LIABILITY FOR OIL POLLUTION DAMAGE: AN ANGLO-SOUTH AFRICAN COMPARISON IN LIGHT OF THE INTERNATIONAL DISPENSATION

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Abstract

Oil pollution incidents have become increasingly prevalent in South African waters. Internationally there exists a comprehensive regime which provides for the compensation for damage caused by oil spilt by ships. South African legislation also makes provision therefore. This dissertation investigates the adequacy of the South African legislation in light of the international instruments. It also sets out practical means of incorporating the international instruments into domestic law, by investigating how this has been done under UK law. Here it was found that the South African oil pollution compensation regime is outdated and does at present not make provision for oil receivers to pay compensation for damage. Furthermore the liability limit set by legislation is far too low.

Afrikaanse opsomming

Die besoedeling van die Suid-Afrikaanse kus deur olieskepe vind al hoe meer plaas. Ingevolge internasionale reg bestaan daar 'n volledige stelsel vir die vergoeding vir skade wat aangerig word deur oliebesoedeling deur skepe. Suid-Afrikaanse wetgewing maak ook voorsiening hiervoor. Met hierdie studie word die doeltrefendheid van die Suid-Afrikaanse wetgewing in die lig van die internationale instrumente ondersoek. Dit sit ook die praktiese inkorporering van die internationale instrumente in die plaaslike wetgewing uiteen, deur dit met die regstelsel van die Verenigde Koninkryk te vergelyk.

Daar word bevind dat die skadevergoeding vir oliebesoedeling in die Suid-Afrikaanse regstelsel veroudered is en dat dit nie voorsiening maak vir diegene in die land wat olie ontvang om by te dra tot die skadevergoeding nie. Laastens is gevind dat die aanspreeklikheidsbeperking wat deur wetgewing gestel is, te laag is.

1 Introduction

South Africa, located on one of the busiest tanker routes in the world, has seen its fair share of shipping disasters, many of which have resulted in the spill of oil into the marine environment and coastline.[1] Of these, the most notorious were the Castillo del Bellver[2], the Treasure and the Jolly Robino.[3] The Treasure sank in Table Bay in 2000 and spilt a modest 13 000 tonnes of bunker fuel costing in excess of R45 million to clean.[4] Pollution of the marine environment by oil can emanate from any number of sources including: accidental discharges from vessels of fuel or cargo as a result of navigational accidents and the carriage of hazardous goods and as a result of operational discharges from ships and offshore prospecting and mining installations.[5]

Oil pollution incidents have led to drastic developments in the field of civil liability for oil pollution internationally, for instance, in the wake of the sinking of the Torrey Canyon, the *International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* of 1969 (hereafter Intervention Convention) was negotiated and adopted. Most recently, the Erika disaster revealed numerous shortcomings in the compensation system in place and led to the International Maritime Organisation (hereafter IMO) bringing about numerous amendments thereto.[6]

Locally, the field of environmental law has also seen drastic development in the past few years, the reason for this being the value that South African society now

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1 WWF Newsroom 2005 HYPERLINK http://www.panda.org.za/article.php?id=247_3 March 2005.

2 The Castillo de Bellver caught fire 12 miles off the coast of Saldana Bay. It spilt 276 000 tonnes of oil into the ocean although none of the oil came ashore.

3 The Jolly Robino ran aground 200 metres from the shore of the St Lucia park which is listed as a world heritage site by UNESCO. The vessel caught fire and the crew had to abandon it. It had 1 300 tonnes of fuel and barrels of inflammable chemicals on board.

4 These incidents, however, cannot compare to the marine and coastal damage incurred internationally by vessels such as the Torrey Canyon, the Exxon Valdez and the Erika.

5 Glazewski *Environmental Law in South Africa* 635.

6 For example, it was noted that the amount the Fund could make available for claims was insufficient to cover the amount claimed, and thus the contribution levels were increased.

attaches to having a sound environment.[7] The incorporation of environmental rights into the Bill of Rights bears testimony thereto.[8] South Africa recently ratified the IMO's *Protocol of 1992 to Amend the International Convention on the Establishment of the International Fund for the Compensation of Oil Pollution Damages* of 18 December of 1971 (hereafter the Fund Convention) and became a member state on 1 October 2005. As a result, South Africa will need to enact legislation that makes provision for contributions to the Fund; that will provide directions on how to institute claims against the Fund and ascribe jurisdiction to our courts to institute claims against the Fund. The questions that this dissertation seeks to answer are firstly, whether or not South African legislation, at present, is compatible with the Fund Convention and secondly, how this Convention may be assimilated into our law.

These questions shall be answered by investigating the international instruments pertaining to oil pollution compensation. These will be compared to the legislative regime currently in place in South Africa. Lastly, the way in which the United Kingdom, (hereafter the UK) has implemented its international obligations into its domestic legislation will be investigated.[9] The international instruments that are discussed are, *inter alia*, *The United Nations Convention on the Law of the Seas, 1982* (hereafter 1982 UNCLOS), *International Convention for the Prevention of Pollution from Ships 1973* (hereafter "MARPOL") the *International Convention on Civil Liability for Oil Pollution Damage 1992* (hereafter "CLC Convention") and the Fund Convention.

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7 Havenga 1995 *SAMLJ* 187.

8 Section 24 of the Constitution.

9 The reasons for basing this comparison study on UK legislation are firstly, because South Africa was formerly a British colony, thus a large part of our law (specifically our maritime law and our law of delicts) is founded in UK law. Secondly, UK Maritime law is well developed as the UK is a major player in the shipping field, and it alone has seen three of the world's twenty biggest oil pollution disasters, (i.e. Torrey Canyon).

1.1 *Defining "pollution" and "pollution damage" as core concepts*

The marine environment is one of the most addressed environmental fields and there are numerous instruments devoted to the protection thereof.[10] Clear definitions must be established in order to orientate the focus of this dissertation as well as to bring legal certainty to the points of departure. Specifically, the terms "pollution" and "pollution damage" are defined.

The 1982 UNCLOS defines marine pollution as:

> the introduction by man, directly or indirectly, of substances or energy into the marine environment including estuaries, which result or is likely to result in such deleterious effects as harm to the living resources and marine life, hazardous to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of water and reduction of amenities.[11]

This definition was given effect in South Africa when it was entrenched domestically in the *Marine Pollution (Control and Civil Liability) Act* 6 of 1981, (hereafter the CLC Act).[12]

The definition of "pollution"[13] as set out in the *National Environmental Management Act* 107 of 1996 (hereafter the NEMA) should also be considered. Here pollution is defined as:

> a change in the environment which has an adverse effect on human health or well-being or on the composition, resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have such an effect in the future.

Pollution can also be termed as interference, presumably unjustifiable, with acquired possession and/or enjoyment of property, be it land or sea.[14] From this it can be seen that oil pollution in this context, is thus the:

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10 Larsson *The Law of Environmental Damage* 127.
11 Article 1(4) of the 1982 UNCLOS.
12 Glazewski *Environmental Law in South Africa* 657.
13 Section 1 (xxiv) of the NEMA.

> introduction of oil by a vessel or oil installation into the ocean which has the effect of causing damage to the marine ecosystem or legitimate human uses of the sea.

"Pollution damage" is defined by the CLC Convention,[15] the Fund Convention[16] and the UK *Merchant Shipping Act*, 1995[17] as being:

> damage caused outside a ship by contamination resulting from a discharge or escape of oil from the ship; the cost of preventive measures; and further damage caused by preventive measures. This does not include any damage attributable to any impairment of the environment except to the extent that any such damage consists of either: loss of profits; or the cost of any reasonable measures of reinstatement actually taken or to be taken.

However, in the South African context the CLC Act does not define pollution damage in section 1. Only the concept "loss or damage" is used when providing for civil liability.[18] From this it can be seen that there exists a discrepancy in South African law and thus the provisions of the CLC Act will have to be brought in line with the international instruments, as is done in the UK legislation, in order to make these definitions compatible with the international instruments.

