”: to care, from West Germanic “rokijanan”/“rækja”: to care for; “giruochan”: to care for, have regard to; German “geruhen”: to deign, which is influenced by “ruhen”: to rest). The same affixed form is in German “ruchlos”, Dutch “roekeloos”: wicked. The root verb is “reck”, Old English reccan⁵⁴⁹.”

The ordinary meaning of the word in English is therefore “careless”, “heedless”, “inattentive of duty”⁵⁵⁰, “without thinking or caring about the consequences of an action”⁵⁵¹.

The question however is, what does the term mean in law? Despite repeated assurances of the judiciary that it retains its ordinary meaning⁵⁵², this “ordinary meaning” has been interpreted and bent by the same judiciary in all sorts of directions, leaving its meaning far from clear.

Black’s Law Dictionary,⁵⁵³ in an attempt to lift the fog surrounding the term, defines recklessness as:

“1. Conduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk. Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing. 2. The state of mind in which

⁵⁴⁹ Online Etymology Dictionary. <http://www.etymonline.com/r2etym.htm>. On 27.8.2004

⁵⁵⁰ Donovan J in Reg -v- Bates [1952] 2 All ER 842, 845

⁵⁵¹ The New Oxford Dictionary of English, Edited by Judy Pearsall, Chief Editor, Current English Dictionaries, Patrick Hanks, Clarendon Press, Oxford, 1998, p.1549

⁵⁵² See for example Lord Diplock in Reg -v- Caldwell [1982] A.C. 341 at 353

⁵⁵³ Black’s Law Dictionary, Bryan A. Garner, Editor in Chief, 7th Edition, West Group, St Paul, Minn., 1999

*a person does not care about the consequences of his or her actions – also termed heedlessness.*⁵⁵⁴

However, even within the dictionary there reins confusion. Having defined recklessness as requiring a greater degree of fault than negligence under the heading “recklessness”, a page earlier under “reckless” we find that it is “much more than mere negligence: it is a gross deviation from what a reasonable person would do”⁵⁵⁵, hence suggesting recklessness to be merely a heightened form of negligence, a sort of gross negligence, rather than a different thing altogether which requires a different standard of fault. As we will see, this confusion is widespread.

It is clear that further analysis is needed in order to establish what lies behind the term “reckless”.

3.2 History of the term in English law

The concept of recklessness dates back to Roman law. Under the Roman law of obligations prior to the *lex Aquilia*,⁵⁵⁶ a deposittee who held a thing for safe-keeping was liable to its owner for any damage done to it only where he had caused the damage through his deliberate fault (*dolus*) or through behaviour which was so grossly lacking of care that it was reckless, bordering on deliberate fault (*culpa lata*).⁵⁵⁷

Whereas *dolus* requires activity, *culpa* is often distinguished by being something passive, an omission. The damage may come about by an act, but the act derives its culpable character rather from something that is omitted (*negligentia*⁵⁵⁸) than from what is done. The culpable party omits to act with the diligence required⁵⁵⁹.

⁵⁵⁴ Black’s Law Dictionary, Bryan A. Garner, Editor in Chief, 7th Edition, West Group, St Paul, Minn., 1999, p. 1277

⁵⁵⁵ Black’s Law Dictionary, Bryan A. Garner, Editor in Chief, 7th Edition, West Group, St Paul, Minn., 1999, p. 1276

⁵⁵⁶ 286 BC

⁵⁵⁷ Watkin, Thomas Glyn, *An Historical Introduction to Modern Civil Law*, Ashgate, Dartmouth, Aldergate 1999, p. 291

⁵⁵⁸ Even today the English law of torts therefore centres around the “negligence” of the tortfeasor

⁵⁵⁹ Article by George Long, M.A., Fellow of Trinity College cited on p. 373 of Smith, William, D.C.L., LL.D.: *A Dictionary of Greek and Roman Antiquities*, John Murray, London, 1875.

It could therefore be argued that recklessness is the passive counterpart of intent.

This definition however would make its distinction from negligence difficult which is characterised by the unthinking, the passive, whereas there is a slightly more active mental process going on in the mind of the reckless perpetrator of an action who, one may say, “actively disregards” all dangers.

In English law, the first time the term recklessness is employed in a (criminal law) statute is the Motor Car Act 1903, s. 1 which made it an offence to drive a motor car on a public highway recklessly.⁵⁶⁰

3.3 How is it used in Criminal Law?

Recklessness plays a much bigger role in criminal law than it does in civil law. The reason for this is very simple. In civil law mere negligence, meaning failure to exercise such care, skill or foresight as a reasonable person would exercise in the circumstances, the test being purely objective, is generally sufficient to establish the necessary fault. Whether or not the behaviour exceeded the required threshold and if so by how much, is therefore usually not of interest.

In the criminal law however the degree of fault is very important⁵⁶¹. Mere negligence is usually not sufficient to found criminal liability⁵⁶². Recklessness is the least that is required for many crimes and some can only be committed with intent⁵⁶³.

Given the importance of determining the degree of the defendant's culpability, one would assume the law had over the years found a very clear definition of each state of mind. This however is unfortunately not so.

⁵⁶⁰ R-v-Reid [1992] 3 ALL ER 685

⁵⁶¹ A view expressed, inter alia, by Lord Atkin in *Andrews -v- Director of Public Prosecutions* [1937] A.C. 576 at 583 when he says: “ Simple lack of care such as will constitute civil liability is not enough for purposes of the criminal law. There are degrees of negligence and a very high degree of negligence is required to be proved before the felony is established”.

⁵⁶² One exception is careless driving in contravention of the Road Traffic Act 1988, s.3

⁵⁶³ The Draft Criminal Code 1989 suggested that recklessness should always be sufficient to establish criminal liability unless specifically stated otherwise: Clause 20(1), Law. Com. No. 177 (1989)

It seems clear that recklessness lies somewhere between intent and negligence. To define it, we therefore have to distinguish it from both.

Some writers⁵⁶⁴ have wrongly grouped recklessness with intention, perceiving it as a variety thereof. However, recklessness is no more a variation of intention than negligence is. Intent and recklessness are two very different things, even if Lord Edmund-Davies correctly perceives in *Reg -v- Caldwell*⁵⁶⁵ that “...”intention” and “recklessness” are more than birds of a feather; they are blood-brothers”, a view supported by James LJ in *Reg -v- Venna* who says that “in many cases the dividing line between intention and recklessness is barely distinguishable”⁵⁶⁶. The fact that the two concepts are distinct from one another is also made quite clear in the wording of the liability conventions discussed below. The formula for breaking limitation is always “with intent or recklessly”, thus making clear that they are distinct concepts, but also that, grouped so closely, they are close in meaning.

It was always clear that “intent” was where the actor acts with the purpose of bringing about a certain result. It is also an intentional act where the actor foresees a definitive consequence even though he may not desire it, as for example where a surgeon removes a patient’s heart in the course of a transplantation. More difficult however was the question whether intention also encompasses the sort of behaviour where the actor knows the result to be the probable rather than the certain consequence of his act. *Hyam -v- Director of Public Prosecutions and Moloney*⁵⁶⁷ as explained in *Hancock -v- Shankland and Nedrick (CA)*⁵⁶⁸ establishes that a court may also infer that a result was intended, even where it is not desired, where the result is a virtually certain consequence of the act, and the actor knows that.⁵⁶⁹ This view is also expressed by the Law Commission which proposed the following definition of intention: ““intentionally” with respect to a result is when (i) it is his purpose to cause it; or (ii) although it is not his purpose to cause that result, he is aware that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result”⁵⁷⁰.

⁵⁶⁴ Cooke, John, LLB Mphil, Prof. Oughton, David, *The Common Law of Obligations*, 3rd Edition, Butterworths, London 2000, p.220

⁵⁶⁵ *R -v- Caldwell* [1982] AC 341 at 359

⁵⁶⁶ *R -v- Venna* [1976] QB 421, 4²⁹

⁵⁶⁷ *Hyam -v- Director of Public Prosecutions and Moloney* [1975] AC 55

⁵⁶⁸ *Hancock -v- Shankland and Nedrick (CA)* [1986] AC 455

⁵⁶⁹ Smith & Hogan, *Criminal Law*, 7th Edition, London, Dublin, Edinburgh, 1992, p. 54

⁵⁷⁰ Law Com. No. 122 (1992) 5.4-5.11 and cl. 2 of Draft Bill, following Smith “A Note on Intention [1990] Crim LR 85

This is where recklessness is different⁵⁷¹. Someone who intends to do something does not merely take the risk of it happening, as he would do if he were reckless, but knows, or thinks he knows, that if he achieves his purpose he will also cause that other consequence.

Recklessness also has to be distinguished from mere negligence. As Lord Atkins put it in *Andrews*⁵⁷² when directing the jury upon a charge of manslaughter by reckless driving: *“If you are not satisfied that it was reckless, then the verdict is not guilty. To amount to reckless driving mere negligence is not enough. His conduct must go beyond the question of compensation between citizens and amount to, in your view, criminal conduct requiring punishment”*.

Negligence has been defined by Glanville Williams⁵⁷³ as a failure *“to exercise due caution, where the mind is not actively but negatively and passively at fault”*. The Criminal Law Commissioners defined negligence as involving *“the want of consideration, the omission to exercise that degree of vigilance to acquire the knowledge of danger, and found upon it those measures of precaution which prudent men who form reasonable regard to the safety of human life would exert and adopt”*.⁵⁷⁴

Another definition of negligence is given by Alderson B. in *Blyth -v- Birmingham Waterworks Co.*⁵⁷⁵: *“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or do something which a prudent and reasonable man would not do”*.

The difference between negligence and recklessness is therefore, in simple terms, that one is advertent, the other inadvertent. The moral justification is, that an inadvertent mistake is less blameworthy than an advertent taking of a risk. This division dates back to 1843, to the Victorian Criminal Law

⁵⁷¹ For an argument that there are instances of “aggravated recklessness” which should, in terms of culpability, be treated equivalent to intentional conduct see Sullivan, G.R. “Intent, Subjective Recklessness and Culpability”, *Oxford Journal of Legal Studies* (O.J.L.S). 1992, 12(3), 380-391. This argument is not explored here as it is apt to confuse the boundary between intent and recklessness by the invention of a form of aggravated recklessness which, it is submitted, is an artificial and superfluous concept which does nothing to aid the clarification of the present confusion over the meaning of the term recklessness.

⁵⁷² *Andrews* [1937] A.C. 576

⁵⁷³ Williams, Glanville, *Criminal Law: The General Part*, 2nd Edn., Steven’s & Son’s Ltd, London, 1961, p. 100

⁵⁷⁴ Criminal Law Commissioners (1839) Fourth Report, Parliamentary Papers XIX, XXV

⁵⁷⁵ Alderson B. in *Blyth -v- Birmingham Waterworks Co.* (1856) 11 Exch. 781 at 784

Commissioners⁵⁷⁶ and was later affirmed by Stephen⁵⁷⁷ in 1883 and by Kenny in 1902.⁵⁷⁸

In *Roper -v- Taylor's Central Garages (Exeter) Ltd.*⁵⁷⁹ Devlin J said of the distinction between negligence and recklessness that: “*There is a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make*”. The former constituted recklessness according to Devlin J, the latter was negligence⁵⁸⁰.

While some risk-taking is therefore acceptable and does not constitute recklessness, other risk-taking will be considered reckless. The risk taken has to be unjustifiable, the test being an objective one (i.e. that of the reasonable and prudent person). What amounts to an unjustifiable risk depends on the social value of the activity in relation to the probability and gravity of the potential harm⁵⁸¹. A daredevil game such as Russian roulette clearly only warrants the taking of a very low risk because it has no social value. An emergency rescue operation at the other extreme would warrant the taking of a very high risk. A case which was decided based on this argument is *Vehicle Inspectorate -v- Nutall*⁵⁸². In that case Lord Steyn felt that the Defendant, who had ignored to read the tachograph records of his employees in accordance with s. 96 (11A) of the Transport Act 1968, had imperilled the safety of the public. The social utility of the law being high, the risk which could be taken without constituting recklessness was correspondingly low.

The transportation of oil by sea clearly lies, in terms of social value and necessity, between these two extremes, so that one would expect the degree

⁵⁷⁶ Victorian Criminal Law Commissioners (1843, 23-6), Criminal Law Commissioners (1834) First Report, Parliamentary Papers XXVI

⁵⁷⁷ Stephen (1883, II, 118-21, 122-23), Stephen, J. F., Digest of Criminal Law, London MacMillan, 1887

⁵⁷⁸ Kenny, C. S. Outlines of Criminal Law, Cambridge, Cambridge University Press, 1902

⁵⁷⁹ *Roper -v- Taylor's Central Garages (Exeter) Ltd* [1951] 2 T.L.R. 284 at 288

⁵⁸⁰ Such distinctions were also made in *James & Son Ltd -v- Smee* [1955] 1 QB 78; *Green -v- Burnett* [1955] 1 QB 78; *Gray's Haulage Co. Ltd -v- Arnold* [1966] 1 WLR 536, *Robinson -v- Director of Public Prosecutions* [1991] R.T.R. 315

⁵⁸¹ *Smith & Hogan, Criminal Law, 7th Edition, London, Dublin, Edinburgh, 1992, p. 60.* The same thought was also expressed by the Law Commission in their Working Paper on the Mental Element in Crime, Law Com No. 31, p.53

⁵⁸² *Vehicle Inspectorate -v- Nutall*, House of Lords, session 1998-1999, <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990318/nuttall.htm>, Lord Steyn , p. 8.

of risk one may justifiably take as being settled somewhere in between a very low and a very high risk.

Where exactly the threshold of an acceptable risk should lie is evidently ultimately a political decision based on a value judgment⁵⁸³ and, as will be seen later in this thesis, the social value, or economical and political value, of oil transportation is evidently put highly as recklessness in terms of oil pollution is built up into a seemingly unsurpassable hurdle by the courts. This view is underpinned by Ashworth who says, “evaluations of the reasonability of risks taken by transport operators may go some way to explaining the rarity of prosecutions following large-scale transportation disasters.”⁵⁸⁴

Due to the larger role played by the term recklessness in criminal law, it is instructive to look at criminal law cases to establish the meaning of recklessness. For this very reason judges in civil actions⁵⁸⁵ have also looked to the criminal law for guidance on the meaning of this term.

3.3.1 Cunningham

In 1957 the legal position on recklessness was summed up in the leading case of *R -v- Cunningham*⁵⁸⁶. The facts of the case were as follows. A house had been divided into two. The dividing cellar wall was made of loosely cemented rubble. The Defendant’s prospective mother-in-law lived, as the Defendant knew, in one of the converted houses. The other was not occupied. One evening the Defendant went to the cellar of the empty house, tore the gas meter from the wall and from its pipes and stole money from it. He did not turn off the gas at a stop tap located nearby. The gas therefore escaped seeping through the dividing wall of the cellar. It partially asphyxiated the Defendant’s prospective mother in law in the adjoining building who was asleep in her bedroom at the time. The Defendant was charged under s. 23 of the Offences against the Person Act 1861, with having unlawfully and maliciously caused another to take a certain noxious thing, namely coal gas, so as thereby to endanger her life.

⁵⁸³ In his article “Subjectivism, Objectivism and the Limits of Criminal Recklessness” (1992) 12 O.J.L.S. 45, A. Norrie also argues that recklessness is an inherently political concept^t

⁵⁸⁴ Ashworth, A., *Principles of the Criminal Law*, 3rd Edn., Oxford, Oxford University Press, 1999, p.185

⁵⁸⁵ For example *Goldman -v- Thai Airways International Ltd* [1983] 1 WLR 1186 or *Nugent -v- Michael Goss Aviation Ltd* [2000] 2 Lloyd’s Rep. 222

⁵⁸⁶ *R -v- Cunningham* (1957) 2 QB 396

In this case, Byrne J, quoting the principles first elucidated by Kenny in 1902⁵⁸⁷, defined “reckless” to mean:

“... in any statutory definition of a crime, “malice” must be taken not in the old vague sense of wickedness in general, but as requiring either (1) an actual intention to do the particular kind of harm that in fact was done, or (2) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it.) It is neither limited to, nor does it indeed require any ill-will towards the person injured.”

In short therefore, according to the definition of recklessness in Cunningham, the defendant has to foresee the risk but nevertheless go on to take it. The test is therefore subjective: Did the defendant in question foresee the harm? This definition makes the distinction between recklessness and negligence obvious. Whereas a person acting negligently simply fails to consider or evaluate the risk as a reasonably prudent person would, a person acting recklessly is aware of the risk but chooses to disregard it. The latter state of mind could be described as wantonness or a “couldn’t care less” attitude, although as correctly pointed out by Smith and Hogan⁵⁸⁸, the description “couldn’t care less” may be misleading in that the defendant may very much hope for the harm not to be done, but nevertheless opts to take it in his stride.

The distinction between intention and recklessness is also clear in the context of the above test. While a wrongdoer acting with intent either wishes for a result or takes it as a probable side-product of his wish, a person acting recklessly does not desire the consequence, but rather hopes it will not occur. In the 1979 edition of Archbold “Pleading, Evidence and Practice in Criminal Cases”, on which jury directions were routinely based at the time, the distinction was put as follows:

“whereas “intent” requires a desire for consequences or foresight or probable consequences, “reckless” only requires foresight of possible consequences coupled with an unreasonable willingness to risk them.”⁵⁸⁹

⁵⁸⁷ Kenny, C. S., *Outlines of Criminal Law*, Cambridge, Cambridge University Press, 1902. Cited from Kenny, *Outlines of Criminal Law*, 16th edn., 1952 at 186

⁵⁸⁸ Smith & Hogan, *Criminal Law*, 7th Edition, Butterworths 1992, London, Dublin, Edinburgh, p. 67

⁵⁸⁹ Archbold, *Pleading, Evidence and Practice in Criminal Cases*, Editor Stephen Mitchell, 40th Edition, Sweet & Maxwell, London, 1979, page 958, paragraph 1443C

Not only the Cunningham case but also The Law Commission in its Report “The Mental Element of Crime”⁵⁹⁰, attributed a subjective meaning to recklessness. This view was repeated by the Law Commission in their Report “Offences of Damage to Property”⁵⁹¹. The Criminal Damage Act 1971 was also based on this view.

In terms of case law, Cunningham was followed inter alia in *R -v- Briggs*⁵⁹², *R -v- Parker (Daryl)*⁵⁹³ and *R -v- Stephenson*⁵⁹⁴.

In *R -v- Briggs (Note)*⁵⁹⁵ and *R -v- Parker (Daryl)*⁵⁹⁶ recklessness was defined as someone carrying out a deliberate act knowing that there is some risk of damage resulting from it. It is clear from this definition of course that a person who fails to give any thought to the possibility of danger does not act recklessly. Anyone failing to think is hence negligent. These cases uphold the traditional differentiation between recklessness and negligence.

In *R -v- Stephenson* the Defendant, who suffered from schizophrenia, crept into a haystack and lit a fire to keep warm. The fire spread to the haystack. In the Court of Appeal Geoffrey Lane LJ stated at page p. 703 that:

“A man is reckless when he carries out the deliberate act appreciating that there is a risk that damage to property may result from his act. It is however not the taking of every risk which could properly be classed as reckless. The risk must be one which it is in all circumstances unreasonable for him to take ... We wish to make it clear that the test remains subjective, that the knowledge or appreciation of risk of some damage must have entered the defendant’s mind even though he may have suppressed it or driven it out ... The schizophrenia was not evidence of something which might have prevented the idea of danger entering the appellant’s mind at all. If that was the truth of the matter, then the appellant was entitled to be acquitted”...

⁵⁹⁰ Law Com No. 89, cited in Michael Allen, Textbook on Criminal Law, 2nd Edn., Blackstone Press Limited, 1993, London, p.61

⁵⁹¹ Law Com No. 29, cited in Michael Allen, Textbook on Criminal Law, 2nd Edn., Blackstone Press Limited, 1993, London, p.61

⁵⁹² *R -v- Briggs* [1977] 1 WLR 605

⁵⁹³ *R -v- Parker (Daryl)* [1977] 1 WLR 600

⁵⁹⁴ *R -v- Stephenson* [1979] QB 695

⁵⁹⁵ *R -v- Briggs (Note)* [1977] 1 WLR 605, 600, 608

⁵⁹⁶ *R -v- Parker (Daryl)* [1977] 1 WLR 600, 603-605

3.3.2 Caldwell

The legal waters were then rather muddied in 1982 by the decision in the case of *R -v- Caldwell*⁵⁹⁷ and, later that day, *R -v- Lawrence*⁵⁹⁸, which followed *Caldwell*⁵⁹⁹.

The facts of the matter in *Caldwell* were that Mr Caldwell set fire to a hotel because he bore a grudge against the proprietor. At the time of the incident the hotel had guests staying. Caldwell claimed intoxication as a defence to a charge of intention to endanger life. This defence was upheld, but it was ruled the intoxication was no defence against a charge of recklessness. The House of Lords held that although the accused could claim not to have foreseen risk, and therefore was not subject to a charge of recklessness as set out in *R -v- Cunningham*, recklessness could reasonably include cases where a reasonable (sober) person would have seen that the risk was obvious.

Lord Diplock put the test as follows:

*"A person ... is "reckless" as to whether or not property would be destroyed or damaged if (1) he does an act which creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has none the less gone on to do it."*⁶⁰⁰

Caldwell therefore established an objective test for recklessness. According to this test a person can be reckless where he is either aware of the risk, or, where the risk would have been obvious to a reasonable person, and the defendant failed to give any thought to the possibility of that risk existing. The test is an uneasy and inharmonious mixture of being objective but also having a subjective element.

⁵⁹⁷ *R -v- Caldwell* [1982] AC 341

⁵⁹⁸ *R -v- Lawrence* [1982] AC 510

⁵⁹⁹ *Lawrence* was applied e.g. by *R -v- Clarke (Andrew)* (1990) 91 Cr.App.R. 69 [1990], R.T.R. 248, also a case of causing death by reckless driving

⁶⁰⁰ In his dissenting opinion Lord Edmund-Davies expressed "respectful, but profound, disagreement" with Lord Diplock's dismissal of Professor Kenny's statement on which the decision in *Cunningham* was based and which was, to Lord Edmund-Davis' mind "accurate not only in respect of the law as it stood in 1902 but also as it has been applied in countless cases ever since, both in the United Kingdom and in other countries where the common law prevails". *R -v- Caldwell* [1982] AC 341 at page 357

The justification given by Lord Diplock for changing the test from a subjective to an objective one and thus extending the meaning of recklessness was, because in his view, reckless was not a term of art but rather ought to be given its ordinary, dictionary meaning of “*careless, regardless or heedless of the possible harmful consequences of one’s acts*”. He further thought that both foresight and failure to consider the consequences were equally blameworthy.⁶⁰¹ Lord Diplock also feared that the distinction between advertent and inadvertent risk-taking would be much too fine for a jury who would be forced to analyse meticulously the thoughts that went through the defendant’s mind just before the incident. He felt that Parliament could not have intended to draw such a fine distinction, even though, looking at the history of the Criminal Damage Act 1971 and the Law Commission Report on which it is based,⁶⁰² it is clear that this is exactly what Parliament intended.

This legal development had been foreseen by Glanville Williams⁶⁰³ who predicted that the law would shift from a subjective interpretation of recklessness to an objective one. In his “Textbook of Criminal Law”⁶⁰⁴ he states that “*Recklessness is a more emphatic word of condemnation, and on the subjective view it has kept its literal meaning, as the conscious (and unreasonable) running of risk, whereas on the objective view it merely means a heightened degree of negligence*”⁶⁰⁵. Williams explains this as being due to a need felt by judges to explain this concept which is hard to prove to juries and that it was easier to ask them to consider whether the defendant, as a reasonable person, ought to have foreseen the consequences which ensued, than to ask them to consider whether the defendant had himself foreseen the consequences. This, as Williams predicted, was part of a general move of the law towards blurring the boundaries between recklessness and negligence, a phenomenon which he explains by the etymology of the term “reckless”, “*the constant pressure to extend the reach of the criminal law on account of the supposed policy of the individual case*” and, as mentioned above, the ease of instructing juries.

⁶⁰¹ This stance has caused some discussion amongst lawyers, see, inter alia Michael Allen, Textbook on Criminal Law, 2nd Edn., Blackstone Press Limited, 1991, London, p.64

⁶⁰² See below

⁶⁰³ Williams, Glanville, Textbook of Criminal Law: The General Part, Stevens & Son’s Ltd, 1978, para 24 cited in Allen, Michael, Textbook on Criminal Law, 2nd Edition 1993, Blackstone Press Limited, London, p.60

⁶⁰⁴ Williams, Glanville, Textbook of Criminal Law: The General Part, Steven’s & Son’s Ltd 1978, p. 70

⁶⁰⁵ For a detailed treatment of the debate over objective or subjective basis of mens rea see Amirthalingam, Kumaralingam (2004) “Caldwell Recklessness is Dead, Long Live Mens Reas’s Fecklessness”, The Modern Law Review 67 (3) 491-500

Alan Norrie explains the split in the law between subjectivism and objectivism as having a moral provenance. According to him this occurred through the Enlightenment reform project.⁶⁰⁶ The split is the historical product of the de-moralisation and decontextualisation of fault. From a sociological point of view this analysis is of course surprising given that society has since the Enlightenment and the industrial revolution become more individualistic rather than less, which would mean that more rather than less emphasis should have been placed on the individual guilt of the defendant.

