
THE DOCTRINE OF ABSOLUTE LIABILITY VIS-À-VIS MARINE WATER POLLUTION

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ABSTRACT

International conventions formulated for preventing oil-based pollution in the seas, due to their discharge or escape from ships/tankers has seen considerable coverage over the years. The Civil Liability Convention designed by the International Marine Organisation therefore seeks to impose a strict liability on the shipowners for causing such pollution and also grant them the right to limit their liability, on certain specific grounds. This convention is further supplemented by the Fund for Compensation Convention, which establishes an international fund for the purposes of compensation in case of lack of availability of funds with the liable shipowners. Accordingly, it is suggested in the paper that such strict liability imposed on the shipowners, be replaced with the application of absolute liability, owing to the severe damage and harm that is caused to the marine environment due to such pollution. Moreover, through the means of analogical deduction, it shall be contended as to why the principle of absolute liability is a much more reliable option in such cases, and why should there be a change in the already existing laws governing the liability imposed therein. This shall be backed by providing a brief overview of the effects and changes that are caused in the environment when oil is discharged or escaped from the ships or tankers into the sea and shall be done by reviewing the available literature in this regard, thereby providing the necessary suggestions and conclusions upon the same.

INTRODUCTION

The use of maritime channels for the purpose of transportation, is extremely common and one of the most important transit platforms available. A majority of world's trade, in terms of volume and value, is shipped through the use of seas and handled by the ports established by different countries.¹ Naturally, the constant use of such water channels by ships, cargos, tankers or bunkers, raised the stakes of marine environment pollution caused from the discharge or escape of oil by such shipping vessels even though most marine pollution is originated from land-based sources.² Accordingly, observing the degree and nature of environmental damage that was caused, a number of international legislations, in the form of conventions and treaties were drafted upon, by the UN recognised marine authority, known as the International Maritime Organisation (hereinafter referred to as IMO), which is responsible for the safety and security of shipping as well as taking necessary steps for the purpose of preventing or controlling marine and atmospheric pollution by the ships.³ Subsequently, after the *Torrey-Canyon* oil spill incident, the need for oil-based pollution legislations was recognised, where the Liberian tanker ran aground on the Seven Stones Reef off the coast of southwest England and spilled over 80,000 tons of oil into the ocean⁴ causing an unprecedented environmental damage to the ocean water and sea life. As a result, the International Convention on Civil Liability for Oil Pollution damage (CLC) was enacted by the IMO for imposing legal and financial responsibility, in the form of strict liability upon the vessel owners from whose ships the oil was discharged or escaped. The convention was amended constantly over the years, with a final protocol being enacted in 1992 and was hence replaced with it, subsequently ratified by the different member States of the IMO. In order to further the position and provide support to the ship owners, in case of compensatory claims being risen against them, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, also referred to as the FUND convention, was also enacted. These two international legislations, read along with other oil-based marine pollution conventions such as MARPOL and the International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, therefore, provide the basic international legal framework required for the prevention or control of pollution in the seas or oceans by different sources, including

¹ United Nations Conference on Trade and Development, <https://unctad.org/webflyer/review-maritime-transport-2018>, last visited on November 19th, 2020.

² JingJing XU, *The law and economics of pollution damage arising from carriage of oil by sea*, Vol. 36, MARIT. POL. MGMT., 309, 309-310, 2009.

³ International Maritime Organisation, <https://www.imo.org>, last visited November 19th, 2020.

⁴ JingJing XU, *supra* note 2, at 310.

oil. India, being a member of the IMO, has ratified the CLC and FUND convention under article 253 of its Constitution and adopted the same in the Merchant Shipping Act of 1958, which is positioned as one of the most important legislations governing and regulating maritime affairs. Following the international conventions, this municipal maritime legislation consists of provisions imposing the same form of liability, and simultaneously requires the government to establish a Fund in cases of oil-pollution damage claims being raised against Indian sea vessels.

