

**A CRITICAL EXAMINATION OF SOUTH AFRICAN LAW ON
CIVIL LIABILITY FOR OIL POLLUTION DAMAGE FROM
SHIPS**

By

Stuart Hiscox BA LLB (UCT)

A dissertation submitted in partial fulfilment of the Degree of Master of Laws in approved courses and a minor dissertation.

The other part of the requirement for this degree was the completion of a programme of courses.

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SUMMARY OF CONTENTS

CHAPTER ONE

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In this chapter, by way of introduction, consideration is given to the development of the awareness of the marine environment and the need for it to be protected from oil pollution. Allied to this is the development that the coastal state, which has suffered damage or loss as a result of oil pollution damage, is entitled to claim compensation from the owner of the vessel which caused the damage.

The next consideration is the different forms of damage that may result from pollution. This paper is limited to loss or damage that results from either the accidental or deliberate (including operational) discharge of oil from ships. Having thus limited the discussion to this topic, the next area that is examined is the extent of the risk to South Africa from vessel source oil pollution damage. The conclusion is reached that due to the volume of traffic off the South African coast allied to the notoriously bad weather conditions and great length of coastline that may be affected by oil pollution damage, South Africa faces a grave risk of loss or damage from oil pollution damage.

A brief discussion of who should be protected from the harm follows.

Finally, the opinion is expressed that the rights of a claimant, who has suffered oil pollution damage and wish to claim compensation from the ship-owner, needs to be protected in South African Law.

CHAPTER TWO

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This chapter is devoted to the development of compensation for oil pollution damage in International Law. The purpose of this is to determine what the position of civil liability for oil pollution damage is in terms of International Law to determine whether South African Law reflects International Law.

The starting point is to determine what the position of International Customary Law is in regard to oil pollution damage. The conclusion is drawn that although there is an obligation in International Customary Law that States must not allow their nationals to knowingly cause harm to another State, this obligation is too broad to be effective.

The discussion then moves to the International Conventions which were adopted as a result of the inability of International Customary Law to deal with civil liability for oil pollution damage.

The International Convention on Civil Liability for Oil Pollution Damage 1969, ("CLC") is then analysed under the following headings: Liability, Limitation and Compulsory Insurance. Having examined the "CLC" under these headings, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (The Fund Convention), is then examined with particular emphasis on the amount to which the ship-owner is entitled to limit his liability in the event of oil pollution damage.

The next area to be discussed is the tanker industry initiatives to provide compensation for oil pollution damage. TOVALOP and CRISTAL, which operate along similar principles to the "CLC" and Fund Convention, are examined.

The Protocols to the "CLC" and Fund Convention are then examined. These Protocols are the most recent amendments to the International Law on civil liability for oil pollution damage and the changes to the "CLC" and Fund Convention are discussed.

CHAPTER 3

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In this chapter civil liability in South African Law is examined.

The first consideration is statutory liability in terms of the Preventing and Combatting of Pollution of the Sea by Oil Act (Pacoposoa) which attempted to introduce the provisions of the "CLC" into South African Law. The provisions of the Act are examined in detail and the conclusion is reached that the Act does not reflect the "CLC" in its entirety. Furthermore, it is submitted that the Act contains a number of deficiencies and anomalies which affect the position of the claimant proceeding in terms of the Act.

Having concluded that there are instances where a claimant who has suffered damage as a result of oil pollution damage would not be entitled to proceed in terms of Pacoposoa, the enquiry then turns to the claimant's position to proceed in terms of the South African Common Law. It is concluded that the claimant can proceed in delict and that in some cases it may be more advantageous for him to do so due to the ship-owner losing his right to limit his liability.

CHAPTER 4

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This chapter contains a brief discussion of the United States regime of civil liability for oil pollution damage. This comparative study is to determine whether any of the innovations introduced into United States Law by the Federal Oil Pollution Act 1990, (FOPA) may be of assistance to South Africa in revamping South African statutory Law on civil liability for oil pollution damage.

The conclusion is drawn that the definition of oil pollution damage as used in the Federal Oil Pollution Act, if adopted in South Africa, would simplify the heads of damage for which the ship-owner would be liable.

CHAPTER 5

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Certain conclusions are drawn after taking a somewhat critical look at South Africa's approach thus far to the incorporation of civil liability for oil pollution damage, into our Law and certain recommendations are made as to what amendments are required in South African Law to bring it into line with the International Law approach to civil liability for oil pollution damage.

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CHAPTER ONE

INTRODUCTION

A. GENERAL INTRODUCTION

Throughout the development of the International Law of the Sea there has been a conflict between the notion of the freedom of the seas and their rights that a coastal state may exercise over the seas adjacent to its territory. This conflict stems from the coastal state wanting to exploit the resources in the seas as opposed to non-coastal states and other states wanting to exercise the traditional rights, such as the freedom of navigation and fishing, that they enjoyed under the freedom of the seas doctrine.

It thus developed that coastal states have certain rights within specified areas of their coasts. These rights extend from complete sovereignty within the internal waters of the state (with the exception that a coastal state cannot refuse entry to a ship in distress) to the exclusive right to exploit minerals found on the continental shelf of the coastal state¹ and to exploit the resources in their exclusive economic zone. However, except in regard to internal waters, the other users of the seas still retain some of the rights available to them under the freedom of the seas doctrine, the most important of which is the freedom of navigation. This freedom is not absolute, but it is limited to innocent passage in the territorial waters,² and it allows vessels not registered in the coastal state to sail within areas that the coastal state and its citizens have rights in.

The question that arises is what is the position if a vessel, not registered in the coastal state, infringes on the rights of the state. In traditional International Law of the Sea the right of recourse lay in the flag state of the vessel and if the flag state did not take any action then the coastal state could not take any punitive measures against the vessel as it did not have jurisdiction over the vessel or her master. It thus developed, alongside the development of the coastal state's rights in regard to the different maritime zones, that specific enforcement jurisdiction was given to the states to preserve the rights that they exercised over those zones.

As awareness of the marine environment has increased, and more specifically awareness of marine pollution from whatever source, there is developing an obligation on all users of the sea "to protect and preserve the marine environment".³ Combined with this obligation the coastal state has been granted extensive powers to protect the marine environment in the maritime zones that border their territory.

One of the most common sources of marine pollution is the discharge of oil either deliberately (included in this term throughout this paper is an operational discharge) or accidentally into the seas. For many years the discharge of oil into the sea was not considered to be a hazard as the sea was regarded as an endless garbage dump.⁴ However, with the increase in the use of tankers carrying the oil and the subsequent risks in the event of a casualty, International Law of the Sea developed various conventions which were designed to prevent marine pollution from ships. The first example of this was the International Convention for the Prevention of Pollution of the Seas by Oil 1954 which prohibited the discharge of oil and any oily mixture having an oil content of more than 100 parts per million within fifty miles of the land.⁵ The enforcement of this convention rested with the flag state.⁶

The stranding of the "TORREY CANYON" in 1967 and the subsequent spilling of 100 000 tons of crude oil in the sea and the resultant pollution of the coastline illustrated that the existing International Law of the Sea was not able to deal with the question of either intervening in the event of a maritime casualty to prevent oil pollution damage in a coastal state nor compensating the coastal state which suffered loss or damage resulting from pollution damage.

To overcome the problem of the coastal state not being able to intervene in the event of a casualty that could result in oil pollution damage the International Community adopted the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties in 1969. In terms of article I of this convention a coastal state may take such measures on the High Seas that are necessary to prevent, mitigate or eliminate the grave or imminent danger to their coastlines or related interest from pollution by oil.

With regard to compensation for oil pollution damage, the problem areas were whether the coastal state had jurisdiction to try an action for compensation and more importantly, whether such an action was available in International Law. A further problem was whether the owner was entitled to limit his liability in terms of (a) the International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels, Brussels, 1924 and (b) the International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships 1957.

To eliminate these problems in International Law an international accord was agreed^x upon in terms of which contracting states were given enforcement jurisdiction over vessels which were responsible for oil pollution damage in an area fifty miles from the contracting state's coastline. Furthermore this accord made specific provision for an action against the ship-owner for any damage resulting from the discharge of oil from his vessel and specified the extent to which the ship-owner was entitled to limit his liability for pollution damage. This accord was adopted as the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC) and was supplemented by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (the Fund Convention).^x

In 1981 South Africa introduced the Prevention and Combating of Pollution of the Sea^x by Oil Act⁷ (which repealed the 1971 Prevention and Combating of Pollution of the Sea by Oil Act - Act No 67 of 1971) which sought to enact the provisions of the "CLC" into South African municipal law and which attempts to regulate the civil liability of a ship-owner in the event of the discharge of oil off the South African coast. The position as regards South African law on the civil liability of a ship-owner, in respect of oil pollution damage, will be analyzed in this paper in terms of the international conventions and international customary law, in order to determine what^x the international law relating to civil liability of the ship-owner is and to determine and discuss what the position is under the South African legal system. The position in the United States (who are not party to any of the Conventions) will also be briefly examined to determine whether that country's regime may be of any value to South Africa.

B. WHAT IS OIL POLLUTION DAMAGE AND FORMS OF DAMAGE ?

Although there are many forms of pollution in the seas, in this paper only oil pollution from vessels, either accidental or deliberate, will be considered. This is because most of the incidents relating to pollution originate from vessels and as a result the most law has developed in this area.⁸ Another factor to take into account is that there are only a limited offshore oil installations off the South African coast and as such do not pose the same threat as vessels carrying oil. The majority of oil pollution in the South African waters results from vessels.

C. WHAT IS THE EXTENT OF THE RISK TO SOUTH AFRICA ?

The potential threat to the South African coast from oil pollution damage is very significant as (a) South Africa has a coastline of approximately 3 000 kilometres⁹ and (b) 30% of Middle East oil exports to America and Europe pass off the South African coast.¹⁰ This in real terms means that approximately 327 million tonnes of crude oil are transported annually by tanker off the South African coast.¹¹ Coupled with this are the notorious weather conditions that are experienced off the coast. The tankers using this route are also normally too large to use the Suez Canal and thus it is mainly the very large crude carriers (VLCC's) that use this route and thus pose a major risk in the event of a casualty.

As is evident from the recent past, South Africa bears a great risk from oil pollution damage. Examples of this are the following:

- The "VENPET/VENOIL" incident off the South-Eastern coast in 1977 which resulted in approximately 30 000 tonnes of crude oil spilling into the sea and causing pollution damage along the Great Brak River coastline.

- The "CASTILLO DE BELLVER" sank off Saldanha Bay in 1983. It is estimated that between 160 000 and 190 000 tonnes of crude oil were spilled during the incident. It was only due to the intervention of an unseasonal southeasterly wind that the oil did not pollute the ecologically sensitive Langebaan Lagoon, but rather was blown offshore.
- The "KATINA P" which sank off the Mozambique coast in 1992, spilling 40 000 tonnes of crude oil, most of which drifted onto the northern Natal coast.

The threat of pollution of the coast does not only come from oil tankers, but from every ship, whether large or small, that passes the coast as all ships have bunker oil and lube oil on board that poses a significant threat. An example of this is the "KAIYO MARU No 1" which ran aground in 1978 on the Skeleton Coast, Namibia.

A further risk to South Africa is from the deliberate dumping of oil from vessels where the tanks of the vessel are cleaned with sea water and this oily water is returned to the sea. Although this form of pollution causes less damage than an accidental spill, it is still of importance as it causes damage to the marine environment.

Oil pollution damage need not be to the sea and sea shore only, but can also be inland. Inland damage occurs as a direct consequence of an oil pollution casualty where there is an explosion on board the vessel and the oil laden smoke drifts inland and settles. This occurred following the "Castillo de Bellver" casualty and extensive damage was caused to farmers' crops and wool harvests.¹²

D. WHO SHOULD BE PROTECTED FROM THE HARM ?

There are many users of the sea and the coastal shores who derive their income from the sea. South Africa has rich resources of fish and an established fishing fleet. Further there is a developed coastal holiday industry.

These fishermen, coastal hotel owners and coastal municipalities all have rights which they exercise in relation to the sea. It is these rights which are infringed when there is a pollution casualty and they should be entitled to recover their losses from the owner of the vessel that causes the damage. Furthermore, the coastal state is entitled to protect its environment and any expenditure that is as a result of pollution damage should be recoverable from the ship-owner or his insurers.

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CHAPTER TWO

CIVIL LIABILITY IN INTERNATIONAL LAW

A. INTERNATIONAL CUSTOMARY LAW

In looking at compensation for oil pollution damage, the starting point is to determine whether or not there are any international customary law rules applying to the right of a state, which has suffered loss as a result of marine oil pollution, to claim compensation from the person causing that loss.

In terms of the arbitration in the Trail Smelter arbitration (1938 - 1941) it was held that "no state had the right to use or permit use of its territory in such a manner to cause an injury in or to the territory of another state".¹³ The question that arose following this dictum was whether or not a vessel not flagged in the coastal state where the damage occurred could be held liable for oil pollution damage to either the state or an individual in that state. In the Corfu Channel case (1949) the International Court of Justice held that "each state was under an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states".¹⁴ This principle of international customary law has been adopted in the 1958 Geneva High Seas Convention Article 2 which states that "states must exercise the freedom of the high seas with reasonable regard to the interests of other states in their exercise of the freedom of the high seas".¹⁵ This has been taken over into the 1982 Law of the Seas Convention Article 192.¹⁶

As is evident from the above, there is a general provision in international customary law "that states must not permit their nationals to discharge into the sea matter that could cause harm to nationals of other states".¹⁷ However, due to the particular nature of international customary law, in that "it is based on the actual practices of states in a given area of activity which are common throughout the international community, so that they are accepted as having the force of law"¹⁸ there is no particular way of enforcing these rules of international customary law.