The decision in Caldwell was widely criticised in academic circles as being contrary to the principles of the criminal law. The leading academics in criminal law propose, contrary to Caldwell, that recklessness “normally involves conscious and unreasonable risk-taking”⁶⁰⁷. Clause 5.12 of the draft Criminal Code⁶⁰⁸, the leading draftsman of which was Professor Smith, defines recklessness such: *“a person acts.. “recklessly” with respect to –(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk”*. He is correctly of the opinion that *“Caldwell criminalizes people unjustly, and offends against the principles of individual justice upon which the criminal law is supposedly based”*⁶⁰⁹.

This must be right, because in order to have a justification the criminal law must orientate itself at the culpability of the individual accused. The objective test proposed in Caldwell however, does not do that but instead introduces the standard of the reasonable or average individual, which would be better placed in the civil law wherefrom it hails.

The objectiveness of the Caldwell test has since been interpreted very harshly by the courts and has produced some very unjust results in the case of minors and the mentally impaired. No allowance is made for their specific situation, such that, contrary to the principles of criminal law to punish people for their guilty minds, here people were in effect punished for natural shortcomings they could not be blamed for. This can for example be seen in

⁶⁰⁶ Norrie, Alan, *Crime, Reason and History, A critical introduction to criminal law*, 2nd Edn, Butterworths, London 2001, p.60

⁶⁰⁷ Williams, Glanville, *Textbook of Criminal Law: The General Part*, 2nd edn., Stevens & Son’s, 1983, para 5.1, p 96

⁶⁰⁸ *Legislating the Criminal Code: Offences against the Person and General Principles*, Law Commission Consultation Paper no 122 (1992)

⁶⁰⁹ Norrie, Alan, *Crime, Reason and History, A critical introduction to criminal law*, 2nd Edn., Butterworths, London 2001, p.61

the case of *Elliot -v- C*⁶¹⁰. Here a fourteen-year-old girl of below average intelligence was convicted of arson for having set fire to a shed after she had been out all night without food or sleep. The court reluctantly came to the conclusion that what was an “obvious risk” had to be judged by the standards of the ordinary reasonable person and no allowance could be made for the defendant’s ability to judge a risk. Glidewell J, said ⁶¹¹ that:

“if the risk is one which would have been obvious to a reasonably prudent person, once it has also been proved that the particular defendant gave no thought to the possibility of there being such a risk, it is not a defence that because of limited intelligence or exhaustion she would not have appreciated the risk even if she had thought about it.”

The same conclusion was reached in *Stephen Malcolm R*⁶¹² where a fifteen-year-old boy was convicted of arson having thrown petrol bombs close to a girl’s window. Similarly, in *R -v- Coles*⁶¹³ a subnormal defendant was convicted for setting fire to hay stored in a barn and in *Bell*⁶¹⁴ a schizophrenic was held to be reckless when during an attack of schizophrenia he attacked a Butlins holiday camp with his car believing God to have ordered him to do so.

The objective test also means that no positive features, such as the fact that no danger actually existed, will be taken into consideration. In *R -v- Sangha*⁶¹⁵ the Defendant set fire to furniture in a flat. He knew there was nobody in the flat. Due to the special construction of the property the fire could not spread to adjoining premises. He was nevertheless convicted of criminal damage by fire, being reckless as to whether the life of another would thereby be endangered⁶¹⁶. It was held that the ordinary prudent bystander was neither invested with special expertise (in this case to appreciate the special construction of the building) nor with hindsight and if, as here, the danger would have been obvious to the ordinary prudent bystander it ought to have been obvious to the defendant and he therefore acted recklessly.

⁶¹⁰ *Elliot -v- C* [1983] 2 All ER 1005

⁶¹¹ *Elliot -v- C* [1983] 2 All ER 1005 at pages 945-947

⁶¹² *Stephen Malcolm R* (1984) 79 Cr App Rep 334

⁶¹³ *R-v- Coles* [1995] 1 Cr App Rep 157

⁶¹⁴ *Bell* [1984] 3 All ER 842

⁶¹⁵ *R-v- Sangha* [1988] 2 All ER 385 (Court of Appeal Criminal Division)

⁶¹⁶ s. 1(2) (b) Criminal Damage Act 1971

The case of *R -v- Lawrence*⁶¹⁷ was decided the same day and followed Caldwell.

In *R -v- Lawrence* the Defendant was driving a motorbike along an urban street and collided with a pedestrian. The pedestrian was killed in the collision.

Lord Diplock held that manslaughter by recklessness was established where the defendant:

*“...driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property”; and second, where he “did so without having given any thought to the possibility of there being any such risk, or, having recognised that there was some risk involved, had nonetheless gone on to take it”.*⁶¹⁸

As can be seen, the distinction between intention and recklessness is not disturbed by the decision in Caldwell.

However, the distinction between recklessness and negligence becomes blurred⁶¹⁹. One reason for this is that an objective test of “reasonable skill and care” was always the hallmark of negligence. It has now also become a test for recklessness. The second reason why the Caldwell test blurs the distinction between recklessness and negligence is because, according to the new definition of recklessness proposed by Caldwell, a defendant is also guilty of recklessness where he has failed to consider an obvious risk. Hitherto a failure to think had always been a clear mark of negligence. Recklessness on the contrary had always been the sort of situation where the defendant had thought, had recognized the existence of a risk or had shut his mind to it, because after all, one can only deliberately shut ones mind to

⁶¹⁷ *R-v-Lawrence* [1982] AC 510

⁶¹⁸ *R-v- Lawrence* [1982] AC 510 at 527

⁶¹⁹ This can be seen for example in the ruling of the Divisional Court in *Director of Public Prosecutions -v- K (a minor)* [1990] 1 All ER 331. Here a 15 year-old had poured acid he was playing with into a hand-dryer at his school’s lavatories because he had heard someone coming and tried to avoid detection. He did not intend to harm anyone and had planned to clean out the hand-dryer later. Before he could do so, another boy used the drier sustaining injury. The boy was held to have acted recklessly because he should have foreseen the harm. Clearly here the boundaries between criminal assault and negligent assault in tort become indistinguishable. The case was fortunately overruled by the Court of Appeal (*R -v- Spratt*, *The Times*, 14. May 1990). For a more detailed critique of the ruling in the Divisional Court see: Virgo, Graham, *Cambridge Law Journal* (C.L.J.) 1990, 49 (2), 202 -204

something one is aware of, be it half consciously. Glanville Williams⁶²⁰ defined this state of mind, which he calls “wilful blindness” and considers a form of recklessness such: “A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice”. Having been aware of the risk the reckless defendant nevertheless failed to act on this knowledge.

The Caldwell definition of recklessness is furthermore unsatisfactory in that it fails to cover those cases in which the defendant considers the possibility of there being a risk but (wrongly) concludes there is none. This gap in the definition has been termed the “Caldwell lacuna”⁶²¹. A defendant acting in this manner will have acted negligently, but as said, this is not usually a sufficient basis for criminal liability.

It is clear from Caldwell and the decisions that follow it that a defendant will escape liability for recklessness where he can show that, while an obvious and serious risk did exist, he considered the situation and decided that there was no, or only a negligible risk, or where he took steps to eliminate, or reduce the risk to a negligible one. It matters not whether any steps taken to eliminate or reduce the risk were effective or even reasonable, as long as he believed them to be so. This situation is illustrated by the case of *Lamb*⁶²². Here the defendant pointed a loaded revolver at his friend, pulled the trigger and killed him. Both the Defendant and the victim had thought this would be safe, because although there were two bullets in the revolver neither was opposite the barrel. Neither of them knew that the drum revolves before the firing pin strikes. According to Sachs LJ the Defendant had formed the view that his conduct was safe in a criminally negligent way, but he was not reckless. The problem also occurred in *Reid and Chief Constable of Avon and Somerset Constabulary -v- Shimmen*⁶²³ where the Defendant had broken a shop window with a karate kick. He was held to have been reckless having

⁶²⁰ Williams, Glanville, *Criminal Law: The General Part*, 2nd Edn., Stevens & Sons, London, 1961, p159

⁶²¹ Williams, Glanville “Recklessness Redefined” [1981] C.L.J. 252 at 278-281; Williams, Glanville, “Divergent Interpretations of Recklessness” (1982) 132 New L.J. 289, 313, 336 at 313-336, Smith, J., [1981] Crim.L.R. 393,394; Griew, E. “Reckless Damage and Reckless Driving. Living with Caldwell and Lawrence [1981] Crim. L.R. 743 at 748-749

⁶²² *Lamb* [1967] 2 QB 981, [1967] 2 All ER 1282, CA

⁶²³ *Reid and Chief Constable of Avon and Somerset Constabulary -v- Shimmen* (1986) 84 Cr App Rep 7, [1986] Crim LR 800

seen the risk but nevertheless gone on to take it, although he said he had considered the risk but had thought he had minimized it by calculating his foot to stop two inches short of the window. The court, eager to close the lacuna it correctly perceived, held that while a person giving thought to but missing an obvious risk fell within the Caldwell lacuna, a person recognising a risk but seeking to eliminate it or reduce it to a negligible degree, acts recklessly in the Caldwell sense because, after all, he did perceive a risk and nevertheless went on to take it⁶²⁴. It is clear that this judgment is at best hair-splitting⁶²⁵ and that such a distinction makes the interpretation of recklessness even more difficult. From a moral point of view however, surely a person recognizing a risk and then bona fide seeking to eliminate it is less blameworthy and much more prudent and circumspect than one who recognised the risk, and having failed to appropriately judge the risk, decided there was none. But as Birch put it⁶²⁶, we certainly should avoid acquitting people “*whose unshakable faith in their ability to avoid danger displays an arrogance bordering on lunacy*”.

Some people have sought to explain the lacuna away by saying that far from being a lacuna it is the border where recklessness stops and negligence begins.⁶²⁷ It seems that after Caldwell the position was that a person acted negligently rather than recklessly in all cases where, having recognised the possibility of a risk, the perpetrator either considered that there was in fact no risk or tried to eliminate or minimize the risk, or in all cases where the risk was an “obvious and serious risk⁶²⁸”.

Clarkson and Keating⁶²⁹ thought that where the risk was merely “obvious” negligence rather than recklessness would apply. In addition, according to Lord Diplock in Lawrence⁶³⁰, there must be an element of “moral turpitude” in order to establish recklessness. Whereas negligence is merely an error of

⁶²⁴ The court relied on a passage in Smith & Hogan, Criminal Law, 5th Edition, Butterworths, London 1983 at p. 55, which says that an obvious risk having been proven the defendant can only escape liability “if he considered the matter and decided that there was no risk”

⁶²⁵ Professor J.C. Smith Q.C., L.L.D, F.B.A. pronounces the view that a person who considers a risk but decides there is none and a person who considers a risk and seeks to eliminate or minimize it are equally blameworthy and should be treated alike (Criminal Law Review (Crim. L.R.) 1986, Dec. 800-803)

⁶²⁶ Birch, D. “The Foresight Saga: The Biggest Mistake of All?” [1988] Crim. L.R. 4 at 5

⁶²⁷ e.g. Lord Geoff of Chieveley in R -v- Reid (1992) 95 Cr. App.R. 393 (House of Lords).

⁶²⁸ “obvious and serious risk” as per Lord Diplock in Lawrence and per Lord Geoff of Chieveley in Reid

⁶²⁹ Clarkson, C.M.V. and Keating, H.M., Text and Materials, 3rd Edn. Sweet and Maxwell, London 1994, p.178

⁶³⁰ R-v- Lawrence [1982] AC 510 at 527

judgment, recklessness is a culpable indifference, an antisocial disregard. This way of distinguishing negligence from recklessness however very quickly leads to equating recklessness with gross negligence, an entirely separate legal concept.

Following Caldwell there was some debate whether inadvertent recklessness should be treated as recklessness or not⁶³¹. This is conceptually wrong. Some confusion has evidently taken place: inadvertent recklessness is gross negligence. Therefore only advertent recklessness can be true recklessness.

The later ruling in *Reid* left no room for a separate concept of gross negligence. In *Bateman*⁶³² gross negligence was distinguished from “normal”, civil, negligence saying that the prosecution “had to satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment. The exact definition however is notoriously difficult, as observed in *Tinline -v- White Cross Insurance*⁶³³ where it is said that “No one has been able to define where the dividing line is to be drawn” between gross negligence and ordinary negligence. What constitutes gross negligence will always be influenced by the social perceptions of the behaviour at the time, as well as politics. This can be seen for example in *Williamson*⁶³⁴ where a negligent midwife was found not guilty. The reasoning was that the midwife had acted in a dangerous situation and it was feared that a contrary ruling may discourage people from entering that profession. The same, i.e. the influence of political and social considerations can of course be seen in the definition of recklessness and it could well be argued that the fact that, so far, no owner has ever been found to have acted recklessly under the Oil Convention is also influenced by the wish not to deter or financially hinder people transporting oil by sea.

The error of equating recklessness with gross negligence was also made in *Andrews -v- D.P.P.* where Lord Atkins said: ⁶³⁵

“Simple lack of care such as will constitute civil liability is not enough. For the purposes of the criminal law there are degrees of negligence, and a

⁶³¹ Leigh, L.H., Recklessness after Reid, Modern Law Review (M.L.R.) 1993, 56(2), p.217

⁶³² Bateman (1925) 28 Cox CC 33, CCA at 36

⁶³³ Tinline -v- White Cross Insurance [1921] 3 KB 327 at 330

⁶³⁴ Williamson (1807) 3 C&P 635

⁶³⁵ Andrews -v- D.P.P. [1937] A.C. 576 at 583

very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied “reckless” most nearly covers the case”.

Caldwell does therefore not only leave a dangerous lacuna in the law (the “Caldwell lacuna”) but also makes it much more difficult to distinguish recklessness from negligence⁶³⁶, hence making the concept of recklessness even more elusive.

Even the courts have at times shown an inability to apply the Caldwell test of recklessness properly, such as in the case of *Crossman*⁶³⁷. The Defendant was a lorry driver who was told by those loading his lorry that a piece of machinery would have to be chained and sheeted in order to be safe. The driver ignored this advice believing the load to be safe without such precautions. The load fell off and killed a pedestrian. He pleaded guilty to reckless driving and was convicted, even though, if Caldwell were applied properly, he should have been acquitted as he had given thought to the situation and had believed there to be no risk.

It goes without saying that especially for the purposes of the criminal law it is very important to distinguish reckless from negligent⁶³⁸ behaviour. Clearly the negligent person lacks the all-important “criminal mind” for a conviction. Also, convicting people for negligent, and therefore inadvertent⁶³⁹, behaviour cannot be justified in terms of any of the rationales behind the criminal law. A negligent person will not in future be deterred from inadvertent acts if he is punished. His conduct is not morally blameworthy enough to justify retribution. After all he has not chosen to act in an anti-social manner⁶⁴⁰. Rehabilitation is also highly doubtful, as the reason for the offence is not due to the offender’s values. Incapacitation is also not necessarily needed and would in any event only be justified where no lesser punishment would serve the same purpose⁶⁴¹. It is therefore clear that negligent behaviour ought to be

⁶³⁶ Williams is also of the view that the objective test renders the distinction between recklessness and negligence useless. Williams, Glanville, *Legal Studies*, 1988, p.75

⁶³⁷ *Crossman* [1986] Crim LR 406, CA

⁶³⁸ An extensive academic debate reigns on whether negligence is a sufficient basis for criminal liability. For details see Smith & Hogan, *Criminal Law*, 7th Edition, London, Dublin, Edinburgh, 1992, p. 96. It is argued that negligence, even gross negligence, cannot be a sufficient basis for criminal liability.

⁶³⁹ The Caldwell test has been called “advertence based culpability” by J. Gardener and H. Jung, “Making Sense of Mens Rea: Anthony Duff’s Account (1991) 11 O.J.L.S. 559

⁶⁴⁰ The contrary view is expressed by George P. Fletcher “The Theory of Criminal Negligence: A Comparative Analysis”(1971) 119 U.Pa.L.Rev. 401

⁶⁴¹ Further on this point, see Robert P. Fine and Gary M. Cohen, “Is Criminal Negligence a Defensible

kept outside the criminal law and that, therefore, the need to distinguish it from the “criminally qualifying” concept of recklessness is very important.

The situation is further confused as Caldwell by no means overruled *Cunningham*. As confirmed by the House of Lords in *Savage -v- Parmenter*⁶⁴² both authorities exist side by side. There were therefore, and arguably still are, two different tests for recklessness in criminal law, depending on the type of crime in question (and even within these crimes confusion seems to reign). While some criminal offences which require recklessness as a mens rea⁶⁴³ are satisfied where Caldwell recklessness is found to exist, such as reckless driving⁶⁴⁴, criminal damage, or manslaughter⁶⁴⁵, others, such as (non-fatal) offences against the person⁶⁴⁶, rape⁶⁴⁷ and offences requiring “malice”⁶⁴⁸ require “advertent” recklessness of the *Cunningham* type. The situation was justified by Lord Goff in *R -v- Reid*⁶⁴⁹ where he said that recklessness “as used in our law, it has more than one meaning” and by Lord Browne-Wilkinson in the same case who said that “[various] factors may lead to the word being given different meanings in different statutes”. However, such a state of affairs is clearly untenable. There are countless criminal statutes which use the term reckless and a defendant will not know beforehand which test the court will apply. For example in *Large -v- Mainprize*⁶⁵⁰ the subjective test was held to apply to offences against reg. 3(2) of the Sea Fishing (Enforcement of Community Control Measures) Regulations 1985 which prohibits the reckless furnishing of false information as to a fishing catch. In *Warburton -v- Pitt*⁶⁵¹ the Caldwell test however was held to apply to offences under Art. 45 of the

Basis for Penal Liability” (1967) 16 Buffalo L.Rev. 749

⁶⁴² *Savage -v- Parmenter* [1991] 4 All ER 698. The facts of the case were that the defendant threw a glass of beer over a former girl-friend of her husband. The glass slipped from her hand cutting the victim’s forehead.

⁶⁴³ In English criminal law a crime consists of the actus reus, being the illegal physical action or omission which was carried out and the mens rea, the “guilty mind” of the accused. An accused can only be found guilty where both actus reus and mens rea come together.

⁶⁴⁴ This offence has now been abolished and replaced by dangerous driving under section 1 of the Road Traffic Act 1988

⁶⁴⁵ For manslaughter Caldwell was applied in the case of *Seymour* [1983] 2 All ER 1058, HL but then repudiated in *Adomako* [1994] 3 WLR 288, HL, where a gross negligence test was reinstated instead of a test of objective recklessness.

⁶⁴⁶ *Savage -v- Parmenter* [1991] 4 All ER 698

⁶⁴⁷ That *Cunningham* recklessness applies to rape was held in *R-v- Pigg* [1982] 2 All ER 591, [1982] 1 WLR 762, CA. In *Satnam S, Kewal S* (1983) 78 Cr App Rep 149, [1985] Crim LR 236 however it was held that the objective test did not apply to rape

⁶⁴⁸ Such as, for example malicious wounding under s. 20 of the Offences against the Person Act 1861, see for example *W (a minor) -v- Dolbey* (1983) 88 Cr App Rep I, [1983] Crim LR 681

⁶⁴⁹ *R-v-Reid* (1992) 95 Cr.App.R. 393 at p. 412

⁶⁵⁰ *Large -v- Mainprize* [1989] Crim. L.R. 213

⁶⁵¹ *Warburton -v- Pitt* (1991) 92 Cr. App.R. 136

Air Navigation Order 1980⁶⁵² prohibiting reckless acts likely to endanger aircraft or persons within them.

The Caldwell test was modified in 1992 by *R -v- Reid*^{653 654}. Here the Defendant was driving on a dual carriageway. When overtaking a car in front of him, the Defendant ignored the road markings indicating that an obstruction ahead of him forced him to move over into the other lane. He consequently hit the obstruction killing his passenger. He was convicted of causing death by dangerous driving. In his defence the Defendant brought forward that the Caldwell test of recklessness was unjust as there may be good reasons why reasonable and prudent people overlooked an otherwise obvious risk. The House of Lords held that while the Caldwell test of recklessness remained good law, because advertent recklessness was just as blameworthy as inadvertent recklessness, it may be a defence to claim that an obvious risk was overlooked in certain circumstances, such as, for example, sudden illness or distraction, or as Lord Keith of Kinkel put it⁶⁵⁵ “*where his [the defendant’s] capacity to appreciate risks was adversely affected by some condition not involving fault on his own part*”. Lord Goff further pronounced his opinion⁶⁵⁶ that an actor proceeding on the basis of a “bona fide” or innocent mistake which is therefore pardonable would not be held to have acted recklessly. The example given for this by Lord Ackner⁶⁵⁷ is that of a driver of a left-hand-drive car, who prior to overtaking asks his passenger whether the road is clear, but the information is bad and an accident ensues. Their Lordships however further give very detailed examples of circumstances where inadvertent or Caldwell recklessness will not exculpate the actor. Lord Goff of Chieveley names, inter alia, situations where the actor disregarded the risk due to drink, rage, an attitude of indifference (“couldn’t care less”), wilful blindness or because he is acting on the spur of the moment without addressing his mind to the possibility of risk such as, for example, a person speeding who thinks only of the speed⁶⁵⁸. Another example is provided by Lord Ackner who cites the situation where somebody disregards a pre-existing disability, such as a nearly blind person who decides to drive

⁶⁵² The Order was made pursuant to powers bestowed under sections 60 and 61 of the Civil Aviation Act 1982

⁶⁵³ *R -v- Reid* [1992] 1 WLR 793 (HOL)

⁶⁵⁴ For a more detailed treatment of this ruling see L.H. Leigh, *Recklessness after Reid*, M.L.R. 1993, 56(2), 208-218

⁶⁵⁵ *R -v- Reid* [1992] 1 WLR 793 (HOL) at p. 675

⁶⁵⁶ *R -v- Reid* [1992] 1 WLR 793 (HOL) at pp. 812, 813

⁶⁵⁷ *R -v- Reid* [1992] 1 WLR 793 (HOL) at p.806

⁶⁵⁸ *R -v- Reid* [1992] 1 WLR 793 (HOL) at p. 810

anyway⁶⁵⁹. It can be seen that Reid does qualify Lord Diplock's view in Caldwell and Lawrence that recklessness includes all cases of inadvertence to an objectively perceptible, unacceptable risk. The way in which Reid qualifies this view and therefore narrows the concept of recklessness again after it had been widened by Caldwell and Lawrence to include inadvertent recklessness, is on a moral basis. The principle behind Reid is that a defendant is to be blamed only for inadvertence which constitutes recklessness if he could have avoided the accident by making an effort to discipline his mind. The effort required seems to be a reasonable effort⁶⁶⁰.

Another noteworthy matter about the decision in Reid is that their Lordships pronounce the view ⁶⁶¹ that the obligation to take care of one's appreciation of risk is higher than would normally be imposed by the criminal law. This however can be explained by the fact that driving is known to be an activity bearing dangers and it is undertaken voluntarily, like drinking (where *Majewski*⁶⁶² and also Caldwell, *Bailey*⁶⁶³ and *Hardie*⁶⁶⁴ exhibit the same attitude towards culpability) or indeed transporting oil in ships. While it may be argued that the observations of their Lordships are limited to cases of reckless driving, this seems rather unlikely as their Lordships would not have expended so much time on an offence they already knew to be obsolete (reckless driving was replaced by dangerous driving by the Road Traffic Act 1991 ss 1. and 2). It is therefore far more likely that they meant to consider the problem of recklessness in general.

3.3.3 Post Caldwell

The situation immediately after Caldwell can be summed up as follows:

A person is reckless where:

- the act is "unreasonable" and carries a "serious risk" of harm and, either

⁶⁵⁹ R -v- Reid [1992] 1 WLR 793 (HOL) at p. 805

⁶⁶⁰ Simon Gardner, Recklessness refined, L.Q.R. 1993, 109 (Jan), 21-27

⁶⁶¹ R-v- Reid [1992] 1 WLR 793 (HOL) at pp 796, 811 and 819

⁶⁶² DPP -v- Majewski [1977] A.C. 443

⁶⁶³ Bailey [1983] 1 W.L.R. 760

⁶⁶⁴ Hardie [1985] 1 WLR 64

- the accused foresees that the act may lead to harm, but does it anyway (Cunningham), or the accused fails even to consider the likelihood of harm where the risk was “obvious” (Caldwell)
- and, probably, the accused has no “good reason” for this oversight (Reid)

While prior to Caldwell inadvertence was the hallmark of negligence, this position seems to have been abandoned by Caldwell. This makes the definition of recklessness and its distinction of it from negligence very difficult⁶⁶⁵. A person, thus, who simply fails to consider a risk would be negligent but not reckless under Cunningham, but at the same time reckless rather than negligent under Caldwell. The situation may again be different where the defendant is able to show a good reason for having overlooked an obvious risk.

