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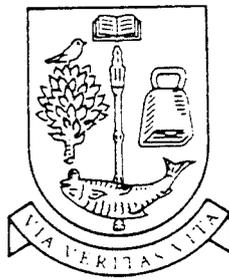
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**UNIVERSITY**  
*of*  
**GLASGOW**

Faculty of Law and Financial Studies  
Department of Private Law

**COMPENSATION AND INSURANCE  
IN RESPECT OF  
POLLUTION LIABILITY AT SEA**

Thesis Submitted for the  
Degree of Doctor of Philosophy (Ph.D.)

By

**Aboutaleb Koosha**  
(LL.B, M.Phil.)

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**AS ORIGINAL**

Dedicated to:

*Those who taught me how to live*

## ABSTRACT

Accidents involving vessels carrying oil or other hazardous and noxious substances have been in many cases the cause of spillage with devastating consequences on the local economic and the environment. This was highlighted by the Torrey Canyon incident, in March 1967, which proved that there is inadequate legal means, at international level, to cope with the problems in the recovery of the considerable expenditure involved in taking preventive measures, cleaning up and damage to the third parties and the environment. This thesis is an attempt to explore, analyse and develop a legal framework aimed at compensating and insuring against pollution liability at sea. The international response in providing liability and compensation and the role of insurance in solving these problems has been carefully considered throughout this thesis.

This thesis is divided in 5 parts beginning with an introduction and ending with a conclusion and bibliography. Part one, which comprises six chapters, seeks to overview the range of legal cases whereby liability for compensation and insurance of pollution damage may be established. The role of Tort or Delict, principally Negligence, Trespass and Nuisance, in establishing liability forms section one of this part. Chapter two outlines the role of two voluntary agreements, TOVALOP and CRISTAL, in settling the question of the liability and financial cover of the costs of oil spillage by tankers. A descriptive and analytical approach, regarding the compensation and insurance, is linked to the discussion of mandatory conventional liability for oil and other noxious substances. This is considered in chapter three, chapter four and chapter five, under the MARPOL 73/78, CLC, FC and HNS in full. Chapter six considers the place of liability cover in the marine insurance market and seeks to find a place for pollution liability cover.

Basic insurance schemes and statements of liability cover in the international insurance market are considered in part two of the thesis. Chapter one of this part examines the place of pollution liability cover in general ships policies. This part is followed, in chapter two, by a discussion of pollution liability cover under the Comprehensive General, Public, Liability policy, in order to determine whether such a policy covers or excludes pollution liability at sea. The Protection and Indemnity Clubs have effectively responded to the liability arising out of oil pollution and other hazardous substances. Therefore, it rightly deserves to occupy more pages of this part in chapter three.

The identification of a suitable party against whom legal action for pollution damage can be brought is an important matter which needs to be discussed in detail in the light of the different potential individuals, polluter, state or community, ship owner, charterer, shippers, users. This is dealt within Part three, which includes three chapters, under the headings of philosophies inherent in pollution liability pays.

Ship owners' liability has, for a long time in maritime history, been subject to the right of limitation, due to the huge potential amount involved in maritime accidents. Thus, sufficient recovery of pollution damage depends on the careful consideration of a ship owner's right to limit and his ability to pay and insure against it. This is why Part four looks at the extent of liability and quantum of cover in its two chapters.

Full cover for pollution liability by insurance will only be efficacious if it aims to deter dangerous or negligent conduct and to encourage preventive action by industry involved in pollution activity. Part five, in Three chapters, considers the effectiveness of insurance so as to not only protect the polluter, but also provide a reasonable vehicle for protection of the environment. To achieve this goal, it

concludes that a balance should be made between the protection of the insured and the environment.

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A. Koosha

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## Abbreviations

A & E	Admiralty and Ecclesiastical Adolphus & Ellis, Reports (110- 3ER) 1834-40
A.C. or App. Cas	Appeal Case Law Reports
A.J.I.L	American Journal of International Law
ACOPS	Advisory Committee on Pollution of the Sea
All E.R.	All England Law Reports
A.M.C	American Maritime Cases
Art.	Article(s)
Bing	Bingham's Common Pleas Reports (130- 1ER) 1799- 1814
C.A.	Court of Appeal(s)
Camp	Campbell's Reports of Tany's Circuit Court Decisions (US)
cf.	confer (Lat) compare
CGL	Comperhensive General Liability
Ch.	Law Reports, Chancery
Chi.L.Q.	Chicago Law Quarterly
CLC	1969 International Convention on Civil Liability for Oil Pollution
CLJ	Current Law Journal
CMI	Committee Maritime International
Cmd.	Command Paper(U.K.)
Co.	Company
Com. Cas	Commercial Cases
Conf	Conference
Cowp	Cowper's King's Bench Reports (98 E.R.) 1777-8
C.P.D	Common Pleas Division Law Reports. 1875-80
CRISTAL	Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution
D.L.R.	Dominion Law Reports
dwt	dead weight. The dead weight tonnage a vessel is the cargo capacity of that vessel in tons
e.g.	exempli gratia(Lat) for example
edt.	editor
edts.	editors
ed.	edition
EEZ	Exclusive Economic Zone

E.R.	English Reports
F.2d	Federal Report, 2nd series (U.S.A)
F.Supp	Federal Supplement (U.S.A)
FC	International Compensation Fund for Oil Pollution Damage, 1971
H.L.	House of Lords
hns	hazardous noxious substances
i.e.	id est (Lat) That is
I.L.M	International Legal Materials
I.B.A.	International Bar Association
I.C.J.R	International Court of Justice Reports
Id.	Ibid
Idaho.L.Rev	Idaho Law Review
IMCO	Inter-Governmental Maritime Consultative Organisation
IMF	Interantional Monetary Fund
IMO	International Maritime Organisation
IOPC	International Oil Pollution Compensation Fund
IOPC Fund	International Oil Pollution Compensation Fund
ITOPF	International Tanker Owners Pollution Federation
J. Int'l.L. & Pol.	Journal of International Law and Politics
J.Legal Stud.	Journal of Legal Studies
J.Mar.Law. & Comm	Journal of Maritime Law and Commerce
L.J.K.B.	Law Journal Reports King's Bench
L.M.C.L.Q.	Lloyd's Maritime & Commercial Law Quarterly
L.R.C.P.	Law Reports, Common Pleas. 1865-75
LI.L.Rep	Lloyd's List Law Reports (before 1951)
Lloyd 's Rep	Lloyd's List Law Reports (1951 onward)
LOF	Lloyd's Open Form
Ltd	Limited.
MARPOL 73/78	International Convention for the Prevention of Oil Pollution from Ships, as amended by the 1978 Protocol thereto
MIA	Marine Insurance Act
OECD	Organisation for Economic Co-operatation and Development
P & I	Protection and Indemnity (Clubs)
P.	Law Reports, Probate, Divorce & Admiralty Division
Para.	Paragraph

Q.B.	Law Reports, Queen's Bench
Q.B.D.	Law Reports, Queen's Bench Division
R.D.C.	Running Down Clause
R.I.A.A.	(U.N.) Reports of international Arbitral Award
S A	The Tanker Owners Voluntary Agreement Concerning Liability Oil Pollution Standin Agreement.
S.	Section
S.C.	Session Cases (Scotland)
S.L.T.	Scots Law Times
S.C. L.R	Scottish Civil Law Reports
SDR	Special Drawing Right
T S	The Tanker Owners Voluntary Agreemen Concerning Liability for Oil Pollution, Supplement.
T.L.R.	Times Law Reports
TOVALOP	The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution.
U.S.	United States Supreme Courts Reports
U.K.	United Kingdom
UNCLOS	United Nations Convention on Law of the Sea
U.S.A	United States of America
V.L.R.	Victorian Law Reports (Australia)
W.L.R.	Weekly Law Reports

## Introduction

An accident involving an oil tanker may result in millions of gallons of oil spilling into the water and catastrophic damage to the environment, coastal property, the fishing industry, tourism and other commercial interests. This may also happen when a vessel is carrying other chemical pollutants. There is little doubt that those who have suffered the damage and loss should be compensated, but the problems arise when deciding on how liability arises, who is liable and to whom and what losses the law should compensate. These issues are complicated by the fact that the rules relating to compensation may vary according to the nationality of the offending ship despite the fact that justice and equity demand that pollution victims should be compensated for their losses no matter where these losses arise.

The Torrey Canyon incident in March 1967 highlighted the fact that inadequate provisions existed at international level to enable Governments and others affected by marine pollution damage to recover the considerable expenditure involved in taking preventive and cleaning up measure quite apart from the question of damage to third parties. Before this incident, if oil from ships polluted the shore of one or more states, the question of whether an individual or Governmental authority could sue for damage and loss resulting from pollution was legally governed by the internal law of each state. This presented severe problems in many states. In Common law countries, liability is based on negligence and the plaintiff has to prove fault. Further, jurisdiction against a foreign defendant could only be established if the wrong was held to have occurred in the territory sea or internal waters of the state, rather than on the high seas. There was also no legal obligation to insure against pollution liabilities.

The Torrey Canyon disaster forced the international community to reconsider the problem of marine pollution, and in particular oil pollution, caused by ships. Several international agreements and conventions were formed. First, in January 1969, the major tanker owners of the world agreed to a voluntary scheme on liability, the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (hereinafter TOVALOP). Secondly in November that year, a formal International Convention on Civil Liability for Oil Pollution Damage, hereinafter CLC, was opened for signature at Brussels. Thirdly, in January 1971, TOVALOP was supplemented by a Contract Regarding an Interim Supplement of Tanker Liability for Oil Pollution (hereinafter CRISTAL). Fourthly In 1971, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, (hereinafter FC), was promulgated as supplemental to the 1969 CLC. These four documents, which have been revised several times, can be seen as successive steps on two parallel paths, the voluntary path and path of public international law, to settle the question of liability and financial cover to the costs of oil spillage. However the terms and application of the four elements are not exactly similar.

World-wide concern with the risks which necessarily arise with the increased frequency in the carriage of hazardous and noxious substances by sea has led to the formulation and adoption of international technical standards to promote maritime safety and enforcement of measures. These goals have been well set out in the International Convention for the Prevention of Pollution from Ships 1973 and its Protocol of 1978, (referred to MARPOL 73/78), as a response to the threat of contamination of the marine environment. Although MARPOL is not an international convention on civil liability for oil pollution

In addition, growing environmental awareness of the public at large, especially in the industrialised countries of the world, has given rise to the consideration of issues of liability and compensation in respect of damage caused by hazardous and noxious substances other than oil, when carried by sea. The International Maritime Organisation, IMO, has responded to the public concern by proposing a Draft Convention on Liability and Compensation in connection with the Carriage of Noxious and Hazardous Substances by Sea- (Draft HNS Convention). The analysis of the background of the Draft HNS Convention will have a great effect on the development of this instrument.

The first condition for the recovery of pollution damage is to establish appropriate liability against those who have been involved in activities at sea which cause pollution. Liability for damage can be established in a number of ways. Firstly, liability can be based on fault, (i.e. a party may be liable only when the claimant can prove that the accident resulted from negligence); secondly, it can be founded on fault with a reverse burden of proof on the party from whom compensation is being claimed; thirdly, it may be founded on strict liability, with some exceptions, under which responsibility is imposed upon the party causing the damage whether or not he was at fault; and finally, liability can be absolute so that the party causing damage is liable regardless of the circumstances. In this part of the thesis, the kinds and extent of damage and loss for which the liability can be claimed will be discussed.

The potential amount of money involved in a claim for pollution damage, in terms of clean up costs and other damages, has risen in the light of the increase in the size of tankers and the amount in volume and the type of substances carried. Possible losses from a supertanker break- up may run into the hundreds of millions of pounds. Most shipping corporations are likely to be financially unable to meet the high costs of cleaning up and compensating

the hundreds of millions of pounds. Most shipping corporations are likely to be financially unable to meet the high costs of cleaning up and compensating injured parties. In consequence, there is a growing trend at international level towards requiring shipping industries to carry a financial certificate which guarantees such payment. There are different possible ways in which a compensation system can financially operate. Among them a system which is based on insurance is the most common method.

While there is little incentive in the insurance market to cover pollution liability at sea, most world ocean going vessels are insured against liability, incurred in their operation, with a group of ship owners which provides protection and indemnity. These are known as P&I Clubs. The members of such clubs mutually insure each other against pollution liabilities. The amount of cover may differ from case to case with regard to the nature of the liability. However it is important to bear in mind that there are uninsurable areas of risk where the parties cannot avail themselves of insurance protection. It should also be realised that the sums insured are subject to certain limitations applied by the underwriters.

Before a claim for pollution damage can be made the appropriate party against whom legal action can be brought must be identified. A ship may be owned by a corporation, but it may have been chartered at the time of the incident. Discharge of pollutants into the water of one state may harm the coastal interest of a nearby state. It may also damage the property and interests of private individuals and impose a financial burden on the citizens at large for the expenses incurred by government in taking measures to prevent or remedy pollution damage and as a result of damage which results from such corrective measures. The second coastal state may seek to obtain compensation for all these damages from the state in whose jurisdiction the

with an interest in the cargo must share the burden of the damages. All these arguments may lead to the conclusion that the community which benefits from carriage of such substances must take on its shoulder all such damages and costs.

Even when contact is made with a financially sound owner, full recovery of damages will depend on whether the ship owner can limit his liability or not. The practical effect of limitation is that any damage caused by the operation in excess of the fixed limit has to be borne by the victim. It is therefore necessary to consider carefully the use of the right to limit liability. Given the limited knowledge of the possible consequences of major pollution, the fixing of a definite maximum limit of liability seems to be a difficult task.

Full liability insurance and compensation for all pollution damage is worthwhile only if it aims to deter unnecessarily dangerous or negligent conduct and encourages a socially optimum level of precautions in the industry at the same time. So long as the cost of negligent or intentional discharge or the inherent risk of shipping oil and other noxious substances by sea can be shifted to third parties such as the insurance industry or a special fund, oil or noxious substances production or shipping industries may have insufficient incentive to improve technology and personal performance to minimise pollution. There is therefore a double edge to full insurance cover and a balance to be struck between compensation and deterrence.

Tremendous efforts, not necessarily based on systematic analysis, have, in recent years, been made so far to solve legal problems concerning compensation and insurance in respect of pollution damage at sea. Although fairly successful results have been obtained there are still legal problems which necessitate further consideration and careful development of existing regimes, at national and international levels. These problems have been highlighted the

necessitate further consideration and careful development of existing regimes, at national and international levels. These problems have been highlighted the Exxon Valdez and Braer incidents and are brought into sharper focus each time there is an accident with catastrophic damage. In relation to the overall theme of compensation and insurance this thesis has the following objectives:

1. To consider the problems which are involved in different compensation and insurance regimes dealing with civil liability for pollution damage at sea;
2. To evaluate and develop the law relating to them, in order to a make a contribution to the remedy of the problems;
3. To suggest, where appropriate, the best direction in which further development should take place.

## **PART 1. OVERVIEW OF LIABILITY**

Different legal mechanisms have provided liability for pollution damage. Liability could arise under common law which is applied to the issue of civil liability for pollution damage where the civil liability convention has not been adopted or does not apply and no special statute has been introduced. Even where the liability convention applies to claims, some of its principles, e.g. causation, remoteness, still need to be considered under the common law. International law has also tried to provide liability, through national law, in connection with duties to enforce pollution standards laid down in specific conventions. Voluntary private legal schemes have addressed the question of pollution liability in order to provide a prompt and sufficient compensation regime. International convention has established civil liability for those who are involved in pollution incidents as well. It is, in this part of the thesis, also worth discussing the place of liability for pollution resulting from substances other than oil and the role of the insurance market in establishment of the principle of liability for pollution hazards. The importance of all these considerations will be realised when attempts are made to provide proper insurance mechanism for the cover of pollution liability at sea.

## **Chapter 1. The role of common law in establishing liability for pollution damage.**

### **1.1. Introduction**

There are some precedents which clarify the liability for damage and cleaning up resulting from pollution. These precedents do not arise from maritime law but from common law and deal not only with oil spillage but also with other problems. The rules of tortious liability, as a legal means to achieve justice between individuals where one has harmed another, were applied to deal with hazards involved in this field.

Tort law was aimed at furthering the mixed private and public goals of compensation, deterrence, and retribution.<sup>1</sup> Before insurance became widely available in relation to pollution, tort compensation was a way to reimburse an innocent victim for his injuries by imposing liability for such injuries.

### **1.2. Principle of negligence and pollution liability**

#### **1.2.1. Action is based on negligence**

In the common law the conventional element of tort (delict) liability was based on negligence,<sup>2</sup> so that the action for negligence constitutes the majority of common law claims. In each negligence case the court must first decide whether the defendant owed a duty of care to the plaintiff or not. Such a duty has been defined as the conduct of a person

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<sup>1</sup> See Cane, P., *Atiyah's Accident, Compensation, and the Law*, 4th ed., Wiedenfeld and Nicolson, London, Chapter 24, 1987, pp. 489-524.

<sup>2</sup> Negligence as an independent tort has been around much longer than that of *Donoghue (or McAlister) v. Stevenson* [1932] A.C. 562, in which it was held that, by Scots law and English law alike, the manufacturer of an article of food, medicine or the like, sold by him to a distributor, in a circumstances which prevent a distributor or the ultimate purchaser or consumer from discovering by inspection of any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.

who fails to avert the risk of harm as a reasonable man would have done.<sup>3</sup> The reasonableness of care depends on the circumstances of each particular case. The recent attitude of the courts is to be cautious as to extending the situations in which a duty of care applies.<sup>4</sup>

By itself, a breach of duty resulting in harm does not necessarily have any legal effect.<sup>5</sup> The plaintiff must also establish that the defendant has been in breach of a specific binding legal duty to take care.<sup>6</sup> This duty is based on the *neighbour principle*, with some qualification, as the source of modern negligence. This principle was outlined in the judgement of Lord Atkin in *Donoghue v. Stevenson*,<sup>7</sup> in which he said:

" the rule that you are to love your neighbour becomes in law, you must not injure your neighbour;...you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

The question which may arise here is whether this concept can be applied in determining the duty of care in all activities, e.g. pollution accidents, or not? There is no reason to prevent the applicability of the principle in all cases where there is no justification or valid explanation for its exclusion.<sup>8</sup>

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<sup>3</sup> *White, Carelessness, Indifference, and Recklessness*, [1961] 24 M.L.R. pp. 592-3.

<sup>4</sup> In Scotland see, e.g. *Landcatch Ltd. v. Gilbert Gilkes*, 1990, S.L.T. 688., in which no duty of care was found to exist in respect of loss of profit following the death of young salmon brought about by a failure in a system to pump salt water through their tank. In England, e.g. see, *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398, in which the Court of Appeal extended duty of care only to latent defect.

<sup>5</sup> *Hedley Byrne & Co. Ltd v. Heller & Partners* [1964] A.C. 465.

<sup>6</sup> *Moorgate Mercantile Co. Ltd. v. Twitchings* [1977] A.C. 890.

<sup>7</sup> [1932] A.C. 562 at p. 580

<sup>8</sup> See Lord Reid in *Home Office. v. Dorset Yacht Co. Ltd* [1970] A.C. 1004. at p. 1027.

The application of the principle was limited by the decision of Lord Wilberforce, in *Anns and Others. v. Merton London borough*

*Council*,<sup>9</sup> who said:

"the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter- in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise".

The proximity or neighbourhood test lost its "definitive character" when the House of Lords, in *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd.*,<sup>10</sup> upheld a long established principle whereby a person could only claim in respect of loss caused to him by reason of loss or damage to property if he had either the legal ownership or possessory title to the property concerned at time when the loss or damage first occurred. In the other words, the duty of care extends to those plaintiffs who have legal or possessory interest at the time of the incident.<sup>11</sup>

The standard of care for the navigation of a ship varies according to the rules, international and local, or principles of seamanlike prudence which accord with common sense and which is reflected in many

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<sup>9</sup> [1978] A.C. 728 at pp. 751-752.

<sup>10</sup> [1986] A.C. 785.

<sup>11</sup> See also *Transcontainer Express Ltd. v. Custodian Security Ltd* [1988] 1 Lloyd's Rep. 128., in which it was held that Custodian, defendant, has a duty of care to Transcontainer, plaintiff, on the ground that such duty extended only to those with a possessory interest at the time of Custodian default and Transcontainer had not such interest, thus its claim failed.

regulations.<sup>12</sup> The existence of the rules will afford the best reason for holding the ship violating it to be guilty of a breach of duty and consequently to blame for the incident. Thus the ship owner will be liable for damage caused by the discharge of a substances from a ship, following an accident, if he, or those for whose action he is liable, have not taken into consideration all rules and prudent measures which are necessary for management, navigation of the ship and transportation of the particular shipment.

Furthermore, if no harm stems from an individual's breach of a duty, there can be no basis for liability. It is also necessary for there to be a *reasonably proximate* causal link, known as the *proximate cause*, between the breach of the duty and the harm. In addition, causal chains cannot include, as the *proximate cause* of the harm, an act or omission which is too *remote* from the injury.<sup>13</sup> Thus if, as a result of the negligent navigation or management of a ship, pollution occurs causing damage to the plaintiff, the plaintiff will be able to obtain compensation from the owner of the vessel if the negligent act resulting in pollution was the proximate cause of the loss or damage.

The application of the tort of negligence in pollution litigation may be limited. This is mainly because negligence requires proof of the defendant's fault.<sup>14</sup> This imposes great burdens on the claimant who

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<sup>12</sup> The Roseline [1981] 2 Lloyd's Rep. 410.

<sup>13</sup> Lord Atkin, *Donoghue. v. Stevenson* [1932] A.C. 562 at p. 580. He said, "acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy".

<sup>14</sup> An example of difficulties inherent in proving negligence can be see in *Pearson v. North Western Gas Board* [1968] 2 All E. R. 669.

must prove the existence of a legal or proximate cause of his damage and establish failure aboard the vessel to take care. Within the sphere of marine pollution liability, defeating a defence of compliance with good professional practice will be very difficult, because of lack of technological know-how and other necessary information about the accident. Proof may also create enormous difficulty for an owner whose actual damage is pure economic loss. There is also some weakness in the tort of negligence, which may cast doubt over its useful application in establishing pollution liability at sea. There is a deep seated idea that one of the main objectives of the law of tort, as a system of establishing liability, is deterrence, the prevention of the harmful conduct, by imposing compensation on those who are liable for the creation of damage. It is, however, doubtful whether there is any deterrent force in the tort of negligence. A generalised instruction to people to take care is of little practical use in controlling their behaviour in a given situation.<sup>15</sup> The force of this criticism probably varies from one type of accident to another. It is particularly strong in the case of pollution accident at sea, where activity is such that the lack of sufficient attention could lead to catastrophic results.

Negligence as a basis of liability has also been criticised for the expensive cost of administration,<sup>16</sup> and problems of long delay from the date of claim to the date of its disposal.<sup>17</sup> Unpredictability of the result of

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<sup>15</sup> Per Lord Radcliffe, *Brown v. National Coal Board* [1962] A.C. 574 at pp. 594-599.

<sup>16</sup> Royal Commission on Civil Liability for Personal Injury, *Person Report*, 1978, vol. 2, Table 116; *The Civil Justice Review* (1988) Cmnd. 394. estimated that in actions for proceeding to trial in the High Court costs amounted to 50 and 70 percent of damage. This amount probably rise in cases pollution litigation in which there is enormous difficulty in proving of negligence.

<sup>17</sup> *Id.* *The Civil Justice Review*.

the cases may put plaintiffs under pressure to settle their claims for amounts less than they would if their claims went successfully to trial.<sup>18</sup> All these criticisms may be a good justification for extension of strict liability, i.e. liability imposed without proof of fault, in particular pollution cases which involve huge problem of proof of negligence.

### **1.2.2. Negligence as a basis for insurance cover.**

The general principle in insurance law is that risks insured against include, unless there is express provision in the policy to exclude, those caused by negligence,<sup>19</sup> whether the negligence is of the assured himself or third parties for whom assured are responsible for their action.<sup>20</sup> Section 55(2) of the Marine Insurance Act 1906 provides, "The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provided, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew."

What is clear from this Section is that the Act has made a distinction between the wilful misconduct on the part of the assured or his agents and loss which is the result of negligence and covered by insurance. It says that if the loss is proximately caused by an insured peril, negligence as a contributory cause is to be ignored. For example, a vessel may

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<sup>18</sup> Royal Commission on Civil Liability for Personal Injury, Person Report, 1978, vol. 2, Table 104.

<sup>19</sup> *Austin v. Drew* (1815) 4 Camp. 360 at p. 362.

<sup>20</sup> *Lord M'Laren, Clidero and Another v. Scottish Accident Insurance*, 1892, 29 S.C. L. R. 303 at p. 308.

strand due to negligent navigation but the loss would be treated as stranding damage not as a negligence. This is supported by the finding in the case of, *Thames and Mersey Marine Insurance Co. v. Hamilton Fraser and Co.*,<sup>21</sup> in which it was held that the proximate cause of the loss was the negligence by the member of the crew and that negligence is not a peril at sea. Since negligence is not a peril of the sea, it had to be specifically stated as a peril in the policy, for loss proximately caused by negligence to be covered. Thus, if an oil tanker is insured against damage or loss resulting from peril insured, the insurer would be liable, regardless of negligence, provided that the pollution damage was caused proximately by insured peril.

There is, with regard to what has been said, an overlap between the tort of negligence and insurance law. First, the victim of accidental injury or damage is entitled to be redressed through the negligence if, and only if, his loss has occurred as a result of the negligence of the defendant or those for whose negligence the defendant must answer; in contrast, insurance cover is available without regard to the fault of negligence of the assured or his agents or servants, provided the loss was caused proximately by a peril insured against and was not caused by the wilful misconduct. Secondly, the indemnity, under tort law, due from the defendant whose liability is established is full, is equivalent as to the plaintiffs' loss; whereas, in a contract of marine insurance the liability of the insurer is to the extent thereby agreed<sup>22</sup> not a full indemnity.<sup>23</sup> This

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<sup>21</sup> (1887) 12 App. Cas. 484. This was the famous Inchmaree case which led to introduction of the Inchmaree clause in the standard hull policy, which extended hull policy to cover loss proximately caused by negligence.

<sup>22</sup> S. 1. MIA 1906.

can be well justified when it is realised that there is limited insurance cover for oil pollution liability under P & I Clubs.

It may be said that there are cases in which the negligence of the assured may have a determining role in insurer's liability. A condition or implied warranty, e.g. seaworthiness of the ship during the particular voyage, in the policy may require the insured to take reasonable care to avoid loss. It seems such a clause would negate a large part of the cover intended to be effected by insurance, since one of the major purposes of a liability policy is to insure the insured against negligence, and negligence is failure to take reasonable care when a duty of care is owed. To give more effect to such a policy, the courts have narrowly construed the condition so that only negligence on the part of the insured will amount to a breach of the condition and have not extended the condition of the duty of care to the assured's agent or servants. Thus where the assured chose trustworthy skilled foreman, his foreman's negligence was held to be no defence to the insurer.<sup>24</sup>

The assured's reasonable care was limited with having regard to the commercial purposes of a contract of insurance which includes indemnity against insured's own negligence.<sup>25</sup> To achieve this purpose, the condition of the duty of care has been construed in a way to ensure that where the insured recognises a danger he should not deliberately take the measures which he himself knows are inadequate to avert it. In other words, to satisfy the condition it is not enough to say that the

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<sup>23</sup> See, Ivamy, ER Hardy, *Chalmers' Marine Insurance Act 1906*, 9th ed., pp. 2, 110.

<sup>24</sup> *Woolfall and Rimmer Ltd. v. Moyle and Another* [1942] 1 K.B. 66.

<sup>25</sup> *Fraser v. B.N. Furman (Production) Ltd, Miller Smith & Partners (A firm) Third Party* [1967] 1 W.L.R. 898.

insured's omission or act " to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, that is to say, made with actual recognition by the insured himself that a danger exists, and not caring whether or not it is averted."<sup>26</sup>

### 1.2.3. Foreseeability of plaintiff as a condition for liability

One of the most important elements in the attribution of legal liability to the tortfeasor, in case of fault, is the causal relationship between the defendant's conduct or breach of duty and the plaintiffs. Bankes L.J. in *Re Polemis*,<sup>27</sup> said, "what a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence." However, while ordinary people may consider that no limit can be set on the consequences of an act, the law seeks to impose limits on consequences. In *Re Polemis* it was decided that the defendant was responsible for all consequences of his negligent act which were the direct result of the act, whether reasonably foreseeable or not. Thus, the consequences to which liability may be attached, i.e. for which the actor may be held accountable or responsible, are those which are in direct result of the breach of the duty of care, in the light of knowledge and experience to be attributed to the reasonable man in the circumstances.<sup>28</sup>

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<sup>26</sup> Id. Per Diplock L.J. at p. 906.

<sup>27</sup> In re An Arbitration between Polemis and Another. v. Furness, Withy and Company Ltd [1921] 3 K.B. 560 at p. 571.

<sup>28</sup> It means keeping all the standard which is related to duty which is to be performed without regard to people, subjects doing it. Anns v. Merton London Borough Council, supra. No. 9.

It does not seem consonant with the idea of justice or morality that for an act of negligence, the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be direct. It is a principle of civil liability that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule; to demand less is to ignore the principle that civilised order requires the observance of a minimum standard of behaviour.<sup>29</sup> For this reason, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act, the answer is not because they are natural, or necessary or probable, but because they have the quality which is judged to be reasonably foreseen.

The direct test lost its credibility when the question was considered in the ***First Wagon Mound (No. 1)***,<sup>30</sup> in which the House of Lords, without distinction between the criterion for determining liability and compensation,<sup>31</sup> decided that the essential factor in determining liability for the consequences of a tortious act of negligence is whether the damage is of such a kind as the reasonable man should have foreseen. Liability does not depend solely on the damage being "direct" or "natural" consequences of the precedent act, because the direct consequence test leads to nowhere but never-ending and insoluble problems of causation.<sup>32</sup> It was concluded that the foreseeable damage from spilling

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<sup>29</sup> Viscount Simonds, *Overseas Tankship (UK) Ltd. v. Morts Dock and Engineering Co. Ltd., the Wagon Mound (No. 1)* [1961] A.C. 388

<sup>30</sup> *Id.*

<sup>31</sup> It was decided that there can be no liability until the damage has been occurred. See *id.*, pp. 424-425.

a quantity of oil into waters of harbour was pollution and, therefore, appellants who could not reasonably be expected to have known that the oil would catch fire, were not liable for the damage.<sup>33</sup>

The distinction between the test of foreseeability in relation to duty of care and remoteness of damage may be well justified, when it is realised that both have different aims. In relation to the duty of care the foreseeable test is used to determine whether the defendant was careless towards the plaintiff or not. In a fault based system the natural tendency is not to condemn a defendant unless he acted negligently, and thus the function of the duty concept is to protect the defendant by posting a necessary relationship, through the foreseeability test, between the parties so as to avoid liability to persons beyond the range of those whom a reasonable man believes are entitled to protection from the careless acts of the defendant. On the other hand, in relation to remoteness of damage the foreseeability test is applied to determine the extent of liability to a person with whom the necessary link has already been established, and hence the tendency is to say that once the defendant has been shown to have acted carelessly towards the plaintiff, the law should not be too severe on excluding loss which in fact been caused by that carelessness. Accordingly, it is suggested that the concept of duty of care and remoteness should be kept distinct, in application of the foreseeability test, in order to prevent confusion and wrong results.

It is also subject to criticism to apply the same test of foreseeability for both duty of care and remoteness, since the two concepts fulfil

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<sup>32</sup> Id. pp. 423-426.

<sup>33</sup> Id. 389.

different roles in insurance. For example, one function of duty is to determine which of two parties, involved in case, should insure against the potential loss, and the question becomes who is in the better position to bear the costs of insurance, whereas, in remoteness the question is how much insurance cover a potential defendant should obtain. Hence, extension of the foreseeability test in duty to remoteness may include some unlikely loss in an insurance policy. It would be, however, wrong to include losses in the policy if no duty has been established in relation to that category of loss.

The foreseeability test, was also considered in the *Southport Corporation* case, without distinction between liability and recoverability, in which it was argued<sup>34</sup> that: "if it was careless on the part of the Inverpool to enter the estuary of the Ribble, it was not a foreseeable consequence of that carelessness that she might strand and have to discharge oil which would be carried by the wind and tide to the Southport foreshore." This was rejected by Lord Denning who said: "the master of every coastal tanker must be aware that if he is in an estuary and he gets himself in to a position where he has to jettison oil, it is very *likely* to reach some part of coast". For recognising likely hazards, it is not necessary that the chance that the damage will result should be greater than the chances that no damage will occur. But a real damage should be reasonably foreseeable.<sup>35</sup>

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<sup>34</sup> By Privy Council, H.I. Nelson Q.C., see *Esso Petroleum v. Southport Corporation* [1956] A.C. 218 at p. 224.

<sup>35</sup> *Overseas Tankship (UK) Ltd. v. The Miller Steamship. Co. Pty. Ltd and Another, The Wagon Mound (No. 2)* [1967] 1 A.C. 617.

Scots Law has drawn a distinction between liability and damage in a application of the foreseeability test. The question was raised in ***McKillen v. Barclay Curle & Company Limited***,<sup>36</sup> in which it was held that the doctrine of reasonable foreseeability had no relevance to the measure of damage once liability had been established since the party guilty of negligence must take his victim as he finds him.<sup>37</sup> The distinction test was recently re-examined in ***Gilchrist v. D.B.Marshall (Newbridge) Ltd***,<sup>38</sup> in which it was held that, once any physical injury was foreseeable, the particular injury suffered by an injured pursuer was foreseeable in law. Thus, in Scotland, once a man is negligent in a pollution accident and injures others by his negligence, he is liable for the damages to the injured man which naturally and directly arise from negligence, whether the reasonable man would have foreseen the damage or not. It does not matter whether pollution victims are close to the place of the accident or far from it.

It cannot be disputed that foreseeability has a particular relevance to cases arising from pollution, since pollution damage is too wide to categorise. Therefore, it must be asked: is it foreseeable, e.g. that an error in navigation, committed by the captain of a tanker on the high sea, will cause damage to the holiday industry in one or several countries some distance away ? What remains of the rights of redress of those who suffer in this way ?

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<sup>36</sup> 1967 S.L.T. 41.

<sup>37</sup> The principle of Scots Law was laid down as long as 1864. See Lord Kinloch in *Allan v. Barelay* (1864) 2 M. 873, at p. 874; see also *Bourhill v. Young's Executor*, 1943, S.L.T. 105.

<sup>38</sup> 1991, *Greens Weekly Digest*, 1-48.

There is no doubt that a duty of care is owed to those pollution victims who are close to the physical impact of the negligent act. Thus, there is no duty of care problem in oil pollution cases which involve physical damage to property, such as the foreshore, harbour installations, vessel, fishing gear. The law, however, is not clear as to the extension of duty of care to those outside the area of likely physical impact. The House of Lords in *Bourhill v. Young's Executor*,<sup>39</sup> decided that a bystander in no physical danger from a street accident is not entitled to recover for nervous shock. This decision has been substantially changed in *McLoughlin v. O'Brian and Others*,<sup>40</sup> in which the mother of a family who suffered nervous shock as a result of witnessing the injuries to other member of her family caused by a road accident in which she was not involved, did recover damages. This decision indicates the extension of the duty of care to those who suffer pure economic loss, as a result of pollution incident, needs further consideration.

#### **1.2.4. Restrictions for recovery of pure economic loss**

Whilst consequential economic loss, arising from pollution damage to the property<sup>41</sup> is recoverable, it would be extremely difficult to recover anything for pure economic loss which resulted from negligence, even where the injury was clearly foreseeable and no causation problems

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<sup>39</sup> 1943, S.L.T. 105.

<sup>40</sup> [1983] A.C. 410.

<sup>41</sup> Such a claim is not recoverable if damage happens to property which does not belong to claimant, see the *Margarine Union v. Cambay Prince Steamship Co. Ltd*, [1967] 2 Lloyd's Rep. 315.

were present,<sup>42</sup> and apparently most other heads of tortious liability (except in certain well established circumstances<sup>43</sup>). This may well be justified because the imposition of a duty of care to avoid pure economic loss may lead to creation of recoverability, "in an indeterminate amount for an indeterminate time to an indeterminate class."<sup>44</sup>

Liability for pure economic loss<sup>45</sup> is not as clearly established as that for economic loss which follows from physical damage.<sup>46</sup> Pure economic loss may be rejected as being too remote, since it is not the kind of harm which is foreseeable. The point was clearly illustrated by *Spartan Steel & Alloys Ltd. v. Martin & Co.(Contractors) Ltd.*,<sup>47</sup> in which the defendant negligently cut off the plaintiff's power supply and damaged metal being processed. The plaintiff recovered the depreciation in value of the metal, but was denied the loss of profit which he would have had from further operation during the power cut. He was denied recovery because the loss of profit was not a consequence of any damage to their property, but simply interruption of the electricity supply. However, there are cases in which foreseeable economic loss is recoverable without

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<sup>42</sup> *Weller & Co. v. Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569.

<sup>43</sup> *Clerk & Lindsell on Torts*, 16 ed., pp. 10-16. See also *Murphy v. Brentwood District Council*. [1991] 1 A.C. 388.

<sup>44</sup> This is known as "floodgate argument", see Cardozo C.J. in *Ultramares Corporation v. Touche*, 255 N.Y. 170 at 179. (1931).

<sup>45</sup> For instance, loss of amenities (such as beaches, harbour which must be closed for cleaning, loss of profit by hoteliers, publican and in tourist industry) cost of preventive measures, the fisherman's lost profit.

<sup>46</sup> Such as: the fouling of nets and fishing gear generally, the contamination of pleasure yacht, lights, buoys, harbours, beaches, and coastline. Also included, in this head of damage, in the case of personal injury, e.g. an individual may get skin disease from contact with polluted water.

<sup>47</sup> [1973] Q.B. 27.

physical damage.<sup>48</sup> In both cases there is no clear reason for acceptance or denial of pure economic loss.

Thus, broadly speaking, there is no specific rule for denial of recovery of pure economic loss, without physical damage, in an action in negligence. It may, therefore, be said that although there is no sufficient proximity between pollution at sea and hotel keepers, loss of profits resulting from pollution of beach, and recovery of such a loss may not be denied since it may easily be shown to be a foreseeable consequence of negligent spill.

Foreseeability as a condition for recovery of pure economic loss does not seem to be sufficient to entitle a plaintiff to recover loss. While the consequences of physical damage are normally limited, the effects of pure economic loss may be almost limitless. This may create fear of giving rise to indiscriminate liability, so insurance may be unobtainable at a reasonable rate.

The costs of prevention or mitigation can be identified as one of the most important kinds of economic loss which may arise out of an oil spill.<sup>49</sup> Are these costs recoverable as damages? One argument might be that since pollution has never reached the shore, no actionable damage has been suffered.<sup>50</sup> There is little difficulty in rejecting the

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<sup>48</sup> See e.g. *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520.

<sup>49</sup> Suppose that a ship has gone aground 30 miles from coast, oil is spilling from her tanks and carried by wind, tide and water currents towards the shore. The local authority succeeds in cleaning up all the shore before it reaches the shore.

<sup>50</sup> In *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520, a majority of the House of Lords extended the duty of care beyond the recognised situation of a duty to prevent harm being done by faulty work, to a duty to avoid such fault being presented. The result was that, they held that the loss incurred in preventing or mitigating to the health or safety of any person or damage to any of other property of the owner is not recoverable.

argument where circumstances show that the measures taken were reasonable to mitigate physical pollution damage.<sup>51</sup> For example, where the defendant's negligence has caused the damage, the defendant cannot escape liability if the plaintiff tries to save himself by choosing a course of conduct to mitigate or prevent further damage or loss, provided that the method used was reasonable.<sup>52</sup>

Like the tort system, insurance also provides compensation for economic loss, i.e. lost profit arising from the damage or destruction of profit-earning property. However, there is a fundamental difference, between the tort system and insurance, in approach, with regard to consequential loss or pure economic loss which does not follow from physical damage to property. This kind of loss is regularly covered by special types of insurance policy which are available to cover a wide variety of risks which are probably not normally protected by the torts system. But there are limits to the cover which is usually available to provide for loss of profits. For example, insurers are not prepared to provide cover for lost profit suffered by hotel proprietor or those who supply to such a hotel which has been closed for polluted beaches as a result of oil spilling from a grounded tanker at sea in miles far away from the beaches.<sup>53</sup>

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<sup>51</sup> In order to decide what is reasonable, balance must be made between action taken with threat posed. See, *Sayers v. Harlow Urban District Council*, [1958] 2 All E.R. 342

<sup>52</sup> *Hyett v. Great Western Railway Co.* [1947] 2 All E.R. 264. This was confirmed in U.K. law in Section 15 (1) of the Merchant Shipping (Oil) Pollution Act 1971

<sup>53</sup> Cloughton, ed., *Riley on Business Interruption and Consequential Loss Insurance and Claims*, 6 ed., 1985, para. 337.

### 1.2.5. Test of remoteness in pollution damage

Before reaching the question of remoteness of damage it must be decided that the breach of duty was, as a matter of law, a cause of damage. In all the cases the causal connection between breach of duty and harm must be established. It is not sufficient to show that both occurred.<sup>54</sup> Suppose, where the ship has gone aground as a result of the negligent act and started spilling which caused damage to a property; there is a legal liability if the accident, spillage and damage is regarded as single and continuing event, i.e. existence of causal relationship. There is no such link if reasonable effort is used to stop any spilled oil reaching at a place where it causes damage.

The Marine Insurance Act 1906, in section 55(2) provides that the insurer is liable for any loss proximately caused by a peril insured against. Thus it is not sufficient, in order to have an insurance cover for loss suffered by insured, only to show that the loss falls within the cover provided in the policy; the insured must also show that the loss was proximately caused by an insured peril. It is, therefore, essential to determine the proximate cause of a loss to ascertain whether damage is to be recoverable under the policy.

More than one cause may, in most cases, contribute to the actual cause of pollution liability. For example, oil pollution may be as the result of oil spill or the failure to keep oil on board when a ship was aground or failure of some persons or authorities to conduct effective clean up operations. The question which arises here is, which of these factors is the effective cause of loss? Looking at the whole circumstances of a

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<sup>54</sup> Roger, W.V.H, *Winfield and Jolowicz on Tort*, 12 ed., 1984. London, Sweet and Maxwell, pp. 10-126.

group of acts or event from a common sense stand-point, which can fairly be said to have chiefly and mainly caused the harm?

Although what is the proximate cause in any situation is a question of fact, there are different tests which help in defining the factual causation. The most generally accepted of them is the so called "but-for test", whereby if the damage would not have happened but for a particular fault, then that fault is the cause of the damage. In another words, if it would have happened just the same, fault or no fault, the fault is not the cause of damage.<sup>55</sup> The applicability of the "but-for" test in every case relating to breach of duty is in doubt. The House of Lords in ***McGhee. v. National Coal Board.***<sup>56</sup> considered that the plaintiff may be successful if he shows that the breach of duty, cause of action, materially increases the risk of injury. The application of the test may even become different where there are two breaches of duty and either one of which alone would have been sufficient to cause the plaintiff's damage.

Interruption or breach of the chain of the causation by some intervening cause,<sup>57</sup> proximate cause in the sense of dominant or effective or real cause not necessarily the nearest cause in time of the actual loss,<sup>58</sup> the last opportunity in avoiding the result, foreseeability of intervening act<sup>59</sup> have been proposed as examples of other tests of causation and remoteness of damage.<sup>60</sup>

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<sup>55</sup> *Barnett. v. Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428.

<sup>56</sup> [1973] 1 W.L.R. 1.

<sup>57</sup> This is known as, *Novus Actus Interveniens*, see *The Oropesa* [1943] 1 ALL E.R. 211.

<sup>58</sup> *McWilliams. v. Sir William Arrol & Co.* [1962] 1 W.L.R. 295.

Legal liability may arise independently of causation such as in the case of imputed negligence, e.g. vicarious liability. Professor Prosser has written:

"A is negligent, B is not. Imputed negligence means that, by reason of some relation existing between A and B, the negligence of A is to be charged against B although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can prevent it".<sup>61</sup>

That is to say, certain classes of individuals are held responsible for conduct of others. For instance, employers are liable for the torts committed by an employee in the course of his employment.

An individual may be also held responsible for the consequences of his act or omission when his conduct is not, properly speaking, the proximate cause. He may be held legally liable to compensate for injuries arising out of the consequences of the opportunities that his act or omission has created.<sup>62</sup> For example, the failure of a master to take account of navigational warnings.

Even if the causation is established between the act and harm, no person is answerable indefinitely for every consequence that follows from his wrongful conduct. Damage may be rejected as being too remote from the initial wrong. The question of what extent of pollution damage may be compensated at common law depends on the application of the rule of remoteness of damage. The problem may be illustrated as follows: suppose the spill causes widespread pollution to five miles of holiday resort beaches in a small country heavily depend

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<sup>59</sup> *In re An Arbitration between Polemis and Anther v. and Furness, Withy & Co. Ltd.* [1921] 3 K.B. 560.

<sup>60</sup> *Clerk & Lindsell on Torts*, 14 ed., 1975, pp. 307-357.

<sup>61</sup> Prosser, *The Law of Torts*, 4 ed. 1971, at p. 485

<sup>62</sup> *Home office v. Dorset Yacht Co. Ltd* [1970] 2 All E.R. 294.

on foreign tourism, at a period when foreign tourists are going on holiday. As a result very few tourists come that year. The sea front hotels lose business. So do those in the inland town fifteen miles away. So do the wholesalers supplying food to these hotels, local fishermen and the national air line. Which of these suffered and which is too remote?

Direct consequences of careless conduct has been considered as a test for remoteness of damage. Therefore, if the breach of duty constitutes negligence, all damages directly resulting from the negligent act would be recoverable. This concept was raised, in *Re Polemis*,<sup>63</sup> by Scrutton LJ who said that "once the act is negligent, the fact that its exact operation was not foreseen is immaterial". Thus, if it be determined that the act is negligent, then the question whether particular damage is recoverable depends only on the answer to the question whether it is a direct consequence of the act or not. It was viewed that the damage is indirect if it is "due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results."<sup>64</sup>

In the extreme case all pollution damage may be regarded as being indirectly caused. In pollution cases it should be pointed out that the relationship between the cause and damage itself is rarely a direct one, but takes place through the factors of environment, e.g. pollution at sea which is brought to the coast by wind or waves.

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<sup>63</sup> *In Re An Arbitration between Polemis and Another v. Furness Withy & Co. Ltd.* [1921] 3 K.B. 560 at p. 577.

<sup>64</sup> Scrutton L.J. *Id.* at p. 577.

### 1.2.6. The burden of proof: the maxim of *res ipsa loquitur*

As a general rule, the burden of proof of negligence rests on the plaintiff.<sup>65</sup> This rule is subject to an important qualification introduced by what is called the "res ipsa loquitur principle".<sup>66</sup> It requires that the mere fact of the circumstances of accident, where it seems unlikely that the event could have occurred without negligence on the part of defendant or other persons for whom he was responsible, raises the inference of negligence so as to establish, in the absence of plausible explanation by the defendant, prima facie evidence against the defendant.<sup>67</sup> For example, where a ship is involved in a collision and oil is discharged, it can be said, that the ship would not be involved in the collision if it was well navigated, well maintained and well run. In the absence of an explanation, such as the stress of very heavy weather, the prima facie case would seem to be made.<sup>68</sup> It is supposed that the application of this maxim brings a negligence case into the sphere of strict liability.

The onus of disproving negligence lies on the defendant. He will be exonerated if he furnishes a reasonable explanation, which is consistent with due care on his part, that the event could have occurred without negligence.<sup>69</sup> If he cannot do this, he will still escape liability if he proves there was no lack of care on his part or on the part of people for whom he is responsible.<sup>70</sup> Lord Denning said that the defendant can only get

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<sup>65</sup> *Brown v. Rolls Royce Ltd* [1960] 1 All E.R. 577.

<sup>66</sup> *Scott v. London St Katherine's Dock Co.* (1865) 2 H & C. 596.

<sup>67</sup> *Winfield and Jolwics on Tort, supra.* No. 54, p. 108.

<sup>68</sup> *Id.* at p.112.

<sup>69</sup> *Barkway v. South Wales Transport Co.* [1950] 1 All E.R. 392.

rid of proof of negligence against the plaintiff by showing inevitable accident.<sup>71</sup> Therefore, the principle of *res ipsa loquitur* is, in this sense, similar to the strict liability under which liability is not avoidable by the defendant except in some particular circumstances, e.g. in inevitable or irresistible cases.

### **1.3. The possibility of extension of the Trespass Principle to pollution damage.**

In a legal sense, trespass means any forcible injury whether to person, chattel, or land. The term forcible has been defined as any physical interference with the person or property. The requirement of forcible interference means that merely causing economic loss, as may happen by deceit, is not regarded as trespass. Trespass to land is constituted by unjustifiable direct interference, however slight, with possession of land, i.e. immediate and exclusive right to possess.<sup>72</sup> Thus, trespass may be an efficient means for recovery of compensation for owners suffering damage in beach fronts, oysterbeds, fish farms if actual physical entry or invasion of pollution is proved. Thus, recovery may not be obtained if the owner cannot show actual invasion of their property.

To constitute trespass, injury must be direct and not merely consequential to a discharge elsewhere.<sup>73</sup> Direct means the acts which follow immediately upon the act of the defendant, so as to constitute part

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<sup>70</sup> *Sinclair Eugene Swan v. Salisbury Construction Co. Ltd.* [1966] 1 W.L.R. 204.

<sup>71</sup> *Esso Petroleum v. Southport Corporation* [1954] 2 Q.B. 182 at p. 200.

<sup>72</sup> Winfield and Jolwics, 12 ed., pp. 359-363.

<sup>73</sup> *Devlin. J. Esso Petroleum Ltd v. Southport Corporation*, [1956] A.C. 218, at p. 224.

of it.<sup>74</sup> In the other words, consequential injury is not, by some obvious intervening cause, regarded as part of defendant's act. It may be argued that there is a good cause of action in trespass if oil deliberately pumped out at sea reaches the shore by the action of tide and wind, i.e. consequential cause. Morris J believed, "There may be trespass if something is placed upon land; but equally I think that there may be trespass if something is thrown upon land or if the force of the wind or moving water is employed to cause a thing to go on to land."<sup>75</sup> However, in the House of Lords, the direct test was preferred, partly on the ground that it would be difficult, if the consequential test applies, to say where any such pollution would end up, thus removing any element of intention in trespass.<sup>76</sup>

Trespass will not normally lie in pollution cases because the establishment of the sufficient direct requirement is, in most cases, impossible. This is true even where it is deliberately discharged on the sea; the injury will be insufficiently direct, on the basis that rarely will there be sufficient certainty that spillage or discharge of the pollutant at the sea will lead to contamination of shore.<sup>77</sup> However, a situation where the injury might be sufficiently direct is where the discharge takes place in harbour or at terminal and the harbour or terminal is affected. It is quite clear if pollutant spills on to the water and then catches fire, resulting damage would be consequential.

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<sup>74</sup> Id. Devlin J at p. 225.

<sup>75</sup> *Southport Corp.* [1954] 2 Q.B. 182 at p. 204.

<sup>76</sup> *Southport Corp.* [1956] A.C. 218 at pp. 242 and 244.

<sup>77</sup> D. W. Abecassis (edt.), *Oil Pollution From Ships*, 2 ed., 1985, p. 359.

In addition, in modern law, trespass to goods is confined to intentional interference and the negligent interference is remedied only by tort of negligence. Lord Denning in Letang. v. Cooper,<sup>78</sup> said, "When the injury is not inflicted intentionally, but negligently, I would say that the only cause of action is negligence and not trespass." Thus when the injury is caused by the defendant's intended act the cause of action is trespass; when unintended, negligence. It may be concluded that trespass may not be regarded as good cause for accidental pollution cases. In the circumstances, therefore, an action for trespass in the case of accidental pollution of the sea causing damage on land is unlikely to succeed without proof of negligence. Thus, trespass, as an intentional tort, is not subject to the insurance cover which is usually provided to cover damages which are caused negligently.

### 1.3.1. Necessity as a defence

It may well be justified that a defendant is not involved in liability when he shows he was acting under necessity to prevent a greater evil, provided that the discharge was reasonable. For example, it can be justified by showing that it was necessary to discharge at sea in order to save life or property.

Devlin J.,<sup>79</sup> was not prepared to hold without further consideration that a man was entitled to damage the property of another without compensating him merely because the infliction of such damage was necessary in order to save his own property, whereas, the necessity for

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<sup>78</sup> [1965] 1 Q.B. 232.

<sup>79</sup> *Esso Petroleum. v. Southport Corporation* [1956] A.C. 218 at p. 227.

saving life has always been considered a proper ground for inflicting such damage upon another's property.

The defence would not apply if the dangerous situation of the vessel was caused by her own negligence.<sup>80</sup> The defence of necessity has also no practical significance in the pollution damage, because it is unlikely to apply where cargo is emptied at sea to save a ship. However, in all cases, it must be decided whether a greater loss will be caused if a pollutant is discharged.

### 1.3.2. Is Traffic Rule a good defence in navigable water?

It is an established law that people whose property adjoin a highway cannot complain for damage caused by people using the highway unless it is caused negligently or wilful intention on the defendant's part.<sup>81</sup> There is no case to show that this principle has been applied to damage in public navigable waters. But Lord Blackburn in *Fletcher v. Rylands*,<sup>82</sup> indicated that the rule applies as much as in navigable waterway as to highway on land, and concluded that people or property adjoining to the traffic at sea are subject to taking inevitable risk or injury upon themselves. He continued that such people could not recover, "without proof of want of care or skill occasioning the accident". Thus, under the rule, as a defence, the defendants would not be liable for an action or omission which they could not control, e.g. because of an explosion in the ship which was not itself attributable to any fault on their parts or to a

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<sup>80</sup> All judges in, *Id.*

<sup>81</sup> This is known as the "Traffic Rule" *Goodwyn v. Chevley* (1859) 28. L.J. Ex. 298; 4 H & N, 631. It was adopted in *Gayler & Pope Ltd. v. B. Davies & Son Ltd.* [1924] 2 K.B. 75.

<sup>82</sup> (1866) 1 L.R. Ex. 265 at p. 286.

collision for which they were in no way to blame or have been brought deliberately for a reason of necessity.

This concept was approved by Devlin J, in the *Southport Corporation*,<sup>83</sup> in which he said that, "owners whose property adjoins the sea, equally with owners whose property adjoins the highway, take the risk of damage being done by users of the sea or of the highway who are exercising with due care their rights of navigation or of passage". This judicial endorsement of the rule is weakened by the fact that he did not give any reason for the extension of the rule from land to sea.

Generally speaking, there is no clear and absolute evidence that the rule applies to a navigable water as well as a highway. Welsh J said, in the *Wagon Mound (No. 2)*,<sup>84</sup> that "the spillage came about from the ordinary use of the harbour waters by the Wagon Mound and not from any unreasonable or excessive user, or that this was a risk which other users of the harbour must be regarded as having taken upon themselves". Although he did not reject the application of the rule where there is unreasonable or excessive use of navigable waters, nevertheless it seems to be wrong to apply the rule to marine pollution cases which mostly arise from ordinary use of the sea and through accident. Non application of the rule to navigable waters can also be justified because it is technically impossible to guard adjacent property, e.g. beaches, against marine pollution, whereas providing such protective measures against property adjacent to highway is easily possible.<sup>85</sup>

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<sup>83</sup> *Esso Petroleum*, supra No. 79, p. 227.

<sup>84</sup> [1963] 1 Lloyd's Rep, 402 at p.429.

#### 1.4. Nuisance as a basis of pollution liability.

The essence of the tort of nuisance is interference with use or enjoyment of land.<sup>86</sup> In modern times, nuisance has closely been concerned with protection of the environment against pollution.<sup>87</sup> An actionable nuisance, whether public or private, has been defined as an unjustifiable interference with the exercise or enjoyment of a right belonging to public or individual.<sup>88</sup> However, whether an action of nuisance lies for interference with an interest depends on further considerations, because nuisance cases often deal with a conflict of interest between neighbouring landowners. The issue has been expressly addressed by the House of Lords.<sup>89</sup>

"A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with".

In principle, one should consider whether what has been done is reasonable, not merely from the defendant's viewpoint, but from plaintiff's also. Reasonable conduct has been defined as conduct, "according to ordinary usages of mankind living in society, or more correctly in a particular society."<sup>90</sup> Thus, whether an act constitutes a nuisance cannot be determined merely by an abstract consideration of the act itself, but by reference to all the circumstances of a particular case.

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<sup>85</sup> As it was expressed by Abecassis in *Oil Pollution from ships*, 1985, at p. 362

<sup>86</sup> H. Street, *The Law of Torts*, 7 ed., 1983, p. 229

<sup>87</sup> e.g. see *Esso Petroleum...* supra No. 79.

<sup>88</sup> Clerk and Lindsell on Torts, 14 ed., p. 803.

<sup>89</sup> *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, p. 903.

<sup>90</sup> Lord Wright, *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880 at p. 903.

Different views have been expressed in attempting to determine the standard of liability in nuisance. Lord Reid, in the *Wagon Mound (No. 2)*<sup>91</sup> argued, "it is quite true that negligence is not an essential element in nuisance. Nuisance is a term used to cover a wide variety of tortious acts or omissions and in many, negligence in the narrow sense is not essential. .... And although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability...." Denning L.J. in *Southport Corporation v. Esso Petroleum Co. Ltd.*<sup>92</sup> without getting into the nature of liability said, "In an action for a public nuisance, once the nuisance is proved and the defendant is shown to have caused it, then the legal burden is shifted on to the defendant to justify or excuse himself."

What is clear from these two arguments is that both judges have accepted that fault in the sense of negligence or deliberate or reckless act is generally necessary for liability in nuisance and have not given any support to the view that there may be an element of strict liability in cases of nuisance. In Scots law, nuisance is also an offence which could be occasioned by a single incident,<sup>93</sup> and the courts saw that, "the proper angle of approach to a case of alleged nuisance is rather from the standpoint of the victim of the loss or inconvenience than from the standpoint of the alleged offender; and that, if any person so uses his property as to occasion serious disturbance or substantial inconvenience to his neighbour or material damage to his neighbour's property, it is in

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<sup>91</sup> [1967] 1 A.C. 617 at p. 639.

<sup>92</sup> [1954] 2 Q.B. 182, at p. 197.

<sup>93</sup> *James Peter Slater v. A & J M'Lellan*, 1924 S.C. 854.

the general case irrelevant as a defence for the defender to plead merely he was making a normal and familiar use of his own property."<sup>94</sup> Thus it was easier to succeed in a claim for nuisance caused by pollution in a Scots court than an English one. In 1985, this precedent was also considered in, **RHM. Bakeries (Scotland) Ltd. v. Strathclyde Regional Council**,<sup>95</sup> in which it was held that an accident giving rise to damage was sufficient at common law to constitute a nuisance, but it was open to the defendant, by proving that some other person or things over which they had no control was responsible for the nuisance created, to escape liability. This decision ended some doubts which have been raised that, under nuisance, fault is not required as a claim for liability and established fault as a necessary means of imposing liability under nuisance.

Generally speaking, the law of nuisance plays an important role in imposing liability for harm caused to other people and their property. However, there are some restrictions in the law of nuisance which reduce its effectiveness in the pollution cases which may affect many rights. The only person who can act as a plaintiff is the person whose legal rights have been damaged. The only right of action is to protect enjoyment of one's property. There is therefore no right of action against certain types of pollution harms, such as oil or chemical pollution which has killed sea animals and birds but has not harmed property. The nuisance also does not ensure that preventive steps are taken to

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<sup>94</sup> Watt v. Jamieson, 1954 S.L.T. 56 at p. 57.

<sup>95</sup> [1985 S.L.T. 3.

prevent or reduce pollution harm. Thus, if such steps are taken there will be no compensation.

#### 1.4.1. Public nuisance

Nuisance is public where an act or omission affects the life, safety, health or reasonable comfort of a class of the subjects in public.<sup>96</sup> The question of what number of people constitute a class of the public is a question of fact in every case.<sup>97</sup> It always remains a possibility that a neighbourhood affected in a particular pollution incident is too small to constitute a public nuisance.<sup>98</sup> Different views have been given to the question of *neighbourhood*, how many people should be affected in order to constitute a public nuisance. Denning L.J, while declining to answer the question how many people make up Her majesty's subjects, said<sup>99</sup> that, "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". Lord Radcliff, considered<sup>100</sup> it may *possibly* be a public nuisance if pollution affects a small area.<sup>101</sup> From these views it can be concluded that there is no public nuisance if only one particular

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<sup>96</sup> Romer L.J, *Attorney General v. P.Y.A Quarries Ltd* [1957] 2 Q.B. 169, at p. 184.

<sup>97</sup> *Id.*

<sup>98</sup> D.W. Abecassis, *The Law and Practice Relating to Oil Pollution From Ships*, 1978, p. 117

<sup>99</sup> *Attorney General. v. P.Y.A. Quarries Ltd* [1957] 2 Q.B. 169 at p. 191.

<sup>100</sup> *Esso Petroleum. v. Southport Corporation* [1956] A.C. 218 at p. 242.

<sup>101</sup> Devlin j, in an unexplained remark, approved it. *Id.* at p. 225.

individual is affected by pollution incident. However it will be regarded as a public nuisance even if a few people are affected. For example, where there is a public right of way over the foreshore, its obstruction by oil pollution might be regarded as a public nuisance, even a few people are affected. The same result can be applied where a hotel, in a remote tourist village with 50 inhabitants, is closed, because of polluted coast, and a few people whose economic life depends on the hotel are affected.

It may be said, in general, that the escape of oil into the water and pollution of sea and coastal environment constitutes a public nuisance, provided there is prejudice and discomfort to the members of public as a group. However, oil pollution does not constitute a public nuisance, even if polluted area is a large stretch of coastline not habitually used by more than a few people. This is probably correct having regard to views which were expressed by different judges in *Esso Petroleum Co. Ltd. v. Southport Corporation*,<sup>102</sup> Lord Denning J said:

"Applying the old cases to modern instances, it is, in my opinion, a public nuisance to discharge oil into the sea in such circumstances that it is likely to be carried on to the shores and beaches of our land to the prejudice and discomfort of Her Majesty's subjects."<sup>103</sup>

#### **1.4.1.1. Special damage as a condition for recovery of individuals**

Private individuals have a right of action in respect of public nuisance if they can prove that they have suffered special damage which is different from others, the general public. As Lord Denning said,<sup>104</sup> the

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<sup>102</sup> [1956] A.C. 218.

<sup>103</sup> [1954] 2 Q.B. 182 at p.197.

<sup>104</sup> *Esso Petroleum v. Southport Corporation* [1954] 2 Q.B. 197.

discharge of oil at sea was a public nuisance and people can only recover if they show that they have suffered greater damage than the public. Although the requirement of distinct or personal injury is well accepted, it is arguable whether the individual's injury must differ from that suffered by general public in kind or merely in degree. It is quite clear in oil pollution cases that the owner of land may suffer special damage for the cost of clean up and contamination of land itself, because it is clearly different in nature and extent to that suffered by the general public, but a fisherman is in a different position if he does not own a fish farm. However, special damage cannot be shown if damaged property is owned by public.

#### **1.4.1.2. The possibility of recovery of pure economic loss under public nuisance.**

It is strongly arguable that if pure economic loss is not recoverable in negligence, it ought not to be recoverable in public nuisance, since courts have tended to equate, in this aspect, the two torts. For example in *The Wagon Mound (No. 2)*,<sup>105</sup> the Privy Council held that the same test for remoteness of damage applied in nuisance and negligence. Contrary to this decision, there have been some cases which supported recovery of pure economic loss under public nuisance. In *Walsh v. Ervin*,<sup>106</sup> Sholl J. fully considered the types of damage recoverable in public nuisance. His judgement assumes that the pure pecuniary loss is recoverable. The question to be decided was whether or not actual

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<sup>105</sup> [1967] 1 A.C. 617.

<sup>106</sup> [1952] V.L.R. 361.

pecuniary loss always had to be shown in order to recover; Sholl J. answered the question in the negative.<sup>107</sup>

The application of the same test for remoteness to both negligence and public nuisance may also be subject to criticism where the possible reason for failing to recover for pure economic loss under negligence is considered. The main reason for irrevocability is, in negligence, said to be public policy<sup>108</sup> under which the law considers that it would be undesirable that the liability should be cast so wide so as to encompass those who have suffered mere economic hardship. If it is regarded as the right explanation for the rule, then it is possible to see why a similar rule should not apply to public nuisance in which recovery has been already limited by public policy to those who have suffered "special damage". This rule was designed to keep down the number of possible claimants. It is not then necessary, as a matter of public policy, to cut down the number of claimants still further by refusing claimants who have suffered purely economic loss.

#### **1.4.2.. Private nuisance**

In private nuisance, the plaintiff must prove unreasonable interference with his reasonable enjoyment or use of land or some right over, or in connection with it.<sup>109</sup> This clearly raises a number of questions. What is reasonable? What would be unreasonable? These questions are answered by balancing the reasonableness of the

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<sup>107</sup> See also judgement of Slade J. in *Gravesham Borough Council v. British Railways Board* [1978] Ch. 379.

<sup>108</sup> Per Lord Denning and Lawton L.J. in the *Spartan Steel Case*. *supra* No. 47.

<sup>109</sup> Winfield and Jolowicz on Tort, 12 ed., p. 380.

defendant's activity and its impact upon the plaintiff's proprietary right.<sup>110</sup> Such a balance can be made by considering the circumstances of the place where the thing complained of actually occurred. What is clear from these answers is the large degree of uncertainty involved in bringing an action in private nuisance.

To give a cause of action in private nuisance, the plaintiff must have exclusive possession of or a proprietary interest in land which has been interfered with. In the other words, anyone who has no interest in the property affected, such as a licensee, cannot maintain an action based on private nuisance.<sup>111</sup> Where there are several interests in one property, in each case protection is limited to the interest of plaintiff.<sup>112</sup>

The argument may be advanced as to whether the owner of land has property rights in the water beneath his land, and therefore cause of action for pollution of water. The argument was raised in *Ballard v. Tomlinson*,<sup>113</sup> in which it was held that having right to water beneath the land was a natural right incidental to ownership and that the plaintiff had a right to extract water beneath his land, and the defendant had no right to contaminate what plaintiff was entitled to get.

It has been suggested in order to constitute an action, the defendant must have used his own land or some other lands in such a way as injuriously, and not in just a slightly annoying way, to affect the

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<sup>110</sup> As it was done in *Sanders- Clark v. Grosvenor Mansions Company Limited and G. D'Allessandri* [1900] 2 Ch. 373.

<sup>111</sup> *Devlin J, Esso Petroleum v. Southport Corporation*, supra No. 76, p. 224.

<sup>112</sup> W. Prosser, *Torts*, 4th ed., p. 593.

<sup>113</sup> (1885) 29 Ch. D. 115.

enjoyment of plaintiff's land.<sup>114</sup> It was, therefore, concluded that discharge of oil was not a private nuisance, because it did not involve the use by the defendant of any land.<sup>115</sup> However, this restriction has not prevented many successful actions being fought by litigants. Devlin J, in the *Southport Corporation*, believed<sup>116</sup> that there is no principle that nuisance must emanate from land belonging to defendant. This is contrary to the view which was given by Denning L.J, in the same case, who said that, "it is clear that the discharge of oil was not a private nuisance, because it did not involve the use by the defendants of any land, but only of a ship at sea".<sup>117</sup> However, both views are weak because none of them give any detailed reason for the approach they take. It seems to me, since private nuisances, at least in the vast majority of cases, are interference by owners or occupiers of land with the use or enjoyment of neighbour land, it would be unreasonable if the right to complain of such interference extended beyond the occupier or the owner of land.

### **1.5. Liability without fault: application of the rule in, *Rylands v. Fletcher***

Under the rule which was formulated in *Rylands V Fletcher*,<sup>118</sup> there is liability which is independent of intention or negligence. This is

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<sup>114</sup> Denning LJ, *Esso Petroleum*, supra No. 79, p. 196.

<sup>115</sup> Lord Wright, *Sedleigh- Denfield v. O'Callaghan* [1940] A.C. 880 at p. 903

<sup>116</sup> *Esso Petroleum. v. Southport Corporation*, supra No. 71, pp. 224-5. He took the view that a nuisance was committed where oil was discharged from ship and carried by wind and tide on foreshore.

<sup>117</sup> *Southport Corporation. v. Esso Petroleum Co. Ltd.* [1954] 2 Q.B. 182. at p. 196.

called liability without fault or strict liability. In this case, *Rylands v. Fletcher*, it was held that a person is *prima facie* responsible for damage done by the escape of dangerous things accumulated for some non-natural purpose of his land, however careful he may have been and whatever precaution he may have taken to prevent damage. In other words, such a person is strictly liable for damage done by him unless he can excuse himself by showing an act of God or act of stranger, e.g. a plaintiff. This judgement was based on the view which was given by Lord Blackburn J, who said:

".....The true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all damage which is the natural consequence of its escape."<sup>119</sup>

This broad concept was limited when the case went to the House of Lords. Lord Cairns said that the rule only applied to *non-natural* use of the defendant's land, as distinguished from:

"any purpose for which it might in the ordinary course of the enjoyment of the land be used."<sup>120</sup>

In *Rickards v. John Inglis Lothian*,<sup>121</sup> Lord Moulton said that a non-natural use "must be some special use bringing with increased danger to others and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community." Thus

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<sup>118</sup> (1866) 3 L.R. Ex. 265. A similar point arose in *West. v. Bristol Tramway Co.*, [1908] 2 K.B. 14. This rule was recently considered in *Cambridge Water Company v. Eastern Country Leather PLC*, [1994] W.L.R. 53, in which House of Lords uphold the decision of the Court of Appeal on the basis of rule in *Rylands v. Fletcher*.

<sup>119</sup> *Id.* at p. 279.

<sup>120</sup> *Rylands. v. Fletcher* (1868) 3 L.R., 330 at p.338, see case in Wier. T, *A Casebook on Tort*, 4 Th. ed., 1979, p. 365.

<sup>121</sup> [1913] A.C. 263 at 280.

liability under the rule is strict, not only must the substance be dangerous if it escapes, but it must also be something which is not naturally on the defendant's land. The concept of non-natural use has been defined by reference to how the substance arrived on the land, not by reference to its use, but in the light of particular circumstances of the user and the environment in which he is operating.<sup>122</sup>

It appears that the principle applies to the escape of dangerous things from land and, thus, extension to a discharge of pollutant by a ship, either on the high sea or within territorial water is probably unwarranted because the bringing of the ship to sea and the maintenance of it in the usual way seems to be an ordinary and reasonable use of the ship and if, in consequence of it, a pollutant escapes without any negligence or fault of the owner, it is not thought he would be liable for any damage that may ensue, unless the plaintiff establishes that the carriage of the pollutant is a non-natural or exceptionally hazardous use of the sea. The difficulty with this argument is that if the sea is regarded as a highway in which the traffic rule applies, the plaintiff would not be able to succeed under the rule because of consenting to that risk by having property adjacent to the navigational water, unless he can show negligence on the part of the defendant.

Ryland's rule does not seem, because of its many limitations and exceptions, to form the basis of a successful claim in modern times. The defendant can excuse himself by showing that the escape was owing to

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<sup>122</sup> See Case Law Analysis, *Strict Liability for Environmental Law: the Deficiencies of the Common Law*, *Journal of Environmental Law*, 1992, 81, at pp. 94-97.

the plaintiff's fault or was in consequences of an act of God;<sup>123</sup> or where a plaintiff has expressly or impliedly consented to the presence of the source of danger and there has been no negligence on the part of defendant;<sup>124</sup> or the source of danger is maintained for common benefit of the plaintiff and defendant;<sup>125</sup> and the escape was caused by an unforeseeable act of a stranger.<sup>126</sup>

The usefulness of the rule was also reduced when the House of Lords ruled that foreseeability of harm was a prerequisite of the damage under the rule. This point has been illustrated in *Cambridge Water Co. v. Eastern Countries Leather Plc and Huchings & Harding Ltd*,<sup>127</sup> in which was held that, since those responsible at the defendant's company, E.C.L, could not at the relevant time reasonably have foreseen that the damage in question might occur, the claim of plaintiff, C.W.C, must fail.<sup>128</sup> The introduction of foreseeability into the rule in *Rylands v. Fletcher*, moves Rylands' liability very close to negligence. Thus, if someone brings onto his land something which he knows will do a particular type of harm if it escapes and then allows it to escape is it not likely he will have been negligent?

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<sup>123</sup> *Cheater v. Cater* [1918] 1 K.B. 247.

<sup>124</sup> *Kiddle v. City Business properties* [1942] 1 K.B. 269.

<sup>125</sup> *Gilson v. Kerrier District Council*. [1976] 1 W.L.R. 904.

<sup>126</sup> *Box v. Jubb* (1879) 4 Ex. D. 76.

<sup>127</sup> [1994] W.L.R. 53.

<sup>128</sup> See *Id*, Lord Goff of Chievly, at P. 81. There are, however early authorities in which foreseeability of damage does not appear to have been regarded as necessary, see. e.g. *Humphries v. Cousins*, (1877) C.P.D. 239.