Thus, for example, if a state suffers loss due to the casualty of a vessel that is not flagged in that state, and the loss occurred outside the territorial waters of the state, it will have to proceed against the wrongdoer in the courts of the state where the vessel is flagged. Here the claimant may encounter problems in that firstly the vessel's flag state may not have made provision in their municipal law for the enforcement of the international customary law rule and secondly he will have to prove fault on the part of the vessel's owners. Thus the injured party may have the right to claim in terms of international customary law but he has no way of enforcing that right.

A further problem relying upon international customary law is that the rule upon which one would have to base the claim, is too broad to be effective. In the modern day transportation of oil and the attendant hazards thereto, there need to be detailed provisions of the exact legal regime that will apply when there is a loss caused by oil pollution. More importantly, the law relating to the enforcement right of the state which is claiming compensation as a result of loss suffered by oil pollution, needs to be modified.

B. INTERNATIONAL CONVENTIONS

Due to the inability of international customary law to deal with compensation of states which had suffered loss as a result of oil pollution damage, as was exemplified after the "TORREY CANYON" stranding off the coast of Great Britain in 1967, the International community decided that the deficiencies in international customary law needed to be filled. These deficiencies were filled by adopting a Convention that attempted to regulate the position of a claimant who had suffered loss as a result of oil pollution damage and wished to claim compensation for that loss. This convention was the "CLC".

The "CLC" was adopted at a conference in Brussels in 1969 but only came into force in 1975.¹⁹ The "CLC" was later supplemented by the "Fund Convention" in 1971²⁰ and further amended by Protocols in 1976 and 1984.²¹

I. THE "CLC"

The "CLC" will be analyzed by looking at the following:

- a. Liability
- b. Limitation
- c. Compulsory Insurance

a. LIABILITY

Article III (1) of "CLC" introduced the most innovative feature of the convention. The article provides:

"Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident".²²

^x Thus the convention introduces the concept of strict liability on the part of the ship-owner for any pollution damage caused by the discharge of oil from his ship. This means that a claimant who has suffered loss no longer has to prove negligence on the part of the owner of the ship, which had been difficult to prove, to bring a successful action against the owner.

Although the concept of strict liability is absolute in the "CLC" the application of the convention is not as broad as it seems at first glance. There are three express exceptions to the rule relating to strict liability and there are further limitations relating to the applicability of the convention that will exclude the operation of the principle of strict liability.

The first exception to the operation of strict liability is that the owner of a ship shall not be liable for pollution damage that "resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character".²³ This exception is based upon the principle that as the convention provides for compulsory insurance it is equitable that the areas that are excluded from insurance cover should also be excluded from strict liability.²⁴

The second exception where the ship-owner will not be held strictly liable is where the damage "was wholly caused by an act or omission done with intent to cause damage by a third party".²⁵ For the owner to avoid liability based upon this exception he would have to prove that the damage was wholly caused by the act or omission of the third party. If for example, there was the threat of discharge of oil from the ship due to the act of a third party and the coastal state took action to prevent the discharge and this action resulted in pollution damage, the ship-owner will not be able to rely on this exception as the damage was not caused wholly by the act of a third party with the intent to cause damage. However the ship-owner would have a right of recourse against the coastal state if he can establish negligence on their part.²⁶

The third exception is where the damage "was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function".²⁷

For the ship-owner to rely upon this exception he would have to prove that the damage was wholly caused by the failure to maintain the navigational aids or lights. As is evident this is a very limited exception as the onus is upon the owner to show that the damage resulted wholly from the non-maintenance and not from any other contributing factors.

As has been indicated above, Article III(1) introduces the concept of strict liability into the convention. However, the wording of the Article is of great importance as in terms of Article I (the definition article) certain of the words used in Article III have a very specific meaning which limits their application and thus the convention appreciably.

In terms of Article III the owner of the ship is liable for any pollution damage caused by oil. Article I states that "for the purpose of this convention ship means any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as a cargo".²⁸ Thus the essential requirement for the operation of the "CLC" is that the ship is carrying oil in bulk as a cargo. If a tanker goes aground whilst on a ballast voyage the subsequent damage will not fall within the convention. Further if the ship in question is not a vessel that carries oil in bulk as a cargo then the convention does not apply. This means that the majority of vessels that ply the oceans do not fall within the convention. Another problem that the convention fails to address is the question of off-shore oil rigs. The "IXTOC I" blow-out off Mexico spewed 30 000 barrels a day for a period of four months in 1989²⁹ but due to the definition of a ship was not subject to the "CLC".

A further limitation in the convention is the definition of pollution damage.

This is defined as:

"loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures".³⁰

For the damage to be recoverable under the "CLC" the loss or damage must be from contamination resulting from the escape or discharge of oil from the ship. Thus if there has been an explosion on board the ship which causes the oil to ignite and damage by soot and smoke results from this, it is submitted that the damage is not caused by contamination resulting from the escape or discharge of oil from the ship and thus would not be subject to the "CLC".

A further problem with the definition of oil pollution damage is that it is limited to the defined words. Article I(6) is introduced with the word "means" and thus pollution damage is confined to the words described in Article I(6). The question that arises is whether pure economic loss situations are covered by the definition contained in Article I. The definition does not give any guideline as to whether it includes pure economic loss or not, as it is wide enough to cover pure economic loss if interpreted broadly, but due to the problems of limiting the scope of potential claims it has been argued that it allows as recoverable economic losses those suffered by persons who depend directly on the earnings from coastal or sea-related activities.³¹

The question of preventive measures is also of importance as the definition contained in the convention further limits the type of costs that can be claimed. In terms of Article 1(7) preventive measures are any reasonable measures taken after an incident.

Article 1(8) defines an incident "as any occurrencewhich causes pollution damage". Thus preventive measures taken that were successful i.e. that no oil spilt then in terms of these definitions these costs could not be claimed against the "CLC".

Article IX provides that where pollution damage has been caused in the territory of one or more contracting states then an action for compensation may only be brought in the courts of that contracting state. Thus in terms of the convention a plaintiff is limited to instituting action within his own state.^{31a}

Article II limits the application of the "CLC" to pollution damage caused on the territory, including the territorial sea and to preventive measures taken to prevent or minimize such loss. Thus only damage caused within 12 nautical miles will be compensated by the "CLC" but the costs of preventive measures taken outside this area will be compensated. This submission is based upon the interpretation of the wording of Article II. In terms of Article II the pollution damage must result on the territory (including the territorial waters) but there is no such geographical limitation on the preventive measures taken to prevent or minimise the damage. Thus the fisherman who relies upon the fish found beyond the territorial sea, if he suffers pollution damage as defined outside the territorial sea will not be able to claim this damage even if it occurs 12.5 miles off the low water mark whilst the state if it took preventive measures in this area will be able to claim compensation.

If the claimant does not bring his action within three years from the date of the damage occurred then his right of action has prescribed.^{31b} A further limitation is that the action must be commenced within six years from the date of the incident and if the damage results from a series of incidents then six years from the date of the first incident.^{31c} This limitation can be of great importance where there has been a casualty which resulted in oil pollution damage which has sunk still containing oil.

If there is a subsequent spillage as the ship rusts over the years the prescription period can be of vital importance to the success of the claimant in bringing his claim under the "CLC".

Article XI further limits the operation of the convention as it excludes all warships and State owned ship used for non-commercial purposes.

b. LIMITATION

A ship-owner has always been entitled, by convention,³² to limit his liability in respect of damage done by his ship.³³

This right to limit the liability of a ship-owner was incorporated into the "CLC" and it enables the owner to limit his liability to a specified maximum amount determined by the size of his ship.

Article V provides that:

"the owner of a ship shall be entitled to limit his liability under this convention in respect of 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".³⁴

This means that an owner of a ship that has caused oil pollution damage as defined in Article I(6) is liable for damages amounting to approximately US \$132 per ton, with an aggregate amount of approximately US \$14 million as his maximum liability.³⁵ (Limitation is discussed in greater depth at pg 43 below) The ship-owner constitutes a fund³⁶ from which all claims for pollution damage are claimed. These include the costs of preventive measures and clean up costs.³⁷ This fund represents the ship-owner's total liability for pollution damage from one incident and no one who has suffered any loss can bring any further action against the owner.³⁸

The only exception to Article V is where the incident occurred as a result of the actual fault or privity of the owner. In this instance the owner is not entitled to limit his liability and is liable for the full extent of the pollution damage.³⁹

This concept of non-limitation for pollution damage which occurred as a result of the fault or privity of the owner has been taken over into the latest limitation convention. Article 3(b) of the 1976 London Convention on Limitation of Liability for Maritime Claims provides that the convention does not apply to claims for oil pollution damage within the meaning of the "CLC" and thus the owner upon whose fault or privity the damage occurred will not be entitled to raise limitation in terms of the 1976 Limitation Convention as the damage is pollution damage as defined in the "CLC" and is excluded from the ambit of the Limitation Convention.

It is important to note that it is only the owner that is entitled to limit his liability and further that the right to limit liability is only lost when the damage occurs with the fault or privity of the owner. Thus if the ship is on demise charter and there is an incident which results in pollution damage it is the owner of the ship that will be held strictly liable and it is the owner from whom the damages must be claimed in terms of the convention. If there was fault on the part of the charterer this is not sufficient to deprive the owner of his right to limit his liability in terms of the convention as the convention requires that it was the owner himself that was at fault.

What constitutes actual fault or privity is a question for the court seized with the matter to determine but as the words are the same as those used in the 1957 Limitation Convention,^{39(a)} it is submitted that they will be given the same meaning. The owner must show that he took all reasonable steps to ensure the efficient management and safe navigation of the ship.^{39(b)} This question is essentially one of fact, to be determined objectively.^{39(c)}

c. COMPULSORY INSURANCE

To prevent the problem of a plaintiff having a claim against the owner of a ship for pollution damage but the owner of the ship not being able to pay the amount claimed, the "CLC" introduced the requirement that every ship, which carried more than 2 000 tons of oil in bulk as cargo, had to have insurance or security to cover his maximum liability in terms of Article V.⁴⁰ The ship is required to have a certificate indicating that it has the required security. To enforce this requirement Contracting States flag states are given the powers to prevent a ship from trading unless it has a certificate.⁴¹ Contracting States are given powers to introduce municipal legislation to prevent a ship carrying more than 2 000 tons of oil in bulk as cargo from entering or leaving its ports without this certificate.⁴² This provision extends to ships wherever they are registered⁴³ and thus the provisions of the "CLC" regarding the requirement of a certificate of insurance can be extended to vessels which are registered in a non-contracting state.

II. THE FUND CONVENTION

It soon became apparent that the compensation payable in terms of the "CLC" was not adequate or that in circumstances where compensation was not payable in terms of "CLC" supplementary compensation was required.⁴⁴ The question that arose was who was to be liable for this additional amount that was to be paid out. In terms of "CLC" the ship-owner is strictly liable for any pollution damage. However many ship-owners felt that the cargo owner should also bear part of the costs for pollution damage as it was their cargo that contributed to the damage. This is illustrated by the fact that in terms of the "Fund Convention" (as will be discussed below) the cargo owners have to contribute to the fund from which compensation is paid. It was to rectify these areas that the "Fund Convention" was introduced.

All members of the "CLC" are not members of the "Fund Convention" but all members of the "Fund Convention" must be members of the "CLC" as the Fund operates as a top-up fund to the "CLC".

Article 4 of the convention provides that the "Fund Convention" will pay compensation for oil pollution damage (oil pollution damage having the same meaning in this convention as in the "CLC"⁴⁵) in the following circumstances:

1. Where no liability arises under the liability convention.
2. Where the owner who is liable for pollution damage under "CLC" is incapable of meeting his financial obligation arising out of the damage or that the cover provided for in terms of Article V of "CLC" is insufficient to cover the full extent of the pollution damage.
3. Where the damage exceeds the owner's limited liability in terms of Article V (1) of "CLC".

The plaintiff is thus covered for damages arising from circumstances in which the ship-owner would be entitled to avoid liability in terms of "CLC". He is further protected from the situation where there are a myriad of claims against the fund constituted by the ship-owner in terms of Article V of the "CLC" and these claims are proportioned against the fund. In terms of the "Fund Convention" he is entitled to recover the full extent of his damages.

The "Fund Convention" provides that the fund will not be liable if the pollution damage results from an act of war, hostilities, civil war or resulted from the escape or discharge of oil from a warship or a ship owned by a state and used for non-commercial purposes.⁴⁶ A claimant must also be able to identify the ship which caused the damage⁴⁷ to have a claim against the fund.

The fund is also subject to a limitation of liability and the maximum liability of the fund in respect of one incident is 450 million francs.⁴⁸ However this amount includes the amount paid out under the "CLC" and it is thus an aggregate amount that is payable in terms of both conventions.⁴⁹

The fund is financed through contributions from oil importers. Any person who imports more than 150 000 tons of crude oil or fuel oil into the territory of the contracting state in a calendar year is required to make a compulsory contribution to the fund.⁵⁰

It is through these contributions that the cargo owners bear a portion of liability that results from oil pollution damage.