The definition of pollution damage is restricted to the effect on human well-being, property and the reinstatement of the environment. From the definitions of "pollution" and "pollution damage", it can be seen that although the marine environment can be polluted, the damage that is done to it can only be compensated for in so far as is necessary for the reinstatement thereof. Thus, there can be no claim for the intrinsic value of the environment. This is consistent with the Fund Convention's reinstatement policy, which provides that the Fund will not compensate for claims for damages based on abstract quantification, nor award damages of a punitive nature. This may be because the value of the environment cannot be quantified.[19]

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14 Hill *Maritime Law* 419.
15 Article 2(6) of the CLC Convention.
16 Article 2 of the Fund Convention.
17 Section 181 of the *Merchant Shipping Act*, 1995.
18 Section 9(1) of the CLC Convention.
19 Burlington 2004 *Environmental Law Review* 85.

In the next paragraph the international marine pollution compensation instruments are investigated. This is in order to ascertain what standards have been set for compensation internationally and what new obligations South Africa has ascribed to under the Fund Convention.

2 International oil liability regimes

2.1 *Historical development*

The need for the international regulation of oil pollution was first addressed in 1926 in Washington, where a draft convention was drafted in order to address the development of the oil carrying tanker.[20] The draft convention was, however, set aside as the world fought its first and second world wars. Since then, major developments in the marine oil pollution sphere have materialised in the wake of oil pollution disasters. In 1954 the *International Convention for the Prevention of Pollution of the Sea by Oil* was signed in London in May of that year. This led to the adoption of the 1958 *Geneva Convention on the Law of the Sea*, (UNCLOS.) This convention broadly sets out the obligation that every state should provide for its own legislation that addresses pollution of the sea by oil tankers and the regulation of such oil tankers. In 1962 oil companies, as the shippers of tanker cargo, were asked to address the issue of discharge of oil from slops when cleaning the tanks before a new load of oil was loaded. The answers that they provided were entrenched in the 1973 MARPOL Convention.

Since these early developments, there have been various other international instruments that deal with the carriage of oil by sea.[21] For the purpose of this study only the most recent liability regimes are addressed. These include, the

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20 Hare *Shipping Law* 409.

21 Such as, the 1954 International Convention for the Prevention of Pollution of the Sea by Oil; the 1958 Geneva Convention on the Law of the Sea, UNCLOS; the 1969 International Convention on Civil Liability for Oil Pollution Damage; the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and

MARPOL Convention, the 1992 CLC Convention, the 1992 Fund Convention and the 2003 Supplementary Fund.

2.2 *The MARPOL Convention*

MARPOL is the main convention controlling vessel-source pollution.[22] It aims to prevent or regulate deliberate operational discharges, rather than to deal with their consequences.[23] It sets out various rules and standards in its annexures that pertain to various scenarios, these being: the carriage of oil;[24] the carriage of noxious liquid substances carried in bulk;[25] harmful substances carried by sea in packaged form;[26] and sewage and garbage generated on board the vessel.[27] In article 3, MARPOL provides that it applies to all ships under the flag of a member state and to ships, although not flying the member state's flag, operating under its authority. The Convention, however, does not apply to state ships such as warships or other vessels involved in non-commercial service.[28] Article 4 of MARPOL provides that violations of convention requirements must be prohibited and sanctions must be established under the law of the flag state for ships. If there is a violation, the state must either bring proceedings itself or give evidence of the violation to the flag state. Penalties under the law of a member state are required to be severe enough to discourage violations and must be equally severe regardless of where the violations occur.[29]

MARPOL requires that all ships hold a certificate of compliance with MARPOL standards. In the event of substantial non-compliance, the port authority of the member state carrying out the inspection must take such steps to ensure that the

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the voluntary contribution scheme of Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL).

22 Brubaker *Marine Pollution* 122.
23 Glazewski *Environmental Law in South Africa* 655.
24 Annexure 1 of MARPOL.
25 Annexure 2 of MARPOL.
26 Annexure 3 of MARPOL.
27 Annexure 4 and 5 of MARPOL.
28 Brubaker *Marine Pollution* 123.
29 Brubaker *Marine Pollution* 124.

ship does not sail until it can proceed without presenting an unreasonable threat of harm to the marine environment.[30] A port state is allowed, upon request, to inspect a ship within its jurisdiction and, if sufficient evidence exists regarding a violation that has occurred anywhere, issue a report to the flag state and the member state requesting it. A port state may not, however, bring legal action for violations outside its jurisdiction.[31] Article 7 provides that all possible efforts be made by a state to avoid undue detention under articles 4, 5 or 6 to ships, and when there has been such undue detention, the ship is entitled to compensation for damages suffered.[32]

Annexure 1, which provides for oil pollution prevention, prohibits any discharge into the sea of oil or oily mixtures.[33] This regulation is, however, qualified by a number of exceptions. These are briefly, that the tanker may discharge oil but only in certain circumstances, for example when it is not in a special area,[34] or within 50 nautical miles of land and then only if the discharge does not exceed certain limits set out in MARPOL.

2.3 *The 1992 CLC Convention*

The CLC Convention was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships.[35] The provisions of the CLC Convention are not only imposed on all oil tankers registered in a member state, but are also imposed on all tankers entering and leaving a port or terminal installation located

30 Article 5 of MARPOL.
31 Brubaker *Marine Pollution* 124.
32 Brubaker *Marine Pollution* 124.
33 Regulation 9(1) of Annexure 1of MARPOL.
34 Special areas are defined by MARPOL and its amendments have added to the named special areas.
35 International Maritime Organisation 2005 HYPERLINK http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=660 24 April 2005.

in the member state.[36] The CLC Convention applies to oil tankers actually carrying oil in bulk,[37] and does not apply to (persistent) bunker oil discharge.[38]

The 1992 CLC Convention provides that the owner of the ship is strictly liable[39] for the damage caused as a result of an incident. [40] The owner of the ship may limit his/her liability, but only if the damage caused was not as a result of the owner's fault or negligence, which was committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.[41] The burden of proof is on the plaintiff to show that the ship owner should be deprived of his/her right to limit.[42] In 2003 the limitations were increased by 50 percent and now stand at 4.51 million Special Drawing Rights (SDR),[43] if the ship does not exceed 5 000 gross tonnes. For a ship of 5 000 to 140 000 gross tonnes the liability is limited to 4.51 million SDR plus 631 SDR for each additional gross tonne over 5 000. For a ship over 140 000 gross tonnage, liability is limited to 89.77 million SDR. [44]

The owner of a ship carrying more than 2 000 tonnes of oil is furthermore obliged to procure marine insurance which is sufficient for the total of the ship owner's liability in one incident. Again, should a ship not have such marine insurance, the ship owner will not be able to limit his/her liability.[45] The ship then receives a

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36 Oosterveen 2004 *Environmental Law Review* 2.
37 Hare *Shipping Law* 412.
38 This is governed by the *International Convention on Civil Liability for Bunker Oil Pollution Damage*, 2001.
39 Strict liability means that the defendant will be held liable for the damage caused without the need for fault to be present. See Boberg *The Law of Delict* 16.
40 Article 4(1) of the1992 CLC Convention.
41 Article 6(2) of the 1992 CLC Convention, see Glazewski *Environmental Law in South Africa* 648; see International Maritime Organisation 2005 HYPERLINK http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=660 24 April 2005.
42 Hill *Maritime Law* 438.
43 SDRs serve as the unit of account of the International Monetary Fund as well as certain other organisations, such as the International Oil Pollution Compensation Fund. One SDR was equal to R0.10779 on 4 October 2005, See http://www.imf.org/external/np/exr/facts/sdr.htm.
44 International Maritime Organisation 2005 HYPERLINK http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=660.24 April 2005.
45 Glazewski *Environmental Law in South Africa* 648.

certificate attesting to the fact that it carries adequate insurance and without said certificate, the ship may be prevented from trading.[46]

The 1992 CLC Convention functions in a supplementary relationship with the Fund Convention.[47] The CLC Convention is the first layer of protection and the Fund Convention is the second layer which offers additional protection to victims of oil pollution damage who do not get full compensation under the CLC Convention, usually because the damage exceeds the ship owner's liability limit.[48] The two conventions thus share many concepts and essentially work hand-in-hand in order to ensure full and efficient compensation of claims.[49]

