CIVIL LIABILITY FOR OIL POLLUTION

THE MERCHANT SHIPPING (OIL POLLUTION) ACT 1981
THE PREVENTION OF POLLUTION OF THE SEA (AMENDMENT) ACT 1981

Introduction

THE Merchant Shipping (Oil Pollution) Bill [1] and The Prevention of Pollution of The Sea (Amendment) Bill[2] were introduced in Parliament on 15th June 1981, and were passed as The Merchant Shipping (Oil Pollution) Act[3] (hereinafter referred to as the MSOPA) and The Prevention of Pollution of The Sea (Amendment) Act[4] (hereinafter referred to as the PPSA) respectively. The MSOPA, repealed the Civil Liability (Oil Pollution) Act[5] and was passed to give effect to the International Convention on Civil Liability For Oil Pollution Damage signed in Brussels in 1969. The PPSA amends the Prevention of Pollution of The Sea Act,[6] which was passed in 1971, to give effect to the International Convention For The Prevention Of Pollution Of The Sea By Oil held in London in 1954.

The worldwide maritime carriage of oil in bulk coupled with the widespread effects of pollution caused by oil spills have posed problems which extend beyond national boundaries. As a result, effective measures to curb oil pollution require international co-operation. This has been attempted through the two Conventions mentioned above. Adoption of International Conventions as laws by the Convention countries results in uniform international rules and procedures for determining questions of liability and providing adequate compensation, which are useful in controlling oil pollution. To encourage maritime nations to become signatories and adopt the Convention as law in their countries, the Convention on civil liability for oil pollution contains provisions which are of advantage to the signatories. For example, the limitation of liability for damage caused by oil, discharged from a ship, if without the actual fault or privity of the owner, is only available to ships registered with a Convention country.[7]

Civil Liability For Oil Pollution

The MSOPA imposes civil liability for oil pollution and seeks to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships. The PPSA amends those provisions of The Prevention Of Pollution Of The Sea Act which enable the recovery of cost for removing oil. Neither Act deals with criminal liability for oil pollution, which is dealt with by the Prevention of Pollution of The Sea Act.[8]

1 No. 15 of 1981.
2 No. 16 of 1981.
3 No. 15 of 1981.
4 No. 16 of 1981.
5 No. 43 of 1973.
6 No. 3 of 1971.
7 See Article VII of the Convention or Section II Merchant Shipping (Oil Pollution) Act 1981.
8 See Part II of the Act.

The MSOPA imposes more extensive civil liability for oil pollution than the PPSA. The latter only allows "the appointed authority"[9] to recover the cost of removing oil and the damage caused by the pollution. It makes no provision for claims by individuals, which are covered by the MSOPA. It is also provided[10] that in situations where civil liability for oil pollution is imposed by the MSOPA, the provisions in the PPSA which allow recovery for cost of removing oil shall not apply.

Another difference between the two Acts is that the PPSA covers the discharge of oil and oil mixture from a vessel regardless of whether oil is carried in bulk as a cargo or otherwise; whereas the MSOPA only imposes liability for discharge of oil from a ship "carrying a cargo of oil in bulk."[11] This seems to suggest that discharge of oil from a ship, when it is used for fuel or other purposes is not covered. This is however not entirely correct, for it is provided that once a ship "carrying a cargo of oil in bulk" discharges oil then, it is liable, whether the oil that is discharged is carried "as part of the cargo or otherwise."[12] This is confirmed by the definition of oil in Section 2 of the MSOPA as: "any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether carried on board a ship as cargo or in the bunkers of such a ship." The MSOPA would seem to discriminate between ships carrying oil as cargo and those which do not, in that if the latter discharges oil used for fuel, lubrication or otherwise, it is not liable under the MSOPA; while if the former discharges such oil, it is liable. There is no reason why this discrimination should be made. Although the discharge of oil by tankers and the like is potentially more hazardous and widespread, this is true only where the discharge is of the oil carried in bulk. Where the oil that is discharged is used for fuel or lubrication, the hazard is not more or less than when it is discharged by a ship that does not carry oil in bulk.

Both Acts impose strict liability on a shipowner for oil pollution damage. All that is required, for the owner to be liable is the fact that oil has been discharged from his vessel. There is no need to show that the discharge is a result of the fault or negligence of his employees or agents. There are, however, a number of exceptions from this liability. An owner will not be liable under the MSOPA if he can show that the oil escaped as a result of an act of war, act of God or wilful act of a third party; or negligence of an authority responsible for navigational aids.[13] On the other hand, there is no exception to the civil liability imposed by the Prevention of Pollution of The Sea Act nor the PPSA.[14] Here the liability where applicable is absolute.