A further way in which the cargo owners contribute to the payment of oil pollution damages is through the fund indemnifying the ship-owner or insurer who has incurred liability under the "CLC" to an amount of 1 500 francs per ton for each ton of the ship's tonnage or to an amount of 125 million francs whichever is the less.⁵¹ The fund will not compensate the owner if the pollution damage results from the wilful misconduct of the owner himself⁵² or if the damage resulted from the fault or privity of the owner in that the ship did not comply with specified international conventions.⁵³

The "Fund Convention" thus supplements the "CLC" and attempts to spread the load of the strict liability provisions in the conventions between the ship-owner on the one hand and the cargo owners on the other. It also enables a claimant to claim a greater extent of his loss from either the ship-owner or the fund and covers the instance where the ship-owner in terms of the "CLC" would not be liable for the damage.

III. THE TANKER INDUSTRY AGREEMENTS

Due to the increasing numbers of tankers and their size, the threat from both deliberate and accidental oil spills increased.

As has been shown above, the international community attempted to regulate and protect the marine environment from harm by holding a ship-owner strictly liable for any pollution damage that escaped from his ship. However, prior to the introduction of the "CLC" a group of tanker owners introduced a scheme whereby they voluntarily offered compensation to a national government in the event of an oil spill.⁵⁴ This agreement was called the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution⁵⁵ but is better known by its acronym TOVALOP.

TOVALOP was initially only introduced to cover a national government's clean up costs after a spill and was limited to US \$100 per ton to a maximum of US \$10 million.⁵⁶ A further requirement for liability was that there must be negligence on the part of the tanker owner, but in terms of clause IV (B) of the 1969 version of TOVALOP the owner was presumed to be negligent.

As TOVALOP stood in its 1969 guise it was of no benefit to an individual who had suffered loss or damage as a result of an oil spill as it only compensated national governments for expenses that they had reasonably incurred as a result of an oil spill by one of their members.^{56(a)} The "CLC" came into force in 1975 and although ratified by many states⁵⁷ there were still states that had not adopted it and the tanker industry felt that in these areas there needed to be some form of compensation for those who had suffered loss as a result of pollution damage.⁵⁸ TOVALOP was thus revised in 1978 to give effect to these principles.

The most important change to TOVALOP was that the tanker owner (including a bareboat charterer) undertakes, voluntarily and as promptly as possible to dispose of all valid claims arising against him under the TOVALOP Agreement irrespective of fault.⁵⁹ These claims are in respect of any persons who have sustained pollution damage.⁶⁰ The agreement thus moves away from only government clean up costs as the definition of persons includes governments, individuals and other entities.⁶¹

TOVALOP does not apply where the "CLC" applies⁶² as in terms of Clause IV of TOVALOP, liability will not be assumed by the TOVALOP fund if the damage is covered by Article III (2) of "CLC". Thus if the damage would be covered by the provisions of the "CLC", the claimant cannot approach TOVALOP for compensation. The definition of oil pollution damage in TOVALOP is the same as in the "CLC" but it allows the costs of preventive measures taken to avoid pollution damage to be claimed.⁶³

The definition of a tanker in TOVALOP differs from that of a ship in the "CLC" in that it covers any sea-going vessel designed and constructed for carrying oil in bulk as cargo whether or not it is actually so carrying oil.⁶⁴ Thus the provisions of the agreement are applicable to a tanker in ballast as well as to a tanker actually carrying oil as a cargo.

Under TOVALOP the owner is entitled to limit his liability in accordance with the tonnage of his vessel. The maximum compensation available under TOVALOP is US \$16.8 million.⁶⁵

As is evident the provisions of the 1978 TOVALOP Agreement are a very useful way in which to claim compensation for oil pollution damage where the provisions of the "CLC" are not applicable. It also gives the claimant the opportunity to claim the full extent of his losses if part of his loss falls within the "CLC" whilst the other portion can be claimed under TOVALOP. An example of this is where the ship is under bareboat charter and the loss results from the negligence of the charterer. The claimant can proceed against the owner of the ship in terms of the "CLC" and if he does not recover the full extent of his loss then he can proceed against the charterer in terms of TOVALOP.

However the effect of inflation has meant that the limits available under TOVALOP do not adequately compensate a claimant and thus in 1986 the TOVALOP Agreement was revised to increase the amount of compensation available under the agreement.

A supplement has been introduced whereby if the tanker causing the damage is carrying a CRISTAL (discussed below) owned cargo, then a supplementary compensation scheme is available up to a maximum of US \$70 million.⁶⁶ Thus if the cargo carried is a non-CRISTAL cargo the maximum liability remains at US \$16.8 million.

To date approximately 98% of the world tanker tonnage is entered in TOVALOP⁶⁷ and thus a claimant whose claim falls within the provisions of the agreement is in a strong position to recover the full extent of his loss without having to resort to litigation as the agreement provides for arbitration in the event of a dispute.⁶⁸

A second agreement that the tanker industry introduced relating to compensation for oil pollution damage was the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution,⁶⁹ better known by its acronym CRISTAL. The purpose of CRISTAL was to provide a top-up to the compensation available under TOVALOP. For CRISTAL to apply the oil spilled must be owned by a CRISTAL member and the ship from which it escaped must be a party to TOVALOP.⁷⁰ The limit of CRISTAL's liability is US \$30 million per incident.⁷¹

In 1978 CRISTAL was revised for the same reasons as TOVALOP and substantial revisions were made to the agreement. The basic requirement of ownership of the oil by a CRISTAL party and that the ship is owned or bareboat chartered by a TOVALOP member remains.⁷² The maximum liability of the agreement was increased up to US \$36 million.⁷³ This amount is available where third persons cannot collect in full from "CLC" or TOVALOP, however it does not apply if the "Fund Convention" is applicable.⁷⁴

CRISTAL was also amended in 1986. The major amendment was that the cargo had to be owned by a member of CRISTAL but the ship did not have to be owned or bareboat chartered by a member of TOVALOP.⁷⁵ A further amendment was that the maximum compensation payable under the agreement was increased to US \$135 million per incident.⁷⁶

The agreements provide another important avenue in which a claimant can recover loss caused by oil pollution damage where the "CLC" or "Fund Convention" do not apply.

IV. THE PROTOCOLS

The stranding of the "AMOCO CADIZ" off the coast of Brittany in 1978 and the subsequent pollution damage to the coast of France had the same effect on international law relating to liability for oil pollution as the "TORREY CANYON" had in 1969. The costs of preventive measures and clean-up costs exceeded the maximum limit of the "CLC" but also exceeded the TOVALOP limit.⁷⁷ It was evident that the limit of liability available under the "CLC" as it stood was inadequate and further that the "Fund Convention" was contributing more towards clean-up costs and compensation than it was intended.⁷⁸

In an attempt to resolve the problem of the limitation available under "CLC" two protocols were adopted in 1984 that altered the provisions of the "CLC" and the "Fund Convention". The most important features of these protocols will be discussed.

The first area that needs to be looked at is the question of liability. As has already been discussed the ship-owner is held strictly liable for any pollution damage caused by his ship in terms of the "CLC". This principle is maintained in the Protocol relating to the "CLC" but an integral part of this strict liability is the ship-owner's ability to limit his liability in terms of Article V of "CLC". However, in terms of Article V (2) of "CLC" the ship-owner loses his right to limit his liability if the loss results from his fault or privity. In this instance the ship-owner is then responsible for the full extent of the loss. In the negotiations leading up to the adoption of the Protocol the argument was raised that the compensation limits could not be raised unless the provisions regarding the owner's loss of the right to limit his liability were altered.⁷⁹ This argument was successful and the Protocol revised the "CLC" in that an owner only loses his right to limit his liability:

"if the damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with the knowledge that such damage would probably result"⁸⁰

With the ship-owner's interests protected the question of the increase in the limit of liability was addressed. In terms of Article 6 (1) of the "CLC" Protocol the owner may limit his liability in respect of one incident to 3 million units of account for a ship not exceeding 5 000 tons and for a ship in excess of this tonnage 420 units of account for each ton subject to a maximum amount of 59.7 million units of account. The unit of account in the Protocol is a special drawing right or a SDR. The maximum liability under the "CLC" is thus US \$60.8 million.⁸¹ The maximum liability in terms of the "Fund Convention" Protocol has also been raised to 135 million units of account of approximately US \$138 million.⁸²

The second area of the "CLC" Protocol that requires attention is the provisions that introduced significant changes to the scope of application of the convention. These include a new definition of a ship,^{Stewart p118} a new definition of pollution damage and an extension of the territorial application of the convention.^{p119, p120}

The conference recognised that, apart from the spectacular incidents that result from the stranding or sinking of a tanker, the majority of oil spilt into the seas result from operational discharges from ships through the washing of their slop tanks. According to the definition of a ship contained in "CLC" the convention only applies when the vessel is actually carrying oil in bulk as cargo. The Protocol now defines a ship as:

"any sea-going vessel and sea-borne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk on board".⁸³

Thus the owner of a ship whether a tanker or a combination carrier will be held strictly liable for any damage resulting from the residues carried on the subsequent voyage after the carriage of the oil cargo i.e. this applies when the cargo of oil has been discharged and the vessel is either in ballast or carrying another cargo.

The Protocol amended the problem area of what constituted pollution damage. Under the "CLC", as has been discussed above,⁸⁴ there is a question as to what damages may be claimed from the ship-owner. The Protocol attempts to define more specifically what constitutes pollution damage. In terms of Article 2(3) of the Protocol the definition contained in Article I(6) of "CLC" is amended. The new definition of pollution damage is as follows:

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

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

The definition limits a claim in respect of the environment to the costs actually incurred or to be incurred in restoring it to its pre-damage condition.⁸⁵ The proviso "other than loss of profit from such impairment" indicates that loss of profit from the impairment to the environment is now without doubt a competent head of damage under the "CLC" Protocol. However, in applying this provision the questions of remoteness of damage and causation will have a limiting function on what at first glance seems to be a very wide provision.

The question of preventive measures taken to avoid pollution damage has also been clarified by the Protocol. As we have seen⁸⁶ in terms of the definitions of incident and preventive measures in "CLC", measures taken prior to the discharge of oil were not claimable in terms of "CLC".

This anomaly has been removed in the Protocol by the introduction of a new definition of incident which states that "an incident is an occurrencewhich causes pollution damage or creates a grave and imminent threat of causing such damage".⁸⁷ Thus any preventive measures taken to avoid pollution damage are now claimable against the owner as long as the threat of pollution damage is grave and imminent.

Due to the coastal state having acquired varying rights in international law over their exclusive economic zone (EEZ) there were strong calls for the provisions of the "CLC" to be made applicable to the EEZ.⁸⁸ This proposal was adopted and the "CLC" will now apply to the EEZ.⁸⁹

The Protocols have amended and clarified certain aspects of the international law relating to liability for oil pollution damage and have attempted to raise the limits of liability to realistic limits to take into account the increase in size of vessels transporting oil and the increased value of the cargo. However it must be stressed that the Protocols have not come into force as the "CLC" Protocol requires ratification by ten states, including six states each with a gross tonnage of not less than one million units of tanker tonnage. To date only eight countries have ratified the Protocol.⁹⁰ The Fund Protocol requires ratification by at least eight states who receive at least 600 million contributing tonnes.⁹¹ As neither of these Protocols is yet in force the current position is that the 1969 "CLC" and the 1971 "Fund Convention" are still in force and regulate the international law position as regards damage resulting from oil pollution.

Having looked at the position of a claimant for oil pollution damage in international law and the attendant problems thereto the question that needs to be answered is what is the position of the claimant under South African law. Coupled with this inquiry is the question of whether South Africa is complying with the obligations imposed on it by international law.