2.4 *The Fund Convention*

The Fund Convention[50] may be regarded as a widely accepted and readily used compensation regime. This is evident in that in the Fund's first 6 years of existence it paid out approximately US$ 42 million on 16 claims.[51] One of the aims of the Fund Convention is the notion that the ship owners should not be expected to bear the entire responsibility for oil spills and that the oil industry itself should at least bear part of it.[52] This incorporation of the liability of the oil industry is in line with the polluter pays principle, [53] which would dictate that the

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46 Hill *Maritime Law* 440.
47 Originally the *International Convention on the Establishing of a Fund Convention for Oil Pollution Damage,* 1971.
48 Oosterveen 2004 *Environmental Law Review* 3.
49 Hill *Maritime Law* 441; Glazewski *Environmental Law in South Africa* 649.
50 The Fund Convention establishes the International Oil Pollution Compensation Fund.
51 Brubaker *Marine Pollution* 158.
52 Hill *Maritime Law* 441; Brubaker *Marine Pollution* 156.
53 The "polluter pays principle" suggests that the polluter should bear the cost of abating waste and restoring the environment to an acceptable condition. By compelling the polluter to bear the expense, the cost of these clean up measures is reflected in the cost of the goods and services that generate the pollution through their production or consumption. When the price of goods and services reflects their environmental costs, consumers are not challenged to gather and consider information concerning a good's or service's effect on the environment.

oil industry, which generates a large profit out of the international sale of oil, should share the environmental risk inherent in shipping copious amounts of oil around the world.[54] Thus the Fund receives its contributions from persons in a member state who receive more than 1 500 tonnes of oil annually. Although South Africa has been a party to the CLC Conventions since 1978,[55] it only became a member of the Fund Convention on 1 October 2005.[56] As a result, it is necessary to understand the working of the Fund, should the need arise to claim from it.

The Fund Convention establishes a worldwide inter-governmental organisation that provides compensation for oil pollution damage resulting from spills from tankers. It is to be recognized in each member state as a legal entity capable of suing and being sued and having rights and liabilities.[57] The Fund receives its finances from those persons in a member state who receive more than 150 000 tonnes of oil in one calendar year. Each contributor pays a specified amount per tonne of oil received. The amount to be levied is decided on annually by the Fund Assembly.[58]

Compensation under the Fund is to be paid where the CLC Convention has proved to be inadequate, either because no liability has arisen under the CLC Convention, the offending owner cannot meet his financial responsibilities in full, or because the total value of the damage exceeded the owner's liability as limited by the CLC Convention.[59] However, certain exceptions to the Fund's obligation

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Rather, because consumers prefer the least expensive goods and services, the consumer generally makes a decision based on price alone, in which the social and environmental costs of contamination are already embedded. Consequently, the polluter pays principle ensures that the choices made in the self-interest of the consumer further environmental responsibility. See Larsen *Vanderbilt Journal of Transnational Law* 542. See further in this regard Oosthuizen 1998 *SAJELP* 355-361.

54 Hughs *Environmental Law* 557.

55 N58 *Government Gazette* No. 5867 dated 21 January 1978.

57 Hill *Maritime Law* 441.

58 See June 2005 Explanatory Note on the Fund Convention; International Maritime Organisation 2005 http://www.imo.org 20 July 2005.

59 Hill *Maritime Law* 441.

may apply. The Fund will not compensate if the damage was caused by an act of war or hostilities, or if the oil escaped from a warship or other ship owned or operated by a state. Neither will it pay if the claimant cannot show that the damage resulted from an incident involving at least one ship or, if the pollution was as a result of an act or omission, committed by the person who suffered damage, with the intent to cause such damage.[60]

In order for a claimant to institute a claim against the Fund, it must meet certain requirements. These are: firstly, that any expense, loss or damage must actually have been incurred; secondly, any expense must relate to measures that are considered reasonable and justifiable; thirdly, the expense, loss or damage must be considered to be caused by contamination resulting from the spill; fourthly, there must be a reasonably close link of causation between the expense, loss or damage, and the contamination caused by the spill, it must be a quantifiable economic loss. Lastly, a claimant has to prove the amount of his or her expense, loss or damage by producing appropriate documents or other evidence.[61]

The definition of pollution damage, as discussed in paragraph 1 above, is a combination of an open concept of damage and an open concept of causation. This created the flexibility that enabled the Fund to develop to a large extent its own doctrine in respect of liability and compensation for oil pollution damage.[62] The claims that can be instituted fall into three categories, these being: costs for preventive measures, compensation for loss of profit, and claims for reinstatement of the environment. In order to assist in the homogenisation of claims under the Fund Convention in different jurisdictions, the IMO developed a claims manual which sets out to what extent these three components of pollution damage may be claimed for. The provisions of this manual are discussed below.

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60 Article 6(3) of the Fund Convention.

61 Claims Manual 11 of the Fund Convention; International Maritime Organisation 2005 http://www.imo.org 20 July 2005.

62 Oosterveen W 2004 *Environmental Law Review* 3.

With regards to claims for preventive measures, the claims manual provides that clean-up operations are generally considered to be preventive measures, as, such measures are usually intended to prevent or minimise pollution damage. Costs for preventive measures, taken in the case of a grave and imminent threat of pollution damage, even if no pollution occurs, can be claimed for. It is, however, required that the measures taken were in proportion to the threat posed.[63] The test of reasonableness is an objective test made on the basis of all relevant facts and information available to the person taking the measures.[64] Loss or damage caused by reasonable measures to prevent or minimise pollution can also be claimed for.[65]

In terms of damage that causes loss of profit, the claims manual sets out two scenarios. Either there is a loss of profit due to consequential loss, which is when the loss or damage occurs as a result of damage to the claimant's property. For example, when fishermen cannot fish because their nets have been damaged by the oil that was spilt.[66] The second scenario, termed pure economic loss,[67] would be the loss derived from the inability to generate income because the sea may be polluted or because there may be a fishing ban. Compensation is claimable for pure economic loss but only if a sufficiently close link of causation exists between the contamination and the loss or damage. When considering whether such a close link exists, the Fund takes certain factors into account. These are: the geographic proximity of the claimant's business activity to the contaminated area; the degree to which a claimant's business is economically dependent on an affected resource; the extent to which a claimant had alternative sources of supply or business opportunities; and the extent to which a claimant's business

63 Claims Manual 22; International Maritime Organisation 2005 http://www.imo.org 20 July 2005.
64 Oosterveen 2004 *Environmental Law Review* 4.
65 Claims Manual 21; International Maritime Organisation 2005 http://www.imo.org 20 July 2005.
66 Claims Manual 25 International Maritime Organisation 2005 http://www.imo.org 20 July 2005.
67 See further in this regard Kotze 2002 *SAYIL* and Scott 2001 *THRHR* 681-689.

forms an integral part of the economic activity within the area affected by the spill.[68]

The last category provided for in the definition of pollution damage is for the reasonable costs of actual reinstatement of the environment.[69] To determine the 'reasonableness' of reinstatement measures the Fund takes into consideration criteria such as: that the measures, significantly speed-up the natural process of recovery, that the reinstatement measures prevent further damage as a result of the incident, that the measures are technologically feasible and that the costs of the measures are not out of proportion to the extent and duration of the damage and the benefits likely to be achieved.[70] The Fund will not compensate where the damages are of a punitive nature based on the degree of fault of the ship owner.[71] Compensation for damage caused solely to the intrinsic value of the environment cannot be claimed as these claims are essentially unquantifiable.

2.4 *The 2003 Supplementary Fund*

It soon became evident that should a major oil spill occur, the costs of the damage would far exceed the Fund's financial capacity. Thus the Fund Assembly sought a way to enhance the amount the Fund could make available for compensation claims. It was realised that even with the 50% increase of contribution levies, the Fund would still fall short in the event of a serious oil spill disaster. The final answer to this problem was to develop a third layer in this protection scheme, by adding a Supplementary Fund.