Therefore, the author through this paper aims to put forward the contention of applying the absolute liability principle instead of strict liability, in cases of such oil-based pollution caused in the marine areas, and highlight the importance of marine environmental conservation and prevention as a reason as to why such change would be better applicable. The paper would be first directed at providing a brief review of the literature available in this regard, throwing light on the different conventions and conferences established and held for the purpose of environmental protection in general and marine environment in particular along with the various municipal laws formulated for the same. The different legal principles and aspects involved shall also be explained and lastly, the arguments and counter-arguments supporting main claim statement shall also be put forward, through the means of analogical deduction and economic analysis of the laws, to a certain extent.

The principle no-fault liability is generally applied in scenarios where an individual may be held liable even without any negligence on his part and irrespective of whether or not he has taken due and reasonable steps to prevent a particular harm or injury from taking place.⁵ Subsequently, the no-fault liability principle has been classified into two types, namely- the principles of strict liability and absolute liability.

STRICT LIABILITY

The principle of strict liability was evolved in the case of *Rylands v. Fletcher*⁶ by Blackburn J. who considered it to be a special branch of tort liability, different from torts of negligence, nuisance etc. It is based on the legal maxim, '*sic utere tuo ut alienum non laedas*' which means the right to use a person's own property without injuring the property of another. He stated that where any person collects, keeps and uses on his/her land anything that may cause mischief due to its escape, then it should be kept at such an individuals own accord. Where such thing escapes and causes damage, then it would be the responsibility of such person to be held

⁵ 7th Edition, SK Kapoor, Law of Torts, 272, Central Law Agency

⁶ (1868) LR 3 HL 330

accountable for the same⁷. Accordingly, the principle of strict liability allows the person from whose property or land the thing likely to cause mischief has escaped, the right to reduce or limit the amount of liability that is imposed on him to make good the losses, on the basis of certain defences. These defences include the Act of God⁸, which maybe defined as any event that occurs, beyond the control of human beings, such as snowstorms, cloudbursts, earthquakes, tornadoes, cyclones etc.,⁹ the defence of Act of third party, which may be availed only when it is proved that the defendant has acted and taken all reasonable care to prevent the harm that was caused due to such third party's actions¹⁰, the defence of plaintiff's consent, based on the legal maxim of '*volenti non fit injuria*'¹¹ where the plaintiff cannot seek remedy from the defendant for any actions to which he has given consent. Lastly, the defence of plaintiff's default where the plaintiff, through his own negligence, causes the harm or injury to any property, and therefore cannot seek redressal from the defendant.¹²

ABSOLUTE LIABILITY

The principle of absolute liability was derived by the Honourable Supreme Court in cases of *MC Mehta v. Union of India*¹³ and *Union Carbide Corporation v. Union of India*¹⁴ wherein the courts observed the need to extend the limit of liability imposed against the defendants in certain situations, on the basis of the severity of their consequences. Accordingly the principle of absolute liability requires the defendant to make good the losses or injury incurred by others, such that none of the defences provided under the strict liability rule, can come into play¹⁵. Irrespective of whether the defendant has taken reasonable care or steps to prevent the damage from happening, yet the degree of damage caused is extensively high and dangerous, and hence no defences can provide a backbone to the defendant from escaping such liability¹⁶ as far as the principle of absolute liability goes. Accordingly for the principle of absolute liability to apply, it should consist of those enterprises who are involved in hazardous or inherently dangerous activities, no defences laid down in the strict liability principle should be applied to

⁷ 4th Edition, B.M. Gandhi, Law of Torts, 345, Eastern Book Company.

⁸ Nugent v. Smith, (1876) 1 CPD 423.

⁹ B.M. Gandhi, *supra* note 7, at 357.

¹⁰ Id. at 358

¹¹ e-lawresources.co.uk, <http://www.e-lawresources.co.uk/Volenti-non-fit-injuria.php>, last visited 20th November, 2020.

¹² B.M. Gandhi, *supra* note 7, at 359.