Interestingly enough, there was a very similar controversy over the inadvertence/advertence question in German criminal law as concerns the term “leichtfertigkeit”⁶⁶⁶, which Lord Goff equates to recklessness, and whether it required a conscious causing of danger or whether an unconscious causing of such danger sufficed. Prevailing opinion seems to be that it is not necessary to have caused the danger consciously as long as a negative outcome was a considerable possibility and the defendant could have recognised this with a minimum of attention. Hence the German position, according to Lord Goff, is very similar to that taken by the courts in Caldwell. Lord Goff does however warn of drawing too direct a parallel to English law because in his opinion German law has a much higher degree of abstraction and a wider range of degrees of fault are recognised in German law. The warning rings true as the legal systems, if due to nothing else than their history, are very different. A comparison therefore has to be undertaken with great care. It is also certainly true that German law is far more abstracted than English law, which, due to its precedent approach is very pragmatic and seeks to handle matters more on a case by case basis. English law therefore also adheres more closely to a “feeling” of justice where German law would rely on a string of academic philosophy to solve a given problem.⁶⁶⁷

⁶⁶⁵ A position recognised, inter alia, by Lord Goff in *R-v- Reid* [1992] 3 ALL ER 689, 690. The solution of how to differentiate between careless and reckless driving is rather unconvincing and not clear enough to serve a judge or jury. His conclusion is, really, that the differentiation between the two will be clear in practice, which is probably correct, but serves little for an academic analysis of the problem.

⁶⁶⁶ *R-v- Reid* [1992] 3 ALL ER 689

⁶⁶⁷ *R-v- Reid* [1992] 3 ALL ER 689

Some headway was made in 2003 in clearing up the confusing position created by the two different tests for recklessness which were applied depending on which offence was being contemplated.

The case of *R -v- G and another*⁶⁶⁸ seems to have abolished the Caldwell test of recklessness, at least as concerns criminal damage. It is hoped, that it abolished the test generally, but this will remain to be seen in future decisions.

The facts of the case were as follows: The defendants, aged 11 and 12, were camping. They went to the back of a supermarket and lit some newspapers which in turn set fire to a wheelie-bin, which set fire to the shop, causing £1 million in damage. The boys had not been aware that their actions could have the consequences they did. It was held that Caldwell had been wrongly decided and that the test for recklessness within the meaning of s. 1 of the Criminal Damage Act 1971 was that a person was reckless where they were aware of a risk and it was in the circumstances known to them at the time unreasonable to take that risk⁶⁶⁹. The boys were acquitted of arson.

The reason why *R-v-G* departed from Caldwell was put by Lord Bingham as follows:

“Firstly, the most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if⁶⁷⁰ one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of

⁶⁶⁸ *R-v-G and another* [2003] HL.

<http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd031016/g-2.htm>

⁶⁶⁹ This is based on clause 18(c) of the Criminal Code Bill annexed by the Law Commission to its Report “A Criminal Code for England and Wales, Volume 1: Report and Draft Criminal Code Bill” (Law Com No 177, April 1989) which provides: “A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to –

(i) a circumstance when he is aware of a risk that it exists or will exist;

(ii) a result when he is aware of a risk that it will occur;

and it is, in the circumstances known to him, unreasonable to take the risk.”

⁶⁷⁰ For reasons other than self-induced intoxication: *DPP v Majewski* [1977] AC 443

imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.

....Secondly, the present case shows, more clearly than any other reported case since R -v- Caldwell, that the model direction formulated by Lord Diplock ... is capable of leading to obvious unfairness... It is neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself had no such apprehension.

...Thirdly, I do not think the criticism of R-v- Caldwell expressed by academics, judges and practitioners should be ignored. A decision is not, of course, to be overruled or departed from simply because it meets with disfavour in the learned journals. But a decision which attracts reasoned and outspoken criticism by the leading scholars of the day, respected as authorities in the field, must command attention. One need only cite (among many other examples) the observations of Professor John Smith⁶⁷¹ and Professor Glanville Williams⁶⁷². This criticism carries even greater weight when also voiced by judges as authoritative as Lord Edmund-Davies and Lord Wilberforce in R- v- Caldwell itself, Robert Goff LJ in Elliott- v- C⁶⁷³ and Ackner LJ in R -v- Stephen Malcolm R⁶⁷⁴. The reservations expressed by the trial judge in the present case are widely shared. The shopfloor response to R- v- Caldwell may be gauged from the editors' commentary, to be found in the 41st edition of Archbold⁶⁷⁵. The editors suggested that "remedial legislation was urgently required".

3.3.4 Conclusion

As we have seen above, the concept of recklessness in the criminal law changed over time. The definition of the concept started from the position given by Professor Kenny⁶⁷⁶ that *"the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it"*. This definition was approved in *R -v- Cunningham* entrenching the view that only advertent recklessness was culpable. The term was then widened by Lord Diplock in the decisions in *R -v- Caldwell* and *R -v- Lawrence*. Even though Lord Diplock

⁶⁷¹ Professor John Smith [1981] Crim LR 392, 393-396

⁶⁷² Professor Glanville Williams, "Recklessness Redefined" (1981) 40 CLJ 252

⁶⁷³ Elliott- v- C [1983] 1 WLR 939

⁶⁷⁴ R -v- Stephen Malcolm R (1984) 79 Cr App R 334

⁶⁷⁵ Archbold, Pleading, Evidence and Practice in Criminal Cases, 41st Edn., 1982, paragraph 17-25, pages 1009-1010

⁶⁷⁶ C. S. Kenny, *Outlines of Criminal Law*, Cambridge, Cambridge University Press, 1902

contends that: ““reckless” as used in the new statutory definition of the mens rea of these offences is an ordinary English word. It had not by 1971 become a term of legal art with some more limited esoteric meaning than that which it bore in ordinary speech...”⁶⁷⁷ . He nevertheless gave the term a meaning it had hitherto not possessed and included inadvertent recklessness within the definition of culpable recklessness. This new definition was hardened in the case of *Elliot -v- C*⁶⁷⁸ where it was made clear that there was no excuse even for being young or mentally impaired, but that the test of recklessness was objective and applied to all types of defendants alike. This position was somewhat retracted by *R -v- Reid* which allowed for circumstances which would make the actions excusable and therefore not reckless. At this stage Lord Goff, giving into the reigning confusion, correctly perceived that “recklessness” “as used in ordinary speech, and likewise as used in our law, it has more than one meaning”⁶⁷⁹. Now, following *R -v -G* it seems the law is retracing its steps back to the beginning and back to the situation pre Caldwell.

What is interesting to observe is that, in the end, whether recklessness ought to be interpreted objectively or subjectively, whether inadvertence should or should not count, these considerations are, when considering the matter closely, mere decisions of policy which will change in relation to each offence (as indeed has been the case since Caldwell, different tests applying to different offences), and to some degree in relation to each single case.

Decisions of policy also of course include considerations of morality. Andrew Halpin⁶⁸⁰ argues that the question here is a decision of morality or focus. If we think that only conscious risk taking is culpable enough for major offences we should go with Kenny and Cunningham in holding only advertent recklessness as sufficient. But if we think it is the exposure to harm which is culpable, then we ought to go with Caldwell and include also “inadvertent recklessness” as culpable.

As argued above, there is no concept of “inadvertent recklessness”. Inadvertent recklessness is gross negligence. This then solves Halpin’s dilemma quite easily. The criminal law should doubtlessly punish advertent recklessness as Halpin calls it. Gross negligence, however, due to its inadvertent character has no real mens rea and therefore no sufficient moral

⁶⁷⁷ *R-v- Caldwell* [1981] 1 All ER 961 at 966

⁶⁷⁸ *Elliot -v- C* [1983] 2 All ER 1005

⁶⁷⁹ *R-v-Reid* [1992] 1 WLR 793 at 807, 815

⁶⁸⁰ Andrew Halpin, *Definitions and directions: recklessness unheeded*, *Legal Studies (L.S.)* 1998, 18(3), 294-315

turpitude and ought to be left to the civil law. No educating effect is achieved by criminally punishing the grossly negligent perpetrator either, as Halpin suggests would be the case if we go with the views expressed in Kenny and Cunningham. Both “advertent” and “inadvertent” recklessness, i.e. both recklessness and gross negligence have traditionally and conceptually unproblematically been dealt with by the civil law.

Despite all these debates however, it is very interesting to see that, looking closely at the judgements, there is in fact a consensus that recklessness means a kind of seeing carelessness or heedlessness, a wilful blindness to a risk, an attitude of couldn’t care less. Something decidedly more culpable than negligence and less so than intention.

3.4 How is it used in Civil Law?

The short answer to this question would, to put it casually be, that it is not used a lot.

There is surprisingly little material in English civil law on the subject of recklessness. This is, on reflection, not entirely surprising as negligence will generally be sufficient to establish a tort. While intent and recklessness are concepts establishing liability in criminal law, a much lower threshold will suffice in civil law. It therefore matters very little to a judge having established negligence on the part of a defendant that he may have been even more ethically culpable and that his behaviour may even have amounted to recklessness or intent⁶⁸¹. The only instances where the thoughts of a judge or legal academic will have to turn to the question of recklessness in civil law is in cases of malicious prosecution, malfeasance in a public office⁶⁸², the tort of deceit and certain economic torts like inducement to breach a contract, as well as any secondary liabilities⁶⁸³ for tortious conduct such as liability for assisting, inducing, encouraging, authorizing or conspiring in the tortious conduct of another.

⁶⁸¹ Although Atiyah (1987)7 OJLS 279 at 287 has suggested that considerations as to the state of mind of the defendant ought to go towards the amount of damages awarded.

⁶⁸² e.g. *Three Rivers D.C. -v- Bank of England (No 3)* [1996] 3 All ER 558

⁶⁸³ D.J. Cooper, *Secondary Liability for Civil Wrongs*, Unpublished PhD Thesis, University of Cambridge, 1995

3.4.1 Academic writings

In *R -v- Stephenson*⁶⁸⁴, a criminal case, giving the reserved judgment of the court, Geoffrey Lane LJ⁶⁸⁵ reviewed the definition of recklessness in the Law Commission's Working Paper No. 31⁶⁸⁶. The Working Paper defines recklessness as follows:

“A person is reckless if,

- (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and*
- (b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present.”*

He further reviewed the acceptance of that definition by the leading academic authorities and the House of Lords' adoption of a subjective meaning of recklessness in tort in the case of *British Railways Board -v- Herrington*⁶⁸⁷. The legal meaning of recklessness as described in Kenny and expressly approved in *R -v- Cunningham*⁶⁸⁸ was found to be correct. Geoffrey Lane LJ thought that:

*“A man is reckless when he carries out the deliberate act appreciating that there is a risk that damage to property may result from his act. It is however not the taking of every risk which could properly be classed as reckless. The risk must be one which it is in all the circumstances unreasonable for him to take. Proof of the requisite knowledge in the mind of the defendant will in most cases present little difficulty. The fact that the risk of some damage would have been obvious to anyone in his right mind in the position of the defendant is not conclusive proof of the defendant's knowledge, but it may well be and in many cases doubtless will be a matter which will drive the jury to the conclusion that the defendant himself must have appreciated the risk”.*⁶⁸⁹

⁶⁸⁴ *R -v- Stephenson* [1979] QB 695

⁶⁸⁵ *R -v- Stephenson* [1979] QB 695 at pages 700-703

⁶⁸⁶ Law Commission in their Working Paper on the Mental Element in Crime, Law Com No. 31. The views of the Commission have been discussed above

⁶⁸⁷ *British Railways Board -v- Herrington* [1972] AC 877

⁶⁸⁸ *R -v- Cunningham*⁶⁸⁸ [1957] 2 QB 396

⁶⁸⁹ *R -v- Stephenson* [1979] QB 695 at pages 700-703

Peter Cane⁶⁹⁰ defines recklessness such: *“Whereas to intend a consequence is to aim at producing it, to be reckless as to a consequence is to know that one’s action may produce it without caring whether it does or not”*. In other words, Cane defines recklessness as a state of mind where the perpetrator is aware of but indifferent to the consequences of his act or omission.

John Cooke and Prof. David Oughton⁶⁹¹ define recklessness such: *“Recklessness or advertent negligence, is normally classed as a variety of intention. Here the consequence of the defendant’s act or omission is neither desired nor certain, but is foreseen as possible”*.

This definition is rather confused unfortunately, as it fails to differentiate between recklessness and intention which, though closely related, are two different things. This confusion however seems to prevail amongst civil lawyers as both concepts are treated as ethically equivalent, both states of mind are conscious and to some degree deliberate, and the need to draw a distinction is felt not to be so prominent. The definition further fails to differentiate recklessness from negligence. Though, again, the two concepts are close they need to be distinguished. An interesting thought however, is the definition of recklessness as “advertent negligence”. This description is quite close to the core of the matter.

Clerk and Lindsell’s⁶⁹² definition of recklessness is as follows: *“Recklessness, in the sense of indifference to the consequences and/or willingness to run the risk of those consequences...”*

Recklessness has also been perceived as and distinguished from both negligence and intention in terms of a sliding but continuous scale⁶⁹³. This view seems very realistic in the sense that delimitations between these three states of mind can be rather fluid in the real world. In this view negligence is a risk to others which is perceived by the actor or should be perceived by the actor and which exceeds its utility. The more disproportionate the risk gets, the more the conduct moves over to being reckless until it is so disproportionate that it becomes indistinguishable from intent and being

⁶⁹⁰ The Anatomy of Tort Law, Peter Cane, Hart Publishing, Oxford 1997, p.33

⁶⁹¹ John Cooke LLB Mphil, Prof. David Oughton, The Common Law of Obligations, 3rd Edition, Butterworths, London 2000, p.220

⁶⁹² Clerk & Lindsell on Torts, 18th Edition, Sweet & Maxwell, London, 2000, p.30

⁶⁹³ American Law Institute Restatement of the Law as Adopted and Promulgated by The American Law Institute at Washington D.C., May 25th 1963 and May 22nd 1964, St Paul Minnesota, Second Vol. Torts 2nd §§281 to 503, American Law Institute Publishers, 1965

similarly morally culpable is punished in a similar way. Though the sliding scale idea is certainly very appealing, what is absent in this definition is, that negligence's hallmark is that it is inadvertent, whereas recklessness and intent both involve, to a greater or smaller extent, a degree of consciousness. An example illustrating the difference, is a driver proceeding onto a busy road ignoring a stop sign and a driver who due to a moments inattention has overlooked the stop sign and proceeds on to that road. The former is reckless, the latter is negligent.

3.4.2 Case-law

Having considered the views of academic writers on the subject, one ought to turn to the prime source of English law: case law.

Again, there are only very few civil cases which deal with recklessness. Those that do, often refer to the criminal law for help⁶⁹⁴.

3.4.2.1 General Torts

The leading civil case which defined recklessness is that of *Derry -v- Peek*⁶⁹⁵. Sir Henry Peek brought an action in deceit against the directors of the Plymouth, Devonport and District Tramways Co. Ltd for misstatements contained in their prospectus. The prospectus claimed that the company had the right to use steam or other mechanical power when in fact this right still depended on a consent being given by the Board of Trade and the corporations of Plymouth and Devonport. In reliance on this statement Sir Henry Peek bought 400 shares in the company. In the event, the necessary consents were refused and the company was compulsorily wound-up.

In order to found an action in deceit, fraud has to be proved. A person is fraudulent where they make a fraudulent representation either knowingly or without belief in its truth or recklessly not caring whether it be true or false.⁶⁹⁶ Earlier case law such as *Arkwright -v- Newbold*⁶⁹⁷, *Weir -v- Bell*⁶⁹⁸ or *Smith -v- Chadwick*⁶⁹⁹ had held that recklessness in this context meant "*without reasonable ground for believing the statement to be true*". Lord Herschell

⁶⁹⁴ For example Lord Steyn in *Vehicle Inspector -v- Nuttall* [1999] Crim LR 674. Or *Shawingian -v- Vokins & Co Ltd* [1961] 1 WLR 1206 at 1212 where counsel draws on criminal law to attempt an explanation of the meaning of recklessness in civil law.

⁶⁹⁵ *Derry -v- Peek*, H.L. [1886-90] All ER Rep.p.1

⁶⁹⁶ *Derry -v- Peek*, H.L. [1886-90] All ER Rep. p.1

⁶⁹⁷ *Arkwright -v- Newbold*, Cotton L.J. 17 Ch.D. at p. 320

⁶⁹⁸ *Weir -v- Bell*, H.L. [1886-90] All ER Rep. p.18

⁶⁹⁹ *Smith-v- Chadwick*, 20 Ch.D. at p.44

thought that making a false statement through carelessness which ought to have been known to be untrue, of itself, was not sufficient to found deceit⁷⁰⁰ and, presumably therefore not sufficient to amount to recklessness. Lord Herschell thought that recklessly making a statement not caring whether it be true or false was the same as making a statement without an honest believe in its truth. Wilfully shutting ones' eyes to the facts or purposely abstaining from inquiring into them was also thought to be amounting to recklessness by Lord Herschell⁷⁰¹. Lord Herschell therefore clearly identifies a degree of wilfulness in recklessness. It is more than mere inadvertence, less though than intention. It involves consciously not seeing or finding the truth or shutting doubts away in one's heart. Short of outright dishonesty it is nevertheless not having an entirely clear conscience. In the same case Lord Herschell warned that "*mischief is likely to result from blurring the distinction between carelessness and fraud*"⁷⁰². There is thus here already a clear statement that recklessness is more than mere negligence and that the two concepts have to be kept quite separate, a delineation which, we will see in later case law, is hard to make and confusion between recklessness and gross carelessness has welled up time and again.

In *Angus -v- Cifford*⁷⁰³ Bowen LJ provided some further guidance on Lord Herschell's "*recklessly, careless whether it be true or false*". He said "... *the old direction [to the jury], time out of mind, was this, did he know that the statement was false, was he conscious when he made it that it was false, and without caring? Not caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth.....*".⁷⁰⁴

*Roper -v- Taylor's Central Garages (Exeter) Ltd*⁷⁰⁵ is a further civil case dealing with recklessness. In that case Devlin J observed⁷⁰⁶ on the distinction between negligence and recklessness that: "*there is a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make.*" These distinctions were also made in later decisions such as *James & Son Ltd*

⁷⁰⁰ Derry -v- Peek, H.L. [1886-90] All ER Rep. P.19

⁷⁰¹ Derry -v- Peek, H.L [1886-90] All ER Rep. P.21

⁷⁰² Derry -v- Peek, H.L [1886-90] All ER Rep. P.21

⁷⁰³ Angus -v- Cifford [1891] 2 Ch 449

⁷⁰⁴ Angus -v- Cifford [1891] 2 Ch 449 at 471

⁷⁰⁵ Roper -v- Taylor's Central Garages (Exeter) Ltd [1951] 2 T.L.R. 284

⁷⁰⁶ Roper -v- Taylor's Central Garages (Exeter) Ltd [1951] 2 T.L.R. 284 at 288

*-v- Smee*⁷⁰⁷, *Green -v- Burnett*⁷⁰⁸, *Gray's Haulage Co. Ltd -v- Arnold*⁷⁰⁹ and *Robinson -v- Director of Public Prosecutions*⁷¹⁰

3.4.2.2 Constructive Trusts

Recklessness also cropped up in the context of a constructive trust in the case of *Lipkin Gorman -v- Karpnale Ltd and Another*⁷¹¹. The judges unfortunately did not comment on the meaning of recklessness, but the case is an interesting example of reckless behaviour, illustrating the point made above. Here C., a partner in the Plaintiff firm of solicitors had a gambling addiction. He kept drawing money from the client accounts held at the Defendant's bank in order to fund his gambling. His partners were unaware of his addiction. The Plaintiffs sought to recover the funds from the gambling club and the bank in quasi-contract, negligence, conversion and as constructive trustees of the moneys. It was held that the gambling club had not wilfully or recklessly failed to make appropriate inquiries, nor had it wilfully shut its eyes to the obvious. Although C. would come in to gamble every day, gambling clubs saw a lot of people coming in with funds from unclear origins. One could furthermore not expect of gaming club personnel to know in detail how the management of client funds at a solicitors firm was handled. The bank which had made the funds available to C. on the other hand was different. It was found that the bank manager was aware of C.'s gambling habit and had nevertheless wilfully or recklessly failed to make any enquiries as to what the funds would really be used for. The bank was therefore found liable as constructive trustees for rendering knowing assistance to C.

3.4.2.3 Shipping Law

There is a string of shipping cases dealing with the term "reckless". They are however cases dealing with inland waterways, more specifically the Thames. The London Lighterage Clause under which contracts of carriage on the Thames are performed provides for the carrier to be exempt from liability for unseaworthiness, negligence, wrongful act or default of servants or agents, but goes on to say that "*the foregoing exemption excluding us from liability arising from unseaworthiness of craft shall not apply unless we are able to establish that we have not knowingly or recklessly supplied an unseaworthy barge....*"

⁷⁰⁷ James & Son Ltd -v- Smee [1955] 1QB 78

⁷⁰⁸ Green -v- Burnett [1955] 1 QB 78

⁷⁰⁹ Gray's Haulage Co. Ltd -v- Arnold [1966] 1 WLR 536

⁷¹⁰ Robinson -v- Director of Public Prosecutions [1991] RTR 315

⁷¹¹ Lipkin Gorman -v- Karpnale Ltd and Another [1987] 1 WLR 987

The leading case explaining the meaning of the word “recklessness” within the context of the London Lighterage Clause is that of *Albert E. Reed & Co. Ltd -v- London & Rochester Trading Company Ltd*⁷¹². Here the barge in question, the “Niagara” was hired by the Plaintiffs for the carriage of dry woodpulp from Royal Victoria Dock, London to Aylesford. The cargo was found damaged by an ingress of water through a hole in the barge’s bottom plating. The barge was 54 years old. Her bottom plates should have been renewed about 25 years before the incident. It was not clear whether that had happened, but at least her bottom was cemented and wood sheeting had been put in at least partially. Two years before the incident, the barge had started rusting in a serious way and the captain had reported that the barge was making water. It was sent for repairs. It was obvious that the Defendants knew that the barge was not in a good condition. Nevertheless, no drill tests were undertaken to establish whether the plating beneath the concrete may have gone down too low. One reason given for that was the presence of the concrete. It was further found that the Defendant’s policy as regards the replacement of bottom steel plates in their barges was to let them waste away to three-sixteenths of an inch which was found by Justice Devlin to be too low and certainly lower than wise. He was however not prepared to say that to follow such a policy in itself was reckless⁷¹³. However, it was further found that the Defendants in general never undertook anything unless and until they got reports from their masters that there was a leak. Justice Devlin found that such behaviour was indeed reckless. He said at page 13 that the man responsible “ .. was letting the plates go down, quite unjustifiably, to a thinness much below what everybody agrees is the minimum, and waiting for a report of a leak before they did anything, and the natural inference from that, I think, is that he was running an unjustifiable risk, and plainly, from his evidence, he was doing it deliberately”. Justice Devlin described his state of mind as follows: “ I do not think it is necessary to draw a distinction as to whether he knew that the vessel was unseaworthy or not. I do not think he knew that the vessel was unseaworthy in the sense that he knew that when the barge went out on any particular occasion it was highly likely that she would make water through a hole which would arise; but I am satisfied that he did know that she might do so, and that he did not care whether she did so or not, not perhaps believing that to be blameworthy, but he did not care whether she did so or not, because he thought that nothing could be done about it until it had in fact occurred”.

⁷¹² *Albert E. Reed & Co. Ltd -v- London & Rochester Trading Company Ltd* [1954] 2 Lloyd’s Rep 463

⁷¹³ *Albert E. Reed & Co. Ltd -v- London & Rochester Trading Company Ltd* [1954] 2 Lloyd’s Rep 463 at 470

In that definition Justice Devlin very clearly draws a distinction between a reckless state of mind and intention. The definition given by him here is therefore a very useful one. Justice Devlin defined “recklessness” at p. 11 as follows: *“the term “recklessly”, I think, does not really give rise to much difficulty. It means something more than mere negligence or inadvertence. I think it means deliberately running an unjustifiable risk. There is nothing necessarily criminal, or even morally culpable, about running an unjustifiable risk; it depends in relation to what risk is run; it may be a big matter or it may be a small matter. If I go out on a cold afternoon and forget to take my overcoat with me although I know quite well that I may catch cold if I do not, I run the risk of catching cold and I run that risk deliberately, although it may not be a very serious matter. I think that is the sort of recklessness that has to be considered in this case. It does not involve, in the circumstances of this case, a reckless disregard of human life, or anything of that sort, but it is sufficient that in relation to the cargo which the barge is intended to carry, the company or somebody in it who is in this connection responsible, should be deliberately running an unjustifiable risk of this kind of cargo being damaged.”*

The definition given by Justice Devlin is applaudable not only because it is very clear but also because, uniquely, he has drawn a distinction between recklessness in criminal law and recklessness in civil law, making quite clear that the term itself is and ought to be the same but that it is rather the consequences of the behaviour itself that make the difference. It should however be mentioned that recklessness is not as entirely free from moral blame as Devlin’s definition would like us to believe. Devlin’s use of the word “deliberate” however is inspired. Its use makes clear that recklessness is deliberate as opposed to inadvertent (which is a sign of negligence) but that it is nevertheless also distinct from intention which is intended and not just deliberate.