NOTES

13. L.H. Van Meurs "Marine Pollution" Special Publication No 2 Institute of Marine Law 1986 pg 13
14. D.J. Cusine and J.P. Grant Eds, "Impact of Marine Pollution" 1980 pg 31
15. Article II
16. This article has not entered into force.
17. Churchill and Lowe op cit pg 216
18. J.H. Bates, "United Kingdom Marine Pollution Law" 1985 pg 169
19. N. Singh, "International Maritime Conventions" 1983 pg 2455
20. Singh op cit pg 2500
21. The 1984 Protocol has no entered into force
22. Singh op cit pg 2469
23. Article III (2)(a)
24. D.W. Abecassis, "The Law and Practice Relating to Oil Pollution From Ships" 1978 pg 182
25. Article III (2)(b)
26. Article III (5)
27. Article III (2)(c)
28. Article I(1)
29. Cusine and Grant op cit pg 23
30. Article I(6)
31. M. Jacobsson and N. Trotz "The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil liability Convention and the 1971 Fund Convention" 17 (4) Journal of Maritime Law and Commerce, 1986 pg 478
- 31(a). It is interesting to note the judgement in the "AMOCO CADIZ" Part 3 [1984] Vol.2 Lloyds Law Reports 304 where the claimants instituted action in a country other than that where the damage occurred
- 31(b). Article VIII "CLC"
- 31(c). Ibid

32. For example the 1924 and 1957 International Conventions relating to the Limitation of the Liability of Owners of Seagoing Ships, both signed at Brussels
33. Article I(i)(b) of the 1957 Limitation Convention
34. Article V(1)
35. A.H.E.Popp, "Liability and Compensation for Pollution Damage Caused by Ships Revisited: Report on an Important International Conference", (2) LMCLQ 1985 pg 118
36. Article V(3)
37. Article III(1) read with Article I(6)
38. Article VI(1)
39. Article V(2)
- 39(a). Article I(1) of the 1957 Limitation Convention
- 39(b). Bates op cit pg 73
- 39(c). The "MARION" [1984] 2 WLR 942 at pg 942
40. Article VII(1)
41. Article VII(10)
42. Article VII(12)
43. Article VII(11)
44. Jacobsson and Trotz op cit pg 467
45. Article I(1)
46. Article 4(2)(a)
47. Article 4(2)(b)
48. Article 4(4)(a)
49. Ibid
50. Article 10(1)
51. Article 5(1)
52. Ibid
53. For the full list of conventions see Abecassis op cit pg 229
54. Soni op cit pg 198
55. It entered into force in 1969
56. Clause I, III, IV of 1969 TOVALOP

- 56(a). D.W. Abecassis ibid Pg 305
57. See Singh op cit pg 2476 for States that have ratified the "CLC"
58. Noted in the preamble to the 1978 revision of TOVALOP
59. G.L. Bekker, "The Role of the Oil Majors and Others as Oil Transporters" in D.J. Cusine and J.P. Grant Eds, The Impact of Marine Pollution pg 123
60. Clause IV
61. Clause I(B)
62. Clause IV B(a)
63. Clause IV(A) and clause I(k)
64. Clause I(a)
65. Bekker op cit pg 123
66. Cohen "Revision of Tovalop and Cristal : Strong Ships for Stormy Seas" Vol 18 Journal of Maritime Law and Commerce 1987 Pg 529
67. Cohen op cit pg 526
68. Bekker op cit pg 126
69. Introduced 1 April 1971
70. Bekker op cit 127
71. Ibid
72. Ibid
73. Bekker op cit pg 128
74. Ibid
75. Cohen op cit pg 533
76. Ibid
77. D.W. Abecassis "IMO and Liability for Oil Pollution from Ships: a Retrospective", Lloyds Maritime and Commercial Law Quarterly 1983 Vol 1 pg 49
78. D.A. Jacobsen and J.D. Yellen, "Oil Pollution: 1984 London Protocols and the Amoco Cadiz" Vol 15 Journal of Maritime Law and Commerce 1984 pg 476
79. Popp op cit pg 121
80. Article 6(2) Protocol
81. Popp op cit pg 126

82. Ibid
83. Article 2(1) Protocol
84. Pg 11
85. Jacobsson and Trotz op cit pg 488
86. Pg 11
87. Article 3 Protocol
88. Popp op cit pg 123
89. Article 3 Protocol
90. C. Redgwell "Compensation for Oil Pollution Damage" Vol 16 No 2
Marine Policy 1992 pg 90
91. Ibid

CHAPTER THREE

CIVIL LIABILITY IN SOUTH AFRICAN LAW

South Africa acceded to the "CLC" on 17 March 1976. The provisions of the "CLC" were published for general information in Government Gazette No 5867 of 27 January 1978. However, it was not until the introduction of the Prevention and Combating of Pollution of the Sea by Oil Act⁹² (Pacoposoa or the Act) that the provisions of international law, as reflected in the "CLC", relating to compensation for oil pollution damage were introduced to South Africa. The first section of this chapter will deal with the provisions of Pacoposoa relating to the civil liability of a ship-owner in South African law. The second portion of this chapter will deal with the position of an individual who has suffered damage as a result of oil pollution that is not covered by the provisions of Pacoposoa.

Although South Africa is a party to the "CLC", it has not adopted the "Fund Convention" as the procedure whereby monies are collected for the Fund requires the contracting state to declare their oil imports and the owner thereof.⁹³ Due to the oil embargo on South Africa there is a reluctance to declare the extent of oil imports. Thus South Africa has only acceded to the provisions of the "CLC".

South Africa has ratified the 1984 Protocol to the "CLC"⁹⁴ but to date has not introduced the provisions of the Protocol into South African municipal law.

A. STATUTORY LIABILITY IN SOUTH AFRICA (PACOPOSOA)

The act will be analyzed by looking at the following:

- a. Liability
- b. Limitation
- c. Compulsory Insurance and related topics

d. Jurisdiction of the Court

e. Causality - This will be discussed below^{94(a)} when examining South African Common Law

a. LIABILITY

Section 9(1) of the Act introduces the concept of strict liability into South African law.

The section provides:

"Subject to the provisions of this Act the owner of any ship, tanker or offshore installation shall be liable for..."

The word "shall" has been interpreted by South African Courts to mean that no mens rea is required and thus no intention or negligence needs to be proved by the claimant.⁹⁵ The liability is therefore, it is submitted, strict. This submission is further strengthened by the provision of Section 9(5) which entitles a ship-owner to limit his liability where the damage resulted from an incident that was not caused by the fault of the owner. The conclusion to be drawn from this provision is that, if the owner were not held strictly liable for any damage in terms of Section 9(1)(a), the provisions relating to his ability to limit his liability without being at fault, would be meaningless. Thus to bring about a claim in terms of Pacoposoa for loss or damage resulting from pollution damage, the claimant only needs to fall within the provisions of the section for his claim to be successful.

The question that needs to be answered is in what circumstances the ship-owner would be held strictly liable. The first instance is for "any loss or damage caused, elsewhere than on such ship, tanker or offshore installation, in the area of the Republic by pollution resulting from the discharge of oil from such ship, tanker or offshore installation".⁹⁶ This section is of great importance as it limits the scope of application of the Act to the events described in the section.

The first limitation in the section is that strict liability only attaches to the ship-owner if the loss or damage results from a discharge from a ship, tanker or offshore installation. A ship is defined as "any kind of vessel or other sea-borne object from which oil can be discharged, excluding a tanker".⁹⁷

Thus the Act applies to any vessel, excluding a tanker, from which oil can be discharged. Oil is defined in the Act as "any kind of mineral oil and includes spirit produced from oil and a mixture of such oil and water".⁹⁸ Having regard to the definition of a ship and that of oil, it is submitted that the Act is applicable where the damage results from oil from the bunkers of a ship not actually carrying oil in bulk as a cargo. In terms of the definition the Act is only applicable to sea-going vessels. This provision relating to a ship is far wider than that under the "CLC" as the provisions of the "CLC", as we have seen, only apply to ships actually carrying oil in bulk as cargo. The Protocol extends the provisions of the "CLC" to tankers and other oil carriers whilst on ballast voyages after carrying oil as cargo but does not extend to any other class of ships.

A tanker is defined as "any seagoing vessel of any type whatsoever, actually carrying oil in bulk as cargo and in respect of which the provisions of the Convention are applicable".⁹⁹ This is a similar definition to that contained in the "CLC" and is, it is submitted, of similar interpretation in South African law. For the owner of a tanker to be held strictly liable in South African law, the claimant would have to show that the damage resulted from the tanker as defined, ie that the tanker was actually carrying oil in bulk as cargo at the time that the loss or damage occurred. Thus if the tanker was on a ballast voyage and loss or damage resulted from a discharge of oil as defined, the owner of the tanker would not incur strict liability. This is an anomaly in Pacoposoa as ships on ballast voyages fall within the Act, but tankers, which constitute a greater threat, do not. A further problem with the definition of a tanker are the words "in respect of which the provisions of the Convention are applicable" when used in connection with a tanker.

This limitation on the applicability of the Act to tankers which are only subject to "CLC", severely affects the effectiveness of Pacoposo and the relief available to the State and an individual who has suffered loss resulting from oil pollution. This is another anomaly in the Act as the Act is applicable to all ships irrespective of their flag state nationality.

An offshore installation is defined as "a facility ... which is used for the transfer of oil to land ... and includes any exploration platform or production platform".¹⁰⁰ Here too the Act goes beyond the "CLC" as any pollution damage from an oil rig or an oil reception point falls within the provisions of the Act, but in international law would not be subject to the provisions of the "CLC".

ii) The second area of limitation within Section 9(1)(a) is the wording "within the area of the Republic". This is defined to include the territorial waters of the Republic.¹⁰¹ Section 2 of the Territorial Waters Act¹⁰² states that the territorial waters of the Republic are twelve nautical miles from the low-water mark. Pacoposo is thus applicable to any damage that occurs on land and within twelve nautical miles of the land.

The third area that needs to be looked at is the requirement that the loss or damage results from the discharge of oil. This causal requirement is of great importance as it limits the application of Pacoposo. Discharge means:

"any discharge of oil from a ship or a tanker or an offshore installation into a part of the sea which is a prohibited area and includes any escaping, spilling, leaking, pumping or dumping of oil from such ship".¹⁰³

The first requirement for any oil spillage to fall within the definition of discharge is that the oil must be discharged into a part of the sea which is prohibited. The sea is defined as the water and the bed of the sea.¹⁰⁴

Thus if there is an explosion and fire on board the vessel and oil laden smoke causes damage on the land, as happened on the Cape West coast after the "CASTILLO DE BELLVER" casualty, this would not subject the owner to strict liability as the oil was not discharged into the sea as required for it to be a discharge as defined. The second requirement of the definition of a discharge is that the oil is discharged into a part of the sea that is prohibited.

The prohibited area is a distance of fifty nautical miles from the low-water mark.¹⁰⁵ Thus if the discharge occurred more than fifty miles from the land and there was subsequent damage in the Republic as defined in Pacoposo, this damage would not be recoverable in terms of Pacoposo as the damage did not result from a discharge as required by Section 9(1)(a). An example of this is the recent sinking of the tanker "KATINA P" in the Mozambique Channel. As a result of the sinking, a large quantity of oil was spilt into the Channel. Due to the currents, this oil was washed up on the Northern Natal coast causing damage. The question that arises out of this case is whether the owner of the "KATINA P" can be held strictly liable in terms of South African law for the damage caused by the oil. It is submitted that as the oil was discharged outside the prohibited area of the Republic it is not a discharge as contemplated by Pacoposo and thus the damage, although it occurred within the territory as defined by Pacoposo, will not be recoverable in terms of the provisions of the Act.

The most important enquiry is what constitutes loss or damage in terms of Pacoposo. There are many different forms of loss or damage that may result as a result of a discharge of oil. For example there may be actual physical damage to fishing nets or to fishing boats. There can be a loss of a non-physical nature such as a fisherman's loss of income resulting from the discharge of oil into his fishing grounds, or the coastal hotelier who loses trade as a result of the pollution damage. There can be loss resulting from the measures taken to avoid the discharge of oil, or the costs of cleaning up the oil spill. I shall look at each of these heads of damage separately.

i. Physical Loss or Damage

The words "loss or damage" must be interpreted in their ordinary meaning¹⁰⁶ and thus as South African law allows actual physical loss or damage to be recovered at common law¹⁰⁷ there will be no bar on a claimant claiming for the actual physical loss or damage he suffered as a result of pollution damage.

ii. Non-Physical Loss or Damage

The question that needs to be addressed here is whether the words "loss or damage" cover the instance where loss or damage has occurred without there being any actual physical loss or damage to corporeal property belonging to the claimant.¹⁰⁸ This is the so called pure economic loss or mere pecuniary loss situation.

South African courts have accepted that the mere fact that the claim is for non-physical damage is no bar to liability.¹⁰⁹ However the problem with allowing a claim for pure economic loss is that there may be a multitude of claims arising out of a single incident for which the ship-owner would be held strictly liable. Thus the approach of the South African Courts has been to allow claims for pure economic loss, but to limit the liability of the defendant within reasonable grounds. The manner in which the Courts have sought to limit the application of claims for pure economic loss is on the basis of policy considerations. These policy considerations are based upon the duty of care which the defendant owes to the plaintiff¹¹⁰ and, to determine whether the breach of this duty is wrongful, the Courts have adopted the following guidelines: *cf* *Coronation Brick case* at 384

- (1) "a defendant's conduct, including an omission, is regarded as unlawful (wrongful) when the circumstances of the case are of such a nature that it not only incites the moral indignation, but also that the legal convictions of the community demand that it ought to be regarded as unlawful and that the damage suffered by the plaintiff ought to be made good by the defendant."¹¹¹

- (2) "In coming to its conclusion the court should, inter alia, have regard to the probable extent of the foreseeable loss; the degree of risk that the loss would be suffered as a result of the conduct complained of; the value to the defendant and/or society of the object which the defendant was seeking to achieve; whether there were reasonably practicable measures available to the defendant to avert the loss."¹¹²

- (3) Allowing the claim "might give rise to a multiplicity of actions and the situation might be fraught with an overwhelming potential liability".¹¹³

Thus in each case where there has been pure economic loss resulting from a discharge of oil, the circumstances of each case will have to be investigated to determine whether the Court, based on policy considerations, will allow the claim. Although the guidelines above are not exhaustive, it is submitted that, based upon those guidelines, a Court faced with the question of allowing a claim for pure economic loss would have little hesitation in granting the claim. This submission is based on the following:

1. Due to the ship-owner being entitled to limit his liability in terms of Section 9(5) of Pacoposoa, there is only a specified limited amount from which to satisfy claims resulting from the discharge of oil that results in oil pollution damage. There is no distinction in the section between physical and non-physical damage and thus the limitation fund established by the owner is to satisfy all claims resulting from the incident. Further in terms of Section 10(1) of the Act the ship-owner shall not be liable otherwise than in terms of the Act. Thus if the extent of the losses exceeds the amount to which the ship-owner is entitled to limit his liability, then the claimant cannot proceed against the owner at common law. The net result of this is that by allowing a claim for pure economic loss the Court is not subjecting the owner to a multiplicity of claims with an overwhelming potential liability as, as indicated, the owner is only liable to a specified maximum.

