

INTERNATIONAL MARITIME COMMITTEE

« TORREY CANYON »

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COMITE MARITIME INTERNATIONAL

INTERNATIONAL SUBCOMMITTEE

« TORREY CANYON » PRELIMINARY REPORT

INTRODUCTORY

1. This enquiry arises out of the wreck of the « TORREY CANYON ». The relevant facts about this can be stated shortly. The « TORREY CANYON » was a single screw tanker built in 1959 of 61,263 gross tons and 48,437 net tons registered with a deadweight capacity of 120,890 tons on her winter marks; her dimensions were 974 ½ feet in overall length, 125 ½ feet in beam and 69 feet in depth. She was registered by the Republic of Liberia and owned by a Liberian company. On February 18, 1967 she left the Persian Gulf loaded with 119,328 tons of crude oil shipped by B.P. Trading Limited of the United Kingdom, her ultimate destination being Milford Haven, England. On March 18 she went aground on the Seven Stones reef between the Scilly Isles and Lands End. In the opinion of the Board of Investigation set up by the Liberian Government, the stranding was due solely to the negligence of the master.

2. The stranding damaged many of the cargo tanks and by March 20 it was estimated that 30,000 tons of oil had spilled into the sea. On March 25 oil began to arrive on the Cornish beaches, 100 miles of coastline being affected. On March 26 high seas and strong winds caused the ship to break her back, releasing, it is estimated, a further 30,000 tons of crude oil. Between March 28 and 30 the ship was bombed by British Naval and Air Forces in order to open the remaining tanks and release the rest of the oil into the sea. The oil was then set on fire by dropping aviation fuel, napalm and sodium chlorate devices; and it is believed that all the oil in the vicinity of the wreck was destroyed by March 30.

3. Immediately after the news of the grounding, the British Government inaugurated protective measures. These consisted chiefly of the use of detergents, the erection of booms and the removal of oil from the surface by mechanical suction and sweeping. The chief of these was the use of detergents. At the peak of the operation 53 ships were employed and 90,000 gallons of detergent used daily. The British Government put the cost of these operations, including the bombing of the ship, at £ 1,600,000. No detailed assessment has yet been made

of the damaged property, but it is thought that the total of all claims may reach £ 6,000,000. Oil also reached the coasts of Brittany where it did considerable damage; French claims have not yet been quantified. The « Limitation Tonnage » of the « TORREY CANYON » under the 1957 Convention was 59,350 tons and on the assumption that only property damage occurred, the limitation fund would be \$ 4,746,000. Thus the limitation fund would cover the British Government's claim for the cost of protective measures, but would leave only a negligible surplus available to meet claims by property owners.

4. The British Government requested IMCO to consider the problems raised by the « TORREY CANYON » and to initiate action for the future. The Council of IMCO met on May 4 and tabulated a number of matters for urgent study and report. These cover mainly safety and preventive measures and the only matter with which the C.M.I. is concerned is Item 16 which is as follows :

« All questions relating to the nature (whether absolute or not), extent and amount of liability of the owner or operator of a ship or the owner of the cargo (jointly or severally) for damage caused to third parties by accidents suffered by the ship involving the discharge of persistent oils or other noxious or hazardous substances and in particular whether it would not be advisable :

- (a) to make some form of insurance of the liability compulsory;
- (b) to make arrangements to enable Governments and injured parties to be compensated for the damage due to the casualty and the costs incurred in combating pollution in the sea and cleaning polluted property. »

On May 26 the Bureau Permanent of the C.M.I. resolved to set up an International Subcommittee to study the liability problems arising from the « TORREY CANYON » incident and to work in co-operation with IMCO. IMCO set up an Ad-Hoc Legal Committee which met on June 21 and agreed that in regard to Item 16 the C.M.I. should be asked to co-operate. A joint meeting from representatives of the two bodies has been arranged for September 25. Accordingly, this meeting of the International Subcommittee has been called so that it may direct how the C.M.I. enquiry is to be organized, particularly in relation to co-operation with IMCO; and the purpose of this paper is to provide some material to enable a preliminary view to be taken of the problems involved.