A further case involving the London Lighterage Clause is that of *Industrial and Mining Supplies Company Ltd -v- City Lighterage Company Ltd (The “Janice”)*⁷¹⁴. Here the Plaintiffs hired a barge from the Defendants which was 46 years old. Her plates had worn paper-thin and water entered through holes in her swim plates damaging the Plaintiff’s cargo of cork slabs. However, the Defendant’s had instructed a very experienced lighterman to inspect the barge before the voyage and he had found no fault with her although at the time of the inspection she had carried a far heavier cargo than the Plaintiff’s cargo and had done so without problems. Judge Block

⁷¹⁴ *Industrial and Mining Supplies Company Ltd -v- City Lighterage Company Ltd (The “Janice”)* [1957] 2 Lloyd’s Rep. 48

held⁷¹⁵, basing himself on the judgment of Justice Devlin in *Albert E. Reed*⁷¹⁶, that recklessness was “*deliberately running an unjustifiable risk*” and that the fact alone of employing a barge of that age did not amount to running an unjustifiable risk. The Defendant would have been running an unjustifiable risk which would have made them reckless had they been aware of the thinness of the plates. However, Judge Block held that the Defendants were not aware of the thinness of the plates and had therefore not acted recklessly.

Another definition of recklessness was provided by *Megaw J in Shawingian Ltd -v- Vokins & Co Ltd*⁷¹⁷. Here the Defendants had hired a barge from a reputable firm to transport the Plaintiffs’ cargo of resin under the London Lighterage Clause. The Defendants inspected the barge but had failed to inspect the bottom plates. This was normal practice. One of the plates was holed, letting in water and damaging the Plaintiffs’ cargo. The Plaintiffs alleged that the Defendants had acted recklessly. It was held that the Defendants were entitled to rely on the good reputation and past dealings they had had with the firm from which they had hired the barge and that they had therefore not acted recklessly. Considering the meaning of “knowingly or recklessly”, the judge observed: “*In my view “reckless” means grossly careless. Recklessness is gross carelessness - the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such, having regard to all the circumstances, that the taking of that risk would be described as “reckless”. The likelihood or otherwise that damage will follow is one element to be considered, not whether the doer of the act actually realises the likelihood. The extent of the damage which is likely to follow is another element, not the extent which the doer of the act, in his wisdom or folly, happens to foresee.... The only test, in my view, is an objective one*”.

But is it correct, as Megaw J postulates, that recklessness is merely a heightened form of negligence⁷¹⁸? “Gross carelessness” as he calls it? It is a very utilitarian view of the law, but is it correct? If it were so, how would Megaw J then distinguish recklessness from gross negligence? The crux of his definition becomes evident. He has failed to distinguish the mental element

⁷¹⁵ *Industrial and Mining Supplies Company Ltd -v- City Lighterage Company Ltd (The “Janice”)* [1957] 2 Lloyd’s Rep. 48 at 53

⁷¹⁶ *Albert E. Reed & Co. Ltd -v- London & Rochester Trading Company Ltd* [1954] 2 Lloyd’s Rep 463 at 470

⁷¹⁷ *Shawingian Ltd -v- Vokins & Co Ltd* [1961] 1 WLR 1206 at 1214

⁷¹⁸ A view with which Edmund Davies LJ agrees in *Herrington -v- British Railways Board* [1971] 2 WLR 477 at 494, 495

which is the difference between negligence and recklessness. The former, as has been argued above, is a form of inadvertence, whereas the latter involves some sort of consciousness. Not only has he confused the mental elements needed for recklessness and gross carelessness but his utilitarian approach is also much more suited to criminal law and not so much to civil law. To him recklessness is the sort of behaviour that is so outrageous and of such little utility for society that it ought to be punished, just like a crime. Negligence however is based on a legal duty he says ⁷¹⁹and is therefore different. By drawing this distinction he conceptually banishes recklessness from the world of civil law and this is clearly wrong.

3.4.2.4 Trespassing

A further early line⁷²⁰ of cases on recklessness deals with reckless disregard for the safety of trespassers.

The leading case here is *Robert Addie & Sons (Collieries) Ltd -v- Dumbreck*⁷²¹. In this case a boy of four years was playing in a field in a colliery. The field was often used as a playground, it was close to a road and bound by hedges which had several large gaps. In the field was a large iron wheel with a wire cable. Children would often play with the wheel which was highly dangerous. They were only occasionally warned off. Colliery servants, knowing that children may well play on the wheel and the danger it would present to them if the wheel were set in motion, nevertheless set the wheel in motion without taking any steps to see whether a child may thereby be endangered. As a result the Plaintiffs' son, who at the time was playing on or near the wheel was killed. The House of Lords gave judgment for the Defendants, saying that, for the Plaintiffs' case to succeed: "*There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser*"⁷²². The actions of the colliery servants were found not to be sufficient. This case was later followed in *Videan -v- British Transport Commissioner, Commissioner for Railways -v- Quinlan* and *Commissioner for Railways -v- Mc Dermott*.⁷²³

⁷¹⁹ *Shawingian Ltd -v- Vokins & Co Ltd* [1961] 1 WLR 1206 at 1214

⁷²⁰ *Videan -v- British Transport Commissioner* [1963] 2 QB 650, *Commissioner for Railways -v- Quinlan* [1964] AC 1054, *Commissioner for Railways -v- Mc Dermott* [1967] 1 AC 169. Discussing the leading case only is sufficient here as the latter cases add nothing for the purposes of this work.

⁷²¹ *Robert Addie & Sons (Collieries) Ltd -v- Dumbreck* [1929] AC 358

⁷²² *Robert Addie & Sons (Collieries) Ltd -v- Dumbreck* [1929] AC 358, Lord Hailsham LC at 365

⁷²³ *Videan -v- British Transport Commissioner* [1963] 2 QB 650, *Commissioner for Railways -v- Quinlan* [1964] AC 1054, *Commissioner for Railways -v- Mc Dermott* [1967] 1 AC 169

Fortunately, this line of cases was later overruled by *British Railways Board -v- Herrington*⁷²⁴ in light of the criticism the leading case, *Robert Addie & Sons (Collieries) Ltd -v- Dumbreck*⁷²⁵, had received⁷²⁶.

The facts of *Herrington -v- British Railways Board*⁷²⁷ were, that the Defendants owned an electrified railway line which was fenced off from a meadow where children habitually played. The fence had become dilapidated and for several months people went through a gap in the fence to cross the electrified line as a short cut. Some months before the incident the station master had been informed that children had been seen on the line, yet no action was taken. Eventually the Plaintiff, then aged six, strayed on to the line and sustained considerable injury on the live rail.

The reason why the earlier trespass cases were overruled by this case is very interesting in the context of this work. They were overruled because it was felt that times had changed and social feelings of morality had shifted in such a way that recklessness, which in this context had been interpreted very harshly, had to be interpreted much more leniently. In the Court of Appeal, Salmon LJ, recommending Addie's case to be overruled put it as follows: *"the doctrine that a trespasser, however innocent, enters land at his own risk, that in no circumstances is he owed a duty of reasonable care or any care by the owners or occupiers of the land, however conscious they may be of the likelihood of his presence and of the grave risk of terrible injury to which he will probably be exposed, may have been all very well when rights of property, particularly in land, were regarded as perhaps more sacrosanct than any other human right. This view was widely held in the nineteenth century and, perhaps, even at the beginning of the present century, influenced the minds of those who were then no longer young. It is hard to see why today this doctrine should not be buried"*⁷²⁸.

It was then in fact buried by the House of Lords in the same case⁷²⁹. Lord Pearson, similar to Salmon LJ also thought that Addie's case had been rendered obsolete by changes in both physical and social conditions. People now lived tighter together in towns and children had less space to play making them more likely to trespass. Due to the progress in technology

⁷²⁴ *British Railways Board -v- Herrington* [1972] AC 877

⁷²⁵ *Robert Addie & Sons (Collieries) Ltd -v- Dumbreck* [1929] AC 358

⁷²⁶ *British Railways Board -v- Herrington* [1972] AC 877

⁷²⁷ *Herrington -v- British Railways Board* [1971] 2 WLR 477

⁷²⁸ *Herrington -v- British Railways Board* [1971] 2 WLR 477 at 482

⁷²⁹ *British Railways Board -v- Herrington* [1972] AC 877

greater dangers could lurk on land and occupiers therefore needed to take better care to deter trespassers.⁷³⁰

This shift of the meaning of recklessness over time as society and social values changed illustrates quite clearly the influence social, economic and political motives have upon the meaning of recklessness at any particular time and in any particular context. Or, as Lord Diplock put it in the context of why Addie's case had to be overruled: "*It [the overruling] takes account of the social attitudes and circumstances and gives effect to the general public sentiment of what is "reckless" conduct as it has expanded over the forty years which have elapsed since the decision in that case.*"⁷³¹

The case is also interesting for another reason. Unlike in the earlier case of *Shawingian -v- Vokins*, the distinction between recklessness and negligence was admirably drawn by Salmon LJ in the Court of Appeal in *Herrington -v- British Railways Board*⁷³². The passage is so enlightening that it warrants a quotation despite its length because distinguishing recklessness from the concepts of negligence and intention will bring us closer to an understanding of the nature of recklessness:

"It has often been said that so far as the law of torts is concerned, there is no such thing as gross negligence. Gross negligence is only negligence with an opprobrious epithet. Although there are no degrees of negligence there are, of course, degrees of the blameworthiness and causative effect attributable to negligence....The degree of blame as such, however, has nothing to do with whether or not the tort of negligence has been committed. This depends upon whether there has been any breach of the duty to take reasonable care. Nor do I know of any authority for the proposition that, by itself, carelessness, however gross, can constitute a separate tort independent of negligence. Recklessness, however, so far as the law of torts is concerned, is essentially different in kind from negligence. It is, in my view, akin to intentional wrongdoing. A man who by some act or omission injures another, not caring whether he does so or not, is in much the same category as the man who injures another intending to do so and, therefore, equally liable in damages for the injury which he causes. I cannot believe...[it] to mean merely "very careless". I

⁷³⁰ *British Railways Board -v- Herrington* [1972] AC 877 at 929

⁷³¹ *British Railways Board -v- Herrington* [1972] AC 877 at 941

⁷³² *Herrington -v- British Railways Board* [1971] 2 WLR 477

think [it] denotes something of the same kind as “wilfully” or “wantonly” causing injury as distinct from mere carelessness whatever its degree.”⁷³³

The definitions of recklessness given by Salmon LJ and Cross LJ in this case are also very useful.

Cross LJ provided a definition of recklessness while acknowledging that the term is notoriously nebulous. He said *“Reckless is an ambiguous word which may bear different contexts. In some branches of the law it is used to connote what I should suppose to be a very rare state of mind between negligence however gross on the one hand and deliberate wrongdoing on the other - the state of mind of a man who says to himself “What I am going to do may be or result in a breach of duty or it may not; I do not know and I do not care”.*⁷³⁴

Cross LJ unfortunately then goes on to fuel the confusion between recklessness and gross negligence by acknowledging and embracing the existence of this confusion. He continues to say: *“In other contexts “reckless” simply amounts to gross negligence..”⁷³⁵*

He does however go on to provide us with a wonderful example of how easy it is to confuse these concepts. He takes the example of a man out shooting on his land who sees a rabbit squatting next to a tramp who is asleep. The thoughts in a reckless mind, according to Cross LJ would be: *“I hope that I shall hit the rabbit. It is true that I am a bad shot and so it may well be that I shall hit the tramp. But what matter if I do? He has no right to be on my land.”* The thoughts of the grossly negligent man according to the example would be: *“Of course I must not hit the tramp, but I am a very good shot and even if I miss the rabbit there is really no risk of my hitting the tramp. I will just give him a fright”.* Cross LJ then goes on to say that really the second state of mind would also show “reckless disregard” of the presence of the tramp⁷³⁶. Cross LJ unfortunately however overlooks a very slight yet important difference between the two states of mind. Whereas the first state of mind is one where the man has considered the consequence of his action but does not care, or hopes it will not occur, in the second state of mind the man does not think the consequence will occur. He, wrongly or rightly, believes himself to be a good shot who will not hit the tramp.

⁷³³ *Herrington -v- British Railways Board* [1971] 2 WLR 477 at 487

⁷³⁴ *Herrington -v- British Railways Board* [1971] 2 WLR 477 at 498

⁷³⁵ *Herrington -v- British Railways Board* [1971] 2 WLR 477 at 498

⁷³⁶ *Herrington -v- British Railways Board* [1971] 2 WLR 477 at 498

Cross LJ then applying himself to the facts of the case held that, *“although a mere failure to ensure that the fences were properly inspected at reasonable intervals would be a breach of an ordinary duty of care, I would find it difficult to characterise such a failure as “wanton” or “reckless” or “inhuman” conduct so long as the Defendants had no reason to think that the fences were defective”*. But, he carries on that, having had reports of children on the line, which would lead one to the conclusion that the fence must have been defective and then failing to ensure that it was at once inspected, that was reckless.⁷³⁷ He would also have found a complete failure to fence *“reckless, or wanton or inhuman - whichever adjective one prefers”*⁷³⁸

Salmon LJ in the same case found that in the context of trespassers being injured *“a reckless disregard for safety” meant “doing or omitting to do something when you recognise that your act or omission is likely to cause serious injury and you do not care whether it does or not..... something akin to wilfully causing injury. Ex hypothesis it is something different in kind from negligence or mere carelessness whatever its degree”*⁷³⁹. Applying it to the facts of the case Salmon LJ found the station master to be reckless as *“He could not have cared whether or not children were electrocuted, although no doubt he hoped that they would not be. He was content to take that risk rather than put himself to the trouble of taking any of the elementary precautions which he could and should have taken. In failing to take any such precautions the defendants showed a reckless disregard to the safety of the Plaintiff”*.⁷⁴⁰

As Salmon LJ had done in the Court of Appeal, Lord Pearson also provided a distinction between recklessness and negligence in the same case before the House of Lords. He said: *“I think the word “reckless” in the context does not mean grossly negligent but means that there must be a conscious disregard of the consequences - in effect deciding not to bother about the consequences. Thus a subjective, mental element, a sort of mens rea, is required as a condition of liability.”*⁷⁴¹

This dicta is also valuable for another reason. It defines the ingredients of recklessness. *“A sort of mens rea”* is required, so Lord Pearson, and that, surely is an important factor. Recklessness does not require the full mens rea of intention, but rather something less defined and more hazy in the mind of

⁷³⁷ *Herrington -v- British Railways Board* [1971] 2 WLR 477 at 503

⁷³⁸ *Herrington -v- British Railways Board* [1971] 2 WLR 477 at 502

⁷³⁹ *Herrington -v- British Railways Board* [1971] 2 WLR 477 at 486

⁷⁴⁰ *Herrington -v- British Railways Board* [1971] 2 WLR 477 at 488

⁷⁴¹ *British Railways Board -v- Herrington* [1972] AC 877 at 928

the perpetrator. However, it does require something, some sort of thinking rather than the thoughtlessness of negligence.

Lord Wilberforce sitting in the same case used the following description of recklessness: “..reckless disregard... surely bears its normal meaning in the law – as akin to intentional injury, but instead of intention, not caring whether he does so or not.”⁷⁴²

The question whether the test of recklessness should be objective or subjective was considered by Lord Reid in *British Railways Board -v- Herrington*⁷⁴³. Lord Reid observed that “Recklessness has, in my opinion, a subjective meaning: it implies culpability. An action which would be reckless if done by a man with adequate knowledge skill or resource might not be reckless if done by a man with less appreciation of or ability to deal with the situation. One would be culpable, the other not. Reckless is a difficult word. I would substitute culpable”⁷⁴⁴. Applying the facts to the case at hand, Lord Reid thought the Railways Board had acted recklessly in these circumstances.⁷⁴⁵

Since *Herrington* came later, it prevails having specifically considered *Shawingian* and found it to be wrong. *Herrington* was later followed in *Three Rivers District Council and Others -v- Governor and Company of the Bank of England*⁷⁴⁶ where Lord Steyn also pronounced subjective recklessness to be sufficient in tort⁷⁴⁷.

The subjective interpretation of recklessness was confirmed in a study undertaken by Professor Wilhelmsen for the Comité Maritime International.⁷⁴⁸ The opinion given in *Herrington* and later followed in *Three Rivers District Council* is also preferable from an ethical perspective. Recklessness is a form of culpability, an ethical wrong, on the grounds of which a specific person is punished for their state of mind and behaviour. Retribution is aimed at a

⁷⁴² *British Railways Board-v- Herrington* [1972] AC 877 at 919

⁷⁴³ *British Railways Board -v- Herrington* [1972] AC 877

⁷⁴⁴ *British Railways Board -v- Herrington* [1972] AC 877 at 898

⁷⁴⁵ *British Railways Board -v- Herrington* [1972] AC 877 at 899

⁷⁴⁶ HL Session 1999-2000, 18th May 2000, <http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000518/rivers-1.htm> as at 12.12.2005

⁷⁴⁷ The definition of recklessness itself given in *Three Rivers District Council and Others -v- Governor and Company of the Bank of England* is unfortunately too concise to be all too enlightening. Lord Steyn defined “recklessness” as “not caring whether the consequences happened or not”.

⁷⁴⁸ Professor Trine-Lise Wilhelmsen, *Scandinavian Institute of Maritime Law, Issues of Marine Insurance, Misconduct of the Assured and Identification*, CMI Yearbook 2003, p.540 at p. 544

specific form of substandard social appreciation. It should therefore undoubtedly be a subjective test.

The test is also subjective in terms of the likelihood of damage occurring. A person would thus act recklessly even if there is no objective probability of the loss occurring.⁷⁴⁹ This, too must be correct from a moral perspective, as the perpetrator who does not know that there is no objective risk of harm has the same state of mind as the perpetrator in a situation where there is an objective risk of harm. Thus, if the state of mind that goes with an action is to be retributed, no difference ought to be made whether or not the harm could ever have materialised.

3.4.3 Conclusion

It seems clear from the above case law that recklessness is to be found somewhere between intent and negligence. While it is “*akin to intentional injury*” as Lord Wilberforce puts it in *British Railways Board -v- Herrington*⁷⁵⁰, it is quite different from intention. Recklessness does have, as Lord Pearson puts it in the same case “a sort of mens rea”⁷⁵¹. There is an element of wilfulness, of wilfully shutting one’s eyes to the danger, of wantonness, of deliberance, of thought. Yet it is not like intent, which aims for the result. Recklessness is much more aimless, much more hazy.

Recklessness also has to be distinguished from negligence even if confusion between these two concepts is rife, as we have seen most notably in Megaw J’s judgment in *Shawingian Ltd -v- Vokins & Co Ltd*⁷⁵². The difference between recklessness and negligence and the characteristic that sets them apart is that negligence of whatever degree is inadvertent, unthinking, whereas recklessness is meditated.

Recklessness has to be interpreted subjectively. It has to take account of the mind of the specific perpetrator as it is a morally culpable state.

However, the interpretation of recklessness is also, as we have seen from *Robert Addie & Sons (Collieries) Ltd -v- Dumbreck*⁷⁵³ and *Herrington*⁷⁵⁴, very

⁷⁴⁹ Malcolm A. Clarke, *International Carriage of Goods by Road, CMR*, 2nd Ed., Sweet & Maxwell, p. 503-504

⁷⁵⁰ *British Railways Board -v- Herrington* [1972] AC 877 at 919

⁷⁵¹ *British Railways Board -v- Herrington* [1972] AC 877 at 928

⁷⁵² *Shawingian Ltd -v- Vokins & Co Ltd* [1961] 1 WLR 1206 at 1214

⁷⁵³ *Robert Addie & Sons (Collieries) Ltd -v- Dumbreck* [1929] AC 358

⁷⁵⁴ *Herrington -v- British Railways Board* [1971] 2 WLR 477 and *British Railways Board -v- Herrington* [1972] AC 877

dependent on socio political changes. What was felt to be acceptable behaviour in 1929 is classed reckless in 1972.

It would therefore be unsurprising if recklessness within the context of oil pollution would be seen as a very high hurdle because in present day society oil has an important place and its transportation is therefore deemed to be worthy of political protection.

3.5 How is it used in Statute Law?

Recklessness as a term has also been used in statutes, both criminal and civil, though its use is not widespread. Case law involving recklessness within the context of these few Acts is even more seldom.

3.5.1 Criminal

Within the criminal context the Act most applicable here and not discussed within the context of criminal law above, is the Trade Descriptions Act 1968. Section 14 (1) (b) of the Trade Descriptions Act 1968 stipulates that:

- “(1) It shall be an offence for any person in the course of any trade or business*
- (b) recklessly to make a statement which is false; as to any of the following matters....”*

Case law involving recklessness in this section is unfortunately fairly thin on the ground. In *Sunair Holidays Ltd -v- Dodd*⁷⁵⁵, Mr and Mrs Dodd had booked a hotel in Spain with a travel agent in England. The holiday brochure had stated that all of the rooms had twin beds and views over the harbour. When the holidaymakers arrived they were given rooms not matching these criteria. It was held that Sunair Holidays Ltd had a contract with the Spanish hotel to the effect that their clients would be given rooms with such amenities. The statement was therefore true at the time it was made and judgement was given for the Appellants.

In some ways the judgment is fairly disappointing as, although it has an internal logic, it nevertheless clearly seeks to fudge the issue of recklessness.

⁷⁵⁵ *Sunair Holidays Ltd -v- Dodd* [1970] 1 WLR 1037

It is as if the judges were quite careful not to get involved with this difficult concept. All that is, rather nebulously, said by them in relation to “recklessness” is: “*In other words, this by statute is importing the common law definition of “recklessly” as laid down in Derry -v- Peek*”.⁷⁵⁶

Another case involving the Act is *Direct Holidays plc -v- Wirral Metropolitan Borough Council (1998)*⁷⁵⁷. Here the Appellant’s brochure advertised holiday apartments as having three keys. The key rating was an official rating given by the tourist board in Spain. The more keys an accommodation had the better it was. The proper rating for the apartment in question had in fact been one key. It was held that, though it was a harsh conclusion, the magistrates court had been correct in holding Direct Holidays plc reckless because the Appellant had not checked the apartment’s key rating with the appropriate tourist board and the Appellant had no standard procedure for such checks.

In *Yugotours Ltd -v- Wadsley*⁷⁵⁸ a holiday brochure sent out to holidaymakers contained false information. The defendants were held to be reckless as they had made no attempt to correct the information given even after they had learned the true position.

3.5.2 Civil

Use of the term reckless in civil law statutes is very limited. There are nevertheless some examples of its use.

The Copyright, Designs and Patents Act 1988 uses recklessness.

A case dealing with the Act is *Nottinghamshire Healthcare National Health Service Trust -v- News Group Newspapers Ltd (2002)*⁷⁵⁹. Here the Claimant sued the Sun newspaper for copyright infringement. The newspaper had printed the photograph of a patient which was held as part of his medical notes at Rampton Hospital without the consent of either the patient or the hospital. The Claimant, relying on s. 97(2) of the Copyright, Designs and Patents Act 1988, claimed additional damages on the grounds of the

⁷⁵⁶ Sunair Holidays Ltd -v- Dodd [1970] 1 WLR 1037 Lord Parker CJ at 1040

⁷⁵⁷ Direct Holidays plc -v- Wirral Metropolitan Borough Council (1998) LTL 28/4/98 Extempore (Unreported elsewhere) obtained via LAWtel, Document No: C9200003

⁷⁵⁸ Yugotours Ltd -v- Wadsley [1988] Crim. L.R. 623

⁷⁵⁹ Nottinghamshire Healthcare National Health Service Trust -v- News Group Newspapers Ltd (2002) [2002] EWHC 409 (Ch)

flagrancy of the infringement and the circumstances surrounding it. The section provides:

“97. (1) Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.

(2) The court may in an action for infringement of copyright having regard to all the circumstances, and in particular to—

(a) the flagrancy of the infringement, and

(b) any benefit accruing to the defendant by reason of the infringement,

award such additional damages as the justice of the case may require.”

The court held that carelessness sufficiently serious to amount to an attitude of “couldn’t care less” was capable of aggravating infringement and of founding an award of damages under s. 97(2). Recklessness could be equated to deliberation for this purpose.

A further Act using the term recklessness is the Insolvency Act 1986.

A case involving recklessness in this context is that of *Cohen -v- Selby*⁷⁶⁰. This case involved the directors of a jewellery company. The affairs of the company were going rather badly when the then shadow director Gerald Selby obtained jewels on credit in order to sell them abroad. He failed to insure the jewels and it was clear at the time that the company would not be able to pay for the jewels other than through the money obtained on their sale. During Mr Selby’s ferry crossing the jewels, which were contained in a holdall bag, disappeared. The court found that Mr Selby was liable for breach of duty under s. 212 of the Insolvency Act 1986. He had acted recklessly in relation to the company’s assets causing loss to the company’s unsecured creditors. It was reckless, knowing that the company could not meet the costs of the jewels other than through their sale, to transport them personally by ferry without insuring them.

⁷⁶⁰ *Cohen -v- Selby* [2000] B.C.C. 275

The Company Directors Disqualification Act 1986 also mentions recklessness.

*In Re Linvale*⁷⁶¹ is a case involving this Act. Here two brothers had created a new similar company immediately after the first one went into insolvency and had done so again when the second went insolvent. It was held that the manner in which they kept on trading, incurring debts which they ought to have known they would be unable to pay, was reckless.