2. If, on the other hand, the owner loses his right to limit his liability in terms of Pacopsoa as the damage resulted from his actual fault or privity¹¹⁴ then in this instance, it is submitted the owner would fall foul of the first guideline enunciated above. The owner of a ship carrying oil, if the discharge was as a result of his own misconduct, should make good the damage caused to a claimant, based on policy considerations.

3. In addition to the above, it is submitted that, should a South African Court be faced with the question of allowing a claim for pure economic loss arising from pollution damage, it would allow the claim on the second guideline above. Although the ship-owner is held strictly liable for the damage in terms of Section 13 of Pacopsoa, the owner of a tanker carrying more than 2 000 tons of oil must have insurance cover for oil pollution damage. The ship-owner would thus, whilst not avoiding liability, be indemnified against this form of damage. Further the Court should take into account that the owner of a ship should foresee that should his ship discharge oil, due to the nature of oil pollution damage, there are likely to be extensive claims based upon pure economic loss. Further as the majority of the oil passing our shores is not destined for South Africa, there is no reason based upon policy considerations not to allow the claim. There is no real benefit to society by allowing oil to pass around our coastline. On the contrary there is a great risk to society and the Courts should as a matter of policy adopt the principle that the polluter is liable for all losses, including pure economic loss, that his pollution causes.

iii. Costs of Preventive Measures and Clean-up Costs

The ship-owner is held strictly liable for the costs of any measures taken by the Minister (here the Minister refers to the Minister of Transport¹¹⁵) after an incident has occurred for the purpose of reducing the loss or damage resulting from a discharge of oil as defined in the Act.¹¹⁶ In this instance any measures taken by the Minister to prevent or minimise the extent of pollution damage taken after a discharge of oil are recoverable from the owner.

The limitation on this liability is that the measures must be taken by the Minister. Thus if an individual takes any measures to prevent his property being damaged by oil resulting from a discharge then the costs of these measures are not recoverable from the ship-owner. Thus although the owner is strictly liable for any measures taken by the Minister he is not liable for any measures taken by an individual.

Although the Minister is responsible for combating pollution damage for the Republic itself, an individual should also be covered for the costs of his preventive measures, as in terms of South African law on damages, the claimant must act reasonably to mitigate his loss.¹¹⁷ If the individual did not take reasonable measures to mitigate his loss, then although the ship-owner is strictly liable for the loss, the damages to which the claimant is entitled will be affected.

A further question that needs to be looked at is whether the ship-owner is strictly liable in terms of Section 9(1)(b) for the costs taken before the discharge of oil to prevent the discharge, ie the so-called pure threat costs. For example if there is a tanker that has indicated that she has suffered damage and is likely to discharge oil and the Minister instructs that her cargo be trans-shipped to prevent discharge of oil. If this is completed successfully and no oil is discharged, is the owner strictly liable for these costs? It is submitted that on the wording of Section 9(1)(b) the owner will be held strictly liable for these costs. The words "or for the purposes of preventing such loss or damage being caused, whether or not a discharge as contemplated in paragraph (a) has occurred and whether or not such a discharge in fact subsequently occurs"¹¹⁸ on their ordinary meaning, are sufficiently clear to indicate that the legislature intended that this situation be covered. Further in terms of Section 9(2)(a) of the Act "any measures taken by the Minister to prevent pollution of the sea by oil discharged or likely to be discharged from any ship, tanker ... shall be deemed to be measures taken by the Minister for the purposes of Section 9(1)(b)." Thus this section expressly provides that any measures taken to prevent a likely discharge of oil are measures taken in terms of Section 9(1)(b).

This submission is further supported by Section 9(3) which states that the owner will not be held strictly liable for the costs and damage from an anticipated discharge if he falls within the requirements of that section. Thus the intention of the legislature is clear on this issue and the ship-owner will be held liable for the costs incurred to avoid oil pollution damage.

The ship-owner is also held strictly liable for the costs of removing any pollution of the sea by oil.¹¹⁹

The costs of cleaning the sea shores following the discharge of oil are also recoverable from the owner as the definition of the sea includes the land between the high water mark and the low water mark.¹²⁰

The ship-owner is also strictly liable for any loss or damage in the area of the Republic taken by the Minister after the discharge of oil.¹²¹ Thus should the Minister take measures to prevent the extent of the damages as a result of a discharge and these measures cause further damage then the owner is liable for these further damages.

Is the ship-owner strictly liable for damage to the environment?

The question here is whether the phrase "any loss or damage" allows an action to restore the environment following the discharge of oil. Pacoposoa makes specific provision that the ship-owner shall be held strictly liable for an amount to be determined by the Director-General of the Department of Transport to compensate the South African National Foundation for the Conservation of Coastal Birds for expenses incurred in rescuing, cleaning and feeding coastal birds as a result of the discharge of oil.¹²² On the question of other environmental damage, it is submitted that the wording of the Act is broad enough to encompass this head of damage but the question is who may institute a claim for this form of damage.

To institute an action for damages, the plaintiff must have the requisite locus standi or capacity to sue.¹²³ Part of the requisite capacity to sue is that the party has a legal interest in the property over which he is instituting action. In the case of the environment it is important to determine who has the requisite locus standi to institute an action for damage to the environment. The State President is the owner of the sea and the sea-shore in the Republic¹²⁴ and is not entitled to alienate any part of the sea or sea-shore.¹²⁵ The sea and sea-shore are defined as the waters and the bed of the sea under the water and the land between the high water and low water mark.¹²⁶ Thus in South African law the State is the owner of the sea and sea-shore and it is the State that should have the locus standi to bring an action for the restoration of the environment. However it has been argued¹²⁷ correctly, it is submitted, that it is unlikely that the Courts would allow the State to bring about such a claim on the basis that the State is not under a statutory duty to maintain the environment.

What is the position of a private individual wishing to bring a claim for damage to the environment? It has long been accepted in South African law that there is no broad action in the public interest.¹²⁸ Thus where an individual does not have locus standi to institute an action for an infringement of a right, he cannot bring an action on the basis that it is in the public interest that his action be allowed. Flowing from the above, it is to be concluded that in terms of South African law, there is no strict liability on the ship-owner for environmental damage caused by his vessel.

Having considered in what circumstances the ship-owner will be held to be strictly liable, I now turn to the circumstances in which the ship-owner will not be held liable for pollution damage resulting from the discharge of oil from his vessel.

The most important provision relating to the non-liability of the vessel-owner is contained in Section 10(1) of Pacoposoa. This section provides that "the owner of a ship, tanker or offshore installation shall not be liable otherwise than under the provisions of the Act for .. "

This section is of great importance as it denies a claimant who has a claim in terms of Pacoposa, from proceeding against the owner at common law. Thus if the owner is entitled to avoid liability in terms of the Act then he avoids liability altogether. It is thus of cardinal importance to know in what circumstances he will be able to avoid liability in terms of the Act.

In the first instance the ship-owner will not be liable for any loss, damage or costs enumerated under Section 9(1) if he can prove that the loss resulted from:

"an act of war, hostilities, civil war, insurrection or an exceptional, inevitable and irresistible natural phenomenon".¹²⁹

This is the same provision as that contained in the "CLC" and is based upon the same reasoning as that in the "CLC", namely that these are the types of occurrences which are difficult to insure against. It is of importance to note firstly, that the onus of proof is on the ship-owner and, secondly that the notion of "an exceptional, inevitable and irresistible natural phenomenon" is stricter than the Act of God notion.

The second instance in which the ship-owner will avoid liability is where the damage resulted wholly from the act or omission of a person with the intent to do damage, but excludes the owner himself or any of his servants or agents.¹³⁰ In this case the owner has to prove that the damage resulted wholly from the act committed with the intent to cause damage, in order for him to avoid his liability.

The third circumstance in which the owner can avoid any liability in terms of the Act, is if the discharge results wholly from the negligence or other wrongful act of any government responsible for the maintenance of lights or other navigational aids.¹³¹ Here again the onus is upon the owner to show that the discharge resulted solely from the negligence of the government to maintain the lights or other navigational aids.

A further limitation on the application of Pacoposoa is contained in Section 11. In terms of this section a warship or a tanker at the time used exclusively by a state for non-commercial purposes shall not be subject to the provisions of Section 9 of Pacoposoa.

Liability under Pacoposoa is only legally enforceable if proceedings are instituted within three years from the date on which the claim arose.¹³² If there is a series of incidents giving rise to damage then the claim must be instituted within six years of the first of the occurrences giving rise to the damage.¹³³ This is of importance as, should a ship that has already discharged oil sink with some oil in her tanks, it may take a long time before the tanks rust and release the oil. In this instance the first discharge would have occurred at the time of the sinking of the ship and the subsequent discharge could be years later. If the claimant suffers damage as a result of the subsequent discharge, he must bring proceedings within six years of the first occurrence. There is an anomaly in this regard in the Act as in terms of Section 1(2) where more than one discharge of oil results from the same occurrence or from a series of occurrences then they are, in terms of this section, regarded as one discharge for the purposes of the Act. Thus according to this section the claim for subsequent damage must be brought within three years of the first occurrence.

As the Act is ambiguous on this point, the better approach, it is submitted, is to allow the claimant six years from the date of the first discharge in which to submit his claim.

b. LIMITATION OF LIABILITY

Pacoposoa has followed the "CLC" by entitling the owner to limit his liability for any loss or damage that results from the discharge of oil. In terms of Section 9(5) of the Act:

"if the owner of any ship, tanker or offshore installation incurs a liability in terms of the provisions of sub-section (1), for any loss or damage suffered or costs incurred as a result of an incident which has occurred without such owner's fault or privity

- (a) the provisions of Section 261 of the Merchant Shipping Act (Act No 57 of 1951), shall not apply in respect of such liability;
- (b) the aggregate of all amounts payable by such owner in respect of such liability, in so far as it relates to a particular incident, shall not exceed -
 - (i) in the case of a ship or a tanker, one hundred and thirty-three units of account for each ton of the ship's or tanker's tonnage, or fourteen million units of account, whichever is the lesser;
 - (ii) in the case of an offshore installation, a sum to be determined by the Minister, but not exceeding fourteen million units of account."

The first requirement to enable the owner of the vessel to limit his liability is that a liability in terms of Section 9(1) must have been incurred. Thus the owner, in order to limit his liability, will have to prove that the damage resulted from a discharge as contemplated in the section. In the case of the damage caused by oil droplets illustrated above, where the owner will not be entitled to limit his liability if a claim is instituted against him on the basis that he has not incurred a liability in terms of Section 9(1).

The second requirement for limitation of liability is that only the owner of the ship, tanker or offshore installation is entitled to limit his liability. This restriction on the right to limit liability flows from the channelling of liability introduced by the Act. In terms of Section 10(2) no servant or agent of the owner of a ship, tanker or offshore installation shall be liable to any person for any loss, damage or costs. Further, any salvor performing salvage services with the consent of either the owner or the Master will be regarded as an agent of the owner and thus will not be liable in his personal capacity for any damage or losses resulting from a discharge of oil.¹³⁴ The Act also protects the servants of the state when engaged in taking measures to prevent or remove oil pollution, from being liable for any further damage.¹³⁵ Thus the Act attempts to limit the claims against anyone other than the owner of the vessel. The reason behind this is that the owner has the insurance against pollution damage. By making the owner liable for all damages resulting from the discharge of oil, the Act makes the position of the claimant easier as he is not required to ^{prove} fault on the part of the owner, as he is held strictly liable. If the claimant were to claim against anyone else he would have to prove the necessary fault requirement.

Who is the owner?

This is of importance for firstly, it is only the owner who is entitled to limit his liability and secondly, and more importantly, the right to limit is lost if the incident results from the fault or privity of the owner.

The owner of a ship or tanker is the person or persons registered as the owner of such ship or tanker or, in the absence of registration, the person or persons to whom the ship or tanker belongs.¹³⁶

When does the owner lose his right to limit?

In terms of Section 9(5) the owner loses his right to limit his liability if the incident resulted from his fault or privity. These words are the same as those used in Section 261 of the Merchant Shipping Act¹³⁷(MSA) and will be interpreted as they have been in terms of that Act. The words fault and privity have been given the following meaning:

"Fault translates easily enough into negligence or culpa on the part of the ship-owner, whilst privity, as in the doctrine of privity of contract, suggests the ship-owner being party or privy to what occurred".¹³⁸

Although it is clear that it must be the fault or privity of the owner at the time of the incident that resulted in the discharge of oil, how does one determine whether there was fault or privity on the part of the owner? In terms of the definition of an owner quoted above, the owner is that person or persons registered as the owner of the ship or tanker. What is the position if the ship is not owned by a person or persons but by a company? Is the company entitled to limit its liability and if so, can there be fault or privity on the part of the company? In this instance the Court seized with the matter will have little difficulty in holding that the words "person or persons" is broad enough to incorporate a juristic person such as a company. If the Court does not adopt this approach, the whole purpose of the Act will be frustrated, as then any company owning a vessel would escape liability on the basis that it is a juristic person and not a natural person.

The next enquiry is when does a company being a ship-owner lose its right to limit its liability? In this instance one has to look firstly, at what constitutes fault or privity on the part of the company and secondly, what degree of fault or privity is required for the company to lose its right to limit.