OBJECT OF THE ENQUIRY

5. It is convenient to begin by concentrating thought on the problems that arise directly out of the « TORREY CANYON » incident, that is, the danger of pollution by crude oil; though plainly at a later stage it will be necessary to consider whether the solution devised

for this problem can be applied to damage other than pollution and to cargoes other than crude oil. The first question for the Committee therefore seems to be whether damage by oil pollution is something that is adequately covered by existing conventions; and whether the damage done by the « TORREY CANYON » is to be distinguished from damage that may arise out of other maritime casualties only by its size and not by its nature. Is there in short a need for a new convention introducing new principles? If this question is answered in the affirmative, then the second object of the enquiry will be to determine in broad outline what new principles ought to be introduced.

6. As the Committee will know, this is not a new type of enquiry. It has already been undertaken in relation to nuclear material. The three principal conventions (with two of which the C.M.I. has been directly concerned) on this topic are :

- i. The PARIS CONVENTION on third party liability in the field of nuclear energy of 29 July, 1960 with a supplementary convention signed in Brussels on 31 January, 1963.
- ii. The BRUSSELS CONVENTION on the liability of operators of nuclear ships of 25 May 1962; and
- iii. The VIENNA CONVENTION on civil liability for nuclear damage of 21 May, 1963.

A reading of these conventions will show the fundamental matters to be settled if new principles of liability are introduced. Some of these matters are specifically mentioned in Item 16 set out above. For preliminary purposes the matters that require study can be catalogued as follows :

1. Nature of Liability : Strict or based on fault ?
2. Compulsory Insurance :
3. Limitation of Liability :
4. Jurisdiction over claims :
5. Scope of any new convention : in relation to
 - a) area included i.e. high seas only or including territorial waters
 - b) material carried or damage done.
6. Assessment of Damage.

There will be minor points which it will be useful to indicate without examination at this stage.

7. The first question is then whether there is any need for a new system of liability. Crude oil is not dangerous in the sense that nuclear material is dangerous. When carried in a tanker, it is not capable of causing damage unless it escapes as a result of a maritime accident, such as collision, stranding or jettisoning in heavy weather. The damage that it causes is mainly damage to property on shore which is not different in character from the damage that can be done by negligent

navigation to harbour installations. Is there any need then for enlarging the existing framework of law which covers damage done by ships? If there is, it can only be to introduce new principles, such as strict liability and compulsory insurance. And if such principles are introduced, will it not be asked why, of all the consequences that may arise from accidents at sea, pollution by crude oil is singled out for special treatment?

8. As against this it can be argued that pollution by crude oil has three features which distinguish it from ordinary maritime damage. The first is that the carriage of crude oil in quantity amounts to what has come to be called an ultra-hazardous activity. It is not the nature of the cargo that counts but the nature of the activity. It is not the sort of risk that counts but the sort of damage that may happen. Discussing the expression « ultra-hazardous activity » in his work on *Ultra Hazardous Liability* Dr. Jenks says :

« It does not imply that the activity is ultra-hazardous in the sense that there is a high degree of probability that the hazard will materialise, but rather that the consequences in the exceptional and perhaps quite improbable event of the hazard materialising may be so far-reaching that special rules concerning the liability for such consequences are necessary if serious injustice and hardship are to be avoided. »

On this way of looking at it, the question is a practical one, namely, whether the existing rules are adequate. The existing framework covers a comparatively close world of shipowners and cargo-owners with a small minority of « outsiders », such as passengers and harbour authorities. The damage and risk is all insurable, the classes of potential sufferers are limited and they are all persons for whom insurance is easily available. The potential victims of pollution on the scale of the « TORREY CANYON » on the other hand are numerous and heterogeneous — local authorities, hotel keepers, amusement proprietors with beach installations, market gardeners and small property owners of any sort; and the sort of damage is uninsurable.

9. The second distinguishing feature is that it creates a new type of claim, i.e. a claim for the cost of protective measures. It is true that expenditure in averting the consequences of a peril is a familiar head of claim in most systems of law, but usually it is supplementary and unimportant. Here, if the measures are successful (and with increasing experience it may be hoped that they will be) it may constitute the whole claim. Moreover, the claim has hitherto usually been confined to persons taking measures to avert damage to their own property. What is significant here is the introduction of a new type of claimant, namely governments and local authorities who take measures to protect the property of those whom they have a moral (but not usually a legally enforceable) duty to protect.