3.5.3 Conclusion

Disappointingly, case-law on “recklessness” within the statutory context is quite thin on the ground. It seems from *Direct Holidays plc -v- Wirral Metropolitan Borough Council (1998)*⁷⁶² and *Yugotours Ltd -v- Wadsley*⁷⁶³ that recklessness, at least within the Trade Descriptions Act 1968, is quite a low hurdle to surmount and certainly very low in comparison with recklessness within the context of international conventions, as we will see below.

Within the Copyright, Designs and Patents Act 1988, the Insolvency Act 1986 and the Company Directors Disqualification Act 1986, the hurdle also seems comparatively low.

The explanation for this phenomenon is of course that these Acts are all protection Acts. They are all aimed at protecting a certain class of people in certain situations from certain types of behaviour found to be undesirable by the state. It is therefore only natural that the judiciary, eager to protect the public in these circumstances, should perceive “recklessness” within these Acts as a low threshold. If one looks at the English legal system the reason for this becomes even more evident, as Acts are made by Parliament only in response to specific perceived problems, an approach quite unlike law-making in continental systems which is of a more general nature rather than being response driven.

It should therefore seem from the above as though recklessness should also be given quite a low threshold within the context of the CLC, given that the CLC is also a protective legal instrument. However, as we will see below,

⁷⁶¹ *In Re Linvale* [1993] B.C.L.C. 654

⁷⁶² *Direct Holidays plc -v- Wirral Metropolitan Borough Council (1998)* LTL 28/4/98 Extempore (Unreported elsewhere) obtained via LAWtel, Document No: C9200003

⁷⁶³ *Yugotours Ltd -v- Wadsley* [1988] Crim. L.R. 623

international conventions and their judicial interpretation are quite different from the interpretation of national statutes. For one thing, in an international convention it is less clear exactly who the group of persons should be which the legal instrument seeks to protect and how.

3.6 How is it used in International Conventions similar to the Oil Convention?

3.6.1 The Warsaw Convention

The Warsaw Convention was originally agreed in 1929. At the time it was thought necessary to impose a uniform international regime limiting and defining the circumstances in which a claimant could recover losses so as to ensure that funding would be forthcoming to set up international airlines.⁷⁶⁴

Article 25 of the Convention provides:

“The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result...”

Undoubtedly the leading case on recklessness within the Warsaw Convention is that of *Goldman -v- Thai Airways International Ltd*⁷⁶⁵.

In this case a passenger on a flight from Heathrow to Bangkok sustained serious injury to his lower spine when he was thrown out of his seat during severe clear air turbulences. The passenger had not fastened his seat belt because the pilot had failed to illuminate the fasten seatbelt signs despite instructions to all pilots to do so while flying in turbulent air and when turbulences could be expected. The area where the turbulences were encountered had been forecast as an area of moderate clear air turbulences before the departure of the airplane. Despite this, it was held that the pilot had not been reckless.

⁷⁶⁴ *Gurtner -v- Beaton* [1993] 2 Lloyd's Rep. 369 Lord Justice Neill at 386

⁷⁶⁵ *Goldman -v- Thai Airways International Ltd* [1983] 1 WLR 1186

The judgment however is not free from difficulty. Eveleigh LJ said⁷⁶⁶ that he would ordinarily have held the pilot to be reckless, because by ignoring the instructions given to him, which he knew were to be for the safety of the passengers, he demonstrated a willingness to accept a risk. He interpreted recklessness as follows: *“When a person acts recklessly he acts in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence....one cannot therefore decide whether or not an act or omission is done recklessly without considering the nature of the risk involved”*⁷⁶⁷. However, Eveleigh went on to say that he could not hold the pilot guilty of recklessness because the pilot had not known that damage would probably result from his omission.

Not only, as will be appreciated, does this make little common sense in reality, but it also goes well against the notion of recklessness. Anyone taking a reckless risk will hope that damage will not result, otherwise they would act differently or be guilty of intent. And it cannot be said that, generally, the pilot would not have known that in case of turbulences passengers not strapped in could sustain injuries. The explanation Eveleigh gives and which he founded on the discussions which took place in 1955/56 in the The Hague at the International Conference which created Article 25, is, in a nutshell that it was a political decision to make it even harder to break limitation by also making it a requirement for the perpetrator to know that damage would probably result. But even if that were true then, surely, in this case the pilot did know that damage would probably result. It is unfortunately clear throughout the judgement where the judge’s sympathies lay. At page 1196 he says that the witnesses supporting the captain both said they would have waited for bumps before switching the seat-belt signs on. He also says that the judge before him thought these witnesses partisan but he, clearly, does not have the same problem. For an English judge not to put considerable weight on the findings of fact in the lower courts is unusual and the judgement is, all in all, unusually pro the Captain. The judge finds at p.1199 that: *“There could be no reason for the pilot to omit so trivial a precaution as the seat belt sign if he had thought that injury was probable”*. So not only does he draw inferences, but he also does so in favour of the Captain, a Captain who had been found to be an unsatisfactory witness by the court below. The same argument is also valid, or, it is submitted, more valid, the other way around: Switching on the seat-belt sign was such a small and elementary act of ensuring passenger safety that a captain who does not do so in these

⁷⁶⁶ Goldman -v- Thai Airways International Ltd [1983] 1 WLR 1186 at 1194

⁷⁶⁷ Goldman -v- Thai Airways International Ltd [1983] 1 WLR 1186 at 1194

circumstances can only be presumed to be reckless. This sort of argument for example is shown in German case law where it was found that a transport business which does not control the comings and goings of each parcel must be presumed to act “leichtfertig” or reckless because in neglecting to observe such elementary precautions no other state of mind can be presumed.⁷⁶⁸ The case should therefore be seen on its facts and if one cuts away the evident bias, what remains is what Eveleigh said earlier in the judgment that such behaviour as was evinced by the pilot was, in itself, in fact reckless, because the pilot had consciously decided to ignore a measure designed for the safety of passengers and had therefore demonstrated his willingness to run the risk. The judge was trying to find a way to influence that finding. In that context it ought to be born in mind that the judge at first instance had considered the captain’s behaviour to be reckless. The case, for that reason, is also very instructive in showing us how flexible the concept of recklessness is and how easily it can and does get altered to fit individual circumstances. Clearly here the judges were keen to exculpate the pilot.

Connor LJ said by way of explanation that “*recklessly and with knowledge that damage would probably result*” has to be construed so strictly because Article 22 imposes limits not only for injury to persons, but also for loss or damage to goods. Eveleigh LJ relied on the second part of the requirement to hold the pilot not reckless. For present purposes we do not have to concern ourselves with why the judge sought to find for the captain on the grounds that he did not meet the “knowledge” requirement of the Article. We are only interested in the meaning of recklessness itself here and in what the term itself means. The question whether and if so how it is then influenced by the remainder of the Article is a step beyond this current thesis and a step which can and should only be taken once the meaning of recklessness itself has been established. As said by Justice Gross in *Margolle and Another -v- Delta Maritime Co Ltd*: “*Plainly, the two requirements of recklessness and knowledge are separate and cumulative.*”⁷⁶⁹

The case of *S.S. Pharmaceutical Co. Ltd and Another -v- Qantas Airways Ltd*⁷⁷⁰ is one of the very few cases where a defendant was held reckless. Here the second Plaintiffs consigned cartons of pharmaceuticals to the Plaintiffs. The Defendants carried the goods from Melbourne to Tokyo. The goods were wrapped in several waterproof layers and marked with stencilled umbrellas to show that they would be damaged if exposed to water. The goods arrived

⁷⁶⁸ BGH, Judgment dated 25.3.2004 –I ZR 205/01, TranspR 7/8 – 2004 p.309-312

⁷⁶⁹ *Margolle and Another -v- Delta Maritime Co Ltd* [2003] 1 Lloyd’s Rep 203 at 209

⁷⁷⁰ *S.S. Pharmaceutical Co. Ltd and Another -v- Qantas Airways Ltd* [1989] 1 Lloyd’s Rep. 319

in Sydney and were stowed in an outside storage position for eight hours awaiting the onward flight to Tokyo, even though showers and occasional thunderstorms had been forecast for that day. In the event there were heavy rainfalls in Sydney which damaged the cargo.

Mr Justice Rogers made quite clear in his judgment⁷⁷¹ that guidance is needed on the interpretation of the limitation provision and that there is little assistance to be had from Australian judgments as the matter had not been previously considered by a superior Australian court. He therefore called in no uncertain terms on Parliament to bring some clarification to the issue warning, quite rightly, that the rights of the air traveller, consignors and consignees of air cargo have to be made clear before a major disaster calling upon these rights should ensue.

In the course of his judgment Mr Justice Rogers found the Defendants reckless without much doubt. In his view there was clear knowledge of the likelihood of damage to specifically vulnerable cargo in the prevailing weather conditions and to leave the cargo exposed to such weather conditions without particular precautions was simply reckless.

In *Gurtner and Others -v- Beaton and Others*⁷⁷² a pilot flying a light aircraft from Gatwick Airport to Dundee crashed into a hillside near Dundee killing two passengers and severely injuring himself as well as three other passengers. The pilot had attempted to approach Dundee by means of the correct chart. However, he had made a grave navigational error and flew into the wrong direction which in turn in the dense cloud persisting at the time, made him think he was over low ground when he was in fact approaching the hillside he then crashed into. The Plaintiffs tried to break limitation under Art. 25 of the Warsaw Convention which applies (with certain exceptions) to carriage by air within the United Kingdom by virtue of the Carriage by Air Act (Application of Provisions) Order 1967. The trial judge thought the pilot reckless in flying that low in dense cloud when he knew this to be a hilly area. At the appeal however the pilot was found not to have been reckless because at the time of the crash he believed himself to be on low ground. It should of course be born in mind that, much like the Goldman case, it will always be very difficult to establish that a pilot was reckless. This is due to the sui generis situation of flying an airplane. In order to establish that a pilot was reckless one would at the same time have to establish that he was

⁷⁷¹ S.S. Pharmaceutical Co. Ltd and Another -v- Qantas Airways Ltd [1989] 1 Lloyd's Rep. 319 at 320

⁷⁷² Gurtner and Others -v- Beaton and Others [1993] 2 Lloyd's Rep. 369

suicidal, as pilots are of course also on board and also in a very vulnerable position. These pilot cases will therefore, it is submitted, have to be viewed with some caution.

In the case of *Antwerp Diamonds BVBA (1), The Excess Insurance Co. Ltd (2) -v- Air Europe*⁷⁷³ a consignment of diamonds worth in excess of \$70,000 was lost while in the custody of the Defendant airline between Brussels and London. The value of the diamonds had however only been declared to be 10,000 Belgian francs, a fraction of their real value. The Defendants argued they were only to be held liable for the declared value of the diamonds as per Art. 22, of the (amended) Warsaw Convention. The Plaintiffs argued that this limitation ought to be broken by Art. 25. On a preliminary point the Court of Appeal held that the limit given in Art. 22 i.e. the declared limit, could be broken by Art. 25 if the Plaintiffs were able to establish the requirements of Art. 25. Hirst LJ said about the requirements for breaking limitation that what was needed was “...to prove the very strict criteria laid down in Article 25...” and that “In such cases of extreme misconduct...it does not seem to me unjust that the limit should be lifted”.⁷⁷⁴ The statement made here is clear. Recklessness would require extreme misconduct and as such will of course be very rare.

The case of *(1) The Thomas Cook Group Limited (2) Thomas Cook Foreign Money Limited (3) Guardforce International (UK) Limited (Formerly Group 4 International Airborne Services Limited) (4) Group 4 Securitas (Malta) Limited -v- Air Malta Company Limited (Trading as Air Malta)*⁷⁷⁵ deals with the unamended⁷⁷⁶ Warsaw Convention where “wilful misconduct” was still the benchmark. The judgment however also comments on recklessness. The claim was brought against Air Malta as contracting carriers because sacks containing banknotes were seized during an armed robbery at Luqa International Airport in Malta. The judge found that while security had some weak points it also had enough plus points to enable Air Malta to make use of the limits of liability under the Convention as their conduct had not been so far outside what would ordinarily be expected as to amount to “wilful misconduct”. In the judgment Creswell J held that: “A person acts with reckless carelessness if, aware of a risk that goods in his care may be lost or damaged, he

⁷⁷³ *Antwerp Diamonds BVBA (1), The Excess Insurance Co. Ltd (2) -v- Air Europe* [1995] 3 WLR 396

⁷⁷⁴ *Antwerp Diamonds BVBA (1), The Excess Insurance Co. Ltd (2) -v- Air Europe* [1995] 3 WLR 396 at 404

⁷⁷⁵ *(1) The Thomas Cook Group Limited (2) Thomas Cook Foreign Money Limited (3) Guardforce International (UK) Limited (Formerly Group 4 International Airborne Services Limited) (4) Group 4 Securitas (Malta) Limited -v- Air Malta Company Limited (Trading as Air Malta)* LTL 6/5/97 Unreported elsewhere, 1994 Folio No. 829, 1994 Folio No.827

⁷⁷⁶ i.e. before amendments were agreed in The Hague in 1955

*deliberately goes ahead and takes the risk, when it is unreasonable in all the circumstances for him to do so*⁷⁷⁷.

An interesting approach was taken in *Monarch Airlines Ltd -v- London Luton Airport Ltd*⁷⁷⁸. Here the term “reckless” appeared in a contract and was construed with the help of an international convention, namely Art. 25 of the Warsaw Convention. The Defendant in this case was the owner and operator of London Luton Airport, the Plaintiff owned and operated aircraft from this airport. The contract between the parties excluded any liability for loss or damage to aircraft occurring in the course of taking off and arising from the negligence of the Defendant or his servants or agents “*unless done with intent to cause damage or recklessly and with knowledge that damage would probably result*”. During a scheduled take-off by one of the Plaintiff’s planes, paving blocks on the turning circle became displaced striking and damaging the aircraft. One of the preliminary issues heard in this case was whether the proviso “*recklessly and with knowledge that damage will probably result*” was to be construed using the same test of construction as that used in construing Art. 25 of the amended Warsaw Convention. The definition given to “recklessness” in the Convention was drawn from the leading case of *Goldman -v- Thai Airways International Ltd*⁷⁷⁹. The question was answered in the affirmative by the court, showing quite clearly that the meaning given to the term “recklessness” in conventions and by the common law is interchangeable. This outcome of course is correct, as after all it is the same term and much legal security could be derived from the fact that terms are always given the same meaning, no matter in what context they appear.

*Nugent -v- Michael Goss Aviation Ltd*⁷⁸⁰ is another case⁷⁸¹ of a would-be reckless pilot and therefore, as mentioned above, special considerations apply. In *Nugent* a passenger was killed in a helicopter crash. His executors claimed that the pilot ought not to be allowed to limit his liability under Art. 25 of the Warsaw Convention because he had been reckless in failing to keep his flying skills up to date, failing to familiarise himself with the helicopter’s navigational aids, failing to make an adequate flight plan and flying whilst

⁷⁷⁷ (1) The Thomas Cook Group Limited (2) Thomas Cook Foreign Money Limited (3) Guardforce International (UK) Limited (Formerly Group 4 International Airborne Services Limited) (4) Group 4 Securitas (Malta) Limited -v- Air Malta Company Limited (Trading as Air Malta) LTL 6/5/97 Unreported elsewhere, 1994 Folio No. 829, 1994 Folio No.827 at p.20

⁷⁷⁸ *Monarch Airlines Ltd -v- London Luton Airport Ltd* [1998] 1 Lloyd’s Rep.403

⁷⁷⁹ *Goldman -v- Thai Airways International Ltd* [1983] 1 WLR 1186

⁷⁸⁰ *Nugent -v- Michael Goss Aviation Ltd* [2000] 2 Lloyd’s Rep. 222

⁷⁸¹ For a case comment see “UK: Warsaw Convention – fatal helicopter crash – limitation of liability”, A& S.L. 2001, 26 (3) 195-196

tired. In the event it was held that the pilot had not been reckless. The reasoning relied on the fact that a pilot who would by his conduct also endanger himself would have to show behaviour “*where there is an element of criminal intent*”⁷⁸². This of course is another example of how intention and recklessness are often confused. What the judgment holds is that the sort of behaviour which a pilot would have to exhibit before a court would hold him reckless would have to be quite exceptional, or “*by its nature likely to be an extreme case*”⁷⁸³. Here it was held insufficient that “background knowledge” (held quite rightly to be indistinguishable from imputed knowledge, i.e. knowing or ought to have known) which the pilot must have had must have meant that he knew damage would probably result from his behaviour.⁷⁸⁴ Had one of course accepted the concept of “background knowledge” one would have moved over to an objective test as the test would then in effect have been: what would the reasonable pilot by virtue of his training have known or appreciated at the time of the incident?⁷⁸⁵ It is submitted that while an objective test is undesirable as discussed above, it is unrealistic not to include a pilot’s training in the consideration. After all, this is part of him as an individual. There is no good reason why, considering the human being in question and applying a subjective test, one should disregard things that individual does or must know from his background. Including such considerations in the test would be much closer to reality and would also avoid much injustice. If a pilot can argue (and such argument is easily made) that he did not even think about the matter at the time, according to Goldman he would then be cleared of any allegation of recklessness. An example of such type of behaviour in a different context is given by Lord Justice Pill of the driver who knows a route and knows there to be a traffic light at a certain point but in a moment of tired distraction goes over the traffic light although it shows red. According to the Goldman argument he did not actually know his action was probable to cause any damage as he was not thinking at the time at all, hence cannot be said to be reckless, which clearly puts a premium on inattention, which is unacceptable. The English courts, at least as concerns Art. 25 of the Warsaw Convention have nevertheless preferred to follow Goldman. In the case of Nugent it is clear, again, that really, the court was unhappy to hold a pilot reckless who had

⁷⁸² Nugent -v- Michael Goss Aviation Ltd [2000] 2 Lloyd’s Rep. 222, Lord Justice Auld at 231

⁷⁸³ Nugent -v- Michael Goss Aviation Ltd [2000] 2 Lloyd’s Rep. 222, Lord Justice Auld at 231

⁷⁸⁴ Again, please note that in German case law imputed knowledge, i.e. what the perpetrator ought to have known, is deemed sufficient. See BGH Judgment dated 25.3.2004 – I ZR 205/01, TranspR 7/8-2004 p.309-312

⁷⁸⁵ This is a consequence the dissenting judge Lord Justice Pill failed to draw at p.231 of Nugent -v- Michael Goss Aviation Ltd [2000] 2 Lloyd’s Rep.222

himself been in the same danger as his passengers as a result of his behaviour.

The Canadian case of *Connaught Laboratories -v- British Airways*⁷⁸⁶ concerned damage to four cartons of vaccines carried by air from Toronto to Sydney via Heathrow. The cartons bore labels directing that they be kept refrigerated at between 2 and 8 degrees Celsius. A similar direction was printed on the air waybills. At Heathrow, the cartons were not placed in a refrigerated area and, as a consequence, the vaccines were spoiled upon arrival in Sydney. The carrier sought to limit his liability pursuant to Article 22 of the Warsaw Convention. The Plaintiff however argued that Article 25 of the Convention applied to disentitle the carrier from limiting his liability. The Plaintiff won on a finding of recklessness. The case is not only interesting as one of the rare findings of recklessness, but also because of the evident will of the judge to let the Plaintiff succeed. Normally, as we have seen, it is the other way round in limitation cases. There was, in this case, no evidence of why the cartons were not stored in a refrigerated area at Heathrow. The judge noted that it could have been because the relevant person thought no damage would come to the vaccines if not refrigerated or because of mere inadvertence. Neither of these scenarios would meet the Article 25 test. However, the judge also noted that it could have been that the relevant person knew there was a risk of damage but simply did not want to bother storing the cargo as directed. Such conduct would meet the Article 25 test. The judge resolved this issue by drawing an adverse inference from the failure of the carrier to present any evidence as to what actually happened and why. The result was that the Plaintiff was entitled to recover in full⁷⁸⁷.

Since limitation under the Warsaw Convention was never broken in an English court the nearest equivalent to be found are courts of the Commonwealth. Even within this ambit however, there seem to be only three cases. The first one was the Australian judgment referred to above, the most recent was the similar Canadian judgment discussed above. The third one was pronounced in the Hong Kong Court of First Instance by Stone J⁷⁸⁸. The case of *DFS Trading Ltd -v- Swiss Air Transport Co Ltd and Jacky Maeder (Geneva and Hong Kong)*⁷⁸⁹ involved the theft of a consignment of valuable

⁷⁸⁶ *Connaught Laboratories -v- British Airways* [2002] O.J. No. 3421

⁷⁸⁷ For a commentary on this case see “Recklessly and with knowledge that damage would probably result”- Loss of rights of limitation under the Warsaw Convention, Peter Jones, 31.March 2005, www.forwarderlaw.com/library/view.php?article_id=326&highlight=reckless on 9.9.2005

⁷⁸⁸ *DFS Trading Ltd -v- Swiss Air Transport Co Ltd and Jacky Maeder (Geneva and Hong Kong)* [2001] HKEC 589

⁷⁸⁹ *DFS Trading Ltd -v- Swiss Air Transport Co Ltd and Jacky Maeder (Geneva and Hong Kong)* [2001] HKEC 589

watches from the terminal operator at Kai Tak airport in Hong Kong. On arrival of the goods in Hong Kong, Shipment Release Forms were issued. For reasons of commercial convenience these Shipment Release Forms had always been treated as bearer documents, in that goods would be handed out to whoever presented these documents without checking their authority to do so. The Shipment Release Forms for the cargo in question had been placed in an unlocked drawer overnight for collection the following morning. During this time the Forms were stolen and used to pick up the goods. The goods were never seen again. The system, or rather lack thereof, for handling and safeguarding Shipment Release Forms was held by the judge to be reckless. It was held to be a slack, undisciplined and uncontrolled practice and the Defendants lost their right to limit their liability.

3.6.1.1 Conclusion

What the cases above show quite clearly is, that wherever the alleged recklessness involves behaviour by a pilot in flight which, necessarily, would also endanger the pilot himself, the courts have bent over backwards in an attempt to find the pilot not reckless, because to do so would be tantamount to saying that the pilot was suicidal. In contrast, where damage occurs on the ground, the courts have been much more ready to make a finding of recklessness. This shows how flexible the term recklessness is and how careful one has to be in its interpretation, as much depends on the surrounding circumstances. The variability with which the term is interpreted is made even worse by adding the subjective requirement established in Goldman that the perpetrator of the action has to have known at the time that damage would probably result. Interpreting what was on a persons mind at some time in the past does of course leave the door wide open to arbitrariness. As Lord Justice Auld put it in Nugent “.. *practical considerations of what a tribunal is prepared to infer as to a defendant’s state of mind may be more determinative than fine matters of principle of what one legal concept adds to another.*”⁷⁹⁰ It therefore seems that the concept of recklessness is often used to guide a case into the desired direction. This of course is highly undesirable as legal security is jeopardized and the door is opened to arbitrariness. A determinative interpretation of the term recklessness is therefore needed.

⁷⁹⁰ Nugent -v- Michael Goss Aviation Ltd [2000] 2 Lloyd’s Rep. 222 at 228

3.6.2 Convention on Limitation of Liability for Maritime Claims 1976

Of all the Conventions containing the term “reckless” the Limitation Convention 1976 is probably the most prominent. It is also the Convention which has yielded the most case-law on the topic of recklessness and is therefore the one which is most useful for present purposes.

The term reckless was introduced into the Limitation Convention 1976 and was not contained in the previous 1957 Convention⁷⁹¹. Sheen J gave an explanation for its inclusion in the 1976 Convention in his judgement in *“The Bowbelle.”*⁷⁹²

The facts of the case were that the “Bowbelle” had been involved in a collision with the “Marchioness” on the Thames. The owners of the “Bowbelle” had constituted a limitation fund in accordance with Art. 11 of the 1976 Convention and applied to have a procedural warning system put in place to prevent any further arrests of the vessel. Their request was granted.

Sheen J said in his judgment: *“I return to consider the Convention of 1976, under which shipowners agreed to a higher limit of liability in exchange for an almost indisputable right to limit their liability. The effect of Articles 2 and 4 is that the claims mentioned in Article 2 are subject to limitation of liability unless the person making the claim proves (and the burden of proof is now upon him) that the loss resulted from the personal act or omission of the shipowner committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. This imposes upon the claimant a heavy burden.”*⁷⁹³

There then followed a string of collision cases considering recklessness within the 1976 Convention.

The first in that row of cases is the case of *“The Captain San Luis”*⁷⁹⁴. Here the Plaintiff’s cruise liner “Celebration” was in collision with the Defendant’s vessel “Captain San Luis” off the coast of Cuba. The Plaintiffs disputed the right of the Defendants to limit their liability alleging that the loss had been caused by the Defendants’ recklessness in that they had allowed their vessel

⁷⁹¹ For the position prior to the 1976 Convention see for example *“The Lady Gwendolen”* [1964] 3 WLR 1062. The required fault was “actual fault or privity”.

