



THE EXTENT TO WHICH LAWS AND REGULATIONS ON ENVIRONMENTAL LIABILITY PROTECT THE ENVIRONMENT AND COMPENSATE THE VICTIMS OF OIL POLLUTION

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Abstract

This article provides an examination and analysis of the laws and regulations on environmental liability, in light of the growing global concern of oil pollution of the marine environment. It considers several fundamental legal provisions that have attempted to protect the environment and compensate the victims of oil pollution and assesses the extent to which these provisions have achieved these aims. A recent high profile incident has reinstated the issue as a worldwide public concern and provides context for this article.

Keywords: oil pollution, liability, environmental liability, international conventions, EU waste law

Introduction

Oil pollution has once again had devastating effects as a result of the BP Deepwater Horizon incident, which attracted worldwide media attention and raised concerns regarding marine pollution. As a result, the laws relating to environmental protection from oil pollution and laws regulating the compensation and liability elements involved have been revisited for debate. This article will examine this topical and interesting area of law.

It has been asserted by Young that:

The ocean has absorbed and biodegraded significantly more oil than the world's population to date has discharged, allowing time for the [legal] regime to learn how to become more effective.²

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However, this should not be seen as a justification for allowing legal regimes, adopted in relation to oil pollution of the marine environment, to operate at the slow pace that they so often do. Others are not so optimistic about the ocean's continuing ability to rectify man's mistakes, as 'the ongoing increase in world oil consumption implies a limit even to the ocean's absorptive abilities.'³

A number of oil spills, primarily as a result of tanker incidents, initially instigated a reaction from those concerned about the environment and subsequently the law reacted accordingly. It has therefore been suggested that 'the evolution of the oil pollution regime could be characterised as reactive rather than anticipatory.'⁴ Taking legislative action as a response to an oil disaster only secures protection for future incidents. Although this is beneficial to the environment and those using it in the future, it demonstrates a weakness in the law's ability to take preventative action and potentially avoid considerable levels of damage to the marine environment. It is therefore evident that 'prevention rather than response after the event is the most appropriate response.'⁵ The *Torrey Canyon* disaster in 1967, which is considered Britain's worst and most damaging oil spill, has been claimed to provide proof that 'big oil spills plague ecosystems for decades.'⁶ Commentators have also claimed that:

The cost of putting right such extensive environmental damage is huge, and...the company that was responsible for the *Torrey Canyon* should be paying for it under the polluter-pays principle but the international laws weren't in place back then.⁷

The 'polluter pays' principle aims to ensure that 'the costs of dealing with pollution are not borne by the public authorities but are directed to the polluter.'⁸ The principle is reflected in many of the objectives of the legislation enacted to deal with attributing liability for remediation and clean up costs.

The *Torrey Canyon* disaster demonstrated the scale of the problem in relation to oil pollution and therefore arguably had very beneficial consequences. Until this point,

² Young, O.R., *The Effectiveness of International Environment Regimes*, (1999), p.86.

³ Terrier, V., 'Are "black tides" inevitable?' (2001) 6 (2) *Coventry Law Journal*, p.38.

⁴ Louka, E., *International Environmental Law – Fairness, Effectiveness, and World Order*, (2006, 1st Edition), p.451.

⁵ Kemp, D.D., *Exploring Environmental Issues an Integrated Approach*, (2004, 1st Edition), p.199.

⁶ Roussel, R. of Guernsey's public services department, from Barkham, P., 'Oil Spills: Legacy of the Torrey Canyon', *Guardian.co.uk*, 24 June 2010:

<http://www.guardian.co.uk/environment/2010/jun/24/torrey-canyon-oil-spill-deepwater-bp>

⁷ *Ibid.*

⁸ Birnie, P., Boyle, A., Redgwell, C., *International Law & the Environment*, (2009, 3rd Edition), p.432.

pollution control was a seemingly minor concern but this incident raised awareness and ultimately resulted in an international response and the creation of international maritime regulations on pollution of the sea. In particular it was realised that there was no scheme in place to properly compensate those who had suffered as a result of this incident. It was also recognised that improving protection of the environment and the sea poses diverse challenges for the law, as marine pollution does not recognise national boundaries.⁹ The transboundary nature of the oil and shipping industry requires an international response whereby laws and principles apply extra-territorially. This means that ‘internationally agreed and universally applied standards [are] an absolute prerequisite.’¹⁰

It was therefore proposed that there be a permanent international body to promote safety in the maritime industry more effectively. This proposal was confirmed with the establishment of the Inter-Governmental Maritime Consultative Organisation, which was later renamed the International Maritime Organisation (IMO) in 1982. As a result of a huge growth in the amount of oil transported by sea in the 1960s, the concern of oil pollution emerged, requiring attention from the IMO. They therefore set about introducing a number of measures to tackle the problem of oil pollution. This article will examine those measures and consider both their effectiveness in minimising damage following an incident as well as their ability to provide sufficient compensation to both those who have suffered damage and the environment.

1 An International Problem – an International Legislative Response

The international law relating to marine pollution is contained primarily in a number of Conventions, made under the auspices of the IMO, which are the basis of most maritime law. The development of these international instruments – in response to the concern of oil pollution in the 1960s – began with the IMO’s introduction of the International Convention for the Prevention of Pollution from Ships in 1973, known as the MARPOL Convention. This is the main Convention governing the prevention of pollution of the marine environment by ships from operational or accidental causes. Following an initially slow rate of ratification, the IMO removed some of the complex and costly requirements of the 1973 Convention meaning that the only part of MARPOL needing immediate ratification was the part dealing with oil in Annex I. It is

⁹ McEldowney, J., McEldowney, S., *Environmental Law*, (2010, 1st Edition), p.298.

¹⁰ De La Rue, C., Anderson, C.B., *Shipping and the Environment*, (2009, 2nd Edition), p.vii (foreword).

significant that the area deemed most important and thus still needing immediate ratification was the part dealing with oil. This was an important step in setting the problem of oil pollution at an internationally recognised level of severity and one that has not been ignored or softened by legislation.

The *Exxon Valdez* oil spill in 1989 led to demands for additional legislative action to support preventative oil pollution measures. This was specifically aimed at introducing double-hulled tankers to replace all single-hulled tankers as a means to lessen pollution potential. It has been estimated that 'if the *Exxon Valdez* had had a double-hull structure, the amount of the spill would have been reduced by more than half.'¹¹ Further amendments were adopted in 2001, following the sinking of the *Erika*, bringing in a new global timetable for accelerating the phase-out of single-hulled oil tankers. However, the IMO subsequently revised the phase-in timetable after the sinking of the single-hulled tanker *Prestige* in 2002. This incident provided further acknowledgment of the need to speed up the phase-out time limits and consequently resulted in additional amendments to Annex I of MARPOL in 2003. These amendments brought the final phasing-out date for single-hulled tankers forward from 2015 to 2010. Although the changes to the time limits reflect the European Union's (EU) recognition of a need to speed up the introduction of the important preventative measures, they also seem insufficient when compared to the legislative response by the United States (US). Following the *Exxon Valdez* accident, 'the US became the first to ban all single-hulled oil tankers from its ports without waiting for agreement by IMO.'¹² This contrast questions the ability of international conventions to legislate effectively and ensure enforcement of such important measures. Arguably a stricter initial approach, as demonstrated by the US, is more effective in preventing pollution from oil spills, negating the responsive approach of learning lessons from subsequent disasters.

In general, the changes introduced by the MARPOL Convention 'have made some contribution towards reducing deliberate pollution from ships.'¹³ Independent estimates made between 1960 and 1990 confirm a consensus that 'international oil pollution decreased over time, especially after MARPOL's signature in 1973.'¹⁴ It is fair to say that the new equipment requirements introduced by MARPOL have been complied with to a high degree and the 'reduced discharges when such equipment

¹¹ Exxon Valdez Oil Spill Trustee Council: <http://www.evostc.state.ak.us/facts/prevention.cfm>

¹² Birnie et al., *International Law & the Environment*, p.414.

¹³ Churchill et al., *The Law of the Sea*, p.341.

¹⁴ Young, *Effectiveness of International Environment Regimes*, p.48.

was used also suggest that total oil inputs declined.¹⁵ An impartial expert study also concluded that MARPOL 'regulations have resulted in a major reduction of international pollution.'¹⁶

It is therefore possible to conclude that international Conventions have contributed towards improved safety and operation in the shipping industry, which in turn has helped to reduce accidents that can to some extent be prevented. However, it is suggested that the law in this area moves at a slow pace and the IMO is 'not known for its lightning speed of reaction and response.'¹⁷ It is therefore very important to both consider alternative and more stringent preventative measures, as well as ensuring an effective legislative structure is in place to deal with the consequences of such disasters when they do happen.

2 Liability and Compensation – an International Approach

Despite more stringent regulations on the shipping industry, aimed at reducing oil pollution of the marine environment, there will always be a need to have a legal structure in place that determines what happens in the aftermath of an oil spill. Churchill has noted that the very existence of liability schemes favouring the victims of pollution damage may well encourage shipowners to take more care in observing the standards which are designed to prevent pollution.¹⁸ If this is the case then responsive legislation can be said to contribute towards the primary aim of international law relating to marine pollution, which is prevention.

Dealing with the consequences of oil pollution damage is a difficult and expensive process, which is why two extremely important international agreements were adopted in 1969 and 1971 to deal with liability and compensation in this field. The International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC) and the International Fund for Compensation for Oil Pollution Damage 1971 (FUND) – both amended by Protocol in 1992 – were introduced in an attempt to remedy the inadequate provisions available 'to enable Governments, and others affected by oil pollution damage, to recover the considerable expenditure involved in preventative

¹⁵ *Ibid.*, p.49.

¹⁶ Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, (1990), p.21.

¹⁷ Girling, R., *Sea Change, Britain's Coastal Catastrophe*, (2007), p.245.

¹⁸ Churchill et al., *The Law of the Sea*, p.358.

measures and cleaning-up operations.¹⁹ Beforehand, there had often been problems in identifying who should be responsible for any damage caused, difficulties in proving fault on the part of the shipowner, a reluctance of courts to assume jurisdiction in some cases, and difficulties with enforcement. Furthermore, the compensation awarded frequently exceeded the financial resources of the shipowner. The adoption of the two new Conventions attempted to overcome the difficulties faced by the victims of oil pollution. In turn, although an anthropocentric approach, the environment would receive an ancillary benefit from the introduction of these conventions, as it would be easier for victims and governments to receive compensation, enabling them to address any environmental issues resulting from oil spills and to regenerate the affected area.

The two Conventions are very similar in structure and although they do not cover all types of claims for oil pollution, they do apply to most spills from tankers that carry cargoes of oil. Both Conventions provide for strict liability up to a maximum limit and require ships to be issued with certificates attesting that adequate insurance is in place to meet the owner's liabilities under the Convention.²⁰ The two Conventions work in conjunction with each other to provide a more extensive and higher level of compensation for victims of oil pollution damage, ensuring additional compensation in major cases involving substantial costs. The CLC entered into force in 1975 and governs the liability of shipowners for oil spills from tankers. The 1976 Protocol, which came into force in 1981, provided for the expression of liability to be in terms of Special Drawing Rights (SDRs), which were then calculated by reference to the tonnage of the ship. A further Protocol in 1984 increased the limits of liability and 'improved scope and enhanced compensation',²¹ but by 1992 this had still not entered into force and was then superseded by the 1992 Protocol, which came into force in May 1996. The 1992 Protocol recognised 'the need to ensure the entry into force of the content of the 1984 Protocol as soon as possible'²² and, as a result, changed the entry into force requirements from six to only four tanker-owning countries.

Although the CLC represented a progressive step in the recognition of the importance of oil as a pollutant in the marine environment, it was also understood

¹⁹ London Department of Trade, '*Liability and Compensation for Marine Oil Pollution Damage*', (1979), p.2.

²⁰ De La Rue et al., *Shipping and the Environment*, p.3.

²¹ Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, (1969), preamble.

²² *Ibid.*

that further provision would be necessary to cover instances where insufficient compensation was available under it. The CLC was seen as providing a basic level of compensation that attributed costs to the shipowner as the carrier of the oil. To add a second layer to the available compensation scheme the FUND Convention was adopted in 1971. This established the International Oil Pollution Compensation Fund (IOPC Fund), which effectively allows for top-up funding when the limited liability of a shipowner is inadequate to cover the costs of damage and compensation. This second tier of compensation was to be payable by the owners of the oil itself. This is an important concept in relation to the increasingly adopted 'polluter pays' principle. This joint contribution and liability placed upon both the shipowner and the oil companies mirrors the expectation of society that those responsible for pollution of the environment pay for the damage they have caused. In this respect, the legislation is satisfactory and seems reasonable.

The 1971 FUND Convention was replaced by the 1992 FUND Convention. When a state becomes party to the 1992 FUND Convention they become a member of the IOPC Fund, which is financed by:

Contributions levied on any person who has received in a calendar year more than 150,000 tonnes of crude oil or heavy fuel oil after sea transport in a 1992 Fund Member State.²³

Following the *Erika* sinking it was clear that limitation amounts were too restrictive; as a result, in October 2000 the Legal Committee of the IMO adopted two Resolutions increasing the compensation limits of the CLC and FUND Convention by 50 per cent. These amendments increased the maximum amount payable by the 1992 Fund to 203 million SDR 'for any one incident occurring on or after 1 November 2003, including the sum actually paid by the shipowner or his insurer.'²⁴ This increase in compensation inevitably meant greater financial contributions by those responsible for any damage caused. This continued recognition of a need to increase the amounts available for victims is a reflection of the importance of this legislation.

Comparing the original international regime before the introduction of the IOPC Fund to the position following its entry into force demonstrates the improved effectiveness and ability of the international regime to meet the primary objectives of the 1992 Conventions. The Conventions aimed to:

²³ International Oil Pollution Compensation Funds, 'Liability and Compensation for Oil Pollution Damage: Texts of the 1992 Conventions and the Supplementary Fund Protocol', p.3: <http://sp.iopcfund.org/npdf/Conventions%20English.pdf>.

²⁴ *Ibid.*

Provide compensation to claimants as quickly as possible and without the necessity for claimants to go to court, and to do this in an internationally uniform manner, treating all claimants under the system equally, irrespective of where the damage occurred.²⁵

The comparison is well demonstrated when contrasting the *Amoco Cadiz* case, which occurred before the introduction of the IOPC Fund, and the *Tanio* case, which occurred after. At the time of the *Amoco Cadiz* disaster, France had not yet ratified the 1971 Convention establishing the IOPC Fund, meaning that compensation was limited to the ceiling imposed by the CLC. The amount of compensation available from the limitation fund under the CLC was extremely low and only covered one tenth of the amount claimed. The pollution victims therefore sought an alternative legal course, which resulted in thirteen years of complex litigation and concluded with only one tenth of the amount claimed being awarded. This was a clear demonstration of the limits of the existing legal regime. Arguably, the international community reacted positively to the *Amoco Cadiz* disaster and to the problems associated with the limitations imposed by the CLC, and 'found a solution reasonably well adapted to pollution disasters of this magnitude.'²⁶ This was demonstrated in the *Tanio* case where nearly 70 per cent. of the amount claimed was awarded within three to five years of the incident.²⁷ On 7 March 1980, two years after the *Amoco Cadiz* spill, the oil tanker *Tanio* spilled more than 13,500 tons of oil into the sea. Although the amount of oil spilled was far less than the *Amoco Cadiz* spill, the clean up costs were almost the same. Unlike the *Amoco* case, the victims of the *Tanio* disaster were compensated 'discretely and adequately, within the framework of a well adapted compensation scheme.'²⁸ This suggests that the FUND Convention fulfilled its purpose in filling the gaps left by the CLC and provided additional compensation in cases where the costs were substantial.

In May 2003, further increases to the limitation amounts were seen with a Protocol to the FUND Convention, which provided a third tier of compensation by establishing the International Oil Pollution Compensation Supplementary Fund. This is financed by levies imposed on oil receivers in states which are parties to the Protocol.

²⁵ Oosterveen, W., 'Some recent developments regarding liability for damage resulting from oil pollution – from the perspective of an EU member state' (2004) 6 (4) *Environmental Law Review*, p.224.

²⁶ De La Rue, C., *Liability for Damage to the Marine Environment*, (1993, 1st Edition), p.102.

²⁷ Brunnee, J., 'Of sense and sensibility: reflections on international liability regimes as tools for environmental protection', (2004) 53(2) *International & Comparative Law Quarterly*, p.366, FN98.

²⁸ De La Rue, *Liability for Damage to the Marine Environment*, p.102.

Membership of the Supplementary Fund is optional and is open to any state that is a member of the 1992 Fund. Together with the existing IOPC Fund it makes it possible to cover up to 750 million SDR in respect of any one incident. Although this is not available to cover disasters which have taken place in the past, such as the *Erika*, it is an important step in attempting to change the way future incidents are dealt with and, more importantly, the potential to act in some ways as a measure with sufficient deterrent qualities to limit the occurrence of incidents causing extensive damage. This increase in available compensation is also beneficial in terms of increasing out of court settlements, thereby enabling quicker resolutions. This is an advantage to small claimants who are often unable to bear the financial burden of pursuing litigation. However, notwithstanding the clear improvements to the system, it remains inadequate in some respects, particularly in relation to situations where innocent victims are unable to claim as a result of their damage or loss suffered falling outside the scope of the conventions.

Although continued increases on the limitation ceiling for liability is a positive step in relation to oil pollution, it is arguably still not enough to offer preventative protection of the marine environment. It has been advocated that 'liability regimes can serve an incentive function only when the likelihood that responsible parties will actually pay for damages is sufficiently high.'²⁹ At first glance, the extension of the scope of the CLC and FUND Conventions in terms of maximum compensation amounts, as well as the introduction of the Supplementary Fund, seems to suggest that responsible parties will be made to pay for the damages that they have caused. It also suggests that the financial burden would be sufficiently high. However, Brunnee questions this, stating:

Other commentators have pointed out that the liability limitations in most international regimes may actually have the reverse effects, removing incentives to take stricter prevention measures.³⁰

If this is the case then it is an important issue for consideration at an international level to ensure that the financial implications for polluters are significant enough to act as both an incentive and a deterrent. If international law is unable to provide a sufficient regime to ensure enforcement of the 'polluter pays' principle, then it is inevitable that other legal regimes will aim to cover the costs that are not compensated for by the international compensation funds.

²⁹ Brunnee, 'Of sense and sensibility', p.366.

³⁰ *Ibid.*

3 Liability - A Different Perspective

A decision of the European Court of Justice (ECJ), following the *Erika* disaster, has examined the issue of liability for oil pollution of the marine environment from a different perspective. The case of *Commune de Mesquer v Total France SA and Total International Ltd*³¹ considered liability from the perspective of EU waste law and has 'potentially far-reaching effects.'³² This means that liability for clean up costs may be incurred not only by the shipowner but also by 'other parties under legislation which treats the spilt oil as waste and imposes obligations on them to pay for the cost of its disposal.'³³ This case also brought into question the ability of the CLC and FUND Conventions to provide full compensation for the cost of clean-up operations, and highlighted a need for legislative change at both an international and a European level.

The case was a preliminary reference from the French *Cour De Cassation*, in relation to the sinking of the oil tanker *Erika*. The Italian company ENEL concluded a contract with Total International Ltd to deliver 30,000 tonnes of heavy fuel oil to be used for energy production. Total International Ltd chartered the oil tanker *Erika*, flying the Maltese flag, to transport the fuel oil from Dunkirk to Milazzo. The *Erika* later sank, spilling her cargo and bunker oil into the sea and polluting the French coastline. Following the incident, compensation was sought by multiple claimants for the cost of clean-up operations and other preventative pollution measures. By 24 September 2008 '7,130 claims for compensation had been submitted for a total of €211m.'³⁴ These claims exceeded the financial limit of the international compensation regime under the CLC and FUND Conventions. 'In these circumstances the municipality of Mesquer...brought a claim independently of the international regime',³⁵ instigating proceedings against Total International Ltd and Total France SA for 'reimbursement of the cost of cleaning and anti-pollution operations on its coastal territory, relying on the Waste Directive.'³⁶

The first Framework Directive on Waste (Directive 75/442)³⁷ was adopted in 1975 to

³¹ Case C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd* [2008] ECR I-4501.

³² Lowther, J., 'Oil shipments, pollution and EC waste law liabilities', (2008) 55 *Student Law Review*, p.29.

³³ De La Rue et al., *Shipping and the Environment*, p.623.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Editor, 'Case comment: ECJ rules on responsibility for cost of cleaning up after oil tanker wreck' (2008) 237/238 *EU Focus*, p.23.

³⁷ Directive 75/442/EEC, Waste Framework Directive [1975] OJ L194/39.

formalise and harmonise measures within member states. This Directive has since been amended by Council Directive 91/156/EEC³⁸ of 18 March 1991 and more recently codified in Directive 2006/12/EC.³⁹ For the purposes of the *Erika* case, decisions were determined by reference to the date of the incident itself, and therefore on the pre-consolidated position before 2006. The essential objective of Directive 75/442 'should be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste.'⁴⁰ This would suggest that the marine environment should be protected against the harmful effects of spilled oil, dependent on the question of whether 'hydrocarbons accidentally spilled at sea constituted "waste" within the meaning of the Directive.'⁴¹ If considered 'waste', then Total International Ltd and Total France SA should be liable for the costs involved in disposal of the waste oil, in their capacity as 'previous holders' or 'producer of the product from which the waste came' under Article 15 (b) of the Directive.⁴² Directive 75/442 defines 'waste' in Article 1.1(a) as meaning 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.'⁴³

Annex I provides lists of substances and objects that may be classified as 'waste' and this list includes 'materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap.'⁴⁴ This would suggest that oil spilled and contaminated as a result of a shipwreck would constitute waste for the purposes of Directive 75/442. However, the lists are only intended as guidance, meaning that the category of waste referred to in point Q4 'merely indicates that such materials may fall within the scope of waste'⁴⁵ – dependent on the circumstances of the situation, the holder's actions, and the meaning of the term 'discard'.

These issues were put to the ECJ, the referring French court presenting them with three questions. First, the referring court asked whether heavy fuel oil, as the product of a refining process, could be classified as waste within the meaning of Article 1(a) of Directive 75/442. The Total companies argued that the heavy fuel oil was not 'waste' as it was going to be used for a specific purpose. The second question asked

³⁸ Directive 91/156/EEC [1991] OJ L 78/32.

³⁹ Directive 2006/12/EC [2006] OJ L 114/9.

⁴⁰ Recital (2) of the preamble to Directive 2006/12/EC [2006] OJ L 114/9.

⁴¹ Editor, 'Case comment', p.23.

⁴² Directive 2006/12/EC [2006] OJ L 114/9, Article 15.

⁴³ *Ibid.*, Article 1.1(a).

⁴⁴ *Ibid.*, Annex I Q4.

⁴⁵ *Commune de Mesquer*, para.54.

was whether the fuel oil being transported, once spilled as a result of a shipwreck, could be considered 'waste' either in itself or when mixed with water and sediment. The final question related to identification of the 'polluter'. The referring court asked whether, if the first question was answered in the negative and the second in the affirmative, the producer of the heavy fuel oil and/or the seller of that oil and charterer of the ship can be responsible for the costs of disposing of the waste, even though at the time of the accident (which transformed the oil into waste) it was being transported by a third party.

On 24 June 2008 the ECJ delivered its judgment on the case and the questions put forward. In relation to the first question, they held that the fuel oil itself did not constitute 'waste' within the meaning of Directive 75/442. The ECJ had previously adopted a very wide definition of 'waste' and this included products or materials occurring as a result of a production process for a different primary object. In the case of *Palin Granit*,⁴⁶ the ECJ concluded that leftover stone from quarrying was not the product primarily sought by the operator of the granite quarry for subsequent use and could more properly be described as 'production residue' and was therefore 'waste'. However, in addition to the criterion of whether a substance constitutes a production residue, it must be determined whether or not that substance is likely to be reused, and if this can happen without further processing. If the product can be reused and:

There is also a financial advantage to the holder in so doing, the likelihood of reuse is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to "discard", but as a genuine product.⁴⁷

Where this is the case, a 'production residue' will not be classed as 'waste' meaning that although the fuel oil in question was a 'production residue' from the process of oil refining, it was held not to be waste due to the fact that it was able to be 'exploited or marketed on economically advantageous terms and [was] capable of actually being used as a fuel without requiring prior processing.'⁴⁸

In response to the second question, the ECJ held that hydrocarbons accidentally spilled at sea, mixed with water and sediment and drifting along the coast of a member state until being washed up on that coast, fitted within the category provided

⁴⁶ C-9/00, *Palin Granit Oy v Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533.

⁴⁷ *Palin Granit Oy*, para.37.

⁴⁸ *Commune de Mesquer*, para.1.

for in Annex I, therefore constituting 'waste' for the purposes of Directive 75/442. As identified in previous cases before the ECJ, 'the scope of the term waste turns on the meaning of the term discard',⁴⁹ thus requiring that the ECJ examine whether accidental spillage of hydrocarbons could constitute 'an act by which the holder discards them within the meaning of Article 1(a) of Directive 75/442'.⁵⁰ It has been established that the verb 'to discard' cannot be interpreted restrictively and must be interpreted in light of the aims of the directive.⁵¹ In relation to situations where the substance or object is considered 'product residue', the directive requires that they must no longer be capable of being exploited or marketed without prior processing. It was therefore concluded that the spilled oil, mixed with water and sediment would no longer be a product of value or use in its current state and would therefore require prior processing for reuse, following a previous ruling by the ECJ in *Van de Walle*.⁵²

In that case, the ECJ held that hydrocarbons which had been unintentionally spilled from leaking underground tanks at a petrol station, causing contamination of soil and groundwater, were considered 'waste' as they could no longer be reused without prior processing. Consequently the spilled oil, mixed with water and sediment, would equally be considered 'waste', as well as a burden which the holder 'discards'. The ability to exploit or market hydrocarbons that have mixed with other materials remains an unknown possibility. As such, in *Commune de Mesquer* it was stated that:

Even assuming that it is technically possible, such exploiting or marketing would in any event imply prior processing operations which, far from being economically advantageous for the holder of the substance, would in fact be a significant financial burden.⁵³

Based upon this conclusion, the 'holder' of the 'waste' had effectively discarded the oil, albeit involuntarily, thus classifying hydrocarbons spilled at sea as 'waste' within the scope of Directive 75/442.

Since Directive 75/442 was held to be applicable to hydrocarbons spilled at sea, the ECJ, in relation to the final question, was required to identify who could constitute a

⁴⁹ Joined Cases C-418/97 and C 419/97, *ARCO Chemie Nederland Ltd and others* [2000] ECR I-4475, para.36.

⁵⁰ *Commune de Mesquer*, para.44.

⁵¹ '[P]ursuant to Article 174(2) EC, which states that Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken'. C-1/03 *Paul Van de Walle, Daniel Laurent, Thierry Mersch and Texaco Belgium SA* [2004] ECR I-7613, para.45.

⁵² *Ibid.*

⁵³ *Commune de Mesquer*, para.59.

'polluter' liable for the costs of disposing of the 'waste'. The Court aimed to address the purpose of Directive 75/442 by ensuring that those responsible for pollution did not escape liability. The ECJ therefore began by discussing the application of the 'polluter pays' principle in accordance with Article 15 of the Directive, which provides that:

In accordance with the "polluter pays" principle, the cost of disposing of waste must be borne by: (a) the holder [of the waste] and/or (b) the previous holders or the producer of the product from which the waste came.⁵⁴

Article 1(b) of Directive 75/442 defines the 'producer' as follows:

Anyone whose activities produce waste ("original producer") and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste.⁵⁵

Article 1(c) defines a 'holder' as 'the producer of the waste or the natural or legal person who is in possession of it.'⁵⁶ Possession is not defined in Directive 75/442 itself but has received its common meaning, and entails 'simply effective control and does not presuppose any proprietary or other legal rights in the object.'⁵⁷ This was reflected in the ECJ's decision in the case of *Van de Walle*, where the spilled hydrocarbons were in the possession of the petrol station manager at the time that they effectively became 'waste', thus enabling him to be regarded as the 'producer' of the waste. As he had both possessed and produced the waste in question, he also became the 'holder' of that waste.

Following this decision the ECJ concluded that in relation to the *Erika* shipwreck, the national court could regard the owner of the ship as a 'producer' of the waste on account of the fact that:

The owner of the ship carrying...hydrocarbons is in fact in possession of them immediately before they become waste. In those circumstances, the shipowner may thus be regarded as having produced that waste within the meaning of Article 1(b) of Directive 75/442, and on that basis be categorised as a "holder" within the meaning of Article 1(c) of that directive.⁵⁸

However, Directive 75/442 'does not rule out the possibility that, in certain cases, the

⁵⁴ Directive 75/442/EEC, Waste Framework Directive [1975] OJ L194/39, Article 15.

⁵⁵ *Ibid.*, Article 1(b).

⁵⁶ *Ibid.*, Article 1(c).

⁵⁷ Sadeleer, N.D, 'Case Comment - Liability for oil pollution damage versus liability for waste management: the polluter pays principle at the rescue of the victims' (2009), 21(2) *Journal of Environmental Law*, p.304.

⁵⁸ *Commune de Mesquer*, para.74.

cost of disposing of waste is to be borne by one or more previous holders',⁵⁹ as established in *Van de Walle*. In accordance with the case law:

Both Advocate General Kokott and the ECJ reached the conclusion that, even if it was in principle the ship owner who held the waste, the producer of heavy fuel oil as well as the seller and the oil tanker charterer could be held liable for waste disposal costs.⁶⁰

The financial burden is accordingly imposed on those who have contributed to the creation of the 'waste' in some way and this includes contribution to any factors leading to the shipwreck itself and thus leading to the accidental production of 'waste'. It was therefore established that the national court may regard the seller of the hydrocarbons and charterer of the ship carrying them as 'previous holders' if that court found that the seller-charterer 'contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship.'⁶¹

The ECJ also ruled that if full compensation for costs of disposal could not be met under the CLC and the FUND Convention, because the ceiling for compensation for that accident had been reached and liability limitations had been met, then national law should make provision for the costs to be borne by 'the producer of the product from which the waste...came.'⁶² This decision enables correct transposition of Article 15 of Directive 75/442, ensuring that the polluter pays in circumstances where he has 'contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.'⁶³

At the time of the *Erika* disaster, the third tier of the international compensation scheme had not yet come into force. This meant that the continued broad approach taken by the ECJ when interpreting EU waste legislation allowed the objectives of the 'polluter pays' principle to be met, where limitations restricted the ability of the international scheme. The extension of the application of the 'polluter pays' principle in EU waste law to the spilling of oil at sea allowed for costs of spilled oil to be covered where the international rules were not sufficient. The International Conventions dealing with liability and compensation were a more favourable option

⁵⁹ *Ibid.*, para.75.

⁶⁰ Sadeleer, 'Case Comment', p.304.

⁶¹ *Commune de Mesquer*, para.78.

⁶² De La Rue et al., *Shipping and the Environment*, p.624.

⁶³ *Commune de Mesquer*, para.89.

for Total International Ltd and Total France SA. This was as a result of the fact that the CLC imposes liability on the owner of the oil tanker 'which has the effect of paralysing any compensation claims for third parties',⁶⁴ thus limiting liability for those to blame. Even with the intervention of the FUND Convention, liability remains limited to the maximum values available, meaning that the costs of waste disposal may not ultimately be borne by those responsible for the pollution, 'which seems contrary to the logic of the "polluter pays" principle.'⁶⁵ The ECJ was therefore presented with the contradiction, identified by Sadeleer, of 'international rules limiting the liability of oil companies...and Article 15 of the Waste Framework Directive, which does not provide for any limitation on the liability of the waste holder.'⁶⁶ This conflict between EU law and the international liability regimes was dealt with by the ECJ when it noted that:

The Community is not bound by the Liability Convention or the Fund Convention. In the first place, the Community has not acceded to those international instruments and, in the second place, it cannot be regarded as having taken the place of its Member States, if only because not all of them are parties to those conventions.⁶⁷

As such, the EU was not bound by any obligations arising from the international instruments.

In its ruling, the ECJ also made reference to Directive 2004/35⁶⁸ on environmental liability with regard to the prevention and remedying of environmental damage. This directive contains specific provisions to exclude damage that falls within the scope of certain international Conventions.

Article 4(2) states that:

This Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV...which is in force in the Member State concerned.⁶⁹

Both the CLC and FUND Conventions are listed in Annex IV and in relation to maritime oil disasters 'preference was given to international environmental liability arrangements because...their scope is greater as they apply on a worldwide basis

⁶⁴ Sadeleer, 'Case Comment', p.305.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Commune de Mesquer*, para.85.

⁶⁸ Directive 2004/35/EC [2004] OJ L143/56.

⁶⁹ Directive 2004/35/EC [2004] OJ L143/56, Article 4(2).

and legally bind third countries as well as EU Member States.⁷⁰ Recital 10 of Directive 2004/35 explicitly states that account should be taken of those activities where international Conventions are able to regulate 'more comprehensively and more stringently' than the Directive itself.⁷¹ In the *Commune de Mesquer* case, the Belgian and United Kingdom governments did not feel that Directive 75/442 should apply to the circumstances at hand and considered it 'preferable for the accidental spillage of hydrocarbons at sea to be covered exclusively by the Liability Convention and the Fund Convention.'⁷² However, Directive 75/442, in contrast with Directive 2004/35, contains no such limitation of that nature or any similar provision, even in the more recent, codified Directive 2006/12. Consequently, Directive 75/442 was held to be applicable to the spilling of oil and resulting pollution of the marine environment.

This application of EU law, alongside an existing international regime, is an important step in ensuring enforcement of the 'polluter pays' principle. It is also a demonstration of the EU ensuring adherence to obligations set out in Article 288 of the Treaty on the Functioning of the European Union (TFEU) which require that member states 'take all the measures necessary to achieve the result prescribed by a directive';⁷³ in this case, this requires taking all measures necessary to enable the 'protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste.'⁷⁴ This in turn requires that national courts interpret law in light of the purpose of the directive, to comply with their obligations under Article 288 TFEU. This was confirmed in the case of *Marleasing SA v La Comercial Internacional de Alimentacion SA*⁷⁵ and further supported in the case of *Inter-Environnement Wallonie ASBL v Région Wallonne*,⁷⁶ where the ECJ stated that interpretation by the courts must be in accordance with the objectives of the directive 'whether the provisions in question were adopted before or after the directive or derive from international agreements entered into by the Member State.'⁷⁷ This ruling by the ECJ demonstrated the effectiveness of EU law in conjunction with international instruments when attempting to remedy pollution of the environment.

⁷⁰ Editor, 'Legislative comment, Environmental Liability Directive enters into force' (2007) 209 *EU Focus*, p.3.

⁷¹ Recital 10 in the preamble to Directive 2004/35/EC [2004] O.J L143/56

⁷² *Commune de Mesquer* [2008] ECR I-4501, para.52

⁷³ *ibid*, para.83

⁷⁴ Recital (2) of the preamble to Directive 2006/12/EC [2006] OJ L 114/9

⁷⁵ Case C--106/89 [1990] ECR I-4135, para.8

⁷⁶ Case-C-129/96 [1997] ECR I-7411, para.40

⁷⁷ *Commune de Mesquer*, para.84.

The ECJ ruling provides clear support at a European level for the importance of making polluters pay for the environmental costs of their activities, providing sufficient compensation for victims of oil pollution, and protecting the environment by ensuring the clean up and restoration costs of damage to the environment are covered. The ECJ's willingness, purposively, to extend EU waste legislation in both the *Van de Walle* and *Commune de Mesquer* decisions presents a clear message that liability for those responsible for causing pollution cannot be avoided as a result of limitations imposed at an international level. Although it is recognised that the international scheme aims to 'ensure prompt and full compensation for oil pollution damage in an internationally uniform manner',⁷⁸ disasters such as the *Erika* still highlight areas requiring improvement. The *Erika* disaster was therefore responsible for change at both an international level and an EU level by instigating the introduction of the Supplementary Fund and the application of EU waste legislation to oil spilled at sea. Although this perhaps represents a benefit in terms of future disasters, it is still a reflection of a scheme that seems to be responsive in many respects, relying on continued oil disasters to generate any fundamental changes.

Conclusion

It has been suggested that there are parallel arguments supporting environmental liability regimes, in that:

They are seen as a tool for environmental protection, and they are seen as devices to improve the prospects that pollution victims are compensated for damage suffered.⁷⁹

The examination in this article of the laws and regulations on environmental liability in light of oil pollution has considered the extent to which the law is able to both protect the environment and compensate the victims of oil pollution. Numerous oil tanker disasters have consistently exposed the limits of the existing laws and regulations in this area. Highlighting the limitations of the system meant that these issues could be addressed and consequently refined in future legislation by way of amendments to existing legislation and the introduction of new provisions.

Although the reactive approach has been responsible for the increase in compensation limits for victims of oil pollution damage, this was not an immediately

⁷⁸ Oosterveen, 'Some recent developments', p.223.

⁷⁹ Brunnee, 'Of sense and sensibility', p.365.

adequate solution and required continued pollution disasters to instigate a more appropriate increase in the maximum ceiling for compensation available. The continued legislative changes in this area suggest an unsatisfactory situation throughout the history of the international regime. This has meant that limitations have served to render the international legal regime insufficient in providing compensation to a number of victims at the time of the incidents responsible for the loss or damage they have suffered. This has prompted commentators to question: 'what is the use of comprehensive liability if it can be subject to considerable limitations?'⁸⁰ However, it is suggested that both the introduction of the FUND Convention and the Supplementary Fund have increased the original ceiling limits to a level that will enable the law to achieve relative success in the future. This will help the laws and regulations in this field to meet their objectives, which are to provide adequate and prompt compensation to victims.

Gradual amendments to the international regime have meant that the CLC and FUND Convention 'have generally worked well in the large majority of over one hundred incidents resulting in claims to the IOPC Fund. Almost all of these claims have been met promptly and in full without resort to litigation'.⁸¹ This suggests that, aside from the initial slow progress, the International Conventions are now increasingly able to achieve their aims in terms of providing sufficient compensation following an oil spill at sea. However, although this system has significantly improved over time, it cannot substitute or remove the need for litigation in some circumstances, as demonstrated in some of the cases examined in this article. In particular the *Amoco Cadiz* and *Commune de Mesquer* cases illustrate how a system containing limits is sometimes unacceptable. As a result the 'judicial process remains an indispensable safety valve',⁸² enabling the victims of a disaster to combat the inadequacies of an unsatisfactory civil liability scheme. This process helps to stimulate development of the law in this field and ultimately allows victims and the courts to act as a checking system for the international regime, thereby ensuring that it reflects the needs of victims.

The extent to which the laws and regulations considered here protect the environment is a more difficult issue to assess. It is suggested from the research considered that International Conventions regulating the structure and safety of tankers have improved tanker standards, thus acting as a preventative measure in

⁸⁰ Birnie et al., *International Law & the Environment*, p.439.

⁸¹ *Ibid.*, p.438.

⁸² *Ibid.*, p.101.

protecting the environment from unnecessary accidents. MARPOL has been particularly effective in improving the safety of tankers and equipment standards, which has ultimately reduced the amount of oil spilled into the ocean as a result of accidental oil spills. Accidents, however, remain unavoidable and therefore not fully preventable meaning that 'oil pollution remains a problem, but probably a smaller one than experienced previously.'⁸³

Protecting the environment by way of restoration of the environment itself after an oil spill is a more controversial element of the issues explored. The environment does not have any legal standing or rights,⁸⁴ and any remedies awarded for damage are personal remedies for those who suffer damage or loss as a result of pollution damage to the environment. It is therefore a problem that the damages or compensation awarded after an incident do not have to be spent on repairing or restoring the environment. This means that the compensation schemes, although potentially sufficient for victims, cannot necessarily compensate the environment to the same extent. Due to the maximum amounts imposed for compensation in accordance with the CLC, FUND, and Supplementary Fund Conventions, full compensation can never be guaranteed for any one incident. Where this is the case, 'payment of individual claims is not only reduced but delayed until contested claims are resolved, either by negotiation or in court, and governments may have to forego some of the clean-up and environmental-restoration claims.'⁸⁵ This evidently illustrates the problems associated with protection of the environment under a scheme 'intended principally to compensate individuals for property and economic loss.'⁸⁶ Although the environment receives an ancillary benefit from the compensation scheme, it is not considered a primary victim and is consequently at the back of the queue in terms of importance.

Overall the examination of the rules and regulations governing oil pollution of the marine environment has shown both strengths and weaknesses in the international legal regime. Clearly, legal recognition of the issues surrounding pollution in the oil and shipping industries has been a vital step in environmental law and an important confirmation of a growing global concern and understanding of a need to legislate activities with a risk of pollution to protect the natural environment. The weaknesses

⁸³ Young, *Effectiveness of International Environment Regimes*, p.49.

⁸⁴ Stone, C.D., *Should Trees Have Standing?*, (2010, 3rd Edition)

⁸⁵ Birnie et al., *International Law & the Environment*, p.439.

⁸⁶ *Ibid.*

highlighted in this field have been addressed to improve the system and ensure that the same problems will not reoccur. The extent to which the updated legal regime will be able to meet the costs of future large-scale pollution disasters is yet to be seen and ultimately only time will tell. There is a limit to the environment's and the ocean's ability to re-generate itself following pollution. So far the ocean's ability to absorb and biodegrade the oil spilled at sea has meant that the slow pace of the international legal regime has not caused significant harm. This has allowed 'time for the regime to learn how to become more effective.'⁸⁷ However, it remains to be seen just how much the regime has learnt from its mistakes.

⁸⁷ Terrier, 'Are "black tides" inevitable?', p.38.