Although, theoretically, there may be some merit in a system of strict liability for pollution risk, in comparison with a fault based system, practically its effectiveness depends on the economic situation of the defendant or the practicability of insurance. The normal sequel of the imposition of such liability is that the persons potentially subject to liability will protect themselves against its consequences by insurance,<sup>129</sup> otherwise it would be unjust and unfair to make someone liable without giving sufficient opportunity, except some limited defence, to defend himself against the plaintiff. This may be supported by the fact that torts which are based on strict liability are subject to compulsory insurance up to statutory limit.<sup>130</sup>

### **5. 7. Concluding remarks**

The major barrier to the efficacy of the tort system in the context of pollution damage is the ineffectiveness of those doctrines of liability available to plaintiffs. Trespass was primarily designed to deal with unauthorised physical entry from one person's land to another's. Extension of this from land to ship is doubtful. Even if it is applied, it has no practical use in pollution cases because in such cases the injury, even in intentional discharge, is rarely sufficiently direct. Trespass may not lie where the pollutant accidentally or involuntarily discharges at sea, on the ground that trespass generally lies where the defendant causes

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<sup>129</sup> This self-evident truth appears sometimes to be overlooked. See Lord Denning M.R. in *S.C.M. (United Kingdom) Ltd. v. W.J. Whittall and Son* [1971] 1 Q.B. 337 at p. 344, who said that the risk should be borne by the whole community who suffer the losses rather than the defendant who may or may not be insured against the risk.

<sup>130</sup> e.g. see the liability under the Nuclear Installation Act 1965; The Merchant Shipping (Oil Pollution) Act 1971 as amended by the Merchant Shipping Act 1988.

the trespass through a voluntary act, whether intentional or negligent. Even if trespass lies, in the case of pollution at sea causing damage on land, it is unlikely to succeed without overcoming the enormous difficulty in proving negligence. Even if the negligence is proved, the plaintiff has to fight against availability of the defence of "necessity" and "traffic rule". Trespass as an intentional tort is not also regarded as a good basis for establishing pollution liability under an insurance contract, since liability insurance has never supported wilful misconduct.

Nuisance may have more potential application in establishing liability in pollution at sea, provided the question of fault can be obviously established on the basis of strict liability. There is a possible ground of such change in common law due to the existence of the principle of *res ipsa loquitur*, the rule in *Rylands v. Fletcher* and the view that negligence, in the narrow sense, is not an essential element in nuisance, but so far there is evidence that the courts are willing to develop the law so as to bring the nuisance clearly into the line of the strict liability. However, nuisance is potentially capable of founding an action for pollution damage, without proof of negligence, in spite of the remaining possibility that a court may follow the "Traffic Rule" and consequently hold in some cases that the plaintiff must prove negligence. In practice, a plaintiff, in application of nuisance without proof of negligence, may face enormous difficulties, because of widespread economic and environmental damage which is caused pursuant to the causing of pollution incident at sea, when it is realised that he must show that the defendant was or ought to have been aware that the damage to his interest was inevitable or was the likely consequence of the defendant's activity.

Most pollution victims, with regard to the deficiency in other torts, are forced to base their claims on the tort of negligence. This principle may also lose its effectiveness because of the extreme difficulties of proving negligence by pollution victims. Even when a defendant has been negligent, it is extremely difficult for pollution victims to prove that harm was foreseeable, in particular, in pure economic loss. However, liability based on the tort of negligence has more practical use, than the other torts, in providing the liability insurance where the major purpose of a liability is to insure against liability in negligence, unless policy otherwise provides.

Insurance differs from tort compensation in many ways. Insurance, as a method of compensation, is almost entirely optional, except in a few cases where compulsory insurance is demanded by law. A second major contrast with the tort system is the fact that in the case of insurance, the method of compensation normally depends on what has been lost, without regard to the fault, whereas in the tort system, it is an essential element, for recovery of compensation, that the negligence be proved by the plaintiff. A third difference between tort compensation and insurance is that the latter, unlike the former, does not offer "full compensation". The extent of insurance coverage is usually optional, but there are many types of insurance in which the standard policy requires the insured to bear part of the loss himself. Another major difference between these two compensation systems is the fact that contributory negligence, in contrast with the tort compensation, is normally immaterial under an insurance claim, because buying insurance means buying protection against the risk of the assured's negligence, as well as the risk of loss or damage by other means.

Strict liability, as introduced in **Rylands v. Fletcher**, or the possibility of its introduction in nuisance, may have an enormous role in establishing liability in favour of pollution victims and the environment. This principle may lose its effectiveness when it is realised that there is no obligation at common law to finance damage in advance. Thus, changing the common law to some form of compulsory insurance cover based on strict liability agreement seems to be necessary, in order to provide sufficient compensation for pollution victims. Even if such insurance is provided by statute, there is still problems, similar to causal problems which so often arise in tort compensation case, which need to be solved by the common law. However, there is a major difference in establishing causal connection between tort cases, in which the courts are compelled to choose two sets of causal principles: those supplied by the usage of ordinary language of policy and those supplied by the independent consideration of the policy, and in the case of an insurance contract, in which the standard of ordinary language of policy is in almost all cases the correct one to be applied.

As a general conclusion, it is clear that to recover compensation on the basis of tort liability is problematic whether or not that liability is based on negligence, strict liability, trespass or nuisance. This is in the main because of the widespread results of pollution at sea which provide the difficult task of proving any claim. There are almost certainly bound to be problems relating to the ambit of the duty of care in every case and similar problems relating to the causation of loss caused through negligence or some other concept giving rise to liability, and there are the more difficult questions of remoteness of injury and remoteness of damage. In these circumstances the inevitable conclusion is that there

requires to be some form of compulsory insurance based on strict liability or an insurance fund from which claims can be met without having to satisfy the rigorous criteria laid down in the common law of negligence or some other tort giving rise to liability.

## Chapter 2. Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution- TOVALOP

### 2.1. Introduction

After the Torrey Canyon disaster in 1967, the government, the public, and industry became actually aware of the dangers of oil pollution.<sup>1</sup> It was felt by many in the industry that constructive action was needed to fill the gaps in the law, and that waiting for the entry into force of any international treaties which may be adopted was not good enough, both from the point of view of the plaintiff, who needs compensation, and of the industry, in which there were many who felt the need to respond to public opinion positively and to arrange insurance for any removal cost voluntarily incurred. The influence of this concept originated in TOVALOP, Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution,<sup>2</sup> and its supplement CRISTAL, Contract Regarding an Interim Supplement to Tanker for OIL Pollution.<sup>3</sup>

TOVALOP is the earliest of the voluntary compensation schemes set up by tanker industries in order to take constructive measures to mitigate and provide compensation for damage by oil pollution from tankers, on the basis of mutual promise. In 1969, seven major tanker companies<sup>4</sup> signed TOVALOP. It is a voluntary agreement only as regards the decision whether or not to participate. As soon as becoming a party, there is an obligation to meet all the terms and conditions of the Agreement. The enforcement of the terms of Agreement

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<sup>1</sup> Brown, E.D. *The Lesson of the Torrey Canyon*, 21 Current Legal Problems. [1968] p. 113.

<sup>2</sup> See text in 6 Bendict, Ch VI, Revision 1993, 6-11.

<sup>3</sup> See text in, Id. 6-12.

<sup>4</sup> BP Tanker Company Ltd, Esso Transport Company Inc., Gulf Oil Corporation, Mobil Oil Corporation, Shell International Petroleum Company Ltd, Standard Oil Company of California and Texas Inc.

directly by third party beneficiaries is doubted, since as a rule where there is a contract for the benefit of a third person, the third person cannot sue alone in his own name; nevertheless it seems there is no difficulty in joining as a third party, as a co-plaintiff, to one of the contracting parties and, therefore, judgement given for the plaintiff will go to the third person.<sup>5</sup>

In May, 1978 TOVALOP underwent a fundamental change to reflect the coming into force of the 1969 Civil Liability Convention, CLC,<sup>6</sup> and the 1971 Fund Convention, FC, which forms an international legal regime providing a system of compensation under which, irrespective of fault, the owner of a tanker spilling oil is liable for damage caused thereby, up to a certain limit and, if this is insufficient, supplemental compensation is provided by means of the FC. In order to make TOVALOP more efficient, effective and consistent with 1984, as adopted by 1992, Protocol to CLC and FC, it underwent another revision, in February 1987, which resulted, among the other things, in a higher limit of financial responsibility through the additional supplement to the Agreement. It is felt that bringing TOVALOP into the line of CLC and applying it to those countries that have not taken the trouble to accede to the Convention, will give such countries a windfall of the rights offered by the Conventions, without their being required formally to assume the burdens, such as the uniform certificate procedure.

TOVALOP is similar to the CLC and, indeed, was designed to operate in a jurisdiction where the CLC is not in force. Restriction of the operation of TOVALOP in jurisdictions where CLC is not in force may lead to unfair results

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<sup>5</sup> This is supported by the opinion which was given by Lord Denning, M.R. in *Beswick v. Beswick*, [1966] 3 All E.R. 1.

<sup>6</sup> International Convention on Civil Liability for Oil Pollution Damage, see text in Ch. IV, 6 *Benedict Revision*. 1993, 6-3,6-4,6-4A,6-4B.

for victims of pollution in the CLC participating countries, in particular where the costs of threat removal measures, discharge from bunker and unladen taker and bareboat charterers are involved. Since all of these events are not covered by the 1969 CLC and, in consequence, the victims of such incident remain uncompensated in the CLC jurisdictions.

The voluntary character of TOVALOP suggests that any right or obligation thereunder could only arise in as much as the voluntary fund is accepted by a potential claimant. Therefore, there would be nothing to stop one or more claimants refusing the package offered to him and raising a case in the courts.

TOVALOP is administered by the International Tankers Owners Pollution Federation Limited, (the Federation), which is an association of which all the parties to TOVALOP are members.<sup>7</sup> It is important to note that the Federation is not a party to the agreement and thus has no responsibility under TOVALOP to take direct measures or compensate third parties. Therefore, the Federation does not provide any insurance or guarantee for payment, and requires that the parties establish their financial capability to the satisfaction of the Federation in order to meet their obligations under the agreement. Hence, the Federation only decides when a person files a claim, whether the tanker involved is subject to TOVALOP, and what the liabilities of parties are to each other on the basis of mutual promise. It means a member of TOVALOP is regarded as the insured and the insurer at same time, the same as ship owners under P & I Clubs. It may be asked what is the premium for which the member, as insurer, undertakes the other liabilities. In response, it may be said that the premium, the same as "call" in P & I Clubs, consists of liability, as a guarantee, to contribute to the loss of the other members of TOVALOP's mutual society.

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<sup>7</sup> TOVALOP (SA), Revision 1990. clause 1(c).

However, TOVALOP is not a contract of insurance. The parties to TOVALOP undertake to maintain their financial responsibility to meet their voluntary obligations, as a fundamental condition of participation in TOVALOP.<sup>8</sup> They can do so by means of insurance (usually through the traditional Protection and Indemnity Clubs), self insurance, or by obtaining a guarantee. They may arrange any combination of these methods in order to satisfy their limitation liability.<sup>9</sup> However, it should be indicated that insurance liability against tanker pollution is in general not looked upon favourably by the insurance industry.<sup>10</sup>

Since TOVALOP is world-wide in its application, any oil pollution liability insurance cover which is subject to geographical exclusion, trading warrant or any other restriction that might result in a party being unable to meet his full obligations, financial and otherwise, under the Agreement (including supplement) cannot be considered as satisfying the insurance condition. Accordingly, an applicant with oil pollution insurance cover which is qualified in such a way might be refused entry into TOVALOP.<sup>11</sup> Thus, tanker owners and bareboat charterers who wish to remain party to TOVALOP should therefore ensure that they have unqualified oil pollution insurance cover.

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<sup>8</sup> A fundamental condition of participation in TOVALOP is that each party shall "establish and maintain his financial capacity to fulfil his obligations under this Agreement to satisfaction of the Federation". Clause II(B) (3).

<sup>9</sup> Having satisfied itself that an applicant's insurance arrangement are satisfactory, the Federation will issue TOVALOP Certificate in respect of the entered vessels. this certificates merely demonstrate that the named tanker owner or bareboat charterer and vessel satisfied the entry requirements at the date of issue. A TOVALOP certificate is not a certificate of financial security. For further details, see: TOVALOP & CRISTAL, *A Guide to Oil Spill Compensation Produced by the ITOPF and CRISTAL Limited*, second ed., 1990.

<sup>10</sup> Comment, *Compensation for Oil Pollution at Sea: An Insurance Approach*, 1975, San Diego Law Review, 729-731

<sup>11</sup> This point was raised by ITOPF, see the letter, dated 8 January 1991, which was sent by White, I.C. managing director, to members under the title of "Urgent for Immediate Attention".

TOVALOP was supplemented by The Contract Regarding an Interim supplement to Tanker for Oil Pollution ,CRISTAL,<sup>12</sup> which is an oil industry scheme to compensate the victims of oil pollution and provide financing for damage not covered by TOVALOP. Under CRISTAL, oil companies which are signatories, contribute to the fund to provide supplemental compensation up to a maximum of \$135 million for ships exceeding 140,000 tons.<sup>13</sup> The CRISTAL fund provides compensation for oil pollution claims on a very similar basis to that set out in the Fund Convention and the scheme remains of particular value in relation to the incidents occurring in countries where the Fund Convention is not in force. CRISTAL is not funded by insurance but pays claims by making calls on its members, on the basis of imported oil.

## **2.2. Services**

### **2.2.1. Under the TOVALOP Standing Agreement.**

1969 TOVALOP in its preamble reflects the opinion of its signatories that traditional maritime law did not always provide adequate means for compensating national governments which incur expenditure to avoid or mitigate damage by pollution to coast lines from discharges of oil as a result of marine casualty, or for reimbursing tanker owners<sup>14</sup> who incur such expenditure. TOVALOP also represents a voluntary effort on the part of tanker owners, including bareboat charterers, to establish their responsibility, on the basis of mutual promise, to assume certain obligations for which they might not otherwise be legally liable, to governments, for paying compensation for clean

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<sup>12</sup> It was adopted in 1971 and has been amended several times

<sup>13</sup> CRISTAL, Revision 1987, clause IV(D)(5)(a).

<sup>14</sup> It includes Bareboat Charterer if the tanker is under Bareboat Charter. clause I(A).

up costs,<sup>15</sup> and to assure tanker owners' capability to fulfil this responsibility. Under the original TOVALOP Standing Agreement, SA, no recovery was allowed by the Federation for private persons or for any property damage. This was amended, in the subsequent SA, so as to include all damage and threat removal measures, regardless of person and the kind of pollution damage, subject to the terms and conditions of the Agreement.<sup>16</sup>

Such a gratuitous payment may be criticised on the principle that the law will not recognise any transaction, savouring of "maintenance" and "champerty."<sup>17</sup> The question is, would such payment be held to be maintenance<sup>18</sup> or champerty<sup>19</sup> and therefore illegal? At one time doctrines of "maintenance" and "champerty" were so strict that no man could pay another's costs. In 1797 Lord Loughborough L.C. said that "every person must bring his suit upon his own bottom and his own expenses."<sup>20</sup> These doctrines have changed considerably with the passage to time. Dankwerts J. in *Martell and Others v. Consett Iron Co. Ltd.*,<sup>21</sup> said:

"Support of legal proceedings, based on a bona fide community of pecuniary interest or religion or principles or problems, is quite different and, in my

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<sup>15</sup> It includes cost of threat removal measure taken as a result of incident, clause. IV (A).

<sup>16</sup> Clause IV, 1990 amendment to TOVALOP.

<sup>17</sup> *Compania Colombiana de Seguros v. Pacific Steam Navigation Co.* [1965] 1 Q.B. 101.

<sup>18</sup> Maintenance has been defined "as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse." See Lord Denning M.R. In *re Treppca Mines Ltd.* (No. 2) [1963] Ch. 199 at pp. 219.

<sup>19</sup> Champerty is the particular form of maintenance which exist when the person maintaining the litigation is to be rewarded out of its proceeds. As a crimes and as torts, maintenance and champerty have now been abolished, see Criminal Law Act. 1967. Ss. 13(1)(a), 14(1). Note that a champertious agreement is still void for illegality so far as the law of contract is concerned, see, *Id.* S. 14(2).

<sup>20</sup> *Wallis v. Duce of Portland* [1797] 3 Ves. 494 at p. 502.

<sup>21</sup> [1955] Ch. 363 at p. 387.

view, the law would be wrong and oppressive if such support were to be treated as a crime or a civil wrong. But I do not believe that the law is in that condition.”

It was held at first instance, and affirmed by the Court of Appeal, that an angling association could support an action by an angler to prevent pollution of a river because there was a sufficient “community of interest” in the subject matter of the action.

The courts would, therefore, would be likely to hold that TOVALOP has a legitimate and bona fide interest in such a payment which is for a common interest. Such payment may also be justified under the charity law whereby a neighbour is allowed to assist the suit of a poor neighbour. Gratuitous payment may also be defended when it is realised some particular agreement, in the course of legitimate business, has not been regarded as “maintenance.” It has been held that an insurer defending actions against policy holders, or banks lending money at interest to a customer to finance his litigation, are not maintainers.<sup>22</sup>

There are some indications that the common law takes a rather harsher view of champertous maintenance (where the maintainer takes a share of proceeds of the action).<sup>23</sup> This is because the champertous maintainer might be more tempted for his own personal gain, e.g. to suppress evidence. In these circumstances, it is thought it would be advisable that the payment, under TOVALOP, is not repaid out of the proceeds of the action, when the right of action is assigned, but is to be repaid out of the damage party’s own pocket the exact amount paid, regardless of the amount recovered in the action, and,

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<sup>22</sup> See Donoran L.J., *In re Trepca Mines (No. 2)* [1963] Ch. 199 at p. 224.

<sup>23</sup> Lord Denning M.R., *Id.* at 219.

therefore, the damaged party may reapply to TOVALOP if they are still unsatisfied, i.e. if the recovered less from third party in action than they expended.

Under TOVALOP SA, participating owners agree, among themselves, to reimburse victims of pollution to the amount of US. \$ 100 per GRT or \$ 10 million limit whichever is the less.<sup>24</sup> This amount was, in order to get close to the limit of CLC, raised by a 1986 amendment to \$ 160 per ton or \$16.8 million whichever is the less, in respect of one incident. In 1989, the TOVALOP SA was amended<sup>25</sup> to make it clear that where, as a result of an incident, the participating owner or his insurer has paid claims, those amounts will be taken into account in determining the maximum amount of the participating owner's financial responsibility under the Agreement. It is clear, so far as insurance is concerned, that the maximum liability of an insurer is the sum fixed by the policy. Where there is no prior agreement to fix maximum liability, it is impossible to establish the extent of insured's liability, except in damage to the property in which the value of the property lost or damaged can be regarded as a maximum liability.

The maximum financial responsibility under TOVALOP agreement has been fixed in respect of any one *incident*.<sup>26</sup> The term "incident" has been defined as, "any occurrence or series of occurrences having the same origin." Difficult questions of construction may arise where the insurance is worded so as to cover a fixed amount in respect of claims arising out of any one occurrence. Thus, the clarification of the term of occurrence seem necessary in

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<sup>24</sup> Clause VII. TOVALOP (SA) 1990.

<sup>25</sup> By the members of ITOPF in annual general meeting on 25 October 1989, with effect from 20 February 1990. This was done following decision of Esso Bericia, see case and decision in *infra* p. 26.

<sup>26</sup> Clause VII(A), 1990 amendment to TOVALOP (SA)

determining the limits of indemnity in respect of one claim or a number of claims under the policy.

The term "occurrence" may find a different meaning if it is looked at from the point of view of the tortfeasors, insureds, or of the victims, and third parties. A number of persons may be injured or damaged by a single act of negligence. On the one hand, it seems, from the victims' point of view, there are different occurrences; on the other hand, there is, from tortfeasors' point of view, only one single occurrence. The question was raised in *Forney v. Dominion Insurance Co. Ltd.*<sup>27</sup> where the policy limited to insurers' liability in respect of any one claim or number of claims arising out of the same occurrence to £ 3,000. Donaldson J. held that the policy contemplated that a number of claims might arise out of the same occurrence and observed:<sup>28</sup> "This seems to me to indicate that a number of persons may be injured by a single act of negligence by the insured- in other words that "occurrence" in this context is looked at from the point of view of the insured." Thus, it seems that the number of occurrences is the number of times the insured is negligent. If there is only one negligent act, there is only one occurrence and the policy limit will apply regardless of how many individual claims may be made by the third parties as a result of the incident.

The meaning of "occurrence" may, in the ordinary sense, overlap with the term "accident". In a popular sense, both mean an incident or an event that happens without being designed or expected.<sup>29</sup> It seems to be necessary to make a distinction between these two terms in the consideration of insurance

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<sup>27</sup> [1969] 1 W.L.R. 928.

<sup>28</sup> *Id.*, at p. 934.

<sup>29</sup> See definition of occurrence in *Black's Law Dictionary*, 5 Th. ed., p. 947; and the term of accident in the Workmen's Compensation Act 1897.

liability in which each of them has got different consequences. As was mentioned, the number of occurrences in a legal meaning, was to be determined by asking how often the insured's negligence occurred. The word "accident" has not received any legal meaning, other than its ordinary sense.<sup>30</sup> Lord Lindley said in, *Fenton v. J. Thorley & Co. Ltd*,<sup>31</sup> "The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss."<sup>32</sup> Thus, the word "accident" was confined to such an unforeseen event, misfortune, loss, act, or omission as is not the result of any negligence or misconduct by the insured. In *South Staffordshire Tramways Co. Ltd v. Sickness and Accident Assurance Association Ltd*,<sup>33</sup> a policy indemnifying the insured against liability for accidents caused by vehicles had a limit of "£ 250 in respect of one accident." One of the insured's trams overturned injuring forty passengers. It was held that "accident" in the policy meant injury in respect of which a person claimed compensation and therefore the insurer was potentially liable for 40 x £250. As a result, an occurrence cannot be called an accident unless it is due neither to design nor to negligence of the party who has committed it.

It has been a well established law and practice to allow ship owners to apply for limitation of their liability, in circumstances where they are found to be

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<sup>30</sup> Macnaghten, in *Fenton C.P. Auper v. Thorley & Co. Ltd*. [1903] A.C. 443 at p. 448 said, " The expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

<sup>31</sup> [1903] A.C. 443 at p. 453

<sup>32</sup> This obiter dictum was affirmed in, *Regina v. Morris* [1972] 1 W.L.R. 228; *Mills v. Smith (Sinclair, Third Party)* [1964] 1 Q.B. 30.

<sup>33</sup> [1891] 1 Q.B. 402.

legally liable for loss suffered by others.<sup>34</sup> The right to limit is, under the U.K. Law, available only when the loss or damage has taken place without the defendant's "actual fault or privity."<sup>35</sup> Thus, the owner will lose the right to limit if the fault giving rise to the claims is one for which he was legally responsible. The position is however different under the voluntary insurance arranged under TOVALOP in which the voluntarily assumed limited financial liability cannot be broken by the pollution victims, even if the owner is actually at fault since under TOVALOP, the owners have accepted, irrespective of fault or privity, the liability that may not otherwise be legally liable and there is also no provision in the Agreement to break the provided financial limit, due to owners' fault or privity. In short, the limit of liability is unbreakable under the TOVALOP. It may be criticised that the unbreakable limit is not in favour of pollution victims who may suffer substantial damage. This criticism does not seem to be fair, since the members of TOVALOP are not obliged to provide any source of reimbursement for pollution damage. Furthermore, additional financial limit is available under CRISTAL, as a supplementary to TOVALOP, to complete the amount of recovery under the TOVALOP at a reasonable level.

### **2.2.2. Under The TOVALOP Supplement**

Although the Standing Agreement, SA, provided constructive measures to mitigate the damage, it did not provide, in all aspects, adequate compensation for all legitimate claims. Liability, under SA, did not include the costs for environmental damage, following an escape or discharge of oil from a tanker. Accordingly, the parties decided to extend compensation for pollution damage

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<sup>34</sup> As a matter of U.K. Law, limitation of liability is governed by the Merchant Shipping Act 1894, S. 504, as amended by the Merchant Shipping (Liability of Shipowners and Others) Act. 1958.

<sup>35</sup> *Id.*, S. 503(1). See in details, conduct barring right to limit in Part. 4. of Thesis.

so as to cover the cost incurred to restore natural resources, in order to encourage owners to mitigate pollution damage and, in consequence of it, to protect the environment. The supplement provided reimbursement of reasonable costs actually incurred in taking reasonable and necessary measures to restore or replace natural resources damaged as a direct result of an incident.<sup>36</sup> They did this without affecting the provision of SA which alone shall continue to apply to any incident which is not applicable under the supplement<sup>37</sup> and does not occur where CLC applies.<sup>38</sup>

The TOVALOP supplement, hereinafter TS, provides a substantially increased level of compensation to victims of oil pollution from tankers, ranging from a maximum \$ 3.5 million for tanker up to 5,000 gross tons, g.t, plus \$493 per g.t for each ton in excess of 5,000 g.t, and up to \$ 70 million for a tanker in excess of 40,000 g.t.<sup>39</sup> This is a positive development for both claimants , victims of pollution damage, and the tanker owner, in particular, when it is realised that the TS expanded its geographical application, in contrast to the SA, to provide world wide coverage where pollution damage occurs, irrespective of whether CLC is in force or whether the spill occurred in territorial waters. Since the level of compensation under TS is substantially higher than SA, in consequence, it will enhance compensation to claimants within the existing CLC jurisdiction beyond that to which they are legally entitled. This

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<sup>36</sup> TOVALOP and CRISTAL *a Guide to Oil Spill Compensation, produced by ITOPF Limited and CRISTAL*, 2 nd ed., 1990, p. 3.

<sup>37</sup> Applicable incident means any occurrence or series of occurrence having the same origin which cause pollution damage by, or creates the threat of an escape or discharge oil carried as cargo in the tanker and owned as defined in CRISTAL, by an oil company parties to it. TOVALOP supplement, see clause. 1 (A).

<sup>38</sup> There is no liability whatsoever under TOVALOP when CLC applies to pollution damage resulting from an incident. Clause IV(B)(a).

<sup>39</sup> TOVALOP Supplement (TS)., clause. 3(c)(3).

increase in compensation has a major advantage for tanker owners participating under the CLC, who might become liable for unlimited amounts where their right to limit liability is broken by claimants or under local legal regimes.

TOVALOP Supplement will only be available to a claimant where the cargo spilled by the tanker is owned by a member of CRISTAL. TOVALOP SA, with its maximum compensation of \$16 million, will continue to be available to claimants when non-CRISTAL cargoes are carried.<sup>40</sup> These two different conditions are very likely to lead to problems, both for victims of pollution damage and for tanker owners. When a tanker owner charters his vessel, frequently the charterer will not own the cargo. Even when the tanker can ascertain the owner of the cargo on loading, the cargo may be sold many times during the voyage. Thus, a tanker owner may find himself at one point with supplemental pollution damage compensation provided by CRISTAL and at next moment with only SA.

Therefore, the claimant's rights, such as that of off-shore fisherman who might sustain an economic loss occurring on fishing grounds outside territorial waters, would be subject to the lottery of who owned the cargo when the damage was caused. If the cargo was being carried by a tanker which belonged to a member of CRISTAL, the claimant would be able to receive his rights under TS, but if it is not, his recovery would be impossible under SA because under TS, the application of pollution damage, contrary to SA,<sup>41</sup> has

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<sup>40</sup> Id, clause. 1(2)(D).

<sup>41</sup> under TOVALOP (SA) only a spill causing pollution damage on territory or territorial waters of a state not party to CLC would be compensated. Art. 1(G), TS. 1990.

not been restricted to territorial sea and, thus, can apply wherever damage occurred.<sup>42</sup>

What can be done to solve this potential problem? It might be suggested that tanker owners insist on a type of CRISTAL clause in their charterparties requiring the charterer to warrant that at all times during the voyage the oil carried will be "owned" by a CRISTAL member. While this solution may have some merit, it is subject to legal limitation as well as market dynamics which may force the tanker owner to delete the clause in order to gain a charter. Moreover, while the tanker owner might have a right of action against his charterer in the event of an incident after which it was determined that a warranty had been broken, it does not ensure against the financial insolvency of the charterer. It is also unlikely that claimants would be able to pursue the charterer under some form of third party beneficiary doctrine.

The word "owned" can include a situation where a party to CRISTAL does not actually possess legal title to the oil cargoes. Thus, the cargo may be the subject of a contract under which a non CRISTAL party owning the cargo has agreed to sell it to a party to CRISTAL. For the purpose of CRISTAL, the cargo will be considered "owned" by a party even if legal title to the oil is still with a non CRISTAL party.<sup>43</sup> A CRISTAL party, therefore, may also elect to be considered the owner of oil cargo, even if the title had been transferred to a non party. Further, a CRISTAL party or one of its affiliates whose tanker is carrying a cargo owned by a non party to CRISTAL can elect to be considered the owner of that cargo. In both instances, the election has to be made in writing to CRISTAL Limited prior to any incident.<sup>44</sup>

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<sup>42</sup> TOVALOP ( SA) clause IV(B)(a).

<sup>43</sup> Clause V(4). 1987.

Pollution damage is defined in the TOVALOP as covering physical loss or damage, e.g. oiling of fishing boat, caused by contamination resulting directly from the escape or discharge of oil, and by preventive measures. It also extends to proven economic loss actually sustained as a direct result of a spill, even without accompanying physical damage.<sup>45</sup> However, the definition does not cover damage to non-commercial natural resources or claims which are theoretical or speculative. Reasonable costs actually incurred to restore or replace natural resources damaged as a direct result of an incident may be allowable in certain circumstances under the supplement.<sup>46</sup>

In the SA, recovery for economic loss in the absence of physical loss or damage, was unclear.<sup>47</sup> In TS it appears that there is a right to recover economic loss unaccompanied by physical damage, so long as the claimant can prove that the loss actually occurred, and that it resulted directly from contamination.<sup>48</sup> Although the condition of recovery, the loss should be proved, of compensation appears to be heavy burden upon claimants, it substantially reduces the deficiency under SA in which economic loss was unrecoverable without physical damage. Recovery of economic loss without physical damage, under the TS, may be doubted when it is realised that the recovery is subject to the phrase, "direct result of contamination to as set out in (I) above" in which the pollution damage has been defined as physical loss or damage. This may be construed to require a claimant to suffer physical loss or damage in order to

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<sup>44</sup> Clause V(2)(3). 1987.

<sup>45</sup> TOVALOP (SA), clause 1(k).

<sup>46</sup> TOVALOP Supplement (TS), clause 1(G)(III).

<sup>47</sup> Clause I(K), TOVALOP (SA) 1990.

<sup>48</sup> Id, 1(G)(I).

succeed on a claim for economic loss. If this is the true construction, it will have different impact when the insurer is involved in determining pollution damage.

TOVALOP Supplement also compensate a member of CRISTAL, in an amount up to the limit of FC, where oil is spilled by a tanker causing damage in a jurisdiction where the provision of FC in force and oil is owned by a member of CRISTAL.<sup>49</sup> This provision may be criticised because such payment may exhaust the TS fund before victims of pollution damage have been fully satisfied. However, it must be realised that the CRISTAL provides substantial compensation, supplemental to TS which becomes available as soon as the TS fund is exhausted. It may said, if it is so, what is the necessity of the payment to CRISTAL by TS fund. It seems that the main reason for inserting such a provision in TS may be to place a CRISTAL member in FC States on as equal footing with those who do not reside in FC States.

### **2.3. Nature of Liability**

Under TOVALOP the tanker owner and bareboat charterer undertake, voluntarily and as promptly as practical, to dispose of all valid claims arising out of the agreement.<sup>50</sup> In other words, as a result of becoming a party to TOVALOP, tanker owners and bareboat charterers agree to assume certain obligations for which they might not otherwise be legally liable. However, the TOVALOP party, in making payments, does not thereby admit legal liability for the incident, nor does he waive any rights of recovery from third parties whose fault may have caused, or at least contributed to, the incident. Thus, TOVALOP only facilitates, without recourse to legal proceeding, the payment of

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<sup>49</sup> Clause 3(B)(2), TOVALOP Supplement (TS) 1990.

<sup>50</sup> TOVALOP Supplement (TS), clause II(B)(4).

compensation, without in any way transferring the actual responsibility for the spill or prejudicing the issue of ultimate liability. This indicates that they are liable to pay compensation irrespective of fault, i.e. strict liability subject to very limited exceptions.<sup>51</sup>

In this sense, the nature of TOVALOP's liability is very similar to insurance in which damage is covered by the insurer upon the occurrence of a described event in the policy, without regard to whether those events were caused by negligence of the insured or another.<sup>52</sup> Thus, it can be concluded that the TOVALOP is essentially an insurance scheme under which the payments have to be made out on the basis of strict liability, i.e. liability without proof of fault, in the same way as insurance company.

The basis, therefore, on which the tanker owner voluntarily undertakes to accept payment is an assumed strict liability. The question which arises here is whether such an established strict liability can be supported under a marine insurance contract. Marine insurance, in legal theory,<sup>53</sup> is essentially a contract of indemnity,<sup>54</sup> i.e. the amount recoverable is measured by the extent of the insured's loss or liability. Thus, where the insured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.<sup>55</sup> In other words, in indemnity

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<sup>51</sup> See exceptions in clause IV(B).

<sup>52</sup> The development of no-fault insurance in this narrow sense was an outgrowth of public dissatisfaction, the same as creation of TOVALOP, with the performance of the system for compensation of losses in traffic accident, which in turn led to a succession of legislative measures. See, Keeton, RE, Basic Text on Insurance Law, 1971, at p. 246.

<sup>53</sup> It has been pointed out that in practice, marine insurance is not perfect contract of indemnity. See. David Aitchison and A.F. Brandt v. Haagen Alfsen Lohre [1879] 4 App. Cas. 755.

<sup>54</sup> S. 1, MIA 1906.

insurance, in which it is not necessary that the issue of the assured legal liability should have been adjudicated upon or decided against or that he should have paid damages <sup>56</sup> (unless the policy otherwise provides), place an obligation upon the insurer to reimburse or indemnify an assured only to the extent that the assured has incurred and discharged his liability.<sup>57</sup> The insurer is, therefore, only concerned when it is proved that the assured has legal liability.

To provide this, there is a condition precedent to liability, in the most standard liability policy, that the insurers "will indemnify the insured against damage all sums which the insured shall become legally liable to pay... in respect of ...damage to property." Thus, until the liability and quantum of the damage has been determined by the agreement or the judgement, the insurer or third party, under Third Parties (Rights against Insurers) Act 1930, has no cause of action against insurer under the policy.<sup>58</sup> Devlin J in **West Wake Price & Co. v. Ching**,<sup>59</sup> said, "The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss." Thus, the member of TOVALOP, who may pay without establishing liability, and who wishes to claim under his own liability insurance policy, may fall into difficulty if the liability has not been proved in the court or arbitration process or has not been accepted by prior agreement between the member and his insurer, since acceptance of such an

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<sup>55</sup> S. 74, MIA 1906; see *Cunnard Steamship Company Ltd. v. Marten*, [1902] 2 K.B. 624 at p. 629.

<sup>56</sup> *In re Law Guarantee Trust and Accident Society, Ltd. v. Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch. 617.

<sup>57</sup> See *West Wake Price & Co. v. Ching* [1957] 1 W.L.R. 45, especially per Devlin, at p. 49.

<sup>58</sup> *Post Office v. Norwich Union Fire Insurance Society Ltd.* [1967] 2 Q.B. 363

<sup>59</sup> [1957] 1 W.L.R. 45 at p. 49.

established liability by the insurer deprives him of his legal right to conduct the defence under the insurance policy.

Assumed legal liability may be accepted under the policy, provided that the insured is able to get the insurer's prior written consent. A condition in the most standard liability policy made it clear that, "No admission, offer, promise, payment or indemnity shall be made or given by or on behalf of the insured without the written consent of the [insurance] company." Thus the insured cannot establish their claim to indemnity by bringing an action setting up their own liability to the third party, unless they have the insurer's consent for admitting the liability. It may be argued that such a condition may not encourage persons, natural or legal, to assume liability in favour of the victims or society who may otherwise receive nothing for sustained damage. This is not a proper argument, because it does not prevent liable persons from insuring, it only means that the insured should have the insurer's prior consent which can be achieved, without difficulty, in the competitive insurance market. It may also be said that there is no need to have the prior consent of the insured if admission of liability does not prejudice the insurers' interest. In other words, an insurer cannot rely on breach of the condition unless he suffer actual prejudice. The question was raised in *Terry v. Trafalgar Insurance Co. Ltd*,<sup>60</sup> in which it was held that the defendant was prejudiced by the plaintiff's admission of liability because he was shut out from any chance of negotiation or favourable settlement. Thus, the defence is defeated, since there is inevitably prejudice in every case to the insurer because of his deprivation of the proper conduct of the defence. It should, therefore, not matter on principle whether or not insurer has in fact been prejudiced by an admission of liability.

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<sup>60</sup> [1970] 1 Lloyd's Rep. 524.

A difficult problem could arise where TOVALOP is dealing with a liability in a possible general average situation where, a mixture of motives lead to off-loading part of the cargo from a stranding vessel in order to avoid pollution and to permit continuation of the voyage to the destination. It may be asked would it be appropriate for a TOVALOP underwriter to reimburse off-loading expenses and then, as the owner's subrogee, to claim a portion of general average cargo and freight? The question will be more clear when it is realised that threat removal measures have been assumed as one of the basis of responsibility of the participating owners,<sup>61</sup> provided it "has occurred for the purpose of removing the Threat of an escape or discharge of oil."<sup>62</sup> The question arises as to what extent the tanker owner can claim the cost of anti-pollution measures he has taken as general average. The answer must be looked for in the Rule VI of The York Antwerp Rules 1974, which say that, "Only such loss, damages or expenses which are the direct consequence of general average act shall be allowed as a general average." Thus any expenditure, e.g. cost of off-loading, incurred to remove pollution threat or any liability arising from such pollution would be allowable in general average, provided such expenditure or liability would be the direct consequence of the general average act, in order to save cargo ship. The application of the test of direct consequence may bring difficulties in some pollution cases in which the purpose of the expenditure is very mixed in the case of taking the threat removal measures. The answer to this question could be "no" if the objective of the threat removal measure is not to preserve from peril the property involved in a common Maritime adventure, but is solely to prevent pollution. On the other hand, the answer could be "yes"

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<sup>61</sup> Clause IV.

<sup>62</sup> Clause I(O).

to the question by arguing that the property, ship, could not have been saved without the removal oil.

No responsibility shall arise under the TOVALOP unless written notice of claim is received by the participating owner within two years of the date of the incident.<sup>63</sup> Limiting notice of claim for a period of time may give rise to difficulties where the cause of loss, incident, comes into operation prior to the time limit but the actual loss, pollution, for which the liability is sought occurs after that limit. Suppose a vessel laden with oil sinks but no or little cargo escapes. A number of years later, e.g. after three years, oil is released from the rusting hull. The question could arise, as to whether the tanker owner still has any liability under TOVALOP, particularly when the owner has abandoned the vessel to his hull underwriter as a constructive or actual total loss. The answer could be found in some insurance cases which could, by analogy, be applied to TOVALOP. In the case of *Meretony v. Dunlop*,<sup>64</sup> it was held that where damage is caused within the limit of time policy, but the extent of it is not ascertained until afterwards, the insurer is not liable. In *Knight v. Faith*<sup>65</sup> however, Lord Campbell<sup>66</sup> doubted this rule and stated:

“If a ship, insured for time, during the time received damage from the perils of the sea, though the amount thereof be not ascertained till the expiration of that time, and she is kept afloat till then, upon the assured taking proper steps, there does not appear any good reasons why they may not, according to the facts, proceed against the underwriters either for total or for a partial loss.” As a result, by

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<sup>63</sup> Clause VIII.

<sup>64</sup> See Willes J. in *Lockyer v. Offley* (1786) 1 T.R. 260.

<sup>65</sup> (1850) 15 Q.B.D 649.

<sup>66</sup> Id. 667

analogy, if an incident occurs which is subject to coverage of TOVALOP and causes a loss which may not occur or be fully ascertainable until after the expiration of notice limit, the TOVALOP ought to be liable. The underwriter, therefore, who has paid compensation for pollution damage, after the abandonment, will receive the amount of that payment in respect of that incident.<sup>67</sup>

The other problem which may come into existence in performance of TOVALOP is where the salvors are involved to haul the vessel off the strand and the tanker owner is obliged to provide insurance against salvor liability for pollution damage which may occur during the salvage effort. Is the cost of such insurance included within the TOVALOP's definition of "Owner's Clean up Costs" and expenditure reasonably incurred in "Removing the Oil"? The basis of TOVALOP is that when a participating tanker spills, or threatens to spill, the owner or bareboat charterer takes appropriate action in response to the incident. Measures taken include attempts to eliminate the threat, an action to prevent or minimise loss or damage which results directly from the escape or discharge of oil. Thus, it can be concluded, that if the salvor's effort is primarily directed to prevent or minimise pollution damage or eliminate the threat, it may be included as costs for which the owners are responsible under the TOVALOP. Otherwise, salvage costs are not recoverable under the owner's insurance policy since salvage charges, as a general principle of marine insurance law, are not included under "The expenses or services in the nature of salvage rendered by the assured or his agents, of any person employed for hire by them for the purpose of averting a peril insured against",<sup>68</sup> unless the

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<sup>67</sup> Clause VII(C)(a)

<sup>68</sup> S. 85(2). MIA 1906.

policy expressly so provides.<sup>69</sup> It must be noted that such expenses may be recovered as particular average or as a general average loss, according to the circumstances under which they may incur.

#### **2.4. Waiver of subrogation rights**

It is established in law that a person, by virtue of an indemnity given by him to some other persons, is subrogated to the rights and remedies of that person assured in relation to subject matter, and only can recover the sum which has been paid and not more than it.<sup>70</sup> Thus, the right of subrogation is based on principle of indemnity<sup>71</sup> and can, therefore, arise quite independently of a contract. This is supported by doctrine which says that nobody can make profit from his loss, i.e. prevention of unjust enrichment. It must also be emphasised that it can be modified, excluded or extended by contract.

The insurer, in the absence of a special contract, must exercise all rights and remedies arising from subrogation in the name of assured.<sup>72</sup> If the assured refuses to allow the insurer to use his name as a plaintiff, the insurer may institute an action against the defendant in his own name, and join the assured

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<sup>69</sup> S. 85(1), MIA 1906.

<sup>70</sup> This principle is based on the fundamental rule of insurance law which say that, "The contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified." See Brett L.J. in *Castellian v. Preston* (1883) 11 Q.B.D. 380 at p. 386; S. 79 MIA 1906.

<sup>71</sup> per Brown LJ said, at *Castellain v. Preston*, Id, at p. 401, that subrogation is an equitable doctrine which is "a corollary of the great law of indemnity".

<sup>72</sup> *Yorkshire Insurance Co. Ltd. V. Nisbet Shipping Co. Ltd.* [1962] 2 Q.B, 330.

as a second defendant.<sup>73</sup> The insurer can proceed directly against a third party in his own name if that right of action is assigned to him, under special contract, by the assured.<sup>74</sup> The assignment of the right to sue from assured to insurer is necessary in order to avail the insurer to take action in his own name, provided that the assignment is complete, i.e. notice is given to the defendant in accordance with Section 136 of Law of Property Act 1925. A bare cause of action, that is, the right to sue another in his own name, is not, in general, assignable, but one enforced by the insurer is legitimate because it is supported by the insurer's interest in respect of the amount of the loss he has paid out as a result of the wrong of the defendant.<sup>75</sup>

This insurer's established right has been incorporated in the TOVALOP in terms that any payment to a person, "shall be conditional upon either that person assigning that Participating Owner his right of action, or authorising him to proceed in the name of that person." Such an assignment may encourage insurers not to accept liability under TOVALOP. Because, insurers, due to some disadvantage of assignment, may not be interested to use the assignment as an alternative to subrogation. If insurers take action in their own name, it may bring bad publicity following an unsuccessful action. This disadvantage seems to have disappeared where the insurer uses the names of their insureds. However, assignment does have advantage over subrogation. In particular, there will be no requirement that the insured be fully indemnified before the insurers can keep everything they recover from the action because

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<sup>73</sup> *In re Miller, Gibb & Co. Ltd.* [1957] 1 W.L.R. 703, 707

<sup>74</sup> *Compania Colombiana De Seguros. V. Pacific Steam navigation Co.*, [1965] 1 Q.B. 101. See also S. 79 MIA 1906.

<sup>75</sup> *Compania Columbianana De Seguros v. Pacific Steam Navigation Co.* [1965] 1 Q.B. 101 at p. 112. Lord Edmund Davies.

the cause of action is entirely the insurers and the insured has forfeited all interest in it.

Although most cases of subrogation are related to insurers, this doctrine is not restricted to the law of insurance.<sup>76</sup> It undoubtedly extends to other contracts of indemnity such as guarantees given to a creditor on behalf of a debtor, although in the former case the indemnifier is subrogated to the rights and remedies of the assured or other person indemnified whereas, in the latter, he is subrogated to the right of creditor. What is absolutely clear from the authorities is that the rights and remedies to which the indemnifier is subrogated are those which were vested in the person to whom payment has been made, no more no less, and that the rights and liabilities of third parties unconnected with contractor are not affected.

The question which arises is whether the doctrine of subrogation entitles tanker owners to recover sums paid to damaged parties in terms of the TOVALOP. In the other words, whether the doctrine of subrogation is extended to the TOVALOP agreement or not. The consideration of TOVALOP shows that tanker owners voluntarily agree to indemnify people affected by oil spillage. In contrast, under a marine insurance contract, the insurer undertakes to indemnify, under the principle condition that subrogation rights are granted by the assured " in manner and to the extent thereby agreed."<sup>77</sup> Thus, a unilateral agreement, such as TOVALOP, cannot be treated as a marine insurance contract under which the insurer would have automatically, without assignment, a right of subrogation, if the insured is fully indemnified. In addition, further consideration of TOVALOP indicates that they are also under no statutory or

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<sup>76</sup> Lord Diplock in , *Orakpo V Manson Investment Co. Ltd*, [1978] A.C. 95 at p. 104; per Diplock J. in *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co. Ltd.* [1962] 2 Q.B. 330 at p. 339.

<sup>77</sup> S. 1. MIA. 1906.

general duties to make payment. The parties agreed voluntarily, for a commercial purpose, to indemnify a person affected by oil spillage. From this it can be deduced that TOVALOP is a gratuitous contract of indemnity so far as damaged parties are concerned; accordingly, the tanker owners are not entitled to recover those sums, if both the owner and the indemnified person suffer physical damage as a result of the action of the relevant third person. However, this does not mean that tanker owners have no right of recourse, out of the Agreement, against third parties, since nothing in the Agreement "shall prejudice the right of recourse of participating owner against third parties or vessels."<sup>78</sup>

The Agreement, until 1990, contained no provision whereby a participating owner can require from a claimant to whom he has made payment, an assignation of the claimant's rights of action against third parties responsible in law for the relevant damage. A clause<sup>79</sup>, in 1990, was inserted in to the TOVALOP Standing Agreement, and by reference in to the TOVALOP Supplement, which entitles a party to TOVALOP to require assignation or an authority to proceed in the name of the person to be compensated as a precondition to payment. The assignment of the right of action may be criticised because a bare right of action, such as a mere right to damage for wrongful conduct, is not assignable since to allow such an assignment would be to encourage undesirable speculation in law suits. Damages in the assigned action are too uncertain at the date of assignment and the assignee may be in a great protection to procure the court to give him greater damages. Indeed, such an assignment would savour of "maintenance" and "champerty" which

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<sup>78</sup> Clause VIII(B)

<sup>79</sup> Id.

provide a defence to the assignee's action. The position, as mentioned earlier, seems to be that a person generally will be allowed to take over another's rights by assignment provided that he can show that he has a legitimate commercial interest in doing so.<sup>80</sup> The House of Lords, in the *Trendtex Trading Corporation and Another v. Credit Suisse*,<sup>81</sup> a case of assignment of a claim for breach of contract, which might apply, by analogy, to the tort,<sup>82</sup> said that an assignee who has a "genuine commercial interest" in the enforcement of a claim may take a valid assignment of it so long as the transaction is not champertous and it seems that a genuine commercial interest may be presented simply because the assignee is a creditor of the assignor.

This seems to be true, since it is of paramount importance that TOVALOP have absolute charge of the running and conduct of the action against the third party, and must also avoid the risk of being held champertous, as mentioned earlier, and illegal, because only TOVALOP can ensure that the third party is fought with maximum ferocity. However, there is no argument as to assignment of the fruits of litigation i.e. the assignment of judgement in action. Such assignment was held, in *Glegg v. Bromley*,<sup>83</sup> not to savour of champertous maintenance because the assignee had no right and the assignor had an absolute right to compromise the litigation.

It may also be argued that what has been paid by the TOVALOP is a mere gift, i.e. a gratuitous payment. Thus, assignment of the right of action is unenforceable because the assignor, the person whom has been paid, has

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<sup>80</sup> See. Y.L. Tan. Champertous Contracts and Assignment, 1990, L.Q.R. 656.

<sup>81</sup> [1982] A.C. 679.

<sup>82</sup> Lloyd. L.J., said in *Brownlton Ltd. v. Edward Moor Inbucon Ltd.* [1985] 3 All E.R. 499 at p. 509, that the principle of the Trendtex applies to contract and tort alike.

<sup>83</sup> [1912] 3 K.B. 474.

suffered no loss. Such an argument may not be correct because there are strong authorities (which apply by analogy to the TOVALOP) to the effect that, in assigning damages in personal injury cases, the court will make no deduction in respect of moneys gratuitously conferred upon a plaintiff from private sources. In *Cunningham v. Harrison*,<sup>84</sup> a gratuitous payment by an employer to his employee who had sustained personal injuries was not deducted by the Court of Appeal from the damages received. The main reason behind this decision was that it would be iniquitous if the kindness and generosity of the third parties was to ensure to the benefit of the tortfeasor. Further, in *Parry v. Cleaver*,<sup>85</sup> where the House of Lords held that a police pension should not be deducted from damages, Lord Reid stated the principle as follows:<sup>86</sup>

“It would be revolting to the ordinary man’s sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and the only gainer would be the wrongdoer.”

It may be a useful idea to apply this principle to the case of fund set up to the devastating damage caused by oil pollution. It would be in the interests of public policy to encourage such a scheme as TOVALOP or CRISTAL by the assignment of right of action.

The question of TOVALOP as a gratuitous agreement was raised by the House of Lords in the *Esso Bernicia*,<sup>87</sup> On 30 January 1978 the unladen tanker, the *Esso Bernicia*, was being berthed at an oil terminal at Sullom Voe in

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<sup>84</sup> [1973] Q.B. 942.

<sup>85</sup> [1970] A.C. 1.

<sup>86</sup> *Id.* at p. 14.

<sup>87</sup> *Esso Petroleum v. Hall Russell & Co. (The Esso Bernicia)* [1988] 3 W.L.R. 730.

the Shetland Islands, with three tugs. A fire which broke out in one of these tugs caused the towing line to the stern of the vessel to be cast off, resulting in loss of control by the other tugs. As a consequence, the vessel came into contact with the jetty, causing damage to the vessel and jetty, and the escape of a large quantity of bunker fuel. Damages were claimed by a crofter whose sheep grazed a seaweed on the polluted foreshore, and cleaning-up expenses were claimed by the terminal operator. As the owner of the vessel, Esso Petroleum Co. Ltd (Esso), was a party to TOVALOP, and as the tanker was unladen at the time of the incident, compensation was paid to the crofter and terminal operator under the terms of TOVALOP, without proof of fault. Having made the payment, Esso then commenced legal proceedings in order to seek recovery of the sum paid, inter alia, from Hall Russell & Co. Ltd, the builders of the tugs which had caught fire and, in Esso's view, the party whose negligence was responsible for the incident. Esso was unsuccessful in this action. In the House of Lords, Lord Jauncey stated that Esso had been under no statutory liability or general duty in law to the crofter and, so far as the crofter was concerned, the payment received by them had been entirely gratuitous. The payment had been made because Esso had chosen, by entering into and remaining a party to TOVALOP, to assume a voluntary obligation to the crofter, and not because of any alleged negligence on the part of Hall Russell. However, this did not mean that Esso never had a remedy in respect of the sum paid under TOVALOP. They could either have obtained from the crofter and the terminal operators assignation of their claim against Hall Russell and sued that company in their own name. Alternatively, they could have sought permission to sue in their names.<sup>88</sup>

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<sup>88</sup> Id. Lord Jauncey of Tullichettle, at p. 745.

The decision in the *Esso Bernicia* may cast doubt over the existence of the general insurers' rule of subrogation rights, under which the insurer is subrogated to the right of the insured whom he has indemnified. It has been well established in insurance law that subrogation applies only where the insured has a right of action.<sup>89</sup> In other words, if the insured, apart from agreement or compromise, has no right of action under which he could pursue, surely the insurer would not be in a better position. The question which arises is whether the tanker owner, the insured, has any right of action against the person whom he paid and who acted negligently. According to the decision of the *Esso Bernicia*, the tanker owners are not, after payment, entitled, unless under assignment of the right of action, to sue the negligent person, i.e. the third party, in order to recover the sum which they have paid, since what has been paid is entirely gratuitous. As a result, the insurer has no right of subrogation, under TOVALOP, against the third party, after indemnifying the tanker owner, the insured. However, if before the participating owner has satisfied in full his financial responsibility<sup>90</sup> under the Agreement, the insurer paid compensation for pollution damage or costs of threat removal measures, he, up to the amount paid, acquires by subrogation the right which the person so compensated would have enjoyed under the Agreement.<sup>91</sup>

The waiver of the right of subrogation may also be criticised, since tanker owners, the insureds, have, by waiver, done something to prejudice the insurers' right. This is perhaps because of the general principle that the right of

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<sup>89</sup> *Simpson and Co. et al. v. Thompson, Burrell et al* (1877) 3 App.Cas. 279; *Midland Insurance v. Smith and Wife* [1881] 6 Q.B.D. 561.

<sup>90</sup> Reference to "liability" have been amended, in 1990, to "financial responsibility" in view of the fact that between claimant and defendant scheme is voluntary.

<sup>91</sup> Clause VII(D), 1990 TOVALOP (SA)

subrogation potentially exists for the benefit of the insurers, therefore, the insured must not do anything which might prejudice those rights which he is liable to repay to the insurer as damages for the amount which the insurers have paid, or where the insurer is able to avoid liability. This criticism may be removed if the insurers voluntarily agree, in the policy, not to exercise the right of subrogation. In other words, the insurer may not take advantage of indemnities, if they have either agreed to waive subrogation or have not included the provision in their contracts. The above mentioned argument may be also applied where the tanker owners have prejudiced the right of subrogation by acceptance of liability for occurrence brought about by a third party without their fault.

It is unclear in CRISTAL, which is also a voluntary agreement, whether, there is a right to sue a responsible party, i.e. the vessel owner, for compensation which it has paid to a claimant. Traditionally, CRISTAL has required a claimant to exhaust all legal remedies against third parties before receiving payment from CRISTAL.<sup>92</sup> On some occasions, this has caused some temporary delays in recovery by claimants. Nevertheless, the revision of CRISTAL attempts to permit it to consider each case and to make payment to a claimant without the latter having to exhaust their legal remedies,<sup>93</sup> in exchange for appropriate assignment, as discussed in TOVALOP, of all rights of any nature or kind, i.e. assignment of the cause of action or the fruits of litigation, and transfer of claims against third parties to CRISTAL.<sup>94</sup> Otherwise, CRISTAL

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<sup>92</sup> Lawrence F. Cohen, *Revision of TOVALOP and CRISTAL :Strong Ships for Stormy Sea* [1987] J.Mar. Law & Comm. 525 at p. 534.

<sup>93</sup> Clause IV(D)(8). Revision 1987.

<sup>94</sup> Clause. IV(D)(9)(a). Revision 1987.

does not subrogate rights because its indemnity, the same as TOVALOP, is entirely on a voluntary basis.

## **2.5. Concluding remarks**

TOVALOP and CRISTAL have provided useful voluntary compensation systems for assisting victims of pollution damage resulting out of oil spills by tankers, without the creation of a large bureaucracy of administrators and without the generation of excessive funds by means of tax. They offer the potential third party claimants a simple and prompt vehicle for recovery of damages without resort to protracted litigation and excessive legal costs which were involved in the tort liability based on the proof of fault and foreseeability of risks and damages. In this sense liability without fault, it is like insurance in that there is no need to prove fault and the insured is indemnified on the occurrence of certain special events which are not foreseeable.

One of the most important characteristics of the TOVALOP is that the tanker owners, the members, mutually promise to insure, risk-sharing, each other against the liability which they have voluntarily assumed. In other words, a person by entering his tanker becomes a member of TOVALOP and whilst his liability is insured by the TOVALOP he is also regarded as an insurer of the liability of the other members. Thus, the TOVALOP is essentially an insurance, i.e. a contract of indemnity where the parties to the scheme indemnify each other. However, under the TOVALOP scheme, in contrast with the insurance (as a bilateral contract) in that the assured is entitled to claim an indemnity, it is the third party who actually makes the claim.

The Federation that runs TOVALOP, normally requires that financial capability, as a fundamental condition of membership in the Agreement, be

demonstrated by oil pollution insurance cover, which is provided by one of the recognised insurance companies, or a guarantee of a nature which satisfies the Federation that an applicant who wishes to become a party to the Agreement is in every way able to meet the maximum potential claims under TOVALOP, including the supplement. Under this condition, there is a difference between TOVALOP's insurance scheme and other insurance contracts in which usually an applicant of insurance becomes an insured, or member, only by signing insurance contract, without showing financial ability.

The voluntary nature of the arrangement may cause disputes between tanker owners, as insureds, and insurance companies, as insurers, over the undertaken liability under the Agreement. Therefore an insurer should take a cautious attitude in providing insurance cover for the gratuitous payment which is made by TOVALOP's members. The assumed legal liability under TOVALOP is far from the general principle of liability insurance under which no liability must be admitted by the insured without the insurer's prior consent in writing. Disputes may also arise when the insurer is dealing with TOVALOP liability in a possible general average where a mixture of motives are involved. Every claim must be notified to the Federation within two years of the incident. This time limit illustrates a difference between insurance companies and TOVALOP where each company has its own time limit for notice of claim. The other problem which may come into existence in performance of insurance is that when the insurer is obliged to provide insurance against salvor liability for pollution, damage may be caused in the process of the salvage effort, as a preventive measure which is payable under the TOVALOP and is not covered by the tanker owner's liability insurance, unless it expressly provides so. The waiver of the subrogation right, under TOVALOP, is a diversion from the

general principle of insurance law under which the insurer has subrogated the rights of those whom he has indemnified.

Generally speaking, on the one hand, TOVALOP is like insurance in that there is no need to prove fault. It is essentially a contract of indemnity where the parties to the scheme indemnify each other. On the other hand, it is not like insurance because of problems which appear to arise in relation to subrogation of claims which is an automatic insurance right. Again, it is perhaps not like insurance in that the tanker owners cannot become members of the Federation without proving financial stability and insurance back-up. Again, it is like insurance in that the question of foreseeability of the risk does not appear to arise if the occurrence actually happens. However, it is unlike insurance in that insurance is a bilateral contract between an insured and an insurer, whereas under the TOVALOP scheme, it is the third party who is not a party to the main agreement who actually make the claim. All these similarities and differences indicate that tanker owners, in the performance of their liability under the Agreement, need a special insurance contract. To do this, it is suggested that the terms on TOVALOP liability are automatically incorporated in to the insurance policy.

## **Chapter 3. Possibility of compensation for pollution victims under the International Convention for Protection of Pollution from Ships: MARPOL 73/78**

### **3.1. The problems**

While devastating accidental pollution receives sensational publicity, a much greater amount of oil and other pollutants is being discharged deliberately. Most figures estimate that the percentage of operational discharge is higher than the total of other ship generated pollution discharge.<sup>1</sup>

The tanker in which the oil is carried is normally cleaned while the ship is returning to its loading port. In modern ships the normal procedure is to use special machines which blast jets of high pressure water on the tank sides removing the oily residues which are left after the oil has been unloaded. This procedure results in a mixture of oil and water at the bottom of cargo tanks.

Some of tanks are also filled with water on the return voyage, to make the ship low enough in the water in order to be properly manoeuvrable. The water used in this way also becomes contaminated with oil residues. In either case, the mixture of oil and water has to be disposed of before a fresh cargo of oil is loaded. In the past the normal practice was to pump these directly to the sea.<sup>2</sup>

Pollution problems may also arise regarding ships which burn heavy fuel oil. During of the voyage, the purification of the fuel oil produces a quantity of sludge, normally this sludge is kept in sludge tanks but eventually the content of tanks must either be discharged to a shore reception facility or at sea.

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<sup>1</sup> National Academy of Science, *Petroleum in the Marine Environment* 1975, cited in R, Michael M, Goingle & Mark Zacher. *Pollution Politics and International Law*, 1979 Berkely University of California Press.

<sup>2</sup> The International Conference on Tanker Safety and Pollution Prevention, 1978, IMO Publication, p. 14.

The nature of the maritime business mandates multilateral attention to resolve the pollution problem which stems from commercial activities.<sup>3</sup> Although unilateral action by a port state or ship owning states may begin to correct the problem for that state it does not encourage international standards. Unilateral action also subjects the ship and its matters to conflicting standards of liability.

The International Convention for Prevention of Pollution from Ships (1973),<sup>4</sup> and its 1978 protocol,<sup>5</sup> hereinafter MARPOL 73/78, which became effective on October 1983 are an international response to the threat of contamination of the marine environment. The goal of the Convention is to reduce and ultimately to eliminate both forms of accidental and operational pollution from ships at sea by regulating all technical aspects of disposal, and all kinds of pollutants listed in (5) Annexes to the Convention.<sup>6</sup>

MARPOL has been implemented in the UK by the Merchant Shipping (Oil Pollution) Order 1983 which repealed some of provisions of the 1971 Act and the Merchant Shipping (Oil Pollution) Act 1974.

The MARPOL has tried to prevent operational pollution through introducing anti-pollution measures into design-e.g. segregated ballast tank, clean ballast tank, crude oil washing and inert gas system and double bottom-, equipment and operation of ships. Reduction of accident is principally achieved by introducing strict standards and navigation procedures on a world-wide basis. Thus, while it is primarily designed to reduce operational pollution damage it

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<sup>3</sup> Abecassis, D. *Marine Oil Pollution in Law in the View of Shell International Maritime Limited*, 8 Intl Business Law, 1980, p.3.

<sup>4</sup> 12 I.L.M., p. 1319.

<sup>5</sup> 17 I.L.M., p. 546.

<sup>6</sup> Originally a ratifying state had to accept Annex (I) (II) but 1978 Protocol deleted Annex (II) as a condition for ratification. See IMCO Conference on Tanker Safety and Pollution Prevention 1978, 7 March, Do, TSPP/Conf/10/add, 1.

has also the secondary advantage of reducing pollution resulting from an accident.

MARPOL aims to prevent all forms of pollution from ships by providing special technical standards and equipment. The interesting question which may arise is whether lack of such technical equipment makes the vessel unseaworthy for particular marine adventure insurance. Marine insurance law generally provides that the insurer may avoid liability in respect of claims which may arise by virtue of unseaworthiness. In all voyage policies there is an implied warranty that the vessel must be seaworthy at the commencement of the voyage.<sup>7</sup> In a time policy there is such an implied warranty, but where, with the privity of the assured, the ship is sent to sea in a unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.<sup>8</sup> It may be argued that the Marine Insurance Act, MIA, 1906 merely reflects seaworthiness to policies on ship and cargo but not to policies which cover liability. Donaldson J. in *Compania Maritime San Basilio SA. v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd. (The Eurysthenes)*,<sup>9</sup> held that the Act, by section 74, also applies to liability insurance and there was no reason why the provision should not apply to such policies.

Section 39(1) MIA 1906 provides, " A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured." It is, therefore, obvious that there can be no fixed and positive standard of seaworthiness, and it must vary with regard to each particular adventure. Lord Cairns in *Steel v. The State Lines SS. Co.*,<sup>10</sup>

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<sup>7</sup> S. 39(1)(2) MIA 1906.

<sup>8</sup> S. 39(5); see also *Alexander John Dudgeon v. Pembroke* (1877) 2 App. Cas. 284.

<sup>9</sup> [1976] 2 Lloyd's Rep. 171 at p. 174.

said that the ship "should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter" in a voyage, even the extent of warranty may be different for the same voyage at different seasons, for the same voyage at the same season according to whether the ship is in ballast or loaded with one kind of cargo or another.<sup>11</sup> Thus it can be said the ship is not seaworthy if she is not, due to lack of required equipment, fit to carry the oil or other substance to the destination contemplated by the policy.<sup>12</sup> As a result, it can be said that although MARPOL is not itself an insurance scheme, but its technical standards may have direct effect on the insurance of a tanker carrying oil or other substances, then if tankers do not come up to MARPOL standards, they will become unseaworthy for particular voyage and they are not, therefore, covered by the insurance.

### 3.2. Discharge standards

MARPOL 73/78 permits operational discharge as long as the tanker is fifty nautical miles distant from the "nearest land,"<sup>13</sup> or is not in a designated "special area". This area is defined as an area where for a recognised technical reason in relation to its oceanographic and ecological condition and to the particular character of its traffic, the adoption of special mandatory methods for prevention of sea pollution by oil is required.<sup>14</sup> Special areas include the entire Mediterranean sea, the Baltic sea, the Red sea, and the Persian Gulf.<sup>15</sup> In

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<sup>10</sup> (1877) 3 App. Cas. 72 at p. 77.

<sup>11</sup> Per Cur. Daniels v. Harris (1874) 1 L.R. C.P. 1 at p. 6.

<sup>12</sup> S. 40(2) MIA 1906.

<sup>13</sup> Nearest land is defined by Art.1 (9) so that the Great Barrier Reef is protected by measuring the 50 miles from its outer edge.

<sup>14</sup> MARPOL 73, Annex 1, Reg. 1 (10).

these areas all discharges, except clean ballast and segregated ballast, are prohibited.<sup>16</sup> A 12 miles discharge ban is provided for ships other than tankers

A stipulation of a restriction in the ability to discharge oil in special areas, may relieve the insurer from liability under a policy against oil pollution. This is because any restriction imposed on the type of trade or navigation of a ship to a geographical limit are generally regarded as warranties<sup>17</sup> the breach of which will relieve the insurer from liability. In *Colledge v. Harry*,<sup>18</sup> a rule providing that a vessel should not sail on specified voyages at specified times was held to be warranty. Thus, the insurer will be relieved from liability, under a policy covering pollution liability at sea, if the policy states that discharge of oil is not allowed in a special area under MARPOL. It may be said that such a restriction is not a warranty, but a mere exception to cover, the effect of which is not to discharge insurer from liability but merely ensure that the insurer is not at risk while the exception is operating. The question was raised in *Birrell and Others v. Dryer and Others*,<sup>19</sup> in which it was assumed without argument that such a restriction clause was a warranty, so that the underwriters were not liable for a loss occurring after it had ceased to be infringed.<sup>20</sup> In this case a time policy contains the clause "warranted no St. Lawrence between on October 1 and April 1", and the vessel was in St. Lawrence on October, but emerged without loss, and during the currency of the policy a loss occurred. It was held that the

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<sup>15</sup> Id.

<sup>16</sup> Id. Reg. 10 (4).

<sup>17</sup> S. 38 of MIA 1906.

<sup>18</sup> (1851) 6 Exch. 205.

<sup>19</sup> (1884) 9 App. Cas. 345.

<sup>20</sup> See also *Scrutton J. in Morgan v. Provincial Ins. Co.* [1932] 2 K.B 70 at p. 80; and *Pollock C.B. in Colledge v. Harry* (1851) 6 Exch. 205.

underwriter could not avoid payment on the ground that between October 1 and April 1 the vessel was in St. Lawrence, i.e. breach of warranty, since such a warranty merely defines the risk insured against something and does not mean a condition or promise that breach voids the whole policy. It seems that in deciding where a restriction is warranty or exception, much attention must be paid to the manner in which the particular restriction is phrased.

The Convention also set the total quantity of the oil a tanker may discharge outside of the prohibited area. Tankers would only be allowed to discharge up to 60 Litres ,100 PPM, per mile, and the total quantity could not exceed 1/1500 of the cargo carried for an existing tanker and 1/30,000 for a new tanker.<sup>21</sup> Thus, there is illegal discharge if the spilled oil is over the permitted level. This illegal discharge cannot be subject to an insurance policy even where there is an implied warranty that adventure insured is a lawful one and will be carried out in a lawful manner.<sup>22</sup> The main reason behind this principle is that, if the original contract being invalid and, therefore, incapable of being enforced, meant that a collateral contract founded upon it could not be enforced. Thus, the question of illegality not only affects the insured but also the insurer, so that where illegality is established the insurer will be unable to recover his premium, and if the risk is illegal, the insurer will be discharged from all liability.<sup>23</sup>

However, whether a statute is such as to render any adventure, in violation of its terms illegal or whether its scope is limited to the mere infliction of penalty is often a difficult question to determine, and depends upon a proper construction of the statute concerned in order to determine what was the

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<sup>21</sup> Id. Reg., 9(1)(a)(v).

<sup>22</sup> S. 41 MIA 1906.

<sup>23</sup> The court has refused to give an effect to an insurance which is seen to be illegal. See *Gedge v. Royal Exchange Assurance Corporation*, [1900] 2 Q.B. 214.

intention of the legislation. It is clear from the MARPOL, as implemented in the U.K. that the violation of its terms, e.g. illegal discharge, do not render the adventure illegal but only provides that a person found guilty of an oil pollution offence is liable on a summary conviction to a fine.<sup>24</sup> This indicates that the Regulation has made a distinction, as it was made by the MIA 1906, between an illegal adventure and adventure carried out in an illegal manner. Thus, the discharge of oil, as an adventure, is not illegal up to a certain level and, therefore, any liability which arises from such a discharge can be subject to an insurance policy. But such a legal adventure may be rendered illegal when discharge is over a permitted level and in consequence is only subject to a penalty which may be covered by an insurance policy. As a result, if the adventure can lawfully be performed, and some illegality is committed in the course of it, which was not intended at the time when the policy was effected, the right of the underwriter and assured may be wholly unaffected for legal adventure.

There is a possibility that illegal discharge may occur purely because of an act of the master. It may be asked is there any liability for the assured's owner against the master's illegal act? In *Wilson v. Rankin*<sup>25</sup> it was held, that where the act complained of as being illegal was the act of the master, there must be circumstances from which the knowledge of the owners may be presumed, in order that they may be affected by such act. The rule of this decision, however, seems to have been somewhat extended by the MIA 1906, ss. 41, where it is stated that an assured will not be excused from the consequences of some illegality, on the part of the master, unless it is clear that not only was the act

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<sup>24</sup> Reg. 34, the Merchant Shipping (Prevention of Oil Pollution) Order 1983.

<sup>25</sup> (1865) 1 Q.B.D. 162.

done without his knowledge and consent, but that nothing in his own conduct was conducive to the illegality being committed. The decision and principle seems to be in contrast with the decision of the House of Lords in *Federal Steam Navigation Co. Ltd. and another v. Department of Trade and Industry*,<sup>26</sup> in which it was held that the owner and the master could each be convicted of an illegal discharge of oil. This decision was reflected in the Regulation of 34 of the Merchant Shipping (Prevention of Oil Pollution) Order 1983, in which it was stipulated that, "the owner and<sup>27</sup> master of the ship shall each be guilty of an offence punishable on summary conviction." This was because the Regulation intended to act as deterrent not only to the master of offending ship but to the owner as well.

It would be very difficult to identify the discharge of oil from a particular tanker if no sample is taken. The tests have shown that effluents with oil contents produce no visible traces of 100 PPM discharge, and are undetectable by remote sensing equipment.<sup>28</sup> Therefore, it may be concluded that whenever remote sensing equipment indicates the presence of an oil slick, the oil content in this slick is always more than 100 PPM, and constitutes clear evidence of violation of discharge by ships other than oil tankers.

It is difficult to say what measures should be taken in order to remedy this problem. One measure that might be useful is to "decrease the discharge norm for all ships. It would certainly be a good idea to set the discharge norm, of

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<sup>26</sup> [1974] 2 All E.R. 97.

<sup>27</sup> The word "and" was replaced to the word "or" in the Merchant Shipping (Oil Pollution) Act 1974, in order to be more consistent with the decision of the Federal Navigation ..., id, in which it was held that the word "or" was used in conjunctively and not in an alternative and exclusively sense.

<sup>28</sup> The test was held in the framework of the European Communities and the Bon Agreement Organisation. This is quoted from Ton Ijltra, *Enforcement of the MARPOL: Deficient or Impossible?* 1989, Marine Pollution Bulletin, No. 12, p. 596 at p.597

discharge of oil, on the same level which has been set for special areas- i.e. on 15 PPM".<sup>29</sup> This also would contribute to an overall decrease of inputs of oily substances and it might contribute to more satisfactory enforcement of the discharge proviso of the Convention.

The Convention also required that the ships must have a discharge monitoring and control system, oily water separating equipment, and an oil filtering system. Such equipment will ensure that any oily mixture discharged at sea after passing through it has an oil content not exceeding 100 PPM for any ship of 400 ton, grt and above.

### **3.3. Criminal liability for pollution offence and compensation for damages resulting from such offence**

Any violation of the requirement of the present Convention is prohibited and sanctions are established under the law of administration of the ship concerned wherever the violation occurs.<sup>30</sup> Subject to certain exceptions,<sup>31</sup> the Merchant Shipping (Prevention of Oil Pollution) Regulations 1983, which implemented the obligations of MARPOL 1973 and its 1978 Protocols, make it an offence to fail to comply with requirements contained in Regulations 12, 13, and 16, concerning the discharge of oil or oily mixture.