The Prevention of Pollution of The Sea Act also imposes civil liability for the discharge of oil "from any place on land."[15] In this

[9] Section 14(1).
[10] The new Section 14(4).
[11] Section 3(1).
[12] Section 3(1), words in parenthesis,
[13] Section 4.
[14] For criminal liability imposed by this Act, there are special defences available; see Section 5 Prevention of Pollution of The Sea Act.
[15] See the new Section 15.

instance, it is the occupier of the land who is liable for the cost of removing the oil that is, the person in control of the source from which the oil is discharged, is the person who is liable. In contrast, where the discharge is from a vessel, it is the owner who is liable.[16] The owner of a vessel may not be in control of the vessel at the time of the discharge, for instance, the vessel may be under charter to another person who exercises control over the master. In such a situation to make the person in control liable would make enforcement difficult. It would be difficult to trace such a person. Furthermore, the compulsory insurance scheme, upon which the successful enforcement of the Act hinges, is most effectvely carried out by imposing the obligation to insure on the owner, instead of the person in control of the vessel.

One point of interest worth noting, is that under the original Section 14 of The Prevention of Pollution of The Sea Act, civil liability was also imposed on the operator, for the discharge of oil "from any apparatus used for transferring oil from or to any vessel." This section, together with the original Section 15 which imposed liability on the occupier for the discharge of oil from any place on land were repealed by the Civil Liability (Oil Pollution) Act.[17] This was because Section 3(1) of the latter Act, was wide enough to cover all these situations, since it applied to the discharge of oil from any ship, "offshore facility" or "onshore facility". This Act itself has now been repealed by the MSOPA; however the MSOPA only imposes liability on a ship carrying oil in bulk. To complement this, the PPSA imposes liability for the discharge of oil from a vessel (not necessarily one carrying oil in bulk) and also from any place on land. However nothing is provided, for the discharge of oil from other facilities such as, "apparatus used for transferring oil from or to any vessel." We are therefore left with the situation where there is criminal liability for the discharge of oil "from apparatus used for transferring oil from or to any vessel",[18] without any provision for statutory civil liability for the discharge.

At this juncture, it might not be impertinent to inquire, whether it was necessary to pass both the PPSA and the MSOPA at the same time, in view of the fact that they covered similar subject matter. Would it not have been more convenient and appropriate for the three clauses in the PPSA (imposing civil liability for discharge of oil or oil mixture) to be included in the MSOPA instead? The Minister of Communications explained[19] that, the three provisions are "more appropriate for inclusion in this Bill (i.e. the Prevention Of Pollution Of The Sea (Amendment) Bill) rather than in the Merchant Shipping (Oil Pollution) Bill which deals only with oil pollution." It is true that the MSOPA deals only with oil pollution, but the three clauses of the PPSA also deal with discharge of oil; true they also cover discharge of "mixture containing oil". This surely can be covered by the MSOPA without abuse to its title as an "Oil Pollution" Act. Furthermore, as explained above, the pre-

[16] Under the new Section 14(1) of The Prevention of Pollution of The Sea Act and Section 3(1) of the Act.
[17] See the Schedule of that Act.
[18] Section 4(c) Prevention of Pollution of The Sea Act.
[19] In the Second Reading of the Prevention of Pollution of The Sea (Amendment) Bill; Singapore Parliamentary Debates Official Report Volume 41, Column 133.

decessor of the three clauses were extracted from the Prevention of Pollution of The Sea Act and then re-enacted (albeit in slightly different form) in the now repealed Civil Liability (Oil Pollution) Act; without any concern, as to the suitability of including them in an "Oil Pollution" Act. There was really no reason for the legislature to re-extract them from the successor to the Civil Liability (Oil Pollution) Act *(i.e.* the MSOPA) and then re-inserted them in the Prevention of Pollution of The Sea Act. To add the three clauses to the MSOPA would mean that the provisions dealing with oil pollution would all be in the same Act; there would then not have been a need to pass the PPSA.