The Supplementary Fund Protocol was adopted in May 2003.[72] This Protocol was established in order to make a larger amount of compensation available to

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68 Claims Manual; 25 International Maritime Organisation 2005 http://www.imo.org 20 July 2005.
69 Article 2 of the Fund Convention.
70 Burlington *Environmental Law Review* 86.
71 Burlington *Environmental Law Review* 86.

claimants, without the need to drastically change the system as it was.[73] The Supplementary Fund builds fully on the 1992 Fund without having to do its own assessment of claims. This provides for a greater amount available for compensation, by creating a second Fund from which claimants can draw, without complicating the process and still allowing for speedy compensation. The Protocol uses the concept of an "established claim", which is defined as a claim which has been accepted as admissible either by the 1992 Fund, or by a binding and final decision of a competent court, and which would have been fully compensated but for the limit of the 1992 Fund Convention.

From the above it can be seen that, internationally there exists a comprehensive oil pollution compensation regime. The international regime must, however, be incorporated into domestic legislation in terms of certain Constitutional requirements. In the following paragraph the South African oil pollution legislation and environmental liability systems are investigated in order to establish how the MARPOL and CLC Conventions have been incorporated into our law and to determine how the Fund Convention will fit into this system.

3 South African law

For the purpose of this dissertation, the South African legislation dealing with marine pollution control is investigated in two categories. These are firstly, statutes of general application, and secondly, statutes specifically dealing with pollution from ships and shipping.[74] This paragraph includes an investigation into the common law position for the institution of a claim for environmental damage.

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72 South Africa has, however, not yet acceded to this Protocol.
73 Oosterveen 2004 *Environmental Law Review* 6.
74 Glazewski *Environmental Law in South Africa* 635.

3.1 *Statutes of general application*

3.1.1 *The Constitution*

As a result of elevating the environment to a fundamental justiciable human right, South Africa set out to protect the environment by an integrated approach, which takes into consideration, *inter alia*, socio-economic concerns and principles.[75] The Constitution is therefore the first statute to be considered. Section 24 of the Constitution contains two elements. Firstly, section 24(a) comprises a fundamental right[76] by stating that "everyone has the right to an environment that is not harmful to their health or well-being."[77] A person's "well-being" is harmed if his or her interests are harmed. This also means that provision is made not only for the instrumental value of the environment but it also encompasses the intrinsic value.[78] What would constitute an environment harmful to a person's well being must, however, be determined in a case-by-case manner.[79] Section 24(a), read with section 8 of the Constitution, is seen as being directly horizontally applicable, and as such individuals share the burden of protecting the environment.[80] For this reason, individuals can be held liable for creating an environment that is harmful to the health or well being of other people. Secondly, section 24(b), which has more of a socio-economic right nature imposes a constitutional imperative on the state to ensure the right of individuals by:

> .... reasonable legislative and other measures that-
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation;
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[81]

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75 *BP Southern Africa v MEC for Agriculture, Environment, Conservation and Land Affairs* 2004 5 SA 124 W at 144.
76 Glazewski *Environmental Law in South Africa* 72.
77 Section 24(a) of the Constitution.
78 Glazewski *Environmental Justice, Governance and Law* 6.
79 *Hichange Investment (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and* Others 2004 2 SA 393 (E) at 415; Glazewski *Environmental Law in South Africa* 77.
80 Currie, De Waal & Erasmus *The Bill of Rights Handbook* 405.
81 Section 24(b) of the Constitution.

This part of the constitutional right is, however, unlikely to have direct horizontal application, as it clearly only imposes obligations on the government and not on individuals.[82] The state may thus be held liable should it fail to implement reasonable legislative measures.

In terms of section 231 of the Constitution, before international agreements can become law in South Africa, they must be signed by the national executive, approved by Parliament and enacted into law by national legislation.[83] Whereas in section 232, customary international law[84] is recognized as part of South African law without the need for it to be incorporated, unless it is inconsistent with the Constitution. As the Fund Convention can arguably not be regarded as customary international law, it is now necessary in terms of section 231, that the provisions of the Fund Convention be incorporated into domestic law. Section 39(1) of the Constitution makes it incumbent for a court to consider international law when interpreting the Bill of Rights. Thus when section 24 of the constitution is interpreted, the court is compelled to consider international law, whether binding or not binding.[85]

It is significant that South Africa has made its environmental right justiciable, which means it carries the same weight as any other fundamental right.[86] This is important for South Africans as it means that a competent court may adjudicate on whether or not the environmental right has been violated or not. In this context it may entail that the court may decide whether or not the damage caused by an

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82 Currie De Waal & Erasmus *The Bill of Rights Handbook* 405.

83 Kotze & Jansen van Rensburg 2003 *Queensland University of Technology Law and Justice Journal* 126; See further in this regard, Dugard *International Law* 54; Schneeberger JA 2001 *South African Yearbook of International Law* 1-40; Blake RC 1998 *South African Law Journal* 668-684; Keightley R 1996 *South African Journal of Human Rights* 405-418.

84 The requirements for customary international law were set out by the ICJ in the *North Sea Continental Shelf Case* 1969 ICJ Reports 3, where the court held that there were two requirements, firstly *usus*, or settled practice, this is a constant and uniform useage by other states. Secondly, *opinion juris,* the state's acceptance of an obligation to be bound.

85 Kotze & Jansen van Rensburg 2003 *Queensland University of Technology Law and Justice Journal* 127.

86 Glazewski *Environmental Law* in South Africa 72.

oil spill into the sea, is in fact "significantly"[87] harmful to health or well-being. Also, the state may be held liable should it fail to implement reasonable legislative measures. Acceding to the Fund Convention, and implementing its provisions into South African law, may be seen as a reasonable legislative measure as called for.

3.1.2 *The National Environmental Management Act*

The National Environmental Management Act[88] (hereafter the NEMA) comprises what is known as environmental framework legislation. Such legislation aims to, *inter alia*, provide general fundamental rules that may assist in introducing new environmental legislation or amending or maintaining existing legislation.[89] The NEMA makes provision for all three fields of environmental concern, these being: resource conservation and exploitation; pollution control and waste management; and development.[90] The Preamble sets out the motivations for the NEMA. In terms of these it can be seen that the NEMA sets out the constitutional environmental right, which in itself calls for "reasonable legislative measures", in a more tangible and workable manner.[91] This has the effect of, *inter alia*, indicating which actions would be necessary for the state to comply with its obligation under the Constitution.

Chapter 6 of the NEMA provides for international obligations and agreements. Section 25(3) empowers the Minister of Environmental Affairs and Tourismto pass domestic legislation or regulations to give effect to any international instrument to which South Africa is a party, once the relevant constitutional provisions have been complied with.[92] Thus, it is the task of the Minister of Environmental Affairs to enact legislation, together with the Department of

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87 *Hichange Investment (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and* Others 2004 2 SA 393 (E) at 415; Glazewski *Environmental Law in South Africa* 77.
88 *National Environmental Management Act* 107 of 1998 (hereafter "the NEMA").
89 Nel & Du Plessis *SAJELP* 2.
90 Glazewski *Environmental Law in South Africa* 166.
91 Preamble to the NEMA; Glazewski *Environmental Law in South Africa* 140.

Foreign Affairs which will incorporate the Fund Convention into South African law.

Chapter 7 of the NEMA is of particular importance to the purpose of this investigation, as it provides for compliance and enforcement. It provides for access to environmental information[93] and protection of whistle-blowers.[94] Access to information is imperative when instituting a claim against a polluter, whether it is a private individual or the state, in order to obtain sufficient evidence to prove the allegation. Further, the NEMA also provides for legal standing to enforce environmental laws.[95] This section should be read in conjunction with the right to legal standing in the Constitution.[96] What makes this section so useful is that it expands the constitutional right in instances of environmental issues and provides that any person or group of persons may seek appropriate relief "in the interest of protecting the environment."[97]

Section 28 of the NEMA pertains to duty of care and remediation of environmental damage. This section starts out by providing that "every person" has a duty to take "reasonable measures" to prevent harm to the environment. It further specifically identifies three categories of persons who bear this duty. These being: an owner of land or premises; a person in control of land or premises and lastly; any person who has the right to use land or premises. This section does not impose an absolute duty to clean up or prevent pollution, but sets out measures which need to be taken. These are wide-ranging and include, but are not limited to,[98] measures to: investigate, assess and evaluate the impact on the environment; inform and educate employees about environmental risks; cease, modify or control any act, activity or process causing the pollution or

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92 Glazewski *Environmental Law in South Africa* 149.
93 See also in this regard Section 32 of the Constitution and the *Promotion of Access to Information* Act 2 of 2000.
94 Section 31 of the NEMA.
95 Section 32 of the NEMA.
96 Section 38 of the Constitution.
97 Section 32 (1)(e) of the NEMA.
98 Glazewski *Environmental Law in South Africa* 150.

degradation; contain or prevent the movement of pollutants; eliminate any source of pollution or degradation, or remedy the effects of the pollution or degradation.[99] However, these measures are stated in broad terms.[100] Therefore, it cannot be seen from this list what exactly would constitute "reasonable measures" in specific circumstances. It is argued that this section should, therefore, be read in conjunction with the requirements set out in the *Marine Pollution (Prevention of Pollution from Ships)* Act 2 of 1986. As is discussed later, this act sets out minimum standards for the design and operation of tankers which must be done in order to obtain a Pollution Safety Certificate, and thus may serve as a measure to determine whether or not "reasonable measures" have been taken for purposes of the NEMA.