The first enquiry has only been judicially considered once in South Africa.¹³⁹ This case dealt with the interpretation of the words "without the actual fault or privity" in terms of the MSA. The Court held that the meaning to be given to these words was the same as that given to the same words in English law.¹⁴⁰ i.e. that the words actual fault or privity mean there must be something blameworthy in the conduct of the owner. The Court then went on to hold that when determining the actual fault or privity of the company one must seek the directing mind and will of the company and that the fault or privity must occur at this level of the company.¹⁴¹

The second enquiry is what degree of fault or privity is required on the part of the company. The Court in the St Pardan case looked at the fact⁵ of the case to determine whether there was actual fault or privity on the part of the owners of the ship. In this case the Court held that the owners were at fault as they had knowledge of the circumstances that gave rise to the casualty.¹⁴² The approach of the Court in the St Pardan case mirrors the approach in English law that the owner of ship must exercise the same degree of effective management, being supervision and control, of his ship's day to day activities.¹⁴³ Thus it is submitted that a Court faced with the interpretation of Section 9(5) of Pacoposa will interpret the requirements of "fault and privity" in the same light as the requirements of Section 261 of MSA. This will be of great importance as the onus of proof rests with the ship-owner to prove that there was no fault or privity on the part of the owner.¹⁴⁴ This could lead to the owner of the vessel losing his right to limit his liability if he cannot show that the incident resulted notwithstanding the effective management of the vessel. Thus if the incident results from factors which the effective management were aware of, or ought to have been aware of, then the owner will not be entitled to limit his liability and the claimant will be entitled to recover the full extent of his losses or damage.

In terms of Section 9(5)(a) the provisions of Section 261 of the MSA do not apply to a liability incurred in Section 9(1). Thus if the owner loses his right to limit liability in terms of Section 9(5) then he is not entitled to limit his liability in terms of the MSA.

The amount to which a ship-owner is entitled to limit his liability is determined according to the tonnage of the vessel. The owner is entitled to limit his liability to one hundred and thirty-three units of account per ton or fourteen million units of account, whichever is the lesser. A unit of account is defined as "a Special Drawing Right(SDR) as defined by the International Monetary Fund and the value of the SDR in South African currency shall be calculated ... at the time payment is made".¹⁴⁵ The value of a SDR at present is R3.948.¹⁴⁶

The method of determining the tonnage of the vessel is also defined in the Act. The tonnage to be used in the calculation of the limitation of a ship is the net tonnage plus any engine room space deducted to obtain the net tonnage.¹⁴⁷ The net tonnage of a vessel is only that part of the ship which is revenue earning and thus excludes the crew accommodation.¹⁴⁸ To determine the net tonnage one deducts the non-revenue earning spaces from the gross tonnage. Thus when determining the ship's tonnage one must include the engine room space and multiply each ton by the value of a SDR to calculate the amount to which the ship is entitled to limit its liability. For example if there is a ship of 5 000 tons that has discharged oil that has resulted in oil pollution damage, the maximum liability of the ship-owner will be 5 000 x 133 units of account per ton. This amount to 5 000 x R525.08 = R2 625 400.00. However before accepting this as the limitation, one has to determine whether this amount is the lesser of the two permitted in terms of the Act. The maximum amount for which the ship-owner is liable in terms of Pacoposoa is 14 million units of account. This amounts to 14 million x R3,948 = R55 272 000,00. Thus in this example the owner of a 5 000 ton ship will be entitled to limit his liability to a maximum amount of R2 625 400,00.

This amount is the total amount available to cover the costs of any damage, preventive measures and clean-up costs.

The maximum amount that the ship-owner may be liable for may seem sufficient to cover claims resulting from a discharge of oil, until one considers that the claims following the stranding of the "AMOCO CADIZ" amounted to US\$ 2 billion.¹⁴⁹ As there are many tankers of the same or similar size to the "AMOCO CADIZ" rounding the Cape, the threat is that, if there is an incident off the South African Coast, the amount of damages and losses resulting from the incident will be of a similar amount.

If there is an incident, the amount to which the owner is entitled to limit his liability will mean that there will be many claimants who will not be able to recover the full extent of the damages suffered as a result of the discharge. This in effect will defeat the object of the Act which is to provide an individual who has suffered loss as the result of the discharge of oil with an effective remedy to recover his loss.

An owner whose ship has caused pollution damage resulting from a discharge of oil may apply to the Supreme Court¹⁵⁰ for an order determining the extent of his aggregate liability for which he will be liable in terms of Section 9(5).¹⁵¹ The benefit to the owner of bringing this application is that a fund is created which stipulates the maximum for which he will be liable in terms of the Act. Once the fund is constituted the ship-owner shall nominate a person to act as a trustee of the fund who must be appointed by the Master of the Supreme Court.¹⁵² The trustee will then distribute the fund amongst the claimants. There is no provision in the Act that the claimants receive a pro rata portion of their claim if there are insufficient funds available to meet all the claims nor is there any provision that the fund must retain some funds to meet any claims arising from a series of discharges. This is a serious lacuna in the Act for, as we have discussed above, there may be claims resulting from a subsequent discharge that may be brought against the ship-owner up to six years after the first discharge. If the trustees distribute the fund prior to this six year period having elapsed, a claimant having suffered damage from a subsequent discharge having the same origin as the first discharge that caused the damage, whilst having a claim in law, would not be in a position to enforce his claim as the owner's liability is restricted to his limited amount and the claimant cannot proceed in terms of the common law.

The ship-owner, if he has paid any amount to any person who has suffered damage prior to the establishment of the fund, can claim that amount from the fund once it has been established.¹⁵³ The owner has the right to, if he can establish that he may be compelled to pay a claimant subsequent to the distribution of the fund, request that the trustees retain an amount out of the fund from which the owner may be compensated for this payment.¹⁵⁴

This provision tries to fill the lacuna discussed above but does not, it is submitted, achieve its aim. The reason for this submission is as follows. If the ship-owner approaches the Court to determine his maximum liability and he then constitutes a fund, this is the maximum for which he would be liable for all claimants.

If there is a subsequent claim as envisaged in Section 12(7), the owner would only be liable if the claims do not exceed the amount in the fund. In this instance he would be entitled to request that the trustees retain a portion of the fund to cover these claims. However in practice, due to the magnitude of the owner's potential liability resulting from the discharge of oil and the small amount to which he is entitled to limit his liability in terms of Pacoposo, it is unlikely that the claims will be less than the amount to which he has limited his liability and, should he be faced with a further claim, he can plead that he has already limited his liability and that the claimant must proceed against the proceeds of this limitation.

c. COMPULSORY INSURANCE

In terms of Pacoposo a tanker carrying more than 2 000 long tons of oil in bulk as cargo shall be allowed to enter or leave a port in the Republic unless it has on board a certificate stating that the tanker has insurance or security for an amount to which the owner will be entitled to limit his liability for damages arising as a result of the discharge of oil.¹⁵⁵ This provision is the same as that contained in the "CLC" and the comments made earlier on this provision also apply here. A part of the requirement that does warrant some comment is the prohibition of a ship entering or leaving a port in the Republic without a valid certificate. A certificate is a valid certificate if it is issued by the Government of a contracting state.¹⁵⁶ This requirement further illustrates the major drawback of Pacoposo.

The definition of a tanker only includes tankers that are subject to the provisions of the "CLC". However in terms of Section 13(8) a tanker from a non-contracting state will not be allowed to enter or leave a port in the Republic unless it has on board a certificate issued by a contracting state.

The question that is raised by this requirement is why does a non-contracting tanker require a certificate if the provisions of Pacoposoa do not apply to it?

If the legislature requires that the tanker has a certificate before it is allowed to enter into a South African port, why do the provisions of Pacoposoa not apply to the tanker? Where the tanker does not have a valid certificate the tanker can be detained until a valid certificate is produced and if the tanker attempts to leave the master and the owner shall be guilty of an offence.¹⁵⁷

A certificate will not be recognised as valid if the insurance can be cancelled for any reason except if the insurance or security is going to expire within three months, nor will it be valid if it is going to expire whilst the tanker will be travelling through South African waters.¹⁵⁸

The provisions of this section also apply to ships.^{158a}

It is obvious from the above that the question of insurance is taken in a very serious light in Pacoposoa. This results from the strict liability placed upon the owner and the attempt to avoid the problems of the one-ship company that has no assets against which to proceed. The strict requirement of a ship or tanker having insurance is also of importance, as, in terms of Section 15(1), a person having a claim against the owner of a tanker resulting from the discharge of oil can proceed directly against the insurer who issued the certificate. If the claim is brought against the insurer, he is entitled to raise the same defence to the claim as the owner and has an additional defence that the incident resulted from the wilful conduct of the owner himself.¹⁵⁹ In this instance the insurer will not be liable and the claimant will have to proceed against the ship-owner himself, although as has been discussed, the owner will not be entitled to limit his liability.

The claimant proceeding against the insurer must make sure that the incident did not result from the fault or privity of the owner of the tanker, as, if he institutes action against the insurer, the insurer is entitled to limit his liability in terms of Section 9(5)(b), whether or not the owner of the tanker was at fault or was privy to the incident.¹⁶⁰ In this instance the claimant would do better to proceed against the owner who would not be entitled to limit his liability.

Although the Act provides for the compulsory carrying of a certificate of insurance and entitles the claimant to proceed directly against the insurer, the Act makes no provision for the instance where the insurer is not within the jurisdiction of the Court.

Thus it may result that the claimant has a claim, but, due to the ship sinking and the owner being outside the jurisdiction of the Court, the claimant has to proceed against the insurer. As discussed above, the purpose of the certificate is to ensure that a claimant will be able to recover his losses resulting from pollution damage. If there is no way in which the claimant can bring the insurer before a South African Court, then the purpose of having a certificate of insurance will be frustrated. It is submitted that the way in which to rectify this defect is to amend the Act to require that the insurer must have an agent in South Africa against whom the claimant can proceed.

It is of interest to note that the provisions relating to proceedings against the insurer only apply to tankers. Thus although a ship is required to have a valid certificate of insurance, a claimant claiming for pollution damage caused by the ship is not entitled to proceed directly against the insurer. This is a strange limitation on the claimant, for there is no sound reason why the claimant cannot proceed against the insurer. The whole purpose of requiring a certificate of insurance is to ensure that the owner will have funds for the claimant to proceed against and there is no difference, from an insurers point of view, between a claim for damage caused by a tanker or a ship except the quantum involved.

d. JURISDICTION OF THE COURT

Pacoposo makes provision that the Supreme Court of South Africa and, within their jurisdictional limits, the Magistrates' Court shall have jurisdiction in respect of all causes of action arising out of the provisions of the Act.¹⁶¹ However as indicated above, the claimant may not be in a position to enforce the judgement given by the Supreme Court, due to the fact that the ship-owner is not before the Court or that he has no assets in South Africa^{161a}. There is a way in which the claimant can enforce his claim against the ship-owner if the owner is not before the Court or if he has no property within the area of the Court for the claimant to execute against. This way is to proceed in terms of the Supreme Court sitting as a Court of Admiralty as defined in the Admiralty Jurisdiction Regulation Act¹⁶² (AJRA).

In terms of AJRA the Court sitting as a Court of Admiralty has the jurisdiction to hear and determine any maritime claim, irrespective of where the claim arose.¹⁶³ Section 1 defines a maritime claim and, in terms of Section 1(z), pollution of the sea or the seashore by oil or by any other substance shall be a maritime claim. Thus the Admiralty Court would have jurisdiction to hear a claim resulting from the discharge of oil that resulted in damage. However it must be stressed that the Court, whilst having jurisdiction to entertain the claim, can only apply the provisions of Pacoposo if the damage falls within the ambit of the Act. The great advantage of proceeding in Admiralty is that the claimant is able to proceed against any associated ship of the ship that caused the damage.¹⁶⁴

This entitles the claimant who has suffered pollution damage from a vessel that has sunk or been destroyed, to proceed against an associated ship owned by the same owner. For the purposes of AJRA an associated ship is a ship owned by the same person who was the owner of the ship concerned at the time the maritime claim arose, or owned, at the time when the action commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose.¹⁶⁵

The provisions of the associated ship clause are very broad, for the claimant only has to show that the associated ship is owned by a person who had control over the company which owned the ship that caused the damage. Thus if the ship-owner owns any other ships that come within the jurisdiction of the Court, the claimant can institute his claim against one of these ships.

A further useful provision for the claimant is contained in AJRA. This is the action in rem procedure which allows the claimant to proceed against the ship itself. To institute an action in rem, the claimant must first arrest the vessel.¹⁶⁶ By arresting the vessel, the claimant is ensured of having an asset of the ship-owner against which to execute for his claim, as the ship will only be released from arrest if the owner establishes security for the claim.¹⁶⁷

SUMMARY

Thus the claimant will, by proceeding by way of Admiralty, be certain that the Court will be able to entertain his claim and more importantly, he will be able to enforce any order that the Court makes.

From the above discussion of the provisions of Pacoposo it is evident that there will be instances where a claimant will suffer pollution damage resulting from the discharge of oil that does not fall within the provisions of the Act. Examples of instances in which the claimant will not be able to institute action in terms of Pacoposo are the following:

- i. where the damage did not result from a discharge as defined in the Act in that the discharge occurred outside the area of the Republic or that the damage was caused by oil droplets being absorbed into the clouds and subsequently raining on the land;

- ii. where the discharge resulted from a tanker not carrying oil in bulk as cargo;
- iii. where the discharge resulted from a tanker not subject to the provisions of the Act, ie the tanker does not comply with the definition of a tanker contained in the Act.