A person guilty of the offences shall be liable on conviction by the Magistrates Court of a fine not exceeding £50,000 or on conviction on indictment to unlimited fine.<sup>32</sup> In addition, breach of requirements such as-oil prevention

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<sup>29</sup> Id.

<sup>30</sup> MARPOL 73, Art. 4(1).

<sup>31</sup> These are set out in Reg. 11 of the 1983 Regulation and include discharges necessary to secure the safety of a ship or saving life at sea.

certificate, oil record book- is an offence punishable on summary conviction by a fine not exceeding £10,000 and on indictment by unlimited fine.<sup>33</sup> It is a defence to the offence, of contravening of the Regulations, for the owner and master of the vessel to show, on the balance of probabilities, that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.<sup>34</sup>

One of the difficulties concerning the imposition of fines is that they are far from adequate to have any deterrent effect. Moreover it still remains legal to take out an insurance policy against fines. On the face of the Regulations, the power to impose a fine of 50,000 on summary conviction and unlimited fine on indictment seems commensurate with the gravity of pollution offences. In practice, fines have never approached this level, perhaps, partly because the majority of prosecutions take place before Magistrates who are reluctant to regard deterrence as the guiding factor in determining the amount of any fine.<sup>35</sup> Indeed, at least in respect of foreign ships, the only person before the court is the master of the vessel, and in such a case the court is obliged to ignore the fact that the owner (or his insurer) may be prepared to stand behind the master and indemnify him for fines levied on him. To achieve sufficient deterrent effect, it is appropriate that the courts treat environmental offences seriously. To do this, it is suggested that the courts take into account the circumstances of the discharge, the benefit which occurred to the owner of the vessel where the discharge was intentional and the damage which has been caused to the

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<sup>32</sup> Reg. 34 (2) of the 1983 Regulations.

<sup>33</sup> Reg. 34 (1), *Id.*

<sup>34</sup> Reg. 34 (3). *Id.*

<sup>35</sup> See. e.g. S. 35 of the Magistrates Courts Act 1980, which requires a court to have regard to the means of the person charged.

environment thereby. In addition courts should not relate the sentence to the ability of the person charged to pay the sum.

Regulations channelled liability to master and owner.<sup>36</sup> The question here is whether both owner and master can be brought to trial and convicted for the same incident. This was decided in *Navigation Co. v. Department of Trade and Industry*,<sup>37</sup> It was held that the words master and owner must be construed conjunctively, not in an alternative and exclusionary sense. Thus, the question of insurance against fines involves not only the shipowner and his P & I Clubs but also the master, even he is not personally blameworthy: the fault may be with no one, or with the owner or the crew.

The size of fines imposed by courts vary with the seriousness of the offences. In *John Wright & Co. v. The M/V "Federal Steamship"*<sup>38</sup> the vessel was under Scottish jurisdiction with discharging some three to six tons of oil from the vessel. The master was charged under the section 2 (1) of the Merchant Shipping (Oil Pollution) Act 1971. He pleaded guilty and fined £250,000 by a Sheriff court. He appealed against the decision and it was held that a fine of £250,000, imposed on the master of the vessel, was harsh and oppressive and a fine of £750 should be substituted. The main reason behind this decision was that, the appropriate fine for this particular offence should be determined with regard to whole circumstances of the case and it is not proper approach to take into account, as the Sheriff did, the total expenses incurred in the cleaning operation and add to the personal penalty.

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<sup>36</sup> Art. 4 (1), Id.

<sup>37</sup> [1974] 2 All E.R. 97.

<sup>38</sup> 1980 S.L.T. 89.

This decision is subject to criticism. If the object of the Act is to make the shipowner and master take all possible precautions to avoid oil pollution, as was provided by the Convention,<sup>39</sup> then the fines imposed must be substantial. One of the main factors which should be contemplated in fixing the fine is the availability of insurance. If there is insurance, the fine should be high; if there is not only a modest fine should be imposed. If there is insurance and the fine is high, the insurer has to pay a large sum which, consequently, will increase the premium. The master/owner, therefore, will suffer from such an increase. This situation will encourage them to take precautionary measures which eventually leads to a deterrent effect.

It should be remembered that penalising deliberate or negligent acts of pollution enables the victim to obtain compensation through civil proceedings in MARPOL contracting States. For example in the U.K., the relationship between crime and tort compensation became quite obvious when the criminal courts were given power<sup>40</sup> to order an offender to pay compensation for any personal injury, damage or loss resulting from an offence. A compensation order should only be made where the convicted person's responsibility is clear.<sup>41</sup> In other words compensation for pollution damage, resulting from illegal discharge, will be awarded only if the offence is established and has led to a conviction, i.e. where it is proved that discharge took place within a prohibited zone or that it was of a such a quantity that it exceeded those authorised.

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<sup>39</sup> Art. 4 (4). MARPOL 73

<sup>40</sup> Power of the Criminal Courts Act 1973, S. 35(8), as substituted Criminal Justice Act 1988. The power was extended to Scottish courts in 1981 by Criminal Justice (Scotland) Act 1980, part. IV.

<sup>41</sup> R. v. Chapel, [1984] 128 S.J. 629.

Civil liability is not a pre-condition for criminal compensation,<sup>42</sup> so that an order for payment of compensation might be made where, for example, there is no civil liability for breach of statutory duty. It seems that this procedure is unsuitable for pollution cases where there are complex questions of quantification of loss and proof. In such cases, civil liability may offer more advantage to pollution victims. For example, there is a higher likelihood of recovery because the defendant may be able to call on a policy of insurance, and a lower burden of proof. The advantage of civil procedure in civil liability, as to criminal procedure in which it is necessary to establish the criminal guilt as a precondition for compensation order, may become less when it is realised that in crime, the award of compensation is ancillary to criminal process. Thus, if the damage suffered by the victim is the result of a prohibited discharge by the provision concerned and is punished by fines, it will therefore suffice for him to establish that the damage was indeed caused by that discharge.

However, where a compensation order is made, it may be less favourable to the pollution victims than a civil judgement because a civil judgement is generally for the full amount of the victims' loss, without reference to the defendant's means, whereas a compensation order should not be beyond the means of offender.<sup>43</sup> It is certainly better for pollution victims to receive some compensation rather than none at all. Yet, there is a loss to be borne, why should it not be borne by the offender rather than by victims? Why should the victim's right be subordinated to the offender's convenience by a statutory provision which requires the court to take into account the "means" of the offender when making a compensation order? The "means" principle may be

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<sup>42</sup> *Id.*

<sup>43</sup> S. 35(4) of the Powers of the Criminal Courts Act 1973.

defended, as being in the public interest, where imposing large financial burdens on poor offenders may increase future offences, thereby victimising more people.<sup>44</sup> However, there is not such a defence where the imposed sentence is a fine and the offenders are shipowners with huge investments. But where offending shipowner's means are limited and the imposed sentence is a fine, it is suggested that the court gives priority to the compensation order, since where the punishment is restricted only to a fine the public interest is not so great as to call for immediate carrying out of the sentence.

It seems, at first glance, that it is against public policy that a punishment imposed upon an offender should be shifted on to the shoulders of another, e.g. an insurer. This concept may be well justified when it is realised that, as a general rule of law, nobody can benefit from his wrong or crime.<sup>45</sup> The application of this concept with respect to insurance policy may be questioned in some instances. It may well have application in the first party insurance where the insured is claiming in respect of a loss suffered solely by him, then it is clear that he cannot recover, or benefit from the insurance policy, if the loss was caused by his deliberate act. But the idea of the insured benefiting from his own wrong does not seem to have justification in the third party (liability) policy where any indemnity received by insured goes to his third party, e.g. pollution victims or society as a whole, not to the insured himself.

The law, statutory or common law, has made a distinction, in the application of the rule of public policy, between the insured's deliberate act, mens rea-a guilty mind, and negligent act, with no mens rea. Although

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<sup>44</sup> Asworth. A. Punishment and Compensation, [1986] 6 O.J.S. 86 at p. 110.

<sup>45</sup> This concept has been based on the famous dictum of "ex turpi cause non oritur actio" (no action can arise from a wrongful cause). See it in *Burrough J, Richardson v. Mellish*, [1824] 2 Bing. 229 at p. 252. For further public policy consideration, see. *Shand, Unblinking the Unruly Horse: Public Policy in the Law of Contract*, [1972] 30 C.L.J. 144 at 161.

insurance is not available for those who intentionally, wilfully, commit a crime,<sup>46</sup> there is no clear rule that public policy prevents a man from insuring against the consequence of his own negligence. In *Tinline v. White Cross Insurance Association*,<sup>47</sup> the insured who had a third party policy in respect of injury or death arising out of the use of his car was involved in accidents resulting in death of pedestrians, because of driving at an excessive speed. The court held that the insurer were liable to indemnify, despite the fact that the insured had acted in a grossly negligent manner.<sup>48</sup> This verdict is subject to doubt with regard to the decision in *Gray V. Bar, Prudential Assurance Co. Ltd. (Third Party)*,<sup>49</sup> It was held that an insured who deliberately embarks on a course of conduct which is criminal and likely to occasion a loss under the policy as the foreseeable and probable result of that conduct, may not on the ground of public policy seek to be indemnified for that loss even though it was unintended.<sup>50</sup>

In the light of the foregoing discussion, it is not possible to draw a simple line between a loss intentionally caused by a criminal act, in respect of which no indemnity is permitted, and a loss caused by a negligent act of the insured, also criminal, in respect of which a claim is maintainable. As a result, a correct distinction should be sought in terms of the requirement of the public policy in each particular case.

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<sup>46</sup> S. 55(2) MIA 1906.

<sup>47</sup> [1921] 3 K.B. 327

<sup>48</sup> See also *James v. British General Insurance Co.* [1927] 2 K.B. 311, which involved similar fact.

<sup>49</sup> [1971] 2 Q.B. 554.

<sup>50</sup> Similar decision was reached in *Haseldine v. Hosken* [1933] 1 K.B. 822

It may be asked whether, on the ground of the public policy, a shipowner be allowed to recover a fine imposed by the court for strict liability offence of oil pollution under the 1983 Regulations from insurers. It is suggested that if a fine is imposed following an intentional, mens rea, discharge of oil, there is no doubt that the rule of public policy may prevent the insured from enforcing the claim, simply because the courts should not allow someone to profit from his intentional criminal conduct. There is no rule, in common law or marine insurance law, which prevents a shipowner or master from insuring against such a fine imposed after negligent discharge of oil, or the strict offence, for which he can be prosecuted whether or not he is in a way to blame, or in special circumstances in which the discharge has happened, e.g. when the ship is holed in a storm or by another vessel while it is tied up. It may be said, that the rule of public policy may not allow such a cover since it ignores the deterrent effect, to prevent tortfeasor and others from doing the same thing again, which is usually expected from imposition of criminal fine. In other words, offering insurance against a fine may escape criminal liability and therefore, would be illegal and unenforceable as being contrary to the public policy.<sup>51</sup> The effect of this criticism may be reduced when it is realised that a deterrent effect may remain since claims for payment of fines will be reflected in the increased "call" (the P & I Club equivalent of a premium) made on him when he wants to renew his cover.

It is, therefore, concluded that a conviction under the 1983 Regulations, which inevitably carries with it the message that the defendants have failed to disprove negligence, would normally be sufficient, because of the seriousness of the offence, to prevent them from enforcing an indemnity against fines. This

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<sup>51</sup> As it was said by Rowlett J, in *R. Leslie v. Reliable Advertising and Addressing Agency Ltd.* [1915] 1 K.B. 652 at p. 658-9. See also Lord Denning in *Asky v. Golden Wine* [1948] 2 All E.R. 35 at p. 38.

is because the law recognises that, in the public interest, such an act should be deterred and moreover that it would be shock to the public conscience if a man could use the insurance policy to pay such a fine. This is why, it is suggested that, in order to prevent insuring against a fine, to make such insurance criminal, despite being of some unfairness in outlawing insurance against all fines without exception, is due to the absolute nature of the offence of causing pollution.

#### **3.4. Concluding remarks**

MARPOL considered that the allowance of discharges of pollutant in the past, was as a result of the absence of proper compliance mechanisms, technical equipment and enforcement. In response to this dilemma, it has provided for the right of control of discharges and installation of monitoring and recording devices. It has also modified the traditional jurisdiction regime for the high seas in order to give coastal and port states certain rights of inspection. There is of course a relationship between insurance and the standard of construction and equipment prescribed in the Convention tend to be adopted by classification societies for ships seeking insurance on normal terms. Similarly, such standards in the Convention may in time be referred to as the criteria by which the insurer may judge whether the seaworthiness warranty in his policy has been observed.

Although MARPOL is not, in its origin, a compensation regime, penalising illegal discharge, it enables the victims to obtain compensation in the criminal courts, with regard to civil proceedings, of contracting states. This does not of course deprive a pollution victim of his right to sue an offender for damages and losses in a civil court if he so wished, although there should be no double recovery. However, incorporating a compensation order into the criminal

process does not secure compensation in cases where the offender is not convicted or may not be found. Thus, it is recommended that Contracting States, through their national legislation, set up a criminal pollution compensation fund, which is financed by a recoverable fine for illegal discharge and a levy on the entered vessel which is carrying oil or other hazardous substance in their territory, in order to cover those who have suffered pollution damage from unknown resources or unconvicted offenders.

An imposed fine, within UK law, is not adequate to discourage violation of Convention. In order to achieve this aim, it is necessary that the amount of the fine is substantially increased. The pollution offence is very often dealt with in lower courts which do not have substantial powers. Thus, sensible provision should be made to transfer the competence to the courts which are involved in trial of serious crime.

Though it is probably not criminal to insure against fines which are imposed on to the master or owner for the negligent discharge of oil, such insurance should almost certainly be illegal and unenforceable because of being contrary to the rule of public policy. To solve this confusion, it is suggested that insurance of this type, should be criminalised through Parliament, even insurance against fines imposed following the negligent discharge of oil, as a serious offence. This would also remove the criticism that prevention of insurance against such a fine, which is imposed following an operational discharge, is contrary to the liability insurance policy which aims to cover the negligent insured for pollution damage resulting from accidental discharge.

## **Chapter 4. International Convention on Civil Liability for Oil Pollution Damage, CLC.**

### **4.1. Historical background**

The shock of the Torrey Canyon<sup>1</sup> incident in March 1967 revealed the fact that, at that time, inadequate provisions existed in international law to enable government and others affected by marine oil pollution damage to recover the considerable damage and expenditure involved in the preventive measures and cleaning-up operations. Following this disaster the International Maritime Consultative Organisation, IMCO, began an urgent investigation of the problem. On the 29 of November 1969, a new international agreement, The International Convention on Civil Liability for Oil Pollution Damage, hereinafter referred to as CLC, was signed.<sup>2</sup>

In 1976 a protocol was adopted and amended the units of account in which limits of liability are expressed. It came into force on April 1981. Following the Amoco Cadiz incident and the effect of strong inflation, it became clear in early 1980, that the compensation available for oil pollution was in need of revision. Accordingly on 29 May 1984, a further protocol was adopted by the International Maritime Organisation, IMO, in order to increase the liability limits of the treaty. The 1984 Protocol was, due to difficulties in bringing it into force, amended by the 1992 protocol which retained much of the substances of the 1984 Protocol but the qualifications for membership were lowered.

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<sup>1</sup> The vessel was owned by the Barracuda Tanker Company of Bermuda which was associated with the Union Oil Company of Los Angeles and for taxation purpose was registered in Liberia at the time of incident, the ship was on lease to the Union Oil Company, but had been chartered by British Petroleum Co. Ltd for a voyage from the Persian Gulf to Milford Haven. It was stranded on the Seven Stones, off the west coast of England: see details in, *Home Office Report: The Torrey Canyon* (Cmnd. 3246) 1967.

<sup>2</sup> It entered into force on June 1975 and until 16 February 1993 the CLC had 79 contracting states. See Convention in 6E. *Benedict on Admiralty* 6-62. 133. 1990; 9 I.L.M. 45. 1970. The Merchant Shipping (Oil Pollution) Act 1971 incorporated into United Kingdom domestic law many of provisions of the CLC 1969.

## 4.2. Nature of liability

During the preparatory work to the 1969 CLC conference, it was debated whether the Convention be based, from a liability point of view, on fault or strict liability. Most of the delegations were in favour of the fault based liability, although some of them argued that strict liability should be applied in the case of oil pollution, and a few suggested a compromise plan.<sup>3</sup>

Protection of maritime risks against negligence, because of some of the special risks involved in maritime adventure, the difficulty of coverage of insurance for the victims who use the beaches, and the difficult task of proving marine fault by non-marine victims were among the important reasons which were given by those who were in favour of the strict liability.<sup>4</sup> In addition, the avoidance of difficulties which may arise for victims of the damage by a complex series of cross actions; preventing multiple coverage of the same risk if this were required; and the ultra hazardous nature of the carriage of oil by tanker; were also three important factors which were named for the justification of adoption of the principle of strict liability.<sup>5</sup>

The supporters of the fault liability concept argued that the liability should be based on fault because, it would not be fair to give preference to those who suffer pollution damage as compared to those who sustain personal injury, death, and property damage resulting from other maritime casualties.<sup>6</sup> It was also argued, that the rule of strict liability which is imposed on the risks arising out of the operation of nuclear ships could not be extended to the risks of oil

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<sup>3</sup> Nicholas, J. Healy, *The CMI and IMCO Draft Convention on Civil Liability for Oil Pollution*, [1969] J.Mar.Law & Comm., p. 93.

<sup>4</sup> As explained chapter. 1.

<sup>5</sup> Brown, E.D. *The Lessons of the Torrey Canyon*, 1968, Current Legal Problems, at p. 118.

<sup>6</sup> This was the opinion of The British Maritime Law Association, 1968 C.M.I. Doc, part 3, at p.50.

pollution from ships, because nuclear material is something which is dangerous in itself,<sup>7</sup> whereas crude oil is not inherently dangerous.<sup>8</sup>

A compromise solution to the problem suggested liability based on the fault, with the onus of proof reversed.<sup>9</sup> Though such a proposal may solve part of the problems facing the claimants, there are certain circumstances where the claimants might still be unable to recover damages; e.g. where a tanker owner or charterer proves that the tanker from which oil escaped had been the innocent party in the collision.<sup>10</sup>

The concept of strict liability was finally adopted, with some exceptions,<sup>11</sup> for any pollution damage caused by a ship carrying bulk oil as a cargo.<sup>12</sup> Thus, a claimant does not have to prove that the ship owner was in any way at fault or negligent in causing pollution. The significance of strict liability is not only that the claimant is relieved from having to prove negligence, it applies equally where questions of proof are not at issue and where it is perfectly plain that no fault is involved on the ship owner's part. It must be noted that the strict liability is not an alternative to the fault, but merely eliminates the fault as a necessary condition of liability.

The principle of strict liability connects liability to activities creating risk, without regard to fault. In other words, it is based on "cause in law" namely in extending the strict liability to the shipowner it is assumed that he would be held

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<sup>7</sup> Heuston, R.F.V & Buckley R.A. *Salmond and Heuston on Law of Torts*, 19 ed., London, Sweet and Maxwell, 1987, at pp. 367-368.

<sup>8</sup> Lord Devlin, as the chairman of the C.M.I. subcommittee, 1967, C.M.I. Doc, part 1 at pp. 76-8.

<sup>9</sup> Proposed by the British Maritime Law Association, C.M.I. Doc, part 1. at p. 54, 1968.

<sup>10</sup> *Id.*

<sup>11</sup> Art. III. 1969 CLC.

<sup>12</sup> Art. IV.

to have caused discharge of pollutant. This, of course, does not mean that the owner intended to cause the damage. In deciding whether a certain enterprise should carry the cost of damages caused by its activity embraces several factors. The likelihood of damage, the extent of potential damages, and feasibility of insurance can be named as examples of such factors. Generally speaking, an activity creating risks in the environment should bear such risks rather than the injured parties who are not responsible for the activity undertaken and do not have the same possibilities of avoiding danger or protecting themselves against it. Therefore, it seems to have an immediate impact on the protection of environment

The practical effect of holding a shipowner strictly liable can be said to shift the burden of the proof of the origin of the oil pollution from the claimant to the vessel owner. Only if the shipowner can bring himself within the exceptional cases provided in the Convention, he can escape liability under strict liability standard. However, a similar result can exist when a negligence standard is used by insurers, since the major purpose of a liability policy is to insure the insured against liability. Similarly, the strict liability, under the CLC, aims to ensure that that adequate compensation is available to a person who suffers damage caused by pollution resulting from the escape or discharge of oil from ships. Despite this similarity in aims, underwriters have always been fearful of the application of the strict liability. Their fear has not been based on the increased liability for pollution damage under an strict liability. The insurance industry argues that if strict liability is imposed on shipowners for oil pollution damage, it may be imposed in respect of other risks.<sup>13</sup> In practice, almost all tankers are insured for liability under the Convention with P & I Clubs.

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<sup>13</sup> See the opinion of James J. Reynolds, President of the American Institution of Merchant Shipping, in Susan L. Waggener, *Compensation for Oil Pollution at Sea: an Insurance Approach*, 12 San Diego Law Review, 1975, 717 at p. 736.

should not exempt the owner from liability where the loss caused by his own government in the time of peace.<sup>16</sup> The question was raised in Janson v. Driefontein Consolidated Mine, etc.,<sup>17</sup> an insurance case which can by analogy be applied to this issue, in which it was held that where a subject of a foreign Government insures treasure with a British underwriter against capture during its transit from the foreign state to this country, and the foreign Government seizes the treasure during the transit, and war is afterwards declared between the foreign and the British Governments, the insurance is valid, and an action may be maintained in this country against the underwriters after the restoration of peace and such an insurance is not against public policy.

There is also exemption from liability if the discharge or escape was due wholly to anything done or left undone by a third party with intention to damage. A vital aspect of this defence is that there must be intent to do damage. If a third party has only been negligent, then this will not provide a defence. The question which may arise here is whether the defence of a third party act is available to the owner, if that act or omission is done by the servant or agent of the owner. There is no such a defence because CLC provides<sup>18</sup> that neither the servant or agent of the owner nor any person performing salvage operations with the agreement of the owner shall be liable for any such damage or cost. If a spillage is caused by the negligent act of a party not being a servant or agent of the owner, the shipowner will be able to claim from the third party in negligence. It is also necessary to mention that the defence of third party act is

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<sup>16</sup> *Aubert v. Gray* (1862) 3 B & S. 163 at p. 169.

<sup>17</sup> [1902] A.C. 484.

<sup>18</sup> Art. III(4).

only available to the owner if “wholly” caused by the third party. There is, therefore, no defence where there is a contributory cause. A clear example of this is a collision where both parties are to blame and cause discharge of oil. In this case both will be subject to “cross liability” under the insurance policy, based on the proportion of liability which attaches to each defaulting vessel.

The natural phenomenon exception seems to be more limited than an act of God, despite of being similar, because both are occasioned by an unanticipated natural disaster. But the key words in the definition of natural phenomenon seem to be “inevitable” or “irresistible”<sup>19</sup> act which may indicate that it obligates the owner to prove not only that the accident could not have been avoided by the master’s exercise of reasonable care but also that it would not have been avoided by anyone under any circumstances,<sup>20</sup> whereas, there is no such restriction in the case of an Act of God. The common law demanded the satisfaction of two requirements before it would recognise an Act of God: the occurrence must have taken place without the intervention of any human agency and it must have been of such a nature that “it could not have been prevented by any amount of foresight and pains and care reasonably to be expected....”<sup>21</sup> of the defendant. Thus, there is at common law no requirement that the Act of God should be inevitable in the common sense of being beyond all human power to prevent. Mansfield. J. in *Trent and Mersey Navigation v. Wood*,<sup>22</sup> said that, “The Act of God is a natural necessity..... which arises from

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<sup>19</sup> It seems in practice, that there is no difference between the word “inevitable” or “irresistible,” because both are clearly a specific reference to the particular liability of an individual defence to overcome the damage.

<sup>20</sup> Abecassis, David. W. *The Law and Practice Relating to Oil Pollution from Ships*, 1978, at p. 182

<sup>21</sup> Per Mellish, L.J. in *Nugent v. Smith* (1876) 1 C.P.D 423 at p. 444

<sup>22</sup> [1785] 4 Dougl. 286 at p. 290.

natural causes and is distinct from inevitable accident.” The defendant, under the Act of God, might escape liability if he proved only that he did all which could reasonably be expected of him to avoid that occurrence, but failed to do so. That another may have succeeded where he failed or that, in other circumstances, he may have succeeded himself was of no relevance. All he had to prove was that he had done his reasonable best.

A further difference between the natural phenomenon defence, under the CLC, and the Act of God lies in that, it was not necessary, to establish an act of God, to prove an exceptional occurrence.<sup>23</sup> Yet, the CLC requires that, in order to relieve a shipowner of his liability, the phenomenon must be of an exceptional nature. It may be that, where a ship sailing at sea in an area where cyclone storms are unusual but not unknown is cast away and damage is caused of the type envisaged by the shipowner, the owner may still be liable, although at common law he may well have escaped liability if he were able to show that he took reasonable precautions and was not otherwise at fault.

The risk of “natural phenomenon,” which is uninsurable, is restricted to those risks which are with an “exceptional, inevitable and irresistible character. Thus, the owner will be liable for pollution damages which are caused by the natural phenomenon without these characteristics. This brings the meaning of natural phenomenon in to line with the definition of the “perils of the sea” in the context of insurance. There is no clear definition of a peril of the sea, because it is generally regarded as unsafe to attempt a complete definition of the expression which may in practice lead to further questions. Lord Herschell in the *Thomas Wilson, Sons & Co. v. Owners of the Cargo Per, The “Xantho”*,<sup>24</sup> in defining the perils of the sea suggested that: “The term “perils of

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<sup>23</sup> *Forward v. Pittard* (1785) 1 Term. Rep. 27 at p. 33.

the sea" does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril "of" the sea. .... It is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which result in what may be described as wear or tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen....., if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category". In brief, an insurable peril of the sea is a danger arising from the accidental, fortuitous and unexpected action of the sea, not ordinary wear and tear or natural cause, which cannot be expressly guarded against, such as storms, or leakage of the vessel, whether caused by agencies working from without or from within.<sup>25</sup>

There is in the Convention the provision that the owner will be exempted for liability if damage resulted from "an act of war, hostilities, civil war, insurrection...". Most of the activities this article suggests seem to be qualified as an act of war if undertaken by governments. The broadening of the language of an act of war seems to aim to extend the exception to collective or individual activity, such as terrorism. This extension does not seem necessary with regard to the third party conduct exception in the Convention.

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<sup>24</sup> (1887) 12 App. Cas. 503. at p. 509.

<sup>25</sup> See, e.g. *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887) 12 App. Cas. 518; Rule 7 of the Rules for Construction of policy set out in the First Schedule to MIA 1906.

Normally, where a vessel caused the pollution damage following an accident, the loss is presumed to be due to maritime perils. But, where the owner is claiming exemption from liability under the Act of war, he has the affirmative burden of the issue and thus the burden of proving, on a balance of probabilities, that loss was caused by a war risk. To do this, the clear definition of the Act of war and its distinction from maritime risk is necessary. The CLC has no definition of war risk, but this term has been comprehensively discussed in the marine insurance law in considering the exclusion of war risk from policy cover.

The word "war" in a policy of insurance is not used in any particular technical sense. It was held there was a "war," for the purpose of charterparty, between China and Japan, irrespective of whether HM Government have recognised a state of war or whether diplomatic relationships had been broken.<sup>26</sup> So the Irish rebellion was held to amount to "war" within the meaning of insurance policy.<sup>27</sup> The word "war" in a policy of insurance includes civil war unless the context makes it clear that a different meaning should be given to the word.<sup>28</sup> Where goods were insured for a voyage which includes incidental land risks and the insured abandoned the goods on the basis that their loss seemed to be unavoidable because the town in which the goods were being held was surrounded by the enemy forces, there was a constructive total loss by war risk.<sup>29</sup> It has also been held to cover an embargo on the export of oil to certain countries during time of war even if certain of those countries were not

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<sup>26</sup> *Kawaski, etc. v. Bantham SS. Co.* [1939] 2 K.B. 544.

<sup>27</sup> *Curtis and Sons. v. Mathews.* [1919] 1 K.B. 425.

<sup>28</sup> Per Lord Morton, *Pesquerias Y Secaderos de Bacalao de Espana, S.D. v. Stanley Groham Beer* (1949) 82 L.L. R. 501 at p. 514.

<sup>29</sup> *Radocanachi v. Elliot* (1874) 9 L.R. C.R. 518.

involved in the conflict.<sup>30</sup> A loss through the activities of terrorists, however, would clearly not fall under the heading of "war."<sup>31</sup> Lord Newbury in *Britain Steamship Co. v. The King (The Petersham)*,<sup>32</sup> stated that the word "hostilities" does not mean "the existence of a state of war." but means "acts of hostility" or.... "operation of hostility". Warlike operation was defined<sup>33</sup> as, "one which forms part of an actual or intended belligerent act or series of acts by combatant forces. It part may be performed preparatory to the actual act or acts of belligerency, or it may be performed after actual act or acts of belligerency, but there must be a connection sufficiently close between the act in question and the belligerent act or acts to enable a tribunal to say with at least some modicum of... common sense that it formed part of acts of belligerency." Plainly it does not include all operations in war, or even all operations for the purpose of war.

What is clear from all these authorities is that no claim may be made under a war risk policy, or in any other form of insurance, unless the loss was caused by the risk insured. Proximate cause has never been given an exhaustive legal definition and the courts have not evolved any philosophical theory of cause and effect. Words such as "direct" or "immediate" have been used to explain the meaning of proximate, but essentially they mean the same thing, namely that some event leads to the loss without the intervention of other factors of sufficient importance as to supersede the first event. This will always be a

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<sup>30</sup> *Seabridge Shipping Ltd. v. Antco Shipping Ltd.* [1977] 2 Lloyd's Rep, 367.

<sup>31</sup> *Pan American World Airways. INC. v. Aetna Casualty and Surety Co. and Others* [1974] 1 Lloyd's Rep. 207.

<sup>32</sup> [1921] 1 A.C. 99 at p. 133.

<sup>33</sup> See *Atkinson J in Clan Line Steamers Ltd. v. Liverpool and London War Risks Insurance Association Ltd.*, [1943] K.B. 209 at p. 221.

question of fact.<sup>34</sup> Difficulties may arise in cases where the final cause of loss is a marine peril, such as stranding or collision, whilst the vessel was involved in an war or warlike operation. The final outcome of a long line of cases was that all the surrounding circumstances must be looked at to discover which was the dominant cause of loss, so that war risk underwriters could find themselves paying for loss in which marine perils played a large, but not dominant part.<sup>35</sup>

Recent conflicts within the world naturally raise new practical problems in the definition of war risk and for its underwriters. There is no doubt that any vessel damage resulting in a polluted sea as a direct result of acts by either of the combatant parties will clearly fall within the definition of war risk and exempt the owner from liability under the CLC. The question may arise when the pollution damage is suffered through the detention of the vessel. Suppose the vessel was detained before the breaking out of war. During the detention the vessel was holed by marine perils and began discharging of oil. The simple answer may be that if the owner were deprived of control of the vessel for a long time and the vessel was under the control of one of the warring parties, naturally the discharge would be regarded as a result of war for which the owner is not liable under the CLC, provided he can prove constructive total loss of the vessel.<sup>36</sup> This means that the owner must prove the subject matter has been reasonably abandoned on account of its actual total loss being unavoidable. In the *Evia (No. 2)*,<sup>37</sup> an 18 month charterparty was held to be

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<sup>34</sup> Lord Dunedin, in *Leyland Shipping Co. Ltd. v. Norwich Union Fire Insurance Society Ltd.* [1918] A.C. 350 at p. 364.

<sup>35</sup> e.g. see *Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport, The Coxwold*, [1942] A.C. 691.

<sup>36</sup> Cf. the judgement of Robert Goff J. in *The Antaios* [1981] 2 Lloyd's Rep. 284; see also S. 60 of the MIA 1906.

<sup>37</sup> *Kodros Shipping Corporation v. Empresa Cubana de Fletes (The Evia. No. 2)* [1983] 1 A.C. 736.

frustrated after the vessel had been trapped for six months. In the Wenjiang,<sup>38</sup> the detention of a vessel chartered for 12 months under a shelltime form for just over two months was also held to frustrate the charterparty.

### **4.3. The scope of liability under the CLC.**

#### **4.3.1. The extent of liability in respect of the pollution damage.**

The definition of pollution, as contained in the CLC 1969,<sup>39</sup> has very general wording. The nature of the definition gave rise to the problem of differing interpretations as to loss or damage in various jurisdictions subscribing to the Convention. The considerable risk of varying interpretations gave rise to the view that some uniformity of interpretation would be desirable. This is why the IMO in a diplomatic conference in the 1984 Protocol to the CLC, as provided in the 1992 Protocol, adopted a new definition of pollution damage, in order to have a comprehensive and more clarified definition of the notion of damage. Under article 2(3) of the protocol, pollution damage is defined as:

(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 the profit from such impairment shall be limited to the cost of reasonable measures of reinstatement actually undertaken or to be undertaken

(b). The cost or preventive measure and further loss or damage caused by preventive measures."

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<sup>38</sup> *International Sea Tanker INC. v. Hemisphere Shipping Ltd., The Wenjiang* [1982] 1 Lloyd's Rep. 128.

<sup>39</sup> The CLC 1969, Art. 1(6).

The requirement of "escape or discharge" as a condition for the pollution damage or preventive measures indicates that both accidental and intentional discharge are covered and this leads to the deduction that the Convention does not apply to a "pure threat situation," i.e. where a stranded tanker may present the threat of an escape of oil, but at the moment no oil has escaped. Thus, there is no remedy for the coastal state and owners who incur substantial expenditure to prevent the escape of oil. This may be challenged when it is realised that the cost of preventive measures is recoverable under Convention even where there is no spill. This challenge will not succeed if it is considered that prevention measures are defined to be those taken after an incident has occurred and incident means any occurrence which causes pollution damage for which the owner is liable, i.e. the damage which is caused by an escape or discharge of oil. The exclusion of pure threat has been remedied by the 1984 Protocols, as adopted by the 1992 Protocols, to the CLC by extending the definition of incident to "grave and imminent" threat, i.e. something near to point of happening, or causing a pollution damage.<sup>40</sup> The phrase "an imminent threat" may be criticised because it does not include the situation where there is a serious fear of spill in time. Suppose where a part of wrecked ship sinks with oil aboard and there is no "imminent" threat of an escape of oil from the sunken part, but it is rightly feared that in time there will be a leak. This criticism might be removed by replacing the word "serious" with "imminent."

The notion of pollution damage only covers damage by contamination; in consequence fire damage caused by the initial or subsequent ignition of oil is not caused by the contamination and so is irrecoverable under the Convention as pollution damage.<sup>41</sup> In other words the requirement of contamination

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<sup>40</sup> Art. 1 (8) of the 1984 Protocol to the CLC.

excludes damage from oil which subsequently ignites. But damage by oil contamination following a fire or explosion aboard ship is recoverable, because damage in such a case is caused by oil not explosion or fire.

Direct damage to property, e.g. boats, fishing gear, beaches and coast line, caused by oil contamination clearly falls within the notion of pollution. The question which arises is whether consequential loss suffered by the owner or user of property is recoverable under CLC or not. For example, the owner of a polluted fishing boat may be prevented from using his boat for the time during which the boat is being cleaned, thereby suffering loss of income. Although all legal systems recognise, under the principle of foreseeability, causation and remoteness, claims for loss of this kind, the CLC does not provide any answer to this question and usually leaves the solution to national law, the IOPC Fund or P & I Clubs' practices.<sup>42</sup>

Leaving the question of determining the meaning and scope of loss or damage to a municipal court or P&I Clubs and IOPC Funds may have two unfortunate results. First, it creates uncertainty as to the intended scope of the pollution damage covered by the Convention, and this uncertainty can be reproduced by the states parties in the legislation through which they have incorporated the conventional rules in their municipal law. Secondly, there is a danger that different interpretations are put upon the same concepts.<sup>43</sup>

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<sup>41</sup> Oil floating on the water has subsequently ignited and caused damages in many cases, e.g. see, *The Wagon Mound* (No. 1) [1961] A.C. 388 and (No. 2), [1967] 617; *The Kazimah* [1967] 2 Lloyd's Rep. 163; *Easter Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners* [1951] 83 C.L.R. 353.

<sup>42</sup> See, Mans Jacobson and Norber Trots, *The Definition of Pollution Damage in 1984 Protocol to 1969 CLC and 1971 FC*, [1986] J.Mar.Law & Comm., p.467.

<sup>43</sup> Brown, E.D., *The International Protection of the Environment in Regional Level*, 1982. Institute of Public International Law and International Relation, the Thesaloniki, pp. 64-5.

Physical damage has always been subject to insurance cover, so insurance of property or liability arising out of the property prima facie has been subject to insurer's liability under a policy. The insurers, broadly speaking, are exempted from liability for consequential loss unless the policy otherwise provides. In *Maurice v. Goldsbrough Mort Co. Ltd.*,<sup>44</sup> where consignee of wool insured it as a trustee for the owners so that they were liable to account to them for the insurance money received following a loss, they could not recover in respect of their loss or commission. Similarly, in the case of *Re Wright and Pol.*<sup>45</sup> an insured inn was destroyed by fire but the insured was unable to recover in respect of the loss of customers, and the hire of other premises while the insured premises were being repaired, since such a consequential loss was not one of the perils insured against under the ordinary form of insurance policy. The same principle was applied in Scottish case of *Menzies v. North British Insurance Company.*<sup>46</sup> in which it was held that the insured could not recover in respect of the wages of servants engaged on the premises when the occupier was bound to pay, even though in consequence of the destruction of the property he received no return for those wages by way of services.

As a result, there is no recovery of loss of profit or earning by the hoteliers whose premises have been contaminated by oil if the policy does not so provide. Non-recovery of the consequential loss may be justified because in this case the hotelier's interest is not a direct interest of the subject matter of the insurance. In other words, consequential losses are recoverable unless they are separately insured.<sup>47</sup> In America, it seems to have been held in certain

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<sup>44</sup> [1939] A.C. 452.

<sup>45</sup> (1834) 1 A & E. 621.

<sup>46</sup> (1847) 9 D. 694.

<sup>47</sup> Privy Council, in *Maurice v. Goldsbrough Mort & Co.* [1939] A.C. 452 at p. 466.

cases that a policy on property might cover a right to certain share in a cargo as profits.<sup>48</sup> It has also been stated that "an insurance on ship or goods specifically without any indication that another subject is intended, cannot be applied to expected profits."<sup>49</sup> It must also be noted that insurance against prospective and anticipated profit neither ascertainable nor certain at the date of the insurance is contrary to the general rule which says that the insured must be interested in the subject-matter insured at the date of contract or be expected to acquire such interest at least at the time of loss.<sup>50</sup> Despite this the insurability of such profit is well recognised.

As the notion of "pollution damage" only covers damage by contamination, therefore, personal injury and death claims are of minor importance in the CLC. But, since pollution damage includes the cost of preventive measures and further loss or damage caused by preventive measures, it appears that personal injury and death caused during preventive measure operations would be covered by the definition of pollution damage.

The notion of pollution damage covers damage by contamination caused outside the ship carrying oil. The question arises as to whether damage resulting from pollution that happens inside another ship falls within the definition of pollution damage under CLC. During the transfer of heavy fuel oil from a tanker<sup>51</sup> to a fishing boat, a crew member erroneously put the nozzle of the supply line into a cargo hold instead of into the bunker tank. As a result of

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<sup>48</sup> Maurice..., *Id.*, at p. 466.

<sup>49</sup> *Id.* See also Philips on Insurance, vol. 1, S. 462.

<sup>50</sup> If there is no interest nor reasonable expectation of acquiring such interest, the policy is void. See. S. 4 of MIA 1906; *John Anderson v. James Farguhar Maurice*. [1876] 1 App. Cas 713.

<sup>51</sup> *T Subame Maru 58*, Japan 18 May 1989; see, in *IOPC Fund, Annual reports*, 1990, p. 41.

this mistake about seven tons of the oil entered into cargo tank and polluted about 140 tons of fish which had been loaded as cargo in that tank. No oil escaped into the sea as a result of incident. The Executive Committee of IOPC decided that the damage in this case should also be considered as being covered by the definition of pollution damage.<sup>52</sup>

The operation to clean the hull and deck of the polluted vessel did not fall within the definition of pollution damage and preventive measures laid down in CLC and FC because the notion of pollution damage covered damage by contamination outside the ship carrying oil, and the cost of preventive measures, i.e. measures to prevent or minimise pollution damage after the incident.<sup>53</sup>

#### **4.3.2. Liability as to pure economic loss**

The definition of pollution damage has included damage and loss.<sup>54</sup> This indicates that it was the intention of those who drafted CLC that some kind of claims, e.g. loss of profits associated with physical damage should fall within the Convention's scope, provided that the "loss or damage" was caused by the contamination.<sup>55</sup> What is less clear is whether it was intended to cover pure pecuniary loss which is not connected with any physical damage to person or

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<sup>52</sup> This decision was also applied in, *Subame Maru* No. 16, Japan, 15 June 1989, in which the spilt oil polluted some fish which had already been unloaded from the fishing vessel on to pier. No oil escaped into the water, see, *Id.*, at. p. 42.

<sup>53</sup> *Nancy Orr Gaucher*, Canada, 25 July and 10 August 1989, see, in IOPC Fund annual report, 1990, at p. 43

<sup>54</sup> The expression of damage in S. 20(1) of the 1971 Merchant Shipping (oil pollution) Act, also S. 1(3) of the 1974 Merchant Shipping Act has included the loss

<sup>55</sup> This view was shared by British Department of Trade, see *Memorandum of Liability and Compensation for Oil Pollution Damage in TISC Report*, vol. III, P. 85 at para. 50

property, e.g. hotelier's lost profits or holiday maker's loss of holiday value resulting from the fouling of a beach which they do not own.

The wording of the definition of pollution damage in the CLC does not clearly give any guidance as to whether pecuniary loss is covered by the definition or not. There is also generally a reluctance in both civil law and common law countries to recognise claims of pure economic loss, i.e. the loss which is not attached to physical damage. The reason for this attitude is fear of the far-reaching consequences that acceptance of such claims could have.<sup>56</sup> In most countries, a claim for compensation is generally accepted only if it relates to damage to a defined and recognised right, e.g. a right to property or a right of possession. Therefore, damage suffered by someone by the loss of use of the environment is not damage to an individual's recognised right and in consequence is not compensated unless the person in question has a specified right of use.<sup>57</sup>

At first sight, it might be suggested that a claimant could be covered for only pecuniary loss which is associated with physical damage, i.e. consequential loss; but this poses the question of physical to whom? Can a hotelier who has not suffered physical damage claim for loss of profit, i.e. pure economic loss, caused by contamination of a public beach? In other words, can a hotelier claim for damage caused by contamination resulting from the escape of the oil within the meaning of pollution damage? It may be argued that hoteliers' claims are not within the meaning of pollution damage on the ground that their claims are for pure economic loss and the word damage does not

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<sup>56</sup> D. Silverston, *Ship Source of Oil Pollution Damage, a Canadian Perspective on Recoverability of Economic Loss and Damage to the Marine Environment*, 1985, *Marine Policy International Journal of Ocean Affairs* 108.

<sup>57</sup> Mans Jacobsson and Norbert Trots, *The Definition of Pollution Damage in the 1984 Protocol to the 1969 CLC and 1971 FC*, *J.Mar.Law & Comm.*, 1986, 467 at p. 477.

encompass pure economic loss.<sup>58</sup> This might be criticised because there is no indication in the clause defining polluting damage under the CLC, that loss is only recoverable where there is also physical damage. On the contrary, the wording of the clause which includes the loss or damage indicates that economic loss is recoverable independently. It is quite logical to say that the natural and ordinary meaning of "loss" would include economic loss. The courts have also tended to construe the words "loss or damage" widely so as to include pure economic loss. The phrase "loss or damage to or in connection with goods" is found in Article III rule 8 of the Hague Rules. It was held in *G.H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama*,<sup>59</sup> that these words were apt to cover economic loss, since the words were not limited to actual loss of or physical damage to goods.<sup>60</sup> Thus, all that can be said with certainty is that there is no reason in principle why economic loss may not be recovered in an action under the CLC. It can, therefore be concluded that the hoteliers claims are recoverable if they establish that their losses were caused by contamination. Although there is no close degree of proximity between contamination and such loss, such losses may easily be shown to be foreseeable consequence of the beaches' contamination.

The problem of pure economic loss has often been considered in the IOPC Fund. It has been decided that only economic losses which are suffered by those who directly depend on earnings from coastal areas or seas, e.g. loss of earnings by fishermen,<sup>61</sup> and any hotelier at a seaside resort are recoverable.<sup>62</sup>

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<sup>58</sup> See Abecassis in *Oil Pollution from Ships*, 1985, p. 185.

<sup>59</sup> [1957] A.C. 149 at p. 150.

<sup>60</sup> See also *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.* [1959] A.C. 133 at pp. 157, 181 and 186.

<sup>61</sup> e.g. *The Fukutohn Mare* no. 8, Fund Executive Committee, EXC. 10. 3, para. 9. 25.

However, claims for compensation for damage to fishing grounds due to the other effects of oil pollution on fisheries have been rejected by the IOPC Fund because the claimants were not able to produce sufficient data to prove that any damage was actually sustained.<sup>63</sup>

In practice, claims for economic loss by individuals such as hoteliers and fishermen have been accepted by insurers, as already mentioned, as pollution damage, if the policy specifically so provides. To succeed, a claimant would have to be able to prove his loss and to quantify it. To do this, he must prove that loss is not too remote from the incident which caused it. In other words, it should result directly from the pollution.<sup>64</sup> For example, loss of earnings suffered by fishermen, hoteliers and restaurateurs at seaside resorts would be recoverable, but losses suffered indirectly, e.g. loss of tax revenues by the local authorities, as a result of damage to tourism, would not be recoverable as a result of their being too remote from pollution damage. As has been noted several times in the course of this thesis, it is not sufficient in order that an insured should recover for a loss that the loss fall within the cover provided as a matter of construction or definition. He must also show that the loss was proximately caused by an insured peril. The proximate cause does not mean the last cause, but the effective or dominant or real cause which is foreseeable by a reasonable man.<sup>65</sup> Working out what is the proximate cause in any situation is strictly a question of fact.

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<sup>62</sup> Fund, EXC. 10, WP. para. 7.

<sup>63</sup> The Koho Maru No. 3 case, Fund EXC. 141, Annex para. 7.4.

<sup>64</sup> Department of Trade, *Liability and Compensation for Marine Oil Pollution Damage*, Report of Inter-Departmental Group, February 1979 p. 20.

<sup>65</sup> See the judgement of the Lord Summer in *Becker, Gray & Co. v. London Assurance. Corp.* [1918] A.C. 101 at p. 112-13.

#### **4.3.3. Cost of preventive measures and coverage of pure threat removal measures.**

The cost of preventive measures and further loss caused by such a measures, e.g. damage to the marine life by spraying of oil with detergent, constitutes a special kind of pollution damage for which the shipowner is liable under the Convention. The CLC covers reasonable measures taken to prevent or minimise pollution damage after an incident has occurred.<sup>66</sup> The question of what is reasonable and how far the cost of measures is to be considered in deciding whether it was reasonable has nowhere been defined in the Convention. The measure must be considered reasonable from an objective point of view in the light of information available at the time when the specific measures were taken. The measures taken must be seen in relation to the threat that existed.<sup>67</sup> However, it must be recognised that the authority concerned and parties involved in the operation often have to decide very rapidly and without full knowledge of the circumstances when they want to take preventive measures. This is why it appears that when the test of reasonableness is to be applied, the parties involved in the operations should be allowed a certain margin of error in their judgements.

Definitions of pollution damage which state that contamination must result from the escape or discharge of oil prove that the CLC does not apply to pure

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<sup>66</sup> Art. 1(7).

<sup>67</sup> Abecassis, D.W. *The Law and Practice Relating to Oil Pollution From Ships*, 1978, p. 137.

threat removal measures, i.e. measures which are taken before the actual spill of oil from a tanker has occurred and are so successful that no spill takes place at all. Therefore, the cost of measures taken before any spill has occurred are not compensated. So, if a ship has been stranded but no oil spilled, the costs of sending boats with detergent spraying capability, of laying booms and other such measures, will not be recoverable.

It has been observed that to<sup>68</sup> cover pure threat removal measures, the definition of preventive should be read in conjunction with the definition of incident which is as follows:

"incident means any occurrence, or series of occurrences having the same origin, which caused the same pollution or creates a grave and imminent threat of causing such damage."

From this definition it can be construed, on the one hand, that an occurrence which has not resulted in a discharge is hardly an incident. On the other hand, it seems clear that a stranding which results in discharge of oil is an occurrence which may cause pollution damage, regardless of whether the oil is discharged immediately upon stranding or sometimes thereafter. From these two arguments it can be concluded that, although the cost of pure threat removal measures cannot be recovered as compensation, because there is no incident and no discharge, it is also possible to say that an occurrence which subsequently causes pollution damage is an incident.

The question which may arise here is whether the insurer is to be liable for the prevention cost under the pollution liability insurance. The problem may be considered in two ways: If liability is insured against pollution damage, can the insured recover if the loss does not actually operate upon the insured's liability,

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<sup>68</sup> In IMO Diplomatic Conference in May 1984.

but it is lost or damaged in circumstances when the insured peril was imminent? If there is no loss, but only because the insured incurs expenditures in preventing what would have been a certain loss, can the insured recover these expenditures?

There is clear authority in marine insurance cases that once the risk insured against has happened, and is so imminent that it is about to operate upon the insured's liability, damage or loss to the subject matter due to efforts to prevent the progress of casualty, is covered, since the proximate or real cause of such damage is the risk insured against. In *Symington v. Union Insurance of Society of Canton Ltd.*,<sup>69</sup> cork was insured against fire. A fire broke out some distance away and to prevent its spreading local authorities threw some of the cork into the sea. It was held that the loss of this cork was covered, on the ground that damage by water to save the consequences of fire and the destruction of property by preventing its spreading were both proximately caused by fire. In other words, in this case, a loss was certain to occur in the absence of precautions such as those which were quite properly taken, and the insured peril was actually operating at the time. Thus, if the sunken oil tanker started leaking oil and the laden oil was pumped in to another vessel the cost of pumping and taking oil to distention would be covered as a prevention cost.

The answer to the question where the risk insured against is not in fact operating in any way, seems to be more problematical. Suppose the shipowner is insured against pollution damage. In a voyage his tanker is stranded. No oil is spilled but in the circumstances it is certain that it will happen unless measures are taken. The insured's expenditure in a salvage operation successfully prevents discharge. Can he recover such cost from his insurer, as

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<sup>69</sup> (1928) 31 L.L.Rep. 179.

a prevention cost? In marine insurance, a "sue and labour" clause would permit recovery, provided that the insurance policy expressly permits this and he could prove that if he had done nothing, the pollution would have happened as a result of an insured peril and the insurer would have been liable.<sup>70</sup> But in the absence of an express "sue and labour" clause it is not clear whether prevention costs are recoverable in marine insurance. In *The Knight of St. Michael*,<sup>71</sup> a case involving a freight policy, a cargo of coal which had heated was unloaded to prevent spontaneous combustion and sold, as the continuation of the voyage with smouldering coal could have imperilled ship and cargo. Recovery was allowed for the lost of freight on the theory that imminent damage of fire existed, although not a loss by fire. Gorell Barnes J. said: "The condition of things was such that there was an actual existing state of peril of fire, and not merely a fear of fire."<sup>72</sup> It was a loss by *ejusdem generis*<sup>73</sup> covered by the general words "all other loss and misfortunes." The problem with regarding this decision as clear authority is that the judge not only based his decision on the loss by fire, but also on the general head of cover in the policy covering "other loss". As a result it is suggested that such prevention costs should be recoverable, even in the absence of express coverage, provided that there is an actual existing state of the peril insured against is certain. Mere danger of such a loss would clearly not be sufficient.

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<sup>70</sup> *Pyman Steamship Co. v. Admiralty Commissioners* [1919] 1 K.B. 49 at p. 53.

<sup>71</sup> (1888) P. 30.

<sup>72</sup> The mere apprehension or fear of fire however reasonable it may have been, is not a peril by fire. See. *Joseph Watson and Son, Ltd. v. Fireman's Fund Ins. Co. of San Francisco* [1922] 2 K.B. 355.

<sup>73</sup> It is a general rule of construction where the general word are linked with particular words they must be construed as limited to the same genus as the particular words applies of insurance. See Lord Coleridge CJ IN *Mair v. Railway Passengers Assurance* (1877) 37 L.J. 356 at p. 358. An insurance of a vessel against the "all other perils" has been held not to cover the explosion of a donkey boiler. See. *Thames & Mersey Marine Insurance Co. v. Hamilton Fraser, & Co.* (1887) 12 App. Cas. 484.

Another important question which must be considered by an insurer is whether, and if so to what extent the cost of the salvage operations fall within the cost of preventive measures. The P & I Clubs have maintained the view that salvage operations could be considered as preventive measures only if the primary purpose was to prevent or minimise pollution damage.<sup>74</sup> Neither the CLC nor its protocol has discussed this problem. But the relationship between salvage operations and preventive measures was considered in the *Fatma* incident<sup>75</sup> which was dealt with by the IOPC Fund. In its pleadings to the Italian court, the IOPC Fund took the position that an operation can be regarded as a preventive measure only if the primary purpose was to prevent or minimise oil pollution damage. The court held that the salvage operation could not be considered as a preventive measure, since the primary purpose of such operation was to rescue the ship and cargo.<sup>76</sup>

#### **4. 3.4. Liability as to the environmental damage.**

One of the most important aspects of pollution damage is the extent to which ecological damage should be recognised. The text of the 1969 CLC was not clear as to whether damage to the natural resources of the marine environment and the cost of its restoration would be paid. But in practice, this was not allowed because of the lack of any reasonable and generally accepted economic and mathematical model which would enable those concerned to translate into monetary terms the value of a clean environment. Furthermore,

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<sup>74</sup> Jacobsson, M. and Tvots, N., *The Definition of Pollution Damage in the 1984 Protocol to the 1969 Civil Liability Convention and 1971 Fund Convention*, 17 J. Mar. Law & Comm., 1986, 467 at p. 475.

<sup>75</sup> It occurred in the Messina Strait in Italy in March 1985

<sup>76</sup> Jacobsson, M. and Tvots, N. *supra*. No. 74, at p. 476.

the other problem with many claims of this type is that no damage can be shown to have been suffered, because there are legal problems with establishing a legal interest for individuals in the marine environment allegedly damaged. It is clear that only rights over individual possessions can be subject to injury by private action and the right of sovereignty over territorial water cannot be injured by private persons. This does not of course mean that damage to State-owned property cannot be claimed by the public authorities, because such rights over such property are not sovereign rights. However, the Convention did not contain any provision excluding or limiting the right to compensation for environmental damage. The definition of pollution damage in the 1984, as adopted by the 1992, protocol to CLC clarifies this very important and controversial issue. It provides, on the one hand, that claims for damage to the marine environment are not admissible, and on the other hand, that the costs incurred in restoring the marine environment, after a pollution incident, are recoverable.<sup>77</sup>

Attention may be drawn in relation to recovery of environmental damage to the fact that the Civil Liability Convention and the Fund Convention were Conventions in the field of civil law adopted for the purpose of providing compensation for pollution victims regarding damages which are capable of quantification. For this reason, it may be maintained that claims which do not strictly relate to quantifiable damages will not fall within the scope of the Conventions, for example, vague claims for general damage to the environment. Since claims of this kind do not relate to quantifiable compensation, such claims may be pursued outside the Conventions on the basis of national law system, subject of course to the restrictions which all

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<sup>77</sup> Art. 1(6)(a), 1984 Protocol to CLC.

national laws place on the recovery of damages or loss especially where loss is based on fault. There are obvious problems of causation and remoteness where general claims relating to damage to the environment are being pursued.<sup>78</sup>

Compensation for restoration of the marine environment is limited, in order to prevent speculative claims, to the cost of reasonable measures of reinstatement actually undertaken or to be undertaken.<sup>79</sup> Therefore, damage to the marine environment cannot be compensated unless the actual cost, (not a purely mathematical calculation) of reinstatement is proved.<sup>80</sup> By limiting compensation of environmental damage to the reasonable costs of reinstatement, argument over the unquantifiable or unquantified environmental claims was eliminated. Further, by limiting environmental compensation to the costs of reasonable measures of reinstatement, it may be argued that this definition is not sufficiently broad to allow compensation where marine oil pollution incident causes economically irreparable environmental damage of a kind which is extensively mitigated by natural generation. If no such costs are recoverable then it becomes apparent that shipowners who cause mild environmental damage must pay compensation, whereas shipowners who cause massive and irreparable damage to the environment need pay nothing, since nothing can reasonably be done to reinstate or restore the affected area.

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<sup>78</sup> These problems are dealt with in chapter 1 of the thesis dealing with common liability in general terms.

<sup>79</sup> *Id.* The interpretation that might be given to the words "to be undertaken" worried the P & I Clubs in 1984 IMO conference, see LEG. Conf. 6SR. prov. at. 4.

<sup>80</sup> IOPC Fund assembly in 1980 unanimously adopted a resolution stating that, "the assessment of compensation to be paid by the IOPC Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with territorial models."

Thus, the definition of compensable environmental damage requires further modification in order to contain clearly mentioned argumentative problems.

In some cases, measures to reinstate the environment may be deferred due to a lack of financial resources. To solve this difficulty, the words to "be taken" were added to help those who can only take measures of reinstatement after compensation has been paid by ship owner or IOPC Fund. The payment is only made if the reason for those measures not having been already undertaken is a lack of funds on the part of claimant. Such compensation is paid by the IOPC Fund or the shipowner and his insurer, provided it is actually used for payment of measures indicated by the claimant in the support of his claim.<sup>81</sup>

The word "reinstatement", as a measure for compensation of environmental impairment, may raise the question whether the insurer can make good the loss, as a mode of discharging liability under the policy, by reinstatement, i.e. by replacing what is lost or repairing what is damaged. Insurance is often described as a contract of indemnity. This means that the assured can, subject to provisions of insurance contract, be expected to be placed in a position equivalent to that which he would have occupied, in relation to subject matter of insurance, if the event against which the insurance was concluded had not occurred. As a general rule and practice, the liability of the insurer to make good the loss under the policy is a liability to do so by a payment in money. This does not, of course, mean that the insurer is not entitled to refer to the other compensation vehicles, e.g. reinstatement, and indemnify the assured if the policy so provides. Such a reinstatement is not a perfect indemnity under the CLC because the costs of reinstatement of

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<sup>81</sup> The interpretative statement refer to, LEG. Conf, 6/ SR. 4. p. 4. Statement of the delegation of the united states of America. LEG. Conf. 6/c. 2/SR. 16. p. 4.

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would seem that this process of election changes the nature of the insurance contract from a contract of indemnity to pay money to a contract to reinstate the subject matter insured. Such an election may put a heavy burden on the insurer when dealing with the environment. To reduce this burden, it may be a good idea to insert in the policy a clause to the effect that reinstatement will be "as circumstances permit and in a reasonably sufficient manner". This burden has already been reduced under the CLC by limiting the costs or reinstatement to costs of reasonable measures actually taken or to be taken, and not all the costs which are needed for reinstatement of the environment. However, the insurer is liable for the consequence of failure to perform reconstruction work adequately.<sup>85</sup> The insurer's liability is for a remedy in damages,<sup>86</sup> i.e. the full value of the property even if originally the loss was a partial one because the insurer who has elected to reinstate is in a position of a contractor, and he, therefore, must bear any loss or damages occurring while they are in possession for that purpose.

The most difficult job in establishing liability for environmental damage, as distinct from commercially valuable resources, is the scientific method of ascertaining what damage has been caused and how it could be quantified in money terms. Although such a remedy cannot be calculated with the high degree of certainty which might be expected, several methods have been provided to quantify such damage. In the U.S.A, the appellate court held that "the primary standard for determining damages in a case such as this is the cost reasonably to be incurred to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is feasible

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<sup>85</sup> Davidson v. Gardian Royal Exchange Assurance [1979] 1 Lloyd's Rep. 406.

<sup>86</sup> Taylor v. Caldwell (1836) 3 B & S. 826.

without grossly disproportionate expenditure.<sup>187</sup> This decision has been reflected in the controversial methods of Natural Resources Damage Assessment in which a category of loss has been developed which enables a value to be placed upon the lost use of the damaged environment. These values are assessed by a process known as "Contingent Valuation Methodology". This standard is very similar to the definition of pollution damage used in the 1992 Protocol to the CLC and FC. In the former Soviet Union, this matter has been dealt with in special legislation. Under this legislation the amount of damage is calculated on the basis of the assumption that each ton of oil that escapes from a ship pollutes a given quantity of the sea water and damages are then awarded in an amount corresponding to a given sum per cubic meter of water that is considered to be polluted.<sup>88</sup>

#### **3.4. Owners' liability and compulsory insurance.**

The establishment of strict civil liability is of little effect if the owner, as defendant, is unable to pay the damages awarded. Accordingly, the 1969 CLC requires owners of the ships, registered in contracting states and non-contracting states who have vessels which enter or leave contracting states' ports or offshore terminals within the territorial sea, to maintain insurance or other financial security, which can include self insurance, to meet the limit of liability for pollution damage which is imposed on any ship which carries a bulk

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<sup>87</sup> Commonwealth of Puerto Rico. v. T SS Zoe Colocotroni, 628 F. 2d 652 (1st Cir) 1980 at p. 675.

<sup>88</sup> Section 5 of the study published by the commission of the European Economic Community; *The Scope and Concept of Compensable Damage Caused by Marine Pollution with Special Reference to Environmental Damage*, December 1981. See also Antonio Grasci Case, IOPC Fund Annual Report 1979.

cargo of more than 2000 tons of persistent oil.<sup>89</sup> It seems to be good idea, in order to ensure that pollution victims are compensated, that there should be an additional guarantee of solvency of persons responsible for the damage. In order to give the best protection to third parties, a compulsory insurance system, which creates an obligation on the person liable to take out insurance, is one the best measures which can be taken. A compulsory insurance system may also be justified where there is a system of strict liability, since only in this way can justice and equity be ensured. In addition, compulsory insurance has advantages for the shipowner because it increases the number of parties insured with all bearing one another's risks under the compulsory insurance. The figure of 2000 tons may be criticised because it deprives a large number of small ships of the security provided by the insurance even although such ships may cause considerable pollution damage.

Compulsory insurance, in order to be enforced, must be certified.<sup>90</sup> Evidence of insurance which satisfies the requirements of compulsory insurance, in the Convention, is usually given by the P & I concerned through a "blue card" which has been accepted by all contracting states. The blue card is addressed to a named authority, i.e. the competent authority which is charged with the responsibility of issuing the Convention certificate. It also certifies that in respect of the ship named therein, there is in force the requisite insurance cover. This certificate of insurance is the document which provides legally valid evidence of the existence of insurance coverage of the CLC liability. Thus, great care must be exercised to ensure the accuracy and adequacy of it. States

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<sup>89</sup> Art. VII. The figure was controversial, but it seems that it has been chosen so as to exclude the bulk to the coastal trade and those dry cargo ships which occasionally carry up to 2000 ton of oil in their deep tanks. See, LEG/CONF/C.2/SR. 14, see also, D.W. Abbecassis, *Oil Pollution From Ships*, 1985, p. 224.

<sup>90</sup> Art. VII(2) 1969 CLC.

may, therefore, refuse to certify if there is doubt about the financial stability of the insurer to cover the amount of the insured's potential liability.<sup>91</sup> Contracting states may cancel the certificate if it is established in legal proceedings that the certificate is invalid.<sup>92</sup>

Every ship, except state owned ships which are in non commercial service,<sup>93</sup> to which the Convention applies must carry a certificate of insurance on board and copies of it should be deposited with the authorities who keep records of the ship's registration, or if the ship is not registered in a contracting state, with the authorities of the state issuing or certifying the certificate.<sup>94</sup> The requirement of the certificate of insurance, as a condition of compliance with the insurance obligation is to indicate that merely a contract of insurance or a policy is not enough to satisfy the Convention provisions. The certificate of insurance contract usually incorporates part of the insurance contract, in order to be easily verifiable. If there is any conflict between these two documents, policy and certificate, the question arises as to which of them should be preferred. The question was raised in *Biddle v. Johnston*,<sup>95</sup> in which it was held that the policy prevails, since the certificate itself is not a contract of insurance.

In order to give states the power to stop a ship proceeding to sea, the Convention provides that "a contracting state shall not permit a ship under its flag to which this article applies to trade unless a certificate has been issued

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<sup>91</sup> Art. VII(6), Id.

<sup>92</sup> Art. VII(7), Id.

<sup>93</sup> A state owned ship must carry a certificate saying that the ship is owned by the state and that its liability is covered up to the limit of the Convention, Art. VII(12), 1969 CLC.

<sup>94</sup> Art. VII(4), 1969 CLC.

<sup>95</sup> [1965] 2 Lloyd's Rep. 121.

under....this article.<sup>96</sup> The penalties for non-compliance amply reflect the gravity of the offence, as failure to have such insurance cover exposes the master or owner, under the Merchant Shipping (Oil Pollution) Act 1971 in the U.K., to a fine up to £ 35000 on summary conviction or an unlimited fine on indictment.<sup>97</sup> The master of vessel must, when requested to do so, produce the certificate to a customs or other officer<sup>98</sup> and failure to do so or failure to carry the certificate on board, may result in a fine on summary conviction up to £400.<sup>99</sup> A contracting state may withhold the right to enter one of its ports or the right to leave one of its ports to ships who have insufficient security. In some cases however, such action may contravene an existing treaty concluded by that state and in these cases it may be difficult for such states to maintain their membership of the convention.

From the requirement of the shipowner's name in the certificate<sup>100</sup> it can be construed that the insurance must be given to a specific shipowner. If there is a change of ownership the insurance will, therefore, fall away. This may mean that the insurance is insufficient, in particular when the ownership changes whilst the ship is at sea. The situation will be more complicated if the ship changes to a new flag and even more so if the new flag is a non-contracting State's flag . The CLC has channelled liability to the owner and has not included those who might use the ship. Thus, compulsory insurance is not extended to those who use the ship, e.g. bare boat charterer. This does not, of

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<sup>96</sup> Art. VII(10), Id.

<sup>97</sup> S. 10(6). The Merchant Shipping (Oil Pollution) Act 1971.

<sup>98</sup> S. 10(5). Id.

<sup>99</sup> S. 10(7), Id., For discussion insurance against fine, see supra. chapter 3 at pp. 97-99.

<sup>100</sup> Art. VII (2)(b).

course, mean that the charterer would not be able to take the advantage of any insurance which has been provided by the owner. It is common to extend a policy, for commercial convenience, to cover more than the insured's owner. At common law, the insured can enforce the contract in so far as it confers a benefit on a third party, there being in effect a waiver of any requirement of insurable interest and presumably the insured then holds any money recovered on trust for third party.<sup>101</sup> However, whether or not a third party, e.g. charterer, himself can sue, if the insured declines to do so, is open to some doubt. In *Vandepitte v. Preferred Accident Insurance Corporation of New York*,<sup>102</sup> the privy council held that a third party was prevented from suing by the doctrine of privity of contract, unless that third party can establish an exception to this doctrine. To establish this, he has to prove that he was the intended beneficiary in trust. On principle there is no reason why the third party cannot claim that the insured contracted as his agent. If a person expressly contracts on behalf of another, even though the other is not actually named, provided he was in existence and capable of being ascertained at the time of contract or at least at the time of the loss, that other can ratify the acts of the agent and sue on the contract.<sup>103</sup>

In order to avoid the possibility of circulatory litigation, the compulsory insurance scheme is taken further by permitting proceedings directly against the insurer or other person providing financial security for the owner's liability for pollution damage. This right was implemented by Article VII(8) of the CLC which provides a right of direct action against insurer for pollution damage,

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<sup>101</sup> *Williams v. Baltic Ins. Ass. of London Ltd.* [1924] 2 K.B. 282.

<sup>102</sup> [1933] A.C. 70.

<sup>103</sup> See generally, *Bowstead on Agency*, 19 ed., pp. 37-36.

irrespective of the actual fault or privity of the insured owner. With regard to this right, it can be said that liability insurance is for the benefit of suffering third parties rather than for the protection of insured. Where a third party can enforce the insurance contract directly, this is subject, of course, to any right of the insurer to avoid liability<sup>104</sup> and is not dependant on the owner insuring as his trustee or agent. In effect he is by statute a party to the contract.

Marine policies usually provide that the insurers are not liable when the vessel, the subject-matter of liability insurance, is unseaworthy for a particular voyage. The question which arises here is whether the insurer will be able to rely on a breach of seaworthy condition or warranty and avoid the liability under the compulsory insurance which is issued to cover the owner's liability against pollution liability under the CLC. As a general rule, on a breach of a seaworthy warranty, the insurer will retain the right to repudiate the contract from the date of the breach, provided that the repudiation does not take effect until written notice has been served on the insured. To do this, the insurer must show that there is a causal connection between the breach of warranty and loss. By not allowing the insurer, under the CLC, to avail himself of any other defences "which he might have been entitled to invoke in proceedings brought by the owner against him", it seems that the Convention does remove from the insurers an important protection which they had under the seaworthy condition or warranty. Thus, insurers cannot rely on breach of the seaworthy warranty and escape liability where an action is brought against them by a third party claimants.

The notion of direct action crystallised in the present Convention is not without precedent in national law. In Scottish private law, there are exceptions

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<sup>104</sup> *Guardian Assurance Co. Ltd. v. Sutherland* [1939] 2 All E.R. 246.

to the general rule that a contract only creates rights and liabilities between the parties to it. For example a contract between two parties may be held in appropriate cases to confer a "*jus quaesitum tertio*" on a third party.<sup>105</sup> Nevertheless, it represents a departure from the English common law principle of privity of contract whereby only parties to the contract are permitted to sue upon it. Statute, in England has under the Third Parties (Rights against Insurers) Act 1930, provided a direct right of action for victims of an insolvent or bankrupt assured.<sup>106</sup> In the U.S.A. various direct action statutes have been enacted which differ in terms and effects.<sup>107</sup>

The Third Parties (Rights against Insurers) Act 1930 operates where an assured under a liability policy has become bankrupt or, in the case of a company, goes into administration or liquidation. This condition may be difficult to interpret in the operation of the 1930 Act. In *Braleley v. Eagle Star Ltd*,<sup>108</sup> the third party, an ex-employee of the assured company, did not become aware of her right of action against the insured until after the insured had been wound up and removed from the Register of Companies, and had therefore ceased to exist. The House of Lords held that it was not possible to sue a company which has ceased to exist, even for the limited purpose of establishing its liability to facilitate an action against its liability insurer under the 1930 Act. There is no such criticism against the provision under the CLC regarding the right of direct

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<sup>105</sup> See *Gloag on Contract*, 2 ed., 1929. pp. 234-247; Walker, *Principle of Scottish Private Law*, 1970, pp. 567-569.

<sup>106</sup> By Section 1(1) of the Act 1930, as amended by Insolvency Act of 1985 and 1986, its provisions apply to all contract of insurance under which a person is insured against liability to third parties. There are two exceptions namely: contract of reinsurance [Section 1 (5)] and contract of employers liability insurance [Section 1 (6)(b)].

<sup>107</sup> The Louisiana Direct Action is the most celebrated one; it has been the topic of numerous legal articles.

<sup>108</sup> [1989] A.C. 957.

action against the insurer, since the right in no way depends on the insolvency of the insured.

The third party is not, under the 1930 Act, placed in any better position against the insurer than the assured himself would have been, since only the insured's rights against the insurer under the contract in respect of liability are transferred to and vest in the third party to whom liability was so incurred.<sup>109</sup> Thus, despite its title, the Act does not confer direct right to the third party against insurers. What the third party acquires by operation of the Act is the transfer to him of the rights which the insured has or had against his insurer under the relevant contract of insurance. This may be compared with the direct right of the injured party against the insurer under the CLC, where the only restriction is that the claim is to "the owner's liability for pollution damage." This means that the third party cannot claim against the insurer for unlimited liability, with reference to the provision which has given a right to limit to the owner, unless the owner's right to limit is broken by his actual fault or privity. This requirement may also bring an obstacle in the way of claimants pursuing direct action against insurers. The right of a third party claimant against the insurers, does not arise until the assured's owner's liability is established to the claimant, by judgement or arbitral award. Lord Denning M.R. in *Post Office v. Norwich Union Fires Ins. Society. Ltd.*,<sup>110</sup> said, "It is clear to me that the injured person cannot sue the insurance company except in such circumstances as the insured himself could have sued the insurance company. The insured could only have sued for an indemnity when his liability to the third person was established and the amount of the loss ascertained." Thus, a third party

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<sup>109</sup> S. 1(4)(a)(b) of The Third Parties (Rights against Insurers) Act 1930. See also, *Farrel v. Federated Employers' Association* [1970] 1 W.L.R. 1400.