Section 30 provides for emergency incidents. This section starts by defining incidents[101] as being:

> an unexpected sudden occurrence, including a major emission, fire or explosion leading to serious danger to the public or potentially serious pollution of or detriment to the environment, whether immediate or delayed.

It may thus be seen from the above, that an emission from an oil tanker would be classified as an emergency incident. This provision then proceeds further to identify the persons who can be held responsible for such an incident. These are: the person responsible for the incident; who owns any hazardous substance involved in the incident; or was in control of any hazardous substance involved in the incident at the time of the incident.[102] This definition suggests strict liability for all three categories of persons. However, it may be argued that culpability in the form of negligence is implied by the phrase "responsible for."[103] This section further places these persons

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99 Section 28(3) of the NEMA.
100 Glazewski *Environmental Law in South Africa* 150.
101 Section 30(1)(a) of the NEMA.
102 Section 30(1)(b) of the NEMA.
103 Glazewski *Environmental Law in South Africa* 153.

under a duty to: report the incident to the relevant authorities,[104] take all reasonable steps to contain and minimize the effects of the incident, undertake clean-up procedures; remedy the effects of the incident; and assess the immediate and long term effects of the incident on the environment and public health.[105]

3.2 *The common law position*

The legislation pertaining to marine oil pollution is somewhat specific, thus, should the oil spill that occurs not fall under said legislation;[106] the claimant would then be able to claim for damages in terms of the law of delict, if all the elements of a delict are met.[107] A delict may be defined as "an act of a person which in a wrongful and a culpable way causes harm to another."[108] The elements of a delict are: an act or omission; wrongfulness; fault; causation and damage.[109]

The first element is that there must be an act or omission that causes harm to another.[110] In the pollution context the emission of a harmful substance would *prima facie* constitute an act or conduct to satisfy this requirement.[111] In the case of pollution from an oil tanker, legislation determines who will be held liable for the emission.

Liability arises only if the harm that resulted was caused in a wrongful manner. In order to determine whether wrongfulness exists, the *boni mores*

104 Section 30(3)(d)(i)-(iv) of the NEMA.
105 Section 30(3)(a)-(d) of the NEMA.
106 For example, if the damage is caused by non-persistant oil, by oil escaping from dry cargo vessels and if the damage is caused by a means other than contamination.
107 Havenga 1995 *SAMLJ* 191.
108 Neetling,Potgieter and Visser *Law of Delict* 4.
109 Neetling,Potgieter and Visser *Law of Delict* 4.
110 Neetling,Potgieter and Visser *Law of Delict* 27.
111 Glazewski *Environmental Law in South Africa* 536.

test, that is, the legal convictions of the community test, is applied.[112] This test essentially consists of weighing up the interests which the defendant promoted by his act, against those which he actually infringed.[113] The test is not applied in every case; it is, however, useful in border line cases, such as whether environmental damage is unlawful, especially when the damage is pure economic loss.[114] To this end, one may look to the Constitution, as the underlying value encompassed in section 24 is an important factor, when balancing the rights of the polluter against those of the individual victim.[115] It may be said that the community values the right to an environment that is not harmful to one's health and well-being and therefore would not condone the pollution thereof.[116] This follows the idea of allowing environmental rights to be accorded appropriate recognition and respect as enunciated by the Supreme Court of Appeal in *Director, Mineral Development, Gauteng Region and Another v Save the Vaal Environment.* [117] The effect is that now the constitutional clause may be used in order to prove the unlawfulness of environmental pollution, in cases where this may be difficult to establish.

The next element, namely, fault, can be divided into two parts, namely intention and negligence. When claiming for damages separate from the marine oil pollution legislation, either fault or negligence must be proved for the claim to be successful. This is contrasted with the position under marine oil pollution legislation, as strict liability,[118] is provided for in these cases.

In order for delictual liability to arise there must be a causal nexus between the conduct and the damage. A single act may give rise to an unlimited

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112 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387; *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597.
113 *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 384; *Dersley v Minister van Veiligheid en Sekuriteit* 2001 1 SA 1047 (T) 1055.
114 *Havenga* 1995 *SAMLJ* 193.
115 Havenga 1995 *SAMLJ* 193.
116 Havenga 1995 *SAMLJ* 193.
117 *Mineral Development, Gauteng Region and Another v Save the Vaal Environment* 1999 2 SA 709 (SCA).
118 Kidd *2002 SACJ* 48.

number of harmful events, therefore both factual[119] and legal[120] causation must be proved in order to limit the remoteness of the claims. [121] Legal causation is established when there exists, "a sufficiently close relationship between the wrongdoer's conduct and its consequence, that such consequence may be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice."[122] Again section 24 of the Constitution can be used as an indicator of policy considerations which are used in order to determine legal causation.[123]

Damage to the environment is recoverable in two instances, when the damage to the environment has resulted in a loss to the plaintiff and damages for the reinstatement and restoration of the environment. [124] In the event of oil pollution, the damage will be quantified by, comparing the position of the plaintiff after the delict occurred with the position he/she would have been in had there been no wrongful act.[125] In terms of type of damages that can be claimed, the main question that is posed is whether or not a plaintiff can claim for pure economic loss. The general rule for this is that a plaintiff can claim for pure economic loss but only where this would not create a multiplicity of actions.[126] What must be determined in each case is whether there existed a legal duty to avoid pure economic loss. The criteria of reasonableness and *boni mores* must be used to determine the legal duty.[127] Here again, the environmental clause in the constitution is to be applied.[128] At present, there exists no South African maritime law case dealing with an

119 This is where a factual causal link exists between the act and the damage. It is determined by applying the *condictio sine qua non* test.
120 Those acts which should, in law, give rise to liability for the damage in question.
121 Neetling,Potgieter and Visser *Law of Delict* 173.
122 Neetling,Potgieter and Visser *Law of Delict* 186.
123 Havenga 1995 *SAMLJ* 195.
124 Glazewski *Environmental Law in South Africa* 543.
125 Glazewski *Environmental Lawin South Africa* 543.
126 Visser and Potgieter *Law of Damages* 393.

128 Havenga 1995 *SAMLJ* 196.

award for pure economic loss resulting from environmental contamination.[129] But although the South African courts are weary to award claims for the recovery of pure economic loss it cannot be said that the possibility of this happening in future, where the case merits it, is completely excluded. [130]

3.3 *Legislation dealing with oil pollution*

South African statutory oil pollution prevention and liability rules draw extensively from ratified international conventions.[131] Amongst the numerous acts that provide for the protection of marine and coastal waters, the three acts that provide specifically for oil pollution are: The *Marine Pollution (Prevention of Pollution from Ships)* Act 2 of 1986 (hereinafter the MARPOL Act); *Marine Pollution (Intervention)* Act 64 of 1987 (hereinafter the Intervention Act); and *the Marine Pollution (Control and Civil Liability)* Act 6 of 1981 (hereinafter the CLC Act). Each of these shall be discussed individually.