On the assumption that the Committee will conclude that some new measures are necessary to meet the type of problem created by the « TORREY CANYON », I shall examine in turn the fundamental matters that I have catalogued above and that will have to be settled in principle before any new convention can be framed.

NATURE OF LIABILITY

10. The nuclear conventions all impose strict liability. But two distinctions can be drawn between a convention dealing with nuclear material and one dealing with crude oil in large quantities. The first distinction is that nuclear material is something that is dangerous in itself and most systems of law impose something in the nature of strict liability for the handling of dangerous material. Crude oil, even in large quantities, is not inherently dangerous. It is only the operation of some precipitating cause, such as a marine casualty, that makes it dangerous. On this view it can be argued that liability ought to be the same as for maritime casualties generally.

The second distinction is that an important ground advanced for imposing strict liability for nuclear material would not apply. It is argued that it is too much to put upon the victim the burden of proof that a nuclear incident was caused by negligence. He will have great difficulty in finding out the facts and in knowing how to put his case and there will be difficulty also in framing a standard of care that is appropriate to nuclear material. This reasoning does not apply in the case of a marine casualty.

11. Thus the imposition of strict liability in the case of a marine casualty would be a marked departure from what has hitherto been accepted, but it may be said that it is a departure which is to some extent overdue. The principal argument in favour of strict liability if a new convention is being prepared seems to me to be that it would be a recognition of the change in economic and legal conditions that has been taking place over the last half century. The policy of the law — in England at any rate — has been to treat insurance as irrelevant; and the law of torts is framed and administered on the assumption, which has now become quite unrealistic, that the defendant will pay out of his own pocket. On this footing it is easy to understand why the law should be careful to make a defendant pay only when he is at fault. There was also the moral feeling that a man ought not to escape payment if he was at fault; and in some early cases it was questioned whether a contract of indemnity against fault was not contrary to public policy. Now, however, that undertakings are so much larger, it is rare, even in the absence of insurance, for the person actually at fault to be the person who pays; and the spread of insurance has replaced the question :

« Who is at fault ? »
with the question :

« Who can most fairly and conveniently pay the premium ? »

12. These questions are particularly apposite to a disaster of the character and size of the « TORREY CANYON ». The negligence of the master, although the sole cause of the stranding, played a comparatively minor part in the damage to the Cornish and Brittany coasts. If the cargo had been innocuous this damage would not have occurred at all; and even with a cargo of crude oil, if the weather had been fine, the damage might have been quite small. Then it is much easier for the cargo to be insured than for the number of small people to seek property insurance independently. It is also fair that the cost should be borne by the cargo; it can be reflected in the price of oil and so paid by the users for whom the cargo is being brought and not by those whose property is damaged in the course of carriage.

13. For these reasons the modern tendency in English law has been, when new liabilities are created by statute, to make them strict. My impression is that in other systems strict or objective liability has always been much more common than it has been in English law. It will, however, be for the International Subcommittee to consider whether strict liability in respect of a disaster such as the « TORREY CANYON » would be acceptable to public opinion in their countries. If it is, it will then be necessary to consider whether there should be any exceptions. The Brussels Convention Article VIII has an exception for « Act of War, Hostilities, Civil War or Insurrection »; and the Vienna Convention Article IV 3 adds to that an exception for « A grave natural disaster of an exceptional character ». The basis for these exceptions seems to me to be, not so much that they show that the operator is not at fault, since fault is irrelevant anyway, but that they destroy the basis on which insurance is ordinarily effected. When war breaks out, everything is changed; and the Cornish property owner, as well as everybody else, becomes subject to risks which are not covered by ordinary insurance.

14. As to who should bear the liability, I have suggested above that this should depend on the answer to the question « who can most fairly and conveniently pay the premium ? ». It seems to me that for reasons both of equity and convenience the carrier should be liable. It is he who has control of the cargo during the ocean voyage, he is responsible for the manning and maintenance of the ship and he has always been the party responsible for this kind of damage — albeit on a limited basis. Moreover, he is more readily ascertainable than the cargo owner whose identity may alter even during the course of the voyage. It will, therefore, be the carrier's responsibility to take out appropriate insurance and no doubt he will pass on the costs of it,

in some form or other, to the cargo owner. It follows from this that any increase in the liability of the carrier will be reflected in the price of the cargo carried.