<sup>110</sup> [1967] 1 Lloyd's Rep. 216 at p. 219.

claimant who wants to sue the insurer directly must first bring an action or arbitration against the insured under the Article VII(8) of the CLC. Commencing such an action where the assured's owner is already bankrupt or in liquidation is itself not without complication where there is an unascertained claim for damage in tort which could not be proved in bankruptcy or liquidation. It may be argued that obtaining an award, as a condition precedent, to the insurers' liability, only binds the assured as a party to an insurance contract and is not extended to the third party. In rejection of this argument it can be said that the provision of direct action against the insurers not only transfers to the third party the right of the action itself but also the contractual rights of the insured. Where these contractual rights are subject to obtaining an award, then the third party claimant is bound by it as well.<sup>111</sup> The same argument may be applied where the insurance contract contains a provision requiring the insured to give notice to the insurer of any incident which gives rise to a claim<sup>112</sup> and a provision that it is a condition precedent to right of recovery that the premium is fully paid. Similarly other conditions, warranties and exceptions in the insurance policy may affect the right of the third party. In all these cases, a third party claimant may be deprived of his right of action because he is standing in the shoes of an assured who has failed to comply with requirements which have been expressed or implied as conditions precedent in the policy of liability insurance. These requirements do not seem to stand if it is understood that compulsory insurance is provided to cover the owner's strict liability, i.e. liability without fault, against an injured third party. Thus, the insurer will be liable, even if the loss is related to the breach of condition or warranty. Although, the

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<sup>111</sup> See, Leggatt J. in *The Padre Island* [1984] 2 Lloyd's Rep. 408 at p. 414.

<sup>112</sup> See, Mocatta. J. in the, *C.V.G. Siderurgicia del Orinoco S.A. v. London Steamship Mutual Owners' Mutual Insurance Association Ltd, (The Vainqueurjose)*. [ 1979] 1 Lloyd's Rep. 557 at 566.

insurers will not be able to rely upon breach of warranty against an injured third party and escape compensation, they have a Conventional right to recover from the insured as damage for breach of warranty the money he has to pay to the third party, since nothing in the Convention prejudices any right of recourse of the owner against third parties.<sup>113</sup> It must, however, be realised that it, the absence of such Conventional or statute right, will not deprive insurers of such remedy, since they have a remedy in a case of non-compulsory insurance under which they pay a third party for property damage where not legally obliged to it because of the breach.<sup>114</sup>

The insurers under the 1930 Act are under the same liability to the third party as they would have been to the assured, except where the amount for which they are liable to the assured exceeds the amount of liability to the third party. The assured remains entitled to the excess and if the amount for which they are liable to the assured is less than the amount of his liability to the third party, the assured remains liable to the third party for the balance.<sup>115</sup> Unlike the 1930 Act which put the insurer and insured at the same position against third party, Article VII(8) of the CLC provides some defences, for the insurers against third parties, which are not available to the insured. For example, the insurer is allowed the limit of liability prescribed in the Convention, irrespective of actual fault or privity of the owner, whereas there is no such a right for the insured's owner. Furthermore, the insurer may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the insured's owner; in contrast the insured's owner is liable irrespective of fault. As a result, it might be

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<sup>113</sup> Art. III(5)

<sup>114</sup> *National Farmers' Union Mutual Insurance Society. v. Dawson* [1941] 2 K.B. 424.

<sup>115</sup> S. 1(4)(a)(b) of the Third Parties (Rights Against Insurers) Act 1930.

said that the 1930 Act does not apply where compulsory insurance is provided under the Merchant Shipping (Oil Pollution) Act 1971, which has implemented the CLC in U.K. law, because both Acts do not have the same effect as to third parties in all cases.

There was some doubt as to the application of 1930 Act to the P & I Clubs. This doubt arose when it was realised that the Act applied only to a "contract of insurance," i.e. contract of indemnity. In other words to bring a case within direct action, there must be a direct right to indemnity for the insured: a right which can be enforced either at law or in equity. It was thought<sup>116</sup> that the suing and labouring clause in the policy "is not a contract of indemnity in any proper sense; it is a contract to pay the assured expenses which he may incur, but not to indemnify him against any claims made by other people against him." A third party claimant, therefore, has no right to take direct action for the expenses which incurred by the order of the insured. Beyond this, a further question was whether the relationship between club and member, which is based on the contribution from the member, could be regarded as a contract of insurance. This was considered in the "***Allobrogia***"<sup>117</sup> where Slade J. decided that although the 1930 Act made no attempt to define a contract of insurance, the arrangement between a P & I club and its members was a contract of insurance within ordinary legal terminology and within the meaning of Section 1(1) of the 1930 Act, as a result of it being a mutual promise to indemnify each other's liability.<sup>118</sup> A third party claimant, in order to succeed in his action against an

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<sup>116</sup> See Lindley, L.J. in *Johnston and Others. v. The Salvage Association and McKiver*, (1887) 19 Q.B.D. 458 at p. 460.

<sup>117</sup> *Re Allobrogia Steamship Corporation, (The Allobrogia)* [1979] 1 Lloyd's Rep. 190.

<sup>118</sup> *Id.*, at p. 194. It may also be noted that mutual insurance is expressly brought within the ambit of the Marine Insurance Act 1906.

insurer, must make out a prima facie case showing that the insured is entitled to a "contribution" from or "indemnity" against the insurer. It might be argued that a contract which only promises an assured that he will be indemnified at the insurer's discretion is not a contract of insurance in this particular sense.<sup>119</sup> In the case of those risks for which a member of club is covered only at the discretion of the committee, therefore, it may be considered that there would appear to be no "contract of insurance" to which the 1930 Act can apply. This argument cannot have any application to the Article in the CLC regarding the third parties' rights against the P & I Clubs, since the Article has directed third party claimants to the insurer rather than to the "contract of insurance."

A liability insurer would not be liable to a third party, under the 1930 Act, if the contract of insurance contains a clause that "the assured would not be indemnified unless payment to the third party is made", i.e. a pay to be paid clause which is provided in most marine insurance agreements and which was devised to indemnify the insured, as opposed to the liability insurance. Thus, in such circumstances, the insolvency of the assured prior to payment and his consequent failure to pay, prevents any right of indemnity from being transferred to a third party. It may be argued that such a construction would mean the 1930 Act could never be invoked: because if the assured has paid the third party the Act would be superfluous, and if he has not paid then the Act will not be applied. It seems that the pay to be paid clause does not attempt to evade statute in the same way as, e.g., a term which entitled the insurer to terminate the policy on the insured's insolvency, because allowing the policy term to override the Act would defeat the purpose of the legislation. However the decision of the House of Lords in the case of the *Pardre Island*,<sup>120</sup> has

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<sup>119</sup> *Medical Defence Union Ltd v. Department of Trade and Industry* [1979] 2 W.L.R. 686.

finally, without distinction between the indemnity insurance and liability insurance, established that the so called "pay to be paid" provision, which made payment of any liability to third parties a condition precedent to the member's right to claim an indemnity against the club, creates a contingent right of reimbursement for the claimant and accordingly, where the member was wound up before discharging the liability to the claimant, no cause of action occurred, since there was no existing right to an indemnity which could be transferred to or vested in third parties under Section 1(1) of the 1930 Act. This can be more easily justified when it is realised that Section 1(1) does not purport to place a third party in a better position against an insurer than the insured.<sup>121</sup>

In contrast to this decision, most American jurisdictions having direct action statutes have outlawed this type of clause which purports to make it a condition precedent to an assured's right of indemnity that he should have first paid the claim and requires a claimant to proceed against the insurer after first obtaining a final judgement against the assured. Legislation<sup>122</sup> and cases<sup>123</sup> in most of the American jurisdictions negate the "pay to be paid" clause (known in the U.S.A. as the "no- action" clause) as being contrary to public policy.<sup>124</sup> The effect of these developments in both U.S.A. and the U.K. would be conversion of an

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<sup>120</sup> *Socony Mobil Oil Co. Inc. and Others. v. West of England Shipowners Mutual Insurance Association Ltd. (The Pardre Island)* [1990] 2 All E.R. 705.

<sup>121</sup> The decision in *Pardre Island* can also be applied where a member has not paid an outstanding call as payment of all such calls is a condition precedent to recovery.

<sup>122</sup> See, e.g. *The Louisiana Direct Action*, discussed in Appleman, *Insurance Law and Practice*, vol. VII, para. 4831.

<sup>123</sup> See, e.g. *Saunders v. Austin Fishing Corp.* [1967] A.M.C. 984.

<sup>124</sup> Raymond. H. Kierr, *The Effect of Direct Action Statutes on P & I Insurance, on Various of the Insurances of Maritime Liabilities and on Limitation of Shipowners' liability*, 43 *Tulane Law Review*, 1969, p. 638.

indemnity policy into a liability policy whereby insurers will be liable on the happening of the specified event, since the philosophy behind such insurance is to protect all victims to whom the insured is liable.

One of the most controversial aspects of direct action concerns the legal confrontation between a contract of liability and a contract of indemnity. In the U.S.A. policies of liability insurance have been subdivided into categories according to the nature of the insurance, i.e. contract of indemnity and contract of liability. In the case of a contract of liability, the amount recoverable is not measured by the extent of insureds' loss and is payable whenever the specified event happens.<sup>125</sup> Unlike the contract of liability, a contract of indemnity is solely for the benefit of the insured in that it reimburses the insured for the claims in respect of his liability. Specifically, the happening of the event does not itself entitle the insured to payment of the sum stipulated in the policy: the event must in fact result in a pecuniary loss to the insured who then becomes entitled to be indemnified by the insurer. In other words, the insured cannot recover more than he established to be the actual amount of his loss.<sup>126</sup> They should, therefore, be treated separately in applying direct action legislation. However such subdivision does not exist in the U.K. jurisdictions. Fletcher Moulton L.J. stated that a contract of liability insurance was a contract of indemnity.<sup>127</sup>

With regard to this distinction, it would seem that the CLC may give cause for concern, in particular when it is realised that each contracting state has the

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<sup>125</sup> See 44 *Corpu*, *Jurisecundum* 481-482.

<sup>126</sup> Whether direct action can be brought against the insurer, under a contract of indemnity, depends on the respective statute and case law. See e.g. *Maryland Casualty Co. v. Cusing*, 347 U.S. 409 (1957).

<sup>127</sup> *British Cash and parcel Conveyors Ltd. v. Lamson Store Services. Ltd.* [1908]2 K.B. 1006. at pp. 1014-1015.

power to choose the type and terms of the insurance. The CLC while giving a right of direct action against the insurer also provides some defences. These defences may raise legal confrontation between contracts of liability and contract of indemnity where third parties are involved in direct action against the insurers. Separate treatment of these two contracts in their application of direct action may raise the question of whether the Article applies to a contract of indemnity without any qualification, as it might be in the case of contract of liability. There are occasions in which the insurer is entitled to limitation of liability whereas the owners are denied the benefit of limitation. For example, if the damage occurred as a result of an act or omission by the owner himself, or was done deliberately with his actual knowledge that pollution damage would result, the owner is not entitled to limitation of liability.<sup>128</sup> In that situation, however, the insurer's right to limit his own liability, which should be distinguished from the owner's, remains unaffected. The owner's liability then becomes unlimited. The insurer may also avail himself, under the present Article, of the defence that pollution damage resulted from wilful misconduct of the owner. This, together with the fact the insurer's entitlement to limitation is unaffected may contribute to the belief that the protection for the third parties under the present Article is in effect of no great significance. Generally speaking, it might be argued that with such an approach, the distinction between a contract of indemnity and a contract of liability, is not consistent with the Article on which the right to direct action is based.

The right of direct action may raise the proposition that a third party claimant is a subrogee of the insured's owner and is entitled to all rights and subject to all defences of the insured's owner, under the CLC, as if he was insured. Thus, it could be said that a third party claimant, as a successor of

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<sup>128</sup> Art. V(2). 1969 CLC.

insured's owner, could be liable to other pollution victims, as the owner was himself. In support of such view, it has been held that mortgagees claiming under a "loss-payee" clause are bound by the rules as "successor".<sup>129</sup> It seems, in application of this point, to be more logical to draw a distinction between the position of a third party who is accorded certain unwaivable rights to sue an insurer directly and a named "loss payee" who bases his right not upon a statute, but upon the contract of insurance, which limits his right to what the contract accords itself. Thus, where a third party gains the right to sue an insurer from a source or basis outside the contract (from a statute for instance) he may acquire the rights of the insured in a manner modified by statute.

It has been argued that the right of direct action against the insurer, under CLC, does not apply in cases where the ship is carrying less than 2,000 tons oil as a bulk cargo at the time of incident.<sup>130</sup> The question was raised in the *Akari* case, in which a vessel was carrying only 1899 tons of oil at the time of incident. The Club argued that under Article VII. 1. of the CLC, the owner is required to maintain insurance in respect of any ship registered in Contracting State and carrying more than 2000 tons of the oil in bulk as cargo. The owner was, therefore, not under any obligation to maintain insurance in accordance with the Convention. As a result, no direct right of action existed. This argument was not accepted by the Director of IOPC Fund who maintained the view that a right of direct action against the club as the shipowner's liability insurer did exist.<sup>131</sup> This case does not give clear evidence as being in favour of direct

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<sup>129</sup> *Wells Fargo Bank International Corporation v. London Steam-ship Owners' Mutual Insurance Association Ltd, (The John W. Hill)*. [1977] 1 Lloyd's Rep. 213 especially 215.

<sup>130</sup> P& I Club view in the case of *The Akari* which caused pollution damage in the United Arab Emirates, 25 August 1987. See, *International Oil Pollution compensation Fund, Annual Report, 1990*, at p. 30-34.

<sup>131</sup> *Id.*

action where the vessel is carrying less than 2000 tons of oil, since the action was given up by the Director IOPC Fund after accepting an ex gratia payment which was offered by the Club. However, it seems that the Director is right in his decision because the right of third party direct action under the CLC depends on the existence of the insurer, not owner's liability to provide compulsory insurance to cover his liability for pollution damage under the Convention. This construction is strengthened if it is realised that the convention has provided the direct action can be brought against "any claim" for compensation for pollution damage resulting from owner's liability, not only to the claim, in respect of the owner's liability, where the ship is carrying more than 2000 tons of oil in bulk as a cargo. Furthermore an owner, under Art. III, will be liable for any pollution damage caused by oil which has escaped or been discharged regardless of amount of oil which is carried.

#### **4.4. The International Oil Pollution Compensation Fund as supplementary scheme to CLC**

In 1971 Fund recognised the view which emerged during the CLC conference that some form of supplementary scheme in the nature of an international fund was necessary to ensure that adequate compensation would be available for victims of large scale oil pollution incidents.<sup>132</sup> The provisions of the Fund are, therefore directly tailored to supplement those of the CLC, so that in most cases the same definitions are adopted.

In contrast to the CLC regime, under which the ship owner carries the entire financial burden, the Fund treaty is designed to balance the responsibility

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<sup>132</sup> Misc. No. 8, [1970] Cmnd. 4403, p. 32.

for oil pollution damage between ship owners and oil cargo interests.<sup>133</sup> The Fund pays compensation if a person suffering pollution damage has been unable to obtain full and adequate compensation for damage under the CLC.<sup>134</sup> This may happen where there is<sup>135</sup> :

- (a) exoneration of liability of an owner under the terms of the CLC;
- (b) financial inability of an owner to meet its CLC liability limits; and
- (c) damage in excess of the amount for which offender may be held liable under the CLC.

It was suggested<sup>136</sup> that the Fund's role should be limited to situations involving catastrophic damage which exceeded the limits of liability of the ship owner under CLC. The majority of states were of the view that this proposal was too radical because: (a) such cases would be very rare in practice; and (b) it closes the door on the pollution of the sea as a new risk of property insurance, e.g. the all risk policy for commercial fishermen.

The second function of the Fund is the indemnification of shipowners against additional financial burdens imposed upon them by CLC.<sup>137</sup> Such relief is subject to conditions designed to ensure compliance with safety at sea and other conventions.<sup>138</sup> This provision may create an unnecessary complication by giving the Fund an administrative role to watch shipowners' behaviour in compliance with various requirements. Furthermore, the shipowners' additional

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<sup>133</sup> Art. 2, para. 1.

<sup>134</sup> Art. 4(1), 1971 FC.

<sup>135</sup> *Id.*, 4(1)(a)(b)(c).

<sup>136</sup> By the Polish delegation, in LEG/Conf. 5/ 22.

<sup>137</sup> Art. 2(1)(b) 1971 FC.

<sup>138</sup> *Id.*

liabilities under the CLC are insurable and therefore they suffer no extra financial burden because they can recover their insurance cost through their freight revenue.

The need to establish a uniform approach as to the meaning of words in the Fund; the existence of few judicial precedents in the settlement of disputes under CLC; and the solving of most claims under CLC through negotiation between claimant and P&I Club have resulted in close co-operation between the director of the Fund and the P&I Clubs. The co-operation is based upon the terms of a memorandum of understanding concluded between the Fund and the international group of P&I Clubs on November 5 1980.<sup>139</sup>

Under the procedure the claims are met by taking joint action and use of the same survey, wherever applicable to investigate the reasonableness of the measures taken to deal with oil spills. The result of this co-operation is a saving of time and prevention of a duplication of efforts. Claimants negotiate a claim once, receive compensation, and leave the club and Fund to work out the distribution among themselves.

In order to mitigate undue financial hardship to the victims of pollution damage, the Fund's internal regulations have authorised the Fund to make provisional payments. This is done even before the establishment of the limitation fund, when the Director is satisfied that the owner is entitled to limit his liability, or has no liability under CLC. The payment is restricted to a maximum 60 percent of the amount, (not to exceed 90 million Francs in any incident,) which the claimant is likely to receive from the Fund.<sup>140</sup>

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<sup>139</sup> The text is at Annex II of the IOPC Fund, Report on the Activities of the International Oil Pollution Compensation Fund during 1980, and Fund/A/ES. 1/3.

<sup>140</sup> Internal regulation for the International Fund, regulation 8.6.

The provisional payment may exceed the limit of 90 million Francs if the Assembly decides that this amount is insufficient to mitigate undue financial hardship to victims.<sup>141</sup> Before making a provisional payment, the Fund Director, as a condition can obtain from the claimant any right, up to the amount of the provisional payment, that he may have done under the liability Convention against the owner or his guarantor.<sup>142</sup>

An examination of the Fund's claim practices confirms that additional costs<sup>143</sup> and fixed costs<sup>144</sup> may be paid, and this has been done in several cases so far<sup>145</sup>. The exception to this general practice is the issue of additional insurance costs. The Fund Assembly agreed that a reasonable proportion of fixed costs should be paid, since that is in the interest not only of the particular state but also the Fund. In the calculation of the relevant fixed cost only those expenses which correspond closely to the clean up period in question and which do not include remote overhead charges<sup>146</sup> are covered.

#### **4.5. Concluding remarks**

The CLC has attempted to determine liability and ensure adequate compensation for pollution damage resulting from ships, by creating a system

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<sup>141</sup> Id. regulation 8.7.

<sup>142</sup> Id. No. 5.6

<sup>143</sup> Costs incurred solely as a result of the incident, e.g. salaries of personnel specially used for the operation

<sup>144</sup> Costs related to the incident but which would have arisen had the incident not taken place e.g. value of material or equipment that were stored and maintained for contingency purposes.

<sup>145</sup> Fund W. GR. 5/2, 15 January 1981, p. 8.

<sup>146</sup> Fund/ A4116, 20 October 1981, p. 6.

of strict liability which alleviates the burden associated with establishing and proving common law causes of action. To give more effect to the strict liability, compulsory insurance has been devised, whereby the insurer becomes liable for those amounts which insured's owner is legally liable. The strict liability, from the insurer's point of view, has meant high premiums and less coverage. The effect of this has, in practice, been little because of the limited liability for owners under the CLC.

The advantage of the institution of compulsory insurance becomes obvious when it is appreciated that within the limit of the insurance cover provided persons who have suffered damage or injury of pollution are not left without compensation. Further, it offers advantages to many one-ship or small fleet companies in existence whose total assets are insufficient to cover the oil pollution damage which could be caused. However, the effect of compulsory insurance is reduced in many cases in which a duty to insure does not arise.

The persons who suffer damage caused by pollution resulting from the escape or discharge from ships carrying less than 2000 tons of oil in bulk as cargo may find themselves uninsured for pollution damage which may be huge in some cases. Claims for pollution damage under the CLC can be made only against the registered owner of the tanker concerned. This means that those who might use the tanker, e.g. bareboat charterers, are not obliged to carry a compulsory insurance on board the tanker. The compulsory insurance is subject to prescribed maximum amount of cover, as provided in the Convention and above that, therefore, the victims remain uninsured. The Convention applies only to ships which actually carry oil in bulk as cargo, i.e. normally laden tankers. Spills from tankers during ballast voyages are therefore not covered by the compulsory insurance, nor are spills of bunker oil from ships other than tankers. The CLC liability applies only to damage caused or measures taken

after an incident has occurred in which oil has escaped or been discharged. Thus, the compulsory insurance scheme does not apply to pure threat removal measures, i.e. preventive measures which are so successful that there is no actual spill of oil from the tanker involved. Damage caused by non-persistent oil is not covered by the CLC. Therefore spills of gasoline, light diesel oil, Kerosene, etc., do not fall within the scope of the compulsory insurance. The notion of pollution damage is not clear as to damage to natural resources as it might be and does not extend to all damage to the ecological system of the sea which may result from an oil pollution incident.

Although most of the exemptions of cover from the compulsory insurance may be remedied by Fund Convention, through the IOPC Fund, this remedy is only available against the shipowners whose States are members both CLC and FC. Therefore, there is still a possibility that victims in the CLC Contracting States, which have not acceded to the FC, will remain uncompensated under the compulsory insurance schemes for pollution damages in many cases. Setting up a provisional Guarantee Fund, which is financed by shipowners in the CLC Contracting States which have not acceded the FC, may be a good idea for meeting the claims not covered by the compulsory liability insurance under the CLC. In addition, asking the owners to take additional liability insurance which covers damage which is outside the compulsory insurance is also suggested.

The other difficulty which may arise from compulsory insurance is the problem of enforcement. The CLC adopted the view that the state of registry should determine the conditions of the insurance and the validity of certificate. This may raise problems for the authorities of the registry states in trying to estimate the financial security of an insurer who is resident abroad, acting under foreign law and insurance conditions. Thus, the state may refuse to issue

a certificate when it believes that the insurer or guarantor named in the certificate is not financially capable of meeting the obligations imposed by the Convention. To reach the correct decision, the registry state needs reliable information about the financial capability of the insurer or guarantor who resides in another country. Consultation with other Contracting States, in which the insurer or guarantor resides may provide some help in finding the truth, but such consultation may not be available at all times, in particular where the insurer or guarantor lives in a non-Contracting State, where delays could result. To reduce this difficulty, it may be a good idea to suggest that the IMO provides a list, which can be kept up-to-date in the light of financial capability, of creditable insurers or guarantors, which can be consulted by the shipowners and their registry states.

Allowing direct action against the insurer gives an opportunity to victims of pollution to claim compensation even where an insured is insolvent or bankrupt. Its effectiveness may be reduced, however, where there is a distinction between a contract of liability and a contract of indemnity or where the contract of liability insurance is regarded as a contract of indemnity. There are occasions in which the insurer is entitled to a limitation of liability whereas the owner is denied the benefit of limitation. This may lead to different results from third party claimants if the contract of insurance and contract of liability insurance are treated separately, or where the contract of liability is treated in the same manner as a contract of indemnity. These differences may be removed if the compulsory insurance is regarded as a liability insurance whereby the insurer is liable after the happening of loss, regardless of the insureds' fault, as it is owner under the Convention.

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## **Chapter 5. Draft convention on liability and compensation for damage caused by the carriage of Hazardous and Noxious Substances, HNS Draft**

### **5.1. Necessity of having HNS convention**

The increase in the carriage of hazardous and noxious substances, hns, at sea, growing environmental awareness of the public at large, and the economic cost of maritime casualties both at sea and in port have increasingly given rise to the consideration of liability and compensation in respect of damage caused by hns carried by sea. This issue was given serious consideration, by IMO, under the Draft Convention on Liability and Compensation in Convention with the Carriage of Hazardous and Noxious Substances by Sea<sup>1</sup>, hereinafter as Draft HNS Convention. The main issue which was brought forward, by those who were involved in the preparation of the Draft HNS Convention, was whether there was any need for internationally agreed and uniform rules and standards to deal with issues of liability and compensation in respect of damage caused by hns, or whether national law was sufficiently capable of dealing with these issues.

There was opinion that an international convention was not necessary, because of the great difficulties in defining which types of cargo should be subject to it. Whereas in the case of the conventions dealing with oil pollution, there was no doubt as to type of cargo involved it would seem that no such certainty existed for hazardous and noxious substances because of the difficulty in specifying which materials were inherently dangerous or noxious.<sup>2</sup> In addition, present domestic legal remedies, as provided by the tort system, are broadly sufficient to provide adequate redress to victims of catastrophe. On

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<sup>1</sup> IMO Doc. Leg/Conf. 6/3. Jan. 13. 1984

<sup>2</sup> Committee Maritime International, *Report on Carriage of Hazardous and Noxious Substances by Sea*, HNS-3. II-81, para. 3.

this basis, a victim of incident arising out of carriage of hns must rely on the normal legal remedies based on the tort or contract for bringing an action against a wrongdoer.<sup>3</sup>

It could be said that whilst common law remedies do provide an acceptable system of compensation, they do not provide victims with prompt compensation for damages resulting from release of hns into the environment or from related fires and explosions. Furthermore, a victim of pollution may not be allowed to recover at all because the nature of the hns product generally imposes an onerous duty of care on the carrier and, therefore, it would be very difficult for a victim to prove sufficient negligence on the part of the carrier.

It may also be argued that there is no need to consider special regulation at an international level to provide civil liability and compensation for damage caused by the maritime carriage of hns, as long as there is a general lack of maritime accidents involving substances other than oil and insufficient judicial experience in dealing with hns incidents.<sup>4</sup> This view may be criticised, however, because it is not logical and reasonable to do nothing until an accident happens which may affect a large area of the sea situated between different countries.

It has been pointed out that although there is not enough data available concerning all possible types of substances capable of causing pollution damage of a specific and serious nature, it would nevertheless be undesirable and dangerous to wait for a major catastrophe before taking action with respect to the development of the legal regime covering liability and compensation.<sup>5</sup>

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<sup>3</sup> British Maritime Law Association, (BMLA,) *Submission to the CMI on the Proposed IMCO Draft Convention on the Carriage of HNS by Sea*, Montreal, 1981, para. 1.

<sup>4</sup> See decisions of the Legal Committee of IMCO, at its seventh session in January 1970.

<sup>5</sup> IMCO, LEG, XVIII/5 para. 5.1. It was suggested by the delegation of France, Mexico, Netherlands and Sweden.

Difficulties in the definition of each hns substance can be solved by categorising and listing the substances on the basis of their nature,

It may also be argued that there is no real need for the creation of a new liability and compensation regime because the scope of most types of marine pollution caused by hns substances is so small that clean up costs are unlikely to be high; and the higher limitation amount adopted by 1976 International Convention on Limitation of Liability for Maritime Claims has provided sufficient cover for civil liability problems that could arise in connection with pollution damage, other than oil, resulting from transportation.<sup>6</sup>

This view may be rejected because there is no real experience to prove that the clean up cost of pollution damage resulting from carriage of hns at sea is too low. In addition, damage arising out of hns is not confined to pollution, but may extend to fire and explosions which increase pollution liability. Moreover, the 1976 Limitation Convention on liability is not applicable to non contracting states. In consequence, it does not solve problems of incidents arising from carriage of hns everywhere. Therefore, it is still necessary to have a new liability and compensation regime for carriage of hns.

It has been said that the extension of the CLC to substances other than oil would be argued that it would be

desirable to have an entirely separate convention to cover all hazards and liabilities relating to oil substances as comprehensively as possible<sup>8</sup> because

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<sup>6</sup> Discussed by IMCO, 18-19 session of Legal Committee, May and June 1973.

<sup>7</sup> IMCO, LEG/ XIII/7, para 18-19.

<sup>8</sup> Id. LEG/ XXIX/5, para. 6.

the risk and the nature of damage which can be caused by other noxious and hazardous substances differs considerably from the risk and nature of damage from persistent and other oil. Moreover, the system contained in the CLC, which places primary liability on the shipowner, might prove to be inappropriate in respect of damage arising from the inherent quality of the hns rather than from the fact of transportation, under which it would be more appropriate to put primary liability upon a party other than the carrier, such as the manufacturer, the consignor, the owner of the substances or any other party interested in the cargo.<sup>9</sup> Moreover, the view was expressed that the CLC only covers damage arising out of pollution, whereas damage resulting from the carriage of hns is not limited to pollution. Damage may also result from other hazards such as toxicity, fire and explosion.<sup>10</sup>

To provide more protection to the marine environment, it would be desirable to have an international convention to deal with problems resulting from carriage of hns, rather than rely on national law because in many legal systems liability is based on the concept of fault under which a potential plaintiff has to make his choice as to the person or persons against whom the claim is to be raised and as to the acts or omissions on which he wishes to base his claim. To do this, he has to assume at least a substantial part of the burden of proof. Therefore, a new convention might help such victims by directing claims against a specified person or persons, without too many difficulties in terms of proof.

With regard to what has been mentioned, it can be concluded that the need to establish an international legal regime to deal with civil liability and

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<sup>9</sup> Id.

<sup>10</sup> LEG/XXXII/3, para. 8.

compensation for damage arising out of the carriage of hns is quite obvious, provided some questions such as the drawing up of a special list of substances, the nature of liability, the party liable, the type of damage, limitation of liability, compulsory insurance are properly answered in advance. To achieve this, it is necessary to continue the consideration of the Draft HNS until a satisfactory outcome is achieved which is both largely adequate and widely acceptable at an international level. It is also felt that the establishment of such an acceptable international system would discourage proliferation of unilateral and uncoordinated national schemes.

## **5. 2. Form of liability**

To secure prompt and adequate payment of compensation, the Draft HNS Convention provided that claimants did not need to prove that the shipper or ship owner was negligent but only to prove that hazardous substances caused damage, i.e. strict liability.<sup>11</sup> In limited circumstances the responsible party may escape liability altogether.<sup>12</sup> The application of strict liability could be seen as testifying to a firm intention to allocate personal and direct liability to third party damage covered by the Draft Convention on the basis of consideration of the harmful nature of cargoes carried by sea, rather than of merely the transportation standard or the existence of fault.

The overriding argument was that the liability imposed under a new convention would be more appropriate if it were strict, i.e. liability without proof of fault but subject to a limited number of defences as contained in the CLC.<sup>13</sup>

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<sup>11</sup> Arts. 3, 7. Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, IMO Doc. LEG Conf. 6/3 (Jan. 13. 1984). Hereinafter is cited as Draft HNS Convention.

<sup>12</sup> Art. 3 Para. 2,3. Id.

<sup>13</sup> LEG XXIX/5, para 47.

The effect of the strict liability is , in practice, very similar to the fault principle in insurance contract whereby the insurer would be liable for damage resulted from negligent act of the insured. This is why only this kind of legal regime would be able to provide full, adequate and speedy recovery for victims, especially in those cases where catastrophic damage results from the maritime carriage of hns other than oil.<sup>14</sup> This principle may also be preferred because it provides a greater incentive for the prevention of pollution and, as a consequence, better protection of the environment.

### **5.3. On whom does liability fall?**

The choice of the person to be made strictly liable may be based on grounds of morality or of expediency. These two considerations do not necessarily yield the same answer. If the cargo interests are to be held liable because they share with the shipowner the responsibility for putting the noxious substances into maritime commerce, then there is a case for saying that the consignee also shares in this responsibility, for he will often be the initiator of the transaction under which the goods are shipped. The choice of the consignee would have practical advantages as regards policing in relation to shipment from a non-convention country. It must however be acknowledged that the identity of the consignee may change in the course of transit and that he is not usually the person with whom the shipowner has direct contact. Equally, it might be said that it is the producer who has the greatest moral responsibility for any damage ultimately caused by a noxious products which he has put into circulation. Perhaps the moral responsibility attaches to all those

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<sup>14</sup> LEG XXXIV/7, para 20.

who deal with the goods as principals in which case what is called for might be more in the nature of a "product insurance" rather than a "shipper insurance".

The Draft suggested a mixed shipowner and shipper, or cargo interest, liability system.<sup>15</sup> The choice of the two-tier system indicated a general awareness of the main principle of underlying liability insurance based on limitation of liability and operation of "risk spreading" mechanisms. It states that the whole question of a sustainable insurance market capacity to absorb the risks of potentially catastrophic levels is dependent on the amount of premium that assureds can afford and the limit of liability per incident for persons involved in liability.

It would be reasonable to put liability primarily on the ship owner<sup>16</sup> because the majority of incidents which give rise to liability in maritime affairs are caused by the actions or omissions of the ship owner/operator. This may also be well justified with regard to the principle that to incur legal liability there must be a degree of negligence. Since the cargo is in the care of the carrier under a contract of carriage any liability incurred in relation to the cargo would lie with the carrier. This is also consistent with the Common Law rule which says that the shipowner, as a carrier, has a strict liability for cargo carried on board his vessel and obliged to act in the capacity of insurer of the safety of the goods, with the exception of Act of God, perils of the sea, King's Enemies and inherent vice.

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<sup>15</sup> Arts. 3, 8. Draft HNS Convention. *supra*. No. 10.

<sup>16</sup> The ship owner is "The person or persons registered as the owner of the ship or, in the absence of registered, the person or persons owing the ship". Art. 1, para. 3. Draft HNS Convention. *supra*. No. 10.

Extending liability to the shipper<sup>17</sup> may also be justified by the view that he gains an economic benefit from hns trade. This justification may be strengthened by suggesting that the risk inherent in hns does not arise only from carriage but also from the substances themselves.<sup>18</sup> Furthermore, putting part of the liability on the shipper may make available an additional insurance capacity for victims of pollution incidents.<sup>19</sup> Assuming that the decision is taken to impose strict liability on the shipper, the question as to who should be named as the shipper is controversial. If the person who delivers the goods for shipment, otherwise than a forwarding agent or other person acting in a purely ministerial capacity is named as a shipper the result may differ depending on the nature of contract of shipment, e.g. FOB (Free on Board) or FAS (Free Alongside Ship). If the shipper is identified with whom the contract of carriage is made, such a choice may lead to capricious results and, therefore, make the scheme of the Convention unworkable in practice. It might also be suggested that those who are able to take out insurance for goods are named as a shipper. This may be opposed as a result of being difficult and impracticable. It is difficult because the identification of the party who is to take out the insurance might call for study of the contract of sale and the law governing that contract in conjunction with the contract of carriage. This would be quite impracticable since the "shipper" would have to be identified before shipment.

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<sup>17</sup> The shipper is "The person on whose behalf, or by whom as principle, the hazardous Substances are delivered for carriage". Art. 1. para. 4, Draft HNS Convention. *supra*. No. 10.

<sup>18</sup> The only precedent for such an approach involving personal and direct liability of the shipper has been in the field of maritime carriage of nuclear substances. See, The 1963 Vienna Convention on Civil Liability for Nuclear Damage and 1971 The Brussels Convention Relating to Civil Liability in the Field of Carriage of Nuclear Materials which extend the liability of "operator" of nuclear installation to damage caused by a nuclear incident during the transportation of nuclear substances by sea.

<sup>19</sup> Since success of dividing liability between shippers and ship owners depend much on availability of compulsory insurance, thus, further discussion is provided in chapter four, at pp. 133-148.

Thus, as a result, the Convention, for practical purposes, should identify “the shipper” as the person who delivers the goods for carriage, as was contemplated in the Draft Convention, despite having performance problems in law. For example, to say “the shipper” is the person named in the bill of lading is unacceptable, for this person might be a forwarding agent or there may be no bill of lading; nor is it an answer to identify him as the person named in the certificate of insurance because, quite apart from the fact that this does not accommodate the case where no certificate is issued, the definition is circular: the person liable as shipper is the person insured and the person who is insured is the person liable.

#### **5.4. Substances subject to the Draft of HNS Convention**

The HNS Draft Convention only addresses the bulk carriage of a limited list of substances.<sup>20</sup> The bulk criterion was defined, “when carried without any intermediate form of containment in a hold or tank which is a structural part of ship or in a tank or container permanently fixed in or on a ship.”<sup>21</sup>

Restriction of HNS Draft to bulk cargo may be justified on the assumption that HNS Convention should primarily deal with catastrophic damage caused by highly harmful substances, because catastrophic damage would not be caused unless there was a great quantity of hazard substances, i.e. quantity carried in bulk and not in package.<sup>22</sup> The choice of the bulk criterion may also be justified because of the existence of difficulties with the formulation of a practical definition of term of the shipper. It could be felt that the shipper would

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<sup>20</sup> Art. 1. para. 5. and annex. xx. Draft HNS Convention. *supra*. No. 10.

<sup>21</sup> *Id.* see definition of hazardous substances.

<sup>22</sup> LEG/Conf. 6/3, art. 1, para. 5.

be relatively easily identified in the case of bulk transport which normally involves only a very limited number of consignments carried by each vessel. This would greatly facilitate the identification of the party liable over and above the ship owner in the event of an incident, as well as the enforcement of compulsory insurance requirement.<sup>23</sup>

In providing a list of substances, which are going to be included in the Draft HNS Convention, it may be asked whether it should be short or extensive. A short list may be supported for practical purposes and so that the Convention is completed speedily on the other hand too small a list could prove problematic because of the problems of spreading the insurance risks.<sup>24</sup>

The Draft HNS Convention excluded substances carried in packages, because it was practically impossible to produce a list of substances carried in packaged form and the inclusion of all of them in an expanded list of substances would create complicated administration and implementation problems. Despite this it has to be said that some substances carried in packages in some circumstances cause catastrophic damage.<sup>25</sup> Exclusion may also be justified because only bulk cargo is likely to produce catastrophic damage requiring compensation in excess of the limits available under the 1976 Limitation Convention. This is rejected because the HNS Draft contemplates covering fire and explosion damage, in addition to pollution damage. This might lead to the idea that the Limitation Convention would not be able to provide adequate compensation in the case of fire and explosion, e.g. possible explosion of gas carrier at a port. Exclusion of hns transported in packages may be criticised

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<sup>23</sup> Aline, F.M.D Biever, *Liability and Compensation for Damage in Connection with the Carriage of HNS by Sea*, (1986) 17 J.Mar.Law & Comm., p. 82.

<sup>24</sup> LEG, XLVI/7, para 9.

<sup>25</sup> LEG, XXIX/W, p. 10.

because of the view that the packaged substances may cause the greatest risk of widespread environmental damage. Many of the most dangerous chemical substances are shipped only in packaged form and large quantities of such substances may be transported on a single ship and discharge of such substances may cause enormous damage after a maritime accident.

It has been suggested that the risk covered by the convention should include that of fire and explosion partly because these may be the most serious risks relating to the carriage of hns and also because the inclusion of this risk would enhance the value and acceptability of the convention. In connection with explosions, it would be desirable to extend coverage to residues of hns in an unladen tanker.<sup>26</sup>

### **5.5. Extension of definition of damage**

The HNS Draft provided that damage means "loss of life or personal injury on board or outside the ship carrying the hazardous substances, caused by those substances, and any other loss or damage outside the ship caused by those hazardous substances....".<sup>27</sup> In this definition there is no distinction between damage suffered by people, damage to property, and damage to the environment.

It is suggested that loss caused by fire, or personal injury, should be covered by the Convention without regard to whether such loss or injury occurred on board or outside the ship carrying hns. There is also a strong feeling that the term "damage" must include loss or damage to property if such property was outside the ship carrying hns.<sup>28</sup>

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<sup>26</sup> Committee Maritime International, *Report of HNS by Sea*, HNS-3, II-81.

<sup>27</sup> Art. 6. Draft HNS Convention. *supra*. No. 10.

<sup>28</sup> *Id.* This view was adopted by many delegations to the meeting

The proposed definition of pollution damage indicates that the convention was intended to apply to any damage caused by the dangerous nature of the substance.<sup>29</sup> Generally speaking, there is no duty in effecting insurance on a ship to disclose the nature of cargo shipped or intended to be shipped, although with regard to the safety of the vessel and prevention of potential liability one kind of cargo may be much less desirable than another. This general idea may be doubted in some particular cases. Disclosure seems to be material if the cargo is hazardous, unless it is clearly waived by the underwriters. In *Mann, McNeal & Streeves Ltd. v. Capital and Counties. Ins Co. Ltd.*<sup>30</sup> policies were effected by brokers on a ship for a voyage from the United States to France and back. At the date of insurance her owners had engaged her to carry a large quantity of petrol in an iron drum, but this fact was not disclosed to the underwriter. In an answer to a claim on the policies the underwriters pleaded non-disclosure of the engagement for the carriage of the petrol. Greer J. in the court of first instance, held that there had been non-disclosure of a material fact and gave judgement for the underwriter. In the Court of Appeal, Bankes and Atkin L.J, whilst refraining from overruling this finding of Greer. J. held that the requirement of disclosure had been waived. The court were, therefore, unanimous in allowing the appeal. As a result, it can be said that in the case of goods of dangerous kind the duty of disclosure exists.

The definition of damage is extended to cover "the cost of preventive measures<sup>31</sup> and further loss or damage caused by preventive measures."<sup>32</sup> It

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<sup>29</sup> Id.

<sup>30</sup> [1921] 2 K.B. 300.

may be asked whether the cost of preventive measure and clean up should be included in the convention or not. It was strongly felt that the convention should apply to preventive measures, wherever such measures are taken, provided that the measures aimed to prevent damage which might occur within the geographical scope of the convention.<sup>33</sup>

The geographical scope was closely linked to the definition of damage. In other words, the geographical scope may vary according to the type of damage involved. The Convention has restricted the application of geographical scope to damage caused in the territory, including the territorial sea of a contracting state and preventive measures wherever taken to prevent or minimise such damage.<sup>32</sup> It would be more appropriate that the convention apply to incidents in the Exclusive Economic Zone of a contracting party or parties. This would be more desirable with respect to prevention of damage which may be caused by contamination. It is necessary to extend the EEZ to cover non pollution damage, such as damage cause by fire and explosion.

In consideration of types of damage, attention also should be given to relationship between a salvage award under the Salvage Convention and the compensation to which a salver might be entitled in respect of expenses incurred in a clean up operation. With regard to the nature of hns, which does not usually follow substantial damage in the case of an incident, it can be said that it would be necessary to avoid a situation in which a salver could be

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<sup>31</sup> Preventive measure means "Any reasonable measures taken by any person..... after such an incident has occurred to prevent or minimise the damage". see. Art. 1(7) of the Draft HNS Convention. supra. no. 10.

<sup>32</sup> Art.1(6). Id.

<sup>33</sup> Id.

<sup>32</sup> Art. 2. Draft HNS Convention. supra. No. 10.

entitled to obtain payment for the same service, under the proposed HNS Convention and Salvage Convention

The concept of economic loss, as opposed to consequential loss arising out of property damage, is treated differently in various legal systems and therefore, it would be too difficult to harmonise the different national legal system. It is suggested that the treatment of pure economic loss be left to national legal systems.

### **3.5. who is the assured and how insurance operates.**

The Draft of HNS Convention provided that, at the first stage, ship owners were to maintain insurance or other financial security to meet the limits of their liability for damage caused by ships which carried bulk cargo of more than a certain amount of hns<sup>34</sup> because they have custody of goods for reward and would be parties who can be easily identified and effectively provide compensation. The question which may arise here is whether a shipowner, as a carrier, has an insurable interest in the dangerous goods which he carries and may cause pollution liability. Although the shipowner is not the actual owner, but his insurable interest in the goods committed for carriage has been well recognised in the marine insurance.<sup>35</sup> It is worthwhile to mention that the shipowner's right to insure against liability not only arises from an insurable interest in the goods, but also from the marine adventure in which the risk is involved.

It has been said that although shipowner's compulsory insurance was desirable for achieving adequate financial cover for the Convention, it was not

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<sup>34</sup> As it was proposed by 1969 CLC. See Article 11(A), Para 1.2.3, Draft HNS Convention 1984.

<sup>35</sup> Section. 3(2) of MIA 1906; See also *Hill v. Scott* (1895) 2 Q.B.D. 713.

necessary in practice, because practically every ship owner at present carries adequate liability insurance, usually through P&I Clubs, and it is unthinkable that any shipowner who would be likely to carry the types of cargoes envisaged by the Convention would not have the usual liability insurance.<sup>36</sup> It must however be recognised that the existing levels of liability insurance for vessels involved in catastrophic accidents are inadequate. Moreover, in recent years, most underwriters have excluded pollution liability cover from their general or public policy.

Thus it would be desirable to devise a workable system of compulsory insurance for shipowners' liability because of the limited number of ships involved and the existence of P&I Clubs. This could be justified by the fact that there are no such P&I Club facilities for shippers, although many substantial shippers of hns may have access to a liability insurance market.<sup>37</sup> This is not to say, however, that the shipowner has no means available to protect himself against claims which might arise from incidents involving damage caused by hazardous cargo. For instance in the case of transportation of dangerous goods by sea it is a very long-standing practice that the cost of additional insurance protection taken out by the shipowner is imposed on the cargo interest. Such "re-insurance" arrangements are, however, very different from the concept of shared or exclusive shipper's liability, whereby the cargo interest is made personally and directly liable for loss or damage in spite of the fact that they have no custody over the goods during their transportation. The extension of shipowner compulsory insurance to the shipper, as additional insured, may

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<sup>36</sup> *B.M.L.A proposal to Conference of the CMI, Montreal, May 1981.*

<sup>37</sup> See THE XXXII Conference of the Committee Maritime International, CMI, regarding HNS Draft, Montreal, 81.

be criticised because it creates confusion and because of coverage problems and increased costs. It may be desirable, from the insurers' point of view, that there be no duplication of cover in respect of any one incident which involved substantial liability. Such an extension may also create problems in dividing the limit of compulsory insurance between the shipowner and the shipper because of the different objectives each has in the carriage of goods by ship.

The channelling of compulsory liability insurance exclusively to the shipowner does not, of course, mean that he would not be able to take insurance for shippers. This is usually done by a system under which a shipowner takes out an open cover policy for shippers' liability, and for the shippers' ultimate account. It seems improbable that the insurer would accept the risk which would be consequential upon certificates being issued by the people whose main day-to-day work is not insurance or acting as an agent for insurers, in their name, without it being possible for them to have some effective supervision and control of the issue of certificate. This problem could be solved if the insurance provided is transferable. This can be done by providing an open cover insurance, for the shipowner for shippers' liability, in which the assured is mentioned in a general way, for example: "those who may be found liable" or similar wording. This gives authority to the operator to issue a certificate in the name of individual shipper.<sup>38</sup> Issuing of such certificates is not unusual in cargo insurance, because the essential point in this kind of insurance would be the existence of insurance for cargo liability and not so much the identity of the interested party.<sup>39</sup>

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<sup>38</sup> Such insurance certificate, in effect, would be consignment insurance rather than shipper insurance. This is why it is suggested, this kind of insurance certificate be called as "HNS Green card for operator".

<sup>39</sup> The XXXII conference of the Committee Maritime International, CMI, regarding HNS Draft, Montreal 1981.

The Draft convention replaced the "strict personal liability" of the shipper with a system of compulsory "cargo" liability insurance.<sup>40</sup> This system whilst preserving the principle of compulsory insurance, which is essential to guarantee payment when civil liability has been imposed, prevents the difficulty of identification of the shipper by permitting the claimant to proceed directly against the cargo insurance compensation fund. This approach might be criticised on the basis that the removal of personal liability may threaten an insurer's right of recourse against the shipper. It should also be noted that the absence of direct accountability of the shipper in the event of an incident causing damage may seriously hamper the ability of insurers to vary a premium on the basis of the client's experience, as well as discouraging the exercise of care and loss prevention practices on the part of the assured.<sup>41</sup>

There might also be the problem of identifying the insured in the case of shippers compulsory insurance and of proving an insurable interest. The shipper has been defined in the Draft of the HNS convention as "the person on whose behalf, or by whom as principal, the hazardous substances are delivered for carriage."<sup>42</sup> Although under this definition a shipper may be easily identified, it unfairly places the burden of insurance on the person who has no custody over the cargo during the carriage. A shipper may also be defined as a person or persons who have the highest degree of control over cargoes during carriage at sea. It would be difficult to identify the shipper under this definition because of the complexities of shipping activities involving a great number of different cargo interests and intermediaries who interact with one another

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<sup>40</sup> 1984 LEG/Conf. 6/C. 1/w p.22, art. 13.

<sup>41</sup> As it was discussed in, LEG/Conf. 6/c/1 WP. 24 and WP. 25.

<sup>42</sup> Art. 1, para 4, Draft HNS Convention 1984.

through sophisticated contractual arrangements. This attempt would also lead the shipper to a situation whereby the person made liable would be different from those who are operationally responsible.

It is necessary under compulsory insurance to assure that cargoes are carried with proper insurance. To do this, it has been that contracting states should be satisfied as to the adequacy of the insurance and such certificates should be acceptable to them. This proposal was not adopted because, on one hand, there is no balance between the measures of control and enforcement, and on the other hand, on the account of the fact that a certificate would have to be issued for every consignment. In addition to this, it would not cover certificates issued in a non contracting state.<sup>43</sup>

In order to solve this problem it was suggested that a policing role should be imposed on the shipowner. He was required to bear shipper's liability if he failed to prove that an insurance certificate had been properly issued in respect of the hns consignment taken over for carriage on board his ship.<sup>44</sup> This proposal may be opposed by ship owning interests and insurers because of the belief that only governments could fulfil the task of acting as the guarantee of solvency. In the view of the International Chamber of shipping, it would be unfair, as well as very unreasonable, to propose that a "shipowner could receive legal penalties for failing to perform impossible tasks."<sup>45</sup> It may also be doubted whether it would be possible for a ship owner to take effective steps against the shipper, in particular in cases where loading took place in a non-contracting state.

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<sup>43</sup> IMCO, LEG XLV/WP. 7, 5 March 1981, p. 11.

<sup>44</sup> LEG/ Conf. 6/3 Article 2 para 2- Alternative II.

<sup>45</sup> LEG/Conf. 6/11.

For the establishment of international insurance schemes for hns incidents, it was proposed that an international insurance scheme should be organised. This would use its income to purchase insurance cover in the insurance market against the claimant to whom the ship owner would be liable.<sup>46</sup> It would also cover claims for single incidents which exceed the shipowner's limit of liability up to the limit of the scheme. Therefore, it would be necessary for the international insurance scheme to provide a fixed limit on the compensation which it would pay for an hns incident. The scheme's fixed limit would have to include the amount of the shipowner's liability and specific insurance cover may be needed for it.<sup>47</sup>

The success of international insurance schemes in practice would depend on having an effective financing system. Several alternatives have been examined for establishing the basis on which the levy should be charged: (a) the weight or the volume of the cargoes, (b) the degree of hazard presented by the cargo, (c) the freight payable on the cargo, (d) the value of the cargo.

A levy based purely on weight volume of the cargo offers simplicity of assessment and collection. It could be regarded as unsatisfactory in terms of equity, under which the amount of substances present would not necessarily reflect either its capacity to cause damage or its value.<sup>48</sup> A levy on the degree of hazard presented by a cargo would produce a complicated system that would be cumbersome to operate. A levy based on freight also offers reasonable equity because it reflects to some extent both the amount of the

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<sup>46</sup> U.K. delegation view at the request of IMCO, Document LEG 60/3/4.

<sup>47</sup> IMO, LEG 60/3/4, 28 Sep. 1988.

<sup>48</sup> IMO, Doc. No. LEG 60/3/A, 22 Sep. 1988.

cargo carried and nature of the substances, but it may lose its credibility in the competitive nature of the shipping industry.

The value of cargo seemed to be the most suitable basis for calculating the hns fund levy, despite the fact that it may not be suitable in the case of waste cargo or where the cargo has no commercial value. It might be feasible to base the calculations of levy on the cost of the freight for the carriage. Such a system would reflect to some extent the amount of cargo carried and the nature of the substances and hence the degree of the risk involved. The most serious problem of such a system is the competitive nature of the shipping industry which could cause considerable variation in the freight rate by different carriers for the same route.

#### **5.6. Concluding remarks**

A number of countries have for several years been discussing the question of the establishment of a convention for pollution liability resulting from hazardous and noxious substances other than oil and this question have been based in the Draft Convention on Liability and Compensation in connection with the Carriage of Hazardous and Noxious Substances which is being considered by IMO, but has not been approved so far. Whether or not any HNS Convention on liability and compensation will actually come out of this melting pot is still open to question. Potentially catastrophic pollution damage in transport of hazardous and noxious substances make the need for an effective liability and compensation scheme for hns damage apparent, despite the view that the present domestic legal remedies may be broadly sufficient to provide adequate compensation for the pollution victims suffering from hns incidents. Under these domestic regimes, a plaintiff will usually base his claim in tort and therefore has to choose which person or persons he will make his claim against and the facts

on which he wishes to base his claim. He would, therefore, have to bear a substantial burden of proof of fault which would seem to be very difficult, since the nature of hns carried at sea would impose an enormous duty of care on the shipowner. Thus a HNS Convention, under which victims would be able to direct their claims to specified person without being obliged to prove fault will help victims to achieve adequate guaranteed compensation. The desirability of the having HNS Convention is even more apparent when one considers that the nature of maritime carriage of hns and resulting damage, following and accident, is international and therefore cannot be solved by national laws which in many legal systems are based on the concept of fault.

If it is assumed, as has been done, that some sort of HNS Convention is created, the next point is to consider whether or not it can be implemented in practice. It seems to be practicable, provided that some technical questions are resolved in advance. The most important question which needs to be considered is the availability of insurance. It has been observed that although there might be a problem of the spread of risk if the scope of the convention is limited, insurance capacity is available for the shipper provided that it is limited to a reasonable sum and provided that the first part of liability is borne by the shipowner. Since shipper liability insurance would probably be placed at least initially in a different sector of the market from shipowners' liability insurance, greater overall capacity might be available than if the complete liability were to be placed on the shipowner.

The second question which needs to be clarified is the identity of the party to be insured. In order to avoid uncertainties as to whether the right party has been named in the certificate it would be legally and practically feasible to effect an insurance on any person who might incur liability under the Convention. On the one hand a one-tier system of shipowner liability may be defended because

such a system would be simple to implement, and provide a high limit of insurance cover, rather than a divided system. On the other hand it might be advisable to have a two-tier system of shipper and shipowner liability, as a result of the view that shipping is a joint venture. In spite of the superficial appeal of a two-tier liability system because it is equitable and provides greater incentive to the shipper to select more a responsible owner, the preferred view is for a one-tier system of shipowner liability. This is because such a system first, removes the complicated problem of identification of the many shippers that can often be involved in a single ship, secondly, focuses on the party in the best position to prevent Maritime disaster, thirdly, does not require each cargo to have a separate insurance policy, and fourthly, recognises that the marine insurance market appears to have the capacity to cover shipowner liability limits, and the shipowners' insurance costs can easily be absorbed by shippers through a higher rate structure.

In last ten years effective steps have been taken towards reaching agreement on a Draft HNS Convention. Consideration of current discussions and negotiation on the Draft reveals that agreement has been reached on the basic requirements listed in the Draft. The Convention states that it should be applied to substances carried in bulk as well as substances carried in package form; liability should rest with an easily identifiable party; as far as practicable liability should be strict; and any limit of liability should sufficiently high to provide adequate compensation for hns damage. Despite agreement on these basic questions, it seems that further work needs to be done in order to implement these general agreements in practice. It is advised that while continuing these efforts, further steps should be taken towards the establishment of an international system of liability, which would be both legally and widely acceptable, prior to any major catastrophe involving hns

substances. Until reach the conclusion of the convention is reached, it is suggested that shipowners and shippers consider voluntary compensation as an alternative to the HNS Convention, as a scheme to protect victims suffering pollution damage caused by highly hazardous and noxious substances carried by sea.

## Chapter 6. Place of liability in the marine insurance market

### 6.1. Liability insurance in respect of pollution

An insurance contract is legally valid only if the assured has an insurable interest at risk. If there is no interest, the assured does not expose himself to any loss and there would be nothing for the insurer to agree to indemnify.<sup>1</sup> An insurance policy without interest at the time of the incident is in effect gambling insurance and is not legally valid in the United Kingdom where the assured should be interested in the subject matter insured at the time of loss, although not necessarily when the insurance is effected.<sup>2</sup> By comparison in the United States, an insurance policy is not rendered void if it is proved that the assured does not have an insurable interest at the time of the incident.<sup>3</sup>

The right to insure liabilities, as an interest, comes into existence where there was a lawful adventure. There is a marine adventure, *inter alia* "where...any liability to a third party may be incurred by the owner of, or any other person interested in or responsible for, insurable property, by reason of maritime perils."<sup>4</sup> A person is interested in a maritime adventure, "where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may...incur liability thereof."<sup>5</sup> Thus, a man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it.<sup>6</sup> Pollution liability resulting from discharge or escape of oil and other substances can be

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<sup>1</sup> S. 5. Marine Insurance Act 1906, hereinafter MIA 1906.

<sup>2</sup> S. 4. MIA 1906.

<sup>3</sup> *Republican of China, China Merchant Steam Navigation Co. Ltd. v. U.S.A National Fire Insurance CO.* [1958] 2 Lloyd's Rep. 578.

<sup>4</sup> S. 3. MIA 1906.

<sup>5</sup> S. 5(2). MIA 1906.

<sup>6</sup> *Lucena v. Craufurd* (1806) 2 Bos. & P.N.R. 269; (1805) E.R. 630.

regarded as an insurable interest, provided that the shipowner is legally liable for damages.

One of the categories of liability in respect of which someone may insure is pollution liability. Liability for pollution is a liability which may fall upon the shipowners as a result of law or contract or voluntary agreement. Insurers do not tend to insure contractual liability arising out of breach of contract, except by special agreement. The insurers' attitude towards liability resulting from voluntary agreement, e.g. TOVALOP, is the same as insurance against contractual liability. In *Furness Withy & Co. Ltd. v. Duder*,<sup>7</sup> a shipowner in hiring a tug had agreed to pay damages where as a result of its own negligence it collided with the ship. It was held that the liability of the shipowner under the contract was not covered by the Running Down Clause, since it is a condition precedent in the liability insurance that the insured should not admit liability or offer or promise payment, whether expressly or impliedly, without the written consent of the insurer.<sup>8</sup> The obligation of the insurers is in respect of all sums which the assured is liable to pay as damages. In this context the law is generally taken to mean the general law, i.e. the general duty of the assured as expressed in the law relating to tort, or civil wrong, and the public law as contained in statutes, bylaws and the like.

Thus, there is pollution liability insurance where there is a legally binding potential liability in law to pay damage to another. This does not mean that the assured should be liable to pay, and has paid, the damages in question. It is enough that the liability exists although the sum in question has not been paid. Pollution liability insurance, therefore, provides that the insurer will indemnify

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<sup>7</sup> (1936) 2 K. 461.

<sup>8</sup> This gives the insurer the right to control any proceeding against the insured; see. *Groom v. Crocker* [1939] 1 K.B. 194.

the assured against, or pay on his behalf, the sum and the costs then set out. This means that the option for payment is for the insurer and not one which is offered to the assured. In practice no such choice may be necessary. If the assured is indemnified, then he will be reimbursed in respect of the sums for which he is liable and which he had paid out. However, in contradiction to this argument, the principle enunciated in the MIA 1906 provides, in the absence of words in the policy to the contrary, that the assured is entitled to an indemnity, even where he has not made a payment to the third party.

## **6.2. Pollution damage and collision liability insurance**

Although collision has been regarded a peril of the sea,<sup>9</sup> liability arising from collision is not recoverable as a peril of the sea since it arises not from the sea but from the law of the nations. The word "collision" is generally applied to an accidental contact, usually resulting in damage, between one ship and another ship. Grove J. in *Hough and Co. v. Head*,<sup>10</sup> said "collision" appears to me to contemplate the case of a vessel striking another ship or boat, or floating buoy, or other navigable matter, something navigated, and coming into contact with. It, so to speak, imparts, as it were, two things. It may be that one is active and the other is passive, but still, in one sense, they each strike the other. That does not apply to striking on the ground at the bottom."

The open insurance market is not prepared to extend the marine policy to cover all forms of liability but has agreed to extend hull insurance to cover part of any amount the assured has paid in respect of legal liability consequent upon collision between the insured vessel and another ship. In *De Vaux v.*

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<sup>9</sup> *De Vaux v. Salvador*. (1836) 5 L.J.K.B. 134.

<sup>10</sup> (1885) 53 L.T. 861 at p. 864.

**Salvador**<sup>11</sup> \_\_ it was decided that under the ordinary form of policy underwriters were not liable for the balance which the insured vessel had to pay to the other when both were to blame for the collision. The insurance for collision liability is thus one which is separate from the insurance of the property itself. The significance of this is that there are two separate limits of liability, and that the cover offered by the collision liability clause is not reduced by the extent to which there are claims for a total loss or for other matter covered by policy. The collision liability cover is embodied in a supplementary insurance contract termed the "Running Down Clause," RDC. Thus the plain form of marine policy, that is an Ship General policy form without clause attached thereto, does not extend to liability to the third parties. The clause limits the underwriter to certain types of loss, i.e.;

- (I) loss of or damage to any other vessel or property on any other vessel
- (II) delay to or loss of use of any other vessel or property therein
- (III) general average of, salvage of, or salvage under contract of, any such other vessel or property therein.<sup>12</sup>

The clause specifies that liability, for which cover is provided, must be as a result of the vessel insured "coming into collision with any other vessel." What constitutes a collision with another "ship or vessel" is a matter of judicial decisions. An insured vessel collided with a pontoon crane when it was permanently moored to a river bank in a naval dock yard. It was held that the pontoon was not a ship or vessel, because the primary purpose for which it had been designed and adopted was to float and to lift, and not to navigate. The Judge held that whatever other qualities are attached to a ship or vessel, the adaptability for navigation, and its uses for that purpose, is one of the most

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<sup>11</sup> (1836) 5 L.J.K.B. 134.

<sup>12</sup> See, Running Down Clause, e.g. in clause 8 of the Institute Time, Hull clauses, 1/10/83.

essential elements for bringing the craft within the definition.<sup>13</sup> It has been held that contact between an insured ship and the anchor of another ship constitutes a collision within the meaning of "Running Down" clause.<sup>14</sup> It seems unlikely that a situation could arise in which only a part of a ship came into contact with another ship or vessel. But if it did; if, for example, the situation in the case of the anchor was reversed, so that a negligent act on the unit caused its anchor to foul an adjacent supply ship, it cannot be said with certainty that the assured would have a right of recovery against insurer under the clause.

As to whether contact with a sunken vessel constitutes a collision with another ship or vessel depend upon the facts of each case but some guidance can be obtained from previous cases. In *Chandler v. Blogg*,<sup>15</sup> the insured vessel ran into a barge, which was lying half-submerged following a recent collision with another vessel. This was held to be a collision within the terms of policy. In *Pelton Steamship Co. v. North of England Protecting and Indemnity Association, The Zelo*,<sup>16</sup> the collision was with a vessel which had been sunk and was lying at the bottom of the sea, but salvage operations were in hand and the salvor had a reasonable expectation of raising her. This was held to be a collision with a ship or vessel within the terms of Collision Clause. The test to be applied to any vessel which has sunk appears to be that if salvage operations have been abandoned, or were never contemplated, the wreck ceases to be a ship or vessel within the term of the clause.

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<sup>13</sup> *Merchants' Marine Insurance Co. v. North of England Protecting and Indemnity Association*, (1926) 25 Ll.L.Rep. 446.

<sup>14</sup> *Re Margetts & Ocean Accident & Guarantee Corporation* [1901] 2 K.B. 792. But contact with fishing nets dragging a mile behind a fishing vessel was held not to be a collision for this purpose; *Bennet SS Co. Ltd. v. Hull Mutual Steamship Protecting Society Ltd.* [1914] 3 K.B. 57.

<sup>15</sup> (1898) 1 Q.B.D. 32.

<sup>16</sup> (1925) 22 Ll. L. Rep. 510.

In the event of a collision, it is possible that large quantities of other chemicals carried as cargo may be released at sea. In common with British underwriters the Americans do not undertake pollution liability resulting from collisions. In other words, insurers participating in ordinary hull policies are not prepared to extend RDC to cover amounts paid in respect of pollution or contamination.<sup>17</sup> The Running Down Clause, provides that it shall in no case extend or be deemed to extend to any sum which the assured may become liable to pay or shall pay in respect of: "(c) pollution or contamination or any real or personal property or thing whatsoever (except the other vessel with which the insured vessel is in collision or property on such vessel)." This provision contains an exception within an exception. It can be argued that the inclusion of the phrase "except...." to the paragraph does not seem to be necessary because the RDC expressly refers to "loss or damage to any other vessel or property on any other vessel." Thus the cover extends to liability for other ships and to property on other ships, so that the omission of the extra word makes no difference to the cover. However the cover in question is also subject to exclusion in that liability for protection of other vessels or property for "any real or personal property or thing whatsoever, " could include property on either ship or other property at sea, including property on other ships.

### **6.3. Liability under General Average Act**

General average is an incident of marine adventure and is related to marine insurance by reason of the fact that through the operation of the principle of subrogation the insurer who has to pay the loss on the interest sacrificed is, on payment of loss, entitled to the contribution due from the owner

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<sup>17</sup> Clause 8.4.7, Institute Time Hull Clause, Draft 28/1/83.

of the interest saved. The insurer of interests saved has to make good the loss incurred by his assured by having a contribution to general average if the loss is due to a peril insured against. General average, as a matter of law, exists quite independently of marine insurance and rights of contribution are unaffected by any insurance of general average contribution or lack of it. Nevertheless, in practice, various parties to the adventure, ship, freight or cargo are usually insured against general average contributions.<sup>18</sup>

Liability as to a general average act emerges whenever a sacrifice of property or an extraordinary expenditure is reasonably and voluntarily made or incurred for the common safety and benefit of interested parties concerned in a maritime adventure.<sup>19</sup> An example of this principle may be quoted the case of **Austin Friars S.S. Co. Ltd. V. Spillers and Bakers, Ltd.**<sup>20</sup> In this case a vessel was leaking so badly after having become stranded, that the master and pilot decided to dock her immediately, although tide was not suitable. In doing so they realised that they would strike the pier. Bailhache J. allowed the damage to the ship as a general average as well as the liability to the dock authorities for the damage done to the pier, the liability being a direct consequence of the general average act. Therefore damage to the property in the course of action deliberately taken for the common safety would be a liability recoverable in general average if it arises as a direct consequence of the general average act.

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<sup>18</sup> Leslie J. Buglan, *Marine Insurance and General Average in United States*. 1973, p. 202. Most insurance on cargo provides the same coverage for general average, see Institute Cargo Clause (A), The all risk form, 1/1/82, clause 2.

<sup>19</sup> N.G Hudson and J.C. Allen, *Marine Claims Handbook*, Lloyd 's of London Press Ltd, 4th edition, 1984, p. 2; see also definition of general average loss or general average act in Section 66 of MIA 1906.

<sup>20</sup> [1915] 3 K.B. 586.

Expenditure incurred to avoid or minimise pollution liability would be payable as a general average expenditure provided such expenditure liability was the direct consequence of the general average act. The liability can be regarded as a direct consequence of the general average act if there is a distinct possibility that pollution is foreseeable, and there is no breach in the chain of causation.<sup>21</sup> A *novus actus interveniens* would break the chain. For example, any pollution directly resulting from the jettisoning of oil, whether cargo or bunker, for common safety would be allowable as a general average act. Similarly, when a vessel is obliged to enter a port of refuge for common safety following an accident which has resulted in the vessel leaking oil, any expenditure incurred to avoid or minimise such pollution or any liability arising out of such pollution would be treated as a general average.<sup>22</sup>

As a result it can be said that general average would apply where pollution damage occurs from the direct consequences of an operation and such an operation is done for common safety. But a difficulty may arise where, in the application of the general average rule, liability does not occur but is avoided or minimised by services rendered which are rewarded by salvage remuneration.

Ship owners can claim salvage expenses from the cargo interest through a general average contribution, unless the salvage operation is necessitated directly by actionable fault on their part.<sup>23</sup> The question may, however, arise as to what extent the ship owner can claim the cost of anti-pollution measures as a general average, and how the enhanced award, i.e. an additional award, to

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<sup>21</sup> Lord Denning in, *Australian Coastal Shipping Commission. v. Green and others*, [1971] 1 Lloyd 's. Rep., , 16 at p. 22-25.

<sup>22</sup> For more examples see, Buglass, L. *Marine Insurance and General Average in the United States*, 2nd ed., 1981, at p. 196.

<sup>23</sup> Christopher Hill, *Maritime Law*, 2nd ed., 1985, pp. 203-205.

what is paid for salvage of vessel and cargo, for efforts which has been done to minimise or prevent damage to the environment while is saving the vessel or cargo under Lloyds Open Form (LOF) agreement would be treated in general average.

Salvage expenses are allowed in general average, "to the extent that the salvage operations were undertaken for the purpose of preserving from peril the property involved in common maritime adventure."<sup>24</sup> It would, therefore, be arguable whether expenditure incurred prior to the commencement of a salvage operation, e.g. the costs of removal of oil from a tanker prior to starting the salvage operation, is regarded as a general average or not. Such expenditure would be so regarded, according to the definition of general average expenditure, if the objective of the operation is to preserve from peril the property involved in a common maritime adventure, but not solely the prevention of pollution. Thus there would be no salvage expenses if the action prior to commencement of salvage operation is done by the governmental authority or by regulations relating to pollution or by the duty of best endeavours to prevent the escape of oil under the LOF agreement, unless it can be shown that the salvage operation could not have proceeded without the removal of the pollution.

Under the LOF agreement, the salvor is under the duty to use his best endeavours to prevent the escape of oil from ships. Since Rule VI of the York Antwerp Rules allows in general only those expenditures which were incurred to preserve the property from perils, it might be argued in some cases that the salvor's actions, or part of them, were for the purpose of fulfilling the duty of best endeavours rather than for the purpose of preserving property from perils,

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<sup>24</sup> Rule VI, The York Antwerp Rules, 1974.

so that the resulting salvage award should be wholly or partially disallowed in general average.

Rule VI in the York Antwerp may be subject to criticism when it is compared with the LOF agreement. First, the Rule is not clear as to whether the salvor is motivated both to secure property from peril and to prevent the escape of oil. Secondly, the Rule does not deal properly with the situation where the salvor acts purely to prevent the escape of oil rather than to save property from perils.

#### **6.4. Salvage liability and marine insurance**

A salvage operation on a stranded oil tanker is often a very risky venture. It is risky, "for the salvage master and his crew because of the hazardous conditions under which they have to manoeuvre. It is also involves another kind of risk which is a possible aggravation of pollution damage."<sup>25</sup> Thus it seems necessary for the principle of salvage to be extended to reward those who prevent or minimise damage to the environment from the vessel pollution, i.e. known as "liability salvage".

In March 1978 the Amoco Cadiz suffered a steering failure and became a total loss near the French coast, causing massive pollution along the Brittany coastline. The accident led to prolonged litigation in the United States, where claims were brought against various parties including the salvage company, Bugsier. Their tug Pacific had attempted unsuccessfully to save the tanker. In that event, the claims against Bugsier were dismissed on the ground that a salvor whose efforts are unsuccessful is not liable for loss sustained either by the owners of the property he has endeavoured to save or by third parties, in

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<sup>25</sup> Bernard. A Dubais, *The Liability for a Salvor Responsible for Pollution Damage*, [1977] 8 J.M.L.& Comm. p. 375

the absence of proof of causation, gross negligence or wilful misconduct. The case highlighted the legal risks facing salvors who are called on to assist stricken tankers and raised the question that whether the salvors are entitled to reward their efforts to prevent or minimise pollution damage, where there is no success to save the ship or property thereon.

The essential qualification for an award for salvage charges is that the salvor acts voluntarily and independently of contract.<sup>26</sup> The term "save" in the definition of salvage indicates that the salvage service must be successful, even partially, i.e. "no cure- no pay".<sup>27</sup> This could have harsh results when a salvor undertakes to act in a situation where pollution is present. A salvor who unsuccessfully tries to save the pollutant and reduce pollution cannot get any reward for his efforts and expenses.<sup>28</sup>

Although it is not easy to define categorically what pieces of property may be subject to maritime salvage, one of the many classes of salvage service is the protection or rescue of a ship or her cargo and the lives of the persons on board together with saving of property. Where a salvor renders service to the vessel and her cargo and life is also saved, it has been the practice of the courts to give an enhanced award which reflects the value of the services rendered in the saving of life.<sup>29</sup> Accordingly, where a salvor succeeds not only in saving the ship and or cargo and or life, but also in preventing pollution

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<sup>26</sup> J. Kenneth Good care, *Marine Insurance Claims*, 2nd ed., 1981, p. 475.

<sup>27</sup> *The Rene* [1955] 1 Lloyd 's. Rep. 101.

<sup>28</sup> Abecassis, David. W. *Some Typical Consideration in the Event of Casualty to Oil Tanker*, [1979] L.M.C.L.Q. 449 at p. 451.

<sup>29</sup> *Nourse. v. Liverpool Sailing Ship Owner 's Mutual Protection and Indemnity Association*. (1896) 2 Q.B.D. 16; see also *Grand Union Shipping Ltd. v. London Steamship Owners' Mutual Insurance Association Ltd: The Bosworth* (No. 3) [1962]1 Lloyd 's. Rep. 483.

liability, as a consequential damage,<sup>30</sup> he should expect to receive a suitably enhanced award, provided that there is a chain of causation between physical damage to the cargo or ship and pollution damage.