3.3.1 *The MARPOL Act*

The main contribution brought by the MARPOL Act is that it is the "primary instrument of setting marine minimum standards and measures of policing the design, building and operation of tankers."[132] The Act applies the International Convention MARPOL to any South African ship, wherever it may be, and to any ship found within the Republic or its territorial waters or exclusive economic zone.[133] Section three of the MARPOL provides that non-compliance therewith is a criminal act, subject to a fine of R500 000 or a prison sentence of five years. This Act thus sets out the duty of care that is required of a ship owner when faring within South African waters, it also

129 Kotze 2002 *SAYIL* 180.
130 *Franschhoekse Wynkelder (Ko-operatief) Bpk v SAR & H* 1981 3 SA 36 (C).
131 Hare *Shipping Law* 414; the CLC; the Intervention Convention and the 1973 MARPOL Convention.
132 Hare *Shipping Law* 418.
133 Section 2 of the MARPOL Act.

makes provision for the Minister of Transport to make regulations to give effect to the convention. Two such regulations have been passed to give effect to annexure 2 of MARPOL, which deals with the carriage of noxious liquid substances in bulk, and as such do not fall within the ambit of this discussion.

3.3.2 *The Intervention Act*

This Act incorporates the provisions of the International Convention relating to Intervention on the Hgh Seas in Cases of Oil Pollution Casualties, 1969 into South African legislation.[134] The idea behind this Act is to confer the powers given to a state party[135] in terms of the international convention upon SAMSA[136] in order to intervene in instances of potential spillage in order to circumvent such spillage by a tanker. The Act further imparts jurisdiction upon the court in whose area a person charged with contravening this act is found. The court in which such proceedings will be brought is a Magistrates court, which will impose the penalties provided for in this Act.[137]

3.3.3 *The CLC Act*

The Act has two purposes, firstly, to provide for the prevention and combating of pollution of the sea by oil and other harmful substances and secondly, to determine liability in certain respects for loss or damage caused by oil pollution incidents.[138] In terms of liability, it provides for both criminal and civil liability. Regarding the criminal provisions, the Act starts out by providing that if any oil is discharged from a ship, tanker or offshore installation, the master of the ship and its owner shall be guilty of an offence.[139] The effect of this is to ascribe strict

134 A comprehensive discussion of which can be found in paragraph 4.
135 South Africa ratified the Convention and as such is a member state thereof.
136 The South African Maritime Safety Authority, established by Act 5 of 1998.
137 Section 4(2) of the Intervention Act.
138 Preamble to the CLC Act.
139 Section 2(1) of the CLC Act.

liability[140] on both the master and the owner. There are, however, three defenses of which those liable can avail themselves.[141]

With regard to civil liability, section 9 provides for strict liability on the owner of the ship but not on the master of the ship.[142] This section states that the owner shall be liable for any loss or damage which results;[143] the costs of any measures taken by the authority for the purposes of reducing loss or damage,[144] and any loss or damage caused by any such measures taken.[145] Again, there exist certain exceptions to the liability.[146] These are when the discharge in question took place as a result of: an act of war, hostilities, civil war, insurrection or an exceptional, inevitable and irresistible natural phenomenon; an act or omission on the part of any person, not being the owner or a servant or agent of the owner, with intent to do damage; or was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids.

The CLC Act further makes provision that no person shall be liable to any other person except under the provisions of said Act.[147] The owner's liability is further limited to 133 SDR's[148] per tonne or 14 million SDR's, whichever is the lesser,[149] but only, in terms of section 9(5), when the discharge in question occurred

140 Glazewski *Environmental Law in South Africa* 657.
141 The following defenses are set out in s 2 of the CLC Act: a) the oil was discharged in order to secure the safety of the vessel, or of preventing damage to such ship, or of saving life, and such discharge of the oil was necessary for such purpose or was a reasonable step to take in the circumstances; b) the oil escaped in consequence of damage to the ship and as soon as practical after the damage occurred, all reasonable steps were taken to stop or reduce the escape of oil; c) the oil in question escaped by reason of leakage, and neither such leakage nor any delay in discovering it was due to any lack of reasonable care, and was repaired as soon as practically possible.
142 Hare *Shipping Law* 415.
143 Section 9(1)(a) of the CLC Act.
144 Section 9(1)(b) of the CLC Act.
145 Section 9(1)(c) of the CLC Act.
146 Section 9(3)(a)-(c) of the CLC Act.
147 Section 10(1) of the CLC Act.
148 This relates to the International Monetary Fund's Special Drawing Right, and is determined daily.
149 Section 9(5)(a)(i) of the CLC Act.

without the owner's fault or privity.[150]. If one looks further, it is seen that the Act provides for "compulsory insurance against liability for loss or damage.[151] before any tanker carrying more than 2 000 long tonnes of oil in bulk as cargo may enter or leave a port in the Republic or arrive at or lease an offshore installation in the territorial waters. What must be noted, however, is that in terms of such insurance,[152] tanker owners can be covered for up to $500 Million.[153] This then raises the question: Why does South African legislation cap liability for damage at a mere $20 550 180.00, when ship owners are able to insure themselves for up to $500 Million. The result of this is that ship owners are saving on insurance costs as the CLC Act reduced their insurable interest. In the event of an oil spill, the South African government would then have to cover the remaining costs of the damage.

The problem with the CLC Act is that it still follows the provisions set out by the 1969 CLC Convention, and has not been amended to provide for the 1992 CLC Convention. This is seen in that the liability limit provided for by the CLC Act is insufficiently low, as the CLC Act still provides for the limit set by the 1969 CLC Convention. The 1992 CLC Convention also amended the grounds for the exception to the owner's right to limit his/her liability. The CLC Act states that if the damage was as a result of the owner's "actual fault or privity"[154] he/she will be unable to limit his/her liability. While the 1992 CLC Convention uses the test of the owners personal act or omission , committed either deliberately or recklessly, with the knowledge that pollution damage would probably result.[155] This amendment would make it far more difficult for the claimant to deprive an owner of his/her limitation right.[156] In light of Chapter 6 of NEMA and section 231 of the Constitution, as well as the obligation in section 24(b) of the Constitution, it

150 This amount was roughly between $390 453.42[150] and $20 550 180.00[150] in June of 2005 as the SDR's on 17 June 2005 equaled US$1.46787.
151 Section 13(1) of the CLC Act.
152 Provided by the world's Protection and Indemnity (P&I) Clubs.
153 Hare *Shipping Law* 419.
154 Section 9(5) of the CLC Act.
155 Article 6(2) of the CLC Convention.
156 Hill *Maritime Law* 438.

may be argued that there is an obligation on the Minister of Environmental Affairs to amend the CLC Act in order for it to be in line with international developments and to work together with the Fund Convention.

From the discussion above, it can be seen that, firstly, the constitutional environmental right not only binds the state to ensure that reasonable legislative measures are in place to prevent pollution, but individuals also bear the duty to ensure that their actions do not create an environment that is harmful to the health or well-being of others. It may be argued that legislation providing for the Fund Convention would constitute said reasonable legislative measures, and thus be in compliance with the state's Constitutional obligations. Secondly, the NEMA provides for reasonable measures to be taken in order to comply with a duty of care. The standards set down by the MARPOL Act, may be seen as the reasonable measures which need to be complied with by ships in order for them to meet their duty not to cause pollution through an oil spill. Thirdly, the NEMA provides for strict liability for the owner. This provision corresponds with the strict liability provision set out in the CLC Act.

In the next paragraph an investigation shall be done into the oil pollution legislation of the UK, as well as the way the UK has incorporated the Fund Convention into its domestic laws.

4 The oil pollution protection regime under UK law

Both UK and South African oil pollution compensation legislation is based on the international instruments mentioned in paragraph 2 above. For this reason, UK jurisprudence dealing with claims against the Fund may be used as an example as to how claims should be treated if a dispute arises out of South Africa's fledgling relationship with the Fund. This paragraph commences with a brief overview of the UK oil protection legislation and, thereafter, refers to recent claims against the Fund instituted in UK courts.