¹³ 1987 SCR (1) 819

¹⁴ AIR (1989) (1) SCC 674

¹⁵ Bharat Parmar & Ayush Goyal, *Absolute liability: The Rule of Strict Liability in Indian Perspective*, Manupatra, Articles Section, last visited 20th November 2020, 12:40pm, <http://docs.manupatra.in/newsline/articles/Upload/2D83321D-590A-4646-83F6-9D8E84F5AA3C.pdf>

¹⁶ B.M. Gandhi, *supra* note 7

support the defendant and the principle can be imposed in cases of both natural and non-natural use of land¹⁷.

The theories of absolute and strict liability are founded upon the polluter pays principle, when applied in terms of environmental issues and matters. Accordingly the principle implies holding the polluter or the concerned enterprise liable for the pollution caused, and therefore require them to compensate and return the environment to its original state, irrespective of the intent¹⁸.

INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE (CLC):¹⁹

Convention established by the IMO to ensure payment of adequate compensation to those who suffer damage resulting from oil-pollution in marine areas, causing maritime casualties by oil carrying ships. Although the liability imposed on the shipowner for claims raised against them are strict in nature, yet it provides the defendant vessel owners to restrict their liability by proving that any of the exceptions available are in play. Also allows them to cover their liability by undertaking insurance or some financial support, equivalent to the amount of liability that may be raised in one incident²⁰. The original convention has been replaced by the Protocol enacted and adopted in 1992, which brings about considerable changes with regards to the application of the convention. Hence, the convention covers pollution damage but the costs incurred to undertake reasonable measures to reinstate the contaminated environment are limited. Moreover, the vessel owners are also allowed to recover the costs incurred to undertake preventive measures to prevent damage, even in cases where the oil pollution is not caused, but a great and imminent threat is plausible.²¹

INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS (MARPOL)

This international convention was adopted by the IMO in 1973 for the purpose of preventing pollution in marine areas by ships either through operational discharges or accidental means and covers 6 annexes with list of some of the major ship based pollutants including

¹⁷ MC Mehta v. Union of India, *supra* note 13.

¹⁸ Rupin Chopra, *India: Polluter Pays Principle*, Lexology, November 10, 2017, <https://www.lexology.com/library/detail.aspx?g=c832a88c-7f8c-4628-bb96-c3e7d9189b2d>

¹⁹ International Maritime Organisation, *supra* note 3

²⁰ *Ibid*, International Maritime Organisation, convention applied to all bulk cargo vessels but only those ships carrying more than 2,000 tonnes of oil are required to maintain insurance in case of oil-pollution damage.

²¹ *Ibid*, International Maritime Organisation.

oil(Annex1)²², noxious liquid substances, harmful substances in packaged form, sewage, garbage etc.,²³ The term ‘operational’ herein refers to any activity which causes pollution from any pollutant that has been covered in the annexes²⁴, and ‘discharge’ implies the release of that pollutant in the water, irrespective of the mode through which it has been dumped, as mentioned under Article 2(3) of the Convention.²⁵

INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE (FUND):²⁶

The convention works in addition to the CLC, established and adopted on 18th December, 1971. The fund mainly aims at covering the compensation required to be paid by the shipowners to the States and people who suffer pollution damage, where the quantum of compensation paid is not adequate to cover the damage of the pollution or are unable to receive any compensation at all. Although the Fund’s obligations are limited, yet the States suffering damage may even receive compensation falling beyond the shipowner’s liability. In a situation where the vessel owner is unable to compensate or pay for the damage incurred, then the entire liability shall fall on the Fund. In such cases, the obligation or limit to pay the compensation amount by the Fund shall be increased. The obligation of the Fund to pay damages, is concerned mainly with the pollution damage that is caused in the marine environment of the Contracting States to the Fund. The convention is also obligated to provide such States with assistance in case where they are threatened or may possibly be affected by pollution, and would want to take considerable measures to prevent or control such damage.²⁷

CONSTITUTIONAL PROVISIONS AND MUNICIPAL LAWS

CONSTITUTIONAL PROVISIONS

Article 253 of the Indian Constitution lays down the power of the Parliament to enact any treaty, agreement or convention with any other country/countries or bring into effect, any decisions which maybe ratified by it in any international conferences, associations or bodies.