⁷⁹² *“The Bowbelle”* [1990] 1 W.L.R. 1330

⁷⁹³ *“The Bowbelle”* [1990] 1 W.L.R. 1330 at 1335

⁷⁹⁴ *“The Captain San Luis”* [1994] 2 W.L.R. 299

to sail from Havana when it was known or ought to have been known that her electrical equipment was defective. The Defendants had further failed to have an adequate system of maintenance in respect of electrical equipment while the vessel was at sea. When the “Captain San Luis” suffered an electrical black-out and was lying unlit and immobilised in the busy shipping lane off the North Cuban coast the Defendants failed to despatch assistance in due time and allowed her to lie there without displaying the proper lights for a vessel during the hours of darkness. The Plaintiffs case had been struck out by the Admiralty Registrar on the grounds that their case on limitation was bound to fail. The action was settled on the basis that the “Celebration” was 25% to blame whereas the “Captain San Luis” was 75% to blame. The current action was brought by the Defendants seeking a declaration that they were entitled to limit their liability and that the Plaintiffs should bear the costs of having disputed the issue. The judge held for the Defendants saying that: “... *The right to limit under the 1976 Convention is a legal right exercisable in circumstances which can readily be established and which can only be defeated if the claimant discharges what Sheen J aptly described as a heavy burden: see The Bowbelle [1990] 1 W.L.R. 1330, 1335*”.⁷⁹⁵

This case once again makes clear how high that burden is if a plaintiff is not even given the chance of a full hearing, because whatever his arguments could be, they are presumed far too weak, even in remarkable circumstances like these where an owner has let his vessel lie in a busy shipping lane without any lighting during the hours of darkness thereby causing another vessel to collide with it.

Another case to be discussed here is “*The MSC Rosa M*”⁷⁹⁶ ⁷⁹⁷. The “MSC Rosa M” was a container ship on demise charter to MSC, the Claimants⁷⁹⁸. The vessel was on a coastal passage from Rouen to Montoir when she began to list to port during ballasting operations. Those on board tried to compensate by filling the starboard tanks but the list continued to increase. The vessel was taken in tow, beached and salvaged. The Defendants, cargo interests, became liable for a substantial salvage claim in addition to loss and damage

⁷⁹⁵ “The Captain San Luis” [1994] 2 W.L.R. 299 at 306

⁷⁹⁶ MSC Mediterranean Shipping Co S.A. -v- Delumar BVBA and Others [2000] 2 Lloyd’s Rep 399

⁷⁹⁷ For comments on this case see Stephen Girvin and Howard Bennett, L.M.C.L.Q. 2002, 1 (Feb), 81-82 or C.L.L. Rev. 2001, 1 (Feb), 48-49 “Shipping - limitation of liability” or Jonathan Chambers, “Shipowner’s right to limitation of liability under the 1976 Convention”, Int. M. L. 2000, 7(4), 120-122 or “Salvage claim is limited”, Fairplay 2000, 339 (6084), 24-25 or Fairplay, News Focus, August 10, 2000, www.fairplay.co.uk, “Salvage claim is limited”

⁷⁹⁸ Under the new procedural rules (Civil Procedure Rules, CPR) plaintiffs are now called claimants. The CPR came into force on 26th April 1999

to the cargo. The Defendants alleged recklessness on the grounds that the primary cause of the casualty was that the cross connecting valve between Nos. 4 starboard lower wing tanks was open or opened because its pneumatic control system had been rendered unsafe by the replacement of its pressure regulating valve by a direct pipe connection. Once an initial list was created by the transfer of water through this connection, the list increased by ingress through a damaged non-return soil overboard valve, defective scuppers, the garage deck portside shell door which was not watertight and other defective non-return valves in the portside ballast tank air vents systems. The Defendants alleged that Captain Maresca, the alter ego of MSC, had been advised of some of these defects and ought to have known about the other defects. It was alleged that his failure to give instructions to check the cross connections amounted to a reckless disregard for the safety of the ship and that as a master mariner and technical director he would know that failure to take those steps would lead to the risk of a serious incident. Mr Justice David Steel held that the Defendants had no real prospect of successfully defending the claim to a decree of limitation. He reasoned that: "*As is immediately apparent, the burden imposed by Art. 4 is an onerous one. Indeed, there are no examples in English law of the defence being successfully run in the maritime context. There are even fewer examples in the parallel aviation field...*"⁷⁹⁹. Unfortunately, the judge added very little to the definition of recklessness, finding that there was no difficulty with the word reckless and citing Lord Justice Eveleigh's definition of it in *Goldman -v- Thai Airways International Ltd.*⁸⁰⁰ He further held that the required knowledge under the Convention was actual rather than constructive knowledge and that the relevant loss had to be apprehended as probable. Here, the pleading was as to what Captain Maresca ought to have known. It had not been suggested that he avoided inquiry into matters in order not to know the true state of affairs. Furthermore, the judge held that the damage Captain Maresca would have apprehended if he had known would have been a pollution incident rather than a capsizing. Mr Justice Steel went on to say that the pleading as a whole reflected an unsuccessful attempt to disguise a plea of actual fault or privity for the purposes of the 1952 Limitation Convention as a plea of reckless conduct with knowledge of probable consequences in the context of the 1976 Convention on Limitation of Liability. The defence, in his eyes, showed no reasonable ground for challenging the right to limit and must therefore be struck out. In order to strike out a defence without a full hearing at trial, the judge must have been very sure indeed that the burden of breaking limitation

⁷⁹⁹ *MSC Mediterranean Shipping Co S.A. -v- Delumar BVBA and Others* [2000] 2 Lloyd's Rep 399 at 401

⁸⁰⁰ *Goldman -v- Thai Airways International Ltd* [1983] 1 WLR 1186

under the Convention and proving recklessness would be impossible. He must have thought that the hurdle was very high indeed or maybe even generally insurmountable. The judge clearly implied that the test for recklessness would only have been satisfied by a finding that Captain Maresca would have had to know or have wilfully shut his eyes to the damage and that he would have had to foresee the exact type of damage which occurred. This of course does make the hurdle for breaking limitation insurmountable.

The next case in this line of cases is the case of the *“The Leerort”*⁸⁰¹ ⁸⁰² .

The “Leerort” was lying peacefully at berth at the container terminal in Colombo when the Respondent’s vessel “Zim Piraeus” in the course of entering the harbour, collided with her breaching No. 1 hold. As a result of the collision the “Leerort” flooded and settled on the bottom. There was some evidence that the engine had stopped for 50 seconds which, it was contended, had led to the collision. The vessel had had problems with her engine and surveillance systems on numerous occasions in the past and that fact was known to the owners. The owners of the “Zim Piraeus” admitted liability for the collision on the basis that the vessel had entered the harbour at excessive speed; that the master had failed to engage manual control before going astern when he ought to have known the vessel’s forward speed would jeopardize an astern start-up in automatic mode; and that further, having engaged manual control the master failed to put the engine immediately full astern. In the Admiralty Court it had been held that the Respondents were entitled to limit their liability and that the wish of the owners of the “The Leerort” to pursue further enquiries with a view to defeating this right to limit was bound to fail. This ruling was upheld on appeal. Lord Phillips recalled the history of the present Convention and that it had been made harder to break limitation after the 1957 Convention. He then went on to consider the present Convention within the context of similar Conventions. He said: *“It is worth pausing to consider just how heavy that burden [the burden of breaking limitation] is. The language of Art. 4 of the Convention echoes, though not exactly, that of Art. 25 of the Warsaw Convention as amended at The Hague, 1955..... The limitation provisions in relation to merchant shipping provide even greater protection than those in relation to carriage by air. It is*

⁸⁰¹ Schiffahrtsgesellschaft “Merkury Sky” mbH. & Co. K.G. -v- MS Leerort NTH Schiffahrts GmbH & Co K.G. (“The Leerort”) [2001] 2 Lloyd’s Rep. 291

⁸⁰² For an article on this ruling see “Owners’ collision liability limit right reinforced. LL, July 25, 2001, Online edition, lloydlist.com

only the personal act or omission of a shipowner which defeats the right to limit".⁸⁰³ Lord Phillips then went on to consider what it is the perpetrator has to foresee to be considered reckless. He first said that the perpetrator has to foresee the actual loss which occurs (e.g. a collision with a specific ship), but then later also held that alternatively foresight of loss of the type which occurred (e.g. a collision) is sufficient. In the event, however, he felt it unnecessary to decide which alternative is the correct one.⁸⁰⁴

The latter alternative must clearly be preferred. To choose the former is not only far removed from reality (how could an owner, typically sitting in his office on dry land miles away from the place of the incident, ever be reckless as to a collision with any specific vessel⁸⁰⁵) but also far too close to intent. And last but not least, such an interpretation is not born out by the wording of the Convention. Later case law will show a clear preference for the latter alternative.⁸⁰⁶

Lord Phillips went on to hold that limitation could only be broken where an owner acted deliberately or recklessly in respect of loss or damage to another's property. He went on to say that: *"in circumstances where, inevitably, the same consequences would be likely to flow to his own vessel, maritime history has many instances of scuttling, but I am not aware of one involving deliberate collision with another vessel. More pertinently, Mr Teare [counsel] has been unable to point to any collision case in any jurisdiction where the right to limit under the 1976 Convention has been successfully challenged. These considerations demonstrate that when a claim is made for damage resulting from a collision, it is virtually axiomatic that the defendant shipowner will be entitled to limit his liability"*.⁸⁰⁷ This again shows a confusion between recklessness and intent which is very unfortunate. Lord Phillips further says that: *"...to seek to challenge what is to all intents and purposes a right to limitation which could only be disputable in very unusual and extreme cases..."*⁸⁰⁸. This clearly shows that in his opinion recklessness is a very rare state of mind which will only seldomly be proved.

⁸⁰³ Schiffahrtsgesellschaft "Merkury Sky" mbH. & Co. K.G. -v- MS Leerort NTH Schiffahrts GmbH & Co K.G. ("The Leerort") [2001] 2 Lloyd's Rep.291 at 294

⁸⁰⁴ Schiffahrtsgesellschaft "Merkury Sky" mbH. & Co. K.G. -v- MS Leerort NTH Schiffahrts GmbH & Co K.G. ("The Leerort") [2001] 2 Lloyd's Rep.291 at 295

⁸⁰⁵ Even though, as the exception that proves the rule, such a case did occur in Margolle and Another – v- Delta Maritime Co Ltd and Others [2003] 1 Lloyd's Rep 203

⁸⁰⁶ See Margolle and Another -v- Delta Maritime Co Ltd and Others [2003] 1 Lloyd's Rep 203 at 212 below

⁸⁰⁷ Schiffahrtsgesellschaft "Merkury Sky" mbH. & Co. K.G. -v- MS Leerort NTH Schiffahrts GmbH & Co K.G. ("The Leerort") [2001] 2 Lloyd's Rep.291 at 295

⁸⁰⁸ Schiffahrtsgesellschaft "Merkury Sky" mbH. & Co. K.G. -v- MS Leerort NTH Schiffahrts GmbH & Co K.G. ("The Leerort") [2001] 2 Lloyd's Rep.291 at 297

In relation to the present case the judge thought it “*totally absurd*”⁸⁰⁹ that a 50 second interruption in the operation of the engine could be attributed to the recklessness of the owner. Lord Phillips went on to say more generally that: “*I suspect that the steps that they [the owners of the “Leerort”] have taken in this case reflect an attitude that is still influenced by the previous regime under the 1957 Brussels Convention. If so, the appellants may not be alone in their failure to come to grips with the current law of limitation. The facts of “The Captain San Luis”, “The Happy Fellow*⁸¹⁰” and “*The MSC Rosa M” suggest that there may be a reaction on the part of many claimants suffering losses which fall within Art. 2 of the 1976 Convention, to pursue investigations of the facts of the casualties in the hope of defeating the right to limit, when the odds against success are very long indeed*⁸¹¹”

The case very clearly shows the attitude of both the Admiralty Court and the Court of Appeal that the right to limit is virtually unbreakable, so much so that parties will not even be granted the right to attempt to break it. It is also evident that recklessness, as a result of that attitude, is interpreted very much as if it were intention.

In practice, this interpretation is of course beneficial to the insurance industry. Not only will it be highly unlikely that limitation will be broken, but moreover, given the apparent standard of misconduct required in order to break limitation, the insurer will have a good chance in such circumstances

⁸⁰⁹ Schiffahrtsgesellschaft “Merkury Sky” mbH. & Co. K.G. -v- MS Leerort NTH Schiffahrts GmbH & Co K.G. (“The Leerort”) [2001] 2 Lloyd’s Rep.291 at 298

⁸¹⁰ “The Happy Fellow” [1997] 1 Lloyd’s Rep 130. In this case the vessel “Darfur” was arrested at Le Havre by “Happy Fellow” interests, following a collision, allegedly as a result of a defective steering gear on board “Darfur”. Shortly thereafter proceedings were commenced in France. On 13th March 1996, time-charterers of the “Darfur” commenced an action in England against owners for an indemnity in respect of liability that may have accrued to them as a result of the incident. Shortly thereafter, the “Darfur” owners instituted a limitation action against time-charterers and also against owners of the “Happy Fellow” and others. The “Darfur” was released from arrest on 2nd May 1996 and one day later one of the arresting parties applied for a stay of proceedings in the English limitation action. Justice Longman found that the liability action and the limitation proceedings were related actions within the meaning of Article 22 of the Brussels Convention 1968 and stayed the limitation action so that both limitation and liability actions could be heard together so as to avoid the risk of irreconcilable judgments. The Owners of “Darfur” appealed saying they had already admitted liability in France and as such there was no risk of irreconcilable judgments. Unfortunately for them, the Court of Appeal [1998] 1 Lloyd’s Rep 13 saw themselves bound by the facts presented to the judge below and did not lift the stay. This case certainly shows that the Limitation Convention is not applied in the same way in every jurisdiction. . The Conventions should be applied in the same way everywhere, which is why analysis like the present one are of importance. Applying it equally would prevent forum shopping such as in this case in future. It serves mainly to drive up costs for the parties and clogs up the courts, and of course defeats the object of having a Convention in the first place

⁸¹¹ Schiffahrtsgesellschaft “Merkury Sky” mbH. & Co. K.G. -v- MS Leerort NTH Schiffahrts GmbH & Co K.G. (“The Leerort”) [2001] 2 Lloyd’s Rep.291 at 298

of being able to establish “wilful misconduct”⁸¹², which under most contracts of insurance will avoid any payment obligations for the insurer. Clauses freeing the insurer from any obligations under the contract of insurance in cases of wilful misconduct certainly are standard features of Club Rules. From the point of view of the victims of pollution, this rule of course, in practice, denies them any opportunity of making a recovery above and beyond limitation limits because if they manage to persuade a court to hold that limitation was broken, the insurer will seek to free itself of any payment obligations towards the owner. Given that the owner will in practice generally have ring-fenced his assets by setting up one-ship companies, the victims are unlikely to recover any substantial sums from the owner, if indeed they are able to recover anything from him⁸¹³.

The next case, *Margolle and Another -v- Delta Maritime Co Ltd and Others*⁸¹⁴, evidenced some remarkable behaviour on the part of the owner seeking limitation. The facts were as follows: the “Guedermes” was proceeding through the Dover Straits on her voyage from Tallinn to Conakry, laden with a cargo of fuel oil. The Claimant in the limitation action’s vessel “Saint Jacques II” was on her way from Boulogne-Sur-Mer to the Falls Bank fishing grounds. The “Saint Jacques II” was deliberately manoeuvred through the Dover Straits as a rogue vessel against the flow of traffic so as to get to the fishing banks before other vessels from Boulogne which had set off at the same time. This had by no means been the first time owners acted in this way in the busy shipping lanes of the Dover Straits. The vessels collided and, unsurprisingly, the owners of the “Guedermes” disputed the right of the owners of the “Saint Jacques II” to limit. What is slightly unusual about this case is, that the vessel’s owner was also her skipper and had set the course she was on. At the time of the collision the skipper had however been below deck having left the watch to a 17 year old deckhand who was not qualified as a skipper and spoke no English but had worked on board for 2 years. Mr Justice Gross, in his decision looked back on the history of the Convention and how the requirements for breaking limitation were tightened in the 1976 Convention. He also acknowledged that a very heavy burden had intentionally been placed on those seeking to break limitation. He then considered the

⁸¹² For a definition of “wilful misconduct” see: *Johnson -v- Marshall, Sons & Co. Ltd.* [1906] A.C. 409, 411. The “*Eurysthenes*” [1976] 2 Lloyd’s Rep. 171 (C.A.). Also: Arnould, *The Law of Marine Insurance and Average*, Mustill J.C., Gilman, B., 16th Edition, Sweet and Maxwell, 1996, § 786

⁸¹³ For a more detailed discussion of wilful misconduct within the P&I Club context, see Røsæg, Erik, *The impact of insurance practices on liability conventions, Legislative approaches in maritime law. Proceedings from the European Colloquium on Maritime Law, Lysebu, Oslo, 7-8 December 2000*, Marlus No 283

⁸¹⁴ *Margolle and Another -v- Delta Maritime Co Ltd and Others* [2003] 1 Lloyd’s Rep 203

definitions of recklessness given in “The Bowbelle”, “The Leerort” and those given in cases dealing with the Warsaw Convention, namely *Goldman -v- Thai Airways Ltd and Nugent -v- Goss Aviation*.⁸¹⁵ He came to the conclusion that the defendants seeking to break limitation “need to surmount a formidable hurdle to succeed...In practical terms, in the collision context, for the reasons given by Mr. Justice Sheen, Mr Justice David Steel and Lord Phillips, it is likely that only truly exceptional cases will give rise to any real prospect of defeating an owner’s right to limit...In my judgment, this is such an exceptional case”.⁸¹⁶ Mr Justice Goss held that: “Accordingly, I am satisfied that the first defendants have a real prospect of demonstrating at trial that what was involved here was the taking of a “stupid risk” or a “reckless manoeuvre .. by a non-suicidal” mariner sufficient to bring the matter within Art. 4”.⁸¹⁷ He went on to say that “.. observations in the authorities, such as the “virtually axiomatic” right of the defendant shipowner to limit his liability in a collision case, does not confer a blanket or any immunity on shipowners in collision cases, inconsistent with Art. 6 of the Convention on Human Rights. Instead, these observations properly reflect the heavy burden facing those seeking to challenge the right to limit under the Convention and the practical commonsense that in collision cases such challenges will only very rarely stand a real prospect of success. In the event, for the reasons already given, this is one of these rare cases.”⁸¹⁸

Mr. Justice Goss’s judgment is applaudable. It will be interesting to see what the outcome of the issue will be at the full trial and whether an era has now begun in which breaking limitation becomes a real possibility rather than a purely theoretical option. So far at least it seems clear that the courts are not willing to make breaking limitation near impossible by requiring, on top of recklessness, knowledge of the actual loss that occurred.

It should be born in mind that the above cases (apart from “The “MSC Rosa M”) all deal with collisions and that, much like the airline cases involving a potentially reckless pilot, these cases are to some extent sui generis in that they do involve the owner’s own vessel and the captain’s own physical safety as well as job security. It should therefore not be surprising that the requirements of recklessness are seen very strictly in such a context. What makes limitation even harder to break in the context of a collision under the 1976 Convention is, that Article 4 of the Convention is phrased in such a way that it is only the owner, charterer, manager or operator of a seagoing ship

⁸¹⁵ See above

⁸¹⁶ *Margolle and Another -v- Delta Maritime Co Ltd and Others* [2003] 1 Lloyd’s Rep 203 at 209-210

⁸¹⁷ *Margolle and Another -v- Delta Maritime Co Ltd and Others* [2003] 1 Lloyd’s Rep 203 at 211

⁸¹⁸ *Margolle and Another -v- Delta Maritime Co Ltd and Others* [2003] 1 Lloyd’s Rep 203 at 212

(and not, as in the Warsaw Convention also the servants or agents) who can act recklessly. There are therefore per definition only two types of situation where it may be possible to break limitation. The owner would either have to be an eyewitness and take certain actions in the navigation of the vessel that brings about the collision, or the owner's management system must have created the situation.

An interesting finding was also made in the Australian case of *Barde A.S. -v- ABB Power Systems, AB and ASEA Brown Boveri Limited; JH Bachmann GmbH and Co. and ABB Power Generation Ltd*⁸¹⁹. Here it was said that after extensive research into the relationship between Art. 4 (recklessness) and Art.11 (constitution of a limitation fund), undertaken for the purpose of aiding a decision in this case, not one case on this subject was found in Australia, Bahamas, Belgium, Croatia, Egypt, New Zealand, Holland, Germany, Greece, Japan, Norway, Poland and Spain. This of course lets us conclude with some likelihood that no cases breaking limitation or even extensively dealing with recklessness under Art. 4 exist in any of these jurisdictions because someone challenging the right to limit will at the same time also at least seek to ensure that assets over and above the limitation fund constituted under Art.11 will be secured.

3.6.2.1 Conclusion

It is evident from the case-law discussed above that recklessness within the 1976 Convention is such a high hurdle to surmount and a standard of behaviour almost never, or maybe indeed never, to be achieved, that so far limitation was never broken in the English courts upon a finding of recklessness. In the context of the 1976 Convention therefore recklessness seems to mean virtual intention. A state of mind close enough to intention to encompass the will or at least acquiescence, to sink or damage one's own vessel in the process and maybe even put one's life at risk. It is contended that this, surely, is putting the matter too highly and that if this definition were correct recklessness would add nothing in practice to intention. It is evident however that recklessness was meant to be different from intention as both are mentioned in Art. 4.

⁸¹⁹ *Barde A.S. -v- ABB Power Systems, AB and ASEA Brown Boveri Limited; JH Bachmann GmbH and Co. and ABB Power Generation Ltd*, No. NG399 of 1995, FED No. 828/95, www.judgments.fedcourt.gov.au

3.6.3 Conclusion

It is clear from the above that recklessness is a very flexible concept and that judges are by no means whimsical in interpreting the term in such a way as to suit their needs. What comes clear from an analysis of the above cases is, that a pilot, master or owner will not be held reckless where he would also have endangered his life, safety or property in the process. In contrast, where only goods which are not the property of the perpetrator are involved, the courts are quite happy to make a finding of recklessness. It therefore seems as if there are two different types of recklessness at large in practice: the “personally involved recklessness” and the “other people’s goods recklessness”.

While such a spilt is of course unacceptable, it does allow us to draw some conclusions on how recklessness would be interpreted within the CLC. Whether recklessness would be the insurmountable hurdle that borders intention as in the pilot or master cases, or whether it would be the “more than negligence” state of mind of the damaged goods cases would entirely depend on the situation. If the CLC incident were to endanger the master or the vessel itself, “recklessness” would in all likelihood be treated as virtual intention. If it involved pollution and/or damage to the property of another it would probably be interpreted as a “couldn’t care less” attitude.

3.7 Other maritime conventions where the term will appear in the future

3.7.1 The International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances (HNS)

The HNS Convention has not yet entered into force. In accordance with Article 46, the Convention will enter into force eighteen months after the date on which the following conditions are fulfilled:

(a) at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it, and

(b) the Secretary General has received information in accordance with article 43 that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c) have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.

As of 30th April 2006, only eight states, representing 4.83% of world tonnage had ratified the Convention.⁸²⁰

The regime established by the HNS Convention is largely modelled on the existing regime for oil pollution from tankers set up under the International Convention on Civil Liability for Oil Pollution Damage 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992.

Apart from covering pollution damage arising from spills of chemicals and other hazardous and noxious substances, the Convention also covers fire and explosions, including loss of life or personal injury and loss of or damage to property.

Substances considered to be hazardous and noxious under the Convention are defined by reference to lists of substances. These include some types of oils⁸²¹, other liquid substances defined as noxious or dangerous, liquefied gases, liquid substances with a flashpoint not exceeding 60°C, dangerous, hazardous and harmful materials and substances carried in packaged form. Solid bulk materials defined as chemical hazards are also included. The Convention also covers residues left by a previous carriage of HNS, unless the goods previously carried were carried in packaged form.

The Convention defines damage as including loss of life or personal injury; loss of or damage to property outside the ship and loss or damage by contamination of the environment. Damage further includes the cost of preventative measures and further loss or damage caused by them.

The Convention introduces strict liability for the shipowner and a system of compulsory insurance and insurance certificates.

⁸²⁰ www.imo.org/conventions on 26.5.2005

⁸²¹ Not all types of oil are covered by the CLC. See above for discussions on the CLC

The unit of account used in the Convention is the Special Drawing Right (SDR) of the International Monetary Fund (IMF).

Once it enters into force, the Convention will make it possible for up to 250 million SDR (about US\$320 million) to be paid out in compensation to victims of accidents involving defined substances.

For ships not exceeding 2,000 units of gross tonnage the limit of liability is set at 10 million SDR (about US\$12.8 million). For ships above that tonnage, an additional 1,500 SDR is added for each unit of tonnage. For each unit of tonnage in excess of 50,000 units of tonnage 360 SDR is added. The total maximum amount a shipowner can be liable for is limited to 100 million SDR (US\$128 million).

States which are parties to the Convention can decide not to apply the Convention to ships of less than 200 gross tons which carry HNS only in packaged form and on national voyages. Two neighbouring states can further agree to apply similar conditions to ships operating between ports in their two countries.

The Convention further requires compulsory insurance by shipowners carrying defined substances.

Liability is limited by Article 9 which employs recklessness, proving the popularity and importance of this concept now and for the future of international conventions. Article 9(2) of the Convention provides that:

“The owner shall not be entitled to limit liability under this Convention if it is proved that the damage resulted from the personal act or omission of the owner, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result”

It is therefore clear that, in the future, the concept of recklessness will play an important role in any accidental pollution incidents. This will greatly widen the application of the concept.

For more information on the HNS Convention, please see the IMO Correspondence Group on Implementation of the HNS Convention. Their web

page⁸²² is updated regularly to cater for the ongoing correspondence with regard to the Convention.