4.1 *The Merchant Shipping Act of 1995*

The *Merchant Shipping Act*, 1995 (hereafter the Act) has brought together the *Merchant Shipping (Oil Pollution) Act*, 1971 and the *Merchant Shipping Act,* 1974 which implemented the international agreements of 1969 and 1971 on the civil liability of ship owners.[157] Part VI Chapter II deals specifically with oil pollution. This chapter makes the discharge of oil from a ship an offence,[158] and makes anyone who discharges oil from a ship criminally liable, with certain defences being set out by the Act.[159]

Strict liability for any oil leakage from a ship is placed on the owner of the ship,[160] where such leakage has caused damage to the territory of the UK[161] for any costs incurred in the course of reasonable preventive measures and also for the damage caused by these measures. This section alters the common law position of liability for oil pollution in the UK. At common law, the position was held that negligence was a crucial element in the establishment of common law liability for oil pollution damage.[162] The minimum requirement was that some fault must be proved.[163] The Act does, however, provide for exceptions to this rule.[164] The exceptions are of a very narrow nature and may be extremely difficult to establish. They require that the person seeking to take advantage of them, in no way contributed to the cause of the damage. The use of the word "inevitable" in section 155 (a)[165] indicates that the requirement is that the person could not, by

157 Hughs *Environmental Law* 557.
158 Section 131 of the Merchant Shipping Act, 1995.
159 Section 132 of the Merchant Shipping Act, 1995.
160 Section 153 restates section 1 of the 1971 Act as amended *inter alia* by the Merchant Shipping (Salvage and Pollution) Act 1994.
161 Section 153(5) of the Merchant Shipping Act, 1995.
162 Phillips and Craig *Merchant Shipping Act 1995* 158.
163 *The Wagon Mound* (No. 2) [1967] A.C. 617.
164 Section 155 of the Merchant Shipping Act, 1995.
165 This section provides that no liability shall be incurred by the owner of a ship under section 153 or 154 by reason of any discharge or escape of oil from the ship, or by reason of any relevant threat of contamination, if he proves that the discharge or escape, (a) resulted from

any action of his own, possibly have avoided the damage being caused.[166] These exceptions are the same as under South African law set out in section 9(3) of the CLC Act.[167] Section 156 restricts the liability for oil pollution damage to the owner of the ship. Thus parties, who might otherwise be liable in the same circumstances as the owner, such as charterers and salvors are protected. This section goes further than the extent for which the Convention provides.[168]

The Act provides for the same limitation of liability[169] as set out in the CLC Convention, but this limitation is excluded if it is proved that the injury was as a result from an act or omission committed with "the intent to cause any such damage or cost" or "recklessly and in the knowledge that any such damage or cost would probably result." The reference in this section to personal acts or omissions is treated strictly and as such, the actions of a ship manager or charterer will not affect the right of the owner to limit liability.[170] However, the delegation of responsibility to another by the owner of the vessel does not relieve him of the duty to ensure that a safe system of work is employed on board.[171] When calculating the tonnage of the ship in order to determine the limit of liability, the correct figure is the actual tonnage at the time of the damage.[172] The financial levels for limitation that were set out by this Act were amended so as to keep up with the financial levels determined by the Fund.[173] It is important to note that this Act stipulates that the owner of the ship, when incurring liability as a result of a discharge or emission of oil, is to apply to the court to have the liability limited.[174]

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

166 Phillips and Craig *Merchant Shipping Act 1995* 160.

167 As discussed on page 18 above.

168 Phillips and Craig *Merchant Shipping Act 1995* 161.

169 Section 157 of the *Merchant Shipping Act*, 1995.

170 Phillips and Craig *Merchant Shipping Act 1995* 162.

171 *McDermid v Nash dredging & Reclamation Co.Ltd.* [1987] 1 A.C. 906.

172 *The Petrel* [1893] .320.

173 See the *Merchant Shipping* (Oil Pollution Compensation Limits) Order 2003.

174 Section 158(1) of the *Merchant Shipping Act*, 1995. On such an application the court will determine the limit of the liability and the owner (or insurer or person who has incurred the liability and is entitled to limit such incurred liability,) will then pay the amount to the court. It is then the court's task to direct the distribution of this amount to persons with proved claims, in proportion to their claims.

Section 163 makes provision for compulsory insurance for any ship entering or leaving a port in the UK if such a ship is carrying in bulk a cargo of more than 2 000 tonnes of oil.[175] Section 165 permits a party who has suffered oil pollution damage to proceed against the liability insurer of the vessel owner who is responsible for damages. The insurer has a statutory defence under section 165(2) whereby no liability will attach where the damage resulted from the willful misconduct of the owner of the vessel. Further, the insurer is entitled to limit liability on the same basis of the owner, regardless of whether or not the owner himself would be permitted to limit by virtue of section 165(3).[176]

Sections 172-182 deal with the Oil Pollution Compensation Fund. The first few sections set out the means by which contributions are to be made to the Fund. From these it can be seen that there are three requirements before the obligation to pay compensation is incurred. Firstly, when oil is carried by sea from a place outside of the UK to a port or terminal installation in the UK,[177] regardless of whether such oil is being imported to the UK. Secondly, it is the receiver of the oil who is to pay compensation, regardless of whether or not he/she is the importer. Lastly, liability is only incurred if the receiver receives less than 150 000 tonnes per annum. Those who do not pay their contribution, as they are obliged to do, become liable to pay a fine. Section 175 makes the Fund liable for pollution damage if "the person suffering the damage has been unable to obtain full compensation under section 153," that is, from the owner. This would happen in cases where the discharge of oil was caused by either: an exceptional, inevitable or irresistible phenomenon; as a result of the actions of another person (not the owner or his servant) who intended to cause such damage; or due to the negligence or wrongful act of the government. The other instances when this would happen would be if the owner or guarantor liable for the damage cannot

175 The *Oil Pollution* (Compulsory Insurance) Regulations 1997, S.I. 1997/1820 define oil for the purposes of this section. The Oil Pollution (Compulsory Insurance) Regulations 1981, S.I. 1981/912 were revoked and replaced and were consequent upon the United Kingdom becoming a party to the CLC Convention of 1992.

176 Phillips and Craig *Merchant Shipping Act 1995* 158.

177 Section 173 of the *Merchant Shipping Act,* 1995.

meet his/her obligations in full, or because the damage exceeds the liability under section 153 as limited by section 157.[178] The Fund, however, retains the right of subrogation, and thus may obtain compensation from any person liable.[179]

4.3 *Claims under the common law*

In certain circumstances when there is an oil spill, the CLC and Fund Conventions will not cover the damage. This would be, for example, if oil escapes from dry cargo vessels or damage is caused by non-persistent oil, or damage caused other than by way of contamination.[180] Claimants would then under these circumstances have claims under the common law and the ordinary UK courts would have jurisdiction. The action to be instituted would be based on either the law of nuisance or negligence.[181] The action of trespass cannot be used as, in the case of trespass it is required that the damage must be direct to the land and not as a consequence of a discharge elsewhere.[182] With regard to negligence if, as a result of negligent navigation or management of a ship, pollution should occur which causes damage to the plaintiff, the plaintiff can seek compensation from the owner of the ship. This can, however, only be done if the negligent act was the proximate cause of the loss or damage.[183] The owner of the ship is responsible for any acts of negligence committed by the crew or his other servants or agents if done in the course of their employment. The person who has the management and control of a ship at sea has the duty to take reasonable care and to use reasonable skills to prevent it from doing injury.[184] The onus of proof is on the party alleging negligence to show both the breach of duty and that the damage resulted from it,[185] while in a pollution case it will also

178 Section 175 of the *Merchant Shipping Act*, 1995.
179 Section 179 of the *Merchant Shipping Act*, 1995.
180 Bates *United Kingdom Marine Pollution Law* 65.
181 Baughen *Shipping Law* 335.
182 *Esso Petroleum Ltd v Southport Corporation* [1956] A.C. 218.
183 *The Lord Bailiffs and Jurats of Romney Marsh v Trinity House Corpn.* (1870) 22 L.T. 446.
184 *River Wear Commissioners v Adamson* (1877) 2 A.C. 743.
185 *SS. Heranger (owners) v SS. Diamond (owners)* [1939] A.C. 94.

be necessary that the consequences of the act that caused the pollution were reasonably foreseeable by the person responsible for it.[186] The types of claims that can be instituted are also limited in that, under the common law, a claim for pure economic loss is not available in these circumstances and claims for environmental damage are not easily brought under this structure.[187]

4.4 *Jurisprudence of the Fund*

A few examples of cases against the Fund that were heard in UK courts will now be discussed in order to ascertain how such proceedings are done. When a claimant is unsatisfied with the outcome of a ruling by the Fund, the claimant's national domestic courts will have jurisdiction over the matter.[188] For this reason, when the appellants in the *Landcatch*[189] decision sought to appeal from the Funds decision, the matter was brought before a court in the UK. Most recently the UK courts have had to address the issue of the meaning of the words "damage caused ... by contamination",[190] on a number of occasions.