COMPULSORY INSURANCE

15. It is clear that the efficient working of any new system depends on insurability. Enquiry must therefore be made among those who handle this sort of business so as to get a sound basis of fact on which to construct a workable system. Insurance, of course, includes for this purpose any sort of satisfactory financial guarantee; a large oil company may be satisfactory for this purpose as any insurance company. Since insurance or its equivalent will be taken out by every prudent operator who is prepared to meet his liabilities, is there any reason why it should not be compulsory? It is made so in the nuclear conventions and compulsory insurance against third party risks is now a common feature in many systems of law.

16. The main question here therefore seems to be simply one of enforceability. It ought to be possible to work out a system where under a ship is not allowed to leave or enter the port of any contracting state unless she holds a certificate of insurance or other financial guarantee covering her cargo. If the Subcommittee approves compulsory insurance in principle, a factual study can be made to find out what is feasible.

LIMITATION OF LIABILITY

17. Limitation is a well established feature of maritime liability. The justification for it is that carriage by sea is an important public service and consequently that losses must not be so crippling as to put out of business those who are engaged in it. The same sort of argument would apply to the provision of crude oil or other similar commodities. While it would be premature at this stage to discuss any figure, an enquiry could follow two lines: first to arrive at some estimate of the sort of damage that might be done and secondly to see what would be the premium for an insurance in that figure in relation to the cost of crude oil. Logically the object of limitation should be to produce an insurance premium which the industry can fairly and reasonably be expected to bear.

18. Limitation of liability by reference to the ship's tonnage, as in the 1957 Convention, would seem here to be inappropriate since we are dealing with damage done by the cargo rather than the ship. Moreover limitation per ton, whether of ship or of cargo, is a concept made to fit the idea of the uninsured owner; he ought not to be made liable for more than a proportion of the capital he is adventuring. If it is

looked at as an insurance question, there would seem to be no reason why the figure of limitation should not simply be a « ceiling » whose height is settled, not in relation to tonnage of any sort, but directly as a compromise between the amount of the damage that might be done and the increase to the cost of carriage which the premium will necessitate. If however tonnage is to come into it, then, since the amount of the damage done will vary to some extent with the size of the cargo, logically the limitation figure should be fixed by the tonnage of the cargo actually carried. The feasibility of this opens up another field for factual enquiry. If it were feasible to fix the figure at a percentage of the value of the cargo carried, it would avoid the common danger of limitation figures expressed per ton becoming out of date. But it may be that actual cargo carried would be too difficult a basis to operate; and if so, deadweight capacity would seem to be the best alternative. It may be noted that if the figure in the 1957 Convention of one thousand gold francs per ton were to be applied in the case of the « TORREY CANYON » to deadweight tonnage instead of ship's tonnage, it would produce a limitation of \$ 9,463,000 which would be much more realistic in relation to the scale of the damage done.

19. It seems clear that if there is to be compulsory insurance, there will have also to be limitation of liability, at least for that purpose. It would not be usual to obtain insurance for unlimited liability. It would, however, be possible to provide that the shipowner

- (a) while not obliged to insure for more than the limited amount, should be personally liable for any excess of damage;
- or
- (b) should, as in the 1957 Convention, be personally liable for the full amount if the damage resulted from his actual fault or privity.

The nuclear conventions relieve the operator for any liability over and above the limit. It may be thought that where strict liability and compulsory insurance is imposed, this is a reasonable *quid pro quo*.

JURISDICTION

20. I take this question next because it is bound up to some extent with compulsory insurance and limitation of liability. If there is compulsory insurance and limitation of liability there is a fund available to meet most, if not all, claims. There is no need to rely upon the arrest of ships or other means of founding jurisdiction. It can be part of the terms of the compulsory insurance that the insurer agrees to make the fund available in whatever jurisdiction the convention determines to be appropriate.