This enhancement award is payable by the shipowner or cargo owner, or by their insurer, whose property has been saved aside from the fact that oil pollution has been prevented or minimised. This payment may be disputed on the legal basis of "no cure-no pay", whereby there is no "equitable remuneration" where there is no saving of ship or property. The argument may be weakened when it is considered that the owner's liabilities have been avoided or minimised. This argument is supported by the case of the *Whippingham*<sup>31</sup> in which the potential damage, and financial liability to pleasure yachts and third parties caused by the salvaged ship was taken into account in the calculation of award. In addition, the service of any best endeavours, whether or not the liability has been abated, has been regarded as salvage service and has become part of the criteria by which the size of any award is calculated.<sup>32</sup> In both forms, however, there is no scope for enhancement if no property with a settled salvaged value is saved.

Thus saving life, and by analogy pollution liability, do not of themselves entitle the salvor to a reward except where legislation has provided for this.<sup>33</sup> This may raise problems when the incentive for salvage is mixed. For example,

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<sup>30</sup> The "Eschersheim" [1976] 2 Lloyd's Rep. 1

<sup>31</sup> (1934) 48 Ll.L.Rep. 49; see also *The Gregorso* [1973] Q.B. 274.

<sup>32</sup> Clause 1(a)(II), Lloyds Standard Form of Salvage Agreement, 1990, commonly referred to as the Lloyds Open Form or LOF, because it leaves open the amount of any salvage reward to be decided later by arbitrator. See the text of LOF 1990 in the document section of article which was written by Michael Allen, *The International Convention of Salvage and LOF [1990]* J.M.L. & Comm. vol. 22, no. 1, January 1990, 119 at pp. 159-164.

<sup>33</sup> Sections 544 and 545 of the Merchant Shipping Act 1984 has made salvage payable for saving life.

where an oil laden tanker strands and begins to leak oil into water, salvage may be done to save the vessel and minimise and prevent an oil spill, and consequently reduce the amount of possible oil pollution liability and clean up costs. The question which arises here is which party out of hull insurer, cargo insurer or Protection & Indemnity club would pay salvage expenses incurred to prevent or minimise pollution.

In an American case, the court considered the issue and observed that although the salvage service may have prevented a disaster for which the club cover could have been liable for substantial amounts, any calculation based on the possibility of explosion was "extremely hypothetical."<sup>34</sup> The court concluded that services were primarily directed to the benefit of the other insurer and any benefit to the club from preventing of pollution damage was in a sense incidental. In the other words, only some of the expenses were incurred solely to avert those occurrences or protect those interests for which the club was solely liable.

The conclusion to be drawn from what is discussed above is that it can be said that if the owners' potential oil pollution liability becomes the object of salvage itself (just like the ship and cargo) so that it is saved, a salvage award may be made in respect of it. With regard to the insurance offered by hull underwriters for the ship's contribution to salvage, it can be construed that the shipowner's liability underwriter alone would cover this award. Thus if a salvage effort was effective to a stranded laden tanker and no oil is spilled, under liability salvage policy, the salvor is entitled to get an award because no pollution liability has resulted, and the same reasoning is applied where oil pollution liability is reduced. However, if no pollution is prevented or reduced,

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<sup>34</sup> *Sea Board Shipping Corporation. v. Jockarme Tugboat Corporation*, 461 F2d 500, [1972] A.M.C 2151, at p. 2155 (2nd Cir).

despite considerable efforts by the salvor, he is left without award since there is "no cure-no pay" in liability salvage too.

To remedy this problem a provision was proposed in The Lloyd's Standard Form Salvage Agreement (more commonly referred to as the Lloyd's Open Form-LOF)<sup>35</sup> under which the salvor gets his expenses plus up to fifteen percent, as a safety net, even where the salvage services are not successful<sup>36</sup> provided that the salvaged vessel is a tanker with oil. The 1990 Lloyds Open Form extended cover to all types of hazardous substances and to oil pollution from all ships, rather than merely laden tankers. The "Safety-net" has also been extended to allow a make-up of 30 %, with scope in some cases for a maximum of up to 100%. Thus under this scheme, if the salvor through no fault of his own fails to earn any award, or earn an award which does not cover his expenses, he would receive a form of "special compensation."<sup>37</sup> This would consist of his reasonable expenses<sup>38</sup> which would not exceed a maximum of 30% of such expenses incurred by him. However, the tribunal may increase such special compensation, "but in no event all the total increase be more than 100 % of the expenses incurred by a ship owner."<sup>39</sup>

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<sup>35</sup> Because it leaves open the amount of any salvage award to be decided later by arbitration.

<sup>36</sup> 1980 Lloyds Open Form Salvage Agreement (LOF 80), reprinted in, D. Steel & F. Rose, *Kennedy's Law of the Salvage*, 5th ed., 1985, at p. 1451-63. see clause 1(a).

<sup>37</sup> Special compensation was known as a "safety net" in LOF 1980, see clause 1(a). It said that in circumstances where the services were unsuccessful or only partially successful or the salvors were prevented from completing the services, the salvors were entitled to an award against the tanker owners of reasonably incurred expenses together with an increment not exceeding 15% of such expenses. This was only recoverable to the extent that such expenses, together with the increment, were greater than the amount which would be otherwise be recoverable under salvage agreement.

<sup>38</sup> Such reasonable expenses should be fixed in case of dispute by arbitration in a manner prescribed in the form of art. 1(c), and 6, 1990 LOF.

<sup>39</sup> Clause 14 (1)(2), *id.*

This appears to contemplate two different situations. If there have been salvage operations on a ship and cargo which threatened damage to the environment then the salvor is entitled to special compensation limited to 30 % of his expenses. If, on the other hand, his action has prevented or minimised damage to the environment then his reward will include not only his expenses but also an uplift of up to 100 %.<sup>40</sup>

Payment of a "special compensation", that is compensation which is paid if the salvage operation (which is carried out in respect of a vessel or its cargo) has actually prevented or minimised damage to the environment, is for the account of the shipowner only, with no right to a General Average contribution from the cargo owner.<sup>41</sup> Thus, where departure from the "No cure- No pay" principle exists, the rule that all salvaged interests should contribute rateably to the award has to be waived. It is right that the shipowner alone should pay the "special compensation" award since it is the owner who has been saved the possible expenses of claims in respect of pollution because the "special compensation" is only payable if and in so far as a payment under it exceeds any other sums recoverable.<sup>42</sup> A salvor who preserves a cargo of oil and thus presumably prevents pollution still recovers his award for preserving the cargo from cargo owners. If this were not so an unfair situation would arise whereby the shipowner, through the special compensation provisions, would subsidise the salvage of the cargo.

The payment of special compensation is conditional upon first, the property salvaged being bunker stores and any other property therein.<sup>43</sup> Therefore, it is

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<sup>40</sup> Michael Allen, *The International Convention on Salvage and LOF [1990]*, J.M.L. & Comm., vol. 22, January 1991, p. 119 at p.125.

<sup>41</sup> Art. 14(1)(2) 1990 LOF.

<sup>42</sup> *Id.*

not applicable to a tanker in ballast or to an unladen tanker. In consequence, the owners are able to retain the no cure no pay principle in other circumstances such as those involving freight and passenger vessel. Secondly, it is conditional upon the fact that there must have been no negligence on the part of the salvor in failing to prevent or minimise damage to the environment.<sup>44</sup> It would be difficult to prove negligence, particularly in non contract cases, because salvors vary greatly in expertise and often act under different circumstances. Under contract, however, a negligent professional salvor may be liable to the owner for breach of an implied warranty of reasonable skill and care.<sup>45</sup> The other condition is that the vessel, not only the tanker laden with oil, must by herself or her cargo, threaten damage to the environment. The definition of damage to environment has widened the scope of special compensation by the extension damage caused by "pollution, contamination, fire, explosion or similar major events."<sup>46</sup>

One of the conditions for recovery of the "special compensation" is that the salvor must have failed to earn a reward under Art. 13.<sup>47</sup> This requirement could potentially lead to some procedural difficulties when put in practice. This is because the tribunal will have to go through two-stage process before deciding whether "special compensation" is payable. In such a case time will be wasted and so expensed will be unreasonably incurred not only in hearing submissions on "special compensation", but also as a result of the arbitrator or judge having to calculate the amount of "special compensation". One possible

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<sup>43</sup> Art (1)(a)(I), 1990 LOF.

<sup>44</sup> Art. 14(5), 1990 LOF.

<sup>45</sup> See e.g. *Tojo Maru* [1972] A.C. 820.

<sup>46</sup> Art. 1(d), 1990 LOF.

<sup>47</sup> Art. 14(4), 1990 LOF.

solution would be for the tribunal to allow salvors to reserve their position in respect of Art.14 to make an award under Art.13. and then to leave it to the salvor to claim special compensation at a further hearing, if he so desires.

Reference to LOF shows that the salvor should use his best endeavours to prevent the escape of oil from the vessel performing salvage services. This provision is intended to make it clear to what extent the services earn remuneration. When it becomes likely that the salvor will be able to claim for his reasonably incurred expenses under the "safety net" clause, it is provided that the owner of the vessel shall provide security on demand.<sup>48</sup> The required security is normally given in the form of a guarantee. In practice the guarantee can be given by an insurance company, broker, Clubs or banks. This has been made possible by the agreement of an insurer to accept shipowner's liability under the "safety net" clause as a new risk coming within the scope of insurance cover.

An overlap may occur between the P&I Club, hull and cargo insurer over oil pollution liability salvage, where expenses are incurred for joint interest. There was much discussion between Hull, Cargo, P&I Clubs and liability underwriters as to who should be properly concerned in the safety net payment and enhancement of the award for traditional saving whereof there had been some degree of pollution avoidance in the same salvage operation. After long discussion, the Clubs, as a liability insurer, agreed to bear the full cost of the safety net, on the basis of a so called "funding agreement."<sup>49</sup>

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<sup>48</sup> Art. 4(a) 1990 LOF.

<sup>49</sup> This is based on the agreement which was reached by the International Group of P & I clubs, London Hull and Cargo Insurance (Institute of London Underwriters and Lloyd, underwriter Association) and International Salvage Union. see " funding agreement clause " in, S.J. Hazelwood, *P & I Clubs Law and Practice*, 1989, Lloyds of London Press Ltd, at p. 279.

Lloyd's Open Form does not require the shipowner to provide security to the salvor, in respect of salvaged property other than the vessel.<sup>50</sup> The question may arise as to who gave security for the cargo. It has been an established practice in Maritime Law that the shipowner put up the security for an award on behalf of the cargo as well as the ship, by taking a counter-security from the cargo interest or their underwriters. This may not prove satisfactory in all situations. The cargo owner may dispute payment of their proportion of the award, alleging unseaworthiness of the vessel. For these reasons, the shipowner may become reluctant to put up the security for cargo. It may be advisable to insert a provision in LOF making the shipowners responsible for such security, since the shipowner will always be in a better position to pursue the cargo owner than the salvors. The present wording of LOF<sup>51</sup> merely imposes an obligation on the shipowner, their servants or agents, to use their best endeavours to ensure that the cargo owner provides the required security. This will, no doubt, be of practical benefit to the salvor in the majority of cases without imposing an unacceptable burden on shipowners.

There are occasions when the distressed vessel suffers damage due to negligence on the part of the salvor and difficult conditions under which the rescue operations are undertaken. Although it has long been established that a duty of care exist for every body, it has been suggested that the standard of care should not be high in the case of salvage operation.<sup>52</sup> The reasoning was that every policy of salvage, to encourage the salvor, might be undermined if they were not treated with great leniency by the courts. Is it equitable for the salvor to be liable for such damage resulting from his negligence, for example,

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<sup>50</sup> Clause 4(b) 1990 LOF.

<sup>51</sup> Clause 4 (d) 1990 LOF.

<sup>52</sup> See, e.g. *The Delphinula* [1947] 80 Lloyd's Rep. 459.

increased pollution damage due to the negligence of the salvor in the salvage operations. The question was raised in the *Tojo Maru*.<sup>53</sup> This tanker was in collision with another tanker in the Persian Gulf, as a result of which the vessel sustained extensive damage, a fuel tank and the engine room being flooded. A tug offered her services which were accepted in terms of Lloyd's Standard Form of Salvage Agreement "No cure-No pay". In the course of the services the water was pumped from the engine room, the cargo of crude oil was discharged. The plate needed to be bolted to the hull and it was intended to do this by firing bolts from a bolt gun. Before this could be done, however, it was necessary to free gas from the adjoining tank. The salvor's chief diver, contrary to instruction, attempted to use a bolt gun, causing an explosion and subsequent fire. The House of Lords decided that there should be no award of the salvage remuneration, but the shipowners were entitled to damage, subject to the deduction of the hypothetical salvage remuneration which would have been rewarded if the salvor duly performed the contract. Thus one should assess the salvage remuneration as if there had been no negligence and against a salvaged fund which took no account of the cost of damage caused by the salvor's negligence. One then sets against the award the damage for which the salvor was liable by reason of his negligence. If, therefore, the damages exceeded the salvage remuneration, the salvor was liable to shipowner in damages for the net balance.

Although the decision in the *Tojo Maru* that a salvor is liable in damages for his negligence is undoubtedly correct, the method it adopted for assessing the salvage remuneration and the damage seems at least open to question if it is thought of as laying down any general principle. One may ask whether it will

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<sup>53</sup> [1971] 1 Lloyd's Rep. 341.

be permissible to calculate the amount of salvage remuneration in a case of involving a salvor's negligence by reference to a hypothetical salvaged fund and in particular to make a notional award greater than the actual salvaged fund? Further, if a salvor wishes to limit his liability to damages, does that limit apply immediately to all the damages or does one first set off the salvage remuneration against the sum of damages and then limit only with respect to the net balance, i.e., if the damages exceed the salvage remuneration?

A strange result may be reached if the application of the hypothetical method is adopted as a general rule. Suppose the salvor saves a ship and cargo but negligently causes major damage to the ship. With regard to this method, taking a salvaged ship value, the cargo owners will pay their proportion of an award based on an artificially inflated salvaged value. If there is a non-negligent co-salvor, his award is presumably based on the actual salvaged value, whereas the negligent salvor has an award assessed on the basis of no negligence and artificially inflated value. The problem becomes even more acute if the salvor is allowed to limit his liability to a large amount of damages and then set off the limited damages against an award of salvage made on an inflated notional fund. Difficulty may also arise regarding assessment of damage if a ship were in such a dangerous situation that it was very doubtful if she could be kept afloat but the salvor in such a situation negligently sank her, i.e. contributory negligence.<sup>54</sup>

As a result, although there are cases in which it is fair to all parties to adopt the method applied in the *Tojo Maru*, for example, where there is an isolated act of negligence damaging the ship or cargo and which does not seriously deplete the ship or cargo salvaged fund. But in most cases it would be fair to

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<sup>54</sup> For a more detailed discussion of this problem see Brice, G. The New Salvage Convention: Green Seas and Grey Areas, [1990] LMCLQ. 32 at pp. 45-50.

adopt the solution to assess salvage remuneration by reference to actual salvaged value.<sup>55</sup> In this case the owner of the damaged salvaged property is not being asked to pay more than a reasonable reward of salvage. He is for this purpose assumed to receive full compensation for loss sustained.

The question of right to limit is very complicated where the shipowner is involved in a salvage operation. It has been, as a general rule of Maritime law, the case that shipowners have the right to limit their liability to *damages*. The same right has been given to the salvors.<sup>56</sup> Can salvage remuneration be regarded as a damage, and consequently subject to limitation. Salvage remuneration is a reward, not compensation for damage, which is paid to salvor. There is, therefore, no right to limit liability in respect of it. Thus, it is supposed that the shipowner is only entitled to set off the limit damage against salvage remuneration. It is worthy to mention that the salvor can only limit their liability to damage which is caused as a result of their negligence. In practice, the salvor could not limit their liability in respect of any pollution liability claims for negligence, because they do not fall within the definition of an "owner" in the Merchant Shipping (Oil Pollution) Act 1971.<sup>57</sup>

The salvor, under the LOF, may be deprived of the whole or part of any special compensation if he has been negligent and thereby failed to protect or minimise damage to the environment. Although the Convention addresses the question of depriving the salvor of the whole or part of the salvage remuneration, it leaves unstated the extent of the liability of the salvor for

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<sup>55</sup> As it was provided by Art. 13(3) of 1990 LOF.

<sup>56</sup> See Art. 17(1) Merchant Shipping Act 1979, which incorporated the provision of the International Convention on Limitation of Liability for Maritime Claims, 1976, The London Convention.

<sup>57</sup> It has incorporated the provisions of the CLC 1969 whereby the pollution liability and right to limit is only channelled to the owners who are not included salvors.

damage due to his negligence. In the other words, the penalty for negligence by the salvor is limited to forfeiture of the special award, and nothing more.<sup>58</sup>

Regarding the oil pollution damage following the salvors' negligence It is worthy of note that under the CLC liability is confined to the owner of a vessel, and servants, agents are exonerated from liability.<sup>59</sup> The agents are defined in the CLC and it is not clear to what extent the Convention applies to salvors. However, the Merchant Shipping (Oil Pollution) Act 1971,<sup>60</sup> which was designed to give effects the 1969 CLC, besides exonerating the servants and agents of the owner, also specifically relieves from liability "any person performing salvage operations with the agreement of the owner" in order to provide encouragement to salvors who might otherwise find themselves involved with astronomical pollution liabilities. It must be realised that the decision in the *Tojo Maru*, as mentioned above, may give the idea that the CLC exception would not enable salvors to escape liability in consequence of their own negligent actions. An indemnity clause may be required to be incorporated in salvage contract in which the salvor may be made an additional insured, or a pollution cover be provided by the insurer for professional salvors.

The salvor's ability to secure adequate insurance has become a contentious issue since their potential liability for negligence rose with the size of tankers. Shipowners and their Clubs were reluctant to agree to protect salvors, as additional insured without payment of call, for all claims which might be brought against them for any pollution caused by the salvor in the course of his operation, because of the unlimited liability which such protection may place

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<sup>58</sup> Donald A. Kerr. *The 1989 Salvage Convention, Expediency or Equity?* [1989] J.M.L. & Comm., vol. 20, p. 505 at p. 516.

<sup>59</sup> Art. III (2)(4) 1969 CLC.

<sup>60</sup> S. 3 (b).

on them. As a result, the salvors should look for independent insurance to secure their potential pollution liability.<sup>61</sup> A salvor is also protected, against liabilities resulting from oil pollution, by TOVALOP which requires shipowners to pay the cost of certain private efforts to remove the threat of pollution.<sup>62</sup>

### **6.5. Underwriters liability as to suing and labouring.**

Underwriters would, given the opportunity, take measure to preserve the insured property from loss for which they would otherwise be liable. The underwriters do not have this opportunity because they have no direct control over the insured property. It follows that, by imposing this duty on the assured, the underwriter is, in effect, asking the assured to represent him in preserving the property from insured losses; and in exercising legal rights against parties other than the assured who may be responsible for the loss. To this end, a clause permitting the assured, his factors servants and assigns to use labour and travel for the purpose of preserving the insured property first appeared in a policy called The Tiger in 1613. In the UK it was incorporated as an integral part of the Lloyd's Ships General policy and read as follows "and in the case of any loss or misfortune, it shall be lawful to the assured their factors, servants and assigns to sue labour and travel for in and about the defence safeguards and recovery of the said goods and merchandises on ship etc. or any part thereof without prejudice to this insurance; to the charges thereof we, the assurer will contribute each one according to the rate and quantity of the sum herein insured." Modern Institute Clauses for use in the new form of Lloyds policy put upon the assured the duty to seek to mitigate loss to the subject-matter in a

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<sup>61</sup> This is usually done by P & I Clubs under special agreement.

<sup>62</sup> Clause IV (a).

more positive way.<sup>63</sup> The Marine Insurance Act 1906, in section 78, both for the interpretation of a clause in a policy and, quite separately, a duty on the assured to take all reasonable measures to minimise the loss.

The Marine Insurance Act 1906, in section 78(4),<sup>64</sup> provides "It is the duty of the assured and his agents, in all cases, to take such measure as may be reasonable for the purpose of averting or minimising a loss." The wording of this section might suggest that an express sue and labour clause has outlived its usefulness, and that any assured is protected to the extent of recovering his expenses for suing and labouring whether a clause exist in the policy or not. The point was considered in the Australian case of *Emperor Goldmining Co. v. Switzerland General Insurance Co.*<sup>65</sup> in which a cargo of explosives was insured from Sydney to Figi on All Risks terms. The policy, however, did not contain a sue and labour clause. It was held by Manning, J. that despite the absence of a sue and labour clause, the statutory provision entitled the assured to recover his expenses and that there was nothing in the Act which compelled the court to read section 84(4) (cf. Section 78(4) of the 1906) as imposing a duty on the insured to be carried out at his own expenses. The effect of the judgement would therefore make the sue and labour clause unnecessary and surplus to the assured's rights. However, it is difficult to see why Section 84 in Australia (cf. 78 of the 1906 Act) refers extensively to the sue and labour clause if its existence was not thought necessary to the insured's rights. It was suggested<sup>66</sup> that certainly a term can be implied into a policy which would

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<sup>63</sup> Clause 13. Institute Time Clause, Hulls (1/10/83)

<sup>64</sup> Which has been reproduced in many Commonwealth Statutes on Marine Insurance, e.g. Australia.

<sup>65</sup> [1964] 1 Lloyd's Rep. 348.

<sup>66</sup> Arnould on the Law of Marine Insurance and Average, 16 th. ed., p. 194

enable the insured to recover certain expenses in the face of a likely loss but that in the absence of a sue and labour clause in the policy this is limited to those cases where it can possibly be said that the need for the expenditure is a direct natural result of the casualty.

It can also be construed from the wording of Section 78(4) MIA, 1906, that the insured is indeed under a positive duty towards the insurer. Consequently the insured who fails to use sue and labour clause. to prevent or minimise loss to the subject matter, will provide the insurer with a defence for that particular claim. To succeed in such a defence, however, the insurer must show first, that the action which they alleged assured failed to take was reasonably necessary for the preservation of the subject matter, and secondly, that the fault in failing to take action lay on the assured or his agent. Thus in *Irvine v. Hine*<sup>67</sup> the insured vessel having been damaged, it became necessary to dry dock the vessel to ascertain the precise amount of the damage. The assured, however failed to undertake such dry docking. This was held not to be a breach of section 78(4) as dry docking would not have minimised or averted the loss. Similarly, in the House of Lords case of *Stephen v. Scottish Boat Owners Mutual Assurance Association*<sup>68</sup> it was held that the skipper and owner of the insured vessel, a trawler, which was left in a sinking condition after the sea cocks had opened, was not in breach of duty in failing to send a "May Day" message after it became apparent the vessel could not be saved. The sending of such a message could not have averted or minimised the loss, and the Captain himself was at the time more concerned with the saving of the crew.

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<sup>67</sup> [1949] 2 All. E.R. 1089.

<sup>68</sup> (1989) S.L.T. 283.

Section 78(1) of MIA, 1906, clearly states that the obligations arising under the sue and labour clause are supplementary to the contract of insurance. Hence, the insured may recover more than the basic indemnity agreed to be paid under the policy.<sup>69</sup> This also indicates that the clause was to encourage the insured to take steps to preserve the property which, in the absence of any such undertaking by the underwriter, would involve the insured in expenses which he might never recover. If it is not so provided, the simple answer from the assured might well be that he preferred to see the property lost and recover in full under the insurance. As a result, the charges recoverable from underwriters under the clause are additional to any other claim under the policy. Further, it is not necessary, in order to recover, the sue and labour charges to be successful. In so far it is reasonable under the policy, even though it fails to achieve its purpose. Thus, a sue and labour charge differs from a salvage contribution or General Average contribution which are not recoverable where the act is unsuccessful. The sue and labour service is also not a general average nor salvage, because of being the sole benefit of the ships' underwriters.

From the phrase "in case of any loss or misfortune" can be construed that it is necessary, in order to claim under the clause, to find that as a result of the operation of insured perils, the subject matter of the insurance has been brought into such danger that without unusual or extraordinary labour and or expenses a loss will probably fall on the underwriters. This is an essential prerequisite to avoid a claim for expenses reasonably and prudently incurred by the assured before any loss or danger had been experienced but without which a loss may well have occurred. Such expenses are part of the cost of owning and

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<sup>69</sup> *Aitcheson v. Lohre* (1879) 4 App. Cas. 755.

operating the insured property and in the absence of an insured peril creating a loss or danger of loss, are outside the ambit of insurance.

### **Concluding remarks**

Marine insurance is stated to be in respect of ship, goods, freight and liability of shipowner as to owner of the cargo and third party. There are many way in which a shipowner may incur third party liability and in all of these he has an insurable interest. Generally speaking, the marine insurance policy is related to collision liability, and liability to sue and labour, general average and salvage expenses. The insurance given by the hull policy is a separate insurance from the insurance given by the same policy in respect of collision liability and for the sue and labour clause, general average, and salvage expenses. This is of particular importance in connection with the limitation of liability to the insurers. This is not the same as saying that the assured can recover and the insurer will be liable, whatever the liability of the insured may be in such cases. The limit of liability is subject to insured value.

Oil pollution arising from a collision is largely excluded from the cover provided by the marine insurance policy. The collision liability clause, RDC, has excluded any sum which the assured may become liable to pay in respect of pollution or contamination of any real or personal property or thing whatsoever, except another vessel with which the insured vessel is in collision or property on such a vessel. Thus collision liability insurance does not extend to liability for pollution or contamination of the environment, costs of any action taken to avoid, minimise or remove pollution hazards, or damage to the third parties, except the owner of the other vessels or property on such a vessel. This cover is also considerably less than traditional cover by the collision clause, since under the exclusion liability is limited for the damage or contamination to the

vessel other than the vessel (or cargo thereon) with which the insured vessel collides. As a result, the assured is not sufficiently protected by the collision liability clause in marine insurance policy.

Expenditures in general average, for common safety of ship and cargo, are not confined to the part of the vessel or cargo which was first selected to bear the voluntary sacrifice, but extend also to such other losses as are direct consequences of the general average act. Therefore, pollution expenses, following a general average act, is subject to marine insurance and general average when such a pollution is the direct consequence of general average act. The only problem in extension of such cover is establishing causation and remoteness between the act and damage. This may put many pollution liabilities outside general average and marine insurance policy.

The sue and labour clause is one of the most important clauses in a marine insurance policy. It often comes into play by making provisions regarding expenses incurred in salving or attempting to save the vessel and other property. Thus, sue and labour expenses are recoverable to the extent that they can be regarded as having been incurred in respect of the vessel, whether successful or not in averting or minimising the loss. Therefore, the hull underwriter would not be liable for any part of the sue and labour charges which is done to reduce or minimise the liability, e.g. pollution, unless it is expressly provided in the hull policy.

The principle of salvage applies only to maritime property. Thus, under the marine insurance there is no award given for "pollution liability" salvage by itself. Therefore, if pollution liabilities are saved but no property is involved marine insurance makes no provision for paying the salvor's award. If the property is saved as well as pollution liability, marine insurance provides an enhanced award, for pollution liability salvage, against the owners of salvaged

property. Award for pollution liability salvage may be given, even no property is saved, provided that there is special agreement between the salvor and insured. The amount of such award is limited to "special compensation" as provided under the LOF.

As a general conclusion, it can be said that marine insurance is not prepared to provide cover for damage or injury arising from pollution. With a few rare exceptions, the existing marine insurance arrangement do not give a complete guarantee of compensation for those who suffered pollution damage. To provide sufficient compensation for pollution damages and losses, marine insurance needs substantial changes in its nature so as to extend its cover to pollution liability as a property.

## **PART II. BASIC INSURANCE SCHEMES**

### **Chapter 1. The Place of pollution liability cover in a General Ships Policy**

#### **1.1. Pollution liability cover arising out of collision.**

Under the Running Down Clause,<sup>1</sup> the underwriter agrees to insure the risk of liability of the insured vessel for damage done by the vessel as a result of a collision with another vessel. The clause, in the English standard insurance policy form, only covers 3/4 of the owner's liability,<sup>2</sup> whereas an assured under the American Hull form can recover collision liability in full.<sup>3</sup> Cover being limited to 3/4 may be useful in case of pollution liability resulting from collision, at least it encourages taking of care on the part of the assured by insisting upon 1/4 being self insured. The argument becomes less cogent, when one bears in mind that in practice, the remaining 1/4 is now invariably covered by the P & I Clubs. It might be arguably suggested that the RDC should contain a warranty to the effect that the other 1/4 of collision liabilities will remain uninsured in the case of pollution, in order to encourage shipowner to take more caution.

The RDC does not extend to cover any sum which the assured may become liable to pay in consequence of "pollution or contamination of any real or personal property or things whatsoever, except to the other vessel with which the insured vessel is in collision or property on such other vessel."<sup>4</sup> The assured, in order to be entitled to claim for damage to other vessel or property thereon, must pay first under the clause, i.e. a condition precedent to recovery,

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<sup>1</sup> Clause. 8, Institute Time Clause, Hulls, 1-1-83

<sup>2</sup> Id. 8(1).

<sup>3</sup> American RDC covers four-fourth of the owners, collision liability. American Institute Hull Form, 1977.

<sup>4</sup> Institute Time Clause, Supra. No .1, clause. 8.4.5.

although in cases subject to the Third Parties (Rights Against Insurers) Act 1930, there could be circumstances in which a third party may resort to a direct claim against the policy. However, this payment must be made by the assured. This indicates that payment by others, e.g. servant or master, will not satisfy the condition for recovery. The payment must also arise by reason of the assured becoming legally liable for the damage. Thus, the RDC only covers liabilities arising by virtue of law. Therefore, when a shipowner entered into an agreement for the hire of a tug on terms that he should be liable for all damage, including pollution damage, to the tug, however caused, the payment made by the shipowner under the agreement, following a collision for which the tug was wholly to blame, was held not to be recoverable under the clause.<sup>5</sup>

The underwriters agree, under the RDC, to indemnify the assured for "loss or damage to any other vessel" following collision. This indicates that there must be physical contact between the insured vessel and other vessel. Thus, if the other vessel is damaged in some way other than by physical contact with insured vessel, e.g. by spilling chemical substances from insured vessel, for which there is a legal liability on the part of the assured, the liability is not covered under the clause. For example, if a ship, as a result of negligence on the part of those responsible for her, breaks away from her position and damage, without contact, results to another ship or vessel because it has to take avoiding action, then the clause does not give the assured a right of recovery.

The consequential loss of a collision can be more far-reaching, in particular in pollution cases, than the actual damage sustained by the vessel itself. Thus, the consideration must also be given to the position of underwriters as to liability of the assured "in consequence" of a collision. The underwriters, under

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<sup>5</sup> *Furness Withy & Co. v. Duder* (1936) 55 Ll. L. Rep. 52.

the RDC, have made it clear that the damage or loss consequences of collision are restricted to: (i) loss or damage to any other vessel or property on any other vessel; (ii) delay to or loss of use of any such other vessel or property thereon; (iii) general average, salvage of, or salvage under contract of any such other vessel or property thereon. From the wording of these provisions it would appear that consequential damages suffered by another vessel or property thereon can be claimed from underwriters, subject to the limit of 3/4 of the damage and the principle of causation. Thus, the Running Down clause is capable of covering any sum which the assured pays in respect of consequential loss which follows from pollution or contamination of the vessel with which the insured vessel is in collision. It seems pollution exclusion clauses, in way they have routinely been written, does not extend to the far reaching consequences of damage which may be done to the another vessel following a pollution incident because it has been held by the courts that, if any item is included in the claim which is not considered to be direct consequence of the collision, it will not be allowed.<sup>6</sup>

Under the Running Down Clause, underwriters agree to pay 3/4 of legal costs, in addition to the maximum liability for collision damage, provided that such costs were incurred with the prior written consent of underwriters. What do legal costs include? Are they limited only to cost of legal professionals? Do it extend to any costs which is related to the taking action? It may be construed that inserting the word "legal" before cost may or may not have been intended to limit the recoverable costs to the fees and disbursements of members of the legal profession. Such a broad interpretation would include numerous properly

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<sup>6</sup> As an example, see *The Canadian Transport* (1932) 43 Ll. L. Rep. 286.

claimable items examples of which are: P & I Clubs correspondents' fees, master's travel expenses in connection attendance at hearings, etc.

In the vast majority of collision cases, both ships are partially at fault. It may be asked how pollution liability is to be apportioned in such cases. Under general maritime principles, it has long been settled that although each shipowner has liability to the other to pay damage in proportion of her degree of fault, in fact, there is only a "single liability."<sup>7</sup> This means that only one payment was made and the vessel with greater liability has to pay the balance over to other party.

When it was realised that the insureds could be disadvantaged by applying the method of one single payment,<sup>8</sup> it was made a term of policies of insurance that adjustment should be made on the basis of "cross-liability," that is to say treating each vessel's liability to pay damage to other as a separate process without the lesser liability being set off against the greater.<sup>9</sup> There are limitations to the application of cross-liability, namely, when the liability of one or both vessels is limited by law, because the limited liability distorts the figures if cross-liabilities are applied.

The rule of single or cross liability has no application in most conventional pollution cases, which are based on strict liability. In such cases each vessel would be separately liable if a specific proportion of the damage could be

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<sup>7</sup> *Stoomvaart Maatschappij Netherlands v. P & O Steam Navigation Co. The Khedive* (1882) 5 App. Cas. 876

<sup>8</sup> This idea became first apparent in *London Steamship Owner's Mutual Ins. v. The Grampian Steamship Co.* [1890] 2 Q.B. 663, where it was held that, having received a payment of the balance due from other vessel, the insured vessel was unable to recover under its RDC any part of the amount deducted by the other vessel for damage done to it because the insured vessel had not made any payment as to that amount to any other vessel.

<sup>9</sup> *Greystoke Castle (cargo owners) v. Morrison Steamship Co. Ltd.* (1946) 80 Ll. L. Rep. 55.

attributed to her. If the damage cannot be easily apportioned, the owners of both ships will be jointly and severally liable for the whole damage.<sup>10</sup> The rule of joint and several liability, therefore, has no application where there has been a collision between a laden tanker and a dry cargo ship or between two laden tankers and where therefore the source of pollution damage can easily be identified.<sup>11</sup>

## **1.2. General Average in relation to marine policies.**

Generally, a policy of marine insurance provides an indemnity against general average loss and contribution, subject to any express provision in the policy.<sup>12</sup> Section 66(4) of the MIA, 1906 gives the assured right to "recover from the insurer in respect of the proportion of the loss which falls upon him; and in the case of a general average sacrifice he may recover from the insurer in respect of whole loss without having enforced his right of contribution from the other parties liable to contribute." This section draws a distinction between the right of an assured to recover for sacrifice and expenditure. A sacrifice by definition, is something which is incurred to avoid loss consequent upon a peril insured against and, as such, is one for which insurer are liable.<sup>13</sup> Thus, the owner of sacrificed property can expect a full indemnity from his insurers and is not obliged to give credit to the insurer for contributions which he may later receive from other parties to the venture. Where the insurer has indemnified the

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<sup>10</sup> Art. v. 1969 CLC.

<sup>11</sup> *The Eleni. v. Roseline*, which was involved a collision off the Norfolk coast, in May 1978.

<sup>12</sup> S. 66(4) of the MIA 1906. In general the subject of general average insurance is codified in S. 66 of the MIA, 1906. It must be remembered, however, that the Act is not compulsory and may be varied by the terms of the particular policies which are applicable.

<sup>13</sup> S. 66(2) of the MIA 1906.

assured, he is entitled to be subrogated to the rights of the assured against the owners of other interests who are liable to contribute.<sup>14</sup>

It may be argued that there could be no case for general average contribution where all the interests at risk were owned by the same person. However, this argument was rejected by the MIA, 1906<sup>15</sup> in which it was provided that "where ship, freight and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons". Thus, whether the interests are in the one hands of one assured or of several makes no difference to the liability of the insurer.

The insured's expenditure is treated differently where there is no "loss" of the insured subject-matter; consequently, the extent of the obligation of the underwriters is only to indemnify for the proportion of expenditures which the insured must still bear after taking into account contribution from the other interests involved in general average act. Since the underwriters have not paid for "loss" to the subject-matter insured, they have no claim by way of subrogation for such contributions.

Marine Insurance Act 1906 provides that where the loss was incurred not for the purpose of avoiding a peril insured against, the insurer is not liable for such a general average loss or contribution, unless the policy expressly provides so.<sup>16</sup> Thus, before underwriters become liable it must be determined whether the peril that threatened the venture was one which the policy insured

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<sup>14</sup> *Dickenson v. Jardine* (1868) 3 L.R.C.P. 639

<sup>15</sup> S. 66(7).

<sup>16</sup> S. 66(6).

**Missing pages are unavailable**

the purpose of averting or minimising a loss which would be recoverable under the insurance policy two aspects have to be contemplated. The first is that the peril must be one that is covered by the policy. Thus, in *Cunnard SS Co. v. Marten*,<sup>19</sup> where the operator of a vessel carrying a number of mules, insured not the cargo itself but his own liability for loss of the mules through the negligence of himself or his servants it was held that the policy was a liability policy and not a policy on the merchandise or the ship. The policy contained a sue and labour clause but omitted the negligence clause which exempts carriers from the effects of negligence of their servants or agents. The vessel was stranded during the voyage owing to the negligence of the plaintiff's servants and the plaintiff incurred expenses in saving the mules and in attempting to save others which were ultimately lost. The plaintiff sought to recover this expense under the sue and labour clause but his claim was rejected on the ground that the sue and labour clause only related to the averting or minimising of loss to the subject matter of a standard Lloyd's Policy namely the ship or the goods, and did not relate to liability. The sue and labour clause was held totally inapplicable in such a case.

The second condition is that there must have been a danger of loss which would have been covered by the policy. In *Weissberg v. Lamb*,<sup>20</sup> a claim was made in respect of an All Risks policy covering the removal of furniture from Holland to the United Kingdom. Some furniture was damaged during carriage. The insured complained that the carriers refused to deliver the furniture unless they were paid their carriage charges in cash. The insured thus paid the charges, this being the only way he could recover his furniture. He then sought

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<sup>19</sup> [1903] 2 K.B. 511.

<sup>20</sup> (1950) 84 Ll. L. Rep. 509.

to recover these charges under the suing and labour clause in the policy. It was held that the assured could not recover such payment, because payment in cash would not have been a loss which he could have recovered under the policy when it was issued.

The clause covers only the expenses which are incurred by "the assured, their factors, servants and assigns". It was established in the *Gold Sky*,<sup>21</sup> that the master and crew of the vessel were not to be regarded as the servants and agents of the assured for the purpose of Section 78(4). The same reasoning has been held to apply in the context of re-insurance. Thus, in *Uzielli v. Boston Marine Insurance Co.*,<sup>22</sup> a case decided under the Lloyd's SG policy which referred to "factor, servants and agents", it was held that the term did not extend to insurers who had effected a re-insurance policy. Here the insurers on a Hull policy re-insured with a French re-insurance Company which was in turn re-insured with further company. This second re-insurance covered only total loss and contained a clause requiring the re-insurers "to pay as may be paid on the original policy" as well as a sue and labour clause. The vessel ran ashore and was abandoned by the insured's owner to the first underwriters who in turn refloated and repaired her at a considerable expense and sold her. The insurer recovered from the first re-insurers who sought to recover from the second re-insurers under the sue and labour clause. It was held that they could not recover as the insurers were not the "factors, servants or assigns" of the first re-insurance company.

Sections 78(1) and 65(2) of MIA 1906 provides "proper expenses" as expenses which is interpreted as being limited to cover such expenses as were

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<sup>21</sup> *Astrovlanis Compania Naviera S.A.V. Linard, Gold Sky, The*, [1972] 1 Lloyd's Rep. 331.

<sup>22</sup> (1884) 15 Q.B.D 11.

reasonably necessary for the preservation of the subject matter or minimisation of the loss in the circumstances. Thus in *Lee v. Southern Insurance Co.*,<sup>23</sup> a vessel loaded with a cargo of palm oil and bound for Liverpool became stranded on the Welsh Coast near Pwllheli. To salvage the vessel it was necessary to land her cargo. The salvage operation was successfully done and the vessel was then towed to Carnarvon and made seaworthy for the remainder of the voyage. The shipowner sent the cargo overland by rail to Liverpool incurring expense of over £200. It was discovered by the insurers that had he waited until the ship was repaired and taken the cargo to Liverpool by sea, the freight could have become no more than £70. It was held that the insured was therefore entitled to recover only £70 under the sue and labour clause.

Section 78(2) of MIA 1906, specifically excludes general average losses and contributions, and salvage charges, from scope of the sue and labour clause. The exclusion of salvage charges was necessitated by the definition of salvage charges in Section 65(2) as covering only charges recoverable under Maritime Law by a salvor independently of contract. A salvor is clearly not the assured; and of their factors servants and assigns as described in the Lloyd's SG Policy nor their agents as described in the new Institutes Clauses. This was held to be the case in *Aitchison v. Lohre*,<sup>24</sup> where the assured was not permitted to recover salvage charges paid by him for the recovery of the vessel. Charges incurred for contractual salvage, on the other hand, may be recoverable under the sue and labour clause. The established distinction between "salvage charges" and salvage under special contract would seem to

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<sup>23</sup> (1870) 5 L.R. C.P. 397.

<sup>24</sup> (1879) 4 Ap.Cas. 755.

be a simple matter. Difficulties may arise, however, with respect to so called the “no cure no pay” form of salvage agreement issued by Lloyds under which the amount of salvage remuneration falls to be determined by arbitration, if not agreed beforehand. The question arises as to whether contractual salvage, in which the amount of remuneration is not determined beforehand but is agreed to be submitted to arbitration for assessment under the general Maritime Law falls within the sue and labour clause or not. The problem is arguably compounded by Rule VI of the York Antwerp Rules of 1974 which states that “expenditure incurred by the parties to the adventure on account of salvage whether under contract or otherwise, shall be allowed in general average to the extent that the salvage operations were undertaken for the purpose of preserving from peril the property involved in the common maritime adventure.” The effect of this Rule is that the established distinction is now of little practical importance. Where such expenditure does amount to general average it would normally be excluded from the scope of the sue and labour clause. It must be pointed out that on the other hands the distinction should hold good where the Rule does not apply, as is the case, for example, where the ship is the only interest imperilled at the time when the services are rendered.

In any event sue and labour expenses are, as a general rule, covered under liability policies.<sup>25</sup> The liability policy, however does not cover expenses for prevention of pollution, if the it does not contain a sue and labour clause. The point arose in a case<sup>26</sup> where salvage was carried out as to the ship’s hull in order to save the cargo and prevent an explosion occurring from a leaking

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<sup>25</sup> Ivamy. E.R.H. *Marine Insurance*, 3rd ed., 1979, at p. 480.

<sup>26</sup> *Seaboard Shipping Corporation. v. Jocharanne Tugboat Corporation et al, and Oceans Mutual Underwriting Association Ltd.* [1972] A.M.C, 2151 (2nd Cir.).

vessel. It was held that the P & I club was liable for the expenses incurred to save its interests. However under the policy, it is not liable to the expenses which incurred for the prevention of pollution liability because it did not contain a sue and labour clause.

Every P & I Club under its ordinary cover allows a member to recover extraordinary costs and expenses reasonably incurred, after the happening of an accident, for the purpose of avoiding or minimising any liability. The club by reference to the phrase an "extraordinary", effectively excludes sue and labour expenses of general operation, e.g. the cost of keeping equipment for the prevention of pollution. A further requirement for bringing such expenses within the sue and labour clause is that a club will cover only expenses which have been incurred in avoiding or minimising any liability or expenditure against which the member is insured by the club, i.e. only in respect of insured risk insured against. For example, the Club Rules generally state that the club, by a deductible clause, would be liable to indemnify the member for part of the insurance claim, so the club shall be liable for sue and labour expenses only for the proportion of the costs and expenses incurred in relation to that claim. However, the Committee of general managers of the club are generally given a discretion,<sup>27</sup> which will often exercised in favour of the member's claims, so as to award the full amount of costs.

It is a matter of some doubt, however, whether the ship owner's P & I club would indemnify the assured for expenses which were incurred in order to save two or more interests involved in a maritime adventure, e.g. vessel, freight,

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<sup>27</sup> Discretion of the club manager or committee plays an important role in P & I cover. There is similar importance in case of non coverage. Such a discretion, which is based on the concept of mutuality that insured and insurer are the same people, symbolises the club attitude, contrary to market attitude, that if possible a member's claim should be brought within the cover even though it does not fall neatly in one of specified risks.

cargo and third party liability, or in order to save only one interest, but one which incidentally saves or benefits one or more of the other interests, e.g. where an oil laden tanker becomes stranded and begins to leak oil into the water, a short distance off-shore salvage may be rendered primarily to save the vessel, but it will also succeed to prevent or minimise an oil spillage, which would consequently reduce the amount of possible oil pollution liability and clean up costs to be covered by the P & I club. The basis, for recovery with regard to, of both cargo and hull liabilities is the sue and labour clause. Although the salvage service may well prevent a disaster for which the club might incur substantial liability, the club's cover for such liability is not allowed, since any calculation of award based on the possibility of preventing of pollution liability would be "extremely hypothetical."<sup>28</sup>

#### **1.4. Insurance against salvage charges.**

In fact, the Lloyd's Ships General, S.G, Policy does not expressly mention "salvage charges". However, the assured is entitled to an indemnity in respect of "salvage charges", for section 65(4) of the MIA 1906 states: "Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils". Salvage charges are the charges recoverable by a salvor under Maritime Law, independently of contract, and do not include the expenses of services in the nature of a salvage rendered by the assured or his agent, or any person employed for hire by them, for the purpose of averting the peril,<sup>29</sup> since they are incurred in preventing a loss by a peril, not perils alone. It is worthy of note

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<sup>28</sup> See *Seaborne Shipping Corporation v. Jocharanne Tugboat Corporation, et al*; *Oceanous Mutual Underwriting Association Ltd.* [1972] A.M.C. 2151 at p. 2155.

<sup>29</sup> S. 65(2) of MIA 1906.

that underwriters are not liable for salvage charges under the policy if the charges were incurred in preventing a loss which is otherwise not covered under the policy. For example, if the reason for the salvage services was the unseaworthiness of the vessel and this was within the privity and knowledge of the shipowner, the underwriters are not liable as the services were not rendered by reason of an insured peril.<sup>30</sup>

In order to recover salvage charges, the assured need not, and in fact ought not, to claim for a loss by payment of salvage, rather he should claim in respect of the loss which occasioned the payment of salvage, e.g. loss by perils of the sea.<sup>31</sup> Thus, the liability of the underwriter for salvage charges depends not on his having engaged to indemnify against them by any express words in the policy, but upon the general Maritime law, as a direct and immediate consequences of perils against which he expressly insure.

As a matter of practice, the determination of a salvage award is tied to the salvaged values. This creates a double restriction on recovery against underwriters, because not only is the claim limited to 100 percent of the insured value, but if the property is under insured the claim is proportionately reduced. The former principle is demonstrated in the *Aitchison v. Lohre*,<sup>32</sup> where a vessel was insured for £1200 and was salvaged by salvors with whom no contract was made. They obtained a salvage award for £800. The assured elected to repair the vessel and the cost of repairs became £1200. He claimed an indemnity in respect of this amount and also of the salvage award. It was held

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<sup>30</sup> *Ballantyne v. McKinnon* (1897) 2 Q.B. D. 455. This principle is reiterated in clause 11.4 of the Institute Time Clause, Hulls (1/10/83) which reads: "No claim under this clause 11 shall in any case be allowed where the loss was not incurred to avoid or in connection with the avoidance of a peril insured against".

<sup>31</sup> *Aitchison v. Lohre* (1879) 4 App. Cas. 755. and is now declared to be so by S. 65 of the MIA 1906.

<sup>32</sup> (1879) 4 App. Cas. 755.

by the House of Lords that the insurer was only liable to pay the £1200 as this was the full sum insured. Thus when the contributory interest is under-valued in the policy, or only part of it has been insured, the payment by the insurer will be reduced in proportion to the under-insurance.<sup>33</sup>

It was observed that remuneration, as an enhanced award, is payable for, life salvage, by analogy to liability salvage, if the life salvors also save property. It would appear that the shipowner, having to pay such an award, could recover it from his underwriters, subject, of course, to a deduction in proportion to his under-insurance. In *Grand Union (Shipping) Ltd. v. London Steamship Owner's Mutual Insurance Association, Ltd: The Boworth (No. 3)*,<sup>34</sup> where salvors rendered salvage services to a ship and her cargo in distress in the north sea, and saved the lives of all her crew, it was held that the enhanced award payable by reason of life salvage was recoverable from the insurer under a Hull policy. This was based on the view of the McNair. J.<sup>35</sup> "It needs possibly a little stretching of the language to say that a salvage award in so far as it reflects an element of life salvage give rises to a charge incurred in preventing loss by perils insured against. I think the answer to that is that by the practice of the Admiralty Court an award made in these circumstances is treated as being, and is in fact, an award for services rendered to the ship and cargo". However, it must be realised that this decision has no application where the assured is liable to pay a salvage award to a salvor in respect of life salvage only.<sup>36</sup>

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<sup>33</sup> *Balmoral Steamship Co. Ltd. v. Marten*. [1902] A.C. 511. This principle is now reflected in section 73(2) of MIA 1906 which provides that where the insurer is liable for salvage charges the extent of his liability must be determined on the same principle as is applied to general average.

<sup>34</sup> [1962] 1 Lloyd's Rep. 483.

<sup>35</sup> *Id.* at p. 490.

### 1.5. Pollution coverage under Institute Time Clauses, Hulls.

Since government action was taken to destroy the Torrey Canyon and her cargo to reduce the risk of pollution, it was realised that such action could result in difficulties in determining the extent of the cover provided by the standard hull clause. To clarify the situation where a similar issue arises the Institute of London Underwriters has published a standard pollution hazard clause in their hull policies.<sup>37</sup> The Institute Pollution Hazard Clause was first introduced on 1st August 1973 to provide the assured with additional cover to the extent that action is taken by a government<sup>38</sup> against the vessel to avoid or reduce the risk of pollution, provided, "such act of governmental authority has not resulted from want of due diligence by the assured, Owners, or Managers of the vessel or any of them to prevent or mitigate such hazard of threat."<sup>39</sup> The clause, therefore extended the insurance to cover loss or damage to the vessel in the following circumstances:

(1) The loss or damage must be caused by a governmental authority when acting to prevent or mitigate real or threatened pollution hazard, and;

(2) the pollution hazard must result directly from damage to a vessel covered by the policy.<sup>40</sup>

Intervention of governmental authority is confined to those cases in which there is a real and imminent threat of large scale oil pollution at sea. In such a

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<sup>36</sup> See Matthew J. in *Nourse v. Liverpool Sailing Shipowners' Mutual Protection and Indemnity Association* (1896) 2 Q.B.D. 16 at p. 19.

<sup>37</sup> Robert. H. Brown, *Marine Insurance, vol. 3- Hull Practice*, 1975, pp. 354-5.

<sup>38</sup> Such a power accorded by 1969 International Convention on Intervention, in the High seas in cases of pollution casualties.

<sup>39</sup> Clause 7, Pollution Hazards, Institute Time Clauses, Hulls, 1/10/83.

<sup>40</sup> *Id.*

case the governmental authority give directions to the shipowner or salvor, with objective preventing or reducing oil pollution. If shipowner measures prove inadequate, a governmental authority will take control of the ship, as it happened in Torrey Canyon, and does whatever it is necessary for prevention or reduction of pollution. Regard must, however, be given to any risk to human life; and unreasonable loss or damage caused as a result of the governmental authorities' intervention, when compensation and insurance is claimed. The pollution hazards clause only covers loss or damage to the insured vessel itself. Thus, it excludes liability in respect of the cargo, loss of life, personal injury and so on. However, it seems it was not intended to exclude damage to a vessel, other than vessel directly involved, provided the damage to was for which the underwriters are liable under the clause.

## **Chapter 2. The pollution liability cover under Comprehensive General Liability, CGL policy.<sup>41</sup>**

### **2.1. In general**

Shipowners' liabilities may arise out of any operation of their vessels which might result, for example, in loss of life, personal injury, damage to property, damage to cargo or damage to the environment. To provide themselves with cover in respect such liabilities, shipowners hold policies of standard form comprehensive general liability (CGL) insurance, which provides that the

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<sup>41</sup> Although there is a certain amount of pollution liability cover in the U.K. insurance market, the American underwriters, and courts, have been more involved with the Comprehensive General Liability policy. This is why, despite the similarity in principle, most of discussion of the pollution liability insurance has been focused on American practice.

insurer shall "pay on behalf of the insured all sums which the insure shall become legally obligated to pay as damages because of ..., property damage ...".

Initially pollution claims were, prior to the mid-1960s, few in number. This was so, because neither public opinion nor the shipowning industry nor insurers appreciated the magnitude and gravity of the pollution problem. In consequence no exclusion conditions nor any specific form of insurance were provided in the case of pollution damage. Whenever pollution occurred suddenly and accidentally it was automatically covered by the Comprehensive General Liability policy (CGL policy), covering the activities of the firm insured.<sup>42</sup>

In the light of experience of the huge loss resulting from accident involving oil tankers, in particular the Torrey Canyon, insurers became fully aware of the pollution phenomenon and systematically began to exclude the risk of pollution or environmental damage from their standard general, public and third party liability policies, because the ability to insure against pollution could presumably act to lessen the deterrent on the part of polluters to prevent pollution. Pollution liability insurance has also been disfavoured by the insurance industry because of its general reluctance to accept exposure to liability for risks of unknown dimensions. Another basis for the underwriters' reluctance was that along with the increased limit of liability, the law sought to make the shipowner strictly liable for pollution damage. The clause in policies excluded:

"bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritants contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of

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<sup>42</sup> Howrikam, *Insurance Coverage for Environmental Damage Claims*, 15 Forum [1980] 551 at p. 552.

water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental".<sup>43</sup>

The language of this clause appeared to eliminate the insurability for all pollution except those which were in the words of policy, "sudden and accidental." The term "accidental" in addition to its commonly accepted meaning namely (unexpected, unforeseen or unlooked for event)<sup>44</sup>, has acquired a wider meaning as a result of extensive analysis and interpretation by courts.<sup>45</sup> In some cases the accidental event has been defined as an accident which includes a series of acts and does not have to result out of an isolated event.<sup>46</sup> In some other cases, in determining accidental nature judges examined an event with regard to whether it was intended or foreseen by the injured person, i.e. the claimant rather than the insured.<sup>47</sup> This view is inconsistent with the plain intention of the parties, or at least that of the insurer. This confusion was compounded by the tendency of the courts to decide doubtful issues in favour of the insured.<sup>48</sup>

Ambiguity has also resulted because of the generality in the language used in writing standard contracts. This has created theories under which courts have permitted the assured to recover for a broad range of

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<sup>43</sup> Taylor & Wilcox, *Pollution Exclusion Clauses, Problems in Interpretation and Application Under CGL*, 17 Idaho. L. Rev. 1981 at p. 506. A slight different form of exclusion is used in liabilities policy covering oil risks. The last clause is changed to read "whether or not the event is sudden and accidental". See. Goria. C.F. *Compensation for Oil Pollution at Sea: An Insurance Approach*, [1975] 12 San Diego Law Review, 717 at p. 729.

<sup>44</sup> Blacks Law Dictionary, 5th edition, 1979, p. 14.

<sup>45</sup> A number of British cases ruled the meaning of the term "accident". For example in *Fenton V. Thorley* [1903] App. Cas. 443 at p. 453, the House of Lords stated: "the word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss".

<sup>46</sup> See cases in Jerry. E. Lordwell, *Insurance and its Root in the Struggle between Protection of Pollution Victims and Products of Pollution*, [1980] Berkley Law Review, pp. 920-1

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

contamination related injuries under the comprehensive policy.<sup>49</sup> The rule that ambiguities in an insurance contract should be construed against the insurer, is an internationally accepted rule of insurance law. This rule is based upon the rationale that insurance contracts are contracts of adhesion between parties of unequal bargaining power<sup>50</sup> insurance companies being larger and possessing greater bargaining power than the insured with whom they deal. This view is open to the criticism that it ignores the fundamental principle that an insurance contract, like all other contracts, should be construed in a manner which gives effect to the intention of the parties to the contract rather than against one of them. To interpret this intention, the insurance policy must be taken into consideration as whole and then a decision must be made as to whether the clause is ambiguous or not. If this consideration fails to clarify the ambiguity, then, it would be logical to construe the ambiguity against the insurer.

It has been accepted that the phrase "sudden and accidental" is ambiguous and this ambiguity has not been clarified by the insurance policy. The courts have construed this ambiguity against the insurer, in favour of finding coverage.<sup>51</sup> However, such a construction has no application when actual evidence of the parties' intent is available. Moreover it has been held, in many cases, that such a construction has no validity in cases where the insured is a large, sophisticated business entity.<sup>52</sup> Thus, it is necessary to delete the

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<sup>49</sup> *The Applicability of General Liability Insurance to Hazardous waste Disposal*, 575 CAL. RVD, [1984] p. 475, at pp. 476-9.

<sup>50</sup> Eugene. R. and Evsoam....., *Liability Insurance Coverage for Pollution Claims*, Mississippi Law Journal, [1989] 699 at p. 705.

<sup>51</sup> See cases which deal with the interpretation of the ambiguity of the clause in, Thomas W. Murphy, and Nancy K. Caron, *Insurance Coverage and Environmental Liability*, Federal Insurance of Co-operation Council, FICC, summer 1988, 353. at p. 374.

<sup>52</sup> e.g. see *Mc Neilbine Inc. North River Insurance Co.* 654. F. Sup 525 (DNJ 1986).

phrase "sudden and accidental" in the clause or substitute it with "occurrence", in order to provide better cover for oil pollution liability, since oil spills are more often not sudden or accidental.

Another approach, adopted in a number of cases, has been to construe the term "sudden and accidental" as being equivalent to policy definitions of "occurrence". The courts, in adopting this approach, construe the pollution exclusion clause to restate the definition of occurrence and conclude that the term "sudden and accidental" has the same meaning as occurrence, i.e. the release "neither expected nor intended."<sup>53</sup> Thus, pollution exclusion has been construed as equivalent to the definition of occurrence and therefore most parties responsible for the emission of pollution, neither expected nor intended, may be covered by the insurance policy. This construction may be criticised on the basis that the courts have failed to recognise that pollution exclusion clauses contain two separate and distinctive sections, i.e. a section which excludes from coverage certain pollution and related events, and another which covers pollution damage where the cause is "sudden and accidental." To interpret one part of a contract so as to merely restate another part of the same agreement runs contrary to a well settled rule of contract law which states that an agreement should be read as a whole, giving effect, where possible to all of the agreement's parts.<sup>54</sup> It would seem to follow from this that, if the pollution exclusion clause truly covers an "occurrence" the pollution exclusion will be superfluous. In addition if one reads pollution exclusion clauses and definitions of occurrence as synonymous, this contradicts with what the insurer intended when drafting the clause. It should be remembered that insurance

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<sup>53</sup> See, Richard. F. Hunder, *id.* at pp. 907-909.

<sup>54</sup> A. Corbin, *Corbin on Contracts*, 1952. p. 914

companies created the pollution exclusion clause to escape liability which was imposed by occurrence based policies which lacked the exclusion. Therefore, a reading of a policy, without regard to an exclusion clause, would effectively leave the insurer in the same position, whether or not the policy had contained a pollution exclusion clause.<sup>55</sup>

It may also be argued that the term "occurrence" clarifies the intent of the insurer in order to include coverage resulting from a gradual process as well as a sudden event. The insurance industry defined this as, "an accident including continuous or repeated exposure to conditions which result, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."<sup>56</sup>

This definition poses several questions for an environmental claim. The first question is whether pollution damages are or ought to have been expected by the insured or not. Different interpretation was given to the word "unexpected". In a number of cases it was held that the result of even gradual and anticipated pollution constitutes an occurrence provided that the polluter did not actually intend to cause the result. Again, it was also held that, "in order for the insurer to prove that an environmental damage does not involve an occurrence, they must establish that the policy holder knew with a high degree of certainty that the pollution damage would result from its conduct".<sup>57</sup>

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<sup>55</sup> Mc Geough, *Insurance Coverage of Actions For Environmental Damages, International Law - Defence and Insurance Problems*, [1977] p. 27.

<sup>56</sup> Soderstrom, *The Role of Insurance in Environmental Litigation*, 11 Forum, 762 at p. 764.

<sup>57</sup> See cases in, Ashley, J. *Representation of the Insurers, Interest in an Environmental Damage Claims*, Defence Council Journal, January 1987.

The second question concerns the date of the occurrence (which must be known in order to decide whether the occurrence falls within the coverage period of a particular insurance policy or not. This question is discussed under different theories. The exposure theory states that the date of the occurrence is the date on which the process causing the damage commences. The "manifestation theory" places the occurrence date at the time when damage first manifested itself to the injured party, in order to maximise insurance coverage. The "diagnosable theory places the date of occurrence on the date when the damage is discovered", in order to hold an insurer liable for indefinite period after the expiration of the policies. The "combined theory" puts the date of occurrence on the entire period of time of continuing damage,<sup>58</sup> in order to coverage be available at an any stage in the process.

The third question concerns the number of occurrences in a claim. This question arises because the contamination is often the result of repeated leaks, spills, or emissions of pollution over an extended period of time and most insurance polices contain a limit on the amount of coverage for each occurrence. The courts have tended to adopt one of approaches. The first is a cause oriented approach under which there is a single occurrence when a single uninterrupted and continuing proximate cause leads in multiple injuries. Therefore a finding of multiple occurrence is possible where multiple causes of pollution are established. The second approach is "an effect oriented approach"

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<sup>58</sup> For more discussion of theories, see Carl A. Salisbury, *Pollution Liability Insurance Coverage, the Standard Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, published in *Environmental Law*. North-western School of law and Clark College, vol. 21, 1991, p. 357 at pp. 382-386.

whereby multiple injuries will be considered as s multiple occurrences regardless of whether one or several causes effected harm.<sup>59</sup>

The principles of "indemnity" and "right of defence for Insurers", as major characteristics of an insurance contract, may be used as means for the extension of a pollution exclusion clause to cover the pollution liability.<sup>60</sup> The duty to defend is broader than the duty to indemnify, which is limited to actually covered events. The right of defence exists even if any allegation in a suit is groundless or false. Therefore, the insurer may be liable to the assured even if there is only a potential coverage.<sup>61</sup>

In addition to the above mentioned principles, the courts have established several other principles in order to find insurance cover for injuries caused by pollution. One of these was to limit the subject matter of the pollution exclusion clause. By examining the manner and the type of emissions listed in the initial phrase of the clause which describes the scope of potentially uninsurable pollution, the court implied that the clause applied only to injuries directly caused by industrial contamination of the environment at large.<sup>62</sup> This is simply a particular application of the "Ejusdem Generis" rule of interpretation which allows courts to infer that specific words restrict the meaning of more general terms when specific terms proceed the general terms in a given phrase.

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<sup>59</sup> See related cases and more details of methods in, Jerry Hougland Stewart, *The Pollution Liability Insurance, A Problem- Suggestion for a Solution*, Capital University Law Review, 1988, p. 677, at pp. 686-8.

<sup>60</sup> Brook Jackson, *Liability Insurance for Pollution- Claims: Avoiding Litigation Wasteland*, Tulsa Law Journal, vol. 26, 1990, 209 at p. 212.

<sup>61</sup> Jonathan C. Averback, *Comparing the Old and New Pollution Exclusion Causes in General Liability Insurance Policy: New Language the Same Result*, *Journal of Environmental Affairs*, [1987] 601 at p.611.

<sup>62</sup> *Id.* at p. 616.

The subject matter of pollution exclusion is also limited when the insured is not alleged to have injured other parties by environmental contamination. The language used in the initial phrase of the pollution exclusion clause eliminates coverage for injuries caused by pollutants emitted "in or upon land, the atmosphere or any watercourse or body of water...". This implies that emissions which do not enter the general environment, the land, water or air at large, are covered.<sup>63</sup> Therefore, injury from explosions arising out of the discharge of petroleum are covered because they do not result from contamination of land, water or atmosphere.

An additional rule which the courts apply in construing an insurance policy is the doctrine of the insured's reasonable expectation of coverage, i.e. the policy covers an insured when an average insured would have thought that the policy covered the insured's business against a damages claim which a third party has brought against the insured. Various factors must be taken into account in determining the reasonable expectation. These include the nature of the insured's business, the type of the property, strict liability of the insured even though the insured acted without fault, and the favourability of court towards coverage are important factors which foster the belief that the insured expected coverage.<sup>64</sup>

In determining whether the exclusion applies or not, attention has often been focused upon the polluting event rather than the resulting damage because, the phrase "discharge, dispersal, release, or escape is sudden and accidental," and "occurrence" both refer to unexpected and unintended events rather than to consequential injuries. But since the phrase "sudden and

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<sup>63</sup> Id. P. 618.

<sup>64</sup> Richard F. Hunter, *The Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, University of Illinois, [1986] at p.914.

accidental" has been construed as equivalent to unexpected and unintended, it can be concluded that the phrase can be extended to cover only damages which are neither expected nor intended.

### 2.1. Clean up costs under CGL policy

The general provisions of a standard CGL policy usually provide that the insurer "pay on behalf of the insured all sums which the insured should become legally obligated to pay as damage because of injury to or loss, destruction, or loss of use of property."<sup>65</sup> The question then arises as to whether such a policy, has been taken out by polluter's assured years before pollution clean up, covers expenses incurred in cleaning up pollution, and if it is so whether the claim should be classified as property damage which is recoverable under the CGL policy.

This policy defines property damage as "physical injury to or destruction of tangible property which occurred during the policy period, including loss of use thereof."<sup>66</sup> It has been found that response costs are not property damage, response cost being viewed as economic loss.<sup>67</sup> This view was not without its opponents, and in some cases the courts considered that environmental contamination might indeed amount property damage, since the discharge of pollution into water causes damage to the tangible property in which a government has a property interests or at least, which is not owned by the insured.<sup>68</sup>

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<sup>65</sup> Scoderstron, *The Role of Insurance in Environmental Litigation*, 11 Forum, [1970] 762, 764.

<sup>66</sup> D. Lay lock, *Modern American Remedies*, [1985] p. 5.

<sup>67</sup> *Mavz. v. Canadian Universal co.*, 804 F, 2d 1355 (4th cir. 1986). This is quoted from, Jonathan Bank..., *The Reinsurance of Environmental Claims*, published in *Leading Developments in International (Reinsurance and Pollution Insurance and Industrial report*, 1991, Lloyds of London Press Ltd, at p. 103.

<sup>68</sup> See cases at Id. p. 76.

Clean up costs are usually imposed by statute.<sup>69</sup> Accordingly it may be argued by an insurer that since clean up costs are imposed by government, they are a mandatory form of relief which are not covered by the insurance. It follows for this that, there would be no room for a defence. In consequence insurers would have no obligation to provide coverage for expenses incurred as a result of complying with mandatory injunctions to which they have no defence. It was also argued, that claims for reimbursement of costs are equitable relief not damages insured by CGL policy.<sup>70</sup>

In finding that an action for recovery of clean up costs constitutes an equitable form of relief, it is noted that the clean up cost might not be covered under the terms of an insurance policy.<sup>71</sup> The reason for this is that under the terms of the policy, the insurer is not liable to pay all sums the insured was legally obligated to pay in damages. This is construed from a technical interpretation of damage which differentiates between recovery of clean up costs and recovery for damage to natural resources.<sup>72</sup>

An insured might equally argue that damage is not itself a defined term in a CGL policy. Consequently, in the absence of a limiting definition, damage is a broad enough term to include the clean up costs which the insured pays for governmental action. There has been something of a divergence as between the courts in different jurisdictions over the question of whether the equitable injunctive relief, sought by many environmental claims, includes damages

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<sup>69</sup> For example. 1980 U.S.A Comprehensive Environmental, Response, Compensation and Liability Act, known as Super Fund Act

<sup>70</sup> Lonnei Anne Jones. *Insurance coverage for Hazardous Waste Clean up*, Catholic University Law Review, vol. 39, [1989] 195 at pp. 203-4.

<sup>71</sup> Id. p. 206.

<sup>72</sup> See Brook Jackson, in *supra*. No. 60.

which are payable under a CGL policy. To date "a variety of courts have held that clean up costs are not damages within the meaning of the CGL agreement."<sup>73</sup>

The question may also arise whether the costs incurred by the insured to prevent further pollution should be paid by the insurance company or not. The insurer may argue that such costs are not covered under third party general liability policies because the insured has incurred no liability damage. The insured may respond by arguing that the costs of clean up were incurred in order to prevent the spreading of pollution to surrounding property owned by other parties for whom contamination could constitute property damage covered by the policy. The insured's position on this point has been supported by cases involving preventive costs necessarily incurred in order to prevent imminent damage to other properties.<sup>74</sup>

The assured may bear the preventive cost where there damage is not imminent but merely potential. In support of this argument, emphasis must be put on the policy definition of "occurrence" which requires that damage be neither expected nor intended. Since potential damage may be expected in dangerous activities it cannot be said to be imminent and it is therefore not covered.

An insured may be compelled to clean up under an mandatory injunction. It may be asked whether the costs of complying with it constitute liability for damages covered by liability policy. Traditionally, courts have held that the assured is not indemnified for such costs. It has been suggested that such

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<sup>73</sup> Bruce Rozonowski, *Coverage Issues Presented by Clean up Cost, see in the Leading Developments in International Reinsurance and Pollution Insurance*. An industry report, 1991, Lloyds London Press Ltd, p. 73 at p. 75.

<sup>74</sup> J. Ashley, *Representation of the Insurer's in an Environmental Claim*, Defence Council Journal, January 1987 p. 11 at pp. 14-5.

costs could be covered by the policy as the equivalent of damages which could be collected by a government for its own clean up work.<sup>75</sup> In response to this, it may be said that such injunctive relief is not covered because the plain language of the policy limits coverage to actual damage.

Generally speaking, according to the general rule, in insurance contracts, ambiguous terms should be construed against the insurer and consistent with the reasonable expectation of the insured. Since the term "damage" is subject to different reasonable interpretations, it is open to argument as to whether denial of coverage based on the technical distinction between legal damage and equitable relief might not be inconsistent with the insured's reasonable expectation.<sup>76</sup>

### **Chapter 3. The role of Protection and Indemnity Clubs in pollution liability coverage**

#### **3. 1. Introduction**

In spite of the insurers reluctance to accept pollution risks, oil tankers have long been protected against third party claims arising from pollution damage. Most pollution liability insurance is handled by P & I Clubs, in which each party mutually, on a non-profit making basis, agree to contribute to the losses of the others. P & I Underwriters seek to achieve this mutuality by ensuring that over and above membership of the Club each member pays, a premium the amount of which is just enough to cover his claims and the cost of servicing his claims.

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<sup>75</sup> Id.

<sup>76</sup> See Michael. C. Rullet, *Environmental Clean up Costs and Insurance: Seeking a Solution*, Georgia Law Review, vol. 27, [1990] 705 at p. 712.

The club's involvement arises under the contract of insurance with its members, shipowners and charterers, as set out in the certificate of entry, coupled with the rules of club.<sup>77</sup> The rules of most clubs very commonly include an important stipulation that it shall be a condition precedent of members' right to recover from the fund of the club, in respect of any liability, costs and expenses, that the member shall first have discharged or paid by own calls. In other words, the ship owners contract with the clubs is strictly one of indemnity, and if it so wishes, the club can insist that it is under no liability unless and until the member has first paid the relevant costs or liabilities from his own fund. In practice, it is commonplace for clubs to waive this rule in settling claims brought against their active members, but a stricter attitude is more likely if there are real doubts whether the member could meet his liabilities in the first instance. The most common example of this is where the member has already gone bankrupt whether as a result of the incident itself or for some other reason.

The clubs have effectively responded to the liabilities imposed upon ship owners for pollution resulting from oil and other hazardous substances. Their coverage now embraces civil liability which is governed by CLC and includes other statutory and common law and tort liability, criminal liabilities for fines, voluntary liability as assumed under TOVALOP agreement, and extraordinary expenses which result from government order or action. Clubs have not only extended cover for salvors to include not merely P&I Clubs cover for oil pollution arising out of the operation of the salvage, but also cover for oil pollution liabilities when salvors are engaged in action as professional salvors,

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<sup>77</sup> Each club has its own set of rules under which the club conducts its business and provides cover for the risks. The Rules of clubs are very similar because the interest of most members are the same. The amount and scope of the cover constantly is changing and developing in order to meet better the needs and requirements of a club's members.

not as a ship owner. Under the heading of "sue and labour clause" clubs cover clean up costs not otherwise recoverable under the rules.<sup>78</sup>

Most P&I Clubs' cover is limited to oil pollution damage because the risk of a catastrophic claim for oil pollution is higher than the risks in other fields. The maximum limit is based on the amount of reinsurance which the brokers are able to obtain.<sup>79</sup> One of the most important aspects of the terms offered by the clubs is that the cover, except in relation to oil pollution risk, time charterer risk, and fixed premium, is unlimited. The clubs are able to offer such unlimited cover because of their participation in the pool and market excess reinsurance.<sup>80</sup> However a large insurance package which an owner may buy to obtain limited cover will always compare favourably with unlimited exposure.