²² International Maritime Organisation, [https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx), last visited- 20th November, 2020

²³ Ibid.

²⁴ Proshanto K. Mukherjee, Through the Lens of Maritime Law: A Worldview, 5, EBC.

²⁵ Ibid.

²⁶ International Maritime Organisation, [https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-\(FUND\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-(FUND).aspx), last visited- 20th November 2020.

²⁷ International Maritime Organisation, *supra* note 26.

This article is read along with the powers provided to the Union government or the Parliament under Entry 14 and 10 of the Union List.²⁸ Moreover, under article 48A²⁹ and 51A(g)³⁰ of the Indian Constitution, the Legislation further has the power to make any laws, or take any steps or measures for preventing pollution and improving the environment. Although these two articles are not justiciable per se, yet the courts in various judgements have highlighted their need and importance, for upholding the need and importance of environmental conservation and restoration³¹.

MERCHANT SHIPPING ACT, 1958

The Merchant Shipping Act of 1958 aims to foster development and regulate the Indian maritime and mercantile affairs in an efficient and effective manner, and emphasise on the need to control the safety, security and other perspectives involved with respect to Marine areas. Part XB and XC of the Act focus on the imposition of civil liability for oil pollution damage³² and the establishment of the International Oil Pollution Compensation fund in cases of oil pollution damage³³ caused by Indian sea vessels or ships³⁴.

THE PUBLIC LIABILITY INSURANCE ACT, 1991

This act provides provisions for the application of public liability insurance with the purpose of providing immediate relief to those who have been affected by any accident caused through the mishandling of hazardous substances. Accordingly, the Act defines the meaning of such substances and what is contained under them³⁵. Moreover, the Act also provides a structure of the liability that is imposed against owners, in cases of no-fault liability principle.³⁶

THE ENVIRONMENTAL PROTECTION ACT, 1986

The Environmental Protection Act, 1986 provides the regulating legislation for the protection and conservation of environment and provides the powers granted to the Central and respective State governments, to formulate laws and provisions for the same. Section 2³⁷ of the Act lays

²⁸ India Const., art. 253

²⁹ India Const., art. 48A, ins. by the Constitution (42nd Amendment) Act, 1976.

³⁰ India Const., art. 51A(g), ins. by the Constitution (42nd Amendment) Act, 1976.

³¹ Sachidananda Pandey v. State of West Bengal & Ors., 1987 AIR 1109.

³² Merchant Shipping Act, 1958, §352 (G), §352 (I), §352 (J), §352 (N), No. 4, Acts of Parliament, 1958 (India).

³³ Ibid, §352 (S), §352 (T), §352 (U), §352 (W)

³⁴ Ratification of the CLC and Fund Compensation convention, and implementation under article 253 of the Constitution.

³⁵ The Public Liability Insurance Act, 1991, §2(a), §2(c), §2(d), No. 6, Acts of Parliament, 1991(India).

³⁶ Ibid, §3.

³⁷ The Environmental Protection Act, 1986, §2(a), §2(b), §2(c), §2(d), §2(e), No. 29, Acts of Parliament, 1986(India).

down the important definitions required to explain the purview of application of the law, and the way matters related to these are to be adjudicated.