Further the claimant may wish to institute action against the person who directly caused his damage. As we have seen, the agents and servants of the owner of the vessel cannot be held liable for any loss or damage resulting from the discharge of oil.¹⁶⁸ The question that arises is what is the position of a charterer of the vessel? Will he be regarded as an agent or servant of the owner? It is submitted that the demise charterer (a charterer who hires the whole vessel from the owner for hire and the possession and control of the vessel passes to the charterer instead of the owner¹⁶⁹) will not be regarded as a servant or agent of the owner as the possession and control of the ship passes to the charterer. Thus if the vessel is on demise charter the charterer is not protected against liability for oil pollution damage.

The problem with proceeding against the charterer is that there is no strict liability imposed upon him in terms of Pacoposoa and thus the claimant will have to proceed against the charterer at common law. This does not prevent the claimant from proceeding against the owner of the ship in addition to instituting action against the charterer.

The question is how does the claimant institute an action to recover the damages he has suffered in these instances? To determine this one has to consider position of the claimant at South African common law to determine whether he has an action and, if so, whether it is likely to be successful.

B. CIVIL LIABILITY IN SOUTH AFRICAN COMMON LAW FOR POLLUTION DAMAGE

As indicated above, there will be instances where a claimant has suffered damage as a result of the discharge of oil that does not fall within damage as defined in section 9 (1) (a), (b) or (c) of Pacoposoa. In these instances the claimant will not be able to rely upon the provisions of the Act and thus will have to look at South African civil law to determine whether he is able to recover the damages he has suffered as a result of the discharge of oil.

The position of civil liability in South African law for damage resulting from oil pollution from a ship will be looked at under the following headings:

- i. The jurisdiction of the Court to entertain a claim for pollution damage from a ship
- ii. The law to be applied
- iii. An examination of the law to be applied with a specific emphasis on the requirements for Aquilian liability ie. Roman-Dutch Law.
- iv. The owner's right to limit his liability.

i. The Jurisdiction of the Court to Entertain a Claim for Pollution Damage from a Ship:

The starting point in determining whether the claimant will be able to bring a claim for damage that he has suffered as a result of oil pollution damage is to determine whether the Court has jurisdiction to entertain the claim. There will be no difficulty in the Court having jurisdiction to hear the matter if the action giving rise to the damage occurred within the territorial waters of the Republic, as it has been held that the jurisdiction of the Supreme Court extends to the extent of the territorial waters as defined in Section 2 of the Territorial Waters Act¹⁷⁰ ie the Court has jurisdiction up to 12 nautical miles from the low water mark.

What is the position if the action causing the damage occurred outside the territorial waters? It is submitted that in this instance the Supreme Court, sitting as a Court of Admiralty, would have jurisdiction to hear the matter for the following reasons:

- i. In terms of Section 1(z) of AJRA, any claim relating to pollution of the sea or the seashore is a maritime claim.

For the claimant to show that his claim is a maritime claim, he will have to show that his claim relates to pollution of the sea or the seashore.

- ii. If the claimant is not in a position to show that his damage resulted from pollution of the sea or seashore as defined in the Sea-Shore Act,¹⁷¹ he still has a maritime claim, as he can argue that in terms of Section 1 (ee), his claim by its nature or subject matter is a marine or a maritime matter and should be regarded as a maritime claim.

Thus the Supreme Court, sitting as a Court of Admiralty, would have jurisdiction to hear a claim resulting from oil pollution damage as in terms of AJRA the Court can hear a maritime claim irrespective of where it arose.

ii. The Law to be Applied:

The first inquiry is what law would be applied when claiming for pollution damage when proceeding in the Supreme Court exercising its Admiralty jurisdiction. Section 6(1) of AJRA provides as follows:

"6(1) Notwithstanding anything to the contrary in any law or the common law contained, a court in the exercise of its admiralty jurisdiction shall -

- (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty would have applied with regard to such a matter at such commencement, insofar as that law can be applied;
- (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic."

Thus if the Colonial Court of Admiralty at 1890 had jurisdiction to hear a claim relating to damage resulting from pollution, then the law to be applied would be English law at 1983. If the Colonial Court of Admiralty did not have jurisdiction, then Roman-Dutch law would apply. Did the Colonial Court of Admiralty have jurisdiction to hear a claim based on pollution damage? The jurisdiction of the Colonial Courts of Admiralty Act was partly based upon prior Admiralty statutes.¹⁷² One of these statutes was the Admiralty Court Act 1861.¹⁷³ In terms of this statute a Court of Admiralty had jurisdiction over any claim for damage by a ship.¹⁷⁴ Does pollution damage resulting from the spillage of oil constitute damage done by a ship? It is submitted that in this instance the damage will not be regarded as damage by the ship as the trend in English law has been to limit this claim to damage resulting from the ship itself¹⁷⁵ and further, in the case of pollution damage, the cause of the loss is the oil and not the ship. It would be stretching the meaning of the words damage by a ship to the extreme to allow a claim for pollution damage to be classified as damage resulting from a ship. Thus a South African court when exercising its Admiralty jurisdiction would apply Roman-Dutch law as the law to be applied in terms of Section 6(1)(b).

If the damage occurred within twelve nautical miles from the coast and the claimant did not wish to proceed in the Admiralty Court, then there can be no doubt that any Court hearing the matter would apply South African common law, ie Roman-Dutch law. What is the position under Roman-Dutch law?

iii. An examination of the law to be applied with a specific emphasis on the requirements of Aquilian liability ie. Roman-Dutch Law:

The position under South African Law of delict is that "all damage caused unjustifiably is actionable whether caused intentionally or by negligence".¹⁷⁶ South African delictual law is based upon general principles of liability and all actions based upon delict fall within these general principles. There are two forms that the action can take. The first is based upon the Actio Injuriarum which allows the claimant to claim damages for wrongs to his personality which is clearly not applicable here. The second is the Aquilian action which allows the claimant to claim patrimonial damages.¹⁷⁷

Where a claimant has suffered damage as a result of oil pollution damage and he wishes to institute action against the person causing the harm, he would have to proceed in terms of the Lex Aquilia as the damage that he has suffered is patrimonial damage. Patrimonial loss is pecuniary or financial loss.¹⁷⁸

What are the essential requirements to institute an action based upon Aquilian liability?

The four requirements for Aquilian liability that will be looked at are as follows:

- i. a wrongful act or omission
- ii. fault, which is either intent or negligence

- iii. causation
- iv. patrimonial loss

i. Wrongful Act or Omission:

Conduct is wrongful if it is in conflict with the legal convictions of the community.¹⁷⁹ The determination of wrongfulness is based upon the following factors;

- (a) the nature of the defendant's conduct
- (b) the nature of the defendant's fault
- (c) the nature of the harm suffered¹⁸⁰

The determination is based upon a value judgement of balancing interests to reflect society's prevailing ideas of what is reasonable and proper, what conduct should be condemned and what should not.¹⁸¹

Thus the claimant claiming for loss or damage resulting from oil pollution will have to prove that the loss or damage results from the wrongful act or omission of either the ship-owner, master or the charterer. To prove that the act or omission was wrongful, the claimant will have to show that the conduct giving rise to his claim is the form of conduct that society would condemn as being against the legal convictions of the community. In South African law, it is submitted, a Court would have little hesitation in holding that damage resulting from the discharge of oil is wrongful per se. This submission is based upon the fact that the Court would seek to protect the right of a claimant who has suffered damage at the hands of a negligent or intentional act of the ship-owner or those in control of the vessel and that the Court would allow the claimant to seek compensation for the loss that he has suffered. Moreover it is accepted in South African law that a positive act that causes injury to a person or to property is wrongful.¹⁸²

ii. Fault:

The second requirement for the claimant to succeed in bringing an action under the Lex Aquilia is that the person who caused the harm was at fault. Fault constitutes either intent or negligence. It is submitted that when dealing with a claim resulting from oil pollution damage the claimant will seldom, if ever, be in the position to prove intent. Perhaps the only occasion that intent may play a role is where the ship washes her tanks and the master foresees the possibility of the oil causing damage but disregards that consequence (the *dolus eventualis* situation¹⁸³).

However, due to negligence being a ground on which to found the action there is no real need to try and prove intention which is a subjective state of mind and therefore more difficult to prove.

The plaintiff, when seeking compensation for damage that results from oil pollution damage, needs to show that the person causing the harm acted negligently. The test for negligence is based upon what the reasonable man in the same circumstances would have done.¹⁸⁴ In applying this test the Court looks at whether or not the harm was reasonably foreseeable and if the person took reasonable steps to guard against the harm occurring.¹⁸⁵ In the case of damage resulting from oil pollution from a ship, the Court will take the reasonable man to be a reasonable master and thus the plaintiff would have to show that the master did not act as a reasonable ship's captain would have in the circumstances. In these circumstances the plaintiff will be in a favourable position as it is difficult for a master (and his owner on the principle of vicarious liability) to show that his conduct that resulted in the pollution damage was not negligent as, in principle, the reasonable master will not allow his cargo to cause damage.

iii. Causation:

The claimant will have to show that his loss resulted from the negligent conduct of those in charge of the ship. The law affords the ship some protection in these circumstances as the principle is that the defendant should not be held liable for all the consequences of his wrongful conduct.¹⁸⁶ There must be a cut off point at which the defendant will not be held liable for any damages or loss. What determines the cut off point in South African law? The law on this point is not settled and there are two tests that the Courts have adopted in South Africa.

The first of these is the direct consequence test which holds that the defendant is liable for the direct consequences that flow from his wrongful conduct unless some new act intervenes after his act or omission.¹⁸⁷ The second test is the foreseeability test in which the defendant is held liable for all consequences that were reasonably foreseeable at the time of his act.¹⁸⁸ It is submitted that whatever the test is that is applied when there has been damage resulting from oil pollution, the result will not differ in practice, as the determination of a new act is based upon an objective determination and it can thus be used to limit the ambit of liability, while the approach of the foreseeability test is that the defendant should have foreseen the consequences of his act. This can also limit the ambit of liability. In the case of pollution damage it is difficult to see a Court not allowing the claimant, who has suffered patrimonial loss to recover that loss on policy considerations. How the Court frames these policy considerations can be either in terms of foreseeability or that there was no new act that caused the harm.

iv. Patrimonial Loss:

As we have discussed above the essential element that distinguishes the Aquilian action from other actions in delict is that there must be patrimonial loss on the part of the claimant. Patrimonial loss is a calculable pecuniary loss.¹⁸⁹ Thus as pure economic loss is a calculable pecuniary loss this form of damage is also claimable in terms of this action. What was said about pure economic loss claimable in terms of Pacoposa is of equal force here.

iv. The Owner's right to limit his Liability:

Of considerable importance when discussing patrimonial loss is the quantum that the claimant is entitled to recover.

As has been alluded to earlier the ship-owner is entitled to limit his liability for claims relating to damage of property in terms of Section 261 of MSA. However in terms of Section 261 he loses his right to limit his liability if the loss is caused with his fault or privity.

As has been discussed, fault is interpreted to include negligence and thus if the claimant is able to frame his claim in terms of the requirements of the Aquilian action and he proceeds against the ship-owner or master (if his negligent act binds the owner vicariously) the claimant will be able to claim the full extent of his loss without the attendant worries of the ship-owner being able to limit his liability and there not being sufficient funds to meet his claim. As the MSA limits the right to limit liability to the ship-owner only, if the claimant proceeds against the charterer he will be able to recover the full extent of his loss.

Thus an individual who has suffered loss or damage resulting from oil pollution will be able to institute an action based upon Aquilian liability if he can prove the requisite elements required. His claim will be for the full extent of his loss but unlike the position under Pacoposa he is not guaranteed that the ship-owner will have the funds to meet his claim. This coupled with the fact that the plaintiff will have to prove at least negligence on the part of the person responsible for the damage are the major draw-backs of proceeding in terms of the common law. However if the damage does not result from an instance covered by Pacoposa at least the plaintiff has an avenue available to him through which to seek compensation from the wrongdoer.

This is the position with regard to civil liability for oil pollution damage in South African law. As is evident from the above discussion there are several major failings within the South African regime relating to civil liability for oil pollution damage.

Before making recommendations as to changes that should be made to the law it would be valuable to look at the approach of the United States to civil liability for oil pollution damage to determine whether there are any measures that can be adopted successfully in South Africa. I have decided to look at the law of the United States firstly, as the United Kingdom law is virtually the same as International law¹⁹⁰ and secondly as the United States has not adopted the "CLC" and has recently introduced the Federal Oil Pollution Act¹⁹¹ which has innovative features that will have far reaching consequences for both ship-owners and their insurers.