21. Unless an International Tribunal is set up, this will have to be the court of some country or countries. If the precedent set by the

nuclear conventions is followed, this will be the country where the damage is sustained. If damage is sustained only in one country, this is simple and there is no need for any further machinery. It is, however, not at all improbable that as in the case of the « TORREY CANYON » the same incident will result in damage being done to the coasts of two countries. It is not likely that the government of any country would be willing to require its subjects to seek recourse in the courts of another country. Apart from limitation of liability, there seems to be no reason why claims should not be made in the courts of each country in which damage occurs. It might then be left to the option of the insurer to choose the country in which to deposit the fund. It would then have to be provided

- (a) that the courts of the country administering the fund accept foreign judgments on the same basis as their own; and
- (b) that the country place no restriction on the satisfaction of such judgments in foreign currency.

The distribution of the fund would then become merely mechanical.

SCOPE OF CONVENTION

22. Ought the provisions of a new convention to cover damage flowing from incidents occurring in territorial waters? It would, it might be thought, be inconvenient to try to draw a line between the high seas and territorial waters and have two different sets of principles operating on either side of the line. But then questions might arise about inland waterways. It might perhaps be best to confine the convention to the high seas leaving it optional to each contracting state to apply it to its own waters. No doubt convenience would lead to most states doing so, but then each state could make such conclusions about inland waterways as it thought desirable.

Since there is no universal definition of territorial waters for all purposes, it might be necessary for the convention to specify a territorial limit, e.g. three miles.

The more difficult question is to decide what cargo should be covered by the new convention. The point highlighted by the « TORREY CANYON » and other similar though smaller disasters, is that it is possible for the cargo to cause much worse damage than the ship which is carrying it. It would be idle to think that a convention which covers crude oil and pollution is going to be the end of the matter. There seem to be five possibilities as set out below.

24. The first possibility is to confine the convention to crude oil and pollution with the exception that it will be used as a prototype for later conventions on similar topics. If this is done, it should be easy to arrive at a definition of crude oil. It would have to be considered

whether the convention should apply only to crude oil carried as cargo i.e. excluding bunkers; this might depend on whether the convention applied to territorial waters, where leakage from bunkers might be a nuisance. The disadvantage of the prototype method is that it takes a long time to negotiate a convention and to pass it into law and there is much to be said for tackling the problem in one convention, which would avoid what might otherwise be anomalous differences in relation to different sorts of cargo.

25. The second possibility is to draw up a list of cargoes which are considered to be « ultra-hazardous » and to produce a convention which covers them all. The cargoes to be covered could be listed in a schedule which could be added to from time to time. The disadvantage of this is that scientific developments, particularly in chemicals, may make any list become very rapidly out of date; and it might be difficult to devise suitable machinery for adding to a schedule.

26. The third possibility is to find a general definition for the sort of ultra-hazardous cargoes that are to be covered. The difficulty about this is to find a sufficiently precise definition to be workable. If there is to be, for example, compulsory insurance, it must be quite clear what is to be insured and what is not; there cannot be a dispute about whether a cargo comes within a particular definition. So also if courts of law in different countries are to have jurisdiction, there cannot conveniently be different rulings about whether a particular cargo falls within the general definition.

27. The fourth possibility is to make all cargoes liable for any damage done to third parties. This would be an acceptance of the fact that all cargo is capable of doing damage, though in many cases the risk will be very slight. But since insurability is the key to the new system, it can be left to the insurance market to assess the risk. No hardship will be incurred by the shipper of innocuous cargo because the premium would be nominal. This introduces a flexible system, since the insurance market will respond automatically to changes in the character of commodities and the risks involved in shipping them; and it avoids the need for a general definition.

28. There are, however, two possible disadvantages. The first is that if the convention is to apply to all cargo carried in all vessels, it will bring within its scope alle sorts of small fry; these may find the effecting of an insurance for apparently innocuous cargo, even though the premium is nominal, an intolerable burden. Moreover, since there may, in cases like the « TORREY CANYON », be claims for enormous sums, there would have to be some list of approved insurers; not every certificate would do. The second possible disadvantage of this solution

is that it may avoid the need for one general definition only to fall into another. If there is no definition of cargo, it would look as if there must be a definition of damage. It would be necessary to exclude, for example, damage done when cargo was being handled. But a definition of damage ought to be much easier. What ever the nature of the cargo, what is being aimed at is damage done by its escape from control, e.g. by pollution, explosion, leakage etc.