3.7.2 International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention)

This Convention was adopted in London on the 23rd of March 2001. It was modelled on the CLC. Its objective is to deal with compensation for damage caused on the territory by oil spills from ship's bunkers, as such spills are not covered by the CLC ⁸²³.

The Convention, according to its Art. 1 (9) covers the following damage:

- “(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker 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; and*
- (b) the costs of preventive measures and further loss or damage caused by preventive measures.”⁸²⁴*

The Convention allows for limitation of liability under Article 6. This Article provides 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”⁸²⁵.

It therefore, in a roundabout way, leads back to the Limitation Convention 1976 and limitation employing the concept of recklessness, as discussed above.

⁸²² <http://folk.uio.no/erikro/WWW/HNS/hns.html> on 20.10.2005

⁸²³ See discussions on the CLC above

⁸²⁴ <http://www.fog.it/legislaz/londra-2001.htm#NR1> as at 12.12.2005

⁸²⁵ <http://www.fog.it/legislaz/londra-2001.htm#NR6> as at 12.12.2005

During the Diplomatic Conference at IMO's headquarters held from 19th to 23rd March 2001 in London during which the Convention was adopted, a further three resolutions were adopted. One of these resolutions is relevant here as it, too, introduces "recklessness", namely the "Resolution on protection for persons taking measures to prevent or minimize the effects of oil pollution"⁸²⁶. This resolution recommends that states implementing the Convention ought to legislate to protect those which take measures to prevent or minimize the effects of bunker oil pollution. It recommends more specifically that persons taking reasonable measures to prevent or minimize the effects of oil pollution should be exempt from any liability, unless the liability in question was caused by their personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result. The model that is recommended to states is the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention).

The Bunker Convention has not entered into force yet. It will enter into force 12 months following the date on which 18 states, including five states each with ships whose combined gross tonnage is not less than 1 million gt, have either signed it without reservation as to ratification, acceptance, or approval or have deposited instruments of ratification, acceptance, approval, or accession. As on 30th April 2006 ten ratifications had been received.⁸²⁷

3.7.3 CMI/UNCITRAL Draft Instrument on Transport Law (10th December 2001 and 8th January 2002)⁸²⁸

In 1998 the Comité Maritime International (CMI) started work on a Draft Instrument on Issues of Transport Law. A very ambitious project which did not produce its first draft until 10th December 2001. While the Instrument currently has no practical relevance, it does show what sort of legal concepts were felt worthy of inclusion. Amongst these concepts was the concept of "recklessness", which was used to effect the loss of the right to limit liability. This shows clearly that in the future this concept will be used in liability conventions.

⁸²⁶ <http://www.imo.org/home.asp> as at 10.12.2005

⁸²⁷ www.imo.org as at 26.5.2006

⁸²⁸ This document (except for the Introduction) is identical to the CMI Final Draft Instrument on Issues of Transport Law of December 10th 2001.

In the Draft Instrument the concept of recklessness is used in Article 6.8 which provides that:

*“Neither the carrier nor any of the persons mentioned in Article 6.3.2 is entitled to limit their liability as provided in Articles [6.4.2], 6.6.4, and 6.7 of this instrument, [or as provided in the contract of carriage,] if the claimant proves that [the delay in delivery of,] the loss of, or damage to or in connection with the goods resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result”*⁸²⁹

The UNCTAD Commentary on the Draft Instrument says that: *“In practice, “breaking the limit” would be virtually impossible”*⁸³⁰, a view which, as we have seen, seems all too true.

3.7.4 Conclusion

The term reckless has obviously been considered appropriate for inclusion in various new conventions. This does highlight the term’s importance now and also shows that it will gain much more importance in the future. It is therefore very important to come to understand the term clearly and find a definition which will be understood and adhered to internationally. Otherwise varying interpretations of the term will lead to forum shopping, injustice and uncertainty which are exactly what an international convention is designed to avoid.

3.8 Conclusion

In the course of this analysis it has become clear that the term reckless in its legal context today has moved away from its original Old English meaning of “receleas”: “careless, thoughtless, heedless”.

⁸²⁹ <http://www.mcgill.ca/maritimelaw/maritime-admiralty/cmi-uncitral/#ch6> as at 12.12.2005

⁸³⁰ UNCTAD Commentary on CMI/UNCITRAL Draft Instrument on Transport Law (March 5th 2002) para 85. http://www.mcgill.ca/maritimelaw/maritime-admiralty/unctad/#intro_subs_liab as at 12.12.2005

It is also clear that, however often judges will proclaim that the term retains its ordinary meaning, nobody is entirely sure what that is. The term has undoubtedly over time taken on a specific meaning within the law. The case-law shows that due to the confusion surrounding this term it is often used by the judiciary to achieve the desired outcome to a case. Clearly this is an undesirable state of affairs. Recklessness in its legal context ought to have a clear meaning which is applied consistently.

What clarification in relation to the meaning of the term “recklessness” can we therefore draw from the above analysis? And how is and should the term therefore be used in the context of the CLC?

The definition of recklessness given in Black’s Law Dictionary⁸³¹ is certainly not far off. “Recklessness” is there defined as “1. Conduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk. Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing. 2. The state of mind in which a person does not care about the consequences of his or her actions – also termed heedlessness.”⁸³²

Some assistance can be derived from Roman law which already made use of the term “reckless” within the context of the safe-keeping of goods for others. A safe-keeper could be held liable for damage caused by behaviour which was so grossly lacking in care that it was reckless, bordering on deliberate fault (*culpa lata*).⁸³³ *Culpa* however was characterised by the fact that the perpetrator had been passive. It was the omission to do something, rather than a form of activity that made him culpable. So *culpa lata* does not entirely fit the concept. If such a thing existed, recklessness would be more of an “active *culpa lata*” without at the same time being a *dolus*.

Turning to English law and to criminal law first, it can be seen that during the last century the interpretation of the term reckless has gone full circle. Starting with Professor Kenny’s⁸³⁴ definition in 1902 that “*the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it*”. This definition was later approved in the famous case of *R -v-*

⁸³¹ Black’s Law Dictionary, 7th Edition, Bryan A. Garner, Editor in Chief, West Group, St Paul, Minn., 1999

⁸³² Black’s Law Dictionary, 7th Edition, Bryan A. Garner, Editor in Chief, West Group, St Paul, Minn., 1999, p. 1277

⁸³³ Thomas Glyn Watkin, *An Historical Introduction to Modern Civil Law*, Ashgate, Dartmouth, Aldergate 1999, p. 291

⁸³⁴ C. S. Kenny, *Outlines of Criminal Law*, Cambridge, Cambridge University Press, 1902

Cunningham entrenching the view that only advertent recklessness was culpable. By 1982 the term was then widened by Lord Diplock in the well-known decision in *R -v- Caldwell*⁸³⁵ to include inadvertent recklessness. The test of recklessness was said to be objective and to apply to all types of accused alike. At the high-point of this development *Elliot -v- C*⁸³⁶ decided that no exceptions would be made. Not even where the accused was young or mentally impaired. Needless to say, this interpretation of recklessness was very harsh and led to considerable injustice in some cases. It was, however, also conceptually wrong as this definition included inadvertent behaviour within the definition of recklessness. It is clear that recklessness cannot be inadvertent as inadvertent recklessness is in fact gross negligence. Lord Goff described the Caldwell era very well when he said in *R -v- Reid*⁸³⁷ that recklessness: “as used in ordinary speech, and likewise as used in our law, it has more than one meaning”⁸³⁸. Different tests for recklessness were used for different crimes, and it seemed as though recklessness was everything to all people.

Fortunately, the criminal law seems to have come round to its initial pre-Caldwell position following the recent ruling in *R -v- G*⁸³⁹. It can only be hoped that subjective “Cunningham recklessness” will from now on apply equally to all crimes and in all cases.

Within the civil law the interpretation of the term reckless has also been subjected to change. Following the development of case-law from *Robert Addie & Sons (Collieries) Ltd -v- Dumbreck*⁸⁴⁰ in 1929 to *Herrington*⁸⁴¹ in the early 1970’s, it becomes clear that the meaning of recklessness is very dependent on socio-political changes. What was felt to be acceptable behaviour in 1929 was classed reckless in 1972.

As concerns national statute law, it seems that recklessness is generally perceived as quite a low hurdle to surmount in the context of a statute. This is unsurprising as within the English legal system national Acts are usually aimed at protecting a certain class of people in specific situations from

⁸³⁵ *R -v- Caldwell* [1982] AC 341

⁸³⁶ *Elliot -v- C* [1983] 2 All ER 1005

⁸³⁷ *R-v-Reid* [1992] 1 WLR 793

⁸³⁸ *R-v-Reid* [1992] 1 WLR 793 at 807, 815

⁸³⁹ *R-v-G and another* [2003] HL

<http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd031016/g-2.htm>

⁸⁴⁰ *Robert Addie & Sons (Collieries) Ltd -v- Dumbreck* [1929] AC 358

⁸⁴¹ *Herrington -v- British Railways Board* [1971] 2 WLR 477 and *British Railways Board -v- Herrington* [1972] AC 877

certain types of behaviour found to be undesirable by the state. It is therefore only natural that the judiciary, eager to protect the public in these circumstances, should perceive recklessness within a statute as a low threshold to overcome.

Within the context of international conventions, more specifically the Warsaw Convention and the 1976 Limitation Convention, it seems very obvious that the courts will adjust the meaning of recklessness to suit the situation at hand. A pilot, master or owner will not be held reckless where he would also have endangered his life, his personal safety or property in the process. In such cases recklessness is treated as an insurmountable hurdle close to intent. In contrast, where only goods which are not the property of the perpetrator are involved the courts are quite happy to make a finding of recklessness and recklessness is treated like an aggravated form of negligence.

It seems clear from the analysis of the above that recklessness is a concept settled somewhere between negligence and intent. If we imagine the states of mind as a sliding scale, recklessness would be found closer to intent than to negligence.

While being similar to negligence it is characterized by advertence, by consciousness, by some sort of realisation of the risk taken. It has an active mental element to it, even if committed by omission. There is an element of wilfulness in recklessness, of wilfully shutting one's eyes to the danger, of wantonness, of deliberance, of thought. Yet it is not like intent, which aims for the result. While it is "*akin to intentional injury*" as Lord Wilberforce puts it in *British Railways Board -v- Herrington*⁸⁴², recklessness is much more aimless, much more hazy.

There is also a moral, a culpose element to recklessness that negligence does not have. It is that which makes recklessness fit to be included in the criminal law as society can justly punish the anti-social mind. The culpose nature of recklessness is also the reason why recklessness has to be interpreted subjectively rather than objectively, because the fault of the specific individual is at issue.

Academically speaking, therefore, recklessness can be said to be a culpose conscious or half-conscious risk-taking which does not desire the adverse

⁸⁴² *British Railways Board -v- Herrington* [1972] AC 877 at 919

result but either hopes for that result not to occur or does not care whether or not it occurs.

Practically speaking, however recklessness will be used to let political, sociological, economical and moral considerations flow into the decision of a particular case, or type of case or law to achieve its desired outcome.

Chapter 4

How is Recklessness used in the International Convention on Civil Liability for Oil Pollution? What is it understood to mean?

The Comité Maritime International has established a database of decisions by national courts on the interpretation of maritime conventions⁸⁴³. Its purpose is to make available to judges, lawyers, academics and to the industry as many judgments as possible on the interpretation of maritime conventions, in the hope that this will contribute to their uniform interpretation. No decisions on recklessness or even limitation of liability are available on this database.

ILOPF, renowned for their excellent library on the subject of oil pollution have no legal decisions on the concept of recklessness within the International Convention on Civil Liability for Oil Pollution. Despite repeated enquiries, the IOPC Fund in London has nothing either. Sir Hans Kronberg did not exaggerate when he said *“cases [under the CLC] have seldom come to court to allow precedents to be set”*⁸⁴⁴

Willem Oosterveen, Chairman of the Assembly of the IOPC Fund 1992, explains why there is such little case law: *“The Fund is composed of Member States which are usually primarily interested in making sure that oil pollution damage is compensated in full and as quickly as possible”*.⁸⁴⁵ As a result the Fund tends to apply the Convention in an objective manner rather than trying to reject a claim. Secondly, shipowner, P&I Club and Fund usually work closely together from the start in handling the incident, assessing the damage etc, so therefore fewer disputes arise in the first place. Their co-operation is based

⁸⁴³ http://www.comitemaritime.org/jurisp/ju_intro.html on 5.9.2005

⁸⁴⁴ The Royal Commission on Environmental Pollution, chairman Sir Hans Kornberg, 8th Rep., Oil Pollution of the Sea, Presented to Parliament by Command of Her Majesty, October 1981, London, Her Majesty's Stationary Office, Cmnd. 8358, at p. 68

⁸⁴⁵ Willem Oosterveen, “Some recent developments regarding liability for damage resulting from oil pollution –from the perspective of an EU Member State”, *Environmental Law Review* 6 (2004) pp 223-229 at p.227

on a memorandum of understanding between the International Group of P&I Clubs and the Fund and ensures that the Fund's policies are adhered to by owners and P&I Clubs in practice. Mr. Oosterveen concludes that: *"The combination of the Fund operating as objectively as possible and the standard and good co-operation with the shipowner/P&I Clubs on the basis of criteria for the admissibility of claims adopted within the Fund have led to a practice where the great majority of the claims is settled out of court"*.⁸⁴⁶

But even apart from the situation described by Mr Oosterveen there are a number of other reasons why there is little litigation, let alone cases on recklessness involving the CLC.

Firstly, owners are unlikely to debate compensation payments up to a certain sum as the Fund⁸⁴⁷ will reimburse owners for payments in excess of a certain amount up to a set maximum. Secondly, where oil companies are directly involved compensation is often paid very willingly by these companies for reasons of publicity and in an attempt to avoid a bad press. Also, everyone knows that the limits are, for practical purposes, virtually if not entirely unbreakable. This of course deters potential litigants from even attempting a costly claim that seems to promise little success. The worst and hitherto seemingly undiscovered problem however, is that an attempt at breaking an owner's right to limit liability may potentially end in the litigant recovering less than he would have done had the limits applied. The reason for this is that the 1992 Protocol provides that the Fund will not pay in cases where the pollution was caused by the wilful misconduct of the owner. Wilful misconduct however is very much like recklessness and has historically been treated as quite similar. If recklessness were proved, wilful misconduct may be only a small step away and a step maybe all too easily made by those in whose interest it would be to do so. The danger in alleging that the owner was reckless is therefore that the Fund will then refuse to reimburse the owner on the grounds that the former has caused the pollution by wilful misconduct. In that case an owner, who typically will have hedged his financial exposure by splitting his fleet into one-ship companies (and the one in question will in such cases usually not be worth all that much anymore), is not funded and claimants may not see any or only minimal compensation. Worse still, in such a case the owner's insurance may also not pay as P&I

⁸⁴⁶ Willem Oosterveen, "Some recent developments regarding liability for damage resulting from oil pollution –from the perspective of an EU Member State", *Environmental Law Review* 6 (2004) pp 223-229 at p.227

⁸⁴⁷ The Fund gets its contributions from all those who receive in excess of 150,000 tonnes of crude oil per calendar year. Richard Lloyd, *Slick Operators*, *Legal Bus.* 2001, 113 (April) 82-84

Clubs, too, have a clause freeing them from any obligations to make payment in cases of wilful misconduct.⁸⁴⁸ Challenging the owner's right to limit ought therefore to be well thought through, prepared very carefully and serious consideration should be given to the question whether the owner would have enough attachable funds without the help of his insurance company or the Fund. Otherwise there is a danger that victims could be worse off having challenged the right to limit than they would have been not challenging.

4.1 An attempt at construing how “recklessness” will be interpreted within the International Convention on Civil Liability for Oil Pollution

As discussed above, there are unfortunately no cases involving recklessness within the context of the CLC. However, from the analysis of recklessness within its other contexts, it is possible to draw some conclusions as to how the term would, or should, be interpreted within the CLC and within the context of those conventions which have yet to come into force.

Within these conventions “recklessness” should be interpreted as an advertent form of behaviour and quite distinct from both intent and negligence.

It would not be surprising if recklessness within the context of oil pollution would be seen as a very high hurdle because in present day society oil has an important place and its transportation is therefore deemed to be worthy of political protection. The response to the recommendation made in the Donaldson Inquiry⁸⁴⁹ that the UK Government was determined to take action should the revised test for breaking limitation provide excessive protection to reckless operators, is therefore likely to be forgotten in practice.

Although it would seem from case-law that within a statutory context recklessness is given quite a low threshold where the legal instrument is designed to protect the public, the situation is quite different when it comes to an international convention. International conventions are not made in response to a specific problem as (English) national statutes are and the 1992

⁸⁴⁸ See discussion on this point above

⁸⁴⁹ Safer Ships, Cleaner Seas, Government Response to the Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping, Presented to Parliament by Secretary of State for Transport, February 1995, Cm 2766, London HMSO

Protocol, as opposed to the initial Convention, is not so much response led. Also, very diverse groups of people and interests are often protected by a convention. For example in the CLC it is unclear who the main group which the CLC seeks to protect is: is it society as a whole? Or the shipowning industry? Or maybe the insurance industry? The fishing industry? The tourist industry? It is clear that too many divergent interests are being protected by the Convention. To complicate matters even further, it is not even clear how a certain group would best be protected under the Convention. Is society better served by clean oceans or fuel to serve its many daily needs? Is the tourist industry better furthered by a clean beach or the fuel the aircraft needs to get the tourists to that beach?

It is therefore more likely that international conventions are better pointers towards how recklessness would be interpreted within the CLC. From the examples provided by the Warsaw Convention and the 1976 Limitation Convention it seems as if the question whether recklessness would be seen as the insurmountable hurdle that borders intention, as in the pilot or master cases, or whether it would be the “more than negligence” state of mind of the damaged goods cases, would entirely depend on the situation. If the CLC incident were to endanger the master or the vessel itself, recklessness would in all likelihood be treated as virtual intention. If it involved pollution and/or damage to the property of another it would probably be interpreted as a “couldn’t care less” attitude.

However, the latter scenario is unlikely due to the nature of oil pollution incidents. Also, it should be born in mind that the CLC is different to the Warsaw Convention or the 1976 Limitation Convention. Oil, and therefore the transportation thereof, has a highly political side to it. Our society would not function without oil supplies. We only need to think back to the impact the oil shortages had in the 1970’s. Wars are fought over the supply of oil. It is therefore more than likely that the courts will protect the oil supply by protecting those who transport it and that, therefore, recklessness will probably always be treated as being akin to intention within the context of the CLC.

4.2 Conclusion

Litigation on recklessness and attempts by claimants to break limitation are, as we have seen, few and far between. Given the special circumstances surrounding the CLC, it is unsurprising that so far no case has come to court dealing with this issue. It is however likely that at some stage in the future such a case will be presented to the courts and preparation for this event is important. Especially given the large sums of money and the publicity usually involved in oil pollution cases, a clarification of the term reckless within the CLC is vital. It seems likely that for political, economic and sociological reasons the term “reckless” will be given a very strict interpretation within the CLC, making it a virtually insurmountable hurdle.

Chapter 5

Conclusion

The International Convention on Civil Liability for Oil Pollution Damage presented a specific response to the “Torrey Canyon” disaster. The Convention has been updated over the years to adapt to new economic and political realities. The limitation amounts of the Convention were updated for instance and the balance between higher limitation amounts and the ability to break limitation was readjusted to respond to political forces centring mainly around the question whether shipowners or oil companies should bear the bigger financial burden when it came to oil pollution, but also responding to changes in the insurance market. As the insurance capacity of the market increased, higher limitation limits could be offered but only in return for a heightened certainty that such limits would not be broken.

These political and economic changes are inseparable from the interpretation of recklessness. The reason why recklessness is such a nebulous term is because it is actually the manifestation of a political current. Where economic, sociological and political realities are such as to allow higher limitation amounts but do not allow the uncertainty of these being breakable, the term will, as is the case at the moment, be interpreted as a standard impossible to prove. Recklessness then comes to mean something so close to intent that for practical purposes it is almost indistinguishable. In a different political climate the term can however be interpreted the other way as being merely something more than negligence. This has been done for example in damaged goods cases such as *S.S. Pharmaceutical Co. Ltd and Another -v- Qantas Airways Ltd*⁸⁵⁰ where the situation is clearly different from incidents of oil pollution or would-be reckless pilots and master mariners. On a sliding scale, recklessness, while being distinct from both concepts, is placed between intent and negligence but where exactly its meaning is settled depends on political, economic, sociological and moral realities prevailing at the time and for the type of situation at hand. External influences apart, all that can be said about recklessness is, that it is a culpable conscious or half-

⁸⁵⁰ *S.S. Pharmaceutical Co. Ltd and Another -v- Qantas Airways Ltd* [1989] 1 Lloyd’s Rep. 319

conscious risk-taking which does not desire the adverse result but either hopes for that result not to occur or does not care whether or not it occurs.

In practice the International Convention on Civil Liability for Oil Pollution Damage seems to work well and it seems to have struck a satisfactory balance between all the various interests involved from shipowners to insurers, consumers and oil interests. It is a balance that accords from an economic perspective of the law with the Kaldor-Hicks-criterium⁸⁵¹ which seeks to find the best solution for the common good by placing the responsibility on the cheapest cost avoider, the party who is able to insure cheapest and the party who bears the superior risk⁸⁵². By placing responsibility mainly on the shipowner, this was achieved, while the Fund Convention redresses the moral balance by also involving oil interests and through them to some extent consumers, in the payment of any pollution caused.

However, the “acid test”, so to speak, has yet to be made when the first case of recklessness reaches the court room. It can only be hoped that the judiciary will take the opportunity when it arises to give the term a clear and tangible meaning at least within the International Convention on Civil Liability for Oil Pollution Damage. Otherwise recklessness will remain a worry as it has done in other conventions because the term is so nebulous and therefore always presents an incalculable element in any litigation involving this aspect. It does however unfortunately seem unlikely that the courts will give the term a clear definition as they seem to want the freedom of having a flexible term so as to be able to adapt their decision to the realities of the world and the type of case at hand. While this may be a way of creating greater justice in an individual case, it also creates an undesirable uncertainty for litigants in general. Within the context of a convention, and especially within the context of the International Convention on Civil Liability for Oil Pollution Damage, it is particularly important to ensure a uniform application of the Convention, and this will only be achieved by a clear definition of its terms.