NOTES

92. Act No 6 of 1981
93. D.R.Reinecke "Marine Pollution and Controls" paper delivered at National Marine Conference Stellenbosch 1989
94. Redgwell op cit note 30
- 94(a). At page 62
95. Hutchinson Ed Wille's Principles of South African Law pg 648
96. Section 9(1)(a)
97. Section 1(1)
98. Section 1(1)(a)
99. Section (1)
100. Ibid
101. Ibid
102. Act no 87 of 1963
103. Section 1(1)
104. Ibid
105. Ibid
106. Union Government v Mack 1917 AD 731
107. Union Government(Minister of Railways and Harbours) v Warneke 1911 AD 657
108. J.C. Van Der Walt, Delict: Principles and Cases 1979 para 24
109. Administrator of Natal v Trust Bank of Africa Limited 1979 (3) SA 824 AD at 830H-831B
110. Shell & BP SA & Others v Osborne Panama SA 1980 (3) SA 653 D & CLD at 659
111. Coronation Brick v Strachan Construction 1982 (4) 371 D & CLD at 384
112. Ibid
113. Op cit pg 386
114. See discussion pg 36
115. Sec 1(i) Pacoposoa
116. Sec 9(1)(b)

117. P.Q.R. Boberg, The Law of Delict pg 622
118. Sec 9 (1)(b)
119. Sec 9 (1)(b) read with Sec 9 (2)(a)
120. Sec 1 (1)
121. Sec 9 (1)(c)
122. Sec 9 (2)(b)(ii)
123. C. Loots "Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation" South African Law Journal 1987 pg 131
124. Sec 2 (1) of the Sea Shore Act No 21 of 1935
125. Ibid
126. Sec 1 (1) of Act no 21 of 1935
127. Stewart op cit pg 132
128. Bagnall v Colonial Government (1907) 24 SC 470
129. Sec 9 (3)(a)
130. Sec 9 (3)(b)
131. Sec 9 (3)(c)
132. Sec 9 (7)
133. Ibid
134. Sec 10 (3)
135. Sec 10 (4) & (5)
136. Sec 1 (1)
137. Act No 57 of 1951
138. R.F.Field, "Limitation of Shipowners' Liability" Dissertation LLM 1989, UCT
139. Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GMBH of Bremen 1986 (4) SA 865 (C) (the St Pardan)
140. St Pardan pg 875 I-J
141. St Pardan pg 876 E-F
142. St Pardan pg 881
143. Field op cit pg 53
144. St Pardan pg 876 E

145. Sec 9 (8)(a)
146. The value of the SDR at 5 May 1992 (Financial Mail 8 May 1992)
147. Sec 9 (8)(b)
148. Field op cit pg 13
149. B.A. Dubais, "Some Legal Aspects of the AMOCO CADIZ Incident"
Lloyds Maritime and Commercial Law Quarterly pg 292
150. Sec 12 (8)
151. Sec 12 (1)
152. Sec 12 (3)
153. Sec 12 (7)
154. Ibid
155. Sec 13 (1)
156. Sec 13 (2)(b)
157. Sec 13 (5) & (6)
158. Sec 13 (3)(a) & (b)
- 158(a). Sec 13 (8)(a)
159. Sec 15 (2)
160. Sec 15 (3)
161. Sec 20
- 161(a). This is another anomaly in the Act as in terms of Article X of "CLC" any foreign judgement should be enforceable in all member countries. Thus a claimant should be able to obtain a judgement in South Africa and proceed against the owner where he can find him, assuming it is in a party to "CLC", but it is submitted that the Court will not grant a judgement in these circumstances as firstly its judgement cannot be enforced in South Africa and secondly as South Africa is not the appropriate forum for the hearing.
162. Act No 105 of 1981 as amended
163. Sec 2 (1)
164. Sec 3 (6)
165. Sec 3 (7)(a)(i) & (ii)
166. Sec 3 (5)
167. Sec 3 (10)(a)(i)
168. Sec 10 (2) Pacoposoa

169. A. Waring, Charterparties: a Comparative Study of South African English and American Law pg 19
170. Yorigami Maritime Construction Co v Nissho-Iwai Co 1978 (2) SA 391 (C)
171. Act 21 of 1935
172. D.J. Shaw, Admiralty Jurisdiction and Practice in South Africa Pg 4
173. Reproduced in Shaw op cit pg 145
174. Shaw op cit pg 4
175. D R Thomas, Maritime Liens para 216
176. Perlman v Zoutendyk 1934 CPD 151 at 155
177. Mathews and Others v Young 1922 AD 492 at 505
178. Boberg op cit pg 18
179. Hutchinson op cit pg 647
180. Boberg op cit pg 33
181. Ibid
182. Lillicrap, Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd 1985 (1) SA 475 (A) at 504
183. See Boberg op cit pg 296 for a full discussion
184. Kruger v Coetzee 1966 (2) SA 428 (A)
185. Kruger v Coetzee at pg 430
186. Boberg op cit pg 440 ff
187. Boberg op cit pg 441
188. Boberg op cit pg 442
189. Boberg op cit pg 475
190. For a full discussion see Bates op cit pg 49 ff
191. Introduced in 1990

CHAPTER FOUR

CIVIL LIABILITY IN UNITED STATES LAW

The United States, the major importer of oil, has not ratified either the "CLC" or the Fund convention.¹⁹² The reason for the non-ratification of these conventions was that the limits of liability available to the ship-owner were too low. At the IMO conference that led to the introduction of the "CLC" and "Fund" Protocols the U.S. argued strenuously for the adoption of the higher limits of liability that were eventually adopted by the conference. As a result of these higher limits the U.S. was about to adopt the "CLC" and the "Fund Convention" and the two Protocols when the "EXXON VALDEZ" disaster occurred.¹⁹³ As a result of the "EXXON VALDEZ" disaster a strong environmental lobby argued for unlimited liability on the part of the owner who's ship caused pollution damage. Coupled with this lobby was the pressure from the individual states that felt that their rights to enact legislation to deal with pollution damage would be limited.¹⁹⁴ The result of this pressure was that the U.S. Congress did not adopt the international conventions but introduced the Federal Oil Pollution Act (FOPA).

FOPA introduces a variety of innovative approaches to civil liability for oil pollution damage. I will look at some of these innovations that may have some importance for South Africa.

The starting point is to determine in what circumstances liability will attach where there has been the discharge of oil. FOPA enacts strict liability on the part of the "responsible party" for civil liability under various heads of damage. "Responsible party" includes the owner, the demise charterer and the operator/manager of a vessel or off-shore installation.¹⁹⁵ Thus the net of liability is cast extremely widely to encompass a responsible party where there has been oil pollution damage. The new act applies to all vessels entering the United States waters.

A vessel is defined as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel".¹⁹⁶ It is not confined to tankers as is the "CLC".

FOPA lists specific heads of damage for which the responsible party will be held strictly liable. These heads introduce a new and innovative concept of pollution damage. In contrast to the definition of pollution damage in the "CLC" the types of damage for which liability will attach are specifically enumerated and are all embracing. The main types of damage that the act covers are:¹⁹⁷

- (1) all forms of damage to the environment including the costs of restoring the environment
- (2) all forms of damage to private individuals including economic losses
- (3) any person who loses subsistence use of the natural resources
- (4) any losses resulting from loss of profits from the use of natural resources
- (5) all clean-up costs

The responsible party is strictly liable for the above damages unless he can prove that the damage resulted wholly from an act of God, or of war, or an act or omission of a third party.¹⁹⁸

As is evident from the above, the circumstances in which the responsible party will be able to avoid strict liability will be very limited. FOPA follows a similar reasoning to "CLC" in that by imposing strict liability the Act allows the responsible party to limit his liability. The amount to which he is entitled to limit is dependant upon the type of vessel. If the vessel is a tanker greater than 3 000 tons the responsible party can limit his liability to U.S.\$1 200 per ton subject to a minimum of U.S.\$ 10 million. If the vessel is not a tanker then the amount to which he can limit his liability is U.S.\$ 600 per ton subject to a minimum of U.S.\$500 000. Any amount above this are covered by the Oil Spill Liability Trust Fund which is funded through a levy system.¹⁹⁹

The fund has a limit of U.S.\$ 1 billion per incident.²⁰⁰ It would seem at first glance that there is not much difference between this fund and the Fund Convention except the amount for which each is liable.

However this is not the case in terms of the U.S. law, as there has been severe criticism of this new regime^{200(a)} as the owner will in most cases be unable to limit his liability, for the act provides that the responsible party loses his right to limit his liability if the incident resulted from either gross negligence or wilful misconduct or by any violation of an applicable Federal safety construction or operating regulation.²⁰¹ This means that if the responsible party infringed an operating or safety regulation then he would lose his right to limit his liability. This has a further problem for the responsible party for, due to his potential liability if he is unable to limit his liability, he will find it extremely difficult to obtain insurance for his possible extended liability.

Although FOPA has been criticised, as has been indicated above, it has introduced the concept of civil liability for oil pollution damage into the U.S. It has also introduced a new definition of oil pollution damage to the international community and has set realistic limits of liability in respect of damage resulting from oil pollution.

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NOTES

192. Redgwell op cit pg 93
193. E. Gold, "Marine Pollution Liability after "EXXON VALDEZ": The US "All-Or-Nothing" Lottery" Vol 22 Journal of Maritime Law and Commerce 1991 pg 426
194. Gold op cit pg 433
195. A.F. Bressemer Clark "The US Oil Pollution Act of 1990" Vol Lloyds Maritime and Commercial Law Quarterly 1991 pg 247
196. Ibid
197. For a fuller discussion see Bressemer Clark pg 248 ff
198. Bressemer Clark op cit pg 248
199. Bressemer Clark op cit pg 251
200. Ibid
- 200(a). See Gold op cit
201. Bressemer Clark op cit pg 249

CHAPTER FIVE

CONCLUSIONS

From the discussion above, it is evident that the International Law of the Sea regime relating to civil liability for oil pollution from vessels has developed to keep up with the increasing problems associated with the transportation of oil by sea.

Each step in the development of International Law has followed from a highly visible incident involving a vessel transporting oil, from the "TORREY CANYON" (which led to the adoption of the "CLC") via the "AMOCO CADIZ" (illustrating the need for a higher limitation amount) to the "EXXON VALDEZ" (the result of this being the U.S. FOPA).

As a result of these casualties it was accepted that there were severe short-comings in the International regime regulating the position of a claimant who had suffered damage as a result of the escape of oil from a vessel. As these short-comings were identified the International Community moved to amend the International regime to alleviate the problem. Examples of this, as we have discussed, are the following:

- i. The recognition of the increase in the extent of the damages caused by oil pollution damage and the subsequent increase in the amount to which the ship-owner is entitled to limit his liability;
- ii. The recognition of the need to extend the scope of the International provisions relating to civil liability to other vessels, excluding tankers, which carried oil in bulk as cargo;
- iii. The increasing awareness of the environment and the need to protect it from pollution damage;
- iv. The recognition of the need to provide compensation for the so called pure threat situation.

Unfortunately, as has been discussed, South African Law on civil liability for oil pollution damage has not developed in pace with the International law. As we have seen, South African statutory law on civil liability for oil pollution damage is regulated by Pacoposo and as is evident from the analysis of Pacoposo there are many problems with the Act. The most important problems with the Act are the following:

- i. The amount to which the ship-owner is entitled to limit his liability is minimal compared to the costs of the damage that result from an incident
- ii. The definition of what constitutes a discharge limits the applicability of the Act
- iii. The definition of a tanker limits the scope of the Act
- iv. The Act does not provide for proceeding against anyone other than the owner, ie the demise charterer
- v. The Act is not specific as to the exact heads of damage which are recoverable from the owner
- vi. The Act is ambiguous as to the prescription period for a continuing discharge
- vii. The scope of application of application of the Act is limited to damage that occurs within 12 nautical miles from the low-water mark. It does not take into consideration that South Africa has enforceable rights up to 200 nautical miles from the low-water mark.
- vii. As has been discussed, if the claimant was able to prove the requirements for Aquilian liability, he would be in a more advantageous position to pursue the ship-owner or charterer at common law than under Pacoposo as the ship-owner or charterer would not be entitled to limit his liability. This defeats the whole object of having introduced Pacoposo.

The majority of these short-comings in South African law stem firstly from the legislators not introducing the complete text of the "CLC" and secondly from the problem of South Africa not keeping pace with the developments in international law. As is evident from the paper there is an urgent need to rectify these short-comings in South African law. One hopes that the legislators will not wait until South Africa suffers its own "EXXON VALDEZ" before they introduce the changes that the law so urgently requires.

The starting point to alleviate the short-comings in South African municipal law relating to civil liability for oil pollution damage is to introduce the limitation provisions allowed under the "Fund Convention" into Pacoposo. Although South Africa is not a party to the Convention, it is submitted that the limitation amounts allowed in terms of the convention are reflective of the modern trend to allow a higher limitation fund. As South Africa has ratified the 1984 Protocol to the "CLC", she should adopt the limitation provisions contained in the Protocol as soon as the Protocol enters into force.

The second area that requires amendment is the definition of a tanker. There is no reason why the provisions of Pacoposo should not apply to all tankers whether they are flagged in a contracting state of the "CLC" or not. The requirement that every vessel, carrying more than 2 000 tons of oil, requires a certificate of insurance will not, as it is now, be meaningless in respect of these tankers.

The next area that requires amendment is the heads of damages recoverable from the ship-owner. The Act should be specific as to what damages are recoverable. To have to rely upon policy considerations to fall under a head of damage is fraught with problems. Further the question of locus standi presents a problem to a claimant in South African law where the right to bring a public action is not recognised. It is submitted that in this regard the legislature should adopt the provisions of the U.S. FOPA, which specifies the exact nature of damages recoverable from the ship-owner.

Pacoposoa should also recognise a right of action against the charterer. As has been discussed the demise charterer is in de facto control and possession of the vessel and to require the claimant to proceed against the owner only limits the claimant's prospects of success.

Attention should also be given to extending the scope of application of the Act. If there is pollution damage within the Exclusive Fishing Zone that effects the rights of any individual then the provisions of Pacoposoa should apply to that damage.

If these changes are implemented to Pacoposoa then South African law on civil liability for oil pollution damage will be in accordance with international law and more importantly, an individual in South Africa suffering oil pollution damage will be in a better position to recover the full extent of his losses.

Further by introducing a higher limit to which the ship-owner may limit his liability the ship-owner and the cargo-owner bear more of the costs related to damage resulting from oil pollution damage. This, by making the owner pay, will hopefully make him more careful in his transportation of oil and thus help prevent the spilling of oil off the South African coast.