Heavy claims made against a particular club do not fall only on the members of that club, but beyond a certain figure, are shared proportionally by the members of the clubs which are parties to the Pooling Agreement. Smaller losses are retained by the club whose member caused them.<sup>81</sup> The excess of this amount is reinsured by club in the group pool. The group then collectively reinsure their risk in excess of the pooling amount.<sup>82</sup> The main advantage

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<sup>78</sup> See, AF. Bessemer Clark, *The Role of the Protection and Indemnity Club in Oil Pollution*, 1980, *International Business Lawyer*, vol. 8, 204 at p. 205.

<sup>79</sup> *Id.*

<sup>80</sup> PGF. Leader, *Protection and Indemnity Insurance*, 1985, *Maritime Policy and Management*, vol. 12, No. 1, p. 71 at pp. 72-4.

<sup>81</sup> *Id.* The figure of cover for club, reinsurance company and group pool are varied year by year. Currently each member club retains the first US. \$12 million per claim.

<sup>82</sup> The figure regarding oil pollution is currently, 1993, up to US. \$ 700 000 000.

afforded by such pooling arrangement is that the clubs can gain reinsurance cover at the cheapest price.<sup>83</sup>

P&I Clubs, in addition to their main purpose in dealing with payment of claims, have a subsidiary role as well. This is done by providing administrative help through issuing certificates of financial responsibility and sending practical assistance to vessel owners, after an oil spill. The clubs handle many matters consequential upon the accident, e.g. obtaining reinsurance for some of the extraordinary risk which flows from the accident, assessing legal responsibility of the owners, and supporting their interests.

### **3.2. Scope of cover**

#### **3.2.1. Cover for pollution liability**

The Clubs cover extends to the owner of the insured vessel in respect of civil liability for oil pollution, which is increasingly governed by CLC<sup>84</sup>, and includes other statutory liability and common law liability. P & I Clubs also cover criminal liability for fines; voluntary liability as assumed under the TOVALOP,<sup>85</sup> and expenses which result from governmental action in prevention of oil pollution. It also extends cover to members' liabilities under a salvage agreement. Under the general heading of "sue and labour", the Clubs cover

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<sup>83</sup> The size of the international group and spread of risk is such that the re-insurance premium is more favourable than any individual purchase.

<sup>84</sup> The cover for CLC is granted to tanker members under a "blue card" scheme whereby the standard clubs' Rules on CLC liability are automatically incorporated in to the insurance cover.

<sup>85</sup> The cover fro TOVALOP is granted to tanker owners under a "green card" in which the club's Rule on TOVALOP are automatically incorporated in to the insurance cover.

voluntary clean-up and expenses in the nature of salvage not otherwise recoverable under the other Clubs' Rules.

The Rules of the club extend its cover to liability for "contamination" or "pollution". These terms are not usually defined in an insurance policy. It is necessary to look to the popular meanings of these words, and to such definitions as have been provided in judicial decisions, conventions and contracts, with the proviso that these must all be considered in the context of the actual situation, from which they arose or with reference to which they were framed. Generally speaking, there are considerable similarities and overlaps between the meaning of pollution and contamination. If there has been pollution there will usually also have been contamination, and vice versa, even if one term rather than the other might seem more appropriate on any given occasion.

The assured is insured in respect of his liability for contamination or the cost of any measures reasonably taken for the purpose of avoiding or minimising pollution. There is no specific mention of cover for clean-up costs in a Club's Rules. The provision of cover for the cost of reasonable measures for avoiding or minimising pollution, in addition to the insurance of the liability for contamination, is similar to, and arises out of, the general principle that an assured may and should use all reasonable efforts to avert or to minimise a loss. Thus, the mere fact that the insured has incurred the costs to avert or minimise his loss or damage is sufficient to enable him to recover the costs from the insurers. As a result, the right of the insured to recover the clean-up costs does not depend upon the existence of the specific words in insurance policy.

The Club covers the liabilities, losses, damage, costs and expenses incurred in consequence of the discharge or escape of oil or any other substances. The use of the words "other substances" makes it necessary to

consider what substances, other than oil, are subject to this reference. The words used are found under the heading of Pollution Risks. The same Rule also discusses liability for contamination and pollution. From these two it can be construed that the words "other substances" refer only to the polluting or contaminating substance. Thus if the insured incurred expenditure in preventing non-polluting or contaminating substance, from reaching the shore, it is conceivable that there would no cover under the Club Rules.

The cover extends to "costs and expenses" incurred by a member in consequence of a discharge or escape from an entered ship in the club, having regard to the duty to take measures to prevent, avoid, or minimise pollution damage. Generally the phrase "costs and expenses" is not defined in Club Rule-Books. However, this phrase and its consequences are compatible with the words used in the definition of general average in Section 66 of the 1906 MIA. The law of general average involves extraordinary expenditures other than ordinary disbursements, which are necessary for keeping the ship in an appropriate condition to carry out the trade. The definition of the phrase in the MIA 1906 Act, by reference to costs which are of an "extraordinary" nature, effectively excludes from pollution risks cover expenses of general operation costs. The effect of exclusion is that the insured has to bear certain costs which he would have to incur in any event. If, for example, a salaried employee were to devote a part of his time to the claim in question, the insured could not recover from the insurers a proportion of his salary. So also the office expenses of the insured, reasonable use of the vessel or her equipment are excluded, although they have increased by virtue of the event. This exclusion is based on the fact that the club cannot be expected to reimburse an owner for work done by crew or officers which the member could have discharged by means of regular wages or overtime pay or mere ordinary running costs.

It is conceivable that a situation could arise in which the insured might find it in his interest and in the interests of the insurer to incur special expenses for dealing with the spill, rather than to devote part of his retained services. For example, additional costs, such as salaries of persons specifically employed to deal with the spill, overtime and travel for personnel permanently employed, costs of materials used, depreciation of equipment costs used and other costs which would not have been incurred if the spill had not occurred; and fixed costs, such as salaries of permanently employed, capital cost of equipment used.<sup>86</sup> Consistent with the general principle of indemnity that a member is not allowed to benefit by insurance, clubs normally have a Rule which states that when a member, as a consequence of events which may cause him to become liable has saved expenses or prevented liability which would otherwise have been incurred and which would not have been covered by the club, the club may deduct from the indemnity an amount which corresponds to the benefit acquired by the member who are the insured and the insurer at the same time. Thus, additional and fixed costs which are directly involved in reduction of liability or indemnity may be recovered by the club, subject to the Omnibus Rule whereby the recoverable costs and expenses depends upon the discretion of the clubs' committee.

The Club's cover has extended to the cost of any measures reasonably taken for the purpose of avoiding or minimising pollution liability or any resulting loss or damage together with any liability for loss or damage to property caused by measures so taken, i.e. a sue and labour clause. The Club's Rules imposes the duty to minimise liability after an occurrence of any casualty, event or

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<sup>86</sup> The analysis of pollution damage by fixed and additional costs has been developed particularly by the OECD, see e.g. *Combating Oil Spill*, OECD, 1982, Paris; and *Compensation for Oil Pollution Damage*, OECD, 1981, Paris.

matter capable of giving rise a claim. In the other words, the sue and labour clause does not come into operation until a loss covered by the policy has occurred.<sup>87</sup> Thus it can be construed that the sue and labour clause does not extend cover where there is a cost incurred to remove a threat. To remedy this deficiency, another provision extends cover to costs of any measures reasonably taken to prevent an imminent danger of discharge or escape of oil or any substance which may cause pollution. i.e. pure threat removal measures.

The clubs also extend cover to pollution liability arising out of collision through special mutual clubs which are usually designed by tanker owners, e.g. TOVALOP. In addition, the clubs cover liabilities and costs incurred as result of collision between a member's ship and any other ship to the extent of four-fourths of the members liabilities, costs and expenses relating to "pollution or contamination of any real or any personal property or things whatsoever (except other ships or vessel with which the entered ship is in collision or property on such other ship or vessel)."<sup>88</sup> In other words, the club offers full cover for pollution liability which results from collision and which is wholly excluded from the RDC.

### **3.2.2. Financial limits**

Although in general cover given by clubs is unlimited,<sup>89</sup> unlike hull and cargo, there is an exception to this general rule. The club's maximum liability for claims in respect of pollution shall be limited to a sum which may vary from time

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<sup>87</sup> See Lush. J. in *Xenos v. Fox* (1868) 4 L.R. C.P. 655 at p. 667.

<sup>88</sup> See, e.g. Rule 19(10), The North of England Protection and Indemnity Association Limited, 1991-92.

<sup>89</sup> The Clubs are able to offer such unlimited cover because of their participation in the pool and market excess reinsurance.

to time.<sup>90</sup> During the period of the insurance the assured may incur liability of the same type on more than one occasion, so as to entitle him to make more than one claim against the insurer. It has been stated in the Rule that the maximum limit of cover is in respect of "each entered ship" or "each accident or occurrence". This condition make it clear that the maximum cover is not reduced because of the occurrence of an event giving rise to a claim. The full figure will be available for each later claim. Even if there is not such a clear description in the Club's Rules, the insurer is still liable for each successive loss, in spite of difficulties in determining whether or not a continuing series of disasters involving a covered vessel is one single accident or occurrence or many such occurrences.<sup>91</sup> Section 77(1) of the MIA 1906 states: "Unless the policy otherwise provides, and subject to he provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured".

It can be argued in favour of limited cover that it would be unwise for the clubs to offer their members unlimited cover when they are by no means certain that they can meet a claim arising out of pollution which may result in a catastrophic accident. Furthermore, there would be a possibility, in the case of unlimited coverage for pollution liability, that the club which shoulders primary liability would be unable to pay and be forced into liquidation either by its own members or by a third party claimant. The effect of this would be disastrous, not only for the club, but also for the reputation and general prestige of the P & I Clubs system around the world as a whole. Such loss of confidence might well bring about the demise of the P&I Club insurance system.

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<sup>90</sup> For example, see Appendix A to Rule 2(A), The Rule of UK Mutual Steamship Assurance Association (Bermuda) Limited, February 10, 1990.

<sup>91</sup> For legal definition of "accident" or "occurrence". see chapter. 2. at p. 59-60.

The amount of limitation for claims in connection with pollution by oil or other hazardous substances, either generally or in relation to any particular part of the world, flag or class of vessel, trade, substance, or type of substances, is determined by the director or committee which runs the club.<sup>92</sup> The limit is based on the amount of reinsurance which the brokers are able to obtain.

Where the entered ship provides salvage or other assistance to another ship following an accident or occurrence, a claim by the owner of the ship in respect of oil pollution arising out of the salvage, the assistance or accident shall be aggregated with any liabilities or costs incurred in respect of oil pollution by any other ship similarly engaged in connection with the same accident or occurrence against the association which participates in the pooling agreement of the International Group of P&I Clubs.<sup>93</sup>

Where a ship is separately entered by a member who is the Owner, or Demise Charterer, Manager or Operator with the Association, P&I Clubs, which participate in the Pooling Agreement and the Group excess reinsurance policies, the maximum recovery for each claim for oil pollution following any one occurrence brought against the Association shall be limited to the sum determined by Director.<sup>94</sup>

Where a ship is entered in a P & I Club by or on behalf of a charterer other than a bareboat charterer, the cover provided by the Association in respect of any claim is limited to the amount which, in the view of the committee or

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<sup>92</sup> For example, see Rule 22 of the North of England Protection and Indemnity Association Limited, P & I Rules, 1993. The sum approved by the Directors to apply Rule 22 as from 20 February 1993 is US \$ 700/000/000 for each ship and for any one accident or occurrence. It includes fines and clean up costs.

<sup>93</sup> Rule 22 (A), Id.

<sup>94</sup> See, e.g. Rule 10.3.2, The Rules of the London Steam Ship owners Mutual Insurance Association Limited, in force on February 20, 1991.

Director, such a charterer would have been able to limit his liability, the same as registered owner who had sought and not been denied the right to limit, unless the manager, before entry of ship, have agreed in writing to increase the Association liability in such a case.<sup>95</sup> The Association shall in no circumstances be liable for a sum in excess of liability for damages. Where a member is entitled to limit his liability, the liability of the Association does not exceed the amount of such limitation.<sup>96</sup>

### 3.2.3. Cover for criminal or quasi criminal liabilities

To deter others from offending in like manner, the recovery of punitive damages, fines and civil penalties, in excess of compensation for the injury suffered to punish the guilty party is recognised in maritime law.<sup>97</sup> Fines or penalties frequently arise in connection with oil spills. Criminal liability for oil pollution, from ships, is imposed by the Merchant Shipping (Prevention of Oil Pollution) Regulation 1983, which implemented the obligation of MARPOL 73/78.<sup>98</sup> Failure to comply with its Regulations constitutes a criminal offence which is punishable on summary conviction by a fine of not more than £ 5000 and on indictment by a fine without upper limit.<sup>99</sup> The unlimited fine on

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<sup>95</sup> See, e.g. Rule 23, *supra*. No. 92.

<sup>96</sup> Rule 8(1), The Rules of the West of England Ship owners Mutual Protection and Indemnity Association (Luxembourg), in force in February 20, 1991.

<sup>97</sup> In English Law see, *Wilkes. v. Wood* (1763) Loft. 2; 1a State TV. 1153 . And *Huckle. v. Money* (1763) 2 KB. 205. In the U.S.A., it was recognised by the Supreme Court in *The Amiable Cancy*, F Case No. 5, 196 N.D. Dal. (1959).

<sup>98</sup> See more details in chapter. 3. at pp. 85-93.

<sup>99</sup> Reg. 34(2), The Merchant Shipping (Prevention of Oil Pollution) Regulation 1983.

indictment seems commensurate with the gravity of oil pollution offences. The language of the P & I policy is broad enough to include punitive damage, but there is a divergence of views on whether it is against public policy to allow one against whom punitive damage are personally awarded because of his wilful conduct, to recoup his loss from his insurer.

A corporation's liability is quite independent of the human beings who are members of it. Thus, a corporation can sue or be sued for torts committed against it or is done, by it, against the others.<sup>100</sup> There are certain crimes, by their nature, that is impossible to commit against a corporation, such as assault or false imprisonment, or be committed by corporation against the others, e.g. wrongs in which the intention is essential. There should, therefore, be no public policy principles to bar the corporation from protection itself in respect of punitive damages caused by its individual representative, such as servants or agents. However, a corporation is responsible for the acts of its servant or agents if those acts are done within the "scope of the servant's"/agent's authority. The extent to which a corporation is liable for the acts of its servants/agents committed outside the scope of their authority, is arguable. In *Poulton v. L. & S. W. R. Y.*<sup>101</sup> it was held that a corporation could not be vicariously liable for the torts of its servants committed outside the express powers of corporation. In contrast to this decision, it was considered that if it is accepted that a master's liability for his servant's tort is truly vicarious, there is no need for technical argument to succeed in case,<sup>102</sup> because if somebody of such authority in the company acts tortiously on behalf of the company the

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<sup>100</sup> For knowing who represent company in such cases, see part. IV. pp. 314-319

<sup>101</sup> (1867) 2 Q.B.D. 423.

<sup>102</sup> See full consideration of the relevant cases in W.V.H. Rogers, *Winfield and Jolowicz on Tort*, 13ed., 1989 at pp. 586-588.

company is liable, not by way of vicarious liability, but because the tortious act is that of the company itself.

In the standard form of liability policy, coverage is usually given with respect to "all sums" or any losses.<sup>103</sup> The question which arises is again whether the language of such policies is broad enough to cover punitive damages. Some courts have construed the terms such as "caused by" or "arising out of" to indicate that the policy has coverage limited to the compensatory damage, i.e. such damages which are the result of the insured's conduct and are designed to compensate a third party for the result of that conduct, not damages sustained by the insured by way of liability to a penalty. In this light, punitive damages do not really reflect damage sustained by the claimant, but are a form of punishment inflicted upon the insured defendant.<sup>104</sup> Many courts have held that the policy covers punitive damages because these damages constitute a "sum" which the assured becomes legally obligated to pay as damages for injuries sustained.<sup>105</sup> Some other courts rely on the doctrine of reasonable expectation in order to deny or grant coverage.<sup>106</sup>

The clubs and their reinsuring underwriters are getting increasingly concerned at the growth of penal legislation imposing punitive fines on owner, which bear no relation to the offence or damage caused. There is legislation in some parts of the world which imposes excessive fines on ship owners for oil

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<sup>103</sup> For example, see, *Harrel v. Travellers Indem*, 567, p. 2d 1013 (1977); *Skyline Harvester System v. Centennial Ins*, 331 Now. 2d 106. Iow. (1983).

<sup>104</sup> e.g. *Casperson v. Webber*, 213 N.W. 2nd 372. Minn. (1973); *Schnuck Markets, Inc. v Transamerica Ins. Co.*, 652 s.w. 2d 206. Mo. (1983).

<sup>105</sup> *Southern Farm Bureau Cas, Ins, Co. v. Daniel*. 440 SW. 2d. 582. Ark. (1969).

<sup>106</sup> *Lanzenly v. Universal Underwriters Ins. Co.*, 383 SW. 2d. Tenn. (1964); *Cislewicz v. Mutual Serv. Cas. Ins. Co.*, 267 NW 2d 595. Wis. (1978).

spills. Because of this reinsuring underwriters have insisted that each club should make it clear in its rules that the overall figure for oil pollution applies not merely to the claims for damage resulting from an oil spill, but also to fines.<sup>107</sup> The Clubs have extended their cover, expressly to fines in respect of pollution by oil or other substances. Even where there is no such express provision for cover of fines, the Clubs' cover still extends to fines. This is because the basic insuring agreement in a P & I policy provides that the assured will be indemnified against any loss, damage or expenses for which the assured shall become liable to pay and shall have paid, by reason of any occurrence covered by the policy. Thus, in the absence of an express exclusion, it would appear that this language is broad enough to include fines in respect of claims otherwise covered.

Is fine included in the word "penalty"? The words "fines" and "penalties" seem to differ in meaning in that the word "fine" is more usually employed to describe an amount imposed under a threat of the sanction of the criminal law by a court for an offence against the law,<sup>108</sup> whereas the word "penalty", as a fine or money payment, is usually used for breach of the law of a less criminal nature, e.g. breach of the condition in a bond or breach of a term in contract.<sup>109</sup> Therefore, the word "penalty" seems to be more flexible and can be used to describe the infliction of a monetary sanction by somebody other than a court, for example a port authority. If a penalty is imposed by such a body, it would not be recoverable under the P & I policy. Thus, a "penalty" is also a "fine", subject to P & I Clubs, if it is imposed by judicial authority. As a result in

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<sup>107</sup> AF. Bessemer Clark, *The Role of the Protection and Indemnity Club in Oil Pollution*, 1980, *International Business Lawyer*, vol. 8, 204 at p. 209.

<sup>108</sup> See the Power of Criminal Courts Act 1973, S. 30(1) and Criminal Law Act 1977, Ss. 289 and 61.

<sup>109</sup> See Roger. Bird, *Osborn's Concise Law Dictionary*, 7 the edition, 1983 at p. 249.

clubs' rules, fines include civil penalties, punitive damages and other impositions similar in nature to fines.

Section 22(e) of the UK P & I club, which is one of the biggest in the world, provides cover for fines imposed by courts, tribunals or other authority in respect of pollution by oil or other substances. The term "authority" is not defined in the Club's Rules. It is unclear whether it is restricted to judicial authority or whether it includes any governmental authority. The term occurs after the terms "court" or "tribunal" which are judicial or quasi-judicial authorities. Thus, it may be construed that the term "authority" only includes those who have been delegated judicial power by judicial authorities. Such interpretation is justified by the rule of "*Ejusdem generis*" (of the same kind or another). This rule states where a group of particular term has been specified followed by more general terms, the latter must be construed as being the same kind as specifically mentioned ones. Section 3 of the MIA 1906 defined maritime perils as "the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the sea, fire, war perils, pirates, rovers, thieves, captives, seizures, restraints, and detainment of princes and jettison, barratry, and any other perils, either of the like kind of which may be signed by the policy." The words "any other perils" and "either of the like kind" are added in order to expand the cover of the policy to the maritime perils other than those expressly mentioned. There are many examples in respect of application of the rule of "*edjusdem generis*".<sup>110</sup> For example, in the ***Davidson v. Burnard, the Montezuma***,<sup>111</sup> water entered the vessel through a main discharge pipe from the engine room and damaged the cargo. It was discovered a valve had been

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<sup>110</sup> See more examples of the application of the "*edjusdem generis*" rule to the expansion of the perils of the sea, in J. Kenneth Good Care, *Marine Insurance Claims*, 2nd. ed., 1981, at chapter. VI.

<sup>111</sup> [1868] 4 L.R. C.P. 117.

inadvertently left open as a result of negligence on the part of the crew, and in the view of Wiles J., this was a loss of a similar kind to one caused by perils of the sea.

The term "other authority" may also include those governmental authorities empowered to take quasi judicial decisions from time to time. Thus the fine imposed by the port authority against illegal discharge of polluting substances is covered by the P & I Clubs, provided that authority to impose fine is given by Government regulation or Acts of Parliament. If there is not such authorised power to impose penalties and fines, in the maritime pollution matter, this would not be covered under the club rules. The distinction is important because fines and penalties imposed by governmental authority on insured may not be covered by the insurer.

No fine shall be recoverable unless it was imposed on the member or on a seaman of on entered vessels in circumstances where the member is liable to reimburse such seaman who has paid the fine. In respect of pollution by oil or other substances, the club does not provide cover for any fines imposed as a result of a members failure to comply with provisions relating to the design, construction, adoption and equipment of ships.<sup>112</sup> To clarify this issue, it is necessary to distinguish between criminal fines and civil penalties. Criminal fines are generally levied for wilful violation of the law protecting the public and the environment. If one were able to insure oneself against losses occasioned by such knowing violation, a major purpose of the criminal fines would be frustrated, because the insured would never feel the force of punishment. It should be noted that there is also clear authority to the effect that insurance against the consequence of crime is strictly unenforceable as being it is against

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<sup>112</sup> Rule 22(b). UK P & I Club.

public policy.<sup>113</sup> Thus, it would be wise for clubs not to cover such fines, this is simply the true construction of an insurance contract whereby the insured cannot recover of a loss which was caused by his deliberate act,<sup>114</sup> i.e. the act which is committed with the requisite *mens rea* or negligence. It follows that insurance against fines imposed for deliberate pollution would be against public policy.<sup>115</sup> However, the position is not the same where the conduct of the defendant in a civil action contributed in some way to the commission of the offence by plaintiff, wholly without blame, who then seeks to recover his fine.<sup>116</sup>

Coverage of civil penalties has always been a controversial issue in the insurance market. As a matter of principle, civil penalties are intended to punish those who committed illegal act. The fact that there has been a violation of some measure is generally sufficient to justify imposition of a civil penalty, even where the breach of measures was unintentional, e.g. breach of a MARPOL regulation. It is arguable whether such civil penalties are covered by insurance or not. It may be argued that if insurers are required to indemnify an insured for payment of civil penalties, he would have no incentive to comply with environmental regulations. On the other hand, it might be argued that an insured who wilfully or knowingly fails to comply with environmental regulation is subject to a criminal fine in any event and is, therefore, not qualified for insurance coverage. It may also be said that amounts that are levied for negligent violation and the payment of civil penalties are the same type of

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<sup>113</sup> *Gray. v. Barr Prudential assurance Co. (third party)* [1971] 2 Q.B. 554. See also, Shand, *Unblinking Unruly Horse: Law of Contract*, 3 C.L.J, 1972, 144. at p. 161.

<sup>114</sup> *Beresford. v. Royal Ins. Co.* [1938] A.C. 586.

<sup>115</sup> See details of insurance and public policy at chapter 3. at pp. 98-100.

<sup>116</sup> e.g. see. *Caintal v. Myhan & Son*, [1913] 2 K.B. 220.

financial liabilities that arise in environmental pollution based on strict liability theories. Thus, there is no reason for non coverage of such penalties. This argument may, however, be criticised in that, the coverage for negligence damages in effect increase the chances of future negligent acts and, in consequence, frustrates the entire purpose of the insurance policy.

It is provided by the P & I Clubs that the fine, which is the subject of recovery, must have been imposed upon the members and if was imposed upon an agent or seaman must be one for which the member is liable to reimburse that person. A problem may arise out of the deplorable practice adopted by certain irresponsible masters who deliberately discharge oil into the sea.<sup>117</sup> If the master is fined personally, it is necessary to consider the basis for fine. If a master has negligently transgressed a statute, for example by sailing outside a recognised channel, then grounding and causing a spill, *prima facie*, there would be no reason why he should not be reimbursed by his owner for the fine, or if he is reimbursed why the owner should not be able to recover from his club.<sup>118</sup>

However, if the master has wilfully and deliberately pumped oil overboard in contravention of the law and, as a result, been fined personally, he would not have a right of indemnification for his wrongdoing.<sup>119</sup> If he is indemnified by his

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<sup>117</sup> This is usually done by tank washing. See, Zoe Colocotroni, [1971] A.M.C. 21. Where the master pumped oil overboard in order to refloat the vessel following the grounding, in the mistaken belief that it was in everyone's best interest that he should get the vessel off the ground at once in this way.

<sup>118</sup> Where an agent's or employer's conduct amounts to a tort, but not a crime, he is, at common law, entitled to be indemnified against expenses and liabilities if the transaction was not manifestly tortious or tortious to his knowledge. See, Salisbury's Law of England, 4th ed., vol. 1, Para 809, and vol. 16, para 568; *Adamson v. Juris* (1827) 4 Bing 66.

<sup>119</sup> An employee has no right to indemnity in respect of a transaction involving a breach of a criminal law if the party performing it knew that it was illegal, or if he knew the true circumstances which rendered it unlawful. See, *Smith v. White* (1866) I.R.F.Q. 620; *Leslie v. Reliable Advertising Agency Ltd.*, [1915] 1 K.B. 652.

owners they would not be able to recover from their club.<sup>120</sup> Fines, resulting from the wilful misconduct of seaman, may be reimbursed only if either the member is compelled by law to pay such fine or has reasonably paid the fine in order to obtain the release from arrest of the entered vessel or any other vessel.<sup>121</sup>

The insurer does not exempt the insured from liability coverage where the insured merely intended to commit a wrongful act which was never carried out. In the other words, the assured is not precluded from enforcing the policy if the risk subsequently comes into operation without any misconduct on his part.<sup>122</sup> Thus, the insurer would only be exempt from liability if he actually prove that the alleged offence was actually committed. The evidence brought must be sufficient to justify a conviction on a criminal charge.<sup>123</sup> In the absence of clear proof that the act is criminal, the presumption against crime prevails and the assured is entitled to recover.<sup>124</sup>

### **3.3. Exceptions, in general, applicable to the club cover**

#### **3.3.1. Double insurance**

A shipowner wishing to insure his total interests in his vessel will have to take out insurance of different types, often with different insurers. When a shipowner's cover is comprised in different policies, it is important that such a

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<sup>120</sup> This is merely an illustration of the general rule that an assured may not recover under a policy in respect of loss intentionally caused by his own criminal or tortious act. *Beresford. v. Royal Insurance Co.* [1938] A.C. 586; *Hardy. v. Motor Insurance Bureau*[1964] 2 Q.B. 745.

<sup>121</sup> C. Hill. B. Robertson, Steven Hazelwood, *An Introduction to P & I*, Lloyd 's of London Press Ltd, 1988, at p. 77.

<sup>122</sup> *Barrett. v. Jeremy* (1849) 3 Exch., 535. Per Park. B. at 543.

<sup>123</sup> *Thutell. v. Beaumont.* (1823) 1 Bing. 339.

<sup>124</sup> E.R. Hardy Ivamy, *General Principles of Insurance Law*, 5th ed., 1986, p. 268.

various policies do not result in unintentional gaps in his cover. On the other hand, it is also important to avoid overlapping insurance covers which is obviously uneconomic.

The club rules specifically exclude from cover certain losses which would be covered by other insurance. It is provided that, "the association shall not, unless to the extent that Directors in their discretion otherwise decide, be liable for any liabilities, costs or expenses recoverable under any other insurance or which would have been so recoverable."<sup>125</sup> Such a clause used by the club in their rules is variously known as the escape clause,<sup>126</sup> non contribution clause,<sup>127</sup> or other insurance clause.<sup>128</sup> One of the advantages of the Clubs adopting the "escape clause" is that it effectively protect and indemnify the insured where the cover is not available under any other insurance sources . The clause makes it clear that the P&I Clubs cover do not comprise losses which are covered under other insurance and is thereby expressly made complementary to the latter. It should be noted that the hull insurance which a member has already actually purchased does not define the scope of his P & I cover. But it is the usual practice of clubs not to be responsible for losses which by their nature can be insured under the other insurance.

It must be realised that the areas of potential overlap between hull and P & I insurance are relatively few. Hull insurance is primarily directed towards indemnifying property damage whereas P & I cover is concerned with

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<sup>125</sup> For example, see Rule 5(I) of UK Mutual Steamship Assurance Association (Bermuda) Limited, February 10, 1990.

<sup>126</sup> Joseph A. Lodrigue. v. Montegute Auto Marine Service, et al, [1978] A.M.C. 2272.

<sup>127</sup> Seaboard Shipping Corporation. v. Jocharanne Tugboat Corporation, et al, and Ocean Mutual Underwriting Association Ltd [1972] A.M.C. 2151, especially at p. 2156.

<sup>128</sup> Prudential Grace Lines Inc. v. Continental Casualty Company [1972] A.M.C. 2655.

indemnifying an assured in respect of his liabilities. In spite of their different and distinct areas of risk to which each is relevant, however, there are some instances where the two types of cover may overlap. For example, there are occasions where hull insurers cover the assured's liability; a shipowner may incur liabilities to third parties as a result of efforts to avert or minimise loss for the benefit of Hull insurers; Further, Hull insurers cover a shipowner's liability in respect of a salvage award. This is an area where difficulties have been encountered in categorising particular risks as to whether they fall within hull cover or more correctly lie with the owner's P & I Club. One such instance occurred in *Grand Union (Shipping) Ltd. v. London Steam Shipowner's Mutual Insurance Association Ltd. (The Bosworth)(No. 3)*,<sup>129</sup> in which salvage services were rendered to the entered vessel and the salvage award was enhanced by virtue of including an amount in respect of life salvage. The court decided that life salvage was not a form of maritime salvage but a species of salvage created by statute.<sup>130</sup> and that the award was an award against ship, cargo and freight for services rendered to ship, cargo and freight, enhanced by services rendered for life salvage. The award was, therefore, recoverable under the Lloyd's policy and not from the P & I Clubs.

Most policies for indemnity contain a condition, relevant to double insurance, that purports to oust the liability of the insurer if the liability is covered elsewhere. Problems may arise if one or both of the policy, covering the same risk, contain such condition. If one insurance policy does, but the other does not, then the latter should be solely and wholly liable because there is no double insurance. If both insurance policies contain such a condition, however, the position is more complex. In *Gale v. Motor Union Insurance*

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<sup>129</sup> [1962] 1 Lloyd's Rep. 483.

<sup>130</sup> Section 554 of the Merchant Shipping Act 1984

Co.,<sup>131</sup> L was driving G's car when he caused an accident. L was covered both by his own motor policy and by G's policy on G's car. Both policies had qualifications which in effect provided that they were not applicable if the person concerned was otherwise insured. Both policies also had rateable proportion conditions. Roche. J. held that the conditions purporting to oust liability were not clear, and that the only way to read them was as referring to cases where the other cover gave complete and full indemnity. Here because of the rateable proportion clause, neither policy gave complete cover. Therefore, neither clause applied and the insurers were both liable rateably. Rowlatt. J. in Weddel and Another v. Road Transport & General Insurance Co. Ltd.,<sup>132</sup> went somewhat further than the judge in *Gale* had gone and held that it would be unreasonable to suppose that these conditions would cancel each other out. He continued that, "The reasonable construction is to exclude from the category of coexisting cover any cover which is expressed to be itself cancelled by such coexistence, and to hold in such cases that both companies are liable, subject of cover in both cases to any rateable proportion clause which there may be". Both judgements seem to admit, that if neither policy has a rateable proportion clause, neither insurer will be liable. This is open to criticism, on the basis of equitable principle and justice. A person who has paid premiums for cover to two insurers should not be left without insurance cover, merely because each insurer has excluded liability for the risk against which the other has indemnified.

There is nothing wrong in an insured effecting as many policies as he wishes on the same property or on the same risk. However, if he suffers a loss,

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<sup>131</sup> [1928] 1 K.B. 359.

<sup>132</sup> [1932] 2 K.B. 563 at p. 567.

he is, by virtue of principle of indemnity, entitled to no more than full indemnity. The insurer who pays, the whole of sum insured for the same property or liability, is entitled to claim contributions from the other insurers, as otherwise the latter would be unjustly enriched.<sup>133</sup> In practice, contribution is most unlikely to arise by virtue of a standard term in all indemnity insurance which provides that if there is any other insurance on the property or the risk covered by the policy, the insurer will not be liable to pay or contribute more than its rateable proportion of any loss or damage. Such a rateable proportion clause does not affect the basic legal principle of double insurance, but it simply prevents the insured from recovering all his loss from one insurer.

### **3.3.2. Wilful Misconduct of the member**

It is general rule of the insurance<sup>134</sup> emanating from public policy that wrongdoers and criminals should not be allowed to insure against the consequences of their wrongdoing. This principle has to be qualified in the realms of protection and indemnity insurance because, there is "almost always an element of fault involved, in P. & I. claim and if every claim were excluded on the basis that the assured was at fault the essential purpose of P & I cover would be destroyed."<sup>135</sup>

All clubs expressly exclude liability to effect a recovery which is the direct consequence of an act of wilful misconduct of the member or his managers or managing agents, as opposed to misconduct of subordinate employees or

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<sup>133</sup> *Austin v. Zurich General Accident & Liability Ins. Co.* [1945] K.B. 250; see also S. 80(2) of MIA 1906

<sup>134</sup> Hazelwood, S J, *P & I Club Law and Practice*, 1989, Lloyd's of London Press Ltd, p. 183.

<sup>135</sup> *Id.*

agents of the assured.<sup>136</sup> However, as an exception to this general rule, clubs cover extends to loss which has arisen as a result of the misconduct of the assured, provided that the loss is proximately caused by a peril insured against.<sup>137</sup> This indicates that some degree of misconduct is ignored by P & I Clubs, where misconduct is only one factor in causing the loss, not an effective one.<sup>138</sup> Thus, whilst claims arising out of negligence may be allowed without qualification, the clubs draw the line at "wilful misconduct". It is obviously a matter of some importance for the clubs to make clear exactly what degrees of misconduct they would be willing to tolerate. The decision as to the degree of a member's fault and the measurement of his conduct generally rest with the directors.<sup>139</sup>

A member of a club, who is not also a member of crew, will not lose his cover where the loss is caused by the fault of the ship's master or crew, for that the owner is in privity, in connection with their duties as seamen.<sup>140</sup> A club member would not have any protection against liability caused by his fault committed in his capacity as a member of the crew,<sup>141</sup> In the other words, a

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<sup>136</sup> e.g. Rule 27(3) of The North of England and Protecting and Indemnity Association Limited, P & I Rules, 1991-1992. It is also based on the M.I.A 1906, in which section 55(2)(a) provided, "...the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of master or crew. In the USA it has been held that where a ship owners liability policy did not contain such an exclusion and sought to cover the assured in respect of all claims however caused, the policy was too wide and void as being contrary to public policy, see *The Rose Murphy*, *Fidelity Phoenix Fire Insurance Co. v. John Murphy Co.* [1933] A.M.C. 444.

<sup>137</sup> *Id.*

<sup>138</sup> *Papadimitrou v. Henderson* (1939) 64 L.L.Rep. 345.

<sup>139</sup> S.J. Hazelwood, *P & I Clubs Law and Practice*, 1989 Lloyd 's of London Press Ltd, p. 183.

<sup>140</sup> *Pipon. v. Cope* (1808) Camp. 1012.

<sup>141</sup> *Thomas. v. Tyne and Wear Steamship Freight Insurance Association* [1917] 1 K.B. 938.

club member has no protection if the fault is committed by the member while he is a member of the crew.

Another exception which is based on the conduct of an assured is where the Directors "shall be of the opinion that the claim arose out of sending to sea of the entered ship in an unseaworthy state with the privity<sup>142</sup> of the member or his manager or managing agents."<sup>143</sup>

A shipowner who has paid liability claims and who was denied the right to limit liability on the ground of his "privity or knowledge" may not recover such losses under P&I Clubs policy covering loss sustained "without fault or privity of the assured."<sup>144</sup> These words as used in P&I Clubs policy have substantially the same meaning as those in the English and American limitation of liability statutes.<sup>145</sup> How do behaviour standards of conduct barring limitation weave in other wilful misconduct clauses which bar offering liability insurance cover? In the "Eurysthenes",<sup>146</sup> a club entered vessel was sent to sea in an unseaworthy state with the prior knowledge and concurrence of the assured member this as to debarring him from limiting his liability. The shipowners claimed that they should only be deprived of an indemnity if they had been guilty of "wilful misconduct" regarding the unseaworthy state of the ship. Lord

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<sup>142</sup> Lord Denning at, *Compania Maritima San Basilio S.A. v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd., The Eurysthenes*, [1976] 2 Lloyds' Rep. 171 at p. 179, concluded that privity did not mean that there was any wilful misconduct by assured but only that he knew of the act beforehand and concurred in it being done. Moreover, it did not mean that the assured himself personally and the act but only that someone else did it and that he knowingly concurred in it.

<sup>143</sup> See e.g. Rule 27(4), *The North of England...* supra. No. 136. It is also based on the rule contained in section 39(5) of MIA 1906, which provided, "...where, with the privity of the assured, the ship is sent to sea in an unseaworthiness state, the insurer is not liable for any loss attributable to unseaworthiness."

<sup>144</sup> *Continental Insurance Company Inc. v. Sabine Towing Company Inc., (The "Edgar F Cony 's" and Tow)* [1941] A.M.C. 262 (U.S.).

<sup>145</sup> *Id.* at p. 226.

<sup>146</sup> *Compania Maritime San Basilio S.A. v. The Oceanus Mutual Understanding Association (Bermuda) Ltd.* [1976] 2 Lloyd's Rep. 171.

Denning M.R. equated this type of conduct with deliberate or reckless conduct.<sup>147</sup> The P & I Club claimed that the shipowners were not qualified to any indemnity if they had been guilty of negligence and if they ought to have known that the ship was not reasonably fit to be sent at sea, i.e. privity. Lord Denning said<sup>148</sup> that “privity” did not mean that there was any wilful misconduct by the assured but only that he knew that someone else had been guilty of misconduct and knowingly concurred in it. If therefore, a ship is sent to sea in an unseaworthy state, with the knowledge and concurrence of the assured personally, the insurer is not liable for any loss attributable to unseaworthiness of which the assured know and in which he concurred. This may be criticised on the basis that the standards which break a shipowner’s right to limit and which allow a club to avoid making recovery to its member are radically different. If these two principles are treated as being identical, the club will be faced with unpleasant task of deciding whether to try to enforce their unreasonable conduct rule so as to deprive a shipowner of insurance cover in respect of a claim for which he is unable to limit his liability.

### **3.3.3. Clubs only cover owner of entered vessel**

The club attempts to confine its cover to the losses which members<sup>149</sup> become liable to pay and shall have paid by reason of the fact that the member is the owner of the entered vessel, because the purpose of the P & I Club is,

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<sup>147</sup> Id. at p. 178.

<sup>148</sup> Id. at p. 179.

<sup>149</sup> Charterers Clubs have, in recent years, also provided cover for their members..

broadly, to provide insurance to shipowners in respect of the vessel insured,<sup>150</sup> and not in their capacity as employers of stevedores, dock owners, warehouse men or in respect of anything else.<sup>151</sup> However charterers may become members of P & I Clubs but they are covered only in respect of their liabilities which arise in connection with the entered vessel, and not in any other business capacity, e.g. as operator of the vessel.

It is not sufficient, however, that a claim arises merely in connection with a member's business as a shipowner, it must also arise in respect of an entered vessel. Thus a claim against pollution liability resulting from an entered vessel is a claim which is rightly passed on the club. On the other hand, if the pollution victim has received damages from a ship not entered in the P & I Club but its owner is a member of the Club, this is not the damages for which the club will provide cover.

#### **3.3.4. Liability assumed by contract**

The P&I Clubs policy usually provides that the insurer is not responsible for liabilities contractually assumed, unless otherwise agreed, between the member and a manager of club, because the club's purpose is to protect the assured against liability arising from negligence. For example, in the case of towage contracts, special provisions apply whereby the club will exclude cover in respect of liabilities resulting from the member or any one on his behalf having entered into a contract that results in greater liabilities than would have arisen under the ordinary rules of maritime law unless such a contract could be

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<sup>150</sup> For example, Rule 3, *The North of England....*, supra. No. 136.

<sup>151</sup> In the U.S.A in the matter of *Barge B.W 1933* [1968] A.M.C. 2738, it was decided that a ship owner P & I policy insuring an oil company's liabilities a ship owner did not cover liability imposed on it as terminal operator and shipper.

considered as being customary in the trade concerned or was approved by the club manager.<sup>152</sup>

There are, however, many special instances where a ship owner, in order to meet certain operating conditions, finds that it is necessary to indemnify a third person even though the liabilities are those of the third person. Most clubs' rules provide that the acceptance of a towage contract under which the ship owner agrees to assume liabilities (which ordinarily are those of the tug owner) shall not affect the member's right of recovery under his cover.<sup>153</sup>

### 3.3.5. Salvage operation

There has been reluctance on the part of clubs to accept into membership salvors in respect of those liabilities which spring from their activities as professional salvors, rather than from their activities as traditional tug owners. This reluctance is understandable when bearing in mind that the liabilities which a professional salvor could incur during a salvage operation are mostly due to a negligent act of his employees. In the *Tojo Maru* incident the salvor tugged the entered vessel of one of the club, in a salvage operation. The tug itself caused no damage nor was the employee who committed the negligent act on board or even near the tug at time. Very considerable damage was done to the already crippled *Tojo Maru* by an act of salvage negligence and the club concerned felt itself unable to accept that liability under its ordinary cover.

It is probable, however, that a tug owner who did engage in salvage operations might be able to persuade his club to endorse the certificate of entry for his tugs for (I) damage done by the entered vessel and (II) any act or

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<sup>152</sup> This basically covers normal part towage of an entered vessel in the ordinary course of trading but does not automatically cover ocean towage. *Supra.* No. 139, at p. 188.

<sup>153</sup> For example, Rule 19(15), *The North of England...*, *supra.* No. 136.

omission of persons a board the entered vessel during salvage operations, cover would be extended, so excluding salvage operation only as and when the salvage tug is not an integral part for the salvage operation.<sup>154</sup>

However, the liability of an owner to pay "special compensation" to a salvor of an entered ship in respect of work done or measures taken to prevent or minimise damage to the environment is covered by P & I Clubs, provided that the liability is imposed on the owner pursuant to Art. 14, of the International Convention on Salvage, 1989, or is assumed by the Owner under a term of a salvage agreement approved by the Director of Clubs, and is not payable by those interested in the salvaged property.

### **3.4. Concluding remarks**

The agreed value in a marine insurance policy is conclusive of the insurable or actual value of the vessel and involves the indemnity payable for general average contribution, salvage charges and sue and labour expenses. If the agreed value is less than the actual value, then the assured is treated as being under-insured for such liabilities and expenses, and indemnity is reduced in proportion to the difference between the two values. As a result of the cover in the collision clause being limited to 3/4 or 4/4, as case may be, of the agreed value of the vessel, there is a risk to the shipowner that he will incur collision liabilities which exceed the limit of the agreed value. Thus, in cases in which the pollution damage is covered by SG policy, cover is limited to the insured value. Therefore, effective protection must be sought through "excess liabilities" insurance or through coverage in a P & I Club.

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<sup>154</sup> See Hill, c., Roberson, B., Hazelwood, S..J. An Introduction to P & I Clubs, Lloyd's of London Press Ltd, 1988.

The general insurance market, other than P & I Clubs, has not tended to cover pollution liability by reason of the broad definition of occurrence and the inconsistency in the interpretation of the terms of "sudden and accidental" under the CGL policy. It has also become clear that the cost of defending these claims, more significantly the type of clean up costs, were so enormous as to threaten the profitability, and in some instances the existence, of the underwriters which sold the insurance. Moreover lack of sufficient pollution liability insurance has threatened the existence of many insured parties.

The solution to the problem will depend on a number of factors, including economic conditions in the insurance industry as a whole, the ability of the insurers to develop data that enables them to assess the risks and to operate profitably in pollution insurance market, and also upon judicial and legislative trends. The courts could improve the insurance market for pollution liability through imposing constraints in the interpretation of liability insurance policies, so as to more accurately effect the likely intentions of the parties to a contract of insurance. The legislature is likewise in a position to mitigate the harshness of insurance crises by providing devices which more effectively implement the insurance policy. For example, by the establishment of a fund which is financed by a levy on the oil or other substances could assist the insured and insurer in reaching an agreement on cost-sharing approach, or by passing statutes which ease dispute settlement. The examination of the CGL policy has shown that there is, so far, no sign of a close co-operation needed between the different bodies mentioned in reaching a common policy for insuring the pollution damage. If this trends continue, the only possible solution will be in the hands of the industries involving in the transportation or production of oil or other hazardous substances at sea so as to provide sufficient insurance cover for pollution victims, through insurance club or funding. In this process, of course,

the role of the insurance companies in providing reinsurance cover should not be ignored.

Where pollution cover forms under the umbrella of a CGL policy, such policies will provide the insurer with an indemnity in respect of liabilities to third parties for property or personal injury. Thus, the CGL policy puts clean up costs outside of its cover. There are also restrictions in CGL policy in respect of insurance cover for criminal liabilities or penalties which may be imposed by statute. Insurance cover is normally limited to "accidental events" not intentional.

In providing cover for pollution damages, oil tankers have long been protected against third party claims arising from pollution damage by P & I clubs which are backed by reinsurance. The protection includes loss or damage caused by the discharge of oil or other substances from the entered ship, clean up costs, prevention measures and penalties. Members who are parties to the TOVALOP are also covered by P & I Clubs with regard to their liabilities under that agreement. The Clubs also extend their coverage to extraordinary expenses or liability, not recoverable from hull underwriting or any other insurance, incurred as a result of the compliance with any order or direction given by governmental authorities in order to prevent or decrease the pollution damage. Members also receive coverage for their liability under a salvage agreement, for work done or measure taken to prevent or reduce pollution, provided there is prior approval of the committee or director board of the club.

Although P & I Clubs provides protection for those who suffer pollution damage in most cases, Nevertheless, there are, in fact, cases in which the victims are left without actual protection. The basic P & I policy concludes with various exceptions and limitations. One of important provision is that which excludes cover in respect of assumed contractual liabilities. A double insurance

clause is also incorporated in the policy excluding cover where there is other insurance in effect which already covers the loss. Among the excluded cover is, liability arising from the salvage operation, except "special compensation" which is paid to reward a salvor for his best endeavours to avert or minimise pollution damage under special agreement. Protection and indemnity policies also contain a clause voiding the policy in the event of a loss resulting from the "wilful misconduct" of the assured. In the interpretation of this exception it must always be remembered that the object of P & I insurance is to protect the assured against legal liabilities. However, the restricted interpretation of "wilful misconduct" and the extension of it to privity and fault may have the effect of depriving the assured of the cover he needs.

The club cover is limited in respect of oil pollution liability, contrary to its general policy which is based on the unlimited cover. Most clubs have progressively increased the level of their insurance cover so as to provide enough protection for most pollution accidents. The ability of the P & I clubs in response to oil pollution liability indicates the clubs' vitality and the flexibility of the insurance market in providing necessary protection and indemnity. On the other hand it must be emphasised that the clubs' managers are exposed to the increasing uncertainty surrounding the development of liability of ship owners in pollution cases.

### **PART III. PHILOSOPHIES INHERENT IN WHO PAYS FOR POLLUTION LIABILITY**

#### **Chapter 1. The polluter pays principle**

In 1972 OECD, the Council of Organisation for Economic Co-operation and Development, adopted a recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies which included the polluter pays principle in relation to the allocation in the case of pollution damage.<sup>1</sup> The principle is used:

"For allocating costs of pollution, prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment."<sup>2</sup>

In other words, the polluter pays principle states that the polluter, who is responsible for an act of pollution, whether a natural or a legal person, should bear the expenses of preventing and controlling pollution, which are included by public authorities, to ensure that the environment is in an acceptable state. Thus, the polluter pays principle, as it was introduced by OECD, is not a principle of compensation for damage caused by pollution. It merely pays the cost of pollution prevention and controls measure which are determined by public authorities. This, of course, does not mean that the polluter cannot be held responsible for compensation, above the cost of controlling pollution, if a country so decides but the principle does not make this additional measure obligatory.

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<sup>1</sup> OECD, *The Polluter Pays Principle, Definition, Analysis, Implementation*, 1975, p. 11. In 1973 EC Council of Minister adopted a programme of action on the environment which endorsed the "Polluter Pays" principle, and it later recommended that the cost of environment protection against pollution be allocated uniformly throughout the Community. See "Declaration on an Environmental Action Programme, 22 November 1973". I.L.M. (1974), 164 and Council Recommendation on the application of the Polluter Pays Principle, 7 November 1974 ", ILM (1975), 138. Article 25 of the Single European Act has now provided a new legal basis for EC environmental measure: " Action by the community relating to the environment shall be based on the principles that prevention action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. " See Act, Cmnd 9758 (1986). In England the general principle is acceptable, however reference must be made to specific legislation.

<sup>2</sup> Para. 4, Guiding Principle Concerning the International Economic of Environmental policies, Id.

Under the principle, regulation and levels of compensation, or possibly a combination of the two, are the major instruments of action available to the public authorities for the avoidance of pollution. The levels of compensation have two functions: to encourage the reduction of pollution (an incentive function) and to make the polluter pay his share of collective measure and redistribution charges.<sup>3</sup> The effectiveness of this principle, regarding the protection of environment, may become less if the polluter is allowed to pass the costs of pollution to goods and services which cause pollution damages. In addition, the scope of the polluter pays principle in practice is confined to major incidents such as collision or stranding because it is frequently impossible to associate pollution from low level operational discharges with a specific vessel, so that the liability to pay compensation will not necessarily influence the behaviour of individual polluters.

The polluter is defined as "someone who directly or indirectly causes damage to the environment or who creates conditions leading to such damage."<sup>4</sup> The clause concerning damage "directly or indirectly" poses the difficult problem of delimiting the damage. Pollution damage may be caused through substances which are directly placed at sea, i.e. intentional discharge. Indirect damage covers the situation where an intermediary element, such as an accident, intervenes between the original human act and the arrival of pollutants at sea. The phrase "conditions leading to such damage" enlarges the category of polluter by including not only those who have already caused the damage but also those who have created risks or possible risks of damage. Applying these terms seems to make complication in the application of polluter pays principle because of the involvement of many people as polluters.

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<sup>3</sup> Id.

<sup>4</sup> Advisory Committee on Oil Pollution of the Sea, *ACOPS Report 1979*, at p. 3.

Depending on the instrument used, the polluter would be obliged to bear (a) expenditure on pollution prevention and control measures, when these go beyond the standard laid down by the public authorities, (b) the cost to be borne by the polluter should include all expenditure necessary to achieve an environmental quality objective, including administrative costs directly linked to the implementation of anti-pollution measures. The costs to the public authorities of constructing, buying and operating pollution monitoring and supervision installations may be borne by public authorities.<sup>5</sup>

The wider concept of the polluter pays principle depends on the amendment and improvement of the legal rules on insurance. This is done in order to make sure that the polluter bear all the costs of prevention and control of, and compensation for damage which would not be met by the application of the existing legal rules on third party liability or from compensation otherwise available under existing schemes.<sup>6</sup> If the insurance regulation is not changed to be consistent with this principle, e.g. by inserting in policies (as the term of insurance provided) obligatory clause requiring compliance with the rules concerning design, construction, fitting out and maintenance of the vessel and qualification of crew, and a clause which require the assured takes substantial amount of the loss, it can only be fulfilled partially, because the polluter merely insures against the risk and passes on the costs thereof to the rest of society in the price he charges for the services or goods he provides. Changes of an insurance pattern by insurers may be criticised because it is beyond the insurers' duty to provide the financial cover for shipowners against the marine risks to which their businesses expose them. Though, they do impose conditions and require warranties, the motive for requiring

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<sup>5</sup> OECD, *The Polluter Pays*, *supra*. No. 1. at p. 6.

<sup>6</sup> Brown, E.D. *The International Protection of the Environment on a Regional Level*, 1982, at p. 8.

their insertion in the policies of marine insurance is purely commercial. Thus, such changes should be done by governmental regulation.

The OECD has endorsed the equal right of access as one means of implementing the "polluter pays" principle in transboundary pollution. Equal access entails affording equivalent treatment in the country of origin for transboundary and domestic victims of pollution damage. It may involve access to relevant information, participation in administrative hearings and legal proceedings, and the application of non-discriminatory standards for determining the legality of domestic and transboundary pollution.<sup>7</sup> From the phrase "equal access" can be construed that this right concerns not only the nationals of the state which is the victim of transfrontier pollution but also those who inhabiting in its territory, even if they possess another nationality.

Equal access also requires the removal of jurisdictional obstacles to civil proceedings for damages and other remedies in respect of environmental injury. The effect of this rule is to favour interstate claims over direct access to national courts where the harm originates, which precludes the use of local remedies by individual foreign claimants. One argument against this preference is that the courts of the state where the harm occurs have a stronger interest in making the polluter pay. They are also likely to be in a better position to assess the full extent of any damage and to hear actions involving multiple plaintiffs.<sup>8</sup>

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<sup>7</sup> Recommendation c(74) 224, 14 November 1974; Recommendation c (76) 55, 11 May 1976; Recommendation c (77) 28, 17 May 1977. See in, Francesco Francioni, Tullio Scovazzii. *International Responsibility for Environmental Harm*, 1st Ed, 1991, at p. 370

<sup>8</sup> Thomas O. McGarity, *International Regulation of Deliberate Release of Biotechnology*, at Id. p. 371. These considerations were decisive in determining the allocation of jurisdiction under the 1969 CLC, Art. IX. See IMCO, *Official Records of the International Legal Conference on Marine Pollution Damage (1969)*, 491 (France) and cf. the views of the USA at p.495, and its amendment proposal at p. 569; the amendment proposal was adopted: see 697-9.

Moreover, it is also apparent that equal access does not necessarily reflect a "polluter pays" perspective or guarantee implementation of OECD policy in that respect. Although it offers certain advantages over interstate proceedings, and reduces the jurisdictional and other procedural obstacles facing transboundary litigants, it will advance a "polluter pays" principle only to the extent that national legal systems in the place of the origin of the pollution have already adopted this approach to the allocation of environmental costs internally, a guarantee of national treatment, but no more.<sup>9</sup> Thus "equal access" works effectively only between legal systems which are relatively homogeneous in their treatment of pollution liability or where uniform minimum principles of civil liability are established by agreement applicable to all states concerned. In situations where these factors are absent, equal access is likely to prove unproductive.

The limited utility of equal access, as a model for loss distribution, resulted in the creation of a special regime of civil liability for oil pollution from ships, e.g. 1969 CLC. The liability under 1969 CLC is limited in an amount and supported by compulsory insurance or security. It also excuses the shipowner from liability in certain circumstances. The limitation of liability and arrangements for spreading the burden of liability and the exemption of the owner from liability, indicate that the CLC does not fully implement the polluter pays principle or recognise the unlimited and unconditional responsibility of pollution source states.

One of major difficulties which is associated with the polluter pays principle is how it can be applied where damage to natural resources is involved. Here there is a difficult process of quantification of damage, because there is no identifiable real market value. The demonstration of causal link and the establishment of ownership of natural resources is also problematic. The question

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<sup>9</sup> See Thomas O. McGarity. *Id.* at p. 373-4.

was raised in the *Zoe Colocotroni* case,<sup>10</sup> in which there was a claim for recovery of various environmental damage and clean-up costs. It was argued by the defendant that the State claiming a right as public trustee, lacked sufficient proprietary interests in the natural resources actually damaged. The court rejected this argument and held that a sovereign state represents the collective interests of the people of its jurisdiction and holding in trust to the public property, including living and non-living resources and subsoil. Therefore, the State could bring legal actions in court to protect its property and recover damage, like any private landowner.

In the process of measuring the quantum of damage to natural resources, several methods were considered by the court. The district court awarded damages based on the plaintiff's estimate of the replacement costs of the living organisms which had been found destroyed. It was argued by the defendant that the common-law diminution-in-value rule had to be applied in the calculation of damages. This rule stipulates that damages are assessed on the basis of the difference in market or commercial value of the property as a result of injury, unless full restoration can be accomplished for a lesser amount. The Court of Appeal rejected this argument because it restricted recovery to the mere diminution of value and offered a new method for measuring natural resources damages. In taking reasonable measures and prudent steps for mitigation of pollution damage, a sovereign state should take into consideration many factors including, "technical feasibility, harmful side effects, compatibility with or duplication of natural generation" and disproportionability of the expenses.

What is clear from the decision of the court in the *Zoe Colocotroni* case is that a polluter is liable to pay the state which shows suffering damages for injury to natural resources, as a direct consequence of oil pollution provided it can be

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<sup>10</sup> Commonwealth of Puerto Rico et al v. The S.S. *Zoe Colocotroni* et al, 628 F. 2d (1st Cir. 1980).

proved that the state has suffered financial loss in the sense of a fall in the market value of property, and diminution of income from the exploitation of resources. If however, either particular natural resources are not vested in the State or they have no market value or income-generating value, it would appear that a claim would not lie against the polluter; in the first case because the State would lack a qualifying interest, and in the second case because no "actual damage" had been suffered. The fact that the marine environment has suffered physical damage and community has been deprived of the enjoyment of that environment would not appear to be relevant in law, except in jurisdictions which recognise the "right" of the community to a clean environment and empower the State to recover the costs of its restoration or replacement in the event of damage to it.<sup>11</sup>

## **Chapter 2. State liability for payment of pollution damages**

According to traditional international law principles based on the concept of state sovereignty, each state exercises exclusive jurisdiction within its territory. Pollution which take place or originates on the territory of one state and causes damage or infringes the sovereignty of another state, can give rise the conflicts between the rights of two states. Can vessels be regarded as a portion of state territory on a land on which it has special rights and duties? In the *Buenaventura, The v. Ocean Trade Company*,<sup>12</sup> the Dutch Court of Appeal at The Hague stated:

" Whatever the position may be with regard to the fiction sometimes heard that the ship is, as it were, a piece of sovereign territory of the flag state, such a fiction can at most mean that, in principle, the law of the flag state applies on board that ship,

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<sup>11</sup> Brown, E.D., Making the Polluter Pays for Oil Pollution Damage to the Environment, A Note on The Zoe Colocotroni case, L.M.C.L.Q., 323 at p. 326.

<sup>12</sup> [1984] E.C.C. 183.

and in particular does not pose any obstacle to the assumption of Jurisdiction by the coastal state where the ship puts in. These coastal states have jurisdiction, once the ship enters their territory and there is a conflict in which not only the internal order of the ship, but also the legal order of the coastal state concerned, is involved". Thus, a ship bearing the national flag of a state is for purpose of jurisdiction and it is treated as a if it were territory of that state, since it is in principle as a "floating island".<sup>13</sup> Acceptance of the ship as a territory of flags state was criticised in *R. v. Gordon- Finlayson, ex Pan Officer*,<sup>14</sup> in which it was pointed out that a ship is not part of the territory of the flag state, but jurisdiction is exercisable over the ship by that state in the same way as over its own territory. What is clear from these authorities is that if oil is discharged from a vessel and causes damage, it is deemed that damage has been resulted from the territory of a flag state. This jurisdiction is subject to restriction if the ship has voluntarily entered a port or offshore terminal of a state, or territory of another coastal state. However, while in the ports or internal waters of another state, are in great measures exempt from the territorial jurisdiction of another state, the warships and public vessels of foreign states.<sup>15</sup> If such vessels are used by a state for commercial purposes or non-governmental activities, they are within the scope of the local territorial jurisdiction.<sup>16</sup>

With regard to the recognised international principle of abuse of right which forbids sovereignty to be used in an abusive manner, states have no right to

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<sup>13</sup> See *R. v. Anderson* (1868) 2 L.R. C.C.R. 161; *The Lotus* [1927] Pub PCIJ Series A. No. 10.

<sup>14</sup> [1941] 1 K.B. 171.

<sup>15</sup> *Chung Chi Cheung. v. R.* [1939] A.C. 160.

<sup>16</sup> *The Philippine Admiral* [1977] A.C. 373.

cause damage to the environment outside the limits of their territorial jurisdiction.

This concept is well explained in principle 21 of the Stockholm Declaration:<sup>17</sup>

"States have, in accordance with Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."<sup>18</sup>

Under this principle, states are responsible not only for their own activities, but for all those owners over which they exercise control, both public or private. It can be construed that the state should apply the same rules not only in places where they exercise territorial competence (within their jurisdiction), i.e. on land, but also on the territorial sea or everywhere they exercise "control", e.g. ships.

There is no provision in international law which prevents one state claiming reparation from another state in connection with a pollution incident once a breach of international obligation is shown.<sup>19</sup> This is objective responsibility, which is based on a voluntary act and breach of duty which results in damage.<sup>20</sup> The question which is important to consider in any particular case is whether the pollution incident constitutes a breach of a state's obligation concerning the protection and prevention of the marine environment. This was reflected in the **Corfu Channel Case** in which the I.C.J. held that a state has an obligation "Not to

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<sup>17</sup> The principle was formulated at United Nation Conference on the Human Environment which met in the Stockholm in June 1972; see the text of the conference in the Report of the Human Environment, UN Doc. A/ Conf. 48/14 at 265, 1972.

<sup>18</sup> This was restated, in the UN Conference on the Environment and Development, June 1992 Rio, in which it was declared, "States have a sovereign right to exploit their own resources but should not damage the environment or others". See Principle two Rio Declaration, Nicholas Schoan, *Plan of Action Agreed but Who Pays*, 15 June 1992, Independent p. 10.

<sup>19</sup> Brownlie, I. *Principle of Public International Law*, 3rd Ed, 1979, Oxford, p. 433

<sup>20</sup> Various international cases support the objective test, regarding transboundary pollution. Two of them seem to be centred: The Corfu Channel Case, [1949] I.C.J. R., 4.; Trail Smelter case, [1941] III UN.R.I.A.A. 1905.

allow knowingly its territory to be used for acts contrary to the rights of other states" and found Albania liable to pay compensation to the U.K. for damage and loss of human life which resulted from the explosion in a mine in Albanian territory. In practice, apart from specifically contracted international obligations, e.g. the Outer Space Liability Convention<sup>21</sup>, there is not general acceptance among states that they are responsible or liable for damage or harm caused to the environment of other states.

What is less clear is the exact nature and extent of states' liability to indemnify environmental injuries suffered abroad for activities under their control or jurisdiction, and whether pollution damage claims should be settled between the government and private parties directly concerned or whether a state should be responsible for transfrontier pollution damage caused by private person resident on its territory. It also does not cover responsibility where there is a threat of damage.

Under principle 21, the primary responsibility to ensure that an activity does not cause transnational damage is assigned to states. This suggests that if transnational environmental injury occurs, the injured nation is entitled to compensation directly from the sovereign body which has jurisdiction over the activity causing damage. This would be applicable even where the activity which has caused damage is privately owned and operated. The question arises as to why a state should be liable for activities which are carried out, not by themselves, but by private persons on their territory? The probable answer to this is that harmony among nations would be jeopardised if individuals were encouraged to request their governments to invoke international practices for transboundary

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<sup>21</sup> See 961 UNTS, 187.

pollution injuries and this also would be a threat to development of public international law.<sup>22</sup>

In addition those multilateral treaties which channel liability to the operator or owner of nuclear power facilities, (nuclear vessels,) oil tankers, and off-shore oil and gas rigs do not constitute sufficient evidence that the principle that the state is ultimately accountable for private activities of subjects under its control has been rejected. Therefore, the issue of the potential liability of the controlling state is left untouched.<sup>23</sup>

Furthermore, the national economy of the State on whose territory the activity takes place benefits from that activity generally, and in particular government through revenues. It is, therefore, equitable, to prevent unjust enrichment, that the benefited state compensates damage in another state caused by an activity, under its control, in another state. A state's international accountability also makes sense in view of the possibility that the private persons' assets or other potential financial resources might not be sufficient to cover the full costs of the transnational pollution damage. This argument suggests that those private persons who are economically the primary beneficiaries of the activity should carry the primary burden of eventual liability in form of civil liability and state liability should be subsidiary.

States' accountability for damage caused by private persons may be criticised on the grounds that in certain circumstances the element of control or

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<sup>22</sup> It is a well established principle of international law that the liability a state may incur for the acts of private person is a function of that state's control over the activities concerned. See. Gunther Handl, *State Liability for Accidental Transnational Environmental Damage by Private persons*, 1980, *The American Journal of International Law*, 525, at p. 527

<sup>23</sup> Certain treaties have both weakened and strengthened the state control position over the private activities subjects. e.g. Article III of the 1962 Draft Convention on the Liability for Operator of Nuclear Ships, reprinted in 57 AJIL 268-270, 1962. Article VII of the 1963 Vienna Convention on Civil Liability for Nuclear Damage, reprinted in 21 I.L.M., 727,737, 1963

authorisation may be so attenuated as to no longer provide a reasonable basis for holding the state liable. This would be the case, where owing to circumstances beyond its control, the State exercises merely nominal, rather than effective control over the activity, e.g., state control over a ship which is flying a flag of convenience or where the ship is sailing far from a state's territorial sea or in a war zone. Similarly, holding the state accountable would be without merit where initial state authorisation of the activity be deemed unrelated to the eventual risk created by a private person and the state could not have reasonably expected to extend its control to the place of subsequent risk creation.

### **3.2.1. The impacts of "Trail Smelter Arbitration" on states environmental obligations.**

Owing to the need for effectiveness, international practice including that of states, shifted the legal level at which the problems of compensation for environmental damage was to be solved. Since the traditional rules governing inter-state responsibility were not really helpful (as a matter of fact there was no serious attempt to apply them in this field,) the Trail Smelter Arbitration in 1914,<sup>24</sup> provided a practical solution to help the victim to obtain compensation for damage resulting from activities taking place in foreign country.

In the Trail Smelter Arbitration the United States sought damages caused to the State of Washington by fumes originating from a privately owned Smelter located in British Columbia. This Arbitration formulated a rule that under the principles of International Law, as well as the law of the United States:

"No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious

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<sup>24</sup> [1941] III U.N.R.I.A.A. at p. 1938.

consequences and the injury is established by clear and convincing evidence".<sup>25</sup>

There is a similarity between the principle laid down in the Tail Smelter Arbitration and the Scots law principle of *aemulatio vicini*, i.e. malevolence towards one's neighbour, whereby a landowner is in principle entitled to use his land for his own purposes and to serve his own interests but he must not use it for a malicious or unsocial purpose. Malice or spite is always required.<sup>26</sup> This is based on the view that although there is individual freedom in a society, law should impose some reasonable restraint on selfishness.

The implication of the Trail Smelter rule is that if such a right does not exist, the conduct is unlawful and causes state responsibility for the results. The tribunal also declared that "a state owes at all times a duty to protect other states against injurious acts by individuals from within its jurisdiction". This rule does not explicitly state that there is a duty on the state to compensate environmental damage.<sup>27</sup> However, the facts of the case suggest that once a transnational environmental injury has occurred, there is also a duty on the part of the polluting state to pay compensation for pollution damage.<sup>28</sup> The tribunal held that Canada was responsible under international law for the conduct of the Trail Smelter:

"it is therefore the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined."<sup>29</sup>

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<sup>25</sup> Id. at p. 1965.

<sup>26</sup> See in details, William M. Gordon, *Scottish Land Law*, Edinburgh, W. Green & Son Ltd., 1989.

<sup>27</sup> The issue of state responsibility, in Trail Smelter, stemmed from that the subject matter of dispute ostensibly involving claims by individuals in the United States against a private Canadian Corporation.

<sup>28</sup> William Hancock & Robert N Stone, *Liability for Transnational Pollution Caused by Offshore Oil Rig Blowouts*, 1982, *Hastings International and Comparative Law*, 377 at p. 378.

<sup>29</sup> The Trail Smelter, at pp. 1965-66.

The effectiveness of Trail Smelter concept, as a principle whereby sea polluters should be obliged to pay compensation to their victims, is in some doubt. JP. Grant and DJ. Cusine said:<sup>30</sup>

"It is open to doubt how wide the *ratio* of the *Trail Smelter Arbitration* can be extended. On a narrow construction, it might be applicable to nothing more than damage caused in one state by activities carried out in another State. On a broad construction, it might be applicable to any damage caused to State or its nationals by a vessel subject to the jurisdiction of another State. It is, of course, only on this latter construction that the case is relevant to the question of pollution of the sea by oil."<sup>31</sup>

It is argued that a broad construction of the ratio in the case is more in accordance with the nature of international customary law which is thought to establish broad principles of general application, rather than detailed rules to be followed in every particular case. The broad construction of the case was supported by the decision of the International Court of Justice, I.C.J., in the Corfu Channel Case in which the court recognised, "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".<sup>32</sup> It can be concluded that the territory, in this definition, can be extended to the ships which carry the particular State's flag.

The ratio of the Trail Smelter does not give a clear direction to ensure reparation of damage actually suffered. The Tribunal only asserted a general duty on the part of a state to protect other states from injurious acts by individuals, whether natural or legal within its jurisdiction. Difficulty may arise when it comes to determining what constitutes an injurious act. It seems, with regard to the polluter pays principle, that the polluter should be made liable for compensation to the

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<sup>30</sup> For the legal framework, see *The Impact of Marine Pollution*, eds. DJ. Cusine and JP. Grant, 1980, p. 31.

<sup>31</sup> See also, Brownlie, I., *Principle of Public International Law*, 3rd ed., 1979, p. 285, in which he did not extend the value of case to oil pollution from ships.

<sup>32</sup> The Corfu Channel Case, *supra*. No. 18, p. 22.

victims for all damage sustained as a result of an operation. Thus, the costs to be borne by the polluter should include all expenditure necessary to achieve an environmental quality objective, including the administration costs directly linked to the implementation of anti-pollution measures, i.e. the cost of preventing and eliminating of pollution.

There is also no rule in the case to ensure that the polluter must pay the cost of prevention, control and compensation for damage. To achieve this objective, it may be of interest to determine how the legal rules on insurance guarantee that the polluter must pay all the cost of prevention, control and compensation for damage. This approach may be criticised in that it would be unrealistic to expect the insurance industry to adopt a regulatory role by inserting and enforcing additional conditions to reduce pollution through the application of the polluter pays principle. If such a principle is thought to be desirable, it must be primarily designed by and be the responsibility of the Government.

### **Chapter 3. Owner pays principle**

The usual rule in transport cases puts liability on the carrier.<sup>33</sup> Imposing liability on the operator other than the carrier is an exception to this general rule.<sup>34</sup> In most conventions, transfer of the loss resulting from oil pollution has been based on the particular social and economic condition of the person or persons at the time of incident. In this case, it may be questioned why the carrier should bear the liability of loss. This question may be justified when it is realised that

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<sup>33</sup> Carrier is defined "any person by whom or in his name a contract of carriage of goods by sea has been concluded with a shipper". See the Hamburg Rules, United Nation Convention on the carriage of Goods by sea, 1971 Art. 1; carrier includes "the owner or the charterer who enter into a contract of carriage with shipper". Art. 1(a), The Hague Rule as amended by the Brussels protocol 1969.

<sup>34</sup> e.g. Brussels Convention on the Liability of Operator of Nuclear Installation 1962, channelled liability to operator of nuclear installation, see text of the Convention in 57 A.J.I.L., [1963] p. 268.

channelling liability to the carrier may offer a limited but direct incentive for the carrier to adopt the most efficient scheme for preventing and cleaning up the oil spills, because of his ability to pass liability to the insurers and consumers.<sup>35</sup>

The assignment of liability for a major oil spill to the ship owner could be done in such a way as to leave open the option of how this liability should be borne to the shipowner. He will then have a direct incentive to choose the most cost effective method of pollution control in the case of an oil spill. In a broad sense, this method could range from spending resources to building safer vessels and ultimately to payment of damages once spills have occurred.<sup>36</sup>

### 3.3.1. Common law and owner pays principle

In Anglo-American Common Law, those who have committed negligence are responsible of payment for damage which has been caused by their wrongful conduct. Thus, under the Common Law, the pollution victims who suffer damage, cannot establish a valid claim merely by showing that the defendant owned the ship which caused the damage. In *River Wear Commissioners v. Adamson*,<sup>37</sup> the court expressly said that an owner incurs no liability simply because of that ownership. However, it was accepted that the fact of ownership of property is *prima facie* evidence that at the time of the damage it was the negligent owner or his servant or agent who caused the damage and therefore there is liability for compensation.<sup>38</sup> The owner can only escape the liability if able to show that the damage was caused by the negligence of a person for whom he is not vicariously

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<sup>35</sup> Philip A. Cummins, Denies E. Logue, Robert D. Tollisin, and Thomas D. Willett, *Oil Tanker Pollution Control, Design Criteria. v. Effective Liability Assessment*, 1975, J.Mar.Law & Comm. 169, at p. 175.

<sup>36</sup> Id.

<sup>37</sup> (1877) 1 App. Cas. 743.