⁸⁵¹ See Fletcher, George, P. *The Basic Concepts of Legal Thought*, Oxford University Press, 1996, p. 158. Sen, A.K., *Collective Choice and Social Welfare* (Advanced Textbooks in Economics), North Holland Publishing Co., 1979, p. 30. Wehrt, Klaus, *Ökonomische Analyse des Vertragsrechts*, <http://bgb.jura.uni-hamburg.de/cd-demo/a/a--oear.htm> on 14.5.2002

⁸⁵² For further economic analysis of liability laws see inter alia Hartje, Volkmar J. *Liability Versus Regulation*, Wissenschaftszentrum Berlin, Internationales Institut für Umwelt und Gesellschaft, discussion papers, IIUG/dp 81-16, September 1981, Bradley, P.G., *Marine Oil Spills: A Problem in Environmental Management*, NRJ, Vol.14 (3) 1974, pp. 349-372, Mc Gurren, H.J. *The Externalities of a Torrey Canyon Situation*, An Impetus for Change in Legislation, NRJ, Vol. 11 (2) 1971, pp. 349-372

Appendix I

Oil Spill Statistics

Annual quantity of oil spilt⁸⁵³

Year	Quantity (tonnes)
1970	330,000
1971	138,000
1972	297,000
1973	164,000
1974	175,000
1975	357,000
1976	364,000
1977	291,000
1978	386,000
1979	640,000
1970s	Total 3,142,000

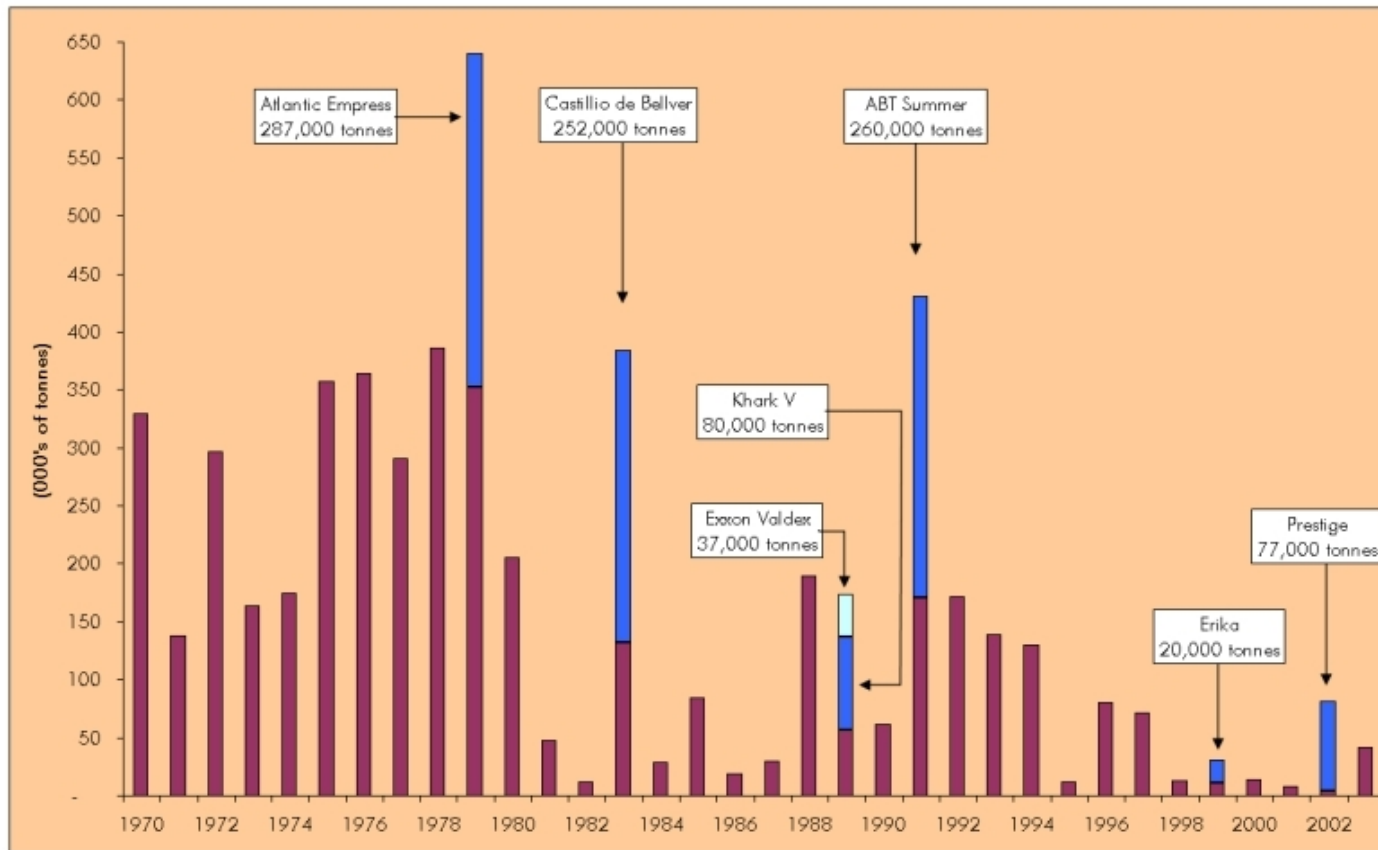
Year	Quantity (tonnes)
1990	61,000
1991	430,000
1992	172,000
1993	139,000
1994	130,000
1995	12,000
1996	80,000
1997	72,000
1998	13,000
1999	29,000
1990s	Total 1,138,000

1980	206,000
1981	48,000
1982	12,000
1983	384,000
1984	28,000
1985	85,000
1986	19,000
1987	30,000
1988	190,000
1989	174,000
1980s	Total 1,176,000

2000	14,000
2001	8,000
2002	67,000
2003	42,000
2004	15,000
2005	17,000
2006	13,000

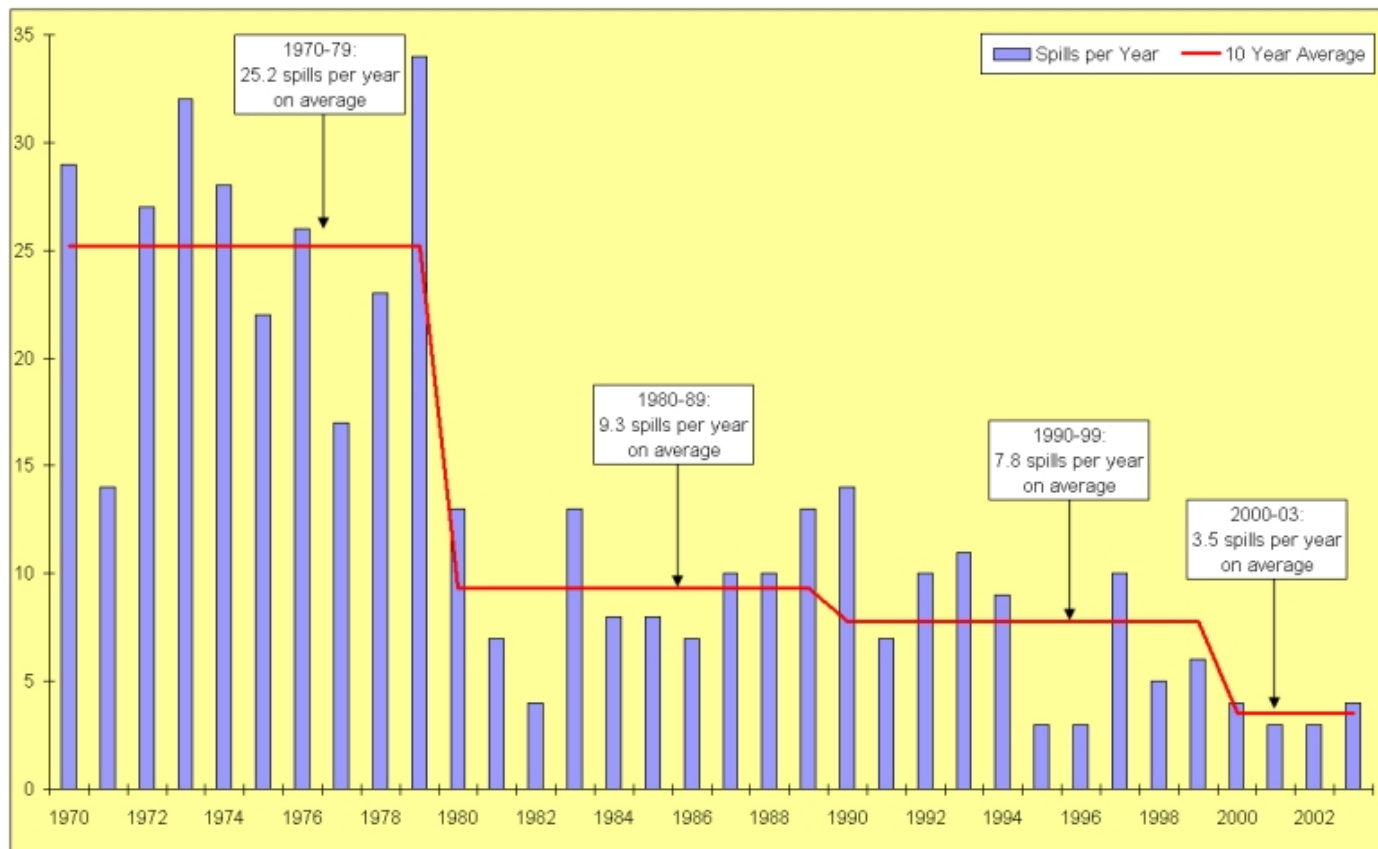
⁸⁵³ The International Tanker Owners Pollution Federation Limited webpage www.itopf.com. On 20.3.2007

Quantities of oil spilt⁸⁵⁴



⁸⁵⁴ The International Tanker Owners Pollution Federation Limited, ITOPF Handbook 2003/2004

Numbers of spills over 700 tonnes⁸⁵⁵



⁸⁵⁵ The International Tanker Owners Pollution Federation Limited, ITOPF Handbook 2003/2004

Number of spills over 7 tonnes⁸⁵⁶

Year	7-700 tonnes	>700 tonnes
1970	6	29
1971	18	14
1972	48	27
1973	27	32
1974	89	28
1975	95	22
1976	67	26
1977	68	17
1978	58	23
1979	60	34
1980	52	13
1981	54	7
1982	45	4
1983	52	13
1984	25	8
1985	31	8
1986	27	7
1987	27	10
1988	11	10

Year	7-700 tonnes	>700 tonnes
1989	32	13
1990	51	14
1991	29	7
1992	31	10
1993	31	11
1994	26	9
1995	20	3
1996	20	3
1997	28	10
1998	25	5
1999	19	6
2000	19	4
2001	16	3
2002	12	3
2003	15	4
2004	16	5
2005	21	3
2006	14	4

⁸⁵⁶ The International Tanker Owners Pollution Federation Limited webpage www.itopf.com. On 20.3.2007

Appendix II

Causes of Spills

Incidence of spills by cause, 1974-2006⁸⁵⁷

	< 7 tonnes	7-700 tonnes	> 700 tonnes	Total
OPERATIONS				
Loading/discharging	2821	332	30	3183
Bunkering	548	26	0	574
Other operations	1178	56	1	1235
ACCIDENTS				
Collisions	173	296	97	566
Groundings	235	222	118	575
Hull failures	576	90	43	709
Fires & explosions	88	15	30	133
Other/Unknown	2181	148	24	2353
TOTAL	7800	1185	343	9328

⁸⁵⁷ The International Tanker Owners Pollution Federation Limited webpage www.itopf.com. On 20.3.2007

Appendix III

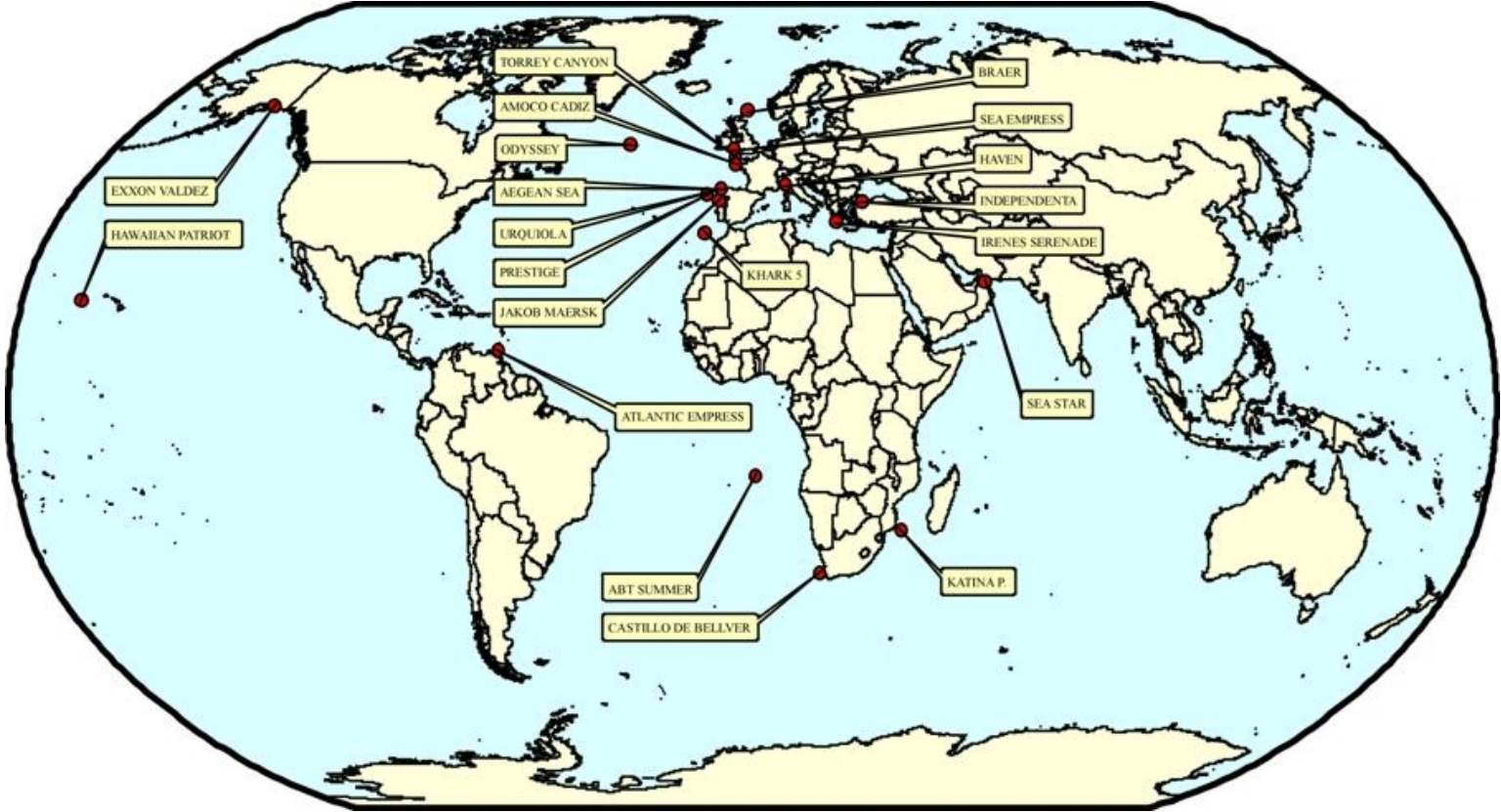
Major Oil Spills

Selected major oil spills⁸⁵⁸

Shipname	Year	Location	Spill (tonnes)
Atlantic Empress	1979	off Tobago, West Indies	287,000
ABT Summer	1991	700 nautical. miles off Angola	260,000
Castillo de Bellver	1983	off Saldanha Bay, South Africa	252,000
Amoco Cadiz	1978	off Brittany, France	223,000
Haven	1991	Genoa, Italy	144,000
Odyssey	1988	700 nautical. miles off Nova Scotia, Canada	132,000
Torrey Canyon	1967	Scilly Isles, UK	119,000
Sea Star	1972	Gulf of Oman	115,000
Irenes Serenade	1980	Navarino Bay, Greece	100,000
Urquiola	1976	La Coruna, Spain	100,000
Hawaiian Patriot	1977	300 nautical. miles off Honolulu	95,000
Independenta	1979	Bosphorus, Turkey	95,000
Jakob Maersk	1975	Oporto, Portugal	88,000
Braer	1993	Shetland Islands, UK	85,000
Khark 5	1989	120 nautical. miles off Atlantic coast of Morocco	80,000
Prestige	2002	Off the Spanish coast	77,000
Aegean Sea	1992	La Coruna, Spain	74,000
Sea Empress	1996	Milford Haven, UK	72,000
Katina P.	1992	off Maputo, Mozambique	72,000
Exxon Valdez	1989	Prince William Sound, Alaska, USA	37,000

⁸⁵⁸ The International Tanker Owners Pollution Federation Limited, ITOPF Handbook 2003/2004

Location of selected spills⁸⁵⁹

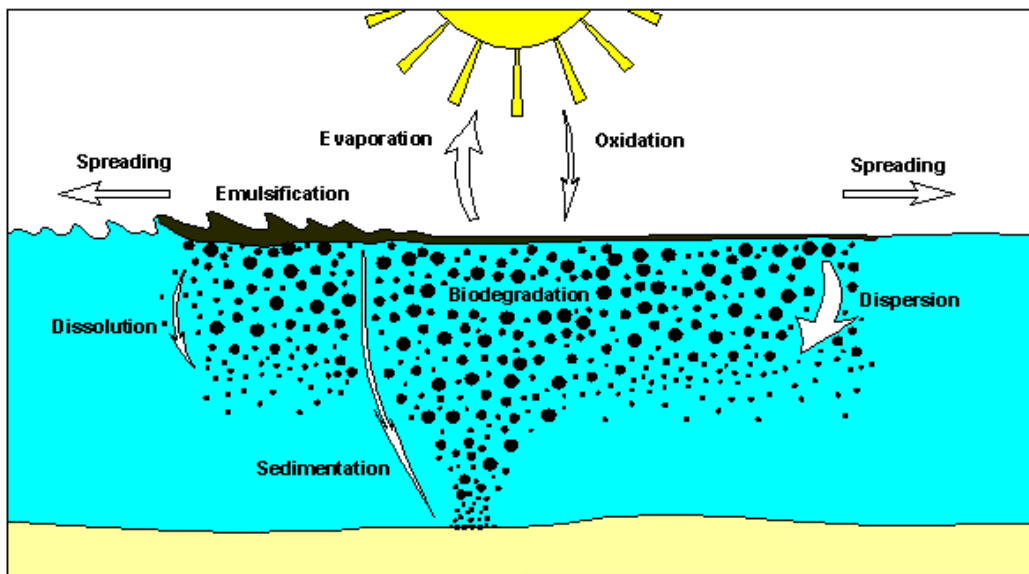


⁸⁵⁹ The International Tanker Owners Pollution Federation Limited webpage www.itopf.com. On 20.3.2007

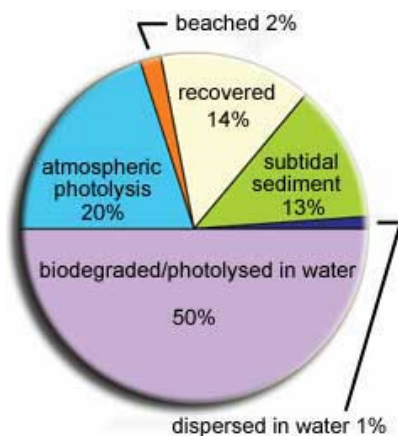
Appendix IV

Clean-up Operations and the Fate of Oil Spills

Fate of oil spilled at sea showing the main weathering processes⁸⁶⁰



The ultimate fate of the oil spilled by the Exxon Valdez⁸⁶¹



⁸⁶⁰ The International Tanker Owners Pollution Federation Limited webpage www.itopf.com. On 20.3.2007

⁸⁶¹ NOAA's National Ocean Service http://oceanservice.noaa.gov/education/stories/oilymess/oily03_remains.html. On 20.3.2007



Beach cleaning



Clean-up operations



Vessel spraying detergents



Booms being used to contain and concentrate floating oil



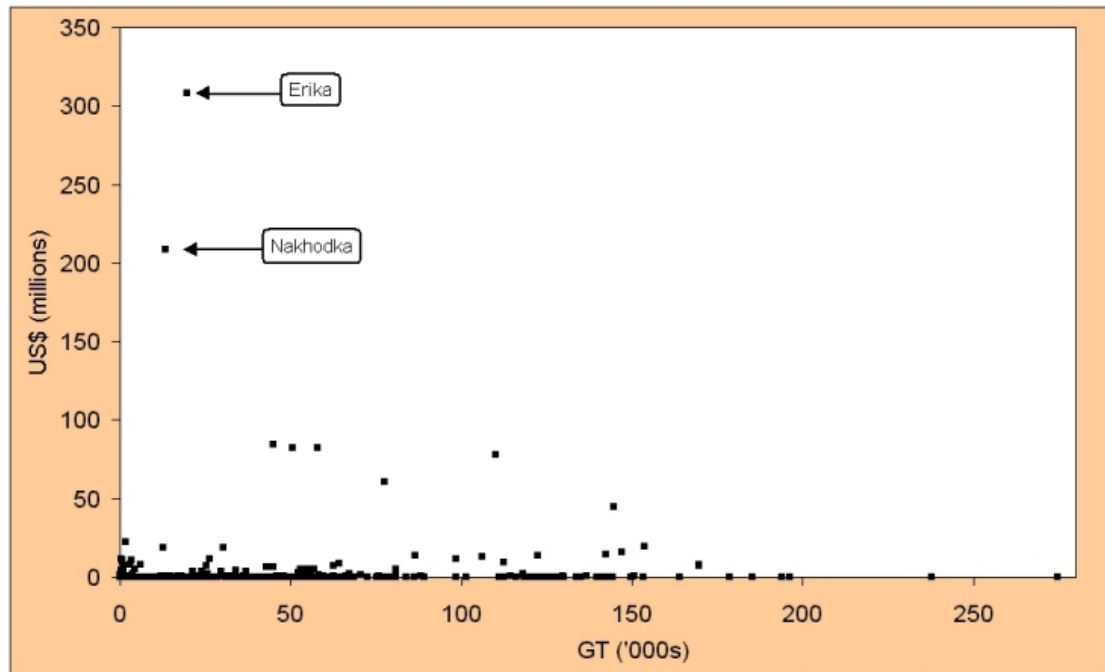
**Shore-line clean-up
rock-washing⁸⁶²**

⁸⁶² All photos from The International Tanker Owners Pollution Federation Limited webpage www.itopf.com. On 20.3.2007

Appendix V

The Cost of Oil Spills

The cost of oil spills⁸⁶³



⁸⁶³ The International Tanker Owners Pollution Federation Limited webpage www.itopf.com. On 20.3.2007

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List of Abbreviations

A.& S.L.	Air and Space Law
A.C.	Appeal Cases
ACOPS	Advisory Committee on Pollution of the Sea
All ER	All England Law Reports
API	American Petroleum Institut. The gravity of oil is measured on the API's gravity scale
Art.	Article
B.C.	Before Christ
B.C.C.	British Company Law Cases
B.C.L.C	Butterworths Company Law Cases
B.D.	Band/ Volume
BGH	Bundesgerichtshof (Federal Court of Justice)
Buffalo L.Rev.	Buffalo Law Review
C&P	Craig & Phillips' Reports
C.L.J	Cambridge Law Journal
C.L.L. Rev	Commercial Liability Law Review
CA	Court of Appeal
CCA	Consumer Credit Act 1974
Ch	Chancery
Ch	Chancery Division
Ch.D	Chancery Division

CLC	International Convention on Civil Liability for Oil Pollution Damage 1969
CMI	Comité Maritime International
Co Rep	Coke's King's Bench Reports
CONF	Conference
COPE Fund	Compensation for Oil Pollution in European Waters Fund
Cox CC	Cox's Cases
Cr.App.R./Cr.App.Rep	Criminal Appeal Reports
Crim LR	Criminal Law Review
CRISTAL	Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution
CRTD	Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels
D.C.L	Doctor of Cannon Law
D.P.P.	Director of Public Prosecutions
DirMar.	Il Diritto Marittimo (Italy)
Diss	Dissertation
Ed	Edition
Ed	Editor
Edn.	Edition
EWHC	England and Wales High Court
Exch.	Exchequer
F.B.A.	Federal Bar Association
FED	Federal

FF	French Franc
GRT	Gross Register Tonnage
HGB	Handelsgesetzbuch
HKEC	Hong Kong Electronic Cases
HL	House of Lords
HNS	International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea 1996
IAPH	International Association of Ports and Harbours
ICS	International Chamber of Shipping
IMCO	Inter-Governmental Maritime Consultative Organisation
IMO	International Maritime Organization
INSA	International Shipowners' Association
Int. M. L	International Maritime Law
INTERTANKO	International Association of Independent Tanker Owners
IOPC Fund	International Oil Pollution Compensation Fund
IPIECA	International Petroleum Industry Environmental Conservation Association
ISM Code	International Management Code for the Safe Operation of Ships and for Pollution Prevention
ITOPF	The International Tanker Owners Pollution Federation Limited
J	Judge
JMLC	Journal of Maritime Law and Commerce

KB	King's Bench Division
L.I. Rep	Lloyd's List Report (before 1951)
L.L.D	Doctor of Laws
LLMC	Convention on Limitation of Liability for Maritime Claims 1976
L.M.C.L.Q	Lloyds Maritime and Commercial Law Quarterly
L.Q.R	Law Quarterly Review
L.S.	Legal Studies
Law Com.	Law Commission
LEG	Legislative
Legal Bus	Legal Business
Lit	Italian Lira
LJ	Lord Justice
LL	Lloyd's List
LLB	Bachelor of Laws
Lloyd's Rep	Lloyd's Reports
LOF	The 1995 Lloyd's Standard Form of Salvage Agreement
LR	Law Review
LT	Law Times
Ltd	Limited Company
LTL	Lawtel Transcripts
M.A.	Master of Arts
M.L.R.	Modern Law Review

MARPOL	International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978
MEPC	Marine Environment Protection Committee
Minn.	Minnesota
MLR	The Modern Law Review
Mphil	Master of Philosophy
New L.J.	New Law Journal
No.	Number
NRJ	Natural Resources Journal
O.J.	Official Journal of the European Union
O.J.L.S.	Oxford Journal of Legal Studies
OCIMF	Oil Companies International Marine Forum
OECD	Organisation for Economic Co-operation and Development
Ölschadengesetz	Gesetz für die Haftung und Entschädigung für Ölverschmutzungsschäden
ÖISG	Gesetz für die Haftung und Entschädigung für Ölverschmutzungsschäden
OILPOL	International Convention for the Prevention of Oil Pollution 1954
ÖIHÜ	Internationales Übereinkommen v. 29.11.1969 über die zivilrechtliche Haftung für Ölverschmutzungsschäden
OPA	Oil Pollution Act 1990
P&I	Protection & Indemnity
p.	page

PAJ	The Petroleum Association of Japan
para	paragraph
paras	paragraphs
pp.	pages
Q.B.	Queens Bench Division
Q.C.	Queens Counsel
QdR	Queensland Reports
R.T.R	Road Traffic Reports
Reg.	Regina
Rep	Report
RINA	Registro Italiano Navale
s.	section
S. & T.L.I.	Shipping and Transport Lawyer
S.L.T.	Scots Law Times
S.p.A.	Societa per Azioni. Italian joint-stock company
SBS	Shell Briefing Service
SDR	Special Drawing Rights
SI	Statutory Instrument
Skr	Swedish Krona
SOLAS	International Convention on the Safety of Life at Sea
T.L.R.	Times Law Reports
TOVALOP	Tanker Owners' Voluntary Agreement concerning Liability for Oil Pollution
TranspR	Transportrecht

U.Pa.L.Rev	University of Pennsylvania Law Review
ULCC	Ultra Large Crude Carriers
UNCITRAL	The United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
Univ.	University
Vol.	Volume
WHG	Wasserhaushaltsgesetz
WLR	Weekly Law Reports
ZR	Zivil Senat