EFFECTS OF OIL SPILLS ON THE MARINE ENVIRONMENT

The effects of oil pollution, spilled or discharged from ships, can have lethal effects on the aquatic environment and the marine ecosystem. The manner in which these spills effect the high seas, depends upon a lot of factors, such as the kind and quantum of oil that has been spilt in the sea, the geographical context in which the marine source is positioned and its consequent behaviour to the damage that is caused subsequently to the spill. The biological composition of the water as well the kind of ecosystem that is present within the source may also affect the manner in which the spill effects the water.³⁸ Amongst the different organisms present within the sea and oceans, that are affected by the oil pollution damage, the most vulnerable are the phytoplankton, which are micro-organisms forming the algae within the sea bed and suffer a high rate of mortality.³⁹ When the oil is dispatched into the sea water, it considerably alters the photosynthesis process of these micro-organisms, thereby reducing the level of oxygen in the water and raising the level of carbon dioxide produced. Such increase in carbon dioxide levels may cause 'green house effect' and impliedly escalate the issue of climate change.⁴⁰ Apart from changing the composition of these organisms in terms of reproduction⁴¹, the spill of oil in the water would also impose a significant impact in the food chain followed within the marine system, such that the oil particles shall infuse with the water, and be absorbed by such phytoplankton, further consumed by the fishes and other organisms, causing major alterations in body composition of these organisms, leading to the evolution of certain type of cancers or mutations.⁴² Apart from the direct effect caused to the food chain by such oil-pollution damage, the next category of organisms who suffer indigenously through it are the fishes and seabirds. While the fishes may not react to the damage caused immediately and severely at the time of the pollution, yet the long term effects of the pollution can be seen through the changes in their bodily compositions and their inherent biological processes. The oil particles present within the water may not stick to the fins and bodies of the fish immediately but may effect them

³⁸ *Effects of Oil Pollution on the Marine Environment*, ITOPF, 20th November, 2020, 6:20pm, https://www.itopf.org/fileadmin/data/Documents/TIPS%20TAPS/TIP_13_Effects_of_Oil_Pollution_on_the_Marine_Environment.pdf

³⁹ *Ibid*.

⁴⁰ Paul Stephen Dempsey, *Compliance and Enforcement in International Law: Oil Pollution of the Marine Environment by Ocean Vessels*, 6, Nw. J. Int'l L. & Bus. 459, 467-468, (1984).

⁴¹ ITOPF, *supra* note 38.

⁴² Paul Stephen Dempsey, *supra* note 40.

through ways of ingestion of the toxins present in the oil, or disruption in their respiratory organs and reproductive systems, gradual degradation of the fins and scales etc.,⁴³

Apart from the wild effects of oil-pollution posed on the marine environment and aquatic wildlife, the problems do not end there. The damage caused from oil-pollution also effects other wildlife forms, especially the migratory sea birds, leading to their plausible death.⁴⁴ The shiny layer of oil on the sea water may attract such birds, causing the layer of oil to stick on their feathers, thereby affecting their strengths to fly and keep themselves warm. In an effort to clean themselves, the oil may move on to other body parts of the body, leading them to ingest the inherent dangerous toxins present in the oil. Such ingestion may effect their lungs and intestines, causing severe congestion and breathing problems. Moreover, it maybe passed on to the their living young ones or either their eggs, who still haven't hatched.⁴⁵ Not just the birds, the oily water also poses severe effects on land based mammals, who come in contact with it. Similar to the birds, the oily layer may stick itself to the fur of the animals and thereby result in loss of their waterproofing capabilities, thereby causing them to lose out on their ability to keep themselves warm and protected. Such loss on insulation and mobility, may lead them to their slow and gradual death.⁴⁶

Apart from the animals, the spread of oil in the river water also effects the economic capabilities and activities of the people who live near or around coastal areas, performing fish farming and enrolled in shrimp culture etc,. This is because the effect of oil pollution damage caused in the water and inherited by the fishes and other sea animals, would cause them to be extremely bad in taste and smell, thereby causing the human beings, ultimately, to take burden of the damage caused. Such degrading impacts to the marine environment through oil-pollution thereby make it necessary to bring a change in the law governing it, such that strict and stringent regulations can be imposed against those through which it may have been caused.

NEED TO REPLACE STRICT LIABILITY WITH ABSOLUTE LIABILITY

The need to protect environment and control the damage caused to it has been clearly defined by the different sustainable development goals that have been developed by the UNDP and adopted by its member States.⁴⁷ All the above mentioned laws, whether international or

⁴³ Ibid, at 468-469.