<sup>38</sup> *Barnard v. Sully* (1931) 47 T.L.R 557.

liable. This view is supported by the decision of *Samson v. Aitchison*,<sup>39</sup> in which Lord Aitchison said,<sup>40</sup> "I think that where the owner of an equipage whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retain the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right or is shown by conclusive evidence to have in some way abandoned his right." Therefore, the party who exercises complete control over the operation, maintenance, repair, and training of the crew has a duty to ensure that the vessel is seaworthy. If he performs his duty negligently or has knowledge that the vessel is unseaworthy he may be liable for any pollution which results from such a negligent act,<sup>41</sup> even if he is not the true author of the accident which caused the pollution.

In the case of multiple causes of damage, all who are involved are accountable.<sup>42</sup> The lesser responsibility of one wrongdoer may not reduce the amount of his liability to the victims, as against his fellow wrongdoers, unless his conduct was not a substantial enough factor to be causative. This is why, where an injury was caused by conduct of two or more people acting in breach of their duty of care, and where there is no way of ascertaining the tortfeasor, the court held that all were jointly and severally liable.<sup>43</sup>

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<sup>39</sup> [1912] A.C. 844.

<sup>40</sup> *Id.* at p. 849.

<sup>41</sup> *The Amoco Cadiz*, [1984] 2 Lloyd's Rep. 304 at p. 337.

<sup>42</sup> *Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd. and Others*, [1952] 1 All E.R. 1326.

<sup>43</sup> *Summers v. Tico*, 33 Cal 2d 80, 199 p. 2 d1, 1948.

### 3.3.2. The CLC and owner pays principle

The main aim of the Convention was to safeguard the interest of the victims of pollution and to reduce oil pollution. To achieve this, it would be in the interests of the victims that the party liable is someone most easily identifiable by the victims and most likely to be able to provide adequate financial guarantees.<sup>44</sup> It should also recognise who would be more able to take effective measures to prevent or minimise pollution.<sup>45</sup>

Under CLC, liability for pollution damage is assigned, in order to obtain foregoing aims, exclusively to the ship owner<sup>46</sup> because it is to identify and locate him.<sup>47</sup> The other rationale for such strict Channelling of liability could be that it would eliminate completely the need for a person other than the ship owner to be insured against claims for pollution damage.

Channelling liability for compensation exclusively to the owner may cause problems if a change of ownership takes place during the currency of an insurance policy. If the pollution damage is to be continuously covered by the insurer, the new owner would have to take insurance cover immediately he came into ownership of the vessel. This might create administrative difficulties, in particular when the change of ownership takes place while the vessel is at sea. Taking new insurance cover could take considerable time. If any accident happens during this

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<sup>44</sup> Mr. Mennies, Australia delegation, LEG/Conf/C. 2/SR.3/ 13 Nov. 1969.

<sup>45</sup> Mr. Newman, U.S.A. delegation , Id.

<sup>46</sup> Art. 1(3), 1969 CLC, defined owner as "the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owing the ship. However 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 a company".

<sup>47</sup> Spanish delegation view regarding Draft Article of Civil Liability for Oil Pollution Damage, see in Official Records of the International Legal Conference on marine pollution damage, 1969, published by IMO 1973, at p. 462

period, the victim of pollution is left without any insurance to cover the loss. This problem may be solved if the insurer is forced to continue cover until, within a specified time, a new owner takes insurance cover.

The freight may substantially increase when the cost of pollution damage is only channelled to owners. The owner may complain that in a difficult freight market, extra costs of this sort are hard to pass on. He may also say that it is not fair to take liability on his shoulders where a time charterer is himself liable for incident. This can be clearly shown where the time charterer sends a vessel to an unsafe port and damage is caused as a result, for which the charterer must indemnify the shipowner.<sup>48</sup>

Under the CLC, claims against the owner are limited to pollution damage in accordance with the Convention.<sup>49</sup> Therefore, if the damage which is suffered is pollution damage but does not attract the rule of liability because one of the specific exemptions in the Convention, there is no remedy against the owner under the general principles of law, such as common law or civil code. As a result it can be said that the owner pays principle is not absolute, and the owner only pays compensation to those who have suffered pollution damage under the Convention.

No claim for pollution damage would be made against the servants or agents of the owner.<sup>50</sup> Of course this does not mean that the ship's agent could not be required to give a contractual indemnity in respect of any pollution damage, nor does it mean that the registered owner cannot take an indemnity from servants

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<sup>48</sup> *Grace (GW) & Co Ltd. v. General Steam Navigation Co. Ltd.* [1950] 2 K.B. 383; *Kodross Shipping Corpn. v. Empresa Cubana de' Flets, The Evia (No. 2)*; See also *The Polyglory* [1977] 2 Lloyd's Rep. 353, where one of the vessel's anchors dragged and fouled the under water pipeline. The charterers were held in breach on the ground that something more than ordinary prudence and skill was required by master and crews in order to avoid the danger.

<sup>49</sup> Art. III(4).

<sup>50</sup> *Id.* The 1984, as adopted by 1992, Protocol to the CLC more clarified the servant and agents and extended protection to other people such as pilot any member other than the crew, charterer, salvors..., see Art. III(4).

or agents if the damage results from their personal intentional act or omission. The question of exactly who is a servant or agent is not defined in the Convention and is, therefore left to national law.

In order to identify a servant, for whose wrong the owner is vicariously liable, a distinction should be made between the contract of a service and the contract for services. An employee is part of the team formed by the business work-force and the job he does is an integral part of the business operation. Under a contract for services the person supplying them is merely an accessory. Mackenna J. examined the question in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions & National Insurance*,<sup>51</sup> and said "A contract of service exists if the following three conditions are fulfilled: (I) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in performance of some service for his master, (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master, (iii) The other provisions of the contract are consistent with its being a contract of service." Thus if a contract of service does not have such characters- existence of consideration, sufficient degree of control , consistency in the provisions of contract, it is not a contract of service and the person doing the work will not be a servant.

Many shipping firms may not need an expensive item of equipment or certain services in their day to day operation to justify the permanent purchase, so they tend to hire from a specialist concern that lends equipment or services. Invariably such transactions are on the basis that the borrower not only takes temporary loan of the equipment or services, but also with it, the employee who operates that particular equipment or services. So such an operator, whilst

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<sup>51</sup> [1968] 1 All E.R. 433. at pp. 439-40.

remaining in the general employment of the firm which hired the equipment or services spends a lot of time away from his employer, working temporarily under the direction of the shipping firm which becomes for a few days or weeks something like a temporary employer. Suppose a situation arises where an operator who causes damage through his own fault, who is responsible vicariously for the consequences? Is it the general employer who probably pays the man's wage and retains the right to dismiss and control him; or the employer shipowner, who had been directing his activities whilst the hired equipment or services was being used for his work? The answer to this question depends on the terms of contract which regulate liability between the general and temporary employer. In the absence of such specific terms, Lord Porter in the House of Lords<sup>52</sup> said "Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed - all these questions have to be kept in mind... Among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged".<sup>53</sup>

The above situation may be applied, by analogy, to the agents and owner, as a principal relationship. Thus an owner is vicariously liable for the wrongful acts or omissions of his agents, provided of course that they arise in the commission of the duties being undertaken for the owner, under the special contract. Mere permission from the owner for a friend or relative to use a ship for his own purpose does not create a principal agent situation. The point was considered by the House

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<sup>52</sup> *Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool) Ltd and McFarlane*. [1946] 2 All E.R. 345. at p. 351.

<sup>53</sup> See also Denning L.J. in *Penham v. Midland Employers Mutual Association Ltd*. [1955] 2 All E.R. 561

of Lords in the *Morgan v. Launchbury*,<sup>54</sup> in which Lord Wilberforce pointed out that on an established common law rule, the owner need not pay if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purpose.

Interpreting the CLC in the light of legislative history, the court<sup>55</sup> found in the *Amoco Cadiz* case,<sup>56</sup> that the term mandataries and preposes ("agents and servants") were intended by drafters "to refer to and immunise the master and crew of a vessel, individuals who would be unable to bear the financial expenses of liability and whom it would therefore be futile and unfair to sue." That is, the terms were not intended to immunise the master and crew of major shipping companies, who are able to afford the financial expenses, from suit. The court also found that the consulting agreement between parent company and registered owner does not purport to create the relation of principal-agent, but that of owner-independent contractor. Furthermore, the registered owner is not a parent company agent where it does not and cannot exercise any direction or control over the operation of parent company.<sup>57</sup>

The owners pays principle does not, under the CLC, extend to a state-owned ship, "warship or other ships owned or operated by a state and used, for the time being, only on Governmental non-commercial service."<sup>58</sup> This exclusion is consistent with the general public international doctrine of sovereign immunity and

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<sup>54</sup> [1972] 2 All E.R 606.

<sup>55</sup> United States District Court for the Northern District of Illinois.

<sup>56</sup> [1984] 2 Lloyd's Rep 304 at p. 337.

<sup>57</sup> Since the United States had not signed the CLC, therefore its court's interpretation cannot have too much legal effects where the CLC is applied, but it still can be regarded as a good guide in the interpretation of "servant or agent" under the CLC.

<sup>58</sup> Art. XI(1).

with the role which states have seen for themselves in the regulation of oil pollution. The exemption may also be justified with the view that lack of such an exemption may drag the state into court against its will, so that in practice a limitation fund would have to be established. If the right to limit was denied claims would be paid in full. However, in the case of commercial activity there is no immunity for a state-owner's claim in connection with a ship if, when a cause of action arises, the ship is used for a commercial purpose. Such exemption may also be well justified when it is realised that the insurer is usually reluctant to compensate governments for the use of ships and men ordinarily engaged in a state service. The Marine Insurance Act 1906<sup>59</sup> provides that a policy "on goods", means only such goods as are merchantable. It can be construed that as property, ships must be merchantable, i.e. a ship is put to sea for the purpose of commerce.<sup>60</sup> Hence, if the ship is used for state service, not commercial service, it is not covered by a general policy on the ship.

Article IV of 1969 CLC provides "when oil has escaped or has been discharged from two or more ships, and pollution damage results, therefore, the owner of all ships concerned, unless exonerated under the Article III, shall be jointly and severally liable for all such damage which is not reasonably separable." The situation clearly envisaged by the Article is where two or more tankers collide and their cargoes spill into one slick, which causes pollution damage which is not separable. This is identical to the common law and Admiralty rule in collision cases where vessel C is damaged by a collision between vessel A and B for which they are both to blame. Therefore, pollution victims can recover damage in full from either of the tanker owners who are to blame, on the basis of single liability for

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<sup>59</sup> Sched. I. r. 17.

<sup>60</sup> So stated by underwriters in *Ross v. Thulaites*, before Lord Mansfield [1776] 1 Park. 23, 24; so defined by Best C.J. in *Brown v. Stapleton* [1827] 4 Bing. 119 at 121.

single injury. This rule will not be applied where pollution damage caused by several owners is reasonably separable. In such a case each owner is held separately liable.<sup>61</sup>

Joint and several liability is applied where oil has escaped or has been discharged from two or more "ships". Ship is defined as a vessel carrying oil in bulk as cargo. Thus, the Article does not apply where a laden tanker and dry cargo vessel collide and oil spills from both of them, since oil has not escaped from "two or more ships", as defined in the convention. It is also noted that the Article does not apply where oil is discharged from one vessel which is owned by different persons, because the Article only applies where "two or more" ships are involved. Similarly, the Article does not apply where charterers or salvors are jointly or severally to blame for pollution damage because it applies only to "the owners of all ships concerned" and they are not regarded as "owners" liable under the Convention.

It may be argued that, since tanker industries are mostly an offshoot of the oil industry and will pass any increases in insurance costs to that industry, it would also be more logical to channel liability to the oil companies as owners, whether or not they actually control the tanker operation. It would also be in the interests of the victims of oil pollution to recover damage by taking action against one of the major oil companies rather than against a tanker owner who is likely to use every device of company law and shipping registration to escape liability.<sup>62</sup>

It may also be said that it would be reasonable to make the operator of a tanker liable rather than the ship owner because firstly, the burden of liability

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<sup>61</sup> See *Performance Cars Ltd v. Abraham* [1962] 1 Q.B. 33; *Baker v. Willoughby* [1970] A.C. 467.

<sup>62</sup> As it was viewed by, G.W. Ketoon, *The Lesson of the Torrey Canyon, English Law Aspects, Current Legal Problems*, (1968) vol. 21, pp. 109-110

should induce a person to take all measures to prevent oil pollution and to minimise a loss when that has occurred. Such measures can only be taken by an operator, as the person exercising control of the operation and management of the ship. Thus where a ship is under a demise charter, the charterer (as owner of pro hac vice)<sup>63</sup> is in actual control of the ship on a particular voyage or at specified time, and the owner has no control over the operation and management of the ship. This difference may raise the question of which of the ship owners, charterers or their agents, would be liable to persons who are strangers to the contract as for instance in the case of damage which may be caused by improper navigation of the ship.<sup>64</sup> Secondly, a condition for providing insurance liability for pollution damage will depend on circumstances arising during the operation of the ship. In consequence, the owner who does not operate the ship will not be in a position to provide proper insurance of liability.<sup>65</sup>

Imposing liability on the operator may be criticised, because it may not safeguard the interest of the victims in certain cases, for instance, in the case of a time charterer who controls the commercial function of the vessel and would normally be responsible for the resultant expenses of such activities to the ship owner.<sup>66</sup> In addition, since the operational contract is one between the operator and owner, the former may not be identifiable by third parties.

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<sup>63</sup> An owner pro hac vice is not true owner of the vessel, but rather than one who has entered a demise charter under which owner surrenders all control of ship. See Gilmore and Black, *The Law of Admiralty*, ss. 4-23.

<sup>64</sup> Colinvaux. R.(editors), *Carvers's Carriage by Sea*, 13 ed, v. 1, London, Stevenson & Sons, 1982. pp. 582-588. it was also viewed by the Union of Soviet Socialist Republic delegation, LEG/Conf/4/Add. 1, 7 Oct. 1969

<sup>65</sup> See the view of Union of Soviet Socialist Republic delegation, Id.

<sup>66</sup> Swedish Delegation views in, LEG/Conf. 4/Add-2, 31 Oct. 1969.

### 3.3.3. TOVALOP and the owner pays principle

Under TOVALOP, liability is assigned to the participating Tanker Owners which includes Bareboat Charterers, as a pro hac owner.<sup>67</sup> The owner has been defined as the person or persons registered as the owner, or in the absence of registration, the person or persons owning the tanker, except that in the case of state-owned ships operated by a company registered as the operator. In this case the operator is deemed the owner for the purposes of the Agreement.<sup>68</sup> It seems that the phrase "registered as the owner of the ship", is of no value since the ownership is usually established by its "registry". However, it is necessary to make a distinction between the "operator" and the owner which might not always be the same person. The concept of "operator" basically covers the bareboat charterer, the case where the management of the ship at sea has been assigned to charterer. Thus time or voyage charterers should be excluded because in both these instances, the shipowner ensures the management of the ship at sea with his crew, and therefore the registered owner remains responsible.

The extension of TOVALOP cover to bareboat charterers does not mean that there is two voluntary payment where tanker is subject to a charter, because there cannot be two claims in respect of one loss. Thus, unless otherwise agreed in writing, "any payment made by the owner to a person constitutes full settlement of all that person's claim against the owner, the tanker involved, its charterer, their officers, agents, employees and underwriters."<sup>69</sup> However, it is not clear that if a claimant accept a TOVALOP offer from the bareboat charterer can sue the registered owner under national legislation.

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<sup>67</sup> Clause I(c) and Clause VIII(e).

<sup>68</sup> Clause 1 (c).

<sup>69</sup> Clause VIII(e) and (k).

### 3.3.4. HNS Draft and the owner pays principle

It was strongly believed that, under HNS, only ship owners should be liable either because this solution was the most easily justifiable in terms of other liability instruments, or because of practical considerations.<sup>70</sup> In addition, shippers' interests argued that the majority of incidents which would give rise to liability under the Convention arise not from the inherent characteristics of the cargo, but from some action or omission on the part of the ship and, therefore, in most cases the ship owner was to blame and should carry the liability.<sup>71</sup>

It may be argued that the ship owner does not bear the substantive risk of civil liability since he, even when his liability is strict, may exclude his liability if he proves that the damage resulted from an act of war, natural phenomena of an exceptional, inevitable and irresistible character, or the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigation aids in the exercise of that function.<sup>72</sup>

## Chapter 4. The shipper pays principle

There is an opinion that the financial protection against pollution would be most suitably established by imposing the financial obligation not only on the shipowner but also on the cargo interest, the shipper, itself. This idea is supported by the view that maritime transport is not dangerous in itself. It becomes dangerous when the ship carries dangerous goods.<sup>73</sup> Therefore, it would be logical

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<sup>70</sup> British Maritime Law Association view in, Conference of the committee' Maritime International, Montreal May 1981, HNS, at p. 6.

<sup>71</sup> *Id.* at p. 7.

<sup>72</sup> See Tiberg, H., *Oil Pollution of the Sea and the Swedish Tsesis Decision, 1984*, L.M.C.L.Q, 212.

<sup>73</sup> Two alternative approaches to the concept of dangerous goods are possible: a traditional view might regard dangerous goods as a category the extent of which is to be developed by precedent or statutory regulation, see Regulation 1(2) of the Merchant Shipping Dangerous Goods, Regulation 1981; The court has viewed in wider terms to embrace cases in which the danger is to be found in the surrounding circumstances

for the party with the cargo interest to accept the risk, or at least part of it.<sup>74</sup> It may also be justifiable that the party with the cargo interest takes on his shoulders pollution damage because he is better able to establish funds and provide more protection for victims of pollution damage.<sup>75</sup>

It may be argued that it would be difficult to identify cargo interests since they include a variety of people, such as shipper, a receiver, and owner for the duration the cargo. The liability cannot be placed on the owner because ownership could change during the voyage and therefore there would be no degree of certainty regarding the owner. The same reason could be applied to the receiver.<sup>76</sup> It would also be optimistic to assume that cargo owners would agree to set up a joint fund for payment of damage, since their interests are different.

The proposal to impose liability for payment on the cargo interest may give rise to a further objection. Although a shipper may not change during the voyage and be a factor known to owner and even to the victims, nevertheless a shipper can not exercise any control over the ship while it is on the high seas. On the other hand, if the shipper, as a cargo interest, accepts liability the ship owner would have no incentive to take the necessary safety measures.<sup>77</sup>

The view that liability should be passed to the person named in the bill of lading may also provide some problems because the shipper with whom the main

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rather than in inherent damage of goods itself. It was said that, while it may be thought inaccurate to categorise some liquid, which is carried in bulk, as inherently dangerous, it may be nevertheless create problems if permitted to leak from their containers and create pollution damage, see *Sellers in Ministry of Food. v. Lamport & Holt* [1952] 2 Lloyd 's Rep. 371 at p. 382.

<sup>74</sup> Mr. Philip, Denmark Delegation, LEG/Conf/C.2/SR. 3 Nov. 1969.

<sup>75</sup> Irish Delegation, IMCO, LEG/Conf/4/Add. 4, 12 Nov. 1969.

<sup>76</sup> As it was said by, Mr. Mc Govern, Irish delegation, LEG/Conf., C.2/WP.1.Rev, LEG/Conf/4/Add. 4, 1969.

<sup>77</sup> Mr. Norden, Swedish delegation, LEG/Conf/ C.2/SR.7, 13 Nov. 1969.

responsibility rests might belong to a country which did not subscribe to the convention and therefore, it would be difficult to obtain desired compensation.

#### **3.4.1. Under CRISTAL**

CRISTAL is the oil cargo interest's voluntary response to the recognition that in some cases persons sustaining pollution damage would not be able to recover adequate compensation under existing legal and other regimes, including CLC and TOVALOP.<sup>78</sup> Under CRISTAL, in the first instance the claimant must seek recovery from the owner of the tanker involved in the incident up to the limit stated in the supplement to TOVALOP. If the recovery from the tanker owner and, where applicable, the fund is insufficient, further recovery must first be sought by the claimant from any other source.<sup>79</sup> Compensation is provided within defined limits by a fund administered by an institute<sup>80</sup> set up under the CRISTAL agreement, and contributed to by the oil companies party to it, through raising a levy based on the receipts from the crude and fuel oil.<sup>81</sup>

#### **3.4.2. Under IOPC Fund**

The Fund Convention seeks to find a solution to distribute the cost of oil pollution damage by involving the industries which bring petroleum products to the market. The main function of the IOPC Fund is to provide supplementary compensation to those who cannot get full compensation for oil pollution damage

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<sup>78</sup> Preamble to Contract Regarding A Supplement to Liability for Oil Pollution, see in Memorandum of Explanation of the Contract Regarding to Tanker Liability for Oil Pollution, revised February 20 1989

<sup>79</sup> Id.

<sup>80</sup> The Oil Companies Institute for Marine Pollution Compensation Limited, a company incorporated in Bermuda

<sup>81</sup> Clause VIII(2).

under CLC, and to indemnify the ship owner for the portion of his liability under CLC.<sup>82</sup>

To provide a more equitable distribution of cost, the IOPC Fund is financed by a contribution paid by any person who receives more than 150,000 tonnes of crude oil or heavy fuel oil, in a contracting state after carriage by sea in the relevant calendar year<sup>83</sup>. In fact the burden of payment falls disproportionately on the oil industry and consumer in those states.

### 3.4.3. Under HNS Draft Convention

There is a general feeling that risks inherent in the HNS do not arise only from carriage but are also inherent in the substances themselves and substandard shipping, as distinct from transportation, such as unsafe packing standards, inadequate or inexact dangerous goods declarations. As a general principle of law, in the common law and certain statute law,<sup>84</sup> the shipper of goods impliedly undertakes, an absolute warranty, to ship no goods of such a dangerous character or so dangerously packed<sup>85</sup> that the ship owner or his agent could not by reasonable knowledge and diligence be aware of their dangerous character,<sup>86</sup> and he is therefore liable to any other person who is injured by the shipment of such

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<sup>82</sup> 1971 Fund Convention, Art. 2.1.

<sup>83</sup> *Id.* Art. 10.1.

<sup>84</sup> See Merchant Shipping Act 1894 ss. 446-450; The Nuclear Installations Act 1965 imposes strict liabilities in relation to accidents occurring during the carriage of nuclear or radioactive matter in certain specified circumstances; Rule 6 of Art. IV in Schedule to the Carriage of Goods by Sea Act, as adopted by The Carriage of Goods by Sea Act 1971 also deals with dangerous goods. See Art iv Rule 6.

<sup>85</sup> See Sir Alan Abraham Mocatta. Michael J. Mstill. Stewart C. Boyd, *Scrutton on Charter parties and Bills of Lading*, 18 ed., London, Sweet & Maxwell, 1974, at pp. 110-102, *Chandris v. Isbrandtsen- Moller* [1951] 1 K.B. 240.

<sup>86</sup> See *Atkin J. in Mitchel, Cotts v. Steel* [1916] 2 K.B. 610 at p. 614.

dangerous goods without notice<sup>87</sup>. Therefore, there was considerable support for shippers only liability as is provided for maritime carriage of nuclear substances.<sup>88</sup>

Ship owning interests believe that the demand for higher compensation in respect of HNS does not derive from any view that the ship owners concerned are negligent, but from the potential of those substances to cause catastrophic damage substantially higher than limits available in the 1976 Limitation Convention. They concluded, therefore, that shippers should bear part of the liability involved in the carriage of dangerous cargoes.<sup>89</sup> Goods may be dangerous within this principle if owing to legal obstacles as to their carriage or discharge they may involve detention of the ship.<sup>90</sup> Thus a shipment of goods which renders the voyage illegal, or which might involve the ship in danger or forfeiture or delay is precisely analogous to the shipment of a dangerous cargo which might cause the destruction of the ship.

A significant majority of states in the IMO Legal Conference voted for a two-tier system of compensation whereby the primary compensation would be channelled to the ship owner, and the excess compensation placed on the cargo in order to provide sufficient compensation for victims of any incident<sup>91</sup>.

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<sup>87</sup> The liability of the shipper and ship owner, where dangerous goods are shipped, were much elaborated in *Brass v. Maitland* [1856] 26 L.J.Q.B. 49.

<sup>88</sup> The 1963 Vienna Convention on Civil Liability for Nuclear Damage. 1971 Brussels Convention Relating to Civil Liability in the fuel or Maritime Carriage of Nuclear Material which extended the liability of operator of nuclear installation to damage caused by nuclear incident during the transportation of nuclear substances by sea.

<sup>89</sup> British Maritime Law Association, *supra*. No. 67, at p. 6-7.

<sup>90</sup> *Mitchell v. Steel* [1916] 2 K.B. 610.

<sup>91</sup> LEG XXXIV, para. 22/49 and 61.

### 3.5. Concluding remarks

There are, as was explained, several ways to assign and apportion responsibility for harm to the marine environment because of pollution incidents at sea. It is generally believed that all businesses, governments, insurance industries and the public must join together to fight pollution and to pay related costs.

The "polluter pays principle" was introduced in order to ensure more effective protection of the marine environment and to encourage a higher standard of care. It also served to provide sufficient insurance to cover the potential costs of any spill. There is some anxiety in the application of the principle to the damage caused by pollution, in particular damage done to the marine environment and its natural resources which do not have a ready market value. It is also fair to say that the merits of the principle are in serious doubt when it comes to enforcement. Equal access principle is too uncertain in its operation to guarantee full compensation and to ensure the implementation of the pollution pays principle unless such a principle is adopted by the relevant national legislation. Although the principle reflects a laudable aim, there are doubts about its application in practice. Even where the polluter is successfully identified and required to pay, he is often merely the initial, rather than the ultimate payer. For example, where the polluter is a government body, payment by it usually results in additional charge on the general taxpayer; and where the polluter is a commercial entity, it can often pass on a remedial cost to its customers in the form of increased prices.

The question of state responsibility for harm to the marine environment takes two forms: (1) responsibility for ensuring that activities which are about to take place do not cause harm to the marine environment, i.e. preventive role, (2) responsibility after the pollution accident has happened. To implement its first duty, states must attempt, through international, regional, and universal co-operation, to avoid damage to the marine environment while enhancing the quality of the marine

environment. The question of state responsibility as to payment of compensation to the victims, after a pollution incident has happened, is a difficult one which needs further consideration. Generally speaking, international law and practice has not received any general principle capable of clearly defining an obligation which rests upon states to compensate any other state in respect of oil pollution. Consequently, it is only in the rare case that a state finds itself liable in international law. Thus, the risk of accidental pollution at sea is usually carried by private parties whose liabilities are regulated through specific private law conventions. Nevertheless, states can play a crucial role regarding compensation within the framework of international conventions.

Most conventions, agreements and regulations regarding pollution liability have assigned liability to the owner, because that is the most expeditious way for a victim to obtain compensation. However, liability does not attach to the owner in a number of specified instances. Therefore, in some cases the victims bear the cost of pollution damage. The complications surrounding ownership and operation of tankers have demonstrated the difficulty confronting claimants in pressing their claims against charterers, and operators of ships. This inadequacy can be remedied by placing liability, by convention or agreement, upon the parties, who are in the position to take significant precautions to prevent or reduce the pollution damage, other than the shipowner. Although assigning liability and payment of pollution damage to the shipper, as cargo interest, may make identifying the responsible party easy where one party owns the cargo, it may not provide sufficient compensation for victims, in particular in catastrophic cases. The establishment of a fund which is financed by the cargo interest would be the most appropriate solution for providing sufficient financial support for victims of pollution.

It is also pointed out that the owner or shipper pays principle, in spite of success in many cases, does not offer a complete solution which covers all

aspects of pollution damage, due to exceptions and financial limits. Thus, attention should be devoted to establishing a state-funded compensation regime in order to cover pollution damage at a level above the Conventions, the CLC and FC. The impact of this scheme would be to spread the cost of serious accidents equitably across the community as a whole and provide sufficient means to compensate all pollution victims.

## **PART IV. THE EXTENT AND QUANTUM OF LIABILITY**

### **Chapter 1. Extent of limit**

#### **4.1.1. Introduction: The importance of limitation for marine pollution**

Limitation of the liability of shipowners for losses or damages in connection with the operation of ships has long been a tradition in international maritime law.<sup>1</sup> The limitation of shipowners' liability, as an exception to the principle of full liability, e.g. in common law, has been justified as a commercially practical device by which the effects of maritime disaster can be reasonably apportioned and as a means to encourage the investment of risk capital in maritime adventure. Availability of the right to limit is more important for a shipowner as the impact and range of their potential liability expands, as in the case of oil pollution in which the strict liability is involved and shipowner may have to pay for incidents over which he has no control and could not have prevented. The range of a shipowner's liability may also expand with regard to the consequential claims which are involved in oil pollution cases.

It may be said that, in modern times, the need to encourage shipowners to invest is no longer a valid reason for limitation, since insurance is available and that this has removed the danger of disaster. There is, however, no doubt that one of the main reasons for continuing the system of the right to limit, in recent times, is to enable the shipowner to obtain adequate insurance cover for third party claims and to encourage the insurers to provide insurance by allowing a reasonable calculation of their maximum exposure with certainty, in particular in oil pollution cases which can involve the huge potential financial liability. In other words, a limit may make the shipowner's liabilities insurable by removing the uncertainty which surrounds unlimited liability insurance. In effect, underwriters

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<sup>1</sup> See more comments in, Dohoran, Jeans. J., *The Origins and Development of Limitation of Ship owners Liability*, 53 *Tulane Law Review*, 1979, at pp. 999-1045.

accept, as does the shipowner, a calculable risk which puts the underwriter in a position to charge a lower premium and the shipowner a lower freight. That would not be possible if the assured's liability was unlimited. In addition, the existence of the right to limit make it possible for a shipowner to obtain cover for his total exposure and not just some portion.

The existence of a right to limit may be criticised, in particular when taken along with insurance cover, on the ground that it encourages shipowners not to maintain their ships properly on the basis that they will not be paying in full for the resultant claims. Consequently, they may send a ship out which is not in a proper condition and is potentially apt to create major risks of pollution. It seems that this theory has no logical reason since, in fact, lack of proper maintenance may well cause the limitation clause to be broken in the insurance policy, thus defeating the supposed object. In a Standard Ships General Policy one of the main conditions for cover is that the ship which is sent to sea should be in a seaworthy condition, i.e. in proper state of maintenance for the particular voyage, Thus, if a vessel puts to the sea in an unseaworthy condition with the full knowledge and consent of the assured, the underwriter is not liable for any loss attributable to unseaworthiness.<sup>2</sup> As a result, if there is any lack of maintenance, the shipowner will lose his right to limit and this is not in his favour, in particular where highly potential pollution risks are involved.

At Common Law, in which there is a tendency to fuller indemnity as adequate protection for those who have suffered damage, the limitation of ship owners may be accepted on two grounds which are based on economic reasons not on justice and equity, "(I) the need which the insurer of civil liability of ships has to determine the scope and consequence of the accident which can affect the insured in order to evaluate the risk and determine the premium, (II) the accident

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<sup>2</sup> S. 39 MIA 1906.

of a catastrophic nature which can lead to bankruptcy of not only ship owners but also insurers."<sup>3</sup>

International conventions have also developed the concept of limitation. The first was adopted in Brussels in 1924 and reflected the fact that a ship owner may limit his liability to the value of the ship and freight or the amount of £ 8 per ton.<sup>4</sup> The second was established in 1957 again in Brussels.<sup>5</sup> The last one was adopted in London in 1976.<sup>6</sup> The other conventions, which deal with the limitation of the liability of shipowners, result from an integral part of the international arrangement providing liability for oil pollution, of which the 1969 CLC and 1971 FC are the core. There are many reasons for providing such special limitations. The most justifiable reason is that the amount of limitation provided in other international conventions was too low to provide sufficient compensation for oil pollution victims.

#### **4.1.2. Legal authorities for supporting right to limit in the case of liability for pollution damage**

The 1924 and 1957 Limitation Conventions clearly granted the right to limit in respect of claims for oil pollution damage. The 1976 London Convention

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<sup>3</sup> Lopezsaavedra, D. M., *The London Convention of 1976 on Limitation of Liability for Maritime Claims: Disadvantages of its Possible Ratification*, [1978-1982] IV Yearbook Maritime Law., 138, at p. 140.

<sup>4</sup> It was named The International Convention for Unification of Certain Rules relating to the Limitation of the Liability Owners of Seagoing Vessels. See text of Convention in Benedict on Admiralty, 7th ed., by Michael F. Stuley, vol. 6, Document No. 5-1, 1993.

<sup>5</sup> Under the name of International Convention relating to the Limitation of the Liability Owners of Seagoing Ships. See text in Benedict, Id, Document No. 5.2. In UK law, the Merchant Shipping (Liability of Shipowners and Others) Act 1958 amended the 1894 Act in order to give effect 1957 Limitation Convention.

<sup>6</sup> The Convention on Limitation of Liability for Maritime Claims, so called 1976 London Convention. See text id, Document No. 5-4. It has been incorporated into English law by the Merchant Shipping Act 1979. The Merchant Shipping Act 1979, sch, 4, contains the relevant provision of the 1976 Limitation Convention.

provided that the convention does not apply to "claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage dated 29 November 1969 or of any amendment or proposal thereto which is in force..."<sup>7</sup> The wording of the article clearly shows that there is no condition that a claim is actually governed by provisions of the 1969 Convention. It has excluded from limitation under the Convention all claims for oil pollution damage "as defined" in the 1969 Convention. The consequence of this is that where oil pollution damage as defined in the 1969 Convention<sup>8</sup> results in liability based not on the 1969 Convention, but on national law, such liability will not be subject to limitation neither under the 1976 Limitation Convention nor under the 1969 Convention.

The effect of this exclusion would be that, in an incident involving claims for both oil pollution damage and other claims, the shipowner would have to establish two distinct limitation funds, one under the CLC for pollution damage, and one under the 1976 Convention for all others claims. In this way, it is felt that the respective rights of pollution victims and other claimants would best be protected. This exclusion also removes the jurisdiction conflict where two limitation funds are to be established. Thus it is possible for a CLC limitation fund to be established in one country and a 1976 Limitation Convention fund to be established in another, both against the shipowner in respect of matters arising out of the same incident.

The wording of the 1976 oil pollution exclusion provision is far from clear; it does not show exactly what claims should be excluded. Unclear provision may give rise to difficulties in countries which have ratified both the 1976 London Convention and the 1969 CLC or the protocol to it. Does it refer to all claims for pollution damage? Does it apply only to claims against the registered ship owner

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<sup>7</sup> Art. 3(b) 1976 London Convention.

<sup>8</sup> Art. 1(6).

for "oil pollution damage"<sup>9</sup> for which liability under the CLC may arise? Another difficulty would be where pollution damage is caused by a laden tanker but suffered in a state which is only party to the 1976 Convention. Since damage of this type caused by a laden tanker is pollution damage within the meaning of 1969 CLC, the question may arise as to which of these conventions must be applied. It has been observed that, had the state also been a party to the 1969 Convention then this claim would be limited under CLC, otherwise it would not.<sup>10</sup>

The CLC contains its own limitation provisions in favour of the tanker owner. It is to the effect that pollution damage be put to the person other than the owner to whom the CLC limitation provision is applied. For example, a cargo ship may collide with a laden tanker causing a massive oil spillage and pollution damage. The claim for pollution damage against the cargo ship would not fall within CLC, but the cargo shipowner would liable for pollution damage. In such a case the cargo shipowner would have to rely upon the 1976 Limitation Convention, in order to be able to limit for pollution claims. Such a division of right to limit may create certain anomalies where both tanker and cargo ship are to blame for the collision which caused the pollution damage. A plaintiff, for example, a government, who has incurred heavy clean-up costs may sue both the tanker owner and cargo ship owner. The tanker owner will be able to limit his liability to the plaintiff under the CLC, and the cargo owner may or may not be able to limit his liability under

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<sup>9</sup> Oil pollution damage is not in fact defined in the 1969 CLC but oil and pollution damage are.

<sup>10</sup> Abecassis, D. W., *Oil Pollution from ships*, 1985 at p. 188.

another convention or provision. In this way, the plaintiff will make fuller recovery of his costs than if the same discharge had been made without the involvement of cargo owner.

Article IX of the CLC 1969 provides that the action for compensation for pollution damage may only be brought in the Courts of any contracting state or states in whose territory pollution damage has happened. Article V(3) of the Convention provides that the action for establishing of limitation fund shall be brought within "the court or other competent authority of any one of Contracting States in which the action is brought under the Article IX. From these two Articles it can be construed that firstly the right of limitation of liability must be invoked in the same contracting state in which the action for pollution damage is brought, and secondly, a limitation fund action must be established independently of any claim for the pollution damage. Thus, it is not in practice possible to commence a limitation action in a jurisdiction in which no proceeding has been brought against the limiting party. In theory, it should be possible to do so, since the act of invoking the limitation of liability is separate from the claim for pollution damage and therefore, constitution of right to limit does not necessarily mean the admission of pollution liability.

The result of such a conclusion would be to prevent pre-emptive action by a shipowner. It may be said that the restriction in priority of taking the limitation action is only imposed on the shipowner and, therefore, the other people who have the right to limit can take such action before starting legal proceedings on pollution

liability. Such a view may have an application under the 1976 Limitation Convention in which people other than the shipowner, (e.g. charterer, manager and operator), are entitled to the right to limit, but has no application in the 1969 CLC where the right to limit is only exclusively provided for the owner of ship as defined in the Convention.

Under the 1984 Protocol, as adopted by 1992 Protocol, to CLC, in contrast with the 1969 CLC, the right to limit may be established before proceedings are instituted in any court or other competent authority in any one of the contracting states.<sup>11</sup> This gives the owner an initiative which may be valuable in a case where he wishes to consider currency movement. The possibility of establishing a limitation fund before action is brought has an added advantage, in particular in cases in which the IOPC Fund<sup>12</sup> is also involved, that claims may be settled without action actually being brought in court. In addition, having authority to establish right to limit, indicates that the court in which the limitation action is taken may be different from the court in which the legal action on merit is taken.

#### **4.1.3. Who may limit liability ?**

If one considers the original purpose of limitation, namely to encourage ship owners to carry on their business and put their vessel to sea, the conclusion may be reached that the right to limit should be restricted to the ship owner only. This was criticised by Lord Denning M.R. in the ***Bramley Moor***,<sup>13</sup> in which he said:

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<sup>11</sup> Art. 6(3). 1984 protocol to the 1969 CLC.

<sup>12</sup> See description of IOPC Fund in *supra*. chapter. 4. pp. 148-151.

<sup>13</sup> [1964] P. 200 at p. 220.

"Limitation of liability is not a matter of justice. It is a rule of public policy which has its origins in history and its justification in convenience." Therefore, in so far as the intention over the years has been to extend the concept of limitation so that it applies to the incident itself rather than to the separate individuals then the wording of the Convention must be construed so far as possible as to give protection to all those involved in the maritime adventure.

However, sufficient encouragement to the shipping industry as a whole may not be provided if only the shipowner has the right to limit. Other entities such as charterers are engaged in types of business that are vitally important to the generation of shipment by sea, and they may be exposed to the same risks as are ship owners.

The 1924 Convention by Article 1 restricted the right to limit liability to the "owner of a sea going vessel" but Article 10 provided that "where the person who operates the vessel without owning it or the principal charterer is liable,...., the provisions of this Convention are applicable to him". The 1957 Convention has provided, in addition to ship owners and bareboat charterers, a right of limitation to "the charterer, manager and operator of the ship."<sup>14</sup> It also applies to the master, members of crew and other servants, whether the ship owner or other principal parties limit liability or not.<sup>15</sup> It should be noted that " other servants " is broad enough to include the shore side personnel of owners, charterers, managers and operators.

The umbrella of protection was expanded in the 1976 London Convention to include additional parties seeking limitation. All of the entities, the owner, charterer, manager and operator of a sea-going ship, who may limit under the 1957

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<sup>14</sup> Art. 6.2.

<sup>15</sup> This is perfectly consistent with the philosophy of encouraging investment in shipping.

Convention are listed.<sup>16</sup> The term charterer is not defined in the 1976 London Convention but, theoretically, it could include bareboat charterer, time charterer, or voyage charterer. To dispel any doubt, it is suggested that the phrase of "any charterer" should be added to the article. Under the 1976 London Convention two new faces also appear in the line of parties expressly entitled to limit: salvors<sup>17</sup> and insurers.<sup>18</sup> They are to be encouraged because their services not only help the owners, but also protect the environment. Moreover, the provisions of the convention allow limitation to any person for whose "act, neglect or default" a principal party entitled to limit would be responsible.<sup>19</sup> Those for whom the principle party is responsible might include, in some circumstances, independent contractors, e.g. stevedores or repairmen.<sup>20</sup>

The owner of a ship shall only be entitled to limit his liability under the 1969 CLC.<sup>21</sup> Therefore, servants or agents of the owner are not entitled to the right to limit under the CLC. The expression "owner" includes any owner whether legal registered owner, or in the absence of registration, the person owning the ship. This does not include a parent corporation of the registered owner, as was held in the *Amoco Cadiz* case,<sup>22</sup> in which the district court<sup>23</sup> found that only Amoco Transport Company (not its parent corporations, Standard Oil Company and

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<sup>16</sup> Art. 1.2. 1976 London Convention.

<sup>17</sup> Art. 1.1. Id.

<sup>18</sup> Art. 1.6. Id.

<sup>19</sup> Art. 1.4. 1976 London Convention. It reads " If any claim set out in this article is made against any person for whose act, neglect or default the ship owner or salvor is responsible, such a person shall be entitled to avail himself of the limitation of liability provided by this Convention."

<sup>20</sup> *The Muncaster Castle*, [1961] A.C. 807.

<sup>21</sup> Art. V(1)

<sup>22</sup> [1984] 2 Lloyd's Rep. 304.

<sup>23</sup> The United States District Court for the Northern District of Illinois.

Amoco International Oil Company) was the registered owner of the Amoco Cadiz. It was also held that the Standard and AIOC were not Transport Agents, and therefore, they could be sued and held liable without limitation under the CLC.

The definition of shipowner is, as mentioned above, recognised as being tied to the meaning of the ship. Article 1(1) of 1969 CLC has defined ship as "any sea-going vessel and any sea-borne craft of any type whatsoever, actually carrying oil in bulk as cargo". Thus, the owner of a ship which is sailing in internal water has no right to limit liability under the Convention. Furthermore, the definition of the ship does not extend the right to limit to the owner of such vessels as a hovercraft or drilling unit, assuming that they could be regarded as sea-going vessels or sea-borne crafts, because they are not capable of carrying oil in bulk as cargo.

It is construed, from channelling liability exclusively to the owner, that the servants or agents of the owner, salvors, bareboat charterers have no right to limit their liability under the 1969 CLC. Therefore, if, for example a charterer is liable for the same spill as the owner itself and both are able to limit their liability, the owner should do it under the CLC and the Charterer under the 1976 Limitation Convention, as enacted in the U.K. The criticism of the charterers' exemption is removed by the 1984 Protocol, as adopted by 1992 Protocol, to 1969 CLC which extended its application to the charterers.

A difficult situation, as to who may seek the right to limit, may arise when oil has escaped or has been discharged from two or more ships owned by the same owner in a situation where one ship out of a group is owned by a different owner.

As to a situation where different ships are involved, the owner of all ships "shall be jointly and severally liable for all such damage which is not reasonably separable." Article V(1) of 1969 CLC provides, the owner of a ship shall be entitled to limit his liability under this Convention. Thus all owners are entitled to seek right to limit, because all independently caused the pollution damage which allow the victims to sue all or any of them for the full amount of his loss.

The CLC is silent as to who can seek the right to limit, when one vessel is owned by a different owner who joins in the causing of oil pollution, thereof leaving the solution to the national law. At common law, the part-owners are joint tortfeasors where "their respective share in the commission of the tort are done in furtherance of a common design."<sup>24</sup> The pollution victim, therefore, does not have several causes of action against each of them, but one action against them all. A judgement against one of the part-owners may bar any subsequent, or even the continuance of the same action, against others. The question of whether there is one injury can be difficult one. The simplest case is that of two virtually simultaneous acts of negligence, as where two shipowners behave negligently and cause the same pollution damage, but there is no requirement that acts be simultaneous. Thus the acts of the two defendants may be separated by a substantial period of time and yet contribute to one, indivisible injury for this purpose. However, where the pollution victim's damage results progressively, the

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<sup>24</sup> It was quoted by Per Bankes L.J, in *The Kursk* [1924] P. 140 at p. 159., from *Cerk and Lindsed on Torts*, 7th ed., P. 59.

individual stages of which are brought about by the separate acts of different defendants, each defendant is liable for the extent to which he contribute to the final result.<sup>25</sup> If the pollution victim shows that the defendant made a material contribution to his loss, it is likely that he will recover in full, unless the defendant is able to show that his action was insufficient to cause the whole loss.<sup>26</sup>

So far as English national law is concerned, one defendant may recover a contribution or indemnity from any other defendant liable in respect of the same damages, but that is a matter between defendants and does not affect the plaintiff, who remains entitled to recover his whole loss from whichever he chooses. Under the Civil Liability (Contribution) Act 1978<sup>27</sup> whereby a defendant may seek contribution notwithstanding that he has ceased to be liable to the plaintiff since the damage has occurred. Thus, under the Act part-owner is entitled right to limit, since deprivation of one of them of the right to limit, because of actual fault or privity, does not deprive the others from their entitlement to limitation.

#### **4.1.4. The standard of conduct barring the right to limit.**

For as long as a global limitation of liability has been permitted to the shipowner, it has been subject to the qualification where the loss was in some direct way the fault of a defendant shipowner or other entitled to limit. The limitation of liability laid down in the 1924 Convention does not apply to the obligation arising out of acts or faults of the owner of the vessel.<sup>28</sup> The 1957

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<sup>25</sup> *Thompson v. Smith's Shiprepairers (North Shields) Ltd.* [1984] Q.B. 405.

<sup>26</sup> *Bonnington Castings Ltd v. Wardlaw* [1956] A.C. 613.

<sup>27</sup> S. 3. replacing sect. 6(1)(a) of the Law reform (Married Women and Tortfeasors) Act 1935.

Limitation Convention allowed limitation for general categories of claims unless "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner."<sup>29</sup> This phrase is identical to that contained in the 1969 CLC.<sup>30</sup> Contrary to general practice, the 1957 convention provided the right to limit for masters or members of the crew "even if the occurrence...resulted from the actual fault or privity of one or more of such persons."<sup>31</sup> The question of fault and privity, as a condition for barring the right to limit was also considered at common law. In the *Lady Gwendolen*,<sup>32</sup> it was held that the plaintiffs were not entitled to limit their liability since their "actual fault or privity" had contributed to the accident.

The phrases such as "fault" or "actual fault" or "privity", are poor guides to the ship owner concerning what he must do or avoid in order to obtain limitation. These words also seem like empty containers into which the courts are free to pour whatever content they will. It may be thought that they are equivalent of wilful misconduct. The word "fault" does not necessarily imply bad or malicious behaviour: that is to say, in legal terms the purposive breach of some general obligation. It can encompass carelessness and lapses of attention. Although "privity" may in many cases be satisfied by proof of the knowledge of the shipowner as the fault of others, it does not seem that the knowledge of consequences of the fault is a necessary part of the privity. Uncertainty

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<sup>28</sup> Art. 2.1. 1924 International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing vessels.

<sup>29</sup> Art. 1(1).

<sup>30</sup> Art. V (2), Under TOVALOP limitation is unbreakable and actual fault and privity is irrelevant.

<sup>31</sup> Art. 6 (3). In *Colwell- horsefall. v. West Country Yacht Charterers Ltd, The Annie Hay*, [1968] 1 Lloyd's Rep. 141, Brandon J held that when the owner of a motor launch made it available as a patrol boat for the use of officials during a power boat race off Falmouth and while navigating it for that purpose negligently struck and sank a larger motor- cruiser, he could limit liability, since navigational fault arose in his capacity as master, not owner, or his vessel. See also *The Alaster* [1981] 2 Lloyd's Rep. 581.

<sup>32</sup> *Arthur v. Guinness Son and Co. Ltd., The Lady Gwendolen*, [1965] 2 All.E. R. 283

surrounding the phrase "fault or privity" has caused the right to limit to be easily lost in many cases.

The decision of the House of Lords in the Marion,<sup>33</sup> indicates how easy it is to break this test in practice. The master anchored and damaged a submarine pipe line because he was not using up to date charts. The House of Lords decided that "It was the duty of the managing director to ensure that an adequate degree of supervision of the master of the Marion, so far as the obtaining and keeping of up-to-date charts were concerned, was exercised either by himself or by his subordinate managerial staff each of whom was fully qualified to exercise such supervision, in so far as the managing director failed to perform his duty in this respect, such failure constitutes in law actual fault of the plaintiffs", the vessel Marion which was managed by a company. In this case, the managing director was also at actual fault by not giving his subordinate managerial staff clear, precise and comprehensive instructions regarding the matters of which they required to be kept informed.

The vagueness of the 1924 and 1957 Conventions was, to some extent, diminished by the 1976 London Convention which provided,

"A person shall not be entitled to limit his liability if it is provided that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."<sup>34</sup>

This provision is similar to that one in Art. 6(2) of the 1984 protocol to 1969 CLC.

The wording seems to give good guidance as to what conduct will defeat the right

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<sup>33</sup> [1984] 2 Lloyd's Rep. 1 at p. 2.

<sup>34</sup> Art. 4. 1976 London Convention. This wording is very close in intent and effect, but not identical, to the English law concept of "wilful misconduct" which governs the question of when the conduct of the assured invalidates insurance cover. See S.55(2)(a). See also *The Salem*, [1983] 1 Lloyd's Rep. 342, in which the charterer and crew conspired to scuttle the ship, clearly wilful misconduct, and some oil escaped. It is debatable whether it could be shown that there was either intent to cause pollution damage or both recklessness and knowledge that such would probably result.

to limit. The phrase "if it is provided", indicates that under this test the burden of proof is on the "claimant". This means that, unlike the test of fault or privity, if there is doubt about the personal misconduct of the owner, he will be entitled to limit.

The words of the "personal act or omission..." in the 1976 London Convention differ from previous conventions regarding the limitation of liability which only speaks of actual fault or privity. Therefore, it can be construed that the words "personal act or omission" were introduced with the intention of effecting a result not dissimilar to that achieved by the use of the words "actual fault...". This provision clearly shows that the actual fault or privity of owners should be distinguished from the act or omission of those who run the company. The use of the word "personal" strongly reinforces this concept. The question was raised by Viscount Haldane in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum. Co. Ltd.*<sup>35</sup> in which he said that the words "personal act or omission" imported "something personal to the owner, something blameworthy in him, as distinguished from constructive fault...such as the fault... of his servant or agents." Therefore, it would be necessary to determine the identity of persons whose personal acts or omissions are treated as being of the company.

Generally speaking, a company is a separate legal entity with rights and obligations separate from and not dependent on the members.<sup>36</sup> If things go wrong, it is company which is ultimately responsible. A company, in fact, must operate through a person where knowledge and a state of mind, in certain circumstances, can be imputed to the company- the alter ego theory.<sup>37</sup> It is important to recognise that the relevant person must have sufficient responsibility

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<sup>35</sup> [1915] A.C. 705.

<sup>36</sup> *Saloman v. Saloman & Co. Ltd.* [1897] A.C. 22; *Tustall v. Steigman* [1962] 2 All E. R. 417

<sup>37</sup> *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705.

and authority to be regarded as the "alter ego" of the company.<sup>38</sup> It may be acceptable to say that the act or omission of the director of the company, as the mind of the company or alter ego must be regarded as an action of company itself; the company

"Has not a mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation."<sup>39</sup>

This concept is subject to criticism. The phrase "alter ego" is misleading. The person who speaks and acts as the company is not an alter. He is identified with the company itself<sup>40</sup> and it would be more correct to use the term "ego" rather than "alter ego" which is sanctified by inveterate usage. The question was raised in *Tesco Supermarkets Ltd v. Nattras*,<sup>41</sup> in which it was decided that the manager was "another person" apart from the company. If this is true, it may be asked who represents and acts as the company in fault, criminal or privity cases.

It was formerly thought that a corporation, being a fictitious person, could not be liable where liability involved some specific state of mind.<sup>42</sup> It is now well settled that it can and accordingly a company may be sued for wrongs involving fraud or malice as well as for wrongs in which intention is immaterial. This was clearly considered in *D.P.P. V. Kent and Sussex Contractors, Limited*,<sup>43</sup> in

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<sup>38</sup> *Arthur v. Guinness Son and Co. (Dublin), The Lady Gwendolen*, [1965] 2 All E. R. 283. In which it was viewed that the marine superintendent was at fault since he was the most senior man in company with any knowledge of shipping, despite of the fact that he exercised an executive function.

<sup>39</sup> *Viscount Haldane, L.C., in Lennard's Carrying Company Limited. v. Asiatic Petroleum Company Limited*, [1915] A.C. 705 at p. 713.

<sup>40</sup> See Lord Reid, in *Tesco Supermarket. v. Nattras*, [1972] AC. 153 at pp. 174-5.

<sup>41</sup> *Id.* at p. 154.

<sup>42</sup> e.g. see *Stevens v. Midland Counties Rly* [1854] 10 Ex. 352; Per Lord Bramwell in *Abrath v. North Eastern Rly.* [1886] 11 App. Cas. 247 at p. 250.

<sup>43</sup> [1944] 3 K.B. 146

which it was held that a company could be convicted of the offence of making a false statement, which was committed by their servants. It was argued by Macnaghten J.<sup>44</sup> that "it is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to body corporate."<sup>45</sup>

It may be argued that if the formal legal management of a ship or control of a vessel is delegated to an identifiable person, his behaviour would constitute the act or omission of the owners' company.<sup>46</sup> The House of Lords in the "Marion" said<sup>47</sup> that the Managing Director of the vessel's management company had a duty to ensure that an adequate degree of supervision of the master in keeping the chart up to date was exercised, either by himself or by subordinate management staff. It concluded that because the Managing Director had failed in his duty, his failure had constituted the actual fault of the ship owner. If the delegation of authority to another was improper, the act of delegation itself may be accounted to be the actual fault of the owners.<sup>48</sup> However, it would remain necessary to show that the directing mind and will of "alter ego" corporation is guilty of the relevant breach of duty.

It may be contended that some duties are not capable of delegation and therefore any breach of the duty is the breach of the shipowner himself. This was

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<sup>44</sup> Id. at p. 156.

<sup>45</sup> See also *Rex v. I.C.R. Haulage, Limited and Others* [1944] 1 K.B. 551 in which it was held that company can be indicted for the criminal act of its agents, and its liability depending upon the nature of the charge, the relative position of agent and other relative facts; *In the Moor v. Bresler Ltd* [1944] 2 All E. R. 515 was held that the officers were acting within the scope of their employment in making the sales and return, and the fact that these were made with intent to defraud the company did not render the officers any less than the agents not to affect the liability of company.

<sup>46</sup> *The Marion* [1984] 2 Lloyd's Rep. 1.

<sup>47</sup> Id.

<sup>48</sup> See *The Garden City* [1982] 2 Lloyd's Rep. 382.

argued in the *Truculent*,<sup>49</sup> in which one of HM submarines was lost as result of a collision which was in part caused by the fact that the submarine was carrying misleading navigation lights. Mr Justice Willmer held that the duty to put lights in the right place on a submarine was indeed a non-delegatable duty and the conclusion that the ship owner, here the Admiralty, was personally or actually at fault did not follow from the premise that the duty was laid down on them directly. He held that for the Admiralty to be denied the right to limit its liability, it was necessary that the breach should not only be a breach by the Admiralty, but it should be committed by the directing mind and will of the Admiralty. He held that where a duty was laid on the Admiralty itself, it was enough to find liability if any one for whom the Admiralty was responsible had breached it; but the right to limitation was not lost unless the person who was guilty of the relevant breach was himself the personal embodiment of the Admiralty. Exactly the same principle can be applied to a corporation, so that the mere fact that a corporation is in breach of its own duty, which is not the sort of duty which requires to be performed by their board of directors or their managing director, does not mean that it thereby necessarily involves the loss of the provision which enables ship owners to limit their liability.

In recent times, hiding behind the veil of incorporation has been seen as an evasion of responsibility. The development of this concept has led to change in legal emphasis such that the individuals behind the company are now prosecuted or sued rather than the company itself. The separate entity principle has been disregarded both by parliament (e.g. the Companies Act 1985, Ss. 24 and 733) and by courts. Significantly, the ability to take action against directors has been included in the most recent statutes regulating the environment. The Water Act

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<sup>49</sup> [1952] P. 1.

1989 and the Environmental Protection Act 1990, which creates specific statutory criminal offence in relation to pollution, both contain provisions permitting prosecutor to take action against Directors. The provision states that where a company is guilty of an offence under the Act and that offence is proved to have been committed with consent of, or because of, the neglect of a Director or the senior officer then he, as well as the company is liable to be punished.

When the common law comes into operation it is much more difficult to say with certainty that directors become personally liable to legal consequence of company. In *Re a Company*,<sup>50</sup> the plaintiff companies sued the defendant in deceit and/ or for compensation for breach of constructive trust and/ or fiduciary trust. It was held that the defendant should not be permitted to hid behind the company. The courts should and would use its power to pierce the corporate veil (i.e. to disregard the separate entity principle) where it was necessary to achieve justice irrespective of the legal efficacy of the corporate structures under consideration. As a result, it is difficult to state that where the court will necessarily or invariably hold the Directors personally liable. Each application is treated on its merits. However, what is clear from this decision is that Directors will begin to find themselves personally responsible for acts of pollution carried out by the company.

After solving the problems of the corporate owner, it may be asked, what happens to the right to limit if the owner is also the master of the ship, and his negligence causes pollution damage? Can such a person limit his liability or will he be disqualified on the ground of his "actual fault or privity"? The question was raised in *Coldwell- Horsefall v. West Country Yacht Charterer Ltd, The Anneitty*,<sup>51</sup> in which a collision was due to the negligent navigation of the master, who also owned the offending vessel. The court held he was entitled to limit

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<sup>50</sup> [1985] 1 B.C.C. 99, 421.

<sup>51</sup> [1968] 1 All E.R. 657.

liability and argued that the owner would lose the limitation privilege if his fault had been in his capacity as owner, as opposed to master, for instance, failure to pass on or observe Admiralty or to install proper navigational equipment.

The word "personal" in the Convention may also raise the question: is limitation of liability actually a defence which is "personal" to the owner, and therefore beyond the insurer's reach? An assured, under insurance law, may avail himself of special defences which are denied to his insurer where it is sued directly, such as the assured's personal immunity from suit, e.g. a wife's suit against her husband's insurance were denied because insurance cover was given personally to the insured.<sup>52</sup> Thus it may be argued that the insured may be denied the right to limit because the conventional right to limit is a right "in personam" and intended to reduce liabilities peculiar to shipowners, not insurers.<sup>53</sup> The argument loses its effectiveness when it is realised that the CLC provides the insurers their own right to limit and the same defences, other than bankruptcy or winding up, which the owner himself would have been entitled to invoke.<sup>54</sup>

The word "privity" of the shipowner as an alternative ground for breaking the limitation has been dropped in 1976 Limitation Convention and substituted by the phrase "knowledge that such loss would probably result". To be privy to another's action means to have some private knowledge of it, to be in on the secret. Thus in this sense, "privity" in the phrase "actual fault or privity" has the same meaning as the word "knowledge....." in the 1976 Limitation Convention. However there is a difference between these two phrases in practice. In the 1976 Limitation

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<sup>52</sup> *Morgans v. Launchberry* [1973] A.C. 127.

<sup>53</sup> Limitation by contract, as distinguished from statutory limitation, is not a personal defence granted by the law to all members of particular class as a matter of public policy, but rather is a limitation agreed upon by parties to the contract.

<sup>54</sup> Art. VII(8).

Convention the phrase "personal act or omission" restricted the application of knowledge to the owner himself, whereas in the phrase "fault or privity", an owner who knows of or who wilfully shut his eyes to a fault, must run the risk of being held actually at fault himself as well as privity to the fault of others. What is important in both phrases is to what extent having such a knowledge is needed to break the right to limit. As an answer to this question, Lord Denning in the *Eurysthenes*,<sup>55</sup> took an objective view of such knowledge and said, "When I speak of knowledge, I mean not only positive knowledge, but also the sort of knowledge expressed in the phrase "turning a blind eye". If a man, suspicious of the truth, turns a blind eye to it, and refrains from enquiry- so that he should not know of it for certain- then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it."

The right to limit is lost only if the loss resulted from the act of the owner: "committed to limit with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result". It seems in practice it is very difficult to imagine a plaintiff being able to prove that the conduct of the person liable was sufficiently serious to deny the right of limitation under the 1976 London Convention, likewise the 1984 protocol to CLC. For practical reasons, the right to limit is usually unbreakable because of the difficulty of proving intention or recklessness. The breaking of the right to limit becomes much more difficult, and in some cases impossible, when it is realised under the test that the claimant must show not only recklessness, but also knowledge that such loss would probably result.

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<sup>55</sup> [1976] 3 All E. R. 243 at p. 251.

The words of intention have received more attention in the criminal law than in private law. A proposal suggested that a test of intention should contain one of two alternative elements:

"Did the person whose conduct is in issue either intend to produce the result or have no substantial doubt that his conduct would produce it?"<sup>56</sup>

Recklessness has, at common law, been defined as the act and unreasonable decision that causes a risk of damage.<sup>57</sup> Lord Diplock has included within the designation of "reckless" those who fail to give thought to the possible consequences of their acts. Recklessness, in the 1976 London Convention, also requires that the actor should have "knowledge that such loss would probably result". It means that even a person who acted in unreasonable ignorance of the risk of loss would not be deprived of the right to limit if he had no knowledge of the probable loss.<sup>58</sup> It is worth pointing out that the test is more stringent than the test for recklessness in criminal proceedings in which the defendant does not have to have any knowledge of the loss at all.

It is supposed that the concept of conduct barring the right to limit, in the 1976 London Convention and 1984 protocol to CLC is close, but not identical, to the English law concept "wilful misconduct" of the assured which invalidates the insurance contract.<sup>59</sup> It may be concluded that the owner may lose the right to limit, in pollution cases, if there is wilful misconduct. However, the facts of the Salem case<sup>60</sup> illustrate the opposite of this conclusion. There, the owner and crew

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<sup>56</sup> Draft Criminal Liability (Mental Element) Bill, cl. 2; See also The Law Commission. No. 89, Reports on Mental Element in Crime (1987), paras. 40-68.

<sup>57</sup> R. V. Stephenson [1979] Q.B. 695.

<sup>58</sup> *Goldman. v. Tai Airlines* [1983] 3 All E. R. 693.

<sup>59</sup> S. 55(2)(a), MIA 1906; *P. Samuel & Co. Ltd. v. Dumas* [1924] All E. R. 66.

<sup>60</sup> [1983] 1 Lloyd's Rep. 342.

conspired to scuttle the ship, which was clearly wilful misconduct, and some oil escaped in the process. Despite the wilful misconduct, the owner retained the right to limit, because it was difficult to show that there was either intent to cause pollution damage or recklessness, and knowledge that such damage would probably result.

The assured owner may lose the right to limit if he has expressly or impliedly granted a warranty,<sup>61</sup> as a term of the insurance contract. Warranties must be strictly complied with. It is quite irrelevant that the breach is connected with a loss that subsequently occurs.<sup>62</sup> The right to limit is lost from the date of the breach of the warranty. Therefore, it will remain intact until the date of the breach. However, losing the right to limit his liability to a third party does not allow the shipowner's liability insurer to restrict his cover. In other words, if the shipowner loses his right to limit to the third party, he will not lose his insurance cover; insurance cover is quite separate and different from issue of the shipowner's limitation and the only link is that the insurer only covers a shipowner's legal liabilities.

On a breach of warranty, the insurer's only option is to repudiate the contract. This option is lost if the insurer waives a breach of warranty. In *West. v. National Motor and Accident Insurance Union*,<sup>63</sup> the insured was alleged to be guilty of a breach of warranty by mis-stating the value of property insured. When he subsequently suffered loss, the insurer purported to reject the claim but also to rely on a term in the policy to refer the dispute to arbitration. It was held that with regard to relying on the policy in this respect, the insurer had waived any right to

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<sup>61</sup> See definition of warranty in S. 33(1) of MIA 1906.

<sup>62</sup> S. 33(3), MIA 1906; *De Hahn. v. Hartley* (1786) 1 T.R. 343; 99 E.R. 1130.

<sup>63</sup> [1955] 1 All E. R. 800.

avoid the policy for breach of warranty. Thus, the insured would not lose the right to limit liability, in the case of a breach of warranty, if the warranty was waived by the insurer.

It must also be realised that there is a close connection between the loss of the right to limit and the operation of the "warranty of seaworthiness" in policies of marine insurance. It was provided<sup>64</sup> that if "with the privity of the assured, a ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness". Therefore, if limitation is broken by the "actual fault or privity" of the shipowner as to the seaworthiness of the vessel, it may be possible for the underwriter to repudiate liability.

In the insurance law it was recognised that liability insurance is primarily for the benefit of the injured party rather than for the protection of the assured. This may conflict with the philosophy which is behind the right to limit, as a device to protect the shipowner, in particular where it is compared with the direct action right against insurers. An insured's rights against an insurer are, under the Third Parties (Rights against Insurer) Act 1930, transferred to a third party. The question which this posed is, whether the assured's right to limit liability is transferable to a third party or not. In *Murray. v. Legal & General Assurance Society*,<sup>65</sup> it was held that the rights and liabilities of the insured which are transferred to third parties are only those rights and liabilities in respect of the liability incurred by the insured to third parties. It can be concluded that since the right to limit is a general right under the general law, and not dependent on any term of policy, therefore the right to limit liability is not transferable to a third party. In consequence, an insurer cannot claim that he has limited liability against a third party, when the insurer having the

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<sup>64</sup> S. 39(5) MIA 1906.

<sup>65</sup> [1969] 3 All E. R. 794.

right to limit, becomes insolvent. Thus, the direct action right does allow full recovery by a third party from the insurer even when the shipowner assured is able to limit his liability. This conclusion does not seem to be logical when it is realised that the Third Parties Rights Against Insurer Act 1930, subjects the insurer to no greater liability than the assured would have. It means that if the shipowner limited his liability, the insurer does also, to the effect that the direct action would not be allowed until completion of the limitation proceeding, otherwise the direct action would deny the shipowner the benefit of its insurance. Thus, in order to impose liability beyond that of the assured and ignore the right to limit on liability under the maritime principle, the principle of limitation would have to be rewritten as would the 1930 Act and the contract of insurance.

Pollution victims may be discouraged from attempting to challenge the owner's right to limit in court because the insurance cover, which is mostly provided by P & I, is limited in the case of oil pollution. Therefore, in most cases the insurance cover will be intact, even if the right to limit is broken. For example, the CLC permits a direct suit against the insurer to those who provide financial responsibility and they are entitled to the CLC limits event the owner is not.<sup>66</sup> What is the impact of the Convention's holding that insurers are entitled to limitation? The insurer is not involved in the litigation as well as the assured. Thus, giving such a right to the insurer also avoids the threat of defeating the right to limit, because of the knowledge of insurance coverage. In addition, having access to the right to limit, gives the insurer an opportunity to make a proper decision over the amount of premium, which usually becomes less than where there is no such right.

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<sup>66</sup> Art. VII(8).

However, if there was no such right, it would be possible that the right to limit be easily broken and consequently prejudice the insurer, without being involved in the litigation.

#### **4.1.5. Establishment of the limitation fund as a condition of availability of right to limit.**

For the purpose of availing himself of the benefit of limitation, under CLC and the limitation conventions, the owner is required to constitute a fund for the total sum representing the limit of his liability with the court or competent authority of the contracting state, in whose territory or territorial sea, damage has occurred and in which an action has been brought.<sup>67</sup> The main goal of the establishment of the fund is to ensure that the pollution victims have security for their claims up to the ships limit under CLC, even, in the event that the ship owner himself is not able, by reason of bankruptcy or otherwise, to satisfy the claims.

The establishment of the fund, under the Convention, seems somewhat illogical because a direct right of action is available against the shipowner's liability insurer.<sup>68</sup> A claimant, therefore, under the CLC has not only the benefit of direct action against the insurer but also the fund. Thus, the defendant in an action under CLC is treated more harshly than the defendant in any other action, e.g. under 1976 London Convention. It might be argued, in favour of constitution of a limitation fund, that the ship owners insurance might fail to satisfy the victims claim in full, particularly in cases where an incident involved a large number of claims.

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<sup>67</sup> Art. V(3). 1969 CLC and Art. 11. 1976 London Convention.

<sup>68</sup> This criticism is not applicable to the 1976 London Convention fund, since there is no general right of direct action against an insurer for liabilities in this Convention.

The fund is constituted either by consignment of the sum or by producing other guarantees, such as bank or P & I Club guarantees, acceptable under the legislation of the contracting state where the fund is constituted and considered to be adequate by the court or competent authority.<sup>69</sup> The acceptance of bank guarantees for the constitution of a limitation fund may be opposed.<sup>70</sup> The reason for opposition is that no interest accrues on a bank guarantee, whereas if the limitation amount is paid in cash, it can be invested by the court, in which the fund is established and will earn interest for the benefit of the third party claimants. This opposition may be rejected on the ground that the bank guarantee should also cover interest on the limitation amount.<sup>71</sup> This argument may have no effect where the limit of liability cannot be exceeded by the addition of interest. For example, the aggregate amount of the ship owner's liability, under the CLC, shall in no event exceed 14 million SDR.

The amount of the limitation fund is distributed on the basis of any one incident in the territory of one contracting state.<sup>72</sup> Therefore, where a ship collides with two vessels, one rapidly after the other, and as the result of one act of improper navigation the owner is entitled to limit his liability to one payment for the whole damage since both collisions are the result of the same act. Thus, if they are not the result of the same act the owner of the offending vessel must establish two limitation funds. Similarly, if an incident pollutes the shore of one contracting state and one non-contracting state, the owner does not have the privilege of establishing only one fund for a claim arising from both contracting states.

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<sup>69</sup> *Id.*

<sup>70</sup> It was opposed by the IOPC Fund in the case of *The Haven*. See details in the IOPC Fund Annual Report 1992, at p. 63.

<sup>71</sup> So held by an Italian judge in the case of *the Haven*, in the Court of first instance in Genoa, *Id.*

<sup>72</sup> Art. V(1) 1969 CLC.

The term "incident" has been defined, under the 1969 CLC, as "any occurrence or series of occurrences having the same origin, which causes pollution damage."<sup>73</sup> In contrast to this provision, and in contrast to the other Limitation Convention, the CLC has accepted the voluntary costs of preventing or minimising the pollution damage (in order to provide an incentive to act), and this can be claimed against the limitation fund, along with other claims. However, such a right can exist only where the preventive costs are incurred by the ship owner after the oil has escaped.<sup>74</sup> Thus, there is no right to claim against the limitation fund for costs which are incurred to remove a pure threat before the incident.

The acceptance of a salvage award as a cost of preventive measures against the limitation fund is in doubt. It may be argued that there is no right of recourse to the limitation fund for such an award, since salvage is undertaken for the saving of ship or cargo, not for the preventing or minimising of pollution damage. The effect of this argument may become less when it is realised that under the Lloyd's Open Form, the owner is entitled the enhanced award for the prevention of pollution damage. Thus, it seems that the amount of enhancement is qualified as a preventive measure for which the owner has a right of claim against the limitation fund.

The established fund is distributed among the claimants in proportion to the amounts of their established claims.<sup>75</sup> Thus, no lien or privilege, to which a claimant may be entitled, enables the claimant to have priority over the other claim against the fund. It is possible in many cases that the amount of established claims exceed the amount of the limitation fund. If this is so, the amount of each claim must be ascertained, and until this happens the distribution of the fund must be

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<sup>73</sup> Art. I(8).

<sup>74</sup> Art. I(7).

<sup>75</sup> Art. V(4).

delayed. In this case there is a question as to who shall get the benefit of any interest occurring on the limitation fund between the date of its establishment and its distribution. Since the Convention is silent on these questions, they are left to national law. However, some of these problems might be solved by inserting a clause in the Convention which enables a provisional distribution of the limitation fund to such claimants whose claims have been properly established, while reserving part of the fund to cover other claims which are anticipated during the limitation action period.

It is not clear in the CLC, under what national law the fund is distributed, the national law of where the fund is constituted or the national law where the fund is distributed or the national law where the claimant has already instituted legal proceedings against the limiting shipowner. Since the fund is usually constituted by depositing sums or by producing a bank guarantee or other guarantee acceptable under the legislation of Contracting States where the fund is constituted,<sup>76</sup> it can be construed that it would be easier and more practical that the fund distribution be governed by the law of the Contracting State in which the fund is constituted.

The statute limiting the liability of owners applies only to the original claim for damage and does not extend to costs or interest.<sup>77</sup> This may raise the question of what constitutes an adequate consignment in court when establishing a limitation fund. Brandon J. defined an adequate payment as "payment of an amount not less than the limit as ascertained in accordance with the order in force at the date which payment was made."<sup>78</sup> It can be concluded that the costs and

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<sup>76</sup> See Art. 14 of the 1976 London Convention.

<sup>77</sup> Lord Stowell, in the *Dundee*, (1827) E.R. 166. at pp. 194, 196.

<sup>78</sup> *The Mecca* [1968] 2 Lloyd's Rep. 17.

interest may be included, with regard to the order in force, in the amount of the limitation fund.