The court first addressed this issue in *Landcatch Ltd v International Oil Pollution Fund.*[191] The court also addressed the question of how the conventions were to be interpreted. With regard to the interpretation of the Fund Convention the court held that if there is any difference between the language of the statutory provision and that of the corresponding provision of the Fund Convention, the statutory language should be construed in the same sense as that of the convention if the words of the convention are reasonably capable of bearing that meaning. Pertaining to the main issue the court held that although the statutory liability was capable of encompassing economic loss, it could do so only to the

186 *The Daressa* [1971] 1 Lloyd's Rep 60.
187 Baughen *Shipping Law* 335.
188 Section 177 of the *Merchant Shipping Act*, 1995.
189 *Landcatch Ltd v International Oil Pollution Compensation Fund.*1999 SLT.
190 Contained in sections 153(1)(a) and 175 of the *Merchant Shipping Act*, 1995.
191 *Landcatch Ltd v International Oil Pollution Fund* 1999 SLT 1208.

extent to which such loss was recoverable under the general law.[192] It was stated that the fact that the Act refers to damage and loss in conjunction with causation without any further explanation points to an intention that these terms should be understood as coming fully armed, as it were, with concepts with which lawyers in the country are well familiar. Claims for economic loss of a secondary or relational nature, such as this one, were held not included by the term "loss" or "damage." It was found that *Landcatch's* claim was too far removed from the actual damage and as such the common law principle of remoteness barred the appellants from succeeding in this action.

The court in *Alegrate Shipping Co INC and Another v International Oil Pollution Compensation Fund and Others* was faced with the same issue. In *Alegrate* the facts were essentially similar to those in *Landcatch* discussed above, although the applicants submitted that as their business constituted the processing of "whelks,"[193] which were caught some 200 miles away, and then supplied to a Korean market. Their claim was, unlike in the *Landcatch* decision, sufficiently close to the damage to justify a pure economic loss claim. The court considered section 176(1), which states that the liability of the Fund under section 175 shall be subject to the limits imposed by the Fund Convention. It was held that these limitations create "a common Fund" which as a source of compensation is finite in amount and in respect of which potential claimants must compete to have recourse. The necessity of a causal link between economic loss and contamination, which is required by subsection 153 and 175, read with the definition of "pollution damage" in section 181(1), is seen as the means of control of the Fund. The ability to establish that link distinguishes those who are able to share in the common Fund from those who are not. This does not mean that the line is drawn at the same place as it is drawn at common law, it merely means that a line must be drawn at some point. Lord Justice Chadwick stated that in

192 Baughen *Shipping Law* 336.

193 Whelks are large marine gastropod snails found in temperate waters. They are sometimes eaten but most often used by fishermen as bait. See HYPERLINK http://www.encyclopedia.com/html/w1/whelk.asp 2005.

search of where this line is to be drawn, the court could not take cognisance of previous claims awarded by the fund. The reasons for this, he stated, were firstly, because the court could not know the specific circumstances in each case and secondly, because the principles that underlie those decisions, although adopted by the Fund after consideration of its obligations under the convention, are not the same as the obligations imposed by English law on domestic courts as enacted by the Act. Finally, the court held that the same test of remoteness applied in the *Landcatch* decision was to be applied here and as such the applicants were excluded from claiming from the Fund as their claim was not a primary claim.

From this paragraph it can be seen that the *Merchant Shipping Act*, 1995 is in many ways the UK equivalent to the South African CLC Act, as they are both the domestic enactment of the CLC Convention. In the UK system it is the court's task to collect the maximum amount from the owner, and then to distribute this amongst those with a proved claim. If a deficit should occur, the court would then assist the claimants in their claim against the Fund. The UK enactment of the Fund Convention may be seen as a concise means of meeting the international obligations that a state takes on when it accedes to the Fund Convention and as such may be useful in the South African context.

From the decisions of the two cases above, South African courts may find a guideline as to how claims against the Fund are to be dealt with. It must be noted that the common law is not directly applied in these claims, but rather the court seeks to give effect to the international instruments contained in domestic legislation and the obligations placed on the contracting state in this domestic legislation. Also the concept of loss was interpreted to incorporate "pure economic loss," but not in every situation. It may be said that a claim for pure economic loss forms part of the concept of loss, but only on the proviso that such a claim is a claim for primary damage, anything else would fall foul as a result of the concept of remoteness.

5 Conclusions and recommendations

By acceding to the Fund Convention, South Africa has now caught up with the developments made internationally which provide for marine oil pollution compensation since 1971 when the Fund Convention was first established. The reasons for South Africa's delayed accession can be seen in that the Fund Convention made it incumbent upon member states to disclose the amount of oil they received per year, this being something that, until 1994, the South African government was unwilling to do.[194] Post-1994, the beaurocratic system might have slowed down the accession process, but finally South Africa is up to date with said international developments. This is of particular importance, in light of the obligation set out in sections 24(b) of the Constitution to provide for reasonable legislative measures to prevent pollution, and the procedures set out in 231 of the Constitution, as well as Chapter 6 of NEMA to allow for the incorporation of international environmental law into domestic law.

In paragraph 1 it was seen that the definition for pollution damage is the same in both the CLC Convention as well as the Fund Convention. This definition was, however, not brought into the CLC Act. The ommission of this definition makes it particularly difficult to determine to what extent damage may be claimed for. Pollution damage, defined in said conventions, is essentially similar to what may be claimed for in the event of damage caused by pollution under South African common law. This is because the pollution damage definition does not make provision for awarding damages for the intrinsic value of the environment;[195] neither does South African common law.[196] Thus, the damage that may be claimed for is: the cost of preventive measures; loss of profits; and the cost of any reasonable measures of reinstatement of the environment actually taken or

194 University of Cape Town Shipping Law 2001 HYPERLINK http://www.uctshiplaw.com/fund.htm 01 June 2005.
195 Article 2 of the Fund Convention; Article 2(6) of the CLC Convention.
196 Glazewski *Environmental Law in South Africa* 543.

to be taken. This definition could, therefore, be incorporated into domestic legislation.

The further assimilation of the Fund Convention into South African legislation may be relatively simple. The reason for this is because the CLC Convention has already been incorporated into South African marine oil pollution compensation legislation in the form of the CLC Act. As the CLC Convention and the Fund Convention work hand-in-hand and the Fund Convention is supplementary to the CLC Convention, the foundation for the Fund Convention in South African legislation has already been laid.[197] However, as was seen earlier, the CLC Act still provides for the 1969 CLC Convention, and as such the CLC Act needs to be amended in terms of the 1992 CLC Convention, in order for it to be able to work together with the Fund Convention. The level of liability limitation must also as a matter of consequence be changed. At present it provides for a ceiling of R120 million, while the latest CLC Convention limit is set at a maximum of R2.56 billion. Together with this amendment, the exception to the right to limit liability must also be changed from "actual fault or privity of the owner" to "a personal act or omission of the owner, committed either deliberately or recklessly with the knowledge that pollution damage would probably result."

In addition to the above amendments, further legislation needs to be brought in, in order for the Fund Convention to be set into place under domestic law. To this end provision must be made firstly, that will oblige South African oil receivers to contribute to the Fund annually. Secondly, the legislation must set out in which instances a claimant will be able to claim from the fund. Generally this would be when the owner of the ship does not incur liability under the CLC Act; when the cost of the damage exceeds the ship owner's liability; or when the ship owner is unable to meet his/her financial responsibility. Lastly, legislation is required which will provide for the administration of claims, for instance, that the court will have the authority to administer these claims. To this end the example set out in the

197 Oosterveen W 2004 *Environmental Law Review* 3.

UK *Merchant Shipping Act,* 1995 could be used as an example of how the Fund Convention may be set out in practice.

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