One final comment on the civil liability imposed by the MSOPA is the effect of Section 3(2). This Sub-section imposes a liability on the owner, in circumstances covered by Section 3(1), to damage caused in other Convention countries. This enables individuals in other Convention countries who suffer damage or incur cost in preventing or reducing pollution damage to submit claims against the owner of the vessel, which discharged the oil, in an action in a Singapore court. The *raison d'etre* is probably to prevent multiplicity of actions; such as where there is a big oil spill from a vessel which affects several neighbouring countries, legal proceedings need only be instituted in one country and people who have suffered damage in the other countries may also make claims. However, if no damage occurs in any area in Singapore and no preventive measures are taken within Singapore, then the Singapore court has no jurisdiction to entertain an action for damage or to recover the cost of preventive measures in other Convention countries.[20]

Limitation Of Liability

Under Section 6 of the Act where the owner of a ship incurs a liability, as a result of a discharge or escape of oil, then in instances where the pollution occurs without his actual fault or privity, he is entitled to limit his liability. Under the repealed Civil Liability (Oil Pollution) Act[21] the liability was limited to three hundred and seventy-five dollars for each ton of the ship's tonnage, extending to a maximum of fifty million dollars; under the MSOPA, the liability is limited to 133 special drawing rights[22] for each ton of the ship's tonnage extending to a maximum of 14 million drawing rights.

In relation to the aspect of limitation of liability, the MSOPA also makes provision for the payment into court in satisfaction of that liability a sum called the "limitation fund" for subsequent distribution among claimants in proportion to the amounts that they could legally claim. There are other rules in relation to the operation of the

[20] Section 16.
[21] Section 6.
[22] Section 7. The Special Drawing Right (SDR) is an asset created in the 1960's by the International Monetary Fund, usable for settling of international accounts. Countries participating in the SDR plan would periodically receive some SDRs. A country in deficit could use SDRs to settle its accounts by selling them to a country designated by the Fund. The designated country would be obliged to take SDR's and to provide in return convertible currency, which the country in deficit could then use to extinguish foreign balances. The value of the SDR is stated in terms of number of grams of fine gold. For a fuller discussion see, Joseph Gold's Special Drawing Rights Character Use IMF Pamphlet Series No. 13, 2nd ed.

limitation fund, such as, if before the fund is distributed the owner or any of his servants or agents or any person providing him with insurance has as a result of the incident in question paid compensation for pollution damage, such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have under the Act.[23] This right of subrogation is also available to any other person in respect of any amount of compensation for pollution damage which he may have paid.[24] In addition it is provided that claims in respect of expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimise pollution damage shall rank equally with other claims against the fund.[25]

In practice these two provisions cannot be of much significance. They envisage the owner and others who have incurred liabilities for pollution damage, paying off these liabilities directly to the claimants and then making claims from the limitation fund. However the limitation fund is only constituted of payments by these same people and not from any other source; so it will not be often that they can be recompensated from the fund. The one possible situation is where the owner who incurs a liability without his fault or privity, pays off this liability; and another person who has also incurred a liability in relation to the same incident, but not under the Act, pays into the fund, then the owner is subrogated to the rights of the person compensated by him and may be recompensated from the fund.

Claims from the limitation fund must be made within such time as the court may direct[26] but the court may postpone the distribution of the fund if there are claims that may later be established before a court of any country outside Singapore.[27] Section 8 of the MSOPA provides for the release of property under arrest when the limitation fund has been paid into court.

Common Law Remedies

The discharge of oil into the sea *per se,* does not give rise to any action at common law. However if the discharge of oil into the sea causes damage to property adjoining the sea, on which the oil becomes deposited through the action of wind and waves, there is a liability in tort. This liability according to the judges in *Esso Petroleum Co. Ltd.* v. *Southport Corpn.*[28] rests substantially in negligence or possibly in nuisance,[29] which would be a public rather than a private nuisance.[30] This is because the discharge of a noxious substance in such a way as to be likely to affect the comfort and safety of the public generally is a public nuisance. In such a situation, if any person should suffer greater damage or inconvenience from the oil than the public generally, he can have an action to recover damages.

[23] Section 7(5)(a).
[24] Section 7(5)(b).
[25] Section 7(6).
[26] Section 7(4).
[27] Section 7(7).
[28] [1956] A.C. 218 at p. 242.
[29] In *Esso Petroleum's Case,* [1953] 2 All E.R. 1204 at p. 1208, Devlin J. at first instance held that there might be liability in nuisance though he also regarded negligence as the substantial issue.
[30] *Esso Petroleum Co. Ltd.* v. *Southport Corpn.* [1956] A.C. 218 at p. 242 *per* Lord Radcliffe; *Southport Corpn.* v. *Esso Petroleum Co. Ltd.* [1954] 2 Q.B. 182 at page 196 *per* Denning L.J.

