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ASPECTS OF OIL POLLUTION

by

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"Owing to a defect in her steering gear an oil tanker became stranded in the estuary of a river. In order to prevent the ship from breaking her back the Master of the vessel jettisoned 400 tons of her oil cargo, which was carried by the tide to a foreshore and caused considerable damage. The Owners of the foreshore brought an action against the Owners and the Master of the tanker, based on trespass, nuisance and negligence, alleging that the stranding of the tanker was caused by faulty navigation by the Master for which the Owners were vicariously responsible."

Some of you may think that the above quotation should have started "Once upon a time" or at the latest that it describes a 19th century mishap to some such vessel as the splendidly restored square-rigger which many of you have probably seen in Honolulu, and which was one of the earliest vessels to carry cargoes of crude oil. My quotation does not however relate to a casualty from those early days; it is from the head-note to the 1954 report of the English Court of Appeal decision in Southport Corp. v. Esso. I have quoted it to illustrate how much concepts of liability for oil pollution have changed in the relatively short time since then.

Without wanting to dwell unnecessarily on what after all may now only be regarded as something of a fossil hunt, the point is underlined by a brief review of the different exhumations which this delving into the past by some of the leading luminaries of the English judicature produced. (Anyway such niceties should surely not be denied to a distinguished gathering of lawyers like the present!). Devlin J. held at first instance that, although the defendants had called no evidence as to the cause of the steering breakdown, there was no negligence by the Owners or Master as pleaded and the plaintiffs therefore could not succeed in nuisance, trespass or negligence. The Court of Appeal (by a majority of 2:1) treated it as a case of res ipsa loquitur so that the onus was on the defendants to explain why the steering gear went wrong; not having done so they were liable in negligence. Trespass failed because no physical act had been done directly against the plaintiffs' land, but again I must quote to give you the full savour of the grounds for allowing nuisance to succeed:

> "The discharge of oil into the sea in such circumstances that it was likely to be carried onto the shore to the prejudice and discomfort of H.M. subjects could constitute a public nuisance, and a person who suffered greater damage therefrom than the generality of the public would have a right of action. In such an action, once the nuisance was proved and the defendant was shown to have caused it, the burden was on him to excuse or justify it, and to do that in the present case the defendants must

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show that it was unavoidably necessary to discharge the oil, but such a defence would not avail them if they failed to prove that the unavoidable necessity was not attributable to their negligence".

The House of Lords were not quite so carried away by the elegance of these distinctions between trespass and nuisance, holding that neither could succeed in face of the necessity to discharge oil for the safety of the crew, as found by the trial judge, at least not without some underlying negligence. The only negligence which had been pleaded (and that with some particularity) was in the actual navigation of the vessel, with nothing to suggest that the cause of the steering breakdown may have been due to lack of proper care. Devlin J. had negatived any negligence as pleaded, to which in their Lordships' view he was therefore right in confining the issue, so that the action failed on all counts.

Putting the clock forward to 1967 there occurred what was up to that time the biggest oil pollution disaster ever experienced, the "TORREY CANYON", involving a spill of some 80,000 tons of oil which caused extensive pollution on both sides of the English Channel. There was massive Government intervention, including the use of troops, to effect clean-up but when the respective Governments tried to recover their expenses, they were faced with daunting problems. Jurisdiction was established effectively only after the opportunity to arrest a sister-ship arose, I believe, here in Singapore. Apart from limitation of liability, those handling the Government claims could anticipate a re-run of the trespass, nuisance and negligence arguments plus the added dimension that if the Government were not Owners of the polluted beaches which they had cleaned-up then, at least under Common Law, they might be placed in that outcast category of "volunteers" rather than victims.

Against this background of legal complexity, uncertainty and ineffectual recourse if there should ever be a repetition of any similar disaster to the "TORREY CANYON" (as was then feared there might be), it is not surprising that Governments represented at IMCO considered there should be an International Convention regulating the liability of Tanker Owners for oil pollution, and that was finally adopted at a diplomatic conference in Brussels in 1969, in the form of the Civil Liability Convention (1969 CLC).

1969 CLC is the subject I propose for discussion today, especially those aspects which are currently being examined by IMCO as needing possible revision. I am not attempting any conscious irony in seeking to direct your minds to these possible changes which some 10 years' experience of 1969 CLC suggests may be necessary - when Australia is only now

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just about to implement 1969 CLC, as did Singapore only last year. If sensible changes are to be made, to have the existing Convention on the statute book, even in its present form, is after all the first step.