29. This thought leads to the fifth possibility which is that the subject matter of any new convention should be a specified sort of damage to third parties, such as pollution. It may be argued that explosion, for example, requires quite different treatment from pollution. When it takes place on the high seas, explosion is unlikely, unless it is nuclear, to cause damage to third parties. It is only when explosive cargo is being handled in port that damage to third parties is likely to occur and this is, it may be said, primarily a matter for municipal law. On this view the scope of a new convention would be the pollution of sea and/or river by escape of cargo of any sort.

ASSESSMENT OF DAMAGE

30. The general rule in conventions of this sort seems to be to leave the assessment of damage to the courts of the country concerned which will follow the principles of its own law governing remoteness of damage. There are two possible difficulties about the application of this general rule to a convention of the type proposed.

31. The first is that the cost of protective measures will clearly be a large item in the bill. It will have to be made clear that the cost of protective measures, whether undertaken by the owner of the property likely to be affected or by some authority on his behalf, is, if the measures were reasonably necessary, to be an admissible item. Some distinction will presumably have to be drawn between measures that are taken generally and those that are taken specifically after a disaster has occurred. The relevant principles in marine insurance should be applicable here.

32. The second feature is that the courts of two jurisdictions may be operating and that without some general principles to follow, they might reach widely different conclusions. Ought a man, for example, to be allowed to claim for estimated loss of takings because a holiday resort was ruined for the season? If in a case like the « TORREY CANYON » the English courts were to allow such a claim and the French courts were not, there would be a feeling of injustice. Should a claim for damage to marine life be admitted, and, if so, how should it be assessed?

MISCELLANEOUS POINTS

33. There is a number of miscellaneous points which it would be premature to examine too closely until the broad outlines of principle have been settled. It may, however, be useful to indicate briefly some of those that may arise. Some may be unlikely to arise in practice but nevertheless would have to be provided for.

34. *Joint Liability.* There might be a collision between two tankers and an escape of crude oil from both. It might then be impossible to say what oil did what damage. The applicable principle here would seem to be that there must be a joint and several liability for what is not « reasonably separable »; and there would have to be provision for dividing the bill between the two tankers in accordance with some formula, such as the amount of their limitation funds or the amount of oil carried or the amount shown to have escaped from each.

35. A collision between two tankers will be rare. A more common situation, giving rise perhaps to a joint liability, is where there has been an invasion of oil which might have come from any one of several ships in the vicinity. How should this be dealt with ?

36. *Exceptions and Fault Operating Together.* This is an unlikely situation but some provision may have to be made for it. Suppose that there is an exception of a grave natural disaster, but that safety measures laid down for the carriage of the cargo have not been complied with. Should this be left as a question of causation for a contracting state to solve according to its own law or should there be a general principle, e.g. that the defendant must prove that the breach of regulations or other fault could not have had any effect ?

37. *Protective Measures taken by the Ship.* After a disaster has occurred the ship may take measures to minimise damage. If the damage claimed is less than the limitation fund she must obviously pay for the measures herself, subject to any arrangement with her insurer. But, if the total bill exceeds the limitation fund, ought the ship to be allowed to charge the cost of minimising the damage against the fund in the same way as public authorities would charge a similar expenditure ? If she is, it would be an encouragement to minimise damage.

38. *Right of Recourse.* Suppose that an escape of oil is due to damage done by collision caused solely by the negligence of another vessel. If the tanker is strictly liable and there is an insurance fund available, the victims will look only to the tanker for redress. Should the tanker have a right of recourse against the offending vessel ? At first sight this would seem to be a point on which the convention should be silent. It should leave the tanker to its rights under the ordinary law, what ever they may be. The offending vessel should undoubtedly bear

all the ordinary consequences of the collision, but it may be said that, if it is made to bear the consequences of the escape of the cargo, it will in effect be made a sufferer from the carrying on of an ultra-hazardous activity just as much as those whose property is injured. The nuclear conventions seem to provide for this either by denying or by limiting the right of recourse; see the Vienna Convention Article 2 (ii) paragraph 5 and Article 10 (x) and the Brussels Convention Article 2 (ii) paragraphs 2 and 6.

39. *Contributory Negligence.* Provision is made in the nuclear conventions for contributory negligence by the claimant. In a convention restricted to crude oil pollution this is hardly likely to arise; but if the scope were wider, it might.

40. *Limitation Period.* There will presumably be some period of limitation within which claims can be brought.