Generally, however no action lies in trespass,[31] because to support an action for trespass to land, the act done by the defendant must be a physical act done by him directly onto the plaintiff's land. This would not be the case when oil is discharged at sea and is carried by the tide onto the land. Here the damage if any is not a direct result of the defendant's act but is consequential. However in *Esso Petroleum's case* Morris, LJ. in the Court of Appeal[32] was of the view that trespass is available if the defendant deliberately uses the current or tide to carry the matter onto the plaintiff's property. This can be reconciled with the other view on the ground that in such a situation the injury is directly the result of the defendant's act. The wind and the waves are merely his agents in this regard.

Are these common law remedies still available to a claimant in view of the imposition of civil liability for oil pollution by the MSOPA and the PPSA? The PPSA and its principal Act, The Prevention of Pollution of The Sea Act clearly have not displaced these common law remedies. They merely enable the authority to recover the cost of measures taken to prevent or reduce damage caused by discharge of oil. They do not provide remedies for individuals who suffer damage.

The MSOPA poses more difficulty; where the MSOPA is not applicable *(i.e.* either where the ship which discharged the oil did not carry oil in bulk or where discharge is from other than a vessel) it is clear that common law remedies are still available. This is confirmed by Section 18 which provides for liability for cost of preventive or abatement measures, for oil pollution damage where Section 3 *(i.e.* the section that imposes civil liability) does not apply. But in the situation covered by the MSOPA *i.e.* where a ship carrying oil in bulk discharges oil, it is not clear whether common law remedies are available against the owner. On the one hand Section 5 provides that in such a situation, whether or not the owner incurs a liability under Section 3, he shall not be liable otherwise than under that section for any damage or cost mentioned therein *i.e.* common law remedies are not available. On the other hand Section 18 states that where oil has been discharged from a ship and any person incurs a liability other than under Section 3 for cost of preventive measures, he shall be liable notwithstanding Section 3 does not apply *i.e.* common law remedies are still available. In this particular situation, the two sections would seem to be in conflict. The Minister of State for Communications in the Second Reading of the Civil Liability (Oil Pollution) Bill,[33] stated with reference to clause 5 of the Bill (which is the forerunner of Section 18 of the MSOPA) that, "In cases where liability is not based on clause 3 (which imposes civil liability for oil pollution in almost similar terms with Section 3 of the MSOPA) but on common law, the Bill gives the right to recover costs of measures taken to prevent oil pollution damage." If that was the intention it is not reflected in either the Civil Liability (Oil Pollution) Act nor the MSOPA. On the other hand, Halsbury's Statutes while commenting on Section 3, of The United Kingdom Merchant Shipping (Oil Pollution)

[31] *Ibid.* at pp. 244 and 242 *per* Lord Tucker and *Southport Corpn.* v. *Esso Petroleum Co. Ltd.* [1954] 2 Q.B. 182, C.A. at p. 1% per Denning L.J.
[32] [1954] 2 Q.B. 182, C.A. at pp. 204, 205.
[33] Republic of Singapore, Parliamentary Debates, Official Report, Volume 32, Column 1188.

Act 1971 [34] (which is in *pari materia* with Section 5 of the MSOPA) stated: "Section 3 restricts the owner's liability for oil pollution damage in circumstances covered by Section 1 (the equivalent of section 3 of the MSOPA) to liability under the Act." It is submitted that in this situation, common law remedies should not be available for the recovery of the items of damage stated in Section 3, otherwise the limitation of liability scheme would be defeated.

It is also provided in Section 5(2) that any servant or agent of the owner shall not be liable for oil pollution damage in circumstances covered by Section 3 of the MSOPA. This is to reinforce the strict liability imposed by the MSOPA on the owner, to the exclusion of other parties including the owner's servants or agents. It is also for enforcement reasons. It would be difficult for claimants and the authority to go about identifying the responsible party for causing pollution. The legislature's intention is, in so far as these people are concerned, the owner of the ship is responsible. If there is any dispute between the owner and the ship-repairing agents or servicing agents, then it is for the ship-owner to take it up separately with his agents.

Compulsory Insurance Scheme

As part of its effort to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the discharge of oil from ships, it is provided[35] that ships, other than Government ships, carrying cargo of more than two thousand tons of oil shall not enter or leave any port in Singapore or the territorial waters of Singapore without having in their possession a certificate of insurance or other financial security, and that ships registered in Singapore must carry a certificate wherever they dock throughout the world. This would ensure that, where damage occurs, the claimant would not be left with an owner who cannot pay for the damage. To reinforce this the MSOPA provides[36] for direct action by a claimant against the insurer. The insurer, however, can raise the defences available to the owners. In addition he can also limit his liability, in the same way as the owner, regardless of whether or not the discharge occurred without the owner's actual fault or privity.