I have listed in Appendix A to this paper those countries which have so far become Contracting States to 1969 CLC, indicating with an asterisk those which have also become Contracting States to the 1971 Fund Convention, a word about which is necessary.

In the course of the Diplomatic Conference which produced 1969 CLC a strong division of view emerged how far the increased and strict liabilities of the newly proposed regime should be borne by Tanker Owners (and their insurers) rather than by the actual Oil Industry. The eventual compromise was to allow to Tanker Owners a limitation of liability which it was recognised might not be enough to cover all claims, but the proposal was to make supplementary compensation available from an international relief fund which would call up the necessary contributions from States wanting to participate in it, according to how much oil each imported annually; in effect this can be made to operate as a levy on the local Oil Companies. Since the increased limits imposed by 1969 CLC on Tanker Owners was substantially more than under the 1957 International Convention covering all liability, and not just oil pollution, the 1971 Fund Convention additionally provided "roll-back" relief to a half-way mark between the 1957 and 1969 Convention figures for ships registered in Contracting States to the 1971 Fund Convention.

Another seeming quirk in the 1969 CLC is that a Shipowner may prove against his limitation fund his own voluntary clean-up expenses, regardless of negligence which may have caused the original spill, and if on this basis he is amongst those "victims" whose claims are abated by limitation, then (in addition to roll-back) he has the benefit of supplementary relief under the 1971 Fund Convention also. This is not so odd as it may seem but sensibly recognises the desirability of Shipowners taking prompt voluntary clean-up measures themselves, without seeking to evaluate whether or not their limit of liability under 1969 CLC was likely to be exceeded i.e. if it was, then the undesirable result might be for an astute Tanker Owner just to walk away from the problem and put his limitation fund on the table.

Reference to the desirability of voluntary action by the Tanker Owner prompts me to mention briefly TOVALOP ("Tanker Owners Voluntary Agreement concerning Liabiltiy for Oil Pollution") which was originally sponsored by the major Oil Companies, also prompted by the experience of the "TORREY CANYON". With exemplary expedition the terms of the proposed

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scheme were formally published in 1968 and the necessary support from independent Tanker Owners (with appropriate encouragement from the Oil Companies) was obtained for TOVALOP to come into effect in October 1969. To a large extent TOVALOP anticipated 1969 CLC, although compensation under it was confined to Government clean-up costs, and in this respect it followed the approach of the unilateral legislation in the USA (the legislative process had already started there in 1968 which was to produce the Water Quality Improvement Act 1970). TOVALOP required Tanker Owners to accept the same sort of strict liability as subsequently formulated in 1969 CLC, and up to similar limitation amounts. The supplementary Fund relief contemplated from the outset for 1969 CLC was reproduced for TOVALOP by way of CRISTAL ("Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution"). Both TOVALOP and CRISTAL continue to be available in jurisdictions where 1969 CLC and the Fund are not yet operative.

The features of 1969 CLC to which I want to draw attention, in particular how they have worked in practice, are the following (the text of the relevant Articles is set out in Appendix B):

(i) Pollution Damage: Art.I 6&7

(ii) Strict Liability: Art.III 2

(iii) Limitation: Art.V 1&2

(iv) Compulsory Insurance: Art.VII 1&8

(v) Channelling of Liability: Art.III 1&4
Art.IX 1

Pollution Damage:

Since the definition expressly includes any reasonable preventive measures by whomsoever taken, no Government will any longer be faced with the argument of being a "volunteer" rather than a "victim". There have been instances however of casualties in which no immediate spill of oil has occurred, but where costly measures have been undertaken to prevent oil escaping from capsized or submerged hulls of tankers or barges. It is strongly arguable that the 1969 CLC definition of pollution damage requires there to have been an actual spill of oil before preventive measures can be brought into consideration.

Within the primary and more obvious meaning of "loss or damage caused" there has been one startling experience of the widely differing effect which can be given in different jurisdictions to those words. The case to which I am referring involved pollution to the coast of both Sweden and Russia; in Sweden damages were claimed in the ordinary way for actual clean-up costs, but in Russia (in addition to actual clean-up

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costs) a formula is used to calculate "environmental damage" as a direct multiplier of the quantity of oil spilled, less the quantity cleaned up. In the particular case, the Russian claim in this way worked out at nearly US$75m and effectively swamped the Owner's limitation fund; for the corresponding abatement of the US$22m Swedish claim however compensation was fortunately available via the Fund.