⁴⁴ Ibid, at 469-470.

⁴⁵ ITOPF, *supra*, note 38.

⁴⁶ Paul Stephen Dempsey, *supra* note 40.

⁴⁷ UNDP, <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> , last visited- 23rd November, 2020.

national therefore focus at preventing pollution that is caused by the oil spilled either accidentally or operationally in the marine environment. The CLC involves imposing a strict form liability upon shipowners, from whose ships the oil maybe spilled, but allows them the right to restrict their liability, if its proven that the either of the exceptions laid down under the convention, may come into play. However, it is important to note and compare the level of environmental damage that is caused when such oil is spilled into the sea. The short as well as the long term effects of such pollution damage, are more than enough reason to contest the fact that such exceptions should not be considered while imposing liability i.e. the shipowners should be held absolutely liable. Such absolute liability can be supplemented by the insurance covers and financial support that is provided to the shipowners through their insurance providers and the Fund for Compensation convention that is ratified by the member States. Thus if the amount of compensation is beyond the payment capacity of the vessel owner's insurance cover, then the Fund be allowed to pay for the remaining compensation amount to the sufferers. As far as the question of pollution being caused by the act of a third person is concerned, such that any other person, like a crew member or charterer etc., intentionally performs any act which results in the spilling of oil, being well informed about the outcome of his/her actions, then in such a case, the amount of compensation derived through the imposition of absolute liability, shall be divided amongst the shipowner and the concerned third party, especially if a person working on the ship, on the basis of the principle of vicarious liability.

The imposition of absolute liability instead of strict liability in this paper is based after observing the judgements passed by the Indian Courts in cases of *MC Mehta v. Union of India*⁴⁸ and *Union Carbide Corporation v. Union of India*⁴⁹ where the courts highlighted the importance of environmental protection, in situations where escape of hazardous and noxious substances is concerned. Though both the judgments focused more on human and societal protection and welfare, yet the decisions were also taken upon the basis of grave environmental effects that were posed by the escape of the hazardous gases.

The main objective of imposing absolute liability would be to restrict the shipowners from limiting or restrict the level of their liability, upon the basis of the exceptions that are provided to them. Although the ship or vessel owners would take the necessary steps to prevent the pollution from being caused, yet the exceptions would give them the privilege to not put in the desired level of efforts that maybe required to prevent the damage from being caused and

⁴⁸ *Supra* note 13.

⁴⁹ *Supra* note 14.

escape their liability as much as possible, imposing a great disregard to the environment and the wildlife. The principle of absolute liability would therefore ensure reduction in the level of oil pollution spills caused by the ships, since it would build immense pressure on the vessel owners, upon the payment of higher amount of claims to improve and regain the original condition of the water. Furthermore, such higher liability shall be supported upon by the already established International Fund for Compensation and the insurance coverage provided to the shipowners by their respective insurance companies.

CONCLUSION

With the current trends and extensive technological changes into play, it is important that certain specific rights be accorded to the environment, wildlife and other natural resources, for the purpose of their protection and conservation in the utmost manner from human activities. Such rights should focus only on the prevention of such animals and environmental resources and not on the extensive enforcement of the fundamental rights guaranteed to human beings in different forms.

The principle of absolute liability imposed on individuals shall act as one step towards the enactment of such rights, especially in cases of marine wildlife and ecosystems, which are harmed by the severe and extensive effects of pollution caused by the spilling of oil through ships in seas and high waters. The principle of absolute liability, unlike strict liability does not provide any form of exceptions or escapes to individuals from their liability and therefore implements the polluter pays principle in its complete sense. Moreover, the imposition of such liability shall also ensure that all forms of reasonable precautions are taken into view and acted upon so as to ensure that the precautionary principle, which was laid out in the Rio declaration is also achieved.

The disruption caused by the spillage of oil into the sea, and the devastating long and short term effects it imposes on the sea creatures and other resources, are important to be looked over and worked upon, and absolute liability can therefore be a step towards preventing the same.