An owner of a limitation fund, as well as his servants or agents or any person providing him with insurance or other financial security, will obtain by subrogation, the rights which the person so compensated would have enjoyed.<sup>79</sup> This right of an owner cannot be properly be described as a legal right to claim against his own limitation fund, since it is not possible for any one to bring a claim against himself. It is rather an equitable right to be given credit in the distribution of a fund, for payment made by him in respect of a claim that could have been brought against the fund but has not been so brought and cannot be so brought, because he has been satisfied by the payment concerned.<sup>80</sup> For this reason, if no payment has in fact been made, the owner cannot put forward in his own right a contingent claim in respect of claims which might in future be proved against him under a judgement.

The amount of the claim put against the fund in respect of payment made elsewhere cannot be more than the amount of the actual claim that the claimant concerned would have been entitled to bring against the fund if he had not enforced or accepted such payment.<sup>81</sup> This means, the owner is only entitled to credit for the amount of the dividend that would have been receivable from the fund by the claimant concerned. If the amount of payment was less than the amount of such dividend, the owner can only obtain credit for the lesser amount so paid and the balance distributed rateably between all the claimants on the fund.

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<sup>79</sup> *The Coaster* [1922] 38 T.L.R. 511 at p. 512. See also Art. V(5). 1969 CLC.

<sup>80</sup> *The Kropreinz Olar* [1921] P. 52 at p. 57.

<sup>81</sup> *The Giacite Motta* [1977] 2 Lloyd 's Rep. 221

Under the Article V(5) of the CLC, the shipowner or his insured stands in the shoes of the claimant for rights which the claimant would have enjoyed under the Convention, i.e. the right of subrogation. Article VI provides that where the owner has constituted a fund and is entitled to limit his liability, "no person having a claim for pollution damage arising out of that incident shall be entitled to exercise any right against any other assets of the owner in respect of such a claim." From a comparison of these two Articles it can be construed that the owner's right of subrogation can only be settled against the fund. Thus, the right of subrogation will be lost where the limiting shipowner has settled a claim in a jurisdiction in which the 1969 CLC does not apply.

The other problem of establishing a limitation fund is when the ship owner settles his claim out of court in one currency, e.g. deutschmarks, and establishes the fund in another currency, e.g. sterling. Since the ship owner has to expend his own currency to purchase that of the claimant whose claim has been settled, it would be closer to justice if the amount of the fund be calculated by converting it into sterling, the amount of shipowner's currency which he had to expend.<sup>82</sup>

The date on which conversion takes place probably should be one of three possible dates: either that of the decree of limitation, that of the constitution of the limitation fund, or that of the proof of the claim against the fund.<sup>83</sup> It may be suggested that since limitation is a form of statutory insolvency, the date ought to be the same as it is in a bankruptcy or company liquidation. It is usually the date when proof of the claim is admitted by the liquidator.<sup>84</sup> It may also be the date of winding up.<sup>85</sup> However, since the limitation fund is mostly calculated at the date on

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<sup>82</sup> *The Despina R.* [1977] 2 Lloyd's Rep. 319. (C.A.)

<sup>83</sup> *The Despina R.* [1977] 1 Lloyd's Rep. 618 at p. 629. (1st instance)

<sup>84</sup> Lords Wilberforce and Cross in *Miliangos v. George Frank (Textiles) Ltd.* [1976] A.C. 443.

<sup>85</sup> *Re Dynamic Corp of America* [1976] 1 W.L.R. 757. at p. 774.

which the fund is constituted or at the date of the limitation decree, whichever is earlier,<sup>86</sup> it is submitted that the conversion of the settlement figures should be made at the earlier of these two dates.

Difficulty may arise in connection with tonnage by reference to which the limitation fund is calculated, in particular where both tug and tow are liable for loss or damage suffered by a third party. Where the tug and tow are in different ownership, each owner is entitled to limit with reference to the tonnage of his vessel.<sup>87</sup> But where the tug and tow are in the same ownership the position may be more complex. It has been held that where the collision with some other vessel was caused by the negligent navigation of those on board the tug and tow, the owner may limit with reference to the combined tonnage of the tug and tow in contact with the other vessel.<sup>88</sup>

## **Chapter 2. Extent of cover**

### **4.2.1. The basis of limit**

The basis of the amount of limitation has been justified by various methods. It was provided that "the liability of the owner of any vessel....shall not exceed the amount of value of the interest of such owner in such a vessel and her freight then pending."<sup>89</sup> The question which arises here is when the vessel's value is determined. It was held that a vessel's value would be measured after the accident

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<sup>86</sup> *The Mecca* [1968] 2 Lloyd's Rep. 17.

<sup>87</sup> *The English Maid* (1894) P. 239 at pp. 244-5.

<sup>88</sup> *The Harlow* [1922] P. 175 at pp. 183- 87. This was also applied in situation where not only was the tug herself not in collision, but also where there was no negligence on board the tow. See *The Freden* (1950) 83 L.L. Rep. 424.

<sup>89</sup> The US. Limitation of Liability Act, S. 183(a), 46 U.S. 1976.

occurred.<sup>90</sup> Moreover the shipowner's insurance proceeds do not constitute part of the owners interest<sup>91</sup> because this would increase the ship owner's limit of liability.<sup>92</sup>

The ship's value method, which favoured the owners of old, poorly maintained ships, does not provide sufficient compensation for victims of pollution damage, which in most cases is huge. If the aggregate amount of limitation exceeds the value of the vessel, many claimants may go without sufficient compensation for their damage. Meanwhile, if a ship in the process of discharging a pollutant is lost or becomes a constructive total loss, the claimants of pollution damage may be left without hope of compensation altogether.

In England, between 1850-60, legislation was passed which fixed the limit of liability on the ship's tonnage base.<sup>93</sup> Before this legislation, in particular in 18th and 19th centuries, English law recognised the value of the ship as the limit of liability, but contrary to this system U.S.A. law measured the value of the ship before the accident.<sup>94</sup> The modern structure of the limitation amount is based on the traditional view which referred to the limitation tonnage of the ship<sup>95</sup> and a new one which introduces a maximum level amount of liability for ships in different tonnage's.<sup>96</sup>

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<sup>90</sup> *The City of Norwich* 118 U.S. 468. (1886).

<sup>91</sup> *Id.* at pp. 193-5.

<sup>92</sup> *MW Hangen Incheah*, 1988 A.M.C. at p. 1230, in which it was held a ship owner is not required to increase its security deposit for a limitation fund by an amount to equal to its insurance coverage.

<sup>93</sup> This system was, without great change, incorporated into the Merchant Shipping Act 1894.

<sup>94</sup> Professor Erling Selving, *An Introduction to the 1976 Convention*, see article in *The Limitation of Ship owners, Liability: The New Law*, Published by Institute of Maritime Law, The University of Southampton, 1986, p. 4.

<sup>95</sup> Art. 3(7) 1957 Limitation Convention.

<sup>96</sup> Art. 6. 1976 London Convention.

The generally accepted point is that the limit should be the maximum that was insurable at a reasonable cost,<sup>97</sup> i.e., the limit should be as much as that figure which enables the ship owner to free himself from liabilities which exceed the amount recoverable by insurance costing a reasonable amount.

#### **4.2.2. The quantum of cover**

##### **4.2.2.1. 1957 Limitation Convention.**

The 1957 Limitation Convention gives extra protection to a personal claimant<sup>98</sup> by treating his claims differently in two respects from property claims:<sup>99</sup> (1) personal claims were given a limit over three times that of a property claim, i.e. 3100 Francs for each ton of the ships tonnage to personal claims and 1000 Francs for each ton of the ship's tonnage to a property claim;<sup>100</sup> (ii) Where there were both property and personal claims then the latter were treated more favourably in that the claims were not aggregated. In effect, the top two thirds of the fund was reserved solely for personal claimants and the remaining one-third of the fund for property claims.<sup>101</sup>

The Convention has provided a uniform limit for all vessels regardless of their size. For example, a ship of 500 tons has the same limit as a vessel with 5000 tons.<sup>102</sup> It is difficult to say that a vessel with 500 tons would cause one tenth

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<sup>97</sup> Further details see, Professor Erling Selving.... *supra*. No. 8 at p. 11.

<sup>98</sup> Personal claims was simple way of describing death or personal injury. See Art. 1(2).

<sup>99</sup> The Convention referred to property claims which is somewhat inaccurate as there may be economic loss. See Art. 1(1) and (2).

<sup>100</sup> Art. 3 (a)(b).

<sup>101</sup> Art. 3 (c).

<sup>102</sup> The Convention has reserved to national law the right to regulate specific provisions for limitation of liability of ships less than 300 tons. See Art. 16(2)(b).

of damage to a vessel of 5000 tons. Small ships may cause great loss, e.g. in pollution cases, yet some sophisticated and expensive ships may have very low limits of liability under the Convention.<sup>103</sup>

Fixing limitation on a tonnage base, without regard to a vessel's age and value can reasonably be criticised. First, "such a system would wholly ignore the wide disparity in vessels; second, any system that is not tied to the value of the vessel in some way is destined for early obsolescence due to changes that inevitably take place in the value of currency throughout the world..."<sup>104</sup> Therefore, such a measure not only does violence to the traditional concept of limiting the ship owner to his investment in the maritime venture, but also fails to take account of practical considerations that justify the protection of ship owners.

It was felt, with regard to casualties involving super tankers, that the provisions of the 1957 Limitation Convention did not provide an adequate level of compensation if claims for oil pollution damage were pooled with that of the Convention limitation fund. This is why, it is necessary for countries which, through municipal law, apply the Convention and separate oil pollution claims from all others to ensure that, where there is an incident involving claims for both oil pollution damage and other claims, the ship owner will have two distinct limitation funds: one for oil pollution damage and one for all other claims.

#### **4.2.2.2. 1976 London Convention.**

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<sup>103</sup> See e.g. *Mc Dermind v Nash Dredging Reclamation Co. Ltd.*, *The Times*, July. 31. 1988.

<sup>104</sup> Clarence Morse, the head of American delegation at the Tenth Diplomatic Conference on Maritime Law 1957 Brussels, see more details of his remarks in Arthur M. Boeal, *Efforts to Achieve in Uniformity of Law Relating to Limitation of Ship owners Liability*, 1979, *Tulane Law Review*, vol. 53, 1277 at p. 1290.

Under the 1976 Convention there is a sliding scale with various layers of limits depending on the vessel tonnage. It provides five "slices" for personal claims and four for property claims.<sup>105</sup> For example, for a ship of 70000 limitation tons and above, there are always five calculations for personal injury claims and four for other claims.

The Convention provides a significant increase in the limits over those agreed in 1957. It has properly taken into account inflation during the 1957-1976 period. There is a substantial increase in the minimum limit for small ships<sup>106</sup> and a modest and gradual falling of limits for the ships in the range of 30000-70000 tons. For ships above 70/000 tons, the additional amount per ton for tonnage in excess of 70/000 tons is so low that the effect of inflation is not fully reflected.<sup>107</sup> In general, although the fixing of a sufficient limitation amount is a difficult job in pollution cases, it would be logical to say that those injured in a disaster should get reasonable compensation for their damage and loss and should be insured against those losses by the ship owner.

It should be added that there is a special limit for a salvor who is not operating from a ship or who is operating solely on the ship to, or in respect of which, the salvage service was rendered and for any person for whose act, neglect or default he or they are responsible."<sup>108</sup> It would be arguable whether the limit should be calculated according the tonnage of the vessel or not when damage is caused by the negligence of the salvage crew.

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<sup>105</sup> Art. 6.

<sup>106</sup> Small ships have received special treatment under the Convention which provided a minimum limit of 500 tons which is applicable to ships whose actual tonnage is less than 500 tons

<sup>107</sup> See the limit of liability in Art. 6. of 1976 London Convention.

<sup>108</sup> Art. 9(b). It was fixed in an amount equivalent to the limit for ship of 1500 tons. See Art. 6(4)

#### 4.2.2.3. The 1969 CLC and 1984 protocol, as adopted by 1992 Protocols

When the CLC was adopted, it was recognised that higher limits would be necessary for oil pollution damage, in order to provide adequate compensation for those who have suffered damage.<sup>109</sup> The maximum amount of financial liability based on the views that the capacity of the insurance market should be taken into account in the fixing of limit. However, any limitation of liability is by its very nature a compromise between the interest of full or maximum compensation to the victim and the interest of the party who will have to pay, e.g. the shipping industry or oil companies.

The shipowner, under the 1969 CLC, is entitled to limit his liability in respect of any one incident to an aggregate amount of 2000 gold francs per ton of ship's tonnage, subject to ceiling of 210 million francs.<sup>110</sup> Upon entry into force of a protocol to CLC, dated 19 November 1976, the unit of account changed from the Poincare gold Franc to the Special Drawing Right (SDR) of the International Monetary Fund. According to SDR system, the amount of gold Franc in 1969 changed to 133 SDR, equivalent to about US. \$.182.21 as at 22nd of February 1993, per unit or a maximum of 14 million, about \$19,180,000 as 22nd February 1993. SDR whichever is the lesser. For this purpose, the ships tonnage is its net plus engine room space.

The liability ceiling under both the CLC and Fund Conventions were too low, in particular in catastrophic cases, e.g. the *Exxon Valdez*, Victims of oil pollution are, therefore, not assured full compensation. Efforts were made to increase these ceilings considerably through protocols to the Conventions. The 1984 Protocol, as

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<sup>109</sup> Preamble to the 1969 CLC.

<sup>110</sup> Art. V.

adopted by the 1992 protocol<sup>111</sup> with a little modification as to tonnage, amended limits of liability in the 1969 CLC. Article (6) provided:<sup>112</sup>

"The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount calculated as follows:

(a) 3 million units of account for a ship not exceeding 5000 units of tonnage;

(B) for a ship with a tonnage in excess thereof, for each additional unit of tonnage,<sup>113</sup> 420 units of account in addition to the amount mentioned in subparagraph (a); provided, however, that this aggregate amount shall not in any event exceed 59.7 units of account".

When the 1992 Protocol comes into force,<sup>114</sup> after ratification by ten states including four states with no less than one million units of gross tanker tonnage (instead of the six states required by the 1984 CLC Protocol), this limit will rise to 3 million SDR for ships not exceeding 5,000 gross tons and 420 gross tons for every ton excess thereof up to a maximum of 59.7 million, approximately \$.81,789,000 as at 22nd February 1993. Furthermore limitation tonnage under the 1992 Protocol will be its gross tonnage calculated in accordance with the International Convention on Tonnage Measurement of Ships. The combination of the use of gross rather than net plus the engine room space and new Tonnage Convention will, generally speaking, result in larger limitation tonnage and consequently larger limitation funds when the 1992 Protocol comes into force. However, if the total of all claims exceeds these figures, then in theory each compensation payment must be reduced in proportion. In practice however this limit is usually of little

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<sup>111</sup> On 27 November 1992 a conference of fifty-five maritime nations adopted a new Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage 1969, IMO Doc. LEG/Conf. 9/15.

<sup>112</sup> It replaced Article V(I) of the 1969 CLC.

<sup>113</sup> The unit of tonnage is, in line with the 1976 London Convention, the gross tonnage calculated in accordance with the International Convention on Tonnage Measurement of Ship. See Art. 4(5) of the 1984 protocol.

<sup>114</sup> It is very likely to become operational in the near future because of the increasing the amount of limits of liability by a "tacit acceptance" procedure and of reducing the procedures of entry into force.

significance to claimants, since normally additional compensation is available from one source or other.

This limit will increase when the amount of the limit in the 1971 FUND Convention is included. The aggregated amount of compensation payable by the Fund, under 1984 protocol to CLC as adopted in 1992 protocol, in respect of any one incident was originally limited so that the total sum of that amount of compensation actually paid under the CLC would not exceed 450 million gold Francs.<sup>115</sup> The assembly of the Fund was empowered to raise this amount to some not exceeding 900 million Francs.<sup>116</sup> This limit has been increased many times, so far, by IOPC Funds Assembly.

Oil pollution victims can recover more than the limitation amount under the Convention where persons other than the owner, e.g. the manager, builder and classification society of the ship, are involved in liability, under general principles of law.<sup>117</sup> The CLC provides that "no claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this convention, no claim for pollution damage under this convention or otherwise may be made against the servant or agents of the owner."<sup>118</sup> It omits, therefore, to exclude a claim against a charterer who may be liable for pollution damage in negligence. In these circumstances the charterer would be entitled to the benefit of

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<sup>115</sup> Art. 4(4). 1984 International Convention on Tonnage Measurement of Ship,

<sup>116</sup> Art. 4(6) Id. Amendment procedure was replaced by Art. 15 of 1984 Protocol to the Fund Convention under which the limit can be revised by a simple procedure where the amendment adopted by the legal committee of IMO is deemed to be accepted eighteen month after being notified to all parties to the 1984 protocol unless a quarter of them object.

<sup>117</sup> There have been two notable cases where such others have been sued. In the Amoco Cadiz, the manager and builder were sued in the United States court in respect of oil spill in France in 1979; and in the Tanio where large number of defendant's including managers and ship repairer were sued in France in respect of spill off France in 1980.

<sup>118</sup> Art. 3(4).

the limitation convention. But, since both he and ship owner have separate limitation funds, i.e. the owner under CLC and charterer under the limitation convention, the effect would be that the greater compensation would be available from them, than it was thought under CLC in which both the owner and bareboat charterer are insured together under one policy.

#### 4.2.3. The limitation unit

It is important that the financial unit by which limitation of liability is to be calculated should be uniform. The limits in 1957 Convention<sup>119</sup> and the 1969 CLC<sup>120</sup> were expressed in gold francs(poincare francs)<sup>121</sup> which should be converted into the national currency of the state in which the ship owners limitation fund is constituted on the basis of the official value of that currency by reference to the franc on the date of the establishment of the limitation fund. The gold value system, which appears to be stable and uniform, has not proved to be stable and uniform where gold value was translated into national currencies at official rates and at other market rates.<sup>122</sup>

To avoid the problem with the gold units, a new unit of account was adopted, in the 1976 protocol to the CLC, which was based on the Special Drawing Right, SDR, as defined by the International Monetary Fund, IMF.<sup>123</sup> The SDR has been defined as a basket of currencies whose value is determined daily

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<sup>119</sup> Art. 3(1).

<sup>120</sup> Art. V(1).

<sup>121</sup> Franc was defined in Art. 3(6) 1957 Convention as being units consisting of 65.5 milligrams of gold, see Art. V(9) of the 1969 CLC.

<sup>122</sup> Tibolouyski. A. The Special Drawing Rights in liability convention: an acceptable solution? (1979)2 L.M.C.L.Q. 169. See also *Franklin Mint v T.W.A* [1984]1 Lloyd's Rep, 220.

<sup>123</sup> Art. 8. 1976 London Convention. and Art. 2. 1976 Protocol to 1969 CLC which entered into force in 1981, and 1976 protocol to the Fund Convention which has not come into force until end of 1992.

by IMF.<sup>124</sup> The whole idea of using such a unit of account depends on the currency of the state and may vary from time to time with the international strength and weakness of the currency.

The SDR is converted into the national currency of the states in which the shipowners limitation fund is constituted, at the date of constitution of such a fund.<sup>125</sup> The protocol to the Civil Liability Convention came into force in 1981, whereas the 1976 protocol to the Fund Convention did not come into force until 1992. The difference in entering into force of these two Protocols raised an important legal question, regarding the method of conversion, when the *Haven* case was being considered by Italian court in 1992. The IOPC Fund claimed that the conversion should be made on the basis of the SDR. The IOPC Fund's main argument in support of its position was that "the inclusion of the word "official" in the definition of the unit of account laid down in the original text of the 1969 Civil Liability Convention was made deliberately in order to ensure stability in the system and it was clearly meant to rule out the application of the free market price of gold; this definition was by reference included in the Fund Convention."<sup>126</sup> The IOPC Fund has also stressed that the application of a different unit of account in the CLC and FC would lead to unacceptable results, in particular as regards the relationship between the portion of liability to be born by the ship owner and IOPC Fund. This argument was rejected by the judge, in charge of the limitation proceedings, who based his decision on the application of the free market value of gold since the 1976 protocol to the FC which replaced (gold) franc with the SDR

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<sup>124</sup> See more technical details in L. Bristow, *Gold Francs Replacement Unit of Account*, 1976, L.M.C.L.Q., P. 31

<sup>125</sup> Art. II of the 1976 Protocol to the 1969 CLC.

<sup>126</sup> The Haven (Italy 11 April 1991), IOPC Annual Report 1992 at p. 70.

was not in force.<sup>127</sup> It is submitted that the judge has made a wrong decision because, although there is a difference between the date of entry into force of the two Conventions and their Protocols, it must be realised that the Fund Convention was originally established as supplementary, not separate to the Civil Liability Convention.

#### **4.3. Concluding remarks**

Limitation of liability is a privilege which was granted by statute to a defined person in shipping activities, to limit liability to pay damage to a certain sum that would otherwise be payable in full provided liability has arisen in certain defined circumstances. The idea of limiting liability for pollution damage considerably preceded the idea of creating a special regime for liability for oil pollution damage, although this was really a by-product of the idea of generally limiting liability of the those involved in shipping. A major factor, in specifying the proper limit of liability, is the need to recognise and be sensitive to the nature and extent of the risk involved in pollution cases. In this way, it is felt that the respective rights of victims of pollution and other claimants can be protected while permitting the ship owner to limit his liability at an acceptable level with regard to the capacity of insurance market.

The existence of a secured right to limit removes an important element of uncertainty from the ship owners liability insurance, as an equitable means of distribution of risks, and causes premiums to be both lower and more certain. It seems that limitation of liability is, from the insurance point of view, in a majority of pollution liability cases is no longer necessary because of the purchase of substantial reinsurance cover by P & I clubs. The real point is that the existence of a right to limit makes the extent of insurance cover possible.

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<sup>127</sup> Id. at p. 71.

As long as global limitation of liability is permitted to ship owners, it will be subject to the qualification that it will not be available if the loss is in some direct way, the result of the fault or privity of the shipowner or other people entitled to limit. This causes difficulties in practice, not only because the burden of proof varies from state to state, but also because of the interpretation of what facts constitute actual fault or privity. As a result, the shipowner, his insurers and all potential claimants have no certainty of expectation as to how they will be treated by the courts if a great disaster occurs.

To reduce these difficulties, the 1976 Limitation Convention, as it was adopted by the 1984 or 1992 Protocol to CLC, provides that the right to limit should only be denied if it is proved that the loss results from the personal act or omission, committed with intent to cause such loss, or recklessly, with knowledge that such loss would probably result, on the part of a person seeking to limit liability. The question which needs more consideration here is, whose and what act or omission is accounted for by the actual fault of the ship owner, and how far those conclusions would be altered when the formulation "personal act or omission" is applied.

In principle, the maximum costs of accidental pollution cannot be determined, since it is always possible to imagine some accident more costly than any given accident. The devastating experience of Amoco Cadiz and the Exxon Valdez litigation disaster sharply emphasise the need to increase the level of compensation available for innocent victims and to cover clean up costs. The raising of the limit of liability of ship owners has always been worrying for the shipping sector, in particular their liability insurers. In order to maintain a kind of balance in the distribution of the pollution risks, the increased limit, however, should be such as to permit their insurance in the P & I markets. However, it

seems that the limit of related conventions to civil liability for oil pollution are too low to be consistent with the present capacity of the insurance market.

In any case, the only system which guarantees full compensation to the victims is unlimited liability. It seems there is a general reluctance among the related industries, to accept the application of unlimited liability, because of a fear that a too severe burden of liability for oil pollution damage may have an adverse effect on the shipping and oil industry. However, a conventional system of limited liability may be acceptable, provided that the limit is set at a level sufficiently high to secure adequate compensation to victims. In fixing the correct amount of limit, it must be realised that it should be higher than the limit of compulsory insurance, because the shipowner always in practice has some fund available in addition to what is covered by insurance. Furthermore, fixing the limit of liability with regard to the amount of insurance market does not seem to be acceptable because it implies a greater risk of pollution damage, since the shipowner is not himself financially interested in avoiding damage to the same extent if all such damage is in fact covered by an insurance company and not by the shipowner. However, in fixing the higher limit, consistency with the insurance capacity seems to be to some extent, necessary in order to secure some level of compensation for pollution victims. By using the SDR, as a measure of converting the limit of liability, the limitation of liability to some extent escapes the possibility of being reduced because of fluctuations in one single currency. This does not, however, take care of detrimental effects which may result from the general inflation which hits all currencies and, in consequence, may in time make an agreed amount inadequate. To avoid this problem, it might be a good idea to establish special committee under the related conventions to recommend immediate amendment, with regard to the increase or decrease in currencies at international level of the amounts specified.

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## **PART V. EFFECTIVENESS OF INSURANCE**

### **Chapter 1. Protection of the Polluter**

#### **5.1.1. Philosophy behind liability insurance.**

The basic philosophy of liability insurance is that it indemnifies the insured from the legal consequences of liability. In practical terms one might say that it subjects the burden of liability to the insurer. If the objective of such insurance is merely shifting liability from one party to another, society will get no benefit from such a transference, in that only a few people can gain from a particular insurance. To achieve overall justice in the abstract sense, it is desirable to discourage dangerous conduct through insurance contracts.<sup>1</sup> It is obvious that any regulation which effectively tries to impose strict liability on the polluter results in some benefits to society.<sup>2</sup> This approach can be justified when it is accepted that the purpose of insurance, as a means of compensation, should not only be the taking of money from the insurer and the giving of money to the injured party nor should it be a method of covering the insured's liability. It should be structured so as to still allow an element of deterrence against unlawful results of negligent acts which in the context of pollution can have catastrophic results.

The kind of risk which may be transferred to the insurer, depends on the terms of each particular insurance contract. An insurance policy may contain terms which show that the policy covers all risks with certain exceptions.<sup>3</sup> In spite of the pervasive regulation of insurance transactions, the coverage offered by an insurance policy is in most respects, and in particular in the case of pollution

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<sup>1</sup> Fleming, Jam. J. R., *Accident Liability Reconsidered: The Impact of Liability Insurance*, vol. 57, *The Yale Law Journal*, 1984, p. 549.

<sup>2</sup> *Id.* p. 551.

<sup>3</sup> A policy signed in this form is called an all risk policy. See Keeton, K., *Basic Text of Insurance Law*, 1971, at p. 270.

liability insurance cases, is subject to many restrictions in terms of the contract. Some restrictions concern the person and the interest to be protected, others concern the nature of the risk covered by the contract.<sup>4</sup> Thus, insurers, as risk managers, should not only look at the insurance as a means of sharing or distributing risks, but also devote some time to notions of prevention and safety to better manage the risks involved in pollution.

If the insurance industry tends to minimise the risk of injury or damage, insurers themselves will benefit. Insurance should sensibly contribute to loss and accident prevention. This is usually done in two distinct ways; "first, insurers may themselves attempt to take direct steps to minimise the losses of accidents against which they insure."<sup>5</sup> Secondly, the premium rating system adopted by insurers may encourage other parties to take steps to minimise loss and accident."<sup>6</sup>

Economic efficiency<sup>7</sup> is one of the most important factors which usually affects different insurance arrangements, as a method of managing risk by distributing it among large number of individuals or groups. Insurance law promotes economic efficiency whenever it is structured to help to reduce the sum of the overall cost through loss prevention.<sup>8</sup> This idea is supported by the concept which states that, "resources are allocated efficiently whenever more could be saved through loss prevention than can be protected by insurance."<sup>9</sup> In other

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<sup>4</sup> Keeton, K., *Id.* p. 273.

<sup>5</sup> In order to do this, for example, insurers usually maintain inspectors to survey ships, equipment, and advice to the insured as to how to minimise and avoid accident. To prevent further loss, the fire brigade in England were originally established and maintained by insurers. See, Atiyah, P.S., *Accidents, Compensation and the Law*, 3d ed., 1980, p. 569.

<sup>6</sup> *Id.* p. 568.

<sup>7</sup> As a measure of the degree to which particular allocation use of resources maximise their value..

<sup>8</sup> Erich and Becker, *Market insurance, Self insurance, and Self protection*, 80 *J.Pol. Eco.*, 1972, p. 623.

<sup>9</sup> Abraham, K.S., *Distributing Risk, Insurance, Legal theory, and public policy*, 1986, p. 11.

words, money should be spent on loss prevention, safety precautions, and the reduction of activity levels, rather than treating as an economic equation so long as it saves more than the same expenditure on insurance would protect. In this way the sum of two costs, economic costs and accidental avoidance will be reduced, and in consequence insurance can enhance overall economic efficiency.

It must be said that the effects of direct loss prevention by an insurer are limited by a numbers of factors. Firstly, such activities have to be paid for out of premium income, and the return on them is not always immediately apparent. This means that an insurer who chooses to cut down or even eliminate expenditure on such activities can probably under cut other insurers in a competitive market, unless insurers can undertake this kind of activity in a joint operation.<sup>10</sup> Secondly, the incentive for the insurer to minimise loss is small because, a new accident precaution device may in theory lead industry to cut the cost of accidents and be a substantial amount. The result of this would be that insurers would immediately come under pressure to reduce their premium rates. Conversely, if the accident rate goes up because of insufficient attention to accident prevention, insurers can, and do, increase their premium rates.<sup>11</sup> Therefore, although insurers are, in practice, well placed to pay a large role in accident and loss prevention, there is little incentive for them to do so.

### **5.1.2. Protection of the polluter as an insured**

In the context of property and casualty insurance the term "insured" ordinarily signifies a person whose risk of a loss of a designated type is part of the

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<sup>10</sup> Id. p. 570.

<sup>11</sup> Id. p. 571.

subject matter of the contract, i.e. a person whose loss is an occasion for liability.

Ordinarily the benefits are payable to the insured who has suffered the loss, unless the insured has assigned the benefits to someone else. However, under the liability insurance, the right of a third person under the cover have been linked to the rights of a third party beneficiary to the contract, so as to entitle the third party to receive benefits even where the insurer has a good defence, e.g. insolvency of the insured polluter.

It is obvious that the victims of pollution damage have to overcome many hurdles in order to obtain compensation on the basis of general principle of the law of tort. In order to protect victims easily and effectively, several alternatives to individual liability have been developed. For example, first party insurance, which spreads the loss among pollution victims, taken out by the victim or by the polluter for the benefit of the victim, or specific funds which compensate victims of pollution damage without the need to first establish liability. If the victim of pollution could insure against such a risk, he would be able to recover pollution damages from the insurer. There are of course policies under which damages caused by pollution may also be covered.<sup>12</sup> However, there is no insurance policy under which the victim of pollution can directly insure against such losses. The technical difficulties involved in this type of insurance are substantial: first, the size of the potential damage deters insurers from bringing it under the cover; second, any insurance cover is only possible if there is an insurable interest.

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<sup>12</sup> A number of reports confirm that pollution damages are incidentally compensated under fire insurance, all risk car insurance, life and sickness insurance and other first party policy. See, e.g. Keeton, E., *Supra*. No. 3, at pp. 12-3, 270.

Even if such cover were available it would entail the disadvantage of the victims themselves financing the compensation by payment of the premiums.<sup>13</sup> This is against the “polluter pays” principle which internalises the cost of pollution damage to the polluter.<sup>14</sup> This also deters insurers from achieving their “prevention” goal through insurance, unless they are able to exercise a right of recourse against the polluter.<sup>15</sup> Moreover, first party insurance is not, in contrary to the some liability insurance, compulsory.

It might be suggested that a mechanism, under which the polluter takes pollution insurance on his account for the benefit of those who suffer from pollution, would put the financial burden of insurance on the polluter rather than the victim.<sup>16</sup> Although, this solves the problem of cost internalisation, by allowing recourse against the polluter in favour of the liability insurer, the difficulty nevertheless seems too large to overcome if pollution insurance for the benefit of victims is intended to have generalised application. In addition, this mechanism would not be able to attract sufficient support on the part of the polluters unless it were made compulsory. It also has to be said that such a move would in a sense reverse the roles of insurer and insured.

As pollution damage became more recognisable, society began to impose liability on the polluter. In response, polluters turned to liability insurance coverage

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<sup>13</sup> Bocken, H., *Alternative to Liability and Liability Insurance for Compensation of Pollution Damage*, 3 Insurance Law Journal, 1990, 141 at p. 142.

<sup>14</sup> This defect, of course, would be minor when the pollution victims are themselves responsible for their own injuries, but the defect is a major concern where the sources of the pollution are other than victims

<sup>15</sup> The concept of subrogation, which would provide insurers an avenue for recovery of losses from responsible polluters, is not always available under prevailing legal doctrine where personal injuries are concerned. See, Jerry E. Cardwell, *Insurance and Its Role in the Struggle between Protecting Pollution Victims and the Producer of Pollution*. 31 *Drak. Law. Review*, 1981-1982, 913 at p. 919

<sup>16</sup> See Bocken, H., *supra*. No. 13. p.142

in order to better protect themselves.<sup>17</sup> This was accomplished by a contractual relationship in which insurance companies or insurers undertook to do something that is of value to the insured.

In legal theory marine insurance is essentially a contract of Indemnity,<sup>18</sup> i.e., the amount recoverable is measured by the value of the assured's loss.<sup>19</sup> However, the consequences of any loss do not always accord with this cardinal principle.<sup>20</sup> Therefore, in marine insurance, a polluter may not be indemnified perfectly. This results from the distinctive characteristics of indemnity insurance, e.g. insurable interest, double insurance, new for old deduction, right of subrogation, and limitation in the policy of the insurers liability.

The essence of insurance is also to protect the assured against the risks of uncertain events. Therefore, as a general rule the insurance does not cover losses caused deliberately, because it would be contrary to public policy to assist someone who has committed a wrong.<sup>21</sup> Thus, liability insurance coverage for intentional pollution is the subject of much uncertainty. The problem can be traced to the fact that some incidents of pollution are caused by negligence while others are a regular and expected consequence of the operation of ships.

In principle insurance protects the insured against the loss which he might suffer after an accident has happened.<sup>22</sup> The question may arise as to whether the

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<sup>17</sup> Cardwell, Jerry. F., *Insurance and Its Role the Struggle Between Protecting Pollution Victims and the Procedures of Pollution*, Drake Law Review, [1981-1982], p. 913, at p. 916

<sup>18</sup> S. 1 of the MIA 1906.

<sup>19</sup> *Lister. v. Romford Ice Ltd.* [1957] A.C. 55.

<sup>20</sup> *Kent. v. Bird* (1777) 2 Cowp. 58.

<sup>21</sup> This principle governs all forms of insurance e.g.. see. *Beresford. v. Royal Ins. Co.*, [1938] A.C. 586. See also *Gray. v. Barr, Prudential Assurance Co. Ltd. (Third Party)* [1971] 2 Q.B. 554.

<sup>22</sup> S. 1. MIA 1906.

preventive costs incurred by the insured are recoverable or not. There is clear authority, under the sue and labour clause, for the view that if the peril insured has occurred and caused partial loss to the insured property, the costs of the measures necessarily taken to prevent further loss are covered.<sup>23</sup> It may be questioned whether the situation would be different if the damage had not actually happened at all. Sue and labour clauses can permit recovery of certain prevention costs in case it was stated that "sums paid to avert a peril may be recovered as upon a loss by that peril."<sup>24</sup> This does not clearly show whether pure prevention costs, without any elements of loss are recoverable or not. It would be logical to apply the same principle to pollution liability insurance and protect the polluter who has prevented further pollution damage.

## **Chapter 2. The role of insurance in protection of environment**

### **5.2.1. The Insurance industry and its deterrent effects**

Economic efficiency is by no means the only goal of insurance. It does not carry all the aims with which society expects insurance to protect society as a whole. It also ignores the question of appropriate and fair distribution of risk which is usually intended by optimal risk management. To achieve this, risk control as a method of risk management, has been suggested in order to minimise or prevent the risk.<sup>25</sup> Therefore, it is logical to argue that the one of insurance purposes should be the reduction of the overall risk in other ways, besides indemnification of the assured.

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<sup>23</sup> *Symington. v. Union Insurance of Canton*, [1928] 97 L.J.K.B. 646.

<sup>24</sup> *Pyman Steamship Co. v. Admiralty Commissioners* [1919] 1 K.B. 49. at p. 53.

<sup>25</sup> Keeton, E., *Supra*. No. 3, pp. 5-6.

The deterrent effect of tort liability, as a means of compensation, seems to be straightforward and much more effective than the insurance and fund compensation, because under such a system those who cause the accident have to pay their victims out of their own pockets. This leads to the cost internalisation which encourages the tortfeasors to choose between loss prevention cost or future liability cost. Under this system, therefore, a potential tortfeasor should calculate the cost of liability and thereby determine to reduce it, in order to obtain more benefits. Alternatively the potential tortfeasor must accept the risk.<sup>26</sup> In consequence, the tort law could realistically strive to promote an optimum level of safety and risk.

Insurers have traditionally played the major role in the minimisation of risk by maintaining equipment and using the advice of experts. Insurers may attempt to take direct steps to minimise the risks which they insure against.<sup>27</sup> For example, insurers usually maintain inspectors to survey ships' equipment and to advise the insurer how to minimise the risk and avoid the loss. Direct loss prevention activity may be limited because, firstly, such activity has to be paid for out of premium income and the return is not always immediately apparent. Secondly, the incentive to insurers to minimise losses is small since accident prevention device may lead to a large cut in the cost of accidents, and therefore pressure to reduce premiums. This is why preventive measures are usually taken by insurers indirectly through premium rating systems which encourage the insured to take steps to prevent or minimise the risk of pollution or through exceptions to coverage for intentionally caused harm. Co-insurance and deductible provisions give the insured a stake in self-protection.

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<sup>26</sup> This is usually done by improvement of the safety system. For further details see in, Calabresi, G. and Hirschhoff, John T., *Towards Test for Strict Liability in Torts*, 81 *Yale Law Journal.*, 1972, pp. 1055,1057. Posner, *A Theory of Negligence*, *J. Legal. Stud.*, [1972] p. 29.

<sup>27</sup> For example, fire brigades in England were originally established and maintained by insurers.

Liability insurance may have either efficient or inefficient deterrent effects. Accurate insurance pricing and risk classification encourage the insured to invest more in deterrence and cost internalisation. On the other hand, inaccurate pricing or classification allows the insured to externalise the risk of liability and ignore the benefit of possible prevention efforts. Thus, the more accurate and detailed the risks classification and pricing, the greater the insurer's influence on achieving the balance between loss prevention and insurance. As a result it can be said that the deterrent effect of liability insurance depends much more on the way premiums are set or risks are classified.

A potential insurance therefore, in order to achieve its deterrent purpose, should be able to predict accurately the prevention, minimisation, or liability costs that it will eventually have to pay. If these costs are precisely predictable, the insurer will make a more accurate decision with regard to a particular assured. On the other hand, if these costs are speculative, the insurer may inaccurately calculate the costs and benefits of investment in loss prevention and the risk of liability.

Predictability of amount of liability varies a great deal from activity to activity. Costs of liability for injuries caused by polluting substances is considerably more difficult to predict than other liabilities. New toxic substances are continuously being introduced and, therefore, the severity of damage that may be associated with them cannot be predicted accurately until experience accumulates. Furthermore, pollution damage does not usually occur immediately after discharge and damage caused by some pollutants may not be discovered until years after discharge. In addition, the ways in which hazardous substances may migrate contiguous property after a discharge are not completely predictable. Legal and economic changes must also be added to these difficulties, because of the very long period between exposure to pollution and manifestation of damage.

Thus may have an effect on the claims experience that render previous predictions inaccurate.<sup>28</sup>

There are two suggestions, with regard to the above mentioned difficulties, under which insurers may be able to obtain their goals: to indemnify the insured and improve environmental conditions through minimisation and prevention of pollution risk. One way is to limit or deduct the amount of liability insurance and thereby encourage the insured to internalise part of the risk. This is usually done by clubs under deductible or excess clauses, whereby the initial amount of money which is to be borne by the member on his own account in respect of any one claim settlement is increased.<sup>29</sup> This threat may induce more cautious behaviour on the part of the insured or encourage him to increase safety measures, in order to reduce final pollution damage. Although this method may, to some extent, improve the environment, the result of its application may be catastrophic for small business<sup>30</sup> which is not able to handle liability where the deductible amount is usually high in pollution cases.

Another way is to provide accurate insuring pricing systems with regard to the high risk involved in the discharge of polluting substances. If the pricing is inaccurate, the allocation of resources between insurer and insured cannot be optimum. If the expected loss is under priced the industries, oil or shipping or insurance, may under-allocate for prevention and over-allocate to insurance. On the other hand, if the insurance is overpriced, the industries may over-allocate

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<sup>28</sup> See Abraham. K., *supra*. No. 9. at p. 47.

<sup>29</sup> Deductible clause is not, of course, peculiar to P & I insurance, they can also be found in wider marine insurance - hull and cargo.

<sup>30</sup> The result may be also disastrous for a big enterprise which is not operating profitably.

resources to prevention.<sup>31</sup> The choice between these methods depend on the philosophy which is behind the particular industry in financing the expected loss. If risk prevention is their priority, they will over allocate their resources to prevention rather than insurance, and in consequence insurance is under-priced. This may encourage industry to purchase more insurance. In contrast, if industry under-allocates its resources for prevention and over-allocates to the insurance, the insurance would be over-priced and industry would not be able to buy more insurance. In practice, people do not buy insurance and invest in loss prevention in sequence. They invest simultaneously in both.

The absence of detailed reliable data, make it difficult to evaluate risk and accordingly to price premiums against liability in the distant future. One solution to these difficulties is to provide a form of insurance that does not rely heavily on long term prediction. To do this the logical way is to replace the conventional form of pollution liability insurance, occurrence coverage,<sup>32</sup> with "claims made" coverage.<sup>33</sup> The former attempts to charge in the present for all the eventual results of personal activities. Consequently, under this kind of policy it is very difficult to price with confidence, especially when the frequency and severity of risk is likely to increase in the future at an unpredictable rate. Whereas, under the latter, claims made coverage, an insurer only needs to predict the extent of insured exposure

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<sup>31</sup> The premium may be based on combination of factors including potential hazards of substance, characteristic of the people and area may be affected by risk, vessel specification, insured risk management policies and safety record. See more details in, Comment, *Compensating Hazardous Waste Victims; Reinsurance Regulation and not so Superfund Act*, 11 Environmental Law., 1981, p. 869.

<sup>32</sup> It covers liability for activities that take place during the policy period, regardless of when, during the policy or years after it, a suit seek to impose liability is filed. How long coverage extend after expire of policies depend on whether the policy cover manifestation of damage during the policy period, exposure during the period regardless of when injury from exposure is manifested, or wrongful act during the policy regardless of exposure or manifestation. See more details, Keeton, E. supra, No. 3 at pp. 300,301,335.

<sup>33</sup> It insures against liability for claims filed during the policy year regardless when pollution activity take place. See, Keeton, E. supra. No. 3. at pp. 445-452.

which is claimed during the forthcoming policy period. Therefore a claims made policy can be priced with more confidence than an occurrence policy.

Although the shift from an occurrence to a claims made coverage policy solves the prediction problems of insurance industries, it does not provide too much encouragement for the assured to care for the environment through cost internalisation, because it is not mainly based on the future costs of today's activities, but it is based on the cost of activities incurred this year as a result of activities that took place in the past. Therefore, a claims made pricing system may induce an enterprise to under-estimate the cost of prospective liability, and consequently it would not pay attention to loss prevention measures. However, this weakness does not necessarily mean that the move towards claims-made coverage has been inappropriate. Since, the insured, under the claims-made policy, is always at risk that his coverage will not be renewed because of unsafe operations, this threat may create an incentive for safe operations.

The claims record of the insured has been recognised as one of the bases for determining of the size of the future premium. It means that future insurance premiums vary with regard to the previous record of the insured, and therefore encourage good behaviour in running the business and indirectly affect loss prevention. To the extent that insurance companies charge different rates for different claims records, the assured may be encouraged to take safety precautions. However, it must be realised that the great majority of shipowners' premium rates are determined by the average experience of shipowners in that class of business, and not by reference to their own experience. The effectiveness of an average experience rating system in loss prevention may be reduced because, first it is not simple to define who is meant by the "experience" of the shipping company. Does this mean that the number or the cost of the accident and damages which have occurred? Should the "experience" take account of costs

which are not paid by the ship owner's insurer? What is done with one very large claim could distort the shipowner's claim experience for years. Secondly, there is the time-lag problem. Experience rating is always based on out-of-date experience. For example, a pollution liability insurance premium in 1993 must be fixed in 1992, and must therefore be based on the experience of 1991 and earlier years. As a result, it seems that it is unlikely that the experience rating system for fixing a ship owners' pollution liability insurance premium has a very significant effect in reducing or minimising the risk of pollution accidents.

### **5.2.2. Control of assured activity through the Special Rules.**

Some rules of clubs are worded in such a way as to entitle the club to avoid or reduce claims which are made against it. This can be done to the extent that such claims have arisen or have been exacerbated by the members failure to abide by the rules. For example, pollution liability is not covered if liability results from non-performance of the Special Rule. However, there should be a causal connection between failure of a rule as a warranty and a claim. The question whether any particular rule amounts to a warranty, implied or express, is a matter of the individual construction of the particular rule.<sup>34</sup>

The Marine Insurance Act 1906 provides that a warranty<sup>35</sup> is a condition which must be complied with exactly according to its terms whether it be material to risk or not.<sup>36</sup> Thus an insurer may avoid liability in cases of non-compliance with warranties regardless of whether the assured's failure has had any bearing on his loss, i.e. an absolute warranty. Therefore, it is important to distinguish whether a

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<sup>34</sup> See Arnould on Marine Insurance, at para. 698.

<sup>35</sup> See definition of warranty in S. 33(1) of the MIA 1906.

<sup>36</sup> S. 33(3).

particular provision of insurance is or is not a "warranty" where the insurer is unable to prove that non-compliance of provision has had any cause or connection with the loss or has in any way prejudiced its position, and also in those cases where a member has failed to comply with the requirement of insurance provision in circumstances where compliance was impossible.

#### **5.2.2.1. The requirement of classification.**

The Rule, which is identical in most clubs, requires that an entered vessel must be, and remain throughout the period of entry, classified according to the regulation of the special classification society which was introduced by the manager of club. The objective of the classification is to provide an assurance that a particular vessel meets the recognised structure or mechanical standards for the purpose of enhancing the safety of life, property and the environment. Failure to observe the classification requirements may lead to an accident which causes loss of life, cargo, and damage to the environment. As a warranty, the requirement also provides a condition precedent for attaching the insurance cover and failure to meet the requirements gives the insurer the right to refuse cover.

The rule of classification, as a measure of loss prevention, may lose its effectiveness when it is realised that the classification societies are primarily interested in ensuring that the vessel is seaworthy in the sense that she will not sink on the voyage or during the time in which a normal policy of marine insurance is in effect. The insurers, on the other hand, are more concerned with the condition of the vessel as a potential source of liability, e.g. its ability to carry cargo carefully. For this reason, in addition to classification, it may be more effective to conduct a special survey in order to provide a more effective means for prevention or reduction of pollution liability.

The condition of classification as an "exception" to liability must be distinguished from the rule of classification as a "warranty", the breach of which would terminate all insurance cover. The effect of an "exception" does not discharge the insurer from liability but merely ensure that the insurer is not at risk while the exception is operating. For example, if an insurer on receipt of survey report disclosing a breach of classification, lifts insurance cover in so far as it relates to a claim for part of sustained damage, this can be construed more as an exception to cover rather than as being a breach of "warranty". The loss of part of the cover could also have severe effects where the insured's vessel is chartered on the condition that the owner should maintain "full insurance cover" for the benefit of himself and the charterer. If the vessel falls out of the class during the charterparty period, such as to deprive the owner of part of his insurance cover this fact alone would put him in prima facie breach of his charterparty obligations.

#### **5.2.2.2. Control of the safety condition of vessels by regular surveys.**

The unacceptable level of operations and low maintenance standards in the shipping industry is said to be one of the main causes of accidents at sea. In order to keep proper standards throughout the operation, the club rules provide that a ship inspection is to be carried out at specified times with a sanction in the case of a member failing to repair, as necessary, for loss of insurance.<sup>37</sup> The ship inspection may include crew experience and training, management policies, safety practice and pollution control facilities<sup>38</sup>.

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<sup>37</sup> In *Arrison v. Douglas* (1835) 3 A & E. 396, the court decided a condition to keep the vessel in good repair was a warranty.

<sup>38</sup> This inspection system will be nothing more specific than a general inspection but it will allow that the Club to make its own independent assessment outside of the assessment made by the flag states and Classification Societies, for the particular vessel in their routine visit.

It may be argued that the effect of the special rule may be reduced if disobeying orders of managers only prevents the renewal of insurance as opposed to rendering the existing policy void. This argument may be rejected if the rule is regarded as a condition precedent, or warranty, for the continuance of the insurance. Thus, the precise language used by a particular club's rule requires close examination in order to judge whether such a rule amounts to warranty. In *Harrison v. Douglas*,<sup>39</sup> it was held that a rule merely directing the committee of the club to examine a vessel was not an express warranty relating to the survey, in consequence the failure to implement did not lead to the loss of insurance cover. Lord Abinger C.B. in *Stewart v. Wilson*,<sup>40</sup> held that the effect of survey rule was that the insurance effected on the vessel was void unless the direction was complied with, because the language of rule was so regulated that it amounted to a condition precedent for cover.

#### **5.2.2.3. Seaworthiness of vessel as a condition precedent to cover.**

Club rules generally provide that the club may avoid liability in respect of claims which have arisen by virtue of "unseaworthiness." This requirement does not originally come from the express rule of club, but rather is rooted in an implied warranty which has generally been accepted in marine insurance law.<sup>41</sup> Thus, mere acceptance of a marine insurance policy is deemed to be an admission of seaworthiness, unless the policy expressly otherwise provides in clear language.<sup>42</sup> There is, in a voyage charterparty, an implied undertaking, which embraces an obligation in respect of every part of the hull, machinery, stores, equipment and

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<sup>39</sup> (1835) 3 A. & E. 396.

<sup>40</sup> (1843) 12 M & W. 11.

<sup>41</sup> S. 39 of the MIA 1906.

<sup>42</sup> See MIA 1906 Ss. 34(3), 35(3).

the crew, that the ship shall, when the voyage begins, be seaworthy for that particular voyage and for the cargo carried.<sup>43</sup> Thus, the standard of seaworthiness varies with every adventure. The shipowner's duty, as to the seaworthiness of a vessel in the case of ordinary perils likely to be encountered, is an absolute one, i.e. there is no defence that he did not know that the ship is seaworthy, except in some ordinary circumstances which is beyond the shipowner's control.<sup>44</sup>

Although there is no implied warranty of seaworthiness in a time policy,<sup>45</sup> an assured is not covered for loss where it is shown that there has been a default in keeping the vessel seaworthy and this has resulted in the loss.<sup>46</sup> It may be argued whether club cover constitutes a time policy. The question was raised in the case of the "*Eurysthenes*",<sup>47</sup> where it was decided that in spite of the vagaries of club cover, entry in a P & I club was a time policy.

The effectiveness of the implied seaworthy warranty, as a loss prevention means, may become less when it is accepted that it is enough to satisfy this warranty that the ship be originally seaworthy for the voyage insured when she sets sail. The rule, therefore makes no warranty that the ship shall continue to be seaworthy in the course of the voyage.<sup>48</sup> This establishes the condition that the assured gives no warranty for continuing good conduct of the master and crew and this therefore, reduces the amount of the effectiveness of loss prevention. Such a reduction should not be over-emphasised, because if the crew and equipment are

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<sup>43</sup> *Stanton v. Richardson* (1874) 9 L. R. C.P. 390.

<sup>44</sup> See more details in ER, Hardy Ivamy, Payne and Ivamy's *Carriage of Goods by Sea*, 13 ed., 1989, at pp.

<sup>45</sup> S. 39(5). MIA 1906.

<sup>46</sup> *Thomas v. Tyne Wear SS. Freight Insurance Association* [1917] 1 K.B. 938.

<sup>47</sup> *Compania Maritime San Basilio S.A. v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1976] 2 Lloyd's Rep. 171.

<sup>48</sup> See Lord Mansfield in *Bermon v. Woodbridge*, (1781) 2 Dougl. 781 at p. 788.

originally sufficient, and master and crew are persons of competent skill, all will have been done what is necessary to comply with the insured's warranty as to seaworthiness.

#### **5.2.2. 4. The limits of navigation**

Any restriction imposed on the type of trade or on geographical limits, either entirely or for certain period, is generally regarded as a warranty, breach of which will relieve the insurer from all liability. In *Colledge v. Harry*,<sup>49</sup> a rule providing that the vessel should not sail on a specified voyage at specified times was held to be warranty which was broken when the vessel sailed towards the prohibited destination and suffered damage. It may be argued that such a restriction is not warranty but a mere exception to cover. It has been argued<sup>50</sup> that although a provision of this kind has generally, previously been construed as a warranty in the strict sense, rather than an exception to cover granted by the policy, recent marine insurance cases do not really support this proposition. The answer to the question, of course, depends on the construction of the particular policy,<sup>51</sup> having regard to the manner in which the particular restriction is phrased.

#### **5.2.2.5. The obligation as to sue and labour**

Club Rules generally contain, as a condition precedent to the cover, detailed provisions as to a member's obligations to take all such steps, as if he is an uninsured ship owner or as if he were not entered in the club, as may be reasonable for the purpose of averting or minimising any expenses or liability<sup>52</sup> in

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<sup>49</sup> (1851) 6 Exch. 205.

<sup>50</sup> See Raoul Colinvaux, editor, *Arnould's Law of Marine Insurance and Average*, vol. II. 1981, at p. 692.

<sup>51</sup> *Provincial Insurance Co. of Canada v. Leduce*. (1874) 6 L.R. P.C. 224.; *Morgan v Provincial Insurance Co. Ltd.* [1932] 2 K.B. 70.

respect of which he may be insured by the club upon the occurrence of any event liable to give rise to a claim.<sup>53</sup> If a member fails in his duty the club committee may at its discretion reject any claim by him against the club arising out of the casualty or reduce the sum otherwise payable by the club in respect thereof by such amount as it may determine.<sup>54</sup> On the other hand, if the members do their duty, as to minimising or averting further liability, as provided by the club, they would be reimbursed, for the extraordinary costs and expenses reasonably incurred by them,<sup>55</sup> in order to encourage them to take more precautionary measures. However, in the absence of an express clause, it is not clear whether sue and labour costs are recoverable in marine insurance.<sup>56</sup>

### 5.2.3. Special Compensation Fund and its deterrent effects

One of the important mechanisms for the protection of victims is the creation of a specialised pollution compensation fund which compensates victims

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<sup>52</sup> Restricting the duty of minimising and averting the expenses and liability does not mean that the member is, prior the accident, at liberty to act in careless manner, because the Club Rules and the provision of the Marine Insurance Act outlaws conduct by an assured which amounts to wilful misconduct. The fact that the duty is said to arise on the occurrence of any casualty is a feature necessitated by the peculiar nature of the P & I insurance coverage. Since an essential feature of indemnity insurance as provided by the club is that no loss within club cover is deemed to have occurred until a member has been both adjudicated liable and has discharged such liability, i.e. pay to be paid.

<sup>53</sup> The provisions is consistent with general principle of marine insurance as expressed in the MIA 1906, in Section 78(4), provided: ".....it is the duty of the assured and his agent, in all cases to take such measures as may be reasonable for the purpose of averting or minimising a loss".

<sup>54</sup> It seems that the clubs rarely exercise their power under this rule. See Brandon J , in the Remak [1978] 1 Lloyd 's Rep. 545 at p. 554.

<sup>55</sup> The phrase "extraordinary" is neither defined by Club Rules nor by the sue and labour provision of the MIA 1906. However, it is compatible with the word used in the definition of general average in Section 66 of the MIA 1906 which says that the extraordinary expenditure is something more than those ordinary disbursement which are necessary for keeping the ship in proper condition to carry out its trade. For a resume of what expenses are covered, see Hazelwood ,S. J, *P & I Clubs Law and Practice*, 1989 at PP. 271-274.

<sup>56</sup> See the knight of St. Michael [1898] P. 30. In the U.S.A. there is clear authority that prevention costs can be recovered under a non-marine policy in the absence of express coverage. See, *Leebov v. United States Fidelity & Guarding Co.* [401] Pa. 477 (1960).

of certain types of environmental damage without obliging them to establish individual liability.<sup>57</sup> The major characteristic of such a fund is that it is financed, through contributions from a group of potential polluters. A fund spreading risks among of all the members operates in the same way as a private liability insurance. But there are important differences between the way insurance premiums and fund surcharges are calculated. Unlike most private liability insurance schemes, compensation funds usually set their premiums in the form of a surcharge that bear no close relation to the amount of risk borne by the members.

Nevertheless, private and public compensation funds have tried to control the behaviour of their members through direct regulation.<sup>58</sup> The funds are not only designed to compensate those who have been injured by exposure to a pollutant, but also to promote the appropriate level of care and safety by handlers of substances. The fund mainly achieves its deterrent goal, through regulation and provision of a right of subrogation.<sup>59</sup> Such a system encourages cost internalisation through making the polluting industry liable to the fund even after pollution victims have received compensation from the fund.

To achieve its goals of compensation and prevention, it is desirable for the fund firstly to promote regulation that prevents misbehaviour and encourages good conduct by giving some concessions to those who observe safety regulations properly, and secondly, to limit its capacity insurance cover in order to promote the

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<sup>57</sup> e.g. see, 1971 FC

<sup>58</sup> Curie, *State Pollution Statute*, 48 Chi.L.Q., 1981, p. 27.

<sup>59</sup> It transfer to the funds victims, rights against polluting enterprise in exchange of payment of damage by the funds. e.g., see, Article. 9, International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971. See also details about right of subrogation, E.R.Hardy.Ivamy, *The General Principle of Insurance Law*, Ch. 46, 1980, 5th ed., pp. 465-480.

optimal level of deterrence. Despite these regulations, the ability of the compensation fund to perform its public and private duty still much depends on whether the fund is granted a right of subrogation or not.

Non-subrogated funds, which are mostly financed by surcharges and where there is no right of subrogation as to what has been paid, have a less deterrent effect than the liability insurance, since the amount of the surcharge, in contrast with private liability insurance under which premiums are calculated with regard to the amount of risk, does not depend on individual fund members' risks. The surcharge, e.g. extra tax, may have some effects on the level of activities of members of the funds, by raising the cost of products, but its impact on the safety level seems to be minimal because, such funds do not apply the risk classification method in their system. It may be said<sup>60</sup> that the surcharge is based on the amount of substances which may have some deterrent effect. In response it should be said that, although such practices have some deterrent effect they do not provide a great effect because it does not incorporate actual loss experience into the surcharge rate.

Although subrogated funds have much potential capability to produce much greater deterrent effect than the non subrogated fund, in practice, it might not be as ideal as we think. Subrogation rights of funds increase deterrence if the fund's liability obliges ship owners to compare the ultimate pollution liability with the cost of loss prevention, since only under this condition will the shipowning industry have to compare the actual cost of insurance against the cost of liability, whether to ordinary plaintiffs or the funds, and costs of precaution which would help to reduce liability. In addition, the subrogated fund would have a deterrent effect if the objective of the fund, in applying the right of subrogation, is to finance the fund.

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<sup>60</sup> See Abraham, K., *Supra* No. 9, at p. 54

Otherwise it would be much easier to achieve the financial objectives through surcharges rather than subrogation under which funds would double the charge to legally responsible members without obtaining much additional deterrence for their effort<sup>61</sup>.

The maximum success of the subrogated fund, as mentioned above, depends on a more refined structure for the pricing of liability insurance which is usually difficult to get in pollution cases, due to the various types of damage involved. This raises the question whether, without having this refined price structure, the approach of cost internalisation through subrogation has any value with regard to the high administration costs which are required to obtain the refund. In addition, a subrogated fund would have little deterrent effect, or the same effect which can be achieved by a non-subrogated fund through surcharges in accordance with risk estimates, if there is no refined classification of insurance coverage. As a result, it would not be rational to pay more and get less.

#### **5.4. Concluding remarks**

It is highly desirable that insurance not only protects the insured, but also provides incentives to avoid polluting incidents and minimise damage after such incidents. In order to protect the insured, the insurer should provide high level cover so that adequate compensation can be available to victims and clean up operations. To further strengthen the preventive measures, some steps might be taken. Firstly, the insurer may be only grant cover to owners provided with adequate pollution prevention equipment. Secondly, such devices should be strictly inspected and supervised by the insurer at the time when insurance is

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<sup>61</sup> Due to difficulties in estimating of total cost of future liability, neither the risky shipping enterprise nor the fund insuring them against liability could have justifiable confidence in the accuracy of their estimates of the relevant costs.

written and through the terms of the policy. Thirdly, the insurer should have the right to terminate the insurance contract if the insured fails to comply with the insurer's instruction to adopt prevention measures which are objectively necessary. Fourthly, the policy should provide for a substantial excess in the event of an incident. There is a different question of balance here. The excess should not be so large as to be against the interests of victims of pollution damage. Excessive deduction may leave victims with inadequate compensation, in particular where a small shipping company is involved. Fifthly, a system of encouragement and penalties related to premiums should be set up to reward ship management who have used due diligence to avoid incidents or minimised damage after an incident and penalise those who have been negligent, on the basis of the number of incidents recorded during the insurance year.

The general assumption is that if compensation and insurance law is couched in penal and reward terms, this will put pressure on the industry to maintain higher standards, and thereby reduce the risk of environmental damage. The role of marine insurance and compensation funds in relation to pollution will always be a complicated one. On the one hand no-one wants pollution to occur. The result of pollution can be catastrophic for the environment and economy alike. On this basis the argument favours internationally agreed measures of a preventative rather than insurance nature. To this end, insurance may make shipowners and masters, feel they do not need to take as many precautions to minimise the risk of pollution. Alternatively, there is a clear need to provide an equitable and workable system of insurance and compensation for the victims of pollution damage. It is clear that the law of individual states are not enough in this area with all the complications that there are, as to causation and liability and of course difficulty if the party who causes the pollution simply cannot pay. The role of marine insurance and compensation funds in pollution cases will always be a

balancing role. On the one hand, the insurance or compensation cover must be adequate enough and accessible enough to compensate the victims of pollution properly and quickly. On the other hand the insurance and compensation scheme must not be so liberal and generous that they remove any deterrent effect and fail to encourage shipowners and masters to take adequate precautions to avoid pollution. Furthermore, insurance and compensation schemes must always encourage measures which minimise the actual pollution damage once an accident has occurred. The role of marine insurance and compensation is to provide an adequate system of checks and balances to achieve all these aims.

## CONCLUSION

The common law liability system has been found significantly lacking in the case of compensation for pollution damage and losses in the past. This failure primarily stems from the fact that the law of torts or delicts was developed to deal with a single individual tortfeasor or wrongdoer. It therefore seems ill-suited for pollution problems in which pollutants usually affect major portions of the population in large regions and make the task of proving any claim infinitely more difficult. It would usually be difficult for a shore-bound or remote claimant to prove negligent seamanship. If a negligence claim fails, no greater success can be expected from trespass or nuisance.

There are also problems relating to the ambit of the duty of care in every case and similar problems relate to the causation factor and the difficult question of remoteness of injury and remoteness of damage. The development of liability insurance, in which the method of compensation normally depends on what has been lost and not fault or contributory negligence, has altered the administration and financing of the tort-based system, in which there is little interest in considering the question of finance. The move away from a purely fault-based system to a compensation system has helped to end a system where some parties might be over compensated at the expense of the other claimants. Nevertheless, the current system is not perfect. The inevitable conclusion is that there requires to be some form of compensation system based on strict liability and compulsory insurance from which a claim can be met without having to satisfy the rigorous criteria laid down in the common law of negligence or some other tort giving rise to liability.

In theory, the strict liability system performs the compensation function better than tort liability, simply because more people will recover compensation if fault does not need to be proved. Furthermore, strict liability has the

advantage over negligence in respect of accident prevention because by imposing liability for damages which are unavoidable at the time of accident, should force shipowners to spend more on safety systems in an attempt to prevent accidents. However, even a strict liability system has drawbacks and could be just as regressive in its effect as a negligence liability. A strict liability scheme does nothing about the two major drawbacks of the tort system, firstly the need to prove a casual link between accident and damages (a difficult job in case pollution damage at sea which may result from different causes) and secondly the need to find the responsible defendant. If it is proposed to adopt an absolute liability, with no need to prove causation, this would provide a full and adequate compensation scheme which is available under the tort system, only if the related economic environment, including the insurance industry has enough potential economic capacity to cover such a system.

The voluntary strict liability system under which the tort action remains intact have now largely been overtaken by conventional obligations. However, this system cannot be ignored for several reasons. Firstly, by no means all countries have, or perhaps intend, to become signatories to the existing conventions. Secondly, although the voluntary and convention devices are broadly similar in context, there are still some significant differences of detail over the scope of claims which necessitates the continuation and development of voluntary arrangements even in countries which are now signatories to the obligatory convention in respect of compensation for pollution damage. Thirdly, despite improvement in the limit of compensation in the conventional schemes, there are still claims which are outside the scope of the limitation of these schemes. Fourthly, there is no provision in existing voluntary agreements, in contrast to obligatory convention, requiring no-fault benefit set off against tort benefit to prevent double recovery.

However, the voluntary scheme, TOVALOP, suffers a major disadvantage by requiring retention of third party liability insurance. The voluntary nature of the agreement may cause an insurer to take a cautious attitude in providing insurance cover for gratuitous payment. The assumed legal liability under the voluntary agreement is far removed from the general principle of liability insurance under which no liability must be admitted without prior insurer's consent in writing. Disputes may also arise when the insurer is dealing with TOVALOP liability in a possible, general average situation where a mixture of motives are involved. Every claim must be notified by the insured within two years of the incident. This time limit illustrates a difference between an insurance company and TOVALOP where each company has its own time limit for notices of claim. The other problem which may come into existence in relation to insurance is when the insurer is obliged to provide insurance against salvor liability for pollution damage which may be caused in the process of the salvage effort, as a preventive measure which is payable under TOVALOP and is not covered by the tanker owners' liability insurance, unless it expressly so provides. The waiver of the subrogation right, under TOVALOP, is a diversion from the general principle of insurance law under which the insurer is subrogated to the rights of those whom he has indemnified. All these differences indicate that tanker owners, in the performance of their liability under the agreement, need a very special insurance contract. To achieve this, it is suggested that the terms on TOVALOP liability are automatically incorporated into the insurance policy, in order to satisfy the financial guarantee under the agreement.

Restricting of the scope of compensation to damages for loss which can be proved to have a relationship and the problems of remoteness of damage and quantification of damage has put many claims for pollution damage or loss out

of the scope of existing compensation regimes and their compulsory insurance, in particular, where economic loss or environmental damage are involved. Pure economic loss is generally described as indirect loss, from the standpoint of the sequence of events, and hence not subject to compensation even if connected by causal link to the event which give rise to it. There are also problems of nature in relation to damage to the environment, except as regards cost of restoration. Even where the environmental damage is recoverable, it is not clear which type of claimant is qualified for compensation and there is difficulty and evaluation of those marine sources which have no directly quantifiable economic value. The language is also ambiguous on the question of whether the cost of anticipatory measures taken by contracting states prior to actual discharge is recoverable. The compensation schemes have not provided any answer to the question of how much preventive measure costs, such as clean up costs, fixed costs or additional costs, all should be taken into account as recoverable damages. These ambiguities give considerable freedom of interpretation to the courts in the contracting states to define, according to their law, the scope of recoverable damages. This can lead to different interpretations which reduce the better functioning of the compensation regimes. It is submitted that it is necessary to revise existing regimes so as to extend their scope to embrace all of these deficiencies.

A mark of the present compensation system, for pollution damages, is that the compensation for environmental damage, i.e. damage to sea fauna and flora, is not covered, due to the fact that the schemes have been specifically devised to compensate victims of pollution damage, as opposed to compensating generally for environmental damage which is difficult to calculate in monetary terms. To amend existing legal schemes is not a perfect solution. Instead, a specific body of law, in the national and international level which

specifically deals with the compensation for environmental damage, would provide a better system. Establishment of a system of mutual cover making use of insurance techniques would help in providing sufficient guarantees for compensation for environmental damage. Such a form of redress could be costly to the shipping industry and this could give way to a more deterrent role for insurance and compensation schemes.

The existing compensation regime does not address pollution damage occurring on the high sea. There is no doubt that the general recognition of an exclusive economic zone, with 200 miles off each adjacent state, will reduce the lack of compensation regime dealing with damage on the high seas. However, there is still an area of the high seas which is not covered. Although limited contribution by the industry's voluntary schemes does provide compensation for pollution damage in this area, there is still a gap in the providing sufficient compensation, which needs to be filled by the extension of the application of existing civil liability schemes to the uncovered area at sea.

Even if in those cases where no-fault liability of the shipowner polluter is an established fact, the position of victims, in relation to recovery of compensation, is still dependant on two factors: any amount of limitation of liability which can be claimed by the party liable, and any condition allowing the party for exoneration of right to limit the amount. A major factor, in specifying the proper limit of liability is the need to recognise and be sensitive to the nature and the extent of risk involved in pollution cases. It is recognised that the capacity of the existing compensation system is far from compensating real damages and losses and neither can the capacity of the insurance market bear the real loss. The existing schemes and insurance markets do not come close to being able to cope with serious disasters involving the enormous scale of losses or damages, such as Exxon Valdez. The cover available for a small tanker is not

comparable with the seriousness of substances involved in pollution incidents. It is submitted that it is necessary to bring compensation levels into line with the reality of the damage caused by a large spill even where there is a small ship. It is the capacity of the insurance market to cope with the reality of such a proposal that must be called in question.

There is a difficulty in practice not only because of the burden of proof which may vary in the different contracting states but also because of the interpretation of what facts constitute actual fact or privity. As a result the shipowner, his insurer and all potential claimants have no certainty of expectation as to how they will be treated by the limit of the compensation. There is therefore the possibility that some victims may be over compensated and some under compensated under the same convention for the same case. The non-existence of a secured right to limit may also increase uncertainty and cause the insurer to increase premiums substantially. This can mean that the shipowner takes less cover and in consequence there is less secured payment for pollution victims.

Insurers have shown themselves very cautious in dealing with the risks that pollution represents. They are concerned because of the way in which the civil liability in the field of pollution damage is developing, and in particular the tendency towards strict liability, and the variety and extent of damage which is involved in pollution incidents. A liability insurance policy does not directly cover damage caused by pollution, it only covers damage attributable to an insured party whose liability is established. A claim remains unsettled as long as the assured's liability has not been established. This may create a climate of contention between the responsible polluter and his victims, both with regard to establishing the responsibility of a third party and the recognition and assessment of damages or losses. Insurers are reluctant to cover liability as to

pure economic loss. Most policies do not cover salvage expenses incurred to prevent the pollution damage from spreading, unless property is saved. Insurers do not regard environmental damage as an insurable interest, since nobody's possessions are damaged. Insurance cover of potential pollution damage is high but is subject to a ceiling. This means that for an amount falling outside the available limit the polluter remains his own insurer. If the amount of damage is substantially beyond the insurance cover, a responsible polluter may experience difficulty in meeting the cost of damage. Consequently the persons who have suffered the pollution damage may find themselves without any compensation. To remove all these deficiencies, it is submitted that it is necessary to replace the third party liability policy by an insurance policy directly covering pollution liability at sea so as to ease the difficulty of proof and extend cover to the risks which are outside the normal third party policy. It is submitted that to increase the amount of limit the existing pooling agreement should be strengthened by insurers from the contracting states of the conventions dealing with compensation for pollution liability at sea. However, it must be accepted that all these solutions depend on the interaction of a multitude of factors including the economic condition of the insurance industry as a whole, the ability of the industry to develop related data which would enable them to assess the risk and operate profitably in the pollution insurance liability market and close co-operation between insurer and insured.

The deterrent effect of compensation is a question of great significance in the construction of a compensation system. It has been realised that the insurance system of pollution damage is not just to indemnify victims, but also to provide a mechanism which has a deterrent and which prevents or reduce the damage. There are a number of possible techniques whereby an element

of deterrence can be retained in schemes involving the use of compulsory insurance and compensation funds.

Insurance operates as a method of distribution of loss and varying premium rates operate as a form of general deterrence. The combination of these two seems to produce a perfect blend. There is no doubt that to the extent that pollution damages are eventually paid through the insurance premiums of those who take part in polluting activities, the insurance system does reflect the purpose of general deterrence. It would be highly desirable that prevention measures designed to avoid incidents are strengthened by a system of encouragement and punishment based on the premium rate. A high premium could encourage less careless actions, provided of course, the premium is not transferred to the consumers of shipping services. The threat of withdrawal of insurance cover, if adequate prevention facilities are not provided, could represent an even more significant deterrent effect, especially where cover is made compulsory and payment of a policy might probably put a company out of business. The existence of a deductible insurance system, provided it is substantial, could also encourage companies to maintain adequate standards and preventive measures. The right of subrogation can also be regarded as an effective measure to encourage more careful actions in order to avoid payment. Comparable deterrent technique could be used in the case of a compensation fund system. However, no matter which of these terms is applied, the balance to be struck between environmental considerations on the one hand and a viable system which can provide sizeable insurance on the other is not easy to strike.

It is clear that the laws of individual states, with all the complications as to causation and liability and of course the ultimate difficulty if the party who causes the pollution simply cannot pay, are not enough to provide an equitable

and workable system of insurance and compensation for the victims of pollution damage, and at the same time encourage precaution measures to minimise the risk of pollution. The role of marine insurance and compensation funds in pollution cases will always be a balancing role. On the one hand the insurance or compensation cover must be adequate and accessible enough to compensate the victims of pollution properly and quickly. On the other hand, the insurance and compensation schemes must not be so liberal and generous that they remove any adequate precautions to avoid pollution.

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