This signal lack of uniformity under an International Convention surely has to give pause for a little wry reflection. Although probably not of very practical concern for Australia, let us hope we will never see Singapore and Indonesia competing to outdo each other in the enormity of their respective claims against a limited amount of compensation available.

Strict Liability:

From the text quoted in Appendix B the only exceptions for the Tanker Owner from liability can be summarised as act of war, act of God, wilful third party damage and government failure to maintain navigational aids. Perhaps only lawyers would lament the denial to Tanker Owners of the convoluted argument of negligence, nuisance and trespass with which I opened this paper, and the more cynical amongst those of us whose job it is to try to defend Shipowners' interests may think that there are no longer any substantial defences left in any area of marine activity anyway! Nonetheless, there have been collision cases giving rise to oil spills in which the tanker was the wholly innocent vessel, but the Tanker Owner was obliged to respond in full for very substantial amounts of compensation under 1969 CLC, which it would be a matter of some fortuity whether or not he could effectively in turn recover from the colliding vessel.

Limitation:

Except that 1969 CLC provided for much larger amounts (reserved exclusively for oil pollution liability) it did preserve for the Tanker Owner a right to limit in the traditional pattern, at a rate per ton of the ship's size. Originally expressed in gold francs, there was a 1976 Protocol adopting SDR's as a more appropriate calculator. When 1969 CLC first came into effect, the sterling equivalents of the relevant gold francs in the United Kingdom were £55 per ton (maximum £5.8m) which, as equivalents of the relevant SDR's when the 1976 Protocol came into force in 1981, became £74.16 per ton (maximum £7,806,750). A daily rate of exchange for SDR's is published by the International Monetary Fund, so there is no difficulty in converting the 1976 Protocol figures of 133 SDR's per ton (maximum 14m SDR's).

Again in accordance with the traditional pattern, the

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right to limit is lost in cases of "actual fault or privity" on the part of the Tanker Owner. The vagaries of different jurisdictions in the application of that concept is amongst the aspects which have caused concern, and will no doubt be considered in the current revision of 1969 CLC; one suggestion is that the much stronger (and hopefully more certain) provision of the 1976 Limitation Convention may be adopted: "A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.".

Of course, it is the fixing of new levels of compensation both under 1969 CLC and by way of the supplementary relief provided by the Fund which is engaging most attention in the current revision discussions. Certainly the experience of the "AMOCO CADIZ" in 1978 (which involved a spill of nearly three times the quantity of oil in the "TORREY CANYON") has demonstrated that the totality of compensation under the combined regimes of both 1969 CLC and the Fund is not enough to cover a catastrophe of those proportions, if there should be another.

Compulsory Insurance:

This was an innovation again adopted from the USA, which the Federal Maritime Commission in Washington had indeed first introduced and operated in the much more restricted specialisation of passenger cruise liners, but which from the outset of the proposals resulting in WQIA 1970 was one of the most prominent features of that legislation. Contracting States to 1969 CLC can require all tankers carrying 2,000 tons of oil as cargo to produce a Certificate of Insurance, under which the insurer may be sued direct. This solves the problem of establishing effective jurisdiction over what may often turn out to be the one-ship Owner of a wrecked and worthless tanker.

The insurer can plead any defences which would have been open to the Tanker Owner and always has the right to limit his direct liability to what would have been the Tanker Owner's appropriate limitation fund, even if the latter is denied the right to limit. The insurer can disclaim liability altogether in a case of wilful misconduct on the part of the Tanker Owner, which in effect means scuttling.

Administratively this compulsory certification procedure has given rise to some problems, both to Governments and insurers. Nothing insoluble has arisen, but the procedure has certainly not proved as easy as e.g. compulsory motor insurance, which is a matter entirely internal to the jurisdiction concerned. It is probably fair comment to suggest

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that the experience of 1969 CLC in this respect would not make anyone too enthusiastic to extend the procedure unnecessarily to other aspects of liability.

Channelling of Liability:

In the original formulation of 1969 CLC, victims of oil spills were being given the advantage (which the "TORREY CANYON" disaster had shown to be necessary) of immediate identification of and effective jurisdiction over the party to be sued, namely the Registered Owner of the tanker from which the oil had been spilt. Fault was no longer a controlling factor and there would certainly be no argument that the fault lay with a Master or crew employed not by the Registered Owner but by a Demise Charterer. The reinforcement of this right to recover was by way of compulsory insurance in the name of the Registered Owner, against which direct recourse could be taken by victims.

In exchange for all of this, some of us believed (perhaps naively) that, in the unhappy event of a casualty, the Tanker Owner and his insurer would be able to assess with some confidence the amount of the bill and the way in which it would have to be paid. This was to be within the regulation of an International Convention, so that (at least as regards Contracting States) the result should be the same wherever the casualty might occur or in whatever jurisdiction claims might be brought.

But what do we find in practice, the first time the totality of compensation is not enough? I am referring to the case of the "AMOCO CADIZ" not because of any special P&I interest in it but because it is a case of such general concern as now really to have become public property - and anyway I am assuming that nobody to whom this paper is being addressed could be even remotely connected with that case.

We find that no proceedings at all have been taken in France under 1969 CLC against the Tanker Owner's limitation fund of some US$15m which was duly constituted very soon after the casualty. Instead claims were brought in the USA where it was hoped perhaps to break limitation more easily and where the alleged operators of the vessel could also be impleaded, to whom the benefit of limitation might not be available in any event.

Can anyone find satisfaction in that, as an example of the working of an International Convention containing express provisions such as Art.III 1&4 and Art.IX 1, set out in Appendix B? Apart perhaps from the satisfaction which the lawyers may be feeling, whose costs (on all sides) are now estimated to be approaching US$20m! However, I would not want

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to close on any note of too profound disillusion, because 1969 CLC still points the way to a uniform and predictable liability regime. This should be an advantage to claimants and is certainly of the greatest importance to Shipowners and their insurers. Increased liabilities will undoubtedly be accommodated; how readily Shipowners will be able to absorb the increased cost for the insurance of those liabilities is not for me to say. What insurers find most difficulty in charging any reasonable premium for are the astronomical "rogue" claims, which can arise outside any such well-ordered framework as 1969 CLC was designed to provide.

I have not touched at all on the considerable IMCO activity which in recent years has been directed to operational aspects of the carriage of oil in tankers (in particular their construction, lay-out and equipment) such as MARPOL 1973 and SOLAS 1974, and the 1978 Protocols to both those Conventions. Nor have I reminded you of the prohibition against discharge anywhere at sea of oil, dirty ballast or tank washings which an increasing number of contries are seeking to enforce. I have assumed that the conceptual aspects of 1969 CLC will be of greatest interest to lawyers, and am hoping that those aspects which I have singled out for brief mention might provide a starting point for discussion.

ASPECTS OF OIL POLLUTION - APPENDIX A

Contracting States to 1969 CLC:

*Algeria
*Bahamas
Belgium
Brazil
Chile
China
*Denmark
Dominican Republic
Ecuador
*Federal Republic of Germany
Fiji
*Finland
*France
*Gabon
German Democratic Republic
*Ghana
Greece
*Iceland
*Indonesia
*Italy
Ivory Coast
*Japan
*Kuwait
Lebanon
*Liberia
*Maldives
*Monaco
Morocco
Netherlands
New Zealand
Nigeria
*Norway
Panama
*Papua New Guinea
Poland
Portugal
Senegal
Singapore
South Africa
South Korea
*Spain
*Sweden
*Syrian Arab Republic
*Tunisia
*Tuvalu
U.S.S.R.
*United Kingdom
Yemen Arab Republic
*Yugoslavia

* = Contracting State to 1971 Fund Convention

ASPECTS OF OIL POLLUTION - APPENDIX B

(i) Pollution Damage:

Art.I 6: "Pollution damage" means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.

Art.I 7: "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

(ii) Strict Liability:

Art.III 2: No liability for pollution or damage shall attach to the owner if he proves that the damage:
(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
(b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

(iii) Limitation:

Art.V 1: The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount of 2,000 francs for each ton of the ship's tonnage. However, this aggregate amount shall not in any event exceed 210 million francs. [Substituted by 133 and 14 million SDR's respectively under the 1976 Protocol.]

Art.V 2: If the incident occurred as a result of the actual fault or privity of the owner, he shall not be entitled to avail himself of the limitation provided in paragraph 1 of this Article.

(iv) Compulsory Insurance:

Art.VII 1: The owner of a ship registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance ... to cover his liability for pollution damage under this Convention.

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Art.VII 8: Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage. In such case the defendant may, irrespective of the actual fault or privity of the owner, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner himself would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the owner himself ... .

(v) Channelling of Liability:

Art.III 1: Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.

Art.III 4: No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.

Art.IX 1: Where an incident has caused pollution damage in the territory including the territorial sea of one or more Contracting States, or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea, actions for compensation may only be brought in the Courts of any such Contracting State or States ... .

Protection of Sea (Civil Liability) Act 1981 (Cont'd).