As an additional safeguard, the Port of Singapore Authority is given the power to detain a vessel if it has reasonable cause to believe that oil has been discharged and it has incurred a liability under the MSOPA. The Authority can hold the vessel until security is furnished.[37] Detention of the vessel is only necessary against vessels which do not carry insurance, either in contravention of the MSOPA or because it does not carry a cargo of more than two thousand tons of oil, making the compulsory insurance scheme inapplicable. It should be noted that this power to detain is only available if "the damage only affects the area of Singapore."[38] This limitation is imposed probably because

[34] Halsbury's Statutes of England, Third Edition, Volume 41 p. 1345.
[35] Section 13.
[36] Section 15.
[37] Section 20. In addition the new Section 17 of the Prevention of Pollution of The Sea Act also empowers the Port Master to detain a vessel if he has reasonable cause to believe that oil or mixture containing oil has been discharged and the owner has incurred a liability under the Act.
[38] Section 20(1).

the power to detain is an additional safeguard which the Singapore Legislature has adopted. It is not provided for in the Convention, nor in its enactment in other countries.[39]

Limitation of Actions

It is provided in Section 12 of the MSOPA that an action to enforce a claim under it must be brought "not later than three years after the claim arose nor later than six years after the occurrences … resulting in the discharge...." The claim arises when the cause of action accrued, *i.e.* in this case since it is actionable only on proof of damage, when the damage occurs.[40]

This provision gives the usual alternative period of limitation, between the time when the act giving rise to the action takes place and the time when the damage occurs. The time gap is given to protect the claimant in cases where the damage occurs much later, and there is a long lapse between the polluting incident and the damage.

Looking into the Convention, one finds the article on limitation of actions to have a different effect. Article VIII states:

> "Rights of compensation *under this Convention shall be extinguished* unless an action is brought thereunder within three years from the date when the damage occurred. However, *in no case* shall an action be brought after six years from the date of the incident which caused the damage." (emphasis mine).

The effect of this article seems to be that, an action to claim compensation for liability established under the Convention must be brought within three years from the time the damage occurred. However in no case shall an action be brought after six years from the date of the incident which caused the damage. In other words, under Article VIII, although a claimant can bring an action to recover compensation within three years from the date when the damage occurred, he will be barred if the action is brought after six years from the date of the incident. Therefore under Article VIII, there is in effect only one limitation period *i.e.* three years from the date of damage; the other period provided, *i.e.* six years from the date of the incident, is an overriding maximum period beyond which no action can be brought, even when the action is brought within three years of the damage. The difference between Section 12 of the MSOPA and Article VIII of the Convention can be illustrated by a hypothetical situation. Suppose, oil was discharged from a tanker on 2 January 1975 and damage occurred only on 2 January 1980. If an action to recover the cost of cleaning up the effects of the pollution was commenced on 2 January 1982 this action would not be barred under Section 12 since it is within three years, after the claim arose; but the action would be barred under Article VIII because though within three years after the claim arose, more than six years have elapsed since the discharge of the oil. One wonders whether this difference is a result of inadvertence.

[39] See for example the United Kingdom's Merchant Shipping (Oil Pollution) Act 1971.

[40] For a further discussion, see Clerk & Lindsell on Torts, Fifteenth Edition, Sweet & Maxwell pp. 9-33.

Conclusion

Existing technology is not very effective in controlling oil spills in the open seas. Depending on wind, oceandrifts and tidal currents, an oil slick can spread rather quickly. Furthermore, enforcement of legislative provisions against oil pollution is difficult. When oil has been discharged in the open seas, it is difficult to know or detect which vessel has discharged it. This points to the conclusion that the only really effective way to control oil pollution is through preventive measures. However, oil pollution cannot be completely stopped. When it happens the polluter must be punished to deter him and the victim, adequately compensated. This is where the MSOPA and the PPSA play their part — in ensuring adequate compensation. Enforcement, investigation and establishment of facts still pose a problem; without adequate means to investigate and establish the facts, legislative provisions will be rendered ineffective. The imposition of strict liability on owners of vessels goes some way in relieving the problem of enforcement. International co-operation, through the adoption of the Convention will also go a long way in solving the problem of enforcement.[41]

SOON CHOO HOCK

41. At the time when Singapore acceded to the Convention the major maritime States have already acceded representing 79% of the world's total shipping tonnage. See The Minister of Communication's speech in Parliamentary Debate, Official Report, Volume